THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NUMBER 0113 OF 2012

RWALINDA JOHN ……
APPELLANT

VERSUS

UGANDA ……
RESPONDENT

CORAM: HON. MR. JUSTICE A.S NSHIMYE, JA

HON. MR. JUSTICE ELDAD MWANGUSYA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

(*Appeal against conviction and sentence of the High Court of Uganda at Masaka presided over by the Hon. Mr. Lord Justice Akiiki Kiiza on 27th April 2012)*

JUDGMENT OF THE COURT

This is an appeal against both conviction and sentence.

The appellant was indicted with offence of murder, contrary to Sections 188 and 189 of the Penal Code Act. On 27th April 2012 he was convicted by *Hon. Justice Akiiki-Kiiza J,* on the alternative count of kidnap with intend to murder and was sentenced to imprisonment for life.

He now appeals to this court on the following grounds.

1. ***The learned trial judge erred in law and fact when he convicted the Appellant on the charge of Kidnapping with intent to murder C/S 243 (1) (a) of the Penal Code Act a charge which was duplex in nature to the charge of murder C/S 188 and 189 of the Penal Code thereby exposing the Appellant to double jeopardy.***

2. ***The learned Trial Lord Justice erred in law and fact when he held that the prosecution destroyed the Appellant's alibi to the prejudice of the Appellant.***

3. ***The Learned Trial Lord Justice erred in law and fact holding that the discrepancies and inconsistencies in the prosecution's evidence where minor thereby to wrongly convicting the Appellant.***

4. ***The Learned Trial Lord Justice erred in law and fact holding that the evidence of PW6 (an accomplice) was sufficiently corroborated by that of PW3, PW2, PW4 thereby coming to a wrong convicting decision.***

5. ***The Learned Trial Lord Justice erred in law and fact when he wrongly exercised his discretion by refusing to agree with assessor's opinion acquitting the Appellant.***

Mr. Yunus Kasirivu learned counsel appeared for the appellant while **Ms. Winfred Ahimbisibwe** learned counsel appeared for the respondent.

The brief back ground to this appeal is as follows;-

The appellant was indicted with the offence of murder jointly with one Baker Muhwezi , wherein it was stated that on the 30th day of June 2010 at Kakama village, Kalisizo Rakai District, the two persons murdered one Mukibi Marvin. In alternative both person were indicted with the offence of kidnap with intent to murder contrary with to **Section 243 (1)** of the Penal Code Act.

Baker Muhwezi pleaded guilty to the offence of kidnap with intent to murder and was convicted on his own plea of guilt.

This was at an earlier criminal court session presided over by Hon. Lady Justice Ibanda Nahamya, who sentenced him to life imprisonment

At the trial, Baker Muhwezi was prosecution witnesses number 6 (PW6).

The prosecution called six witnesses to prove that on the 30th June 2009 one Hadija Namugaba left her two grand-children, Mukibi Marvin aged three years and Birabwa Nanyondo aged six years at her home. She left both children with Muhwezi Baker (PW6) who was working for her as a *shamba* boy.

That after their grandmother had left, Muhwezi Baker called one of the children Birabwa Nanyondo and asked her to guard his hoe in the garden. Muhwezi Baker then went back home where he called out the other child Mukibi Marvin and he left with him. Marvin was found dead four days later. His body was mutilated. Muhwezi Baker was arrested, and confessed having been promised money by the appellant to hand over to him the deceased child for ritual sacrifice. The appellant denied having committed the offence, and he set out a defence of *alibi* which the trial judge rejected. Hence this appeal.

At the commencement of this appeal Mr. Yunus Kasirivu learned counsel for the appellant abandoned grounds 1 and 5 of the memorandum of appeal. He argued the rest of the grounds together.

He submitted that there was no evidence from PW1, PW2, PW3, which corroborated the evidence of PW6 to place the appellant on the scene of crime.

That the trial judge had wrongly rejected the appellant's defence of *alibi.* That PW6 upon whose evidence the Judge relied, was an accomplice and his evidence was not strong enough to place the appellant at the scene of crime. He submitted that although it is not a rule of law that evidence of an accomplice has to be corroborated, counsel submitted that its rule of practice that has

almost become law that the evidence of an accomplice has to be corroborated.

Learned counsel described the evidence of PW6 as a comedy of errors and lies upon which no court ought to have convicted the appellant. That there was no evidence whatsoever to corroborate PW6's testimony, upon which the appellant had been convicted.

In support of his arguments learned counsel cited the cases of ***Kooky Sharma and Others vs Uganda,(Criminal Appeal No. 44 of 2000) ; Supreme Court of Uganda, Achia vs Republic [2003] EA Seliso Charles vs Uganda , Lubaale vs Uganda HCCA 2 of 1995*** and ***Rt. Colonel Dr. Kizza Besigye vs Uganda (Civil case No. 149 of 2005) High Court.***

Learned counsel submitted that the learned trial judge having found no sufficient evidence to convict the appellant on count one he could not have convicted him on the alternative count. He asked this court to quash the conviction and set aside the sentence.

Ms. Winfred Ahimbisibwe for the respondent opposed the appeal and supported the conviction and sentence.

She submitted that PW6 was a credible witness and the Judge believed him. That he was approached by the appellant who was looking for a child to sacrifice to his gods. That the Judge had properly evaluated the evidence and found tht PW6 had

implicated himself as well as the appellant. That although PW6 was an accomplice his evidence was credible. That PW6's evidence was corroborated by the evidence of PW2. That PW6 had no reason to lie on oath in court. He had already been convicted and was serving a life sentence when he testified against the appellant. She supported the finding of the trial Judge that the appellants *alibi* had been destroyed by the evidence of PW6. She asked court to uphold both conviction and sentence.

This is a first appeal and as such this court has a duty to re-evaluate all the evidence adduced at the trial and to make its own inferences on all issues of law and fact. This is a legal requirement under **Rule 30 (1)** of the Rules of this Court. See also ***Kifamunte Henry vs. Uganda Supreme Court Criminal Appeal No. 10 of 1997.***

At the trial and in this court it is common ground that all the ingredients of the two offences, murder and kidnap with intent to murder had been proved by the prosecution. The trial judge found the following had been proved beyond reasonable doubt on count one –murder.

- That a human being was dead.
- Death was caused unlawfully.
- The killer manifested malice aforethought.

On count two-kidnap with intent to murder.

- A human being was taken away by force against his will.

- The intention of forcefully taking the victim away was to have him murdered or exposed to the risk of being murdered.

What is in contention is participation of the appellant in the offence.

The only evidence that directly implicates the appellant is that of PW6 an accomplice. It is the case for the appellant that, the evidence of PW6 an accomplice required corroboration on material facts. That there was no such corroboration and as such the learned trial judge ought to have acquitted him on all counts.

It is contended for the respondent that evidence of PW6 was corroborated by that of PW2 sufficiently as to sustain a conviction on offence of kidnap with intent to murder.

We agree with the learned trial Judge that PW6 was an accomplice and he rightly treated his evidence as such.

The learned trial judge correctly stated the position of the law in respect to evidence of an accomplice at page 5 of his judgment as follows;-

> ***"PW6 was convicted upon his own plea of guilty and was sentenced to life imprisonment. Clearly PW6 falls within the definition of an accomplice as elucidated by the Supreme Court in the***

NASOLO VS UGANDA case, cited above. Hence, his evidence is that of an accomplice. Once a witness has been found to be an accomplice, then his evidence must be corroborated as a rule of practice almost amounting to a rule of Law. This is so despite the provision of S. 132 of the Evidence Act which declares an accomplice a competent witness, and a conviction is not fatal simply because such evidence has not been corroborated, In short, accomplice evidence is good evidence but in practice must be corroborated before a court convicts upon his evidence (See UGANDA VS. CLEMENT NANGOYE [1975] HCB 252 and the recent case of UGANDA VS. KATO KAJUBI GODFREY UCA CR. APPL. 39/10."

The position of the law as regards evidence of an accomplice and the requirement for its corroboration has been discussed in numerous decisions of the Supreme Court and of this Court and it is well settled.

All the authorities appear to stem from the case of ***R vs. Baskerville [1916] 2 KB 658*** which is the fullest, clearest and most authoritative position of the law in this regard. It is

unquestionably the *locus classicus* of the law of an accomplice's evidence.

The brief facts of that case were that, Baskerville was charged of an offence of committing *"gross indecency"* with two boys and convicted. The two boys testified against him. The only corroboration of their statement was to be found in a letter sent by the accused to one of the boys enclosing a note of ten shillings. The words of the letter were capable of innocent construction. The court of appeal held that the letter was sufficient corroboration and the conviction was upheld.

In their Judgment the learned justice of appeal stated as follows.

> ***"The evidence of an accomplice must be confirmed not only to the circumstances of the crime but also to the identity of the prisoner……(It) does not mean that there must be confirmation of all circumstances of the crime, as we have already stated, that is not necessary. It is sufficient if there is confirmation as to material circumstances of the crime and the identity of the accused in relation to the crime."***

Further on in that Judgment, the learned justices of appeal went on to state that;-

> ***"The corroboration need not be direct evidence that the accused committed the crime, it is***

sufficient if it is merely circumstantial evidence of his connection to the crime.

The guiding rules relating to corroboration as derived from the ***R vs Baskerville (Supra) are that:-***

1) ***It is not necessary that there should be independent confirmation in every detail of the crime related by the accomplice. It is sufficient if there is a confirmation as to a material circumstance of the crime.***

2) ***The confirmation by independent evidence must be of the identity of the accused in relation to the crime, ie confirmation in some fact which goes to fix the guilt of the particular person charged by connecting or tending to connect him with the crime. In other words, there must be confirmation in some material particular that not only has the crime been committed but that the accused committed it.***

3) ***The corroboration must be by independent testimony, that is by some evidence other than that of the accomplice and therefore one accomplice cannot corroborate the other.***

4) ***The corroboration need not be by direct evidence that the accused committed the crime', it may be circumstantial.***

Corroboration means independent evidence. The evidence does not have to be a kind which proves the offence against the accused. It is sufficient if it connects the accused to the crime.

Corroboration does not mean that every detail has to be corroborated, that would render the evidence of the accomplice unnecessary since court in its absence would still be able to convict the accused.

All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. *See:* the decision of the Supreme Court of India in ***(Rameshwar vs U.A (1952) SC 54).***

The necessity for corroboration of evidence of an accomplice witness appears to stem from the perceived character of the witness. An accomplice witness has been described in diverse term in various authorities. He has been called *'a most unworthy friend, if at all, having bargained for his immunity he must prove his worthiness for credibility'. The testimony of a man of the very lowest character who throws to the wolves his erstwhile associates and friends in order to save his own skin and who is a criminal and has purchased his liberty by betrayal.'*

The other reasons given for the requirement of corroboration of an accomplice witness is that an accomplice is likely to swear falsely in order to shift the guilt from himself. Being a participant in the crime he is an immoral person. Because he gives evidence under a promise of a pardon or in expectation of it he may not tell the whole truth but may seek to implicate others. The evidence of an accomplice therefore is always regarded as tainted and as such unreliable hence the need for corroboration.

In this particular case the accomplice PW6 had been convicted earlier before appellant's trial on his own plea of guilt. At the time he testified in Court he was already serving a life sentence in prison.

He was therefore not trying to save his neck, when he testified. His testimony was consistent with what he had told the police at the time of his arrest. By testifying the way he did, he had nothing to gain and nothing to lose. The appellant is his grandfather and we have found no reason whatsoever why PW6 would have implicated him in such a heinous crime.

This could be one of those rare cases in which evidence of accomplice would be sufficient to sustain a conviction without corroboration.

Be that it may, looking at the evidence as whole we find that PW6's evidence was generally corroborated. PW2 testified that he

saw Muhwezi Baker (PW6) take Marvin (deceased) into a banana plantation when she tried to follow them. PW6 threw stones at her and told her to go back home. PW3 a police officer testified that PW2 told him how PW6 had taken the deceased and had not come back with him. We agree with the learned trial Judge that this corroborates PW6's testimony that he had taken the victim away from his home where he was with PW2.

The appellant was the person last seen with the victim alive. The victim's body was found 4 days later mutilated. The medical evidence found that the victim's neck had been cut open. The lower jaw was missing and the tongue was missing.

We find that manner in which the victim was killed is characteristic it of ritual killings by *witchdoctors*. In the case of ***Kato Kajubi Godfrey vs Uganda (Criminal Appeal No. 173 of 2013***) *(unreported)* the victim in that case was also killed in an almost similar manner, the killing was related to witchcraft. We can safely say that manner in which the victim was killed point to ritual killing for human sacrifice.

This corroborates PW6's testimony that the appellant had offered him shs. 8,000,000/- (Eight million shillings) because he wanted to take the victim *"to sacrifice him to his god"* In his testimony he states that;-

> ***"the accused said he was going to give me shs. 8,000,000/- (Eight million shillings) because he***

wanted to take the child. That he wanted to sacrifice the child to his gods. I gave him the child. After giving him the child he sent me away that I should go to the garden where I was cultivating."

In his unsworn statement the appellant states that he is a *'witchdoctor'* and a farmer of Kyenkera, Kakora Rakai.

The fact that the appellant testified in court that he is a *'witchdoctor'* corroborates the testimony of PW6 already set out above. The appellant himself does not deny that PW6 is his grandson. In fact he admits that PW6 used to live with him, but he (the appellant) had sent him away because of his bad behaviour.

We find that inspite of minor inconsistencies which are not material, the testimony of PW6 is credible. As already stated he had nothing to gain by giving false testimony against his grandfather against whom he had no grudge.

We agree with the learned trial judge that evidence of the appellant is not credible. It is in fact unbelievable. The defence of *alibi* was rightly rejected by the learned trial judge, the appellant having been put at the scene of crime.

We find that the evidence of PW6 was credible and was sufficient to sustain a conviction kidnap with intent to murder against the

appellant even without corroboration on the basis of the peculiar facts of this case already discussed above.

The appellant's conviction is therefore upheld.

The appellant did not appeal against sentence. The sentence is neither illegal nor irregular. We find no reason whatsoever to interfere with trial judge's discretion on sentence. In any event the facts of this case justify such a sentence.

This appeal therefore wholly fails and is accordingly dismissed.

The conviction is upheld and the sentence is hereby confirmed.

Dated at **Kampala** this **8th** day of **December** 2014.

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HON. MR. JUSTICE A.S NSHIMYE, JA

JUSTICE OF APPEAL

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HON. MR. JUSTICE ELDAD MWANGUSYA

JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL