THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

CRIMINAL APPEAL NO. 0036 OF 2014

{Arising from Criminal Session Case No. 0135 of 2012 at Arua before Hon. Justice Vincent Okwanga on 22.01.2014}

OKWAIMUNGU DOMINIC:::::::::::::::::::::::::::::: APPELLANT

=VS=

UGANDA:: RESPONDENT

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

JUDGMENT OF THE COURT

The Appellant was convicted of Murder contrary to sections 188 and 189 of the Penal Code Act by the High Court of Uganda at Arua before Hon. Justice Vincent Okwanga and sentenced to 21 years imprisonment. He has appealed against both conviction and sentence.

The brief facts as proved and accepted by the trial Judge were that, on the 26/10/2011 the deceased Onyutha Isaac was

cutting trees with a panga in an area that was under dispute with the appellant. The latter arrived at the scene and ordered him to stop cutting the trees.

In the ensuing scuffle the deceased was assaulted by the appellant assisted by one Owanda. The deceased sustained a cut wound on the left arm but he disarmed the appellant and cut him also. Both sides lodged separate complaints to the Police against one another.

The deceased disclosed to several people that he was assaulted by the appellant. He started vomiting and passing blood and was rushed to Ofaka Health Centre where he passed away on 31/10/2011. The appellant was arrested and charged. At the trial the appellant admitted going to the scene but that it was the deceased who attacked him with a panga and cut him twice on the head. He lost consciousness and was admitted at Arua Hospital.

The trial Judge found that the appellant was the aggressor, convicted him of the murder of the deceased and sentenced him to 21 years imprisonment, hence this appeal.

The appeal is premised on three grounds, to wit:-

1. The learned trial Judge erred in Law and fact in failing to properly evaluate the evidence before him hence arriving

at a wrong conclusion thereby occasioning a miscarriage of justice.

2. The learned trial Judge erred in law and fact in convicting the appellant on uncorroborated dying declaration thus leading to miscarriage of justice.

3. The learned trial Judge erred in law and fact in passing out a harsh and excessive sentence thus occasioning a miscarriage of justice.

At the hearing of the appeal, the appellant was represented by Mr. Komakech Denis Atwine and Mr.Oola Sam, Senior Principal State Attorney, appeared for the respondent.

Counsel for the appellant argued grounds 1 and 2 together. He submitted that the learned trial Judge erred by relying on the uncorroborated dying declaration of the deceased which was contradictory. He pointed out the evidence of Ongula Nathan (PW3) which was to the effect that, the deceased told him he was attacked by the appellant and one Owonda.

Counsel further referred to the evidence Jesca Opaya (PW.4) who stated the deceased revealed to her that the appellant stepped on his stomach and he was feeling a lot of pain.

There was also the evidence of P/C Yiki Charles to the effect that the deceased reported to him he was assaulted by Upenja and the appellant.

Counsel strongly argued that, in view of the said contradictions it was unsafe to accept the deceased's dying declaration unless it was sufficiently corroborated.

The other line of argument by counsel was that the learned trial Judge did not evaluate the appellant's defence which revealed he was a victim of the deceased's aggression. Had the trial Judge properly evaluated the evidence, Counsel argued, he would have found the defence of self defence was available to the appellant.

Counsel prayed that court quashes the conviction and sets aside the sentence.

On ground 3, Counsel submitted in the alternative that the sentence of 21 years was harsh and excessive considering the circumstances of this case. He implored court to reduce the sentence.

Counsel for the respondent opposed the appeal. He argued that the learned trial Judge properly evaluated the evidence and came to a correct finding that the appellant was the

aggressor. In his view, the dying declaration was sufficiently corroborated and, therefore, the trial Judge was not in error when he relied on the same to convict the appellant.

Counsel refuted the contention by the appellant's counsel that the trial Judge did not evaluate the appellant's defence. He pointed out that the appellant's defence was discussed at length by the trial Judge but he rejected it as untrue. Counsel invited court to dismiss grounds 1 and 2 and uphold the conviction.

On sentence, counsel for the respondent submitted that the sentence was not illegal, harsh or excessive. The circumstances justified the sentence imposed by the trial Judge considering the gravity of the offence and that it was the appellant who had attacked the deceased. Counsel prayed that court upholds the sentence.

We have carefully considered the submissions of both the appellant and the respondent also perused the record of the lower court.

As a first appellate court, our duty is to review and re-evaluate the evidence before the trial court, draw inferences therefrom and reach our own conclusions, bearing in mind this court did not have the opportunity to hear and observe the witnesses

testify as the learned Judge did – See *Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions; Begunisa and Others –Vs- Tibeboga, SCCA No. 17/2002 and Mbazira Siraji and Another –Vs- Uganda, Criminal Appeal No. 7 of 2004 (SC).*

We note, in the instant case, that the learned trial Judge based his decision to convict the appellant essentially on the deceased's dying declaration and the fact that the appellant placed himself at the scene of crime. In so doing, the trial Judge disbelieved the appellant's version, which was to the effect that he did not assault the deceased, rather it was the deceased who cut him (appellant) leaving him unconscious.

The law is that, the evidence of a dying declaration must be received with caution because cross-examination of the maker is wholly wanting and the declaration may have occurred under circumstances of confusion and surprise; the deceased may have drawn inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Further, particular caution must be exercised when an attack takes place in darkness when identification of the assailant is usually more difficult than in day light.

The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of

his belief that such was the case. It is not guarantee of accuracy.

It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration – See *OKETH OKALE and OTHERS –VS- REPUBLIC [1965] EA 55; TOMASI OMUKONO and ANOTHER [1979] HCB 52; TINDIGWIHURA MBAHE –V-UGANDA, Cr. Appeal No. 9 of 1987 (SC) and ISANGA LAZARO and 2 OTHERS –VS- UGANDA, Cr. Appeal No. 19 of 1999 (SC).*

The learned trial Judge in the present case properly cautioned himself in dealing with the dying declaration. He took into consideration the fact that the attack took place in broad day light and the appellant was well known to the deceased. The other indisputable fact was that the appellant placed himself at the scene. The attack was not sudden so as to have taken the deceased unawares, the two having first exchanged words.

In our view, given those circumstances, the danger of mistaken identification was greatly minimized and the

deceased could not have been mistaken in the identification of the appellant.

Learned counsel for the appellant contended that the deceased mentioned different persons to different people as having been involved in the attack. In Counsel's view this cast doubts on the correctness of the deceased's identification of the assailants.

We are however not persuaded by counsel's above submission in view of the evidence on record. According to the appellant's evidence, he was with Owonda and Upwojimungu (DW.3) when the confrontation with the deceased took place. This evidence corroborates that of Ongulu Nathan (PW.3) who stated the deceased revealed to him his attackers were the appellant and Owonda. There is clearly no contradiction in that context.

The deceased disclosed to Jesca Opaya (PW4) that the appellant stepped on his stomach. There is evidence that he was vomiting blood and his body was swollen. The post-mortem report revealed the cause of death was multiple organ failure especially spleen rapture. In our considered view, the medical evidence corroborated the deceased's dying declaration on the aspect of the appellant having stepped on his stomach.

Having subjected the evidence to fresh scrutiny, we are satisfied the learned trial Judge properly evaluated the evidence in arriving at the conclusion that the appellant was responsible for the death of the deceased.

Counsel for the appellant also contended that, had the learned trial Judge properly evaluated the evidence he would have found the appellant acted in self-defence.
We, upon careful re-evaluation of the evidence, disagree with counsel's contention.

In the first place, it was the appellant who sparked off the confrontation when he attempted to prevent the deceased from cutting the trees. The deceased was armed with a panga for purposes of the task cutting the trees. Secondly, the deceased revealed to PW.3 that he had disarmed the appellant and used the panga to cut the appellant.

The learned trial Judge considered the defence of self-defence and dismissed it as inapplicable to the facts of this case, reasoning that the appellant was the aggressor. We see no reason to hold a contrary view to the finding of the trial Judge.

However, owing to the circumstances of this case, the question is whether the learned trial Judge came to the correct finding

that the appellant had the requisite malice aforethought when he assaulted the deceased.

Ongula Nathan (PW3) testified that

> *"Deceased reported to me at home that the fight was between him (deceased) and accused and Owanda at Amurupii village".*

We have also pointed out the evidence to the effect the deceased disarmed and cut the appellant. The evidence does not show the appellant had a pre-arranged plan to attack the deceased, he only confronted him over the trees the deceased was cutting. There is evidence the appellant was also injured during the fight. The dying declaration was to effect the appellant stepped on the deceased's stomach.
The cause of death was linked to the injuries arising from the ruptured spleen and not the cut the deceased sustained on the arm.

It is our considered view that, in the above circumstances it cannot be said the appellant acted with malice aforethought. We are therefore unable to agree with the holding of the trial Judge that malice aforethought had been proved.

We accordingly allow this appeal to the extent that the conviction for murder is quashed and we substitute it with a conviction for manslaughter contrary to sections 187 and 190

of the Penal Code Act. The sentence of life imprisonment is also set aside.

We shall now proceed to determine the appropriate sentence. It was pleaded in mitigation that the appellant was a first offender, a family man with six children and an 80 year old mother to look after.

The appellant personally made a passionate plea for leniency and was very remorseful over what happened. He was 43 years old at the time of conviction and had spent 2 years and 2 months on remand. We note that the maximum sentence for manslaughter is life imprisonment. We further note there is need to deter others from taking the law into their own hands in a bid to resolve land disputes.

Having duly considered the circumstances of this case, we are of the considered view that a sentence of 15 years imprisonment suffices for the ends of Justice. The sentence is to be served from the date of conviction,that is from 22/01/2014.

We order accordingly.

Dated at Arua this 7th day of June 2016.

11

.....

HON. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

.....

HON. LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL

.....

HON. JUSTICE SIMON BYABAKAMA MUGENYI
JUSTICE OF APPEAL