THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NUMBER 0146 OF 2009

(An appeal from conviction and sentence of the High Court Holden at Kampala before Hon. Justice J.W Kwesiga dated 24th day of June 2009)

NO.652 S.P.C MAGARA RAMADHAN:::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

UGANDA ::: :::: :RESPONDEDNT

CORAM:

HON. MR. JUSTICE RUBBY AWERI OPIO, JA

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

This is an appeal from conviction and sentence of the High Court of Uganda Holden at Kampala, before His Lordship The Hon. Mr. Justice J.W Kwesiga J dated 24th June 2009.

The appellant who was a Special Police Constable was indicted on two counts of murder contrary to Sections 188 and 189 of the Penal Code Act and one count of attempted murder contrary to Section 20 (4) (a) of the Penal Code Act.

It was the prosecution's case that on 5th February 2006 at Bulange in Rubaga Division, Kampala District the appellant unlawfully caused the death of one Vincent Kavuma with malice aforethought. On count two that the appellant on the same day at the same place caused the unlawful death of one Gideon Makabayi with malice aforethought. And on count three that the

appellant on the same day and at the same place by shooting attempted to unlawfully cause the death of Haruna Byamukama.

The accused denied the charges. At the trial, the prosecution called 9 witnesses and produced 12 exhibits to prove its case.

The accused who did not take oath gave evidence and called two witnesses in his defence.

The two assessors' opinion was that prosecution had proved the offence of murder on counts 1 and 2 and attempted murder on count 3. They advised Court to convict the appellant accordingly.

The learned trial Judge disagreeing with the assessors found that malice aforethought had not been proved on counts 1 and 2. Accordingly he convicted the appellant of a lesser offence of manslaughter. The learned trial Judge also found that malice aforethought had not been proved specifically in respect of count 3. He acquitted the appellant of the offence of attempted murder on that count.

He sentenced the appellant to 7 years' imprisonment of each count and directed the sentences to run consecutively hence this appeal.

The appellant's memorandum of appeal sets out 3 grounds as follows;-

1. *That the learned Judge erred in law and fact when he failed to properly evaluate the evidence thus arriving at a wrong decision occasioning miscarriage of justice;*
2. *That the learned Judge erred in law and fact on assessment, interpretation and application of the law on contradictions and inconsistencies thus arriving at a wrong decision occasioning miscarriage of justice;*
3. *That the learned Judge erred in law when he imposed CONSEQUTIVE sentence thus occasioning miscarriage of justice.*

In the alternative and without prejudice to the above grounds the appellant stated in his memorandum of appeal that:-

> *"The learned trial Judge erred in law and in fact when he convicted the appellant of manslaughter rather the rash and negligent act."*

This was an alternative ground.

At the hearing of this appeal Mr. Ducan Ondimu appeared for the appellant while Ms. Barbara Masinde appeared for the respondent.

Mr. Ondimu argued the grounds as set out in the memorandum of appeal.

We must state from the outset that ground one offends the provision of Rule 86 of the rules of this Court which provides as follows;

> 86(1) *"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make" (Emphasis added)*

Ground 1 of the memorandum of appeal is too general and it does not "Specify the points which are alleged to have been wrongly decided".

These kinds of pleadings seem to be fishing expeditions by advocates who just cast a wide net hoping that something will come up. This is the specific mischief that rules 86 above is intended to remedy.

Secondly Rule 30 of the Rules of this Court grants power and a duty to this Court as a first appellate Court to reappraise all the evidence and draw its own conclusions. This rule therefore renders ground one superfluous and redundant.

We would accordingly strike it out.

See;- (*Edward Katumba Byaruhanga versus Daniel Kyewalabye Musoke Court of Appeal Civil Appeal No. 2 of 1998.)*

As already stated above Rule 30 (I) of the Rules of this Court stipulates that on any appeal from a decision of the High Court acting in exercise of its original jurisdiction this Court may reappraise the evidence and draw its own inferences of fact.

The Supreme Court in Kifamunte Henry versus Uganda (Criminal appeal No. 10 of 1997) held as follows;-

> *"we agree that on first appeal from a conviction by a Judge the appellant is entitled to have the appellate Court's own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it when the question arises as to which witness should be believed rather than another and that question turns on manner and demeanor the appellate court must be guided by the impressions made on the Judge who saw the witnesses"*

Notwithstanding the fact that we have struck out ground one of the memorandum of appeal, this Court shall proceed to reappraise the evidence and come to its own conclusion as the law requires. This in effect would cover the issues ground one had intended to cover.

Mr. Ondimu learned counsel from the appellant, put up a spirited fight for his client. He urged strongly and at times emotionally

that the learned trial Judge erred when he believed the prosecution evidence and rejected the evidence of the defence witnesses.

He submitted that they could have been more than one gun at the scene which was a political rally with a huge rowdy and excited crowd. Since the rally was to be addressed by one of the Presidential candidates in the 2006 Presidential elections and since Presidential candidates are provided with armed security by the State, there is a possibility, he argued that the bullets that hit the two deceased persons and injured the third could have been fired from other guns other than that of the appellant.

He argued that this is supported by the evidence of Pw_1 a ballistic expert who testified that she could not conclusively state that the cartridges recovered from the scene of crime were fired from the appellant's gun.

Counsel also urged that Pw_5's testimony should never has been believed by the trial Judge.

Pw_5 had testified that he knew the appellant well. He saw him at the scene of crime. That he had talked to the appellant and convinced him to go back to his car which had apparently been blocked by the crowd. He had urged him to go back and not to try to proceed through the crowd. The appellant accepted and to returned to his car. As soon as he had returned to his car someone in the crowd smashed his car's windshield with a stone. Whereupon, the appellant emerged from the car again, with his gun and fired in the air. The witness then took cover on the ground about 15 metres away from the appellant. The appellant then fired into the crowd.

Counsel argued that the conditions and circumstances prevailing at the scene at that particular moment were not favourable for correct identification. That the witnesses could not have ascertained that it was the appellant who had fired into the crowd.

In his Judgment, the learned trial Judge was at all times alive to the fact that prosecution was under duty to prove the case beyond reasonable doubt. He cited **Woolmington versus DPP. (1935) AC at P. 481** which cites the position of the law as follows;-

> *"Therefore even if the accused puts up an incredible story as long as the Court is of the view that his story might reasonably be true, the accused person would be entitled to an acquittal "*

The learned Judge considered the evidence as a whole. PW_5 was an eye witness. He was at the scene of crime. He saw the appellant, he had talked to him. He saw him shoot in the air and in the crowd from a distance of 15 metres. This evidence was never contradicted, in fact it was strengthened during cross examination.

PW_7 testified that the appellant had received and signed for the gun that was recovered from him after the incident. He had signed for 30 rounds of ammunition. At the time it was recovered from him, 14 rounds of ammunition were missing. 16 rounds of live ammunition were recovered from the appellant unspent together with the gun.

14 spent cartridges were recovered from the screen of crime. Although no evidence was provided to prove that the said cartridges were fired from the gun that was issued to the appellant, the cartridges recovered were capable of being fired from the gun that the appellant had signed for, an AK 47 Assault Rifle.

There was no plausible explanation from the appellant as to what happened to the 14 rounds of ammunition missing from his gun. The gun was recovered from the appellant with 16 live rounds of ammunition, these together with the 14 spent cartridges recovered from the scene make a total of 30 rounds of ammunition issued to the appellant.

The incident took place in broad day light. PW_5 testified in cross examination that he was able to see the appellant who was 15 metres away. He further stated that "I was able to see the accused person even if I had taken cover"

We find that the learned trial Judge properly evaluated the evidence and came to the correct conclusion as to the participation of the appellant in the commission of the offences he was convicted of.

The defence story is unbelievable and we find that the learned trial Judge was right when he rejected it.

We find no serious contradictions in the prosecution evidence as contended by counsel for the appellant. On the other hand we find that the prosecution evidence was strong, credible and consistent.

Grounds two must therefore fail.

On ground 3, it was argued for the appellant that the learned trial Judge erred in law when he imposed consecutive sentences and thus occasioned a miscarriage of justice.

Mr. Ondimu learned counsel for the appellant cited the case of **R versus Sowedi Mukasa (1946) 13 EACA and R versus Fulabhai Patel 13 EACA** which he contended to, establish the proposition that as a general rule of practice in cases where a person has been charged and convicted on two counts involving the same transaction, it is for Court to direct that sentences should run concurrently. We agree entirely with the above proposition of the law as submitted by learned counsel for the appellant.

We have had the opportunity of reading the said authorities and we are grateful to counsel for having provided them to us.

However, nothing suggests in the above cited cases or elsewhere in the law that a Judge cannot direct that sentences run consecutively even where the conviction is on two or more counts involving the same transaction.

In the case of ***Sowedi Mukasa s/o Abdulla Aligawaisa (Supra)*** ***Sir Joseph Sheridan C.J*** had this to say;-

> *"The practice in cases where a person has been charged with and convicted on two counts involving the same transaction, one for burglary or housebreaking and one for stealing has been to direct the sentences to run concurrently. In the present case the accused, a person with a long list of previous convictions, was found guilty on two counts, one for burglary and one for stealing, and sentenced to consecutive sentences of 7 years on each count. While we recognize that the accused is a hardened criminal deserving of a severe sentence, our view is that where, as here, both offences have been committed at the same time and in the same transaction, the practice referred to should be adhered to save in very exceptional circumstances, where, for instance, a person breaks and enters a house and commits the felony of rape therein where an order that the sentences on both counts might be directed to run consecutively. In this case we increase the sentence on the charge of burglary to 10 years, allow the sentence for theft 7 years to stand, and direct that sentences shall run concurrently"*

In the particular case the sentence on the charge of burglary was increased from 7 to 10 years and the sentence of 7 years for theft was allowed to stand.

We are inclined to think that a sentence of a total term of imprisonment for 14 years in the above case for burglary and theft was harsh and excessive and that the Court interfered with the sentence on that account. Courts are required to consider the total length of time a convicted person would have to spend in prison.

The Court in the ***Sowedi Mukasa case (Supra)*** did not specifically state that the directive of the trial of Court to have the sentences to run consecutively was illegal or unlawful. We think that the Judgment in that case is to the effect that the sentences

running consecutively were harsh and excessive. In any case **Sowed**i was emphasizing a rule of practice and not a rule of law.

On the other hand, our understanding of Section 2 of the Trial On Indictments Act (Cap 23) (T.I.A) is that the general rule is for the High Court to impose consecutive sentences and directing sentences to run concurrently is the exception.

Section 2 of the said Act stipulates as follows;-

> "***Sentencing powers of the High Court***
>
> *1. The High Court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.*
>
> *2. When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her for those offences to the several punishments prescribed for them which the Court is competent to impose,* ***those punishments, when consisting of imprisonment, to commence the one after the expiration of the other, in such order as the Court may direct, unless the court directs that the punishments shall run concurrently.*** *(Emphasis added)*
>
> *3. For the purposes of appeal, the aggregate of consecutive sentences imposed under this section,* ***in the case of convictions for several offences at one trial, shall be deemed to be a single sentence."***

For the purpose of an appeal before this Court, sub section 3 above clarifies the matter by stipulating that "convictions for several offences at one trial, shall be deemed to be a single sentence"

It seems therefore, that for the purposes of an appeal this Court is not concerned with whether or not the sentences are concurrent or consecutive. It is concerned with the aggregate of the sentences, in which case this court would consider whether or not the aggregate sentence is harsh and excessive.

We have already stated that the reading of Section 2(2) of the Trial on Indictments Act (Supra) suggests that the general rule is to impose consecutive sentences. Accordingly this overrides the decision in ***Sowedi Mukasa (Supra)*** which suggests that the practice should be to impose concurrent sentences. The doctrine of ***stare decisis*** requires that statutory provisions take precedence over case law. We are therefore bound to follow the Trial on Indictments Act. In any event, it was enacted much later, the said **Sowedi Mukasa *(Supra)*** case having been decided on 13th November, 1946 and the T.I.A having come into force on 6th August, 1971.

Be that as it may, we have found no contradiction that is fundamental between the T.I.A and the case law cited, since sentencing is discretion of the trial Judge and can only be interfered with in limited circumstances. These circumstances were set out by the Supreme Court. The principle to be followed by this Court before interfering with a sentence imposed by the High Court was set out by the Court of Appeal For Eastern Africa in **James S/O Yoram versus Rex (1950)18 EACA at P. 147** and was retaliated in **Ogalo S/O Owoura versus R (1954) 24 EACA 270.** This principle has been followed ever since. The Supreme Court in **Kiwalabye versus Uganda (Criminal Appeal No. 143 of 2001)** set it out as follows;-

> *"The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the desecration 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 the a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle"*

We have found that the learned trial Judge exercised his discretion properly. He did not act on any wrong principle as suggested by counsel for the appellant. He had the discretion to

direct that sentences run concurrently or and consecutively and he exercised it by choosing the latter.
We also found that the aggregate sentence of 14 years' imprisonment for manslaughter is neither a harsh nor excessive.

Even if we had found that the trial Judge had erred in departing from the practice of directing that the sentences run concurrently, we would still not have interfered with the sentence, unless it had occasioned a miscarriage of justice**.** See;- **Kifamunte versus Uganda (Supra)**

In this particular case it is our finding that a sentence of 14 years' imprisonment on a conviction of two counts of manslaughter occasioned no miscarriage of justice. This ground also fails.

It was submitted for the appellant in the alternative that Court ought to have convicted the appellant of a lesser offence of a Rash and negligent Act.

This matter does not seem to have been raised at the trial. We do not think it was open to the appellant to raise it on appeal.

However, considering the circumstances of this case, the appellant having been indicted on two accounts of murder and one count of attempted murder and the Judge having convicted him of manslaughter and acquitted him on attempted murder, we find no reason to fault the learned trial Judge in this regard.

We agree with decision cited by learned counsel **Mr. Ondimu R versus Church (1965) 2 ALL ER 72** whereby it was observed as follows;-

> *" For a verdict of manslaughter inexorably to follow from an unlawful act causing death , the act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of the some harm resulting therefrom albeit not serious harm"*

We find that the appellant having acted in the manner that he did and his actions having resulted in death of two people, the Judge correctly convicted him of manslaughter.

We find no merit in the alternative ground of appeal and we accordingly dismiss it.

In the result this appeal fails and is hereby dismissed.

The conviction and sentence imposed by the High Court are hereby confirmed.

Dated at **Kampala** this22nd ….day of **January** 2014.

……

HON. MR. JUSTICE RUBBY AWERI OPIO
JUSTICE OF APPEAL

……

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA
JUSTICE OF APPEAL

……

HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL