THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NUMBER 0319 OF 2009

SEBULIBA SIRAJI ::::::::::::::::::::::::::::::::::::
APPELLANT

VERSUS

UGANDA::

RESPONDENT

(Appeal from the Judgment of Hon. Justice Eldad Mwangusya in Kampala Criminal Session Case No. 575 of 2005 dated January 19, 2009)

CORAM:

HON. MR. JUSTICE S.B.K. KAVUMA, JA

HON. MR. JUSTICE REMMY K. KASULE, JA

HON. LADY. JUSTICE SOLOMY BALUNGI BOSSA, JA

JUDGMENT OF THE COURT

The appellant was convicted by the High Court of murder and sentenced to imprisonment for life. He appeals against both conviction and sentence.

The prosecution case which was accepted by the learned trial Judge is that, the deceased, one Wangi Deo was a businessman and the accused was a casual labourer at Ben Kiwanuka Street. At one time certain goods belonging to a customer of the deceased were stolen and the deceased identified the appellant as the culprit after which, the appellant was arrested. The police granted him bond, which he jumped and threatened to deal with the deceased.

On August 9, 2005, the accused waited for the deceased with a panga hidden in a kavera (polythene bag) and when the deceased opened his vehicle, the appellant attacked him and cut him with a panga on his head, neck and hand. Witnesses who were at the scene came and rescued him and took him to Mulago hospital but he died hours later. The appellant was arrested by a mob who attempted to lynch him but he was rescued by police and charged accordingly.

At the trial, the appellant pleaded guilty and the learned trial Judge convicted and sentenced him accordingly.

There are two grounds of appeal according to the amended memorandum of appeal namely;

1. The learned trial Judge erred in law and fact when he convicted the appellant based on an equivocal plea of guilty.
2. The learned trial Judge erred in law and fact when he pronounced for the appellant a sentence which is not defined or prescribed by law.

Counsel Chris Bakiza appeared for the appellant and Counsel Sherifah Nalwanga, State attorney, appeared for the State.

On ground 1, Counsel for the appellant argued that ***section 63*** of the ***Trial on Indictments Act*** provides that if the accused pleads guilty, the plea must be recorded and he or she may be convicted on that plea but an accused can change his plea anytime before judgment. In the present case, the appellant first pleaded guilty to the offence of murder and later pleaded not guilty.

Counsel further submitted that there is no evidence on record to show that the charge was read to the appellant in the only language, i.e. Luganda, which the appellant understood. Counsel referred to the case of ***Adan Vs R*** [***973] EA 445,*** and submitted that it lays down the correct procedures courts must follow when recording and taking plea of an accused person. In particular, he referred to the principle that the charge and all

essential ingredients of the offence should be explained to the accused in his language or in a language he understands and that this was not done in the present case.

This according to him, contravened the right to a fair hearing under ***Article 28(3) (c)*** and ***(e)*** of the Constitution.

On ground 2 of the memorandum of appeal, Counsel referred to ***section 189*** of the ***Penal Code Act*** which provides for the offence of murder. He argued that the sentence of life imprisonment is not provided for. He relied on ***Article 28 (12)*** which provides that except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.

Counsel relied on the case of ***Tigo Steven Vs. Uganda Supreme Court Criminal Appeal No. 8 of 2009*** and submitted that before the decision in that case on May 10, 2011, the thinking and belief was that imprisonment for life or life imprisonment meant 20 years in prison. Therefore, when the learned trial Judge was sentencing the appellant in 2009, he was of the view and belief that imprisonment for life meant that the appellant would spend 20 years in prison. Counsel also referred to the case of ***Attorney General vs. Susan Kigula and 417 others Constitutional Appeal No. 3 of 2006*** and argued that since the present case was decided before the cases of ***Tigo Steven Vs. Uganda(supra)*** and ***Attorney General vs. Susan Kigula and 417 others***, the sentence of life imprisonment meant imprisonment for 20 years.

Counsel prayed that this court be pleased to take into account the period spent on remand and the sentence served so far which amounts to 10 years and 2 months.

Arguments of Counsel for the respondent

Counsel for the respondent submitted that the record clearly indicated that a court clerk, one Catherine Musoke, acted as the interpreter. The record also indicated that Counsel Betty Munabi had informed Court that he consulted with his client,

who had indicated to counsel that he intended to plead guilty to murder. Counsel also referred to the case of ***Adan Vs Republic [1973] EA 446***, where court pointed out that the danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented. However, in this case, the appellant was well represented.

On the period the appellant had spent on remand, Counsel for the respondent relied on the cases of ***Opolot Justine and Agamat Richard Vs Uganda Criminal Appeal No. 155 of 2009,*** that quoted the case of ***Bukenya Joseph Vs. Uganda SCCA No. 17 of 2010,*** where the Supreme Court established the principle that taking the remand period into account does not mean that it should be done mathematically. It meant considering the period the accused had been on remand.

Counsel therefore submitted that there was no need to deduct the period that the appellant had spent on remand since court had already taken it into account and as such prayed that this appeal be dismissed.

Resolution of the appeal

This being a first appellate court, it has a duty to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see and hear the witnesses. In ***Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997*** court stated that:

We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its 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 then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

See also the cases of ***Pandya v. R [1957] EA 336, Bogere Moses v. Uganda SCCA No. 1 of 1997 and Rule 30(1) of the Court of Appeal Rules*** that are of the same effect.

We also recall that the procedure for taking a guilty plea is clearly set out in the case of ***Adan Vs R [1973] EA. 445*** where the East African Court of Appeal (as it then was) stated as follows:-

When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered. The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed.

The earlier case of ***Tomasi Mufumu v. R [1959] EA 625*** decided by the same court had earlier stated that;

…it is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself also and record that the accused understands the elements which constitute the offence of murder…and understands that the penalty is death.

Where the plea taken does not amount to an unequivocal plea of guilty to the offence to which the accused is convicted, the conviction must be quashed (see ***R v. Tambukiza s/o Unyonga [1958] EA 212***). We have borne the above principles in mind in the resolution of this appeal.

On the first issue of whether the plea was equivocal, we note from the record that the indication of the appellant's desire to plead guilty was a back and forth affair. When the indictment was first read to the appellant on August 18, 2009, he pleaded not guilty. At that time, Counsel Joyce Nalunga represented the appellant on state brief. The learned trial judge did not try him in that session for the reason that he could only complete part heard cases.

In the next session, one Ms Betty Munabi represented the appellant on state brief. She indicated to the Court that the appellant wished to change his plea from one of not guilty to one of guilty. The appellant confirmed this wish. The indictment was read and explained to the appellant. The record does not indicate the language in which this was done.

The appellant indicated that he knew the offence, killed the deceased but did not intend to kill him. His exact words as they appear on record were;

"I know the offence I killed the deceased but I did not intend to kill him"

Whereupon, learned Counsel for the State, one Paul Lakidi, stated that the prosecution was prepared to accept a plea of guilty to manslaughter contrary to ***sections 187(1)*** and ***190*** of the Penal Code Act, but wished to consult the Director of Public Prosecutions (DPP) first. The learned trial Judge the adjourned hearing to January 19, 2009, to allow for consultations with the DPP.

On the day of the adjourned hearing, Counsel for the State informed court that after consultation with the DPP, they were not accepting a plea of guilt to manslaughter.

Counsel Munabi thereupon informed court that the appellant intended to plead guilty to murder. She stated as follows;

I have explained the sentence that a murder charge carries. He has instructed me that he understood the nature of the sentence and is prepared to meet the consequences.

On his part, the appellant stated;

I have had consultation with my lawyer who has explained to me the consequences of a conviction for the offence of murder and I have understood, I have instructed her that I will plead guilty to the offence charged whatever the consequences.

After this statement, the typed record is silent about what court stated but page 8 of the original record indicates that the learned trial judge stated as follows;

The consequences of a conviction for the offence of murder have been explained to the accused who has insisted that he will plead to the indictment for the offence of murder.

The learned judge then directed that the indictment be re-read and explained to the appellant. The appellant then pled as follows;

I have understood the charge. I killed the deceased, Wangi Deo. I used a panga. I intended to kill him.

The learned judge then entered a plea of guilty to the offence of murder contrary to ***sections 188*** and ***189*** of the Penal Code Act. Following the plea, the prosecution put the facts of the case to the appellant, to which he responded that the facts as narrated by the prosecution were correct and that that is what happened. The court then convicted him on his own plea of guilty.

In our considered view, the procedure as laid down in the case of ***Adan v. R (supra)*** and ***Tomasi Mufumu v. R (supra)*** for the recording of a plea of guilty was followed to the letter, except for the omission to mention <u>on record</u> the language in which the indictment and the facts were read and put respectively to the accused. In these circumstances, we consider that the plea of guilty to the charge of murder was clearly unequivocal, not withstanding that the record does not indicate the language in which he was giving the responses.

The only question that we have to determine in this regard is whether this was fatal to the conviction. The relevant law is to

be found in ***Article 28(3) (b)*** of the Constitution***,*** which reads as follows;

Every person who is charged with a criminal offence shall be informed immediately, in a language that the person understands, of the nature of the offence;

We consider it desirable that a trial court should indicate the language in which the indictment has been read and explained, and the proceedings interpreted to the accused. It assists the appellate courts in discerning whether the appellant fully understood the nature and consequences of the proceedings against him. However, in the circumstances of this case, we do not consider the fact that the learned judged did not record the language of interpretation to be fatal to the conviction. The record clearly indicates that the indictment and facts were not only put but fully explained to the appellant. His answers to all the stages of the proceedings indicate that he understood what was said to him, its consequences, and what the proceedings were all about. Moreover, there is no protest on record from his counsel to indicate that the appellant did not understand or misunderstood anything. In the premises, we conclude that the conviction was valid under ***section 63*** of the ***Trial on Indictments Act*** and uphold it for being unequivocal.

On the second ground of appeal, we have considered the law governing the circumstances in which an appellate court may interfere with sentence. The Supreme Court reiterated the principles in the case ***Kiwalabye Bernard Vs Uganda SCCA No. 143 of 2001*** as follows;

The Appellate court is not to interfere with the sentence imposed by a 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 circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle.

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.

Relying on the above principles, we have found no valid reason to interfere with the sentencing discretion of the learned trial Judge, given the circumstances in which the appellant committed the offence and we uphold the sentence that he imposed. We see no need to clarify whether the sentence remains for the remainder of the appellant's life or a sentence of 20 years' imprisonment. This is a matter for the Prisons department to resolve, in reliance on the Prisons Act and emerging jurisprudence, including the case of ***Tigo Vs Uganda (supra).***

We also consider that life imprisonment is a sentence prescribed by law, given that the maximum penalty is death. Therefore, a trial court is free to give the maximum penalty, or impose a lesser sentence, including life imprisonment, if the circumstances so warrant.

This appeal accordingly fails. We uphold the sentence of life imprisonment for the appellant and dismiss his appeal against both conviction and sentence accordingly.

It is so ordered.

Dated this …18th day of December 2014

Signed by:

Honorable Mr. Justice Steven B K Kavuma, Ag. DCJ_____

Honorable Mr. Justice Remmy K Kasule, JA_____

Honorable Lady Justice Solomy Balungi Bossa, JA_____