THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 29 OF 2014

(CORAM: ARACH-AMOKO, MWANGUSYA, OPIO-AWERI, MWONDHA, MUGAMBA JJSC)

BETWEEN

1. MUHOOZI DENIS

2. KYOREKO DENIS .... APPELLANTS

AND

UGANDA .... RESPONDENT

[Appeal against the judgment of the Court of Appeal, at Kampala Criminal Appeal No. 165 of 2010 delivered on the 27th June 2014 by Kasule, Kakuru and Kiryabwire; JJA]

JUDGMENT OF THE COURT

This is a second appeal. It arises from the decision of the Court of Appeal which upheld the conviction of the appellants by the High Court for the offence of murder contrary to sections 188 and 189 of the Penal Code Act and proceeded to impose a sentence of 30 years imprisonment.

The deceased, KARYABASHISHA SABASTIANO, lived with his wife, HILDA NANA (PW4) at Kyabuzigye "A" Cell, Bushenyi District. On the 29th day of January, 2001 at about 12.00 midnight the couple were sleeping when thugs broke into their house using a stone. One of the thugs was armed with a panga.

The deceased engaged one of the assailants in a fight but he was overpowered when the assailant called for assistance from his companions who had remained outside. The fight lasted an estimated twenty minutes. The deceased sustained multiple cut wounds from which he died. A postmortem performed on his body revealed that the deceased had a deep cut wound fracturing the skull, deep cut wounds on the chest and neck and cut wounds on the left hand and right arm. The lungs were popping out. The cause of death was shock due to cut wounds involving deep wounds exposing the lungs.

According to the prosecution the killing of the deceased was witnessed by his wife Hilda Nana (PW4) who testified that she recognised both Muhoozi Dennis (A1) whom she had known for fifteen years and Kyoreko Denis (A2) whom she had known for five years prior to the incident. She stated that A1 was her husband's brother in-law while A2 was a herdsman. The two appellants had entered the house while other assailants remained outside. The assailants who remained outside were flashing a torch whose light permeated inside the house and enabled PW4 to recognise the two appellants. Besides there was moonlight outside.

After the deceased had been hacked to death, the assailants left the scene but they were traced and arrested following information by PW4 that she had recognised the two appellants. A1 was arrested from his house by No.792 SPC MUHUMUZA YOROKAMU (PW6). At the house PW6 found a shirt with blood stains in a basin. He recovered the shirt which he described as

faded blue. He marked it with his initials "M.Y". The appellant (A1) admitted that the shirt was his but explained that the stains on the shirt were banana stains. A2 had been arrested by residents who escorted him to Kanyabwanga Police Post. PW6 searched him and found him with a blood stained handkerchief. A2 explained that the handkerchief had been stained because he had bled from his nose.

A.B.M Lugudo (PW2), Assistant Commissioner, Government Analytical Laboratory analysed the blood samples on the shirt and handkerchief and found that the stains were of blood which belonged to the same blood group "O" as that of the deceased. He made a report on 7.09.2001. That report was admitted as Exh. P2

Both accused persons gave sworn evidence. They denied the offence alleged against them.

In his defence at the trial A.1 testified that throughout the night the deceased was killed he had not left his shop at Kashenshero Trading Centre which was two kilometres away from the home of the deceased. He stated that PW4 had testified against him because his sister who was PW4's co-wife had a misunderstanding with the deceased. He denied any knowledge of the shirt which had been exhibited as one which had allegedly been found at his home.

In his defence A.2 testified that on the night the deceased was killed he had not left his home at Karama Village which was three

Kilometres from the home of the deceased. He denied having been found with the handkerchief which was exhibited at the trial.

The trial judge believed the prosecution case and rejected the defences of alibi set up by the appellants. He convicted them. Both appellants appealed to the Court of Appeal against their convictions and sentences but their appeals were dismissed. The appellants being dissatisfied with the judgment of the Court of Appeal have now appealed to this Court against both conviction and sentence. Their memorandum of appeal raises three grounds as follows:-

1. **That the learned Justices of Appeal erred in law when they confirmed the conviction of the appellants in total disregard of the unsatisfactory identification evidence of PW4.**
2. **That the learned Justices of Appeal erred in law in confirming the conviction of the Appellants amidst the plausible alibi.**
3. **That the learned Justices of Appeal erred in law in upholding an ambiguous sentence of 30 years imprisonment each while oblivious of compelling mitigating factors.**

Mr. Henry Kunya on state brief represented the appellants at the hearing of the appeal.

There was no representation for the respondent. Upon perusal of the record, it appears that at the pre-hearing conference held on 15th May, 2019 Mr. David Ndamurani Atenyi, a Senior Assistant

Director of Public Prosecutions, represented the respondent. He was present when the appeal was fixed for hearing on 11.07.2019. No reason was advanced for absence of the respondent's representative at the time of hearing. In the premises Court allowed the application for Court to proceed made by Mr. Kunya and the appeal was heard exparte under Rule 69 (9) of the Supreme Court Rules.

We take exception to absenteeism of any party to court proceedings. Court's orders are not made in vain. They must be respected. The absence of the respondent shows lack of respect to this court. We stress that the Directorate of Public Prosecution should take action to curb the habit whereby after cases are fixed for hearing its agents/representatives do not show up.

We note however that both Counsel had earlier filed written submissions. Counsel for appellant adopted his at the trial. In resolving this appeal we have taken into consideration submissions filed on behalf of the respondent.

On the first ground Mr. Kunya submitted that the Court of Appeal in reaching its decisions only considered the positive factors of identification and totally ignored the negative factors. He cited the case of **Wasswa and Anor vs Uganda, (2002) 2 EA 677** to the effect that court must evaluate the conditions favouring correct identification and those that did not favour or adversely affected the identification. He submitted that the evidence of the Government Analytical Report relied on by the prosecution was inconclusive because of the discrepancy

regarding the colour of the shirt recovered from the premises of A.1. He further contended that the evidence of the blood-stained handkerchief and shirt was unreliable as the appellants denied they had them in their respective possession. He mentioned also that there was no search certificate. He added that the blood group was inconclusive since the blood groups of the appellants were unknown. Counsel concluded that the identification evidence was not free from error or mistake and could not form a basis for the appellants' conviction.

Counsel for respondent on the other hand submitted that the Court of Appeal did not err in law when it relied on identification evidence of PW4, a single identifying witness whose evidence was supported by that of PW2, PW3 and PW5. He submitted that the Court also considered the factors which could have adversely affected identification by PW4. Counsel submitted that the contradictions as to the colour of exhibit P4(the shirt) were cured by the evidence of PW6 who recovered the exhibit from the first appellant's home and marked it 'MY' before it was submitted to the Government Analytical Laboratory for examination. He stated that the denial of exhibits by the appellants was an afterthought because the first appellant had admitted that shirt exhibit P4 was his and explained that the stains were banana stains. He added that the handkerchief was recovered from the second appellant who had claimed that he had bled through the nose. Counsel contended that absence of a search certificate was not fatal in view of the uncontroverted evidence regarding the recovery of the two exhibits. Counsel however, agreed with counsel for the

appellant that the trial court should have ordered that the respective blood type of the appellants be tested to establish a more accurate finding.

On ground 2 Counsel for the appellants contended that both appellants had raised the defence of alibi but that it was never subjected to any scrutiny by the learned Justices of the Court of Appeal. He cited the case of **Bogere Moses vs Uganda SC Cr.App No.1 of 1997** where this court has given guidelines as to how the defence of alibi should be approached when it is weighed against evidence of identification which the prosecution is relying on to place the accused at the scene of crime.

Counsel for the respondent submitted that the first appellate Court's finding that the evidence on record was sufficient to destroy the appellants' alibi was well grounded as they were placed at the scene of crime. He added that the appellants' defences of alibi were rightly ejected because they were afterthoughts.

On ground 3, counsel for the appellants submitted that the sentence of 30 years imprisonment imposed upon each of the appellants by the learned trial judge and confirmed by the learned Justices of the Court of Appeal is ambiguous since it was not clear whether the 2 years which the appellants had spent on remand were deducted from the 30 years or not. Counsel invited this Court to consider the compelling mitigating factors, including the fact that they were first time offenders, that they had spent 2 years on remand, that they had family responsibility

and that A2 was HIV positive. Counsel argued that those factors were ignored by the Court of Appeal. Lastly counsel called upon the Court to consider consistency in sentencing and substitute the appellants' 30 years imprisonment with lesser sentences.

Counsel for the respondent submitted that the trial Court took into account the fact that the appellants had been on remand for two years and that the Court of Appeal found the sentences given by the trial judge were legal and were meted out by the trial judge after judiciously exercising his discretion. Counsel prayed that this Court upholds the sentence of 30 years imprisonment against each of the appellants.

