THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: MWONDHA; TIBATEMWA-EKIRIKUBINZA; TUHAISE, CHIBITA; MUSOTA; JJ.S.C)

CRIMINAL APPEAL NO. 25 OF 2021

(Arising from Court of Appeal Criminal Session Case No. 256 of 2015)

BALUKU NICHOLAS :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Arising from the judgment of the Court of Appeal sitting at Kampala dated 10th December 2020 delivered by the Lady Justice Irene Mulyagonja, Justice Christopher Madrama & Justice Kenneth Kakuru, JJA]

JUDGMENT OF COURT

Introduction

This is a second appeal from the decision of the Court of Appeal which upheld the conviction and sentence of the appellant by the High Court at Fort Portal holden at Kasese for the murder of one, Mbambu Zeulia at Nyabirongo II Village in Kasese District.

Brief Facts

On the 2nd day of June 2013, at 6:00 pm, at Nyabirongo II Village in Kasese District, a mob armed with sticks, hoes and other dangerous weapons, went to the home of a one Mbambu Zeulia (hereinafter referred to as "the deceased") and attacked the deceased and her family. The mob ran away into the nearby bushes and hid. The deceased and her daughter (PW2) ran in the same direction, however, the mob caught up with the deceased whom they immediately assaulted and killed using weapons.

PW2 hid in a nearby bush and it was her testimony that she witnessed the appellant and other persons assault and kill her mother. She stayed in the bush the whole night and the next day. She left the hiding place at 4 pm on the 4th of June 2013, ran through the bushes, and boarded a vehicle to a place called Hima. She showed up a week later to relay everything to the Police.

Consequently, on the 21st day of July 2013, the appellant and five others were arrested for the murder of the deceased. They were charged and tried by the High Court at Fort Portal vide HCT-CR-SC-0028/2014. The High Court acquitted the five co-accused persons and only convicted the appellant. The court sentenced the appellant to 33 years and one month in prison.

The appellant appealed the above decision to the Court of Appeal vide Criminal Appeal No. 256 of 2015 against both conviction and sentence. The Court of Appeal maintained the conviction but reduced the sentence to 18 years and 1month imprisonment.

The appellant, then lodged the instant appeal to this court on both conviction and sentence on the following grounds;

1. **The Learned Justices of Appeal erred in law when they failed to evaluate the evidence in respect to the appellant's defense of alibi.**
2. **The Learned Justices of Appeal erred in law in upholding the conviction of the appellant based on weak evidence of a single identifying witness which was informed by prior prejudices her family had against the appellant thereby occasioning a miscarriage of justice.**
3. **The Learned Justices of Appeal erred in law when they sentenced the appellant to a period of 18 years and one month, which was manifestly harsh and excessive in total disregard of the mitigating factors.**

Representation;

At the hearing, the appellant was represented by **Albert Mooli** on State Brief whereas **Joseph Kyomuhendo**, Chief State Attorney, appeared for the respondent.

Both parties filed written submissions which they adopted in their entirety.

Appellant's submissions

Ground one.

The Learned Justices of Appeal erred in law when they failed to evaluate the evidence in respect to the appellant's defense of alibi.

Albert Mooli, counsel for the appellant, submitted that the learned justices of appeal failed to evaluate the evidence in respect of the appellant. Counsel submitted that the trial judge did not examine the defense of alibi put forward by the appellant yet it was never challenged. Counsel added that it was undisputed that the appellant and PW2's brothers had a land dispute and that that was the basis for the arrest of the appellant and the co-accused persons who were acquitted.

Counsel stated that the alibi set up by the appellant was corroborated by two witnesses and was not challenged and therefore implored this court to find that the appellant could not be in two places at the same time. He relied on cases of **Bogere Moses vs Uganda, SCCA No. 1 of 1997, Jonas Ainebyona vs. Uganda SCCA 19 of 2015, Kamudini Mukana vs Uganda, SCCA 36 of 1995, Muhammed Mukasa vs. Ug SCCA 21 of 1995.**

Ground two.

The Learned Justices of Appeal erred in law in upholding the conviction of the appellant based on weak evidence of a single identifying witness which was informed by prior prejudices her family had against the appellant thereby occasioning a miscarriage of justice.

Counsel submitted that none of the factors at the scene of crime favored proper identification by PW2 of the appellant. See; **Abdallah Nabulere vs. Uganda [1979] HCB 77**. He argued that it was ironic that PW2, when in hiding saw the police but did not get out of the bush to relay to them what she saw instead of waiting for several weeks to do so. He stated that it was the land grudge that the appellant had with PW2's brothers that inspired PW2 to refer to the appellant as having been at the scene of crime.

Counsel relied on the case of **Ainomugisha vs. Uganda, SCCA 19 of 2015** where this court acquitted the appellant on basis of mistaken identity, and prayed court to acquit the appellant on the same grounds.

Ground 3.

The Learned Justices of Appeal erred in law when they sentenced the appellant to a period of 18 years and one month, which was manifestly harsh and excessive in total disregard of the mitigating factors.

Counsel submitted that the Court of Appeal only took the period spent on remand but did not take into consideration the mitigating factors put before court by the appellant. He cited the cases of **Magala Ramadhan vs. Uganda, SCCA 01 of 2014** and **Mawazi Malinga vs. Uganda, SCCA 43 of 2018** where the court emphasized the requirement of court considering mitigating factors before reaching a sentence. Counsel explained that the appellant was a first offender,

a young man at the time of his arrest, had demonstrated a good character in prison, and has six children and two wives.

Counsel prayed court to consider the above factors and set aside the sentence of 18 years' imprisonment and substitute it with a lesser one.

Respondent's submissions;

Joseph Kyomuhendo, Chief State Attorney, kicked off his submissions by raising two preliminary objections against the competence of the appeal. He submitted that the appeal is barred by law, the notice of appeal having been filed four months after the delivery of judgment contrary to section 28 (1) of the Criminal Procedure Act which requires that a notice of appeal be filed within 14 days after delivery of judgment.

Counsel argued that to bring this appeal within operation of the law, an order for extension of time under rule 5 of the Rules of this court had to be sought and granted by this Court, which was not done by the appellant. Counsel prayed court to dismiss the appeal on this ground.

The second objection was in regard to ground 2 of the appeal. Counsel submitted that the ground was argumentative and thus offensive to rule 62(2) of the Judicature (Supreme Court Rules) Directions. That this was because it was characterized by reasoning that the evidence of a single identifying witness was informed by prior prejudices her family had against the appellant thereby occasioning

a miscarriage of justice. Counsel prayed court to strike the ground out since it offended rule 62(2) of the Rules of this court.

In the alternative, counsel for the respondent filed submissions regarding the substance of the appeal as follows;

He argued grounds 1 and 2 jointly.

It was his submission that the appellant's grounds of appeal were without merit and that the learned Justices of Appeal were alive to their duty and indeed disposed of the same.

Counsel submitted that it was not true that the Court of Appeal disregarded the appellant's plea of *alibi*. He argued that for an *alibi* to be set up, the accused person does not assume the burden of proving its truth, and that the burden is still on the prosecution to place him at the scene of crime. See **Ssentale vs. Uganda, 1967 EA 531 and Aniseth vs. Republic, 1963 EA 206**. Counsel submitted that the court correctly placed the appellant at the scene of crime when PW2 identified him.

Counsel further submitted that as all the conditions that favor positive identification were in existence since the offence took place at 6:00 pm, the witness identified the appellant from close range and that it was no wonder she was in the position to give a detailed narration as to how the deceased was murdered. (**See Abdallah Nabulere and 2 others vs. Uganda**, supra).

Counsel further submitted that the credible evidence adduced by the prosecution destroyed the appellant's concocted defense of *alibi*.

Counsel stated that the case of **Lt. Jonas Ainomugisha vs. Uganda,** SCCA 19 of 2015 as cited by the appellant was distinguishable from the instant case because in this case, the prosecution adduced cogent and credible evidence that placed the appellant at the scene of crime.

Counsel urged court to rely on the case of **Mweru Ali & 2 Ors vs. Uganda, SCCA No. 33 of 2003,** where this court dismissed the appellant's defense mainly because there was credible evidence of PW1 placing him at the scene of crime.

Counsel also submitted that the evidence of the defence witnesses was marred with grave inconsistencies and contradictions that pointed to the fact that the appellant lied to court.

Counsel submitted that three of the defence witnesses contradicted themselves on their destination after leaving Kagando Hospital. That it was the testimony of DW1 that they were driven by DW3 to his deceased sister's home in Kisenge Kyondo in Kasese District. Dw3, on the other hand, told court that he drove Dw1 from Kagando Hospital and took him and the other occupants to surgeon's home at Kanyazangwa Kasemire village and Dw4 told court that Dw3 took them including the appellant to Kyamemberi Village Ibingo Parish, Kasese district. Counsel further submitted that Dw1 told court that he went outside the hospital where they met Dw3 yet Dw3 testified that they met at the hospital ward. Counsel further added that another contradiction was when Dw4 told court that Dw1 became

unconscious and she carried him while the latter narrated the events that transpired after the death of his sister.

Counsel submitted that the contradictions are so grave and go to the root of the defense case. Counsel prayed court to dismiss the grounds of the appeal.

Ground 3.

Counsel submitted that the ground was misconceived and prayed for its dismissal. He argued that being a second appeal, the role of the court is restricted to determining the legality of the sentence and not severity. **See; Section 5(3), Judicature Act, Bwarenga Adonia vs. Uganda, SCCA No. 45 of 2016.**

Counsel submitted that court took into consideration both the aggravating and mitigating factors of the case and in fact reduced the sentence from 33 years to 18 years' imprisonment which is legal.

Counsel thus prayed court to dismiss the ground.

CONSIDERATION BY COURT.

We have appraised the written submissions by both parties, the authorities and the entire record. The thrust of this appeal is that the Court of Appeal erred when it upheld the conviction of the appellant for the murder of the deceased Mbambu Zeulia and that the sentence passed against the appellant was excessive.

Before delving into the merits of this case, we shall first examine the preliminary objections raised by the respondent. The first was that the appeal was time-barred and therefore must be dismissed because

it offended the provisions of **section 28 (1) of the Criminal Procedure Code Act.** The sections read as follows;

> ***"Every appeal shall be commenced by a notice in writing which shall be signed by the appellant or an advocate on his or her behalf, and shall be lodged with the Registrar within fourteen days of the date of judgment or order from which the appeal is preferred.*** (Emphasis ours)

Further, **Rule 57 of the Judicature (Supreme Court Rules) Directions,** provides for the timelines for lodgment of appeals to the Supreme Court in cases where a death sentence was not passed. It provides as follows;

> ***"In the case of an offence where the death sentence has not been passed, or which does not attract the death sentence, the accused may give notice informally, at the time the decision is given, that the accused desires to appeal against the conviction and sentence, or only the sentence, or by notice in writing which shall be lodged within fourteen days after the date of the decision."*** (Emphasis ours)

The Court of Appeal delivered its judgment on the 10th day of December, 2020 and the appellant filed a notice of appeal to this court on the 19th day of April, 2021. That was approximately four months after judgment delivery, clearly way beyond the fourteen days' timeline provided by the law.

Rule 5 of the Rules of this court provides for an opportunity where parties may apply to this court for an extension of timelines. There is no evidence on record that such leave was sought or granted by the appellant. This objection does not require this court to consider the merits of this case. The appellant, therefore, does not have a right to be before the court or be heard by this court.

The Preliminary Objection raised by the respondent is upheld. This certainly disposes of the entire case.

The appeal is hereby struck out.

Dated at Kampala this..... 8th day of ..... Aug 2023

Faith Mwondha

JUSTICE OF THE SUPREME COURT

Professor Lillian Tibatemwa-Ekirikubinza

JUSTICE OF THE SUPREME COURT

Night Percy Tuhaise

JUSTICE OF THE SUPREME COURT

Mike Chibita

JUSTICE OF THE SUPREME COURT

Stephen Musota

JUSTICE OF THE SUPREME COURT.

The judgment delivered as directed.

Babyl

9/8/2023.