THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

CRIMINAL APPEAL NO. 0183 OF 2009

(Appeal from the decision of the High Court (Kwesiga, J.) dated 28.08.09)

1. OKECHA MUGUMBA
2. PIRWATH ALFRED
3. OVON HUDSON
4. OLWORTHO JIMMY
} **:::::::::::::::::::::::::::::::::::: 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 four appellants were jointly indicted in the High Court at Arua on two counts of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act. The four were convicted of murder and each sentenced to twenty (20) years imprisonment on every count. The sentences were to run concurrently.

The background facts, as accepted by the trial Court, were that on 21.01.08 at Namiwodho village, Nebbi District, at about 11.00 p.m. a group of about 20 and more people went to the home of Pw1, Oketcha Manano, shouting "we the Panyabong people have now come". They were armed with spears, pangas and clubs. They announced in unison that they wanted one Aliango Selly a niece of Pw1 whom, they alleged, had killed a child of the brother of one Oki through witchcraft.

The attackers forcefully entered the houses of Pw1 and that of Pw3, the father of Pw1, which was also in the same compound.

Selly Aliango, whom the attackers were looking for managed to escape from Pw3's house and got away from the compound. The attackers however got hold of Juliana Ozelle, aged 78 years, mother of Selly Aliango and sister to Pw3 and cut her on the head while others beat her with clubs. The said Juliana Ozelle was also carrying on her back a one year old baby girl Jabangwa Moddy, whose mother was Selly Aliango. One of the attackers cut the baby girl with a panga and she died instantly. Juliana Ozelle died soon after being admitted to Nebbi hospital.

The attackers after killing the baby girl and grievously injuring Juliana Ozelle then left the scene of crime.

Pw1, Pw2 and Pw3 claimed to have recognized by help of moonlight the appellants as some of the attackers who killed both deceased. The matter was reported to police, the appellants were arrested,

charged and tried in Court. They were convicted and sentenced as already stated.

The appellants now appeal to this Court against both conviction and sentence.

The grounds of appeal are that:-

1. The learned trial Judge erred in law and fact in finding that appellants participated in the offence of murder and that the same was proved beyond reasonable doubt.
2. The learned trial Judge erred in law and fact in passing out a harsh and excessive sentence thus occasioning a miscarriage of justice.

Appellant No. 3, Ovon Hudson, could not pursue his appeal as he died on 05.10.2014 while in prison serving sentence. His appeal thus abated pursuant to Rule 71 of the Judicature (Court of Appeal Rules) Directions.

On appeal the appellants were represented by Counsel Komakech Denis Atine, on State brief, while Senior State Attorney Barbra Masinde appeared for the respondent.

For the appellants, it was submitted in respect of ground 1 that Pw1, Pw2 and Pw3 could not have identified the appellants as the attackers since the conditions were not favourable for a correct identification. It was night and moonlight could not have enabled the witnesses to identify the appellants as the attackers. Each one of Pw1, Pw2 and Pw3 referred to each appellant with

different names and yet each of the witnesses claimed to have known all the appellants before the commission of the offence. This fact was not considered by the trial Judge.

As to ground 2, Counsel submitted that the trial Judge had not considered the period spent on remand by each appellant while passing sentence. This made the sentence illegal and as such the same ought to be set aside. Further, the sentence of 20 years imprisonment, given the circumstances of the case, was too harsh and excessive. Counsel prayed that Court allows both grounds of the appeal.

Counsel for the respondent opposed the appeal maintaining that the two grounds of the appeal had no merits.

He argued that conditions for identifying the appellants were favourable as there was moonlight and each of Pw1, Pw2 and Pw3 knew very well each of the appellants before the offence. Pw1 had described what each appellant did in the commission of the crime. He had stated the names and the particulars of the parents of each appellant. It was a fact that some of the appellants used different names. He had spoken to them at the scene of crime and there had been sufficient time and closeness for Pw1, by use of moonlight, to recognize the appellants at the crime scene.

Pw2 had clearly described the appellants for they came near her.

Pw3 saw the appellants cut and assault the two deceased and was able to point them out in Court as well as their names as the ones he saw at the scene of crime.

Counsel further submitted that appellant number 2 kept changing his names and this had been confirmed by the police investigating officer, Pw4. None of the appellants, other than appellant number 2, had denied the names referred to them in the indictment.

The appellants were villagemates with witnesses Pw1, Pw2 and Pw4 and as such they must have known each other very well before the commission of the crime. There was accordingly no merit in ground 1 of the appeal.

In regard to ground 2, respondent's Counsel submitted that the trial Judge considered the period each appellant had spent on remand while sentencing the appellants. There were no grounds advanced by the appellants to show that the sentence passed upon each appellant was harsh and/or excessive. There was no merit in ground 2 of the appeal and the same ought to be dismissed.

As a first appellate Court, it is our duty to review and re-evaluate the evidence on record, draw inferences there from and reach our own conclusions, if we find that the trial Judge was in error. We do so however, being conscious of the fact that we, unlike the trial Judge, did not have the opportunity to hear and see the

witnesses testify and thus be able to appreciate their demeanour. See: **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions;** and also **Mbazira Siragi and Another v Uganda: Criminal Appeal No. 7 of 2004 (SC).**

In ground 1, the appellants contend that the conditions for proper identification were unfavourable. Therefore the trial Judge ought not to have relied on the evidence of Pw1, Pw2 and Pw3 in this regard. Counsel for the respondent maintains that the conditions were favourable for a correct identification of the appellants.

The case of **Nabulere & Others v Uganda [1979] HCB 77** by the then Court of Appeal for Uganda, is relevant to the case before us both as to the facts and the law on identification.

In that case the three appellants were convicted of murder of a wife to one of the appellants. Appellant No. 2 was a son to the deceased and to the appellant, husband to the deceased. The appellants had entered the deceased's hut at night and on the orders of the husband, appellants No. 1 and 2 using pangas cut the deceased on the head and shoulder, killing her instantly.

One Mary lived with the deceased in the hut. Her testimony was that she saw the appellants enter the hut, then she run out on the verandah raising an alarm. The appellants followed her on the verandah, one appellant cut her on the left upper arm and another on the left side of scalp. The appellants then ran away.

The hut was dark. Mary knew all the appellants well before the attack. She claimed she clearly saw the appellants on the verandah under bright moonlight. She was the only identifying witness.

Pw3 and Pw4, neighbours of the deceased answered Mary's alarm. She recounted to them what had happened as soon as they arrived at the scene.

At trial Pw3, Pw4 and the area local Chief, all gave contradictory evidence. The trial Judge rejected the evidence of Pw4 and that of the local Chief as being unreliable. He believed Pw3 that Mary had mentioned the appellants to him (Pw3). The Judge and the assessors found Mary an honest, straight forward and truthful witness and believed her identification of the appellants as correct.

The Court considered the law as to identification and observed that a conviction based solely on visual identification evidence invariably causes a degree of uneasiness as such evidence can lead to a miscarriage of justice. A witness, though honest, may be mistaken. The Court then set out the rules of practice that Courts have, over a number of years, developed so as to minimize the danger of miscarriage of justice. These are that; such a testimony, if of a single witness, must be tested with the greatest care, the need is greater if conditions favouring correct identification were difficult, in such a case Court should look to other evidence pointing to the guilt of the accused. However,

subject to known exceptions under the law, it is lawful for Court to convict on the basis of a single identifying witness, so long as the Court adverts to the danger of basing a conviction on such evidence. There is no requirement in law or a practice for corroboration of such evidence.

Where the case against an accused depends wholely or substantially on the correctness of an identification of the accused, and the defence disputes such, the trial Judge has to warn him/herself and the assessors of the need for a caution on the correctness of identification before finding a conviction on the basis of the identification.

The Court has to examine the circumstances under which the identification was made: the length of time of observation, the distance, the light, the familiarity of the witness with the accused, which all go to the quality of identification.

Where the quality of identification is poor, then the Court should determine whether there is "other evidence" that supports the correctness of identification before convicting on that evidence. The "other evidence" may be corroboration evidence or such evidence that just makes the trial Court sure that there is no mistaken identification.

We note that there are a number of similarities in the circumstances of the Nabulere case (Supra) and those of the case we are now considering. In both cases the attack was at night,

involving a lot of violence with lethal instruments like pangas and clubs being used. Fear gripped those who turned out to be witnesses. In both cases the identifying witnesses knew and were closely linked to the attackers before the commission of the offence. In both, identification was by aid of moonlight.

In the case before us, on the issue of identification the trial Judge, like was the case in the **Nabulere case**, directed the assessors that the Court had to be satisfied that the identifying witnesses were not mistaken before acting on their evidence. As such, factors such as the appellants being previously known to the witnesses, sufficiency of light, adequacy of time to observe and whether there was enough closeness of the witness and those identified, had to be carefully considered.

The trial Judge in his Judgment dealt with the issue of identification of the appellants as follows:

"Pw1 Oketcha Manano and Pw3 Daniel Manano and Pw2 Ayio Miriam are the identifying witnesses in this case. They were consistent on the fact that the events took place at about 11.00 p.m. and that there was bright moonlight. They were very close to the mob and the mob set upon the victims, assaulted them with deadly weapons namely clubs and pangas. The attackers were well known by the three identifying witnesses before the incident.

Pw1 exchanged words with the attackers in an attempt to prevent them from committing the offences. These circumstances provided the witnesses sufficient opportunity to positively identify the attackers. These three witnesses at the time of testifying were straight forward, confident in what they were saying and were never discredited in cross examination.

Pw1 stated he did not identify all the attackers but he recognized the following:

a) Okirwoth (A1) who cut Ozelle with a panga on the head and neck.

b) Jajok (A4) who was armed with a panga and cut Julian Ozelle

c) Ovon Hudson (A3)

d) Denis A2

That while A2 and A3 did not do the cutting, they were encouraging the others to cut the victims."

The trial Judge then considered the evidence of Pw2 to the effect that Okwirwoth cut both deceased, Jajok cut deceased Juliana's arm. Pw2 also heard and saw Okirwoth declare, when the child died, that the group's mission had been completed and the group left celebrating.

The trial Judge then considered the evidence of Pw3 to be identical, in material aspects, to that of Pw1 and Pw2.

The defence of each appellant was also analyzed by the trial Judge as part of the whole evidence that had been adduced, and the trial Judge, specifically found the identification evidence to be so watertight in putting each appellant at the scene of crime and this destroyed the alibi raised by each appellant.

It was submitted for the appellants, that the identifying witnesses used different names for the appellants and therefore their evidence was not worthy of belief. We are unable to accept this submission. Pw4, the investigating officer, found that some of the appellants were, by their own arrangement, using different names themselves. Thus the first appellant had the names of Okirwoth, but was also using those of his father: Okecha Mungumba. He would also refer to himself as Oki. Pw3 knew this appellant very well and saw him cut the deceased Juliana Ozella with a panga on her neck and arm. The 2nd appellant Pirwoth Alfred, at times was called Okirwoth and also Denis at other times. Pw1 knew the 2nd appellant very well and testified that:

"A2 is called Denis. He did not kill. He was present and he was giving moral support."

In his defene, the second appellant, denying he was not Pirwoth Alfred, however confirmed the testimony of Pw1 that Denis was his name. He claimed that his names were "Jawiambe Dennis".

