THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

CRIMINAL APPEAL NO. 167 OF 2012

(Appeal against the Judgment of the High Court of Uganda sitting at Arua (Nyanzi Yasin, J.) delivered on 28th of June, 2012 in Criminal Session case No. 0064 of 2010)

1. OBEDLING MELIKI
2. OUCHA ROBERT
3. WOKORAC OVUBI
4. ONONO LAZARO

:: APPELLANTS

VERSUS

UGANDA :: RESPONDENT

Coram: Hon. Mr. Justice Remmy Kasule, JA
Hon. Lady Justice Hellen Obura, JA
Hon. Mr. Justice Byabakama Mugenyi Simon, JA

JUDGMENT OF THE COURT

The appellants were convicted of the murder of one Okecha Francis on 19.06.09 at Kifulu village, Atiak Parish, Pakwach Sub-County, Nebbi District. Each appellant was sentenced to fifteen (15) years imprisonment.

The facts of the case, as found by the trial Court, were that Okecha Francis, the deceased, and the appellants were related and lived together in the same area, but different homesteads. The appellants suspected the deceased to be practicing witchcraft upon their other relative, one Richard Adubango. The appellants had threatened to kill the deceased if Richard Adubango happened to die. He died on 19.06.09.

On the same day Richard Adubango died, the appellants looked for the deceased, found him in a makeshift video hall with his brother (Pw2) preparing to show a video film. They took the deceased some distance away and killed him using pangas and spears. The appellants then disappeared from the area.

Each of the appellants denied the charge and set up an alibi by way of defence.

The appellants appealed against both conviction and sentence on four (4) grounds:

1. That the learned trial Judge erred in law and fact when he convicted the appellants on the basis of unsatisfactory identification and circumstantial evidence.
2. That the learned trial Judge erred in law and fact when he disregarded the appellants' defences of alibi.
3. That the learned trial Judge erred in law and fact when he engaged in speculation to the prejudice of the appellants.

4. That the sentence of 15 years imprisonment for each of the said appellants is deemed to be harsh and manifestly excessive given the obtaining circumstances.

At the hearing of the appeal the appellants were represented by learned Counsel Henry Kunya on private brief, while the respondent was represented by Principal Senior State Attorney, Sam Oola.

For the appellants in respect of grounds 1 and 3, which Counsel argued together, it was submitted that the trial Judge was in error to hold that on the basis of the evidence of Pw1 as the sole identifying witness, it was established, beyond reasonable doubt, that the appellants were identified as the killers of the deceased. Counsel argued that had the trial Judge considered the fact that the attackers of the deceased seized him at about 8.30 p.m., when it was dark in the video hall, after which they ran away fast together with him, deceased, he would not have come to the said conclusion.

Further, that the trial Judge ought to have considered the fact that Pw1 was seized with fear and being all alone and relying on mere moonlight to see, it was likely for Pw1 to make an error as to who attacked the deceased in the video hall.

Counsel contended that the trial Judge had thus failed to consider those factors that could have impaired the correct identification of the appellants as the killers of the deceased.

With respect to ground 3, Counsel submitted that there was no credible evidence that the appellants are the ones who made the threats to kill the deceased on the basis that he, the deceased, was practicing witchcraft upon the appellants' other relative Richard Adubango.

Counsel referred to Exhibit D1, being a letter from the O.C. Station, Pakwach Police Station, to the Officer In charge, Akela Police Post, and LC III Chairman, Pakwach Sub-County. That letter is to the effect that Pakwach Police Station had received threats aimed at harming the deceased and therefore he should be given Police protection. Counsel contended that the letter did not mention any of the appellants as being the ones making and carrying out the said threats. So the threats could not have corroborated any other evidence implicating the appellants in the crime.

Counsel thus prayed that grounds 1 and 3 be allowed.

In respect of ground 2, Counsel faulted the trial Judge for not giving due regard to the alibis set up by the appellants thus denying a fair trial to the appellants. Ground 2 therefore also ought to be allowed.

As to ground 4, Counsel contended that though the sentence of fifteen (15) years passed upon each appellant was lawful, the trial Judge provided no basis for the same. The sentence upon each

appellant was harsh and excessive and as such ground 4 also ought to succeed.

For the respondent, it was submitted in respect of grounds 1 and 3 that there was sufficient light in the video hall from where the deceased was collected. The appellants were well known to Pw1 as they were both his blood relatives and neighbours in the area. Pw1 trailed the appellants as they were with the deceased for half a kilometer and so he had a good opportunity to observe the role of each appellant in killing the deceased. Thus the trial Judge was justified to rely on Pw1's evidence to conclude that it was the appellants who killed the deceased.

On the issue of circumstantial evidence, Counsel contended that the trial Judge was justified to treat the evidence of Pw2 and Pw3 as constituting sufficient circumstantial evidence which, considered together with the other evidence, was sufficient to have the appellants convicted of murder of the deceased.

As to ground 2, Counsel maintained that the trial Judge properly directed himself and the assessors as to the law concerning an alibi put up by an accused. He considered both the evidence of the prosecution and that of the defence as regards the alibi of each appellant and then concluded that the appellants were squarely put at the scene of crime thus destroying the alibi put up by each appellant. Counsel argued that no miscarriage of justice was caused to any of the appellants. Ground 2 therefore ought to be dismissed.

In respect of ground 4 on sentence, Counsel argued that given the fact that the maximum sentence for murder is death, a sentence of 15 years imprisonment for each appellant was a lenient one. The same was lawful and did not violate any principle of sentencing. Counsel thus prayed that the same be not interfered with. Ground 4 too had no merit. All grounds being devoid of merit, Counsel prayed that the whole appeal be dismissed.

We have carefully considered the submissions of both Counsel for the appellants and those for the respondent. Our duty as a first appellate Court is to review and re-evaluate the evidence that was adduced before the trial Court, draw inferences there from and reach our own conclusions. This Court is, of course, conscious of the fact that a decision of the trial Judge must only be interfered with where there are sound reasons to do so. It also takes into account that as an appellate Court, it did not have the opportunity to hear and see the witnesses testify as the learned trial Judge did: See: **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions** and **Wilson Kyakurugaha vs Uganda, Criminal Appeal No. 51 of 2014 (COA)** and also **Mbazira Siragi and Another V Uganda: Criminal Appeal No. 7 of 2004 (SC).**

The issue for determination by this Court in grounds 1 and 3 is whether the learned trial Judge properly evaluated the evidence and rightly came to the conclusion that there was sufficient

circumstantial evidence identifying and putting the appellants on the scene of crime as the killers of the deceased.

As to identification of the appellants, the trial Judge evaluated the evidence of the prosecution and that of the defence. He found that the evidence of Pw2 was not credible as to the identification of the appellants because Pw2 could not explain how and when he got to the scene of crime.

The learned trial Judge addressed himself to Section 133 of the Evidence Act that the law does not require a particular number of witnesses to prove a fact. He then, after evaluating all the evidence before him, concluded that Pw1, even though a single witness, was credible as a witness in his identification of the appellants as the killers of the deceased.

Pw1 had known all the appellants before the crime was committed. The appellants were also related to him by blood. On 19.06.09 Pw1 was with his brother, the deceased, at Olobo Degi village preparing to show a video film when at 8.00 p.m. the appellants entered the fence by force. He observed appellant No. 2 had a spear, No. 3 had a panga and appellant No. 4 had a knife. Then appellants numbers 1, 2 and one Jakoma Moses pulled the deceased outside the video hall and began assaulting him; while violently chasing away those who attempted to rescue the deceased.

Pw1 ran away, telephoned his father, Pw2 and his brother, one Okerican Jacob and told them how the appellants were going to kill the deceased.

Pw1 also followed from behind the appellants along the roadside for about one kilometer where they took the deceased while assaulting him. Pw1 heard and saw appellant No. 4 command the group to stop, then he, appellant No. 4, got a spear from appellant No. 2, speared the deceased in the limbs, appellant No. 3 cut the deceased with a panga on the neck, appellant No. 1 cut his leg, appellant No. 2 undressed the deceased leaving him in an under wear. The deceased had already fallen down. Pw1 was about 15 to 20 metres from the scene of killing. It was about 9.00-9.30 p.m. at night. He had seen the appellants at the video hall where there was light from the bulb, had followed them and was able to see them as there was moonlight.

Before relying on the evidence of Pw1, a single identifying witness, the trial Judge warned himself and the assessors of the danger of Court acting on the evidence of a single identifying witness. Such evidence may be truthful and appear reliable and yet the same may be the result of an honest mistake, particularly as to identification. In such a case the trial Court must ascertain that the identification is free from the possibility of an error. The trial Judge guided himself on this point with the authority of **Kiwanuka vs Uganda [1977] HC B1**.

The learned Judge, on the basis of the authority of **ABDALLA NABULELE And 2 Others vs Uganda: Criminal Appeal No. 0009 of 1978: [1979] HCB 77,** considered the fact that Pw1 had known very well all the appellants before the commission of the offence both as blood relatives and as neighbours. The conditions of identification were favourabale as, though dark, there was bulb light in the video hall from where the appellants had seized the deceased. Then the appellants were continuously with the deceased until they killed him at about 9.00-9.30 p.m. while Pw1 was following them behind along the roadside and was able to see them and what they did with the help moonlight. The trial Judge considered the fact that Pw1 was not contradicted in any way, let alone cross-examined, about his testimony as to the existence of light in the video hall and moonlight at the scene of murder. The Judge thus believed that the conditions of identification were favourable.

The trial Judge further observed that Pw1 had the opportunity to observe the appellants for a considerable time over a distance of one kilometer and gave a detailed account as to what each appellant did in killing the deceased. The trial Judge thus concluded that Pw1's evidence as to identification of the appellants as the killers was free from error.

The above conclusion notwithstanding, the trial Judge proceeded to find, whether Pw1's evidence as a single identifying witness, was corroborated by some other independent evidence. The trial

Judge considered the evidence of the threats to kill the deceased. The trial Judge considered the evidence of Pw1 and Pw2 to the effect that according to Pw1:

> *"The deceased was killed because his paternal uncle who had been sick and Okecha was accused of having caused the sickness by witchcraft. They warned Okecha that if their uncle died he would be killed. On 19/06/2009 the uncle died on the same day Okecha was killed. A1, A2, A3 and A4 all warned Okecha".*

As a result of the above threat, Pw2 and his brother Jacob reported the matter to Pakwach Police station and on 12.05.09 the officer in charge of the station communicated as per exhibit D1 to Akela Police Post and the LC III Chairman, Pakwach Sub-County, instructing the police post to ensure that the family of the deceased is not persecuted.

Though the names of the appellants were not stated in exhibit D1, Pw2 testified that he had given these names to the police. The trial Judge believed the evidence of the threats to the deceased by the appellants and concluded that the threat to kill the deceased corroborated the evidence of Pw1, a single identifying witness, as to the appellants being identified as the killers of the deceased.

The defence evidence by way of alibi whereby each appellant stated that he was away from the area of the scene of crime at the time and soon after the death of the deceased, was evaluated together

with the prosecution evidence putting the appellants at the scene of crime, but then soon after disappeared from the area following the commission of crime. Appellant No. 1 claimed to have been at the landing site fishing from 19.06.09 at 1.00 p.m. up to 20.06.09. Appellant No. 2 claimed to have left in the morning of 19.06.09 and gone to Parambo to visit a brother in-law, returning on 20.09.09 and then going for market day returning on 23.06.09. Appellant No. 3 claimed to have left his home on 20.06.09 for Kabolwa landing site where he heard of the death of the deceased. He returned on 05.09.09. Appellant No. 4 claimed to have left his home for Entebbe to do fishing on 07.05.09 and he returned on 18.02.2010.

The trial Judge directed himself and the assessors that the appellants had no burden to prove the truth of the alibi each one put up. It is the prosecution that has the burden to destroy the same by placing the appellant at the scene of crime.

On evaluating the alibi of each appellant the Judge found the same not credible. None of the appellants showed any concern on learning of the death of the deceased who was a blood relative to each of the appellants. Richard Adubango, another relative had also died earlier on 19.06.09 and appellants were expected to be present on 19 and 20.06.09 for the mourning of both relatives and preparing their burials.

The Judge found that it was not credible that appellant No. 2 returned to his home on 20.06.09 and did not know about the

death of the deceased before he left on the same day for market day from where he returned on 23.06.09. Appellant No. 3 claimed to have left his home on 20.06.09 and so he was around on 19.06.09 when the deceased was killed. Appellant No. 4 could not have left for Entebbe to look for school fees from 07.05.09 up to 18.02.2010, a whole period of 8 months. The trial Judge thus found the alibi of each appellant to be false and thus destroyed by the prosecution evidence that placed each appellant at the scene of crime.

We have subjected the evidence of both prosecution and the defence as to identification of the appellants as the killers of the deceased, to fresh scrutiny and we too find that the trial Judge properly evaluated the same and arrived at the correct conclusion. The trial Judge was entitled and properly took into account the circumstantial evidence of the threats to the deceased, and the disappearing of the appellants from the area, as corroborating the evidence of Pw1 putting the appellants at the scene of crime.

We have on our own appreciated the fact that the attack was at night at about 8.00-8.30 p.m. and that the deceased on being seized from the video hall was taken away for about 1 kilomtre along the road side before he was killed. However, we too like the trial Judge did, find that there was sufficient light from the bulb in the video hall and from moonlight at the scene where the deceased was killed to enable Pw1 to see and observe how the appellants killed the deceased.

Pw1, by following the appellants from behind along the roadside from the video hall up to the place where the deceased was killed had ample opportunity to identify the appellants even more.

Pw1 testified and was cross-examined. It was never put to him by the defence that he was so much gripped with fear that he could not be able to identify the attackers of the deceased.

In our appreciation of all the evidence relevant to identification of the appellants, we find that the fact that Pw1 being a blood brother of the deceased, fear could not have prevented him from following the group, so as to establish what exactly was happening to his brother, now the deceased.

We also find that the detailed nature of the evidence of Pw1 as to how the deceased was killed, the role each of the appellants played in carrying out the killing, the weapons used and the parts of the deceased's body that were injured, all go to show that Pw1 was in full control of all his mental and other bodily faculties. We rule out the possibility that fear ever prevented him from observing what went on when the deceased was being killed.

As to the evidence of Pw2, Onen Alfred Yoko, we note that the trial Judge, upon evaluating his evidence to the effect that he also witnessed the killing of the deceased and identified the appellants among the people who participated in the murder, rejected that evidence on the ground that Pw1 denied that he called Pw2.

Further, that Pw2 did not explain how he got to the scene of crime which was 1½ Kms from where he was when Pw1 called him.

We have subjected the evidence of Pw2 to a fresh evaluation and we find that contrary to what the trial Judge found, Pw1 testified that he called his father Onen Yoko immediately after the deceased was pulled out of the Makeshift Video Hall.

In fact Pw1 testified that he called his father to tell him that the deceased had been killed after the suspects had crossed the road and ran away. He said Onen (Pw2) asked him on phone where he was and he (Pw1) told him that he was around.

According to Pw1, he met his father and Jacob his brother whom he had also called as the deceased was being pulled away from the video hall at the scene of crime immediately the assailants left. Pw2 himself testified that he got a call from Pw1, he was at Panyagoro which was only about 200 meters from the place where the video hall was.

He stated that he reached the place where the deceased was murdered from and witnessed the killing. He testified on the role each by the appellants played in the killing. After the death of the deceased he called his son (Pw1) who told him he was around. He, Pw2, also told him, that he was around at the scene of crim. They met and went to the road side.

In cross-examination, Pw2 confirmed that he was present around the scene of crime when the deceased was killed but he did not

make an alarm because he feared for his own life since he was not armed.

Our own re-evaluation of the evidence as above reveals that Pw2 was also around the scene of crime at the time the deceased was killed. His evidence is corroborated by the evidence of Pw1 who testified that he, his father and brother converged at the scene of crime immediately the assailant ran away. They could only converge within that short time if they had been all around the scene of crime by the time the deceased was killed.

We are therefore of the view that the trial Judge erred in disregarding the evidence of Pw2 on identification of the appellants. Had he properly evaluated the evidence of Pw2 vis-à-vis that of Pw1 he would have come to the correct conclusion that Pw2 also moved to the scene of crime immediately he was informed by Pw1 that the deceased had been pulled out of the video hall by the assailants.

The evidence of Pw2 therefore provided corroboration to that of Pw1 on identification of the appellants as the killers of the deceased.

We accordingly find no merit in grounds 1 and 3 of the appeal. The same are dismissed.

Ground 2 faults the trial Jude for having disregarded consideration of the appellants' defences of alibi.

An alibi is a defence where an accused asserts that at the time when the offence with which that accused is charged was committed, that accused was elsewhere. In **Bogere Moses and**

Another v Uganda, Criminal Appeal No. 1 of 1997, the Supreme Court held:

> *"Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept one version and then hold that because of that acceptance per se the other version is unsustainable."*

In resolving grounds 1 and 3, we have shown how the learned trial Judge dealt with the defence of alibi put up by each appellant, the reasons he gave, on evaluating all the evidence, as to why he rejected the said defence of alibi of each appellant. The learned trial Judge held:

> *"I am alive to the fact that the accused person bears no burden to prove their alibi however their evidence, if they elect to give any is evaluated like the evidence of any other witness by Court. My evaluation of their evidence was for that purpose and not shifting the burden. I have not believed their defences and in so doing kept in mind that they had no burden of prove: See: SEKITOLEKO VS Uganda [1967] EA 53. The prosecution evidence place them squarely at the scene of crime."*

We have on our own also re-considered both the prosecution and the defence evidence as a whole and subjected the same to fresh scrutiny. It was an established fact that one Richard Adubango, a close relative of the appellants died on 19.06.09. Soon after his death, on the same day at about 8.30-9.00 p.m., one Okecha Francis, the deceased in the instant appeal, was also killed. This deceased was also a close blood relative of the appellants. Both deceased lived in close neighbourhoods with the appellants.

In their respective defences of alibis, as it has already been stated, each one of the appellants claimed to have been away from the area where each one lived and also where the deaths had occurred during the days of 19th and 20th June, 2009.

We find it unbelievable that all the appellants, if innocent of the offence, would choose to leave their homes and go away at the time just when two of their close relatives Richard Adubango and Francis Okecha died on the same day one after the other. This conduct, in our considered view, was inconsistent with the innocence of each one of the appellants. The learned trial Judge, was thus right to conclude that the conduct of the appellants by disappearing from the area where the deceased was killed made such defence unbelievable.

We find no merit in ground 2 of the appeal. We dismiss the same.

In ground 4 the appellants fault the learned trial Judge for having imposed a harsh and manifestly excessive sentence of 15 years imprisonment upon each appellant.

In **Criminal Appeal Number 0243 of 2013, KOROBE JOSEPH VS Uganda,** this Court, relying on a number of past Court decisions revisited the principles upon which an appellate Court may interfere with the sentence passed by the trial Court. These are, that; the appellate Court will 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. The said Court will also not ordinarily interfere with the discretion exercised by the trial Court, unless it is evident that the trial Court acted on some wrong principle or overlooked some material factor. The appellate Court may also interfere, if that Court finds that the sentence passed by the trial Court is manifestly excessive or too low, in the circumstances of the case as to amount to a miscarriage of justice: See: **OGALO s/o OWOURA VS R [1954] 21 EACA 270**

JAMES VS REX: [1950] EACA 147

and

KIWALABYE BENARD V UGANDA; CR. APP. NO. 143 OF 2001 (SC.)

At trial, the learned Judge considered the period of remand the appellants had spent, their youthful age, their personal and

social responsibilities including taking care of orphans as mitigating factors.

As to aggravating factors, the trial Judge considered the fact that the deceased was their own relative whom they killed for suspecting him to be a witch. The manner of killing the deceased, by pulling him from a public place, dragging him while he cried for help and none of the appellants showed mercy; was also an aggravating factor.

Having subjected these factors, both mitigating and aggravating, to a fresh scrutiny, and considering that the maximum sentence for murder is death, we find that the sentence of 15 years imprisonment passed upon each appellant was an appropriate one. We have not been persuaded that we should interfere with the same. Ground 4 of the appeal also fails.

All the grounds of the appeal having failed, this appeal stands dismissed.

Dated at Arua this ..... 6th ..... **day of** ..... JUNE ..... **2016.**

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Hon. Mr. Justice Remmy Kasule

Justice of Appeal

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Hon. Lady Justice Hellen Obura

Justice of Appeal

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Hon. Mr. Justice Byabakama Mugenyi Simon

Justice of Appeal