Determination by the Court.

This is a second appeal. This Court does not have the duty to re-evaluate evidence unless it has been shown that the first appellate Court did not re-evaluate the evidence on record. In **Areet Sam Vs Uganda (Criminal Appeal No. 20 of 2005)** the Supreme Court reiterated the above duty in the following terms:-

> **"We also agree with Counsel for the respondent that it is trite law that as a second appellate Court we are not expected to re-evaluate the evidence or question the concurrent findings of facts by the High Court and Court of Appeal. However, where it is shown that they did not evaluate or re-evaluate the evidence or where they are proved manifestly wrong on findings of fact, the Court is obliged to do so and to ensure that justice is properly and truly served..."**

The trial judge on page 4 of his judgment first cautioned himself that in respect to crimes committed at night, such as this one, Court is required to examine the conditions under which the identification is claimed to have been made and weigh it against the factors that would make such identification difficult. The judge was alive to the imperative that the evidence respecting identification has be approached cautiously before coming to the conclusion whether such identification is free from the possibility of error or not because even a credible witness may be honestly mistaken.

The trial judge then evaluated factors such as the available light and its source, the proximity of the assailants during the attack, the time of approximately 20 minutes the attack lasted and the fact that the accused and the witnesses were known to each other very well. He found that those factors would favour correct identification. He further evaluated factors which did not favour the correct identification especially the fact that the attack was at night. The trial judge stated that before the deceased was cut, he engaged A1 in a fight and almost disarmed him before A2 came to the assistance of A.1. Court found that the injuries were inflicted upon the deceased in the bedroom where PW4 had been restricted. It was the finding of the trial Court that when A1 called out for help A2 responded to help out. The appellants did not deny that PW4 knew them very well. The trial judge further stated that if the light was sufficient for the assailants to see the victim whom they fatally cut the same light was sufficient for PW4 to see and recognise

persons who were familiar. Court found that the torch light was being flashed from the back door which was one step from the bedroom that was open and there was moonlight outside in addition. Upon evaluation of the above evidence of identification of the appellants by PW4 the trial judge found that the witness' identification of the appellants was free from the possibility of error.

The Court of Appeal in re-evaluation of the evidence of PW4 on identification of appellants stated:-

> **"In this case we have already made a finding under ground No.1 that PW4 was a reliable witness. Factors that support her testimony like prior knowledge of the appellants, proximity of the assailants with PW4 as well as duration of the ordeal cannot be ignored.PW4 had known A1 for 15 years as the brother-in-law to her husband (brother to her co-wife) and A2 for 5 years as a herdsman who even used to graze their cattle but also worked with A1.She was on good talking terms with A1 and A2 .Considering that the attack took about 20 minutes it was enough time for the A1 and A2 to be properly identified not only with aid of the consistent bright touches but with the relatively adequate moon light which enabled PW4 to even see other assailants outside. Pw4 testified that the open door which had been banged down by the appellants enabled more moon light to stem into the doorway to the bedroom making it favourable for her to identify A1 and A2 properly. She**

could see that A1 was holding a panga. By this time she had removed the blanket wrapped over face and watched as the fight between the appellants and others continued. All the while she was on the same bed where the attack on the deceased was going on, approximately astride away from where she was... We find that the conditions under which the A1 and A2 were identified to have been favourable for correct identification, free of error or mistake and that A1 and A2 were correctly identified as being the assailants who attacked the deceased."

We agree with counsel for the appellants that court must consider conditions that favour proper identification as well as those that do not. The High Court did save for the fact that PW4 testified that the assailants had covered her with a blanket during the incident and so she did not have all the twenty minutes to observe the assailants. The Court of Appeal did not consider any of the conditions that could have a negative effect on the identification of the appellants. In our view this calls for a re-evaluation by this court.

The High Court found that the conditions favoured correct identification. The finding was founded on the factors which the trial judge ably defined. The incident did not take place in darkness and for the appellants whom PW4 knew very well, she recognised them the moment she saw them. As such it was immaterial that she was covered with a blanket for some of the time the appellants were at the scene. Before the deceased was cut he engaged A.1. in a fight. The assailants voices were

audible when A.1. called for help and A.2. responded and helped A.1. out. In our view the factors favoured an identification of the appellants free from error.

On the issue of variance of the colour of the shirt (Exh. P4), Counsel submitted that the Government Analytical Report which was admitted in evidence was inconclusive given the controversy surrounding the colour of the shirt. According to the record, PW5 (Arinaitwe Deus) stated that they recovered a shirt from A1's house which was faded blue and short sleeved. PW6 (SPC Muhumuza Yorokamu) stated that the shirt was faded blue with blood stains. He marked it with his initials. "M.Y." PW7 (D/SGT Tibihika John) stated that the shirt was bluish with some stains of blood. The Government Analytical Report showed that the shirt was white stripped. It is clear that the shirt was faded blue according to the evidence of PW5, PW6 and PW7 who saw the shirt before it was submitted to the Government Analytical Laboratory. This also cures the inconsistence in the report.

In **Kato Kyambade & Anor v Uganda, Supreme Court Criminal Appeal NO. 30 of 2014,** this court held as follows:-

"The law on contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones on the other hand will only lead to rejection of the evidence if they point to deliberate untruthfulness (see Alfred Tajar Vs

Uganda EACA Cr. Appeal No. 167 of 1969 (unreported). We have explained what Counsel described as grave inconsistencies relating to the time the appellants went to the deceased's plantation. We consider it very minor and inconsequential as far as the events leading to the death of the deceased are concerned."

We find that the contradiction as to the colour of the shirt as described in the Government analytical report is a minor inconsistency which does not point to deliberate untruthness.

On reliance on the blood stained handkerchief and shirt, counsel submitted that it was not proper for court to rely on them as evidence yet the appellants denied being in possession of them. PW5 in his evidence stated that he saw a blood stained handkerchief recovered from A2's pocket and that the shirt was recovered from A1's house.PW6 stated in cross examination that Muhoozi (A1) had admitted that the shirt was his but that the stains on it were banana stains. He was emphatic the shirt had the smell of blood. PW6 stated that A2 explained to him that he had bled through the nose addition that it was the reason why the handkerchief was blood stained. In their respective defences at the trial both appellants denied having been in possession of the articles stated to have been found with them. The trial judge believed the testimony of PW6 to the effect that the appellants had owned up to having been in possession of the two items, respectively. We also believe PW6 was a credible witness as found by the trial court and Court of Appeal. It is exactly because the two appellants disowned the two items that the trial court

relied on prosecution evidence regarding them. The denials were after the Government analyst's report which revealed that the stains on the shirt were blood stains and not banana stains and that the stains on the handkerchief were blood stains of the same group as that of the deceased. It was then the appellants disowned the items. We find that such denials are not a sign of innocence.

On the absence of a search certificate counsel for appellants invited court to find that the failure to produce the search certificate renders the recovered items useless while counsel for the respondent submitted that the non-production of the certificate was not fatal. We agree with counsel for the respondent that with or without the search certificate, the exhibits were properly tendered and admitted.

Both items were recovered by SPC Yorokamu Muhumuza (PW6) in the presence of Arinaitwe Deus (PW5). PW6 marked the items with his initials "M.Y." These were the same items produced by PW6 at the trial. Although both appellants denied knowledge of the items the evidence of PW5 and PW6 established that the exhibited shirt was recovered from the first appellant and the handkerchief was recovered from the second appellant.

The immediate reaction of each of the appellants was admission that the recovered items were theirs. They explained the stains which were on them. Their denial of the items at the trial strengthens the prosecution version of the case that these items were disowned after evidence had been adduced that the shirt

and handkerchief were stained with blood which matched that of the deceased's blood group and the trial Court was entitled to rely on it.

Counsel for appellant submitted that mere finding of blood group O was inconclusive since the blood groups of the appellants were unknown. To this counsel for the respondent conceded. The Court of Appeal had this to say:-

"In our opinion, it would have been desirable for the trial judge to have ordered that the blood type of the appellants be tested to establish a more accurate finding. However, the appellants in their defences neither offered any explanation for the blood stained items with which they were found nor did they suggest to have been wounded to account for the blood stains. They did not offer to state their own blood groups. It is therefore cannot be mere coincidence that the blood stained items matching the blood type of the deceased were found with the appellants when PW4 had identified." (sic)

With due respect to the Justices of the Court of Appeal, the appellants had no burden to prove that the articles found on them contained blood. They also had no burden to prove their blood grouping.

It is incumbent on the prosecution to prove the guilt of the accused person as charged. This burden of proof rests on the prosecution throughout and does not shift to the accused person except where there is a specific statutory provision to the

contrary. The prosecution should prove each and every ingredient of the offence. See: **Oketh Okale and Others v. Republic [1965] E.A. 555**

On ground 2, counsel for appellants submitted that the appellants' defences of alibi were not subjected to a fresh scrutiny by the Court of Appeal while counsel for respondent submitted that the Court of Appeal had subjected the evidence to a fresh scrutiny and found that there was sufficient evidence on record to destroy the appellants' alibi.

In case of **Bogere Moses and Another Vs Uganda (Supra)** this court held as follows:-

> **"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time.**
>
> **To hold that such proof has been achieved the court must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence that the accused 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."**

The trial court found that the prosecution evidence which was free from the possibility of error destroyed the alibi of the appellants. The Court of Appeal re-evaluated the appellants' alibi and found that the prosecution evidence sufficiently placed the appellants at the scene of crime which destroyed their respective alibi.

The concurrent finding of the two Courts below was that considering the overwhelming evidence of the identifying witness (PW4) the appellants' defences of alibi were not sustainable. We see no basis for interfering with this finding which was arrived at after the evaluation of both versions of the case as directed in the case of **Moses Bogere vs Uganda** (Supra).

This ground also fails.

Concerning ground 3, Counsel for the appellants submitted that the sentence of 30 years imprisonment was ambiguous as it was not clear whether the 2 years spent on remand by the appellants was deducted or not. Counsel for the respondent on the other hand submitted that the trial court took into account the 2 years spent on remand.

We note that the trial judge acknowledged the fact that the appellants had been on remand for 2 years and that he sentenced each to 30 years imprisonment which sentence the Court of Appeal found to be legal. The first appellate Court found that the sentence was passed after the judge exercised his discretion judicially. The sentencing record reads:-

"The convicts have been on remand for two years. They were initially on bail before their re-arrest. The prosecution asked me to impose the maximum sentence while the defence asked for lenience on the basis that a death sentence is no longer mandatory, the death sentence can still be imposed by Courts but this is in the severest of cases.

The attack on the deceased was unprovoked and the murder was executed with the greatest brutality, to open up the skull and chest, exposing the lungs. This is a case where a deterrent sentence is called for. I sentence each of the accused persons aged 36 years and 30 years respectively to thirty years in prison."

The Court of Appeal in upholding the sentence stated as follows:-

"The appellants were sentenced to 30 years imprisonment for the offence of murder. Section 189 of the Penal Code Act, Cap 120 prescribes the maximum penalty for the offence of murder to be death. In our opinion, the learned trial Judge exercised his discretion and passed a lesser sentence of 30 years for which this Court finds sufficient and will not interfere with. Unfortunately, the antecedents of the appellants were not given for Court to consider. The sentence given by the trial Court was legal and exercised his discretion judiciously. The sentence is accordingly upheld."

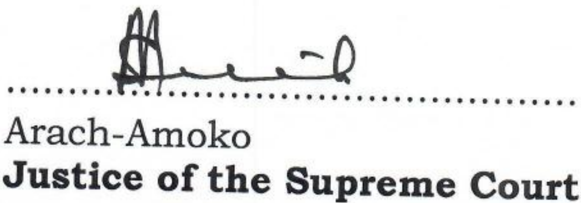
As a second appellate court, this court is not to interfere with the sentence imposed by a trial Court where that trial Court has exercised its discretion on sentence, unless the exercise of that

discretion is such that it results in the sentence imposed being manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle. See **Kiwalabye vs Uganda SCCA No.143 of 2001**.

We find that the trial court took into account the period of 2 years which the appellants respectively spent on remand before sentencing each one of them to 30 years imprisonment. At the same time we note that the sentence is not manifestly excessive or manifestly so low as to cause a miscarriage of justice. This ground also fails.

In the result we find no reason whatsoever to depart from the concurrent findings of the trial court and Court of Appeal. This appeal is accordingly dismissed.

Dated this ....5th.............day of ...September.......................2019.



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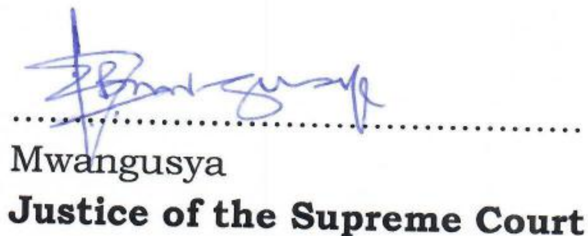

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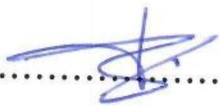

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