The 4th appellant used the names of Olwortho Jimmy, then Issa Jajok and also Jimmy Jajoka. Pw1, Pw2 and Pw4 knew the 4th appellant very well even before the incident. At the crime scene he had a panga and Pw1 saw him together with the first appellant remove both deceased from the house, and again the same witness saw him cutting the child to death.

We have ourselves cautioned ourselves as to the danger of convicting the appellants on the basis of identification evidence and of the necessity for the Court to ensure that favourable conditions of identification were in existence before basing a conviction on such evidence.

On re-submitting the evidence to a fresh scrutiny we find that the identification evidence was supported by other evidence of the postmortem reports as to the injuries found on the bodies of the two deceased. These injuries were consistent with being caused by pangas, and clubs that the assailants had and used to kill the two deceased.

Though the trial Judge did not specifically caution himself in the Judgment with regard to basing a conviction on identification evidence, he did so when summing up to the assessors, and as such no miscarriage of justice has been caused to the prejudice of the appellants.

We are satisfied that the trial Judge properly evaluated the evidence as to identification, considered the same together with

the defence evidence of the appellants, and arrived at the correct conclusion that each of the appellants was placed at the scene of crime.

As to the submission that different names may have been used as referring to particular appellants, we find that, where it happened, it was the particular appellant who used these multiple names. This did not in any way weaken the evidence of any of the identifying witnesses who knew very well each of the appellants being identified.

Ground 1 of the appeal must therefore fail.

Ground 2 of the appeal faults the trial Judge for having passed an excessive and harsh sentence upon each appellant.

An appellate Court only interferes with a sentence passed by the trial Court, in the exercise of its discretion, where the trial Court is found to have acted contrary to law or on some wrong principle or where a material factor has been overlooked. Interference will also be permitted where the sentence is too excessive and harsh or too low so as to amount to a miscarriage of justice. A lawful sentence will not be interfered with by the appellate Court on the mere ground that if the appellate Court had been the original trial Court of the case, it might have passed a different sentence:

See: **Kiwalabye Bernard v Uganda: Criminal Appeal No. 143 of 2001 (SC).**

It was submitted for the appellant that the trial Judge had just mentioned, but had not considered, the remand period each appellant had spent on remand.

The above submission is contrary to what the Court record states. It states under sentencing that:

"Court: I have considered the remand period of 1½ years the accused person have spent in jail" (Sic).

This was taking into account by Court the remand period when sentencing each appellant. Taking into account does not mean that the exact remand period must be mathematically deducted from the sentence periods that the Court decides to impose upon a convict. It requires that the sentencing Court considers that period together with other mitigating and aggravating factors and then decides upon an appropriate sentence. We thus find no merit in the said submission by Counsel for the appellants.

We too, have subjected to fresh scrutiny, what the trial Judge considered as factors, both aggravating and mitigating, to arrive at the sentences that he imposed upon each appellant. We find that, while the trial Judge, properly considered the main relevant factors when sentencing the appellants, he also should have considered the fact that each of the appellants was in his youthful age, and therefore, had room to reform, and had family and social responsibilities to carry out.

We have ourselves considered all the above factors, including those not considered by the trial Judge, and in our considered view, given the grave nature of the offence of murder and the very brutal way both deceased, a defenseless baby child aged one year and a 78 year old lady, the sentence of 20 years imprisonment for each appellant in respect of each count was on the lenient side. We are not persuaded that we should interfere with such sentence. Ground 2 of the appeal therefore also fails.

In conclusion this appeal stands dismissed.

The conviction and sentence of each appellant is upheld. The appellants are to serve their respective sentences concurrently to the full as from the date of their conviction of 28th August, 2009.

It is so ordered.

Dated at Arua this ..... **day of** ..... **2016.**

.....

Hon. Mr. Justice Remmy Kasule
Justice of Appeal

.....

Hon. Lady Justice Hellen Obura
Justice of Appeal

.....

Hon. Mr. Justice Byabakama Mugenyi Simon
Justice of Appeal