THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0468 2020

(Appeal from the decision of Justice P. Basaza Wasswa arising out Criminal Session Case No. 0149 of 2020 delivered on 3rd October 2020 in the High Court of Uganda sitting at Wakiso)

1. **KAWUNDE GEOFFREY**
2. **KINALWA JOEL**
3. **KIWANUKA SAMEO :::APPELLANT**

VERSUS

UGANDA :::RESPONDENT

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ
HON. JUSTICE CHRISTOPHER GASHIRABAKE, JA
HON. JUSTICE OSCAR KIHIKA, JA

JUDGMENT OF COURT

The Appellants were indicted and convicted of the offence of Abduction with intent to murder on count one contrary to sections 243(1) (a) & (b) of the Penal Code Act; Aggravated Torture contrary to sections 2(1) (b) & 5(h) (k) of the Prevention and Prohibition of Torture Act 2012 and an alternative count of cruel and inhuman or degrading treatment or punishment contrary to section 7(3) of the Prevention and Prohibition of Torture Act 2012.

The 1st Appellant was convicted on his own plea of guilty and his appeal to this court is against sentence only. The 2nd and 3rd Appellants were dissatisfied with the conviction and sentence of the trial court and filed this appeal, together with

the 1st appellant (whose appeal is limited to sentence only), on the following grounds;

1. That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence as a whole and convicted the Appellant on uncorroborated circumstantial evidence.
2. That the learned trial Judge erred in law and fact when she failed to consider the 3rd appellants defence of alibi, thereby reaching an erroneous decision.
3. That the learned trial Judge erred in law and fact when she imposed on the Appellants a harsh and excessive sentence on the Appellants. (SIC)

Background

The victim, Wasswa Emmanuel aged I5 years started living with his paternal grandmother one Namakula Cotilda (A4) in the month of January 2019 at Baale village, Masuliita sub county in Wakiso district. The victim's paternal uncle Kawunde Geoffrey (1st Appellant) also lived in the same homestead. Kinalwa Joel (2nd Appellant) and Kiwanuka Sameo (3rd Appellant), also paternal uncles to the victim were living in the surrounding villages. On the 13th February 2019, it was alleged that the victim stole a mobile smart phone and Uganda shillings two thousand only (UGX2000) from their neighbour Nabukalu Esther. The latter reported the incident to Namakula Cotilda, the victim's grandmother. In response to the report of theft, the victim's uncle Kawunde Geoffrey tortured the victim by tying him up with ropes onto a big tree and beat him up brutally thereby causing him a lot of severe pain and suffering until he became unconscious.

The victim's other uncles namely Kinalwa Joel, Kiwanuka Sameo and his grandmother Namakula Cotilda aided the 1st Appellant in tying ropes around the victim to be tortured and in addition watched on as the 1st Appellant continuously tortured the victim. One Mayambala Moses, a neighbour to Namakula Cotilda called the police to rescue the victim. The police arrested the

1st Appellant and warned him to desist from any further torture of the victim. He was later granted police bond.

However, the following day on 14th February 2019, the 1st Appellant continued torturing the victim through whipping him and this grievous assault further deteriorated the condition of the victim. He became unconscious and the accused persons attempted to nurse him using some local herbs. The victim's other uncles namely Kinalwa Joel, Kiwanuka Sameo and his grandmother Namakula Cotilda aided the 1st Appellant in tying ropes around the victim to be tortured and in addition watched on as he continuously tortured the victim. When the victim's condition worsened, the Appellants sent his young brother Kakooma Derrick to the shops to buy water, and while he was away, they abducted the victim. That very evening, the Appellants caused the disappearance of the victim from his grandmother's home and he was later reported missing. The victim's whereabouts were still unknown to the date of trial. Police conducted searches in the Appellant's home and several items were recovered including a blood stained mattress and the victim's blood stained clothes. The Appellants were arrested and accordingly indicted.

Representation

At the hearing of this appeal, Mr. Kumbuga Richard appeared for the Appellants while Ms. Carolyn Marion Achio appeared for the Respondent. Both parties filed written submissions which they adopted at the hearing.

