THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL N0 0315 OF 2010

1. **OGUTU CONSTANT**
2. **OSINYA MOSES**
3. **OBAYI WAFULA GEORGE :: APPELLANT**

VERSUS

UGANDA:: RESPONDENT

(Appeal against the judgment in Criminal Session Case No.0315 of 2010
High Court sitting at Tororo before
the Honourable Justice Stephen Musota dated 30th November 2010)

CORAM: HON. MR. JUSTICE REMMY KASULE, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. LADY JUSTICE PROF. L. EKIRIKUBINZA TIBATEMWA, JA

JUDGMENT OF THE COURT

The three appellants were jointly charged with murder. They were tried, convicted and were each sentenced to death by the High Court sitting at Tororo. They appealed to this Court against both the conviction and sentence. According to the Memorandum of Appeal the grounds of appeal are the following:

1. **The learned trial judge erred in law when he failed to evaluate evidence against appellants to adequate scrutiny, occasioning a miscarriage of justice thereby wrongly convicted appellants of murder.**

2. **The learned trial judge basing on wrong principles erred in law when he sentenced each of the appellants to harsh excessive death sentence.**

On the said grounds they proposed to this Court that

"(a) Conviction be quashed,

(b) Each of the appellants sentence to death be set aside."

Background facts

The appellants lived together with the deceased in Sibodol village, Lungo sub-county in Busia District. The first appellant, Constant Oguto, was their Chairman LCI.

In the morning of 12.08.2008, the three appellants together with others attacked the home of the deceased between 9.00 am and 10.00 am. They told him, they had ordered him to leave the land where he lived and he had refused so they would kill him that day.

He told them he would not shift from the land as he had purchased it and it was his. He ran away from them into his house. They set the house on fire. He ran out of the burning house to a neighbor's home. They caught up with him and

killed him with pangas, spears and clubs. They were later arrested by the police and charged for the offence of murder.

Legal representation

The three appellants were represented by learned counsel, Mr. Henry Seith Rukundo.

The respondent (the State) was represented by Mr. Sam Oola, a Senior Principal State Attorney.

Submissions of counsel for the appellant

Counsel for the appellant submitted that when the appellants and others attacked the home of the deceased, the purpose was to evict him from the land and not to kill him. He contended that that's why they did not kill him immediately. They first tried to chase him from the land. Their intention had been to evict him from the land and not to kill him. Counsel contended that, therefore, there was no malice aforethought and appellants should have been convicted for manslaughter and not murder.

Counsel for the appellants also submitted that that was insufficient evidence that the appellants were properly identified to have participated in the murder of the deceased.

Counsel for the appellants, submitted further that the learned trial judge did not properly evaluate the evidence. According to counsel, if the trial judge had properly evaluated the evidence he would have found that the 1st appellant was not properly identified to have participated in killing the deceased. According to counsel, the first appellant was the one who reported the matter to the police and he did not participate in the murder. Counsel further contended that the first appellant went to the home of the deceased only in his capacity as the Chairman LCI after getting a report from a fisherman called Obanda about what was happening at the home of the deceased. The first appellant was thus convicted in error as he did not participate in the murder.

On ground 2 of the appeal counsel for the appellants submitted that the death sentence imposed by the trial judge was too harsh and excessive. Counsel contended that the circumstances of the offence did not call for a death penalty. The trial judge had not give reasons for imposing a death sentence. He prayed to Court to reduce the sentence.

Submissions by counsel for the respondent.

Counsel for the respondent in response opposed the appeal. He supported both the conviction and sentence. He submitted that the learned trial judge properly evaluated the evidence on record and reached a correct decision in convicting all the appellants.

Counsel contended that the learned trial judge considered the participation of each of the appellants in the commission of the offence. He properly considered the alibi raised by each appellant and correctly came to the conclusion that the alibi for each of them was disproved by the prosecution.

Counsel submitted that the offence was committed in broad day light. The witnesses knew the appellants very well and there was no possibility of error in identification of any of the appellants. He submitted that this Court upholds the conviction.

On ground 2 of the appeal counsel for the respondent submitted that there is no reason for this Court to interfere with the sentence. It would have to be shown that the imposed sentence was illegal, too harsh or too excessive to justify this Court to interfere with the sentence imposed by the High Court and the appellants had not discharged that burden.

Counsel for the respondent maintained that the trial judge had imposed a sentence of death which was appropriate in the circumstances of the case.

The decision of Court

It is appropriate at this point to remind ourselves of our duty as a first appellate Court. This duty is stated by Rule 30(a) of the Court of Appeal Rules. It provides:-

"(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may-

(a) Reappraise the evidence and draw inferences of fact;"

The contents of this rule have been considered in numerous cases by the Supreme Court and this Court.

The Supreme Court in **Constitutional Appeal No.1 of 2001; Attorney General vs. George Owor** on the duty of the first appellate court held as follows:-

> **"It is an established principle of the law that a first appellate Court has powers to consider all questions of Law, mixed Law and fact and of facts. It also has the duty to subject the evidence on record as a whole to a fresh and exhaustive scrutiny and to make its own findings of fact, giving allowance to the fact that it had no opportunity to see and observe the witnesses as they testified. See *Pandya vs. R (1957) EA 336.***

We shall in application of the above stated principles proceed to re-evaluate the evidence on record and consider the judgment of the learned trial judge, submissions of both counsel and the authorities they have availed to court and consider all the issues raised in the appeal to come to our own conclusion of the appeal.

In the instant case the fact that the deceased was killed at his home in the morning of 12.08.2008 is not contested. What is challenged is the participation of

the appellants in the commission of the offence. It is contended that there was no proper identification of each one of them at the scene of crime.

We find it pertinent here to state the law in respect of conditions for correct identification.

The conditions for proper identification of an accused person were stressed in the case of **Abdala Nabulere and Another vs. Uganda Cr. App. No.9 of 1978 (1979) HCB 77** in the following passage:-

> **"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need or caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time,..... the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger.....**

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution. [Emphasis added]"

In the instant case, we have read the testimonies of the prosecution and the defence. The judge considered the issue of identification of the appellants and their participation in the offence. He also considered their defence of alibi which he correctly found to have been discredited and he rejected the defence in accordance with the law.

We reproduce the part of the judgment of the trial judge where he discussed the issue of identification and the appellant's alibi defences.

"The two prosecution eye witnesses i.e. PW2 Maloba Godfrey and PW3 Adeya Andrew were in a position to see how and by whom the deceased was assaulted.

It was broad day light and they knew each of the accused persons very well. They also named other persons who were involved in assaulting the deceased with varying degrees of participation. PW2 and PW3 minutely corroborated each other on what happened at their late father's home when the mob including the accused attacked and attempted to burn him

with his 2 children in his house. These witnesses revealed what each of the accused persons did. It appears the motive of the attack was a land in dispute which they wanted to forcefully retrieve from the deceased. The witnesses said that on arrival at the compound, with both witnesses seeing and hearing attentively, the deceased was told,

'we told you to leave this land but you have refused to leave'.

The deceased is said to have answered,

'This is my land I bought with my money. I cannot leave it.'

Then the attackers said,

'If you have refused then your death has come.'

Each of the accused persons was armed with a panga. A3 Obayi had a panga and a club. Following the threat, PW2 followed his father who sought refuge in his grass thatched house together with a young son. PW2 heard Obayi Wafula George ask for a match box and through the window PW2 saw A3 set the house on fire. The deceased escaped through the door after throwing out the child to escape the fire. PW2 escaped through the roof on the side which had not caught fire. While all this was going on PW3 was watching as well. The mob including the three accused persons chased the deceased up to where he sought refuge at Omuseka's home, a neighbor. They caught up with him before he entered the house. PW2 and PW3 saw Obayi A3 catch the deceased by the shirt. He immediately cut and speared him. As Obayi speared the deceased, on the ribs and cut him on the neck, A2 cut his fingers. That A2 cut the deceased on the leg. The three accused who were well known to

PW2 and PW3 were seen pulling the deceased to under a mango tree. A1 and A2 ran away with their pangas but A3 Obayi remained guarding the deceased. PW2 heard his father say,

'Obayi you have killed me already why can't you leave me.'

PW3's evidence corroborated that of PW2 in material particulars. PW3 was about 20 metres away from Ouma Omuseka's house where the deceased was being assaulted from. I found PW2 and PW3 truthful witnesses who gave a consistent account of what preceded their father's death. They withstood cross-examination. The fact that they are biological sons of the deceased cannot be used to impute concoction of what happened. These witnesses mentioned the names of the other attackers as well. They numbered about 10 and their identities were revealed as Sanya Odera, Odimba Mulumya, Ojiambo, Egesa Mola, Sande Okite. Therefore failing to identify the attackers because they were in a group does not arise.

The medical evidence from the doctor who carried out the post mortem examination of the body of the deceased described the injuries that were consistent with the evidence of PW2, PW3 and all prosecution witnesses who saw the deceased's body. It is my considered view therefore that bearing in mind all the factors prevailing on the fateful morning, I am satisfied that PW2 and PW3 were at the scene of crime and observed whatever was going on. True PW2 and PW3 were traumatized by watching their father's life end in such horrifying circumstances but from

the demeanour of these two witnesses I have no doubt in my mind that they knew and identified A1, A2, A3 and others not arrested. They observed what was taking place.

Prosecution has successfully disproved each of the accused person's defence of alibi. It is not true that A1 went to report before the death of the deceased. It is not true that A2 had gone to recharge batteries and repair a generator. It is not true that A3 had gone to Kenya to commit the offence of smuggling. All the accused have been placed at the scene of crime."

We find that the trial judge properly analysed the evidence available to him on court record. He cannot be faulted for having reached the conclusion he reached. Ground one of the appeal therefore fails.

Counsel for the appellants prayed to this Court to reduce the sentence of death that was imposed by the High Court on the appellants. The respondents' counsel was of the position that the imposed sentence was not appropriate in the circumstances.

A sentence imposed by a trial Court may be interfered with by an appellate court in circumstances that were considered and stated by the Court of Appeal for East Africa in the case of **Ogalo s/o Owoura v R [1954] EACA 270.**

"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v R., (1950) 18 E.A.C.A 147, *'it is evident that the judge has acted upon some wrong principle or overlooked some material factor.'* To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R v Shershewsky, (1912) C.C.A. 28 T.L.R. 364".

The above principles have been accepted and followed by the Supreme Court in the case of **Kiwalabye Bernard v Uganda (SC) Criminal Appeal No.143/2001** (unreported) and numerous other cases of both the Supreme Court and this Court.

We have read the reasons given by the trial judge in justification of the death sentences imposed on the appellants. The learned trial judge considered this was a case of brutal murder. The judge also considered that the deceased met his death in the most savage manner. He concluded that this was one of the most extreme cases. The law prescribes a maximum sentence of death for murder. The appellants attacked the deceased who was peaceful and not armed at his own house. He ran into the house and they set it on fire. He ran to the home of a neighbor and they run after him and cut with pangas. They speared him and used deadly weapons on him until he died. This was in broad day light in full view of

his children. They with impunity took the law into their own hands. This is such a case that is rare of the rarest of cases that call for a death sentence. We do find that the learned trial judge was justified in imposing the maximum sentence.

We are not persuaded that there is a reason for us as an appellate Court to interfere with the sentence. Ground 2 of the appeal therefore fails.

For the reasons given above we confirm the conviction and sentence as determined by the trial Court.

We dismiss the appeal.

Dated this day 12th of June 2015.

Hon. Mr. Justice Remmy Kasule
JUSTICE OF APPEAL

Hon. Mr. Justice Richard Buteera
JUSTICE OF APPEAL

.....L. Tibatemwa.....

Hon. Lady Justice Prof. L. Ekirikubinza Tibatemwa

JUSTICE OF APPEAL

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