

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL No.124 OF 2004

(Arising from High Court (Kampala) Criminal Session Case No.26 of 2008)

- 1. OKADA RAYMOND**
- 2. AKENA JOLLY JOE**
- 3. OCEN AUGUSTINE**
- 4. OCHENG BENON:..... APPELLANTS**

VERSUS

UGANDA :.....DEFENDANT

CORAM:

Hon. Mr. Justice Remmy Kasule JA

Hon. Lady Justice Faith E.K. Mwendha JA

Hon. Mr. Justice Richard Buteera JA

JUDGMENT OF THE COURT

The four appellants aggrieved and dissatisfied with the judgment delivered on the 15th August 2008 by

Hon. Lady Justice Caroline Okello appealed to this Court against conviction and sentence. They were indicted on a charge of murder contrary to section 183 and 184 (now s. 188 & 189) of the Penal Code Act. They were sentenced to suffer death.

They appealed on three grounds as per the memorandum of appeal as follows:

- ”1) The learned trial judge erred in law when she failed to evaluate evidence to adequate scrutiny, occasioning a miscarriage of justice thereby wrongly convicted each of the four appellants basing on wrong recognition and wrong guessing identification of each of the four appellants at the scene of crime.***
- 2) The learned trial judge erred in law when she failed to evaluate evidence adequately in finding that all the four appellants shared common intention to cause death of the deceased.***
- 3) The learned trial judge erred in law when she sentenced each of the four appellants to a harsh excessive maximum death sentence”.***

They prayed that: (a) their convictions be quashed, and

(b) their Sentences be set aside.

Background

It was alleged that Okada Raymond, Akena Jolly Joe, Ocen Augustine, Ocheng Benon, and others still at large, on the 21st day of January 2002 at Te-Angolo Village in Apac District unlawfully murdered Okori Agustino.

The prosecution had the burden to prove the case beyond reasonable doubt against each of the appellants so as to secure their conviction of the charge of murder. The appellants pleaded not guilty to the charge.

The prosecution brought seven witnesses in addition to the medical evidence contained in the postmortem report tendered in as ExhP.I.

In her judgment, the learned trial judge found that the evidence before her proved beyond reasonable doubt that the four appellants shared a common intention to murder Okori Augustino and convicted them of the

charge.

Representation:

Counsel Rukundo Henry was for the appellants on state brief, while Senior State Attorney Amumpaire Jennifer was for the Respondent.

Both counsel made oral submissions

Counsel for the appellants challenged the findings of the trial judge that the appellants participated in the murder of the deceased.

He submitted that the appellants were recognised by only one witness who did not see the person who shot. He relied on the case of **Abdalla Nabulere and others Versus Uganda (1978) HCB 79** which sets out the conditions to be considered for proper and correct identification when the conditions for identification are difficult.

Counsel contended that in this case it was difficult to tell who shot the deceased. There was no light in the grass thatched hut but only a torch was flashed. The one who flashed the torch was never identified.

Identifying appellant Ocheng Benon by voice was mere guess work on the part of PW2 who claimed that Ocheng Benon stammers and this is why she identified him. The appellants when defending themselves said that, at the material time, they were in their respective homes with their wives who too gave evidence to the same effect. Therefore the defense of alibi was not destroyed by the prosecution evidence. There was no identification parade conducted. Counsel prayed that the first ground of the appeal be allowed.

On the second ground, appellants' Counsel submitted that in light of his submissions on ground one, the principle of common intention could not arise. The prosecution witnesses testified as they did because they only wanted the appellants to be in prison because of a land dispute that existed between the appellants and the deceased. Ground 2 of the appeal ought therefore to be allowed.

As to ground 3, the appellants' Counsel contended that the trial judge had given a harsh and excessive sentence of death to the appellants and that on 22.11.2013; the Court presided over by Lameck Nsubuga Mukasa J. dismissed the mitigation proceedings without considering its merits, counsel asked this Court to

allow this ground and reconsider the sentence.

Counsel Amumpaire opposed the appeal and submitted that PW2 identified all the four appellants. The conditions for proper and correct identification existed as there was sufficient light and bright moonlight. The deceased was shot 2 1/2 to 3 meters from the door where PW2 was and she identified the appellants by voice. She further submitted that there was a serious land dispute between the deceased and the appellants and the case is in court and had not been concluded. There was no need to rely on evidence of the identification parade as the appellants were people who PW2 knew very well before the offense was committed.

She prayed that the first ground of the appeal be dismissed.

On the second ground she submitted that the appellants had common intention because the moment the gunshot was fired all the four appellants got into the deceased's house. She prayed that this Court holds that the second ground also fails.

On the third ground, she submitted that the mitigation proceedings were conducted and the death penalty was maintained. She prayed that the death penalty be upheld. She relied on the case of **Mugabe V. Uganda Criminal Appeal No.412 of 2009** where the Court of Appeal maintained the death sentence.

Counsel Rukundo in a short reply insisted that there was no way PW2 could have identified the appellants in the distance of 2 1/2 to 3 meters .way. She could not have seen the one who fired the gun.

He further submitted that this Court had jurisdiction to reduce the sentence and he relied on the case of **Livingstone Kakooza V. Uganda Criminal Appeal No.17 of 1993 (SC)** unreported, in support of the submission.

Consideration of the grounds of Appeal by the Court:

The duty of the first appellate Court is to reappraise the evidence and draw inferences of fact, among others. See; Rule 30(1)(a) of the Judicature (Court of Appeal) Rules. See also the cases of **Bogere Moses versus Uganda (SC) Criminal Appeal No.1 of 1997, and Henry Kifamunte V. Uganda (SCCR. Appeal No.10 of 1997)**

We have carefully considered the submissions of both Counsel and we also carefully perused the trial record

of proceedings.

The trial judge properly directed herself on the law to the effect that the burden is on the prosecution to prove the guilt of each of the accused persons beyond reasonable doubt and that this burden of proof remains upon the prosecution throughout the trial. It does not shift to the accused persons. She relied on the case of **Woolmington V. DPP [1935] AC 462**.

Further, relying on the case of Uganda V. Kassim Obura [1981] HCB 9, the learned trial judge also correctly considered the ingredients that had to be proved beyond reasonable doubt in the offense of murder as being:

- (1) Whether the deceased was actually dead.
- (2) Whether the death was unlawfully caused.
- (3) Whether there was malice aforethought or intention to kill.
- (4) Whether the accused persons participated in the causing of the death of the deceased unlawfully.

Counsel Rukundo's submission was that the learned trial judge wrongly convicted the appellants basing on the evidence of PW2 that she properly identified and recognised the appellants and yet the conditions for proper identification were not present at the time of the commission of the offence. Therefore the first ground of appeal should succeed.

Counsel for the State maintained that the conditions for identification were proper and that PW2 properly identified the appellants as those who attacked and killed the deceased.

The trial judge relied on the evidence of eye witnesses PW2 and PW3.

W2 told court that at 1:00am on the 20th January 2002, she and the deceased had retired for the night when someone came and called saying "**Mzee, Mzee come out**". She (PW2) heard and recognised the voice, as that of their village mate, the 1st appellant. The first appellant continued calling the deceased and said "**if you don't get up we shall send something to wake you up**".

PW2 and the deceased got up when a huge stone was thrown on their door and the same opened. PW2 left the bed and the deceased also got p. PW2 stood near the door. She saw the 2nd appellant also a village mate squatting near the door in a distance of 2 ½ to 3 meters away from her. According to PW2 there was bright moonlight and the assailants were flashing torches. Then a person who was squatting, whom she did not see well, fired a gunshot at the deceased.

After shooting the deceased, the four appellants got into the house and the 1st appellant told her in a serious voice not to make noise or alarm. PW2 insisted that she knew the 1st appellant very well. They both used to pray from the same parish church and they also used to meet in the market.

The 1st appellant's wife used to nurse her child at PW2's mother-in-law's home and the 1st appellant would come to check on the child's condition. PW2 also knew the 2nd appellant as he was of the same place and his wife was in the same entertainment group with her (PW2). Even the wife of the 3rd appellant was in the same entertainment group and that way, PW2 came to know the 3rd appellant.

The 4th appellant was an elder brother to her (PW2) husband.

The evidence of PW3 was that he had gone to chat with the deceased's children in his home. He slept in the boys' house which was 20 meters from the house where the deceased slept. At about midnight or 1:00a.m, on the material night, he heard the voices of the 2nd and 4th appellants. Both appellants were talking while coming from the direction of the boys' sleeping quarters. The 4th appellant was saying "**we have to plan how we are going**". The 2nd appellant agreed saying "**yes**".

The 4th appellant is an elder brother of the father of PW3 and he (PW3) had known him (4th appellant) for long. PW3 knew the 2nd appellant very well as they both prayed from the same church.

PW3 said that when he heard what the 2nd and 4th appellants were talking, he did nothing since he thought they were planning to go home after the marriage ceremony at the home of one Silvesto Opio. He recognized the 4th appellant's voice.

He heard a door bang after hearing the voices of the said appellants. He then heard a gunshot. He ran towards the main house and he saw four people. Two were standing at a distance and so he did not see them clearly.

The other two were near the door coming out of the house. He recognized them as the 2nd and 4th appellants. He saw them with the help of bright moonlight as the season, then obtaining, was a dry one with no clouds in the sky.

When he saw the 2nd and