THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: MWONDHA, TIBATEMWA-EKIRIKUBINZA, TUHAISE, CHIBITA, MUSOTA, JJSC

CRIMINAL APPEAL NO. 50 OF 2021

MAYENGO HASSSAN..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

(Appeal arising from the decision of the Court of Appeal Criminal Appeal No. 036 of 2019 before Buteera DCJ, Bamugemereire and Kasule JJA dated 22nd July 2021)

JUDGMENT OF THE COURT

This is a second appeal lodged by the appellant aggrieved and dissatisfied with the decision of the Court of Appeal. The memorandum of appeal had two grounds as follows:

1) That the learned Justices of the Court of Appeal erred in law when they failed to adequately evaluate all material evidence relating to his age as he was a minor when the offence was committed resulting into being committed on a wrong inference of the law.

2) That the learned Justices of the Court of Appeal erred in law when they upheld an illegal sentence of the lower court which was harsh and excessive which occasioned a miscarriage of justice

He prayed that this Court be pleased to quash the conviction and set aside the sentence.

We have to mention here that the Coram above was as a result of re-constitution. The reason being that after hearing the appeal but before delivery of judgment two justices could not sit as one was ill

and another called by the Lord. It was necessary to rehear the appeal to facilitate delivery of judgment.

Background

The appellant was indicted with the offence of murder c/s 188 and 189 of the Penal Code Act. It was alleged that in the night of 3rd November 2014, the appellant with others at Ndejje Kanyanya Lufula Zone in Makindye Division, Wakiso District murdered one Nakibinge Dickson among others. The appellant was tried by the High Court and was found guilty, convicted and sentenced to 26 years and 4 months' imprisonment.

The appellant was dissatisfied by the decision and he appealed to the Court of Appeal against conviction and sentence. The Court of Appeal upheld both the conviction and sentence hence this second appeal.

Representation

At the hearing, the appellant was represented by Counsel Sarah Awelo. The respondent was represented by Ms. Vicky Nabisenke, Assistant DPP.

Appellant's Submissions

Counsel for the appellant faulted the learned Justices of the Court of Appeal for failing to adequately re-evaluate all material evidence relating to the age as a minor at the time of commission of the offence.

Counsel submitted that the age of the appellant came up during the trial at High Court. That the appellant testified that he was 17 years old having been born in 1997 as told by his mother (DW3)

Counsel further submitted that the appellant made a statement which he signed but was not read back to him. Counsel further submitted that the mother of the appellant gave evidence of the date of birth and this is held to be conclusive evidence. He further submitted that a court room can be a room of tension and intimidation. That the observation of the trial Judge was as follows:

.....I observed DW3 Nantongo Harriet (DW3) as she testified regarding the date of birth of her son A1 and it appeared to me that she could only recall the date of birth with great effort such as characteristic of one who has crammed it for a purpose. The date did not readily come to her recollection and she kept on referring to it repeatedly as 1979 and later correcting it to 1997."

Counsel submitted that in her testimony at page 29 line 14-15 of the record of proceedings in the High Court DW3 stated that she was a peasant farmer and she delivered her son A1 during 1997 and that she has never been to school. That she was born in 1979.

Counsel submitted that DW3 kept interchanging her date of birth which was 1979 with her son's date of birth of 1997. And at the same time was faced with intimidating situation of standing in the dock and facing a Judge, answering questions from an advocate and also facing a crowd that attended court that day. He prayed that this Court accepts the evidence of DW3 as truthful evidence of an illiterate peasant farmer.

Counsel submitted further that the medical report was admitted in evidence under Section 66 of the Trial on Indictment Act and Counsel of the appellant could not cross examine it and this was an injustice to the appellant. He submitted that a mistake of an advocate ought not be visited on an innocent litigant. He prayed that this ground be allowed.

Ground two

The appellant faulted the learned Justices of the Court of Appeal that they erred in law when they upheld an illegal, harsh and excessive sentence of the lower court of 26 years and four months' imprisonment.

Counsel submitted that the appellant showed remorse by apologizing to the relatives of the deceased in his allocutus. That the appellant was a first offender and he relied on the case of **Karobe Joseph Vs Uganda Criminal Appeal No. 243 of 2013**. The appellant in the above case had been sentenced to 25 years

imprisonment but this Court reduced it to 14 years for the reasons that the appellant was of advanced age and had shown remorse. Counsel relied also on the case of **Livingstone Kakooza Vs Uganda SCCA No. 17 of 1993**; this court allowed the appeal and the sentence of 18 years' imprisonment was reduced to 10 years' imprisonment on the basis of being a first offender.

Counsel prayed that this Court allows the appeal, the conviction quashed and sentence set aside. That in the alternative, the illegal and harsh sentence of 26 years and 4 months imprisonment be quashed/set aside and be substituted with a sentence of three years imprisonment.

Respondent's submissions

Counsel for the respondent opposed the appeal and submitted that this being a second appeal, the second appellate Court's duty is to properly determine whether the first appellate court properly re-evaluated the evidence before it and subjected it to fresh scrutiny before coming to its own independent conclusion (**Kifamunte Henry Vs Uganda Supreme Court Criminal Appeal No. 10 of 1997**)

Counsel argued and submitted on ground 1 that the Court of Appeal Justices analysed the evidence which was before the trial Court and properly re-evaluated it. That the evidence by PW2, Dr. Kimwero a pathologist at Mayfair clinic, was admitted under Section 66 of the Trial on Indictments Act. That Exhibit PEX2 was tendered and consented to its admission by the appellant himself 9 days after the murder. The appellant signed on record.

He submitted that the evidence showed that the appellant was examined and was found to be 19 years of age. Counsel further submitted that the evidence of DW3 the mother of the appellant, was not accepted. The trial Judge observed the demeanor of DW3 and concluded that she was not truthful as she recalled the date of birth of her son with great effort, characteristic of one who crammed the information for a purpose.

On close scrutiny and re-examination by the appellate Court of the purported birth certificate, the court agreed with the trial Judge observations and conclusion. The birth certificate appeared to have been specifically prepared for the purpose. The certificate was held to be misleading and unreliable.

The Court of Appeal Justices upheld the learned trial Judge finding that the prosecution had proved its case beyond reasonable doubt.

Counsel prayed that this Court upholds the Court of Appeal finding.

On ground two (2), counsel submitted that the appellant was complaining against the severity of sentence because he had showed remorse in his allocutus and was a first offender

Counsel opposed the submission of counsel for the appellant and relied on the case of **Abelle suman Vs Uganda Supreme Court Criminal Appeal No.66 of 2016** in which the case of **Okello Geoffrey Vs Uganda Criminal Appeal No. 34 of 2014** was cited with approval. It was held;

"...Section 5(3) of the Judicature Act does not allow an appellant to appeal to this Court (Supreme Court) on severity of the sentence. It only allows him or her to appeal against sentence only on a matter of law."

Counsel therefore submitted that since the appellant has no right of appeal on severity of sentence, this court upholds the sentence and dismisses the appeal since there was no illegality of the sentence upheld.

Consideration of the appeal

This is a second appeal against the decision of the Court of Appeal. There are two grounds as stated in the memorandum of appeal reproduced above in this Judgment. The appellant together with others were indicted on a charge of murder C/S 188 and 189 of the Penal Code Act. The appellant and others were convicted and sentenced. However, the appellant was the only one who preferred an appeal when he was sentenced to 26 years and 4 months

imprisonment which sentence was confirmed/upheld by the Court of Appeal.

It is trite law that, "the duty of the first appellate court is to reconsider all material evidence that was before the trial court, while making allowance for the fact that, it has never seen or heard the witnesses and come to its own conclusion on that evidence. In so doing, the first appellate Court must consider the evidence in totality and not any piece thereof in isolation. It is only through the re-evaluation that it can reach its own conclusion as distinct from merely endorsing the conclusion of the trial Court." **See Tito Buhigiro Vs Uganda Supreme Court Criminal Appeal No. 08 of 2014** and cited with approval in **Kifamunte Henry Vs Uganda SC Criminal Appeal No.10 of 1997.**

Ground 1

The main contention was that the learned Justices of the Court of Appeal erred when they failed to adequately re-evaluate all the material evidence in regard to the age of the appellant and did not find that he was a minor at the time of committing the offence.

That ground implied that the appellant was under 18 years of age when he committed the offence and therefore was a minor.

Section 2 of the Children Act, Cap 59 as amended on 1st June 2016 defines a child as:

A person below the age of 18 years.

Section 107 of the Children Act provides for making inquiry as to the age of a person appearing to Court to be below 18 years of age as follows:

(1) Where a person whether charged with an offence is brought before Court otherwise than for purpose of giving evidence and it appears to the Court that he or she is under eighteen years of age, the court shall make an inquiry as to the age of that person.

(2) In making an inquiry, the court shall take any evidence including medical evidence

The evidence about the age of the appellant on record shows that the trial Judge went in detail to analyze it to determine the age. The learned Judge referred to Section 107(2) of the Children Act. From what we have pointed out concerning the provision on determination of age, the medical evidence according to EXP 2 which was not challenged at all was admitted evidence under Section 66 of the Trial on Indictment Act. The learned Judge stated;

I observed DW3 Nantongo Harriet as she testified regarding the birth date of the appellant (A1) her son, and it appeared to me that she could only recall the date with great effort .... characteristic of one who crammed it for a purpose. The date did not readily come to her recollection and she kept on referring to it repeatedly as 1979 and later correcting it to 1997. Scrutiny of the document itself reveals that the piece of paper is much older than the writing on it whereas the standard ink is faded and stained, the handwritten insertions of particulars look fresh in blue ball point ink and so does the purple ink of the stamp impression...This evidence is rejected as misleading and unreliable...

As reproduced above the trial Judge observed the demeanor of DW3 the mother of the appellant. We bear in mind the fact that we did not interface with the witness while testifying so as to observe the nonverbal cues exhibited by the witness like the voice tone, facial expression, body language, including the manner in which she was testifying.

We observed also that on the indictment clearly showed that the commission of the offence was on 24th November, 2014 and his declared age was 19 years. The learned trial Judge found that the appellant was an adult at the time he committed the offence after the mothers' testimony and the medical evidence. Considering all the above we cannot interfere with the findings of the trial Judge.

In addition it was not shown that the Court of Appeal Justices did not re-evaluate the evidence on record against the appellant, to prove that they were manifestly wrong on the finding of fact, in order to oblige this Court to re-evaluate to ensure that justice is properly and timely done (**See Tito Buhigiro VS Uganda (supra).** Accordingly, this Court cannot, interfere with the findings of the lower two courts. We are alive to the fact that this Court did not have the opportunity to observe the witness and materials before it which the trial Court had. So the learned Justices of the Court of Appeal cannot be faulted. Ground one fails as a result.

Ground 2

On the second ground, the appellant fault

d the learned Justices of the Court of Appeal for upholding an illegal sentence which was allegedly harsh and excessive.

We carefully read and examined the record of appeal and concerning sentencing, the learned Judge said and we quote:

"**In the higher category of blame worthiness is A1 Mayengo Hassan alias Kasolo Musilamu who despite not having used a deadly weapon adapted to cutting or stabbing the deceased, he was seen mercilessly dragging him even when it was clear that** he was weak and helpless. This conduct was reflective of **wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind that has no regard for the sanctity of life. Even without extremely deadly weapons, his conduct towards the deceased manifested such frame of mind. In light of those aggravating factors...and in accordance with Article 23(8) of the Constitution, and Regulation 15(2) of the Constitution (Sentencing Guidelines) for Courts of Judicature (Practice) Directions 2013 to the effect that the court should deduct the period spent on remand from the sentence....I observe that A1 has been in custody since 24 November 2014 and set off a period of three years and eight months. I therefore sentence A1 Mayengo Hassan alias Kasolo**

Musilamu to a term of imprisonment of 26 years and 4 months' imprisonment...."

We find no illegality in passing the said sentence which was to begin from the date of conviction as opposed to the date of announcing the sentence as the trial Judge had stated.

So ground two fails also.

In the result, we uphold the sentence as imposed by the trial Court and as confirmed by the Court of Appeal. The appeal is dismissed and the appellant should continue to serve and complete the sentence of imprisonment from the date of conviction which was 13th July 2018.

So it is ordered.

Dated at Kampala this 6th day of Sept 2023.

MWONDHA
JUSTICE OF THE SUPREME COURT

TIBATEMWA-EKIRIKUBINŻA
JUSTICE OF THE SUPREM COURT

TUHAISE
JUSTICE OF THE SUPREME COURT

CHIBITA

JUSTICE OF THE SUPREME COURT

MUSOTA

JUSTICE OF THE SUPREME COURT

The judgment delivered as directed by the D/Registrar

6/09/023.