Grounds 1 and 2

Appellant's submissions

Counsel submitted that none of the prosecution witnesses testified that they witnessed the 2nd and 3rd Appellants torture the victim. The testimonies of PW4 and PW6 were that they saw the 1st Appellant torturing the victim. That whereas PW5, the police officer that coordinated the arrest of the victims, testified that he interviewed a number of witnesses that stated that the victim was beaten by the

1st Appellant and the 2nd Appellant, the witnesses did not state this fact in their testimonies.

Counsel argued that the 3rd Appellant raised an alibi that he was not at the scene of the crime and stated that he was in Katiti fixing a motorcycle and that this alibi was never disproved by the prosecution.

Respondents submissions

In reply, counsel submitted that the evidence of PW4 does not give a conclusive relay of the series of events that happened since she left at some points and does not know what transpired while she was away. The torture took place for two days and some of the witnesses did not witness all the torturing of the victim. On the first day of the torture, the 1st Appellant was arrested and taken to police, but while there, PW6 testified that the 2nd and 3rd Appellants continued torturing the victim. Counsel argued that there were no contradictions in the evidence of the prosecution witnesses and that the evidence of PW4 gave partial details on the occurrence of the two days.

Regarding the defence of alibi raised by the 3rd Appellant, counsel submitted that the evidence of PW4 and PW6 indicates that the third Appellant was placed at the scene of the crime.

Consideration of grounds 1 and 2

Grounds 1 and 2 of the Memorandum of Appeal apply to only the 2nd and 3rd Appellants, considering the fact that the 1st Appellant pleaded guilty to the offences charged.

Grounds 1 and 2 fault the learned trial Judges conviction of the 2nd and 3rd Appellants for the offences of Abduction with intent to murder and Aggravated Torture. The prosecution produced 6 witnesses to prove the case against the 2nd and 3rd Appellants. PWI, Joyce Kisakye, the mother of Emmanuel Wasswa (the victim), PW2, Mayambala Moses, a neighbour to the Appellants, PW3, Kakoma

Derrick, a sibling of the victim, PW4, Nakiddu Susan Peace, a sibling to the Appellants, PW5, Detective lP Bazibu John, the investigating Officer and PW6, Nabukalu Esther, a neighbour to the Appellants.

PW1 testified that the victim was her child and that she had taken the child to the grandmother at Balimu, Kwenda when the incident happened. That on Feb 14 2019 she received a call from one Ssewogumo Deogratius, a paternal uncle to the victim and Mr. Mayambala Moses, a neighbour, who told her that Wasswa had stolen a phone and having been badly beaten, had gone missing.

PW2, Mayambala Moses testified that on that day, he was coming from the garden and found Wasswa crying and screaming at their home and he found the 1st Appellant had tied him on a tree. On inquiry, the 1st Appellant told him that the child had stolen a phone. PW2 untied the boy. The 1st Appellant then got the child and took him to the banana plantation and PW2 got the stick he used to beat the child and took it to police. At police in Luwendde they gave him 2 police officers that came and arrested the 1st Appellant.

PW4, a sister to the Appellants, testified that on that day, the victim left her home and went to the well. Later a woman came claiming that the victim had stolen her phone. She called her mother and when the victim later returned home, the 1st Appellant tied him up and beat him. She went to call her mother and found a neighbour Mayambala and Joel, the 2nd Appellant, had rescued the boy from the 1st Appellant. The next day Kawunde told Wasswa to go and fetch water and when the child delayed, Kawunde said he had gone to pick him. She slept and on waking up found Kawunde beating the child again.

PW6 testified that she had gone to dig between 10 and I1 am and on returning found Wasswa leaving her house holding a phone and money worth 2000/=. Wasswa run and threw the phone at her leaving his bicycle with Jerrycans. She went to Wasswa's grandmother and informed her of what had happened and asked them to come and pick the bicycle and Jerrycans and that she had forgiven Wasswa. She then went with the 1st Appellant and she gave him the bicycle and

Jerrycans. Kawunde returned to her home with Wasswa later and both his hands and legs were tied with a rope that is used to tie goats. He was swollen with blood coming out of his nose and his buttocks were swollen from beating. The 1st Appellant asked the victim to apologise to PW6 and she said she had already forgiven him. After that kawunde tied Wasswa to a tree and continued beating him. The next day, Feb 14, she was coming from the garden at 11 :00 am, when she found Kawunde and Wasswa with Jerrycans from the well and Kawunde was beating him. The stick got broken and when he went to get another stick, PW6 called Mayambala to come and rescue the child.

After PW6 had given her evidence and cross examination was complete, the trial Judge asked her what happened after and that is when she stated that the 2nd and 3rd Appellants continued beating the victim. This is the only prosecution evidence that links the 2nd and 3rd Appellants to the crime scene.

We have perused the statement recorded by PW6 at the police which was tendered in evidence as DEX1 on page 96 of the Record of Appeal and she did not state anywhere that the 2nd and 3rd Appellants participated in the beating of the victim. Her statement in court would, in our view, require corroboration to prove participation of the 2nd and 3rd Appellants. PW4 on the other hand testified that when she went to call the mother to rescue the child, she found Mayambala and the 2nd Appellants had rescued him.

This evidence is corroborated by the defence of the 2nd Appellant when he states that on his way home, he heard an alarm at home, and Mayambala told him to go home that Kawunde was beating Wasswa. He found Kawunde had tied Wasswa on a tree and he removed him together with Mayambala. We have found no corroborative evidence to prove that the 2nd Appellant participated in the torture of the victim. PW6 testified at page 56 of the Record of Appeal, that she made a police statement at Kalliri, and stated that she did not mention that Kiwanuka or Kinalwa beat Wasswa.

We must state that an accused person is presumed innocent until proven guilty or otherwise pleads guilty. It is not for the accused to prove his innocence; he only needs to call evidence that may raise doubt of his guilt in the mind of the court. Any doubt in the prosecution case has to be resolved in favour of the accused person.

The 3rd Appellant raised an alibi and stated that he had been away on the first day the torture happened and only returned on 14th February 2019. When he returned home, he found the 2nd Appellant cutting trees and he got an axe and joined him. While there, a neighbour told them the police had come to their home and that is when the 2nd Appellant disclosed that Kawunde had tortured Wasswa. They went home and found Kawunde had been arrested and after a week, the 2nd and 3rd Appellants were also arrested.

In the case of **Androa Asenua & Another Vs Uganda (Cr. Appeal No 1 of 1998) [1998] UG SC 23**, the Supreme Court of Uganda observed that: -

It is trite that by setting up an alibi, an accused person does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case. See Ntale vs. Uganda (l968) E.A. 365; Sekitoleko vs. Uganda (1967) E.A. 531 and L. Aniseth vs. Republic (1963) E.A. 206. In the case of R___ vs. Chemulon Wero Olancro (1937) 4 E.A.C.A. 46, it was stated:

"The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act".

It is settled law that the burden of disproving an alibi does not lie on the Appellant. Once an accused person raises an alibi accounting for his time at the time an offence was committed, the burden shifts to the prosecution to place the Appellant at the crime scene and prove participation of the Appellant.

We have reviewed the evidence of all the prosecution witnesses and find that the 2nd and 3rd Appellants were not placed at the scene of crime. The prosecution did

not prove participation of the 2nd and 3rd Appellants and as such, we find the 2nd Appellant, Kinalwa Joel and the 3rd Appellant, Kiwanuka Samewo not guilty. We accordingly aquit Kinalwa Joel and Kiwanuka Samewo and order that they be set free unless held on other lawful charges.

1st Appellant's Appeal.

The 1st Appellant filed his appeal to this court against sentence only on the ground that; **"That the learned trial Judge erred in law and fact when she imposed on the Appellants a harsh and excessive sentence on the Appellants."**

Appellant's submissions

Counsel submitted that the 1st Appellant pleaded guilty and did not waste court's time but was sentenced to a harsh and excessive sentence of 18 years on count one and 7 years on count two to run concurrently making them 25 years in total. Counsel submitted that it is an established practice that where an accused person pleads guilty to a charge, the trial court caught to exercise leniency in sentencing such a person. Counsel prayed for a more lenient sentence.

Respondent's submissions

In reply, counsel submitted that an appellate court should only interfere with the sentence passed by the trial court where the trial Judge acted on a wrong principle, the sentence is illegal and where the sentence is harsh and excessive. That the learned trial Judge sentenced the Appellant to 18 years on count one and 7 years on count two to run concurrently after considering all the mitigating and aggravating factors of the case.

Consideration of ground 3

For this Court, as a first appellate court, to interfere with the sentence of a trial Court, it must be shown that; the sentence is illegal, the sentence is harsh or

manifestly excessive, there has been failure to exercise discretion, there was failure to take into account a material factor and an error in principle was made.

The Supreme Court in **Kiwalabye Bernard Vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001** held that;

> *"the appellate court is not to interfere with the sentence imposed by the trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."*

This duty is recognized in **Rule 30(I) (a)** of the **Rules of this Court**. The cases of **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997** have also succinctly re-stated this principle. Furthermore, a first appellate court has to bear in mind that it has neither seen nor heard the witnesses and should therefore make due allowances in that regard **(Selle and Another v Associated Motor Boat Company [1968] EA 123**).

We shall bear in mind the above principles while resolving this appeal.

It is the appellant's claim that the sentence is harsh and excessive considering that the 1st Appellant pleaded guilty.

The sentencing order of the trial Judge is as follows;

> **"I have carefully listened to the factors advanced by either side the I agree with the learned resident state attorney that the action of the three convicts caused and continue to cause great pain not only to the child who cried helplessly at their hands but also to the parents and siblings of the victim that pain is also shored by society at large. Several children have died and or suffered the hands of people who**

ought to protect them they are killed raped tortured and ill-treated. The trend has got be stopped and deterred and those from guilty of such crimes. Must be left the word to those out there who may be intending perpetrators. Considering all these factor therefor, I find the following custodial sentence adequate and hereby pass them. For Al Kawunde, I hereby sentence him to eighteen (18) years' imprisonment on court I and to seven (7) years imprisonment on count 2 the sentence shall run concurrently."

From the above excerpt, it is evident that the trial Judge's sentencing order only considered the aggravating factors in arriving at the sentence of eighteen (18) years on count one and 7 years' imprisonment on count two to run concurrently.

We therefore have no option but to set it aside. We have also considered the criteria for interference with sentence by an Appellate Court as stated by the Supreme Court of Uganda in the case of **Kiwalabye Bernard Vs Uganda (supra)**

This court has the same powers as the High Court, pursuant to **Section 11** of the **Judicature Act**. It states,

'11. Court of Appeal to have powers of the court of original jurisdiction.

For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated'

In this case, we have considered mitigating factors to wit that the appellant was a first offender and pleaded guilty to the offences charged did not waste court's time and continuously apologised for the mistake. On the aggravating factors, the offence committed by the 1st Appellant caused great pain not only to the child who cried helplessly suffered at the hands of the 1st Appellant but also to the parents and siblings of the victim and the society at large. In addition, the victim

had never been seen again by the time of the trial. The maximum sentence for the offence of Abduction with intent to murder is death. We note that the 1st Appellant spent 1 year and 7 months on remand.

We sentence the 1st Appellant to 17 years' imprisonment for the offence of Abduction with intent to murder contrary to section 243(l) (a) & (b) of the Penal Code Act. We deduct the 1 year and 7 months spent on remand and sentence him to 15 years and 5 months' imprisonment to be served from the date of conviction. We sentence the 1st Appellant to 6 years' imprisonment for the offence of Aggravated Torture contrary to section 2(l)(b) and 5(h)(k) of the Prevention and Prohibition of Torture Act 2012, less by 1 year and 7 months spent on remand, he will serve 4 years and 5 months from the date of conviction. The sentences shall run concurrently from the date of conviction, which is October 23rd 2020.

Conclusion

1. Kinalwa Jeol, the 2nd Appellant and Kiwanuka Samewo, the 3rd Appellant's appeal is hereby allowed.
2. They are hereby acquitted and we order that they be set free unless held on other lawful charges.
3. The 1st Appellant's conviction is upheld and he is accordingly sentenced to 17 years' imprisonment on count one and 6 years' imprisonment on count two to run concurrently from the date of conviction.

We so order

Delivered and dated this ..... day of 2021

.....

RICHARD BUTEERA

Deputy Chief Justice

.....

CHRISTOPHER GASHIRABAKE

Justice of Appeal

.....

OSCAR JOHN KIHIKA

Justice of Appeal