THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NOs. 12 /2008 & 39/2009

1. **KANSIIME BRAZIO**
2. **KIBARIKOLA MOLLY.**

.....APPELLANTS

VERSUS

UGANDA.....RESPONDENT

CORAM: HON. MR. JUSTICE A. S. NSHIMYE, JA
HON. LADY. JUSTICE FAITH E. MWONDHA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

This is an appeal form a conviction and sentence of the High Court of Uganda holden at Mbarara in High Court Criminal session No. 007 of 2006 before His Lordship the Hon. Mr. Justice Eldad Mwangusya, J (as he then was).

The appellants were jointly indicated of the offence of murder contrary to Section 183 and 184 of the Penal Code Act and sentenced to imprisonment for life.

The second appellant appeals against conviction and sentence while the 1st appellant appealed against sentence only.

The appellants had each filed a separate appeal. Both appeals were consolidated in this court and this Judgment is in respect of the consolidated appeals.

The two grounds of the appeal are set out in the memorandum of appeal as follows:-

1) ***That the learned trial Judge erred in law and fact when he convicted the second appellant based on a single witness's identification by voice with no corroboration.***

2) ***That the learned trial Judge erred in law when he did not take into account the period spent on remand by the appellants before passing sentence, thereby sentencing them to imprisonment for life, which is deemed to be harsh and excessive in the circumstances of the case.***

At the hearing of this appeal **Ms. Susan Sylvia Wakabala** appeared for both appellants on state brief and **Mr. Brian Kalinaki** learned senor State Attorney appeared for the respondent.

Both counsel were permitted to file written submissions, which they both did.

The undisputed brief facts of the appeal are set out in the submissions of the appellants as follows:-

> ***"The Appellants were convicted of murder contrary to sections 188 and 189 of the Penal code Act of a one, Atusasiire Santrian which occurred on or about the 7th day of October 2004 at Buyonga Cell, Ndeija in Mbarara district. That on the above date, the second Appellant went to the deceased's home and called out for her. They left together and she never returned home only to be found dead in a bush the following day. It was stated that the first Appellant had impregnated the deceased and was fined some money but told some people he would kill the deceased before he paid the fine. The appellants were found guilty on the evidence and were convicted of murder and sentenced to a term of imprisonment for life. Hence this appeal."***

Ms. Wakabala in her written submissions contended that the only evidence upon which the learned trial Judge based his conviction against the second appellant was the voice identification evidence of PW4 who was 11 years at the time the offence was

committed. She submitted that it is always unsafe for court to base conviction on evidence of a single identifying witness, because such a witness maybe genuine but mistaken. She stated that the above is a principle courts have followed and should have been followed in this case by the learned trial Judge.

She submitted that in case before us the witness did not see the 2nd appellant but only identified her by voice, which according to counsel required even more caution. She submitted that the evidence of PW4 identifying the 2nd appellant by voice was not corroborated. That her conviction was thus based on uncorroborated evidence of a single identifying witnesses by voice who was at the time a minor.

She submitted further that in the circumstances of this case the prosecution failed to put the second appellant at the scene of the crime and therefore should have acquitted her of the offence of murder.

In response to the above submissions learned counsel for the respondent in her written submissions argued that the 2nd appellant had been put at the scene of crime by PW4 Ashaba Aloys a brother to the deceased. That in his testimony, Ashaba PW4 stated that while he was at home he heard someone talking to the deceased from outside the house. That she recognized the voice of the caller as being that of the 2nd appellant. That the witness had known the appellant for a long time, when he was

three years old. That the appellant and the witnesses lived in the same village and were neighbours. The witness also stated that he was related to the 2nd appellant and they always exchanged visits.

That the witness also heard a voice of another person which he did not recognize. Learned counsel submitted that the fact that the witnesses testified that he recognized the voice of the 2nd appellant only merit that he was truthful. Learned counsel for the respondent submitted that the witness was from cross examination and was 100% sure it was the 2nd appellant who called out the deceased.

She submitted that the Judge who saw and heard the witness testify believed her, and called upon this court to uphold his finding of fact.

She also supported the learned trial Judge's holding that there is no legal requirement for corroboration of a single indentifying witness relying on voice identification.

She finally submitted that the learned trial Judge properly evaluated the evidence on record and came to the correct conclusion.

On the second ground, counsel for the appellant submitted that the learned trial Judge erred in law when he failed to

comply with the provisions of Article 23(8) of the Constitution which requires that in sentencing an accused person court shall take into account the period the accused has spent on remand. She contended that in this particular case the learned trial Judge did not take into account the 3 years and 3 months the appellants had spent on remand.

She prayed for the sentence to be set aside on that account and for this court to impose a lesser and more appropriate sentence.

In reply learned state Attorney submitted that the learned trial Judge had considered both the aggravating and mitigating factor before passing sentence. That he had considered the remand period also.

That this court can only interfere with trial Judge's discretion in sentencing if the sentence was unlawful. She submitted that the sentence imposed on both appellants was just in the circumstances of the case as the maximum sentence for the offence is death, but the trial Judge imposed a lesser sentence of imprisonment for life.

The duty of this court as a first appellate court is now well settled. This court is required as a first appellate court to re-evaluate the evidence adduced at the trial and to make its own inference on both issues of law and fact. Rule 30 of the Rules of this Court requires that:-

Rule 30

“Power to reappraise evidence and to take additional evidence.

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may-

(a) reappraise the evidence and draw inferences of fact.

The Supreme Court in the case of **Henry Kifamunte vs. Uganda,** Supreme Court (Criminal Appeal No. 10 of 1997) and **Bogere Moses** & **Another vs. Uganda,** Supreme Court (Criminal Appeal No. 1of 1997). While considering the duty of a first appellant curt observed and held that the first appellate court has a duty to re-evaluate the evidence and to make its own inference of fact and law. In **Bogere Moses** & **Another vs. Uganda**, (Supra) the Supreme Court held as follows:-

“While we would not attempt to prescribe any format in which a judgment of the court should be written, we think that were a material issue of objection is raised on appeal, the appellant is entitled to receive an adjudication on such issue from the appellate court even* if *the adjudication be handed out in summary form ...

In ***our recent decision in Kifamunte Henry vs. Uganda we reiterated that it is the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before trial court and make up its own mind ….”***

We are therefore aware of this Court's duty to re-evaluate the whole evidence in the trial Court and to come up with our own Judgment on issues of fact and law. We shall proceed to do so.

On ground one learned counsel for the appellant contended that the evidence of PW4 the single witness who identified the 2nd appellant by voice, required corroboration. That there was no corroboration and therefore the trial Judge ought not have convicted the 2nd appellant basing on the uncorroborated evidence.

The learned Judge held as follows regarding the issue of identification by voice.

The position of identification of a person by his or her voice is stated in ***SARKAR ON EVIDENCE FOURTH EDITION 1993*** at page ***170*** follows:-

> ***"If the court is satisfied about the identification of persons by evidence of identification by voice alone, no rule of law prevents its acceptance as the sole basis for conviction possibilities of mistakes in identifying persons by voice especially by those who are closely familiar with voice could only arise only when the voice heard are different from normal voices on account of***

<u>the situation or when identical voices are possible from other persons also .....(SIC).</u>

We have carefully considered the evidence on record and submissions of both counsel.

We found no reason to fault the holdings of the learned trial Judge in this regard. We agree with the findings of the trial Judge that the 2nd appellant was positively and correctly identified by PW4.

In any case a court may convict on evidence of a single identifying witness where it is satisfied with the evidence and has cautioned itself on the danger of doing so.

In this case the learned trial Judge was satisfied with the evidence of PW4 when at page 10 of his Judgment he sated as follows:-

> "***In this case the witness testified that he had known A.2 all his life. He regularly went to her home to play with her children. She was also a regular visitor at the home because they were close friends with the deceased. When asked as whether he was a hundred percent sure that the voice he had heard was that of A.2 he said he was and before the body o· the deceased was found he had told his father that the deceased had been called by A.2. This consistency is testimony that he knew the voice of the***

person who had called the deceased and unlike in eases where there is confusion as result of attack by assailants this was a normal call to a friend from a person the deceased and witness knew very well and in these circumstances I am satisfied that the person who called the deceased from her home on the night she was killed was A.2."

The Supreme Court in ***Bogere Moses and Anothe***r (Supra) followed the decision of the Court of Appeal of East Africa in ***Roria vs Republic [1967] EA 583*** at page 584 where the Court observed as follows;-

"That the danger is, of course greater when the only evidence against the accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all circumstances it is safe to all on such identification"

We are satisfied that even without corroboration court was justified in holding that PW4 had positively identified the 2nd appellant by voice.

This ground of appeal therefore fails.

Ground two of the appeal is that the learned trial Judge did not take into account the period of 3 years and 3 months the appellants had spent on remand when he imposed a sentence of imprisonment for life.

We agree with learned counsel for the respondent that it is a constitutional requirement for court to take into account the period

of remand while imposing on an accused person a sentence of imprisonment.

Article 23 (8) of the Constitution stipulates as follows:-

> ***"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial <u>shall be taken into account in imposing the term of imprisonment</u>***."(Emphasis added).

The Supreme Court while considering the above provision of the Constitution in the case of ***Kizito Senkula vs Uganda Supreme Court (Criminal Appeal No. 24 of 2001)*** states as follows:-

"As we understand the provisions of Article 23 (8) of the Constitution, it means that when a trial Court imposes a term of imprisonment as sentence on a convicted person <u>the Court should take into account</u> the period which the person spent in remand prior to his /her conviction.

Taking into account does not mean an arithmetical exercise."

We are satisfied that in imposing the sentence of imprisonment for life, the learned trial Judge took all the mitigating factors into account including the period the appellants had spent on remand, in accordance with the provision of Article 23 (8) of the Constitution.

However, we note that the appellants were convicted on 24th February 2008. This was before the Supreme Court pronounced itself in the case of ***Tigo Stephen vs Uganda Supreme Court (Criminal Appeal No. 8 of 2009)*** (unreported) on the 10th May 2011.

In 2008, before the above decision of the Supreme Court, the thinking and belief at that time was that imprisonment for life or life imprisonment meant 20 years in prison.

It is our view that when the learned trial Judge sentenced both appellants to a term of imprisonment for life he had in mind 20 years in prison and not imprisonment for the rest of their lives.

In ***Tigo's case*** (Supra) the Supreme Court observed;-

> "***We are satisfied that the trial Judge intended to impose a sentence of imprisonment for twenty years ….. We uphold the sentence of twenty years imprisonment."***

Neither counsel addressed us on the above matter. However, this court has power and obligation to re-evaluate all issues of law and fact even on its own motion and dispose of them.

Accordingly we hereby set aside the sentence of imprisonment for life imposed by the learned trial Judge upon each of the appellants and substitute it with that of 20 years imprisonment.

We so order.

Dated at **Kampala** this **1st** day of **July** 2014

HON. MR. JUSTICE A. S. NSHIMYE
JUSTICE OF APPEAL

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HON. LADY. JUSTICE FAITH E. MWONDHA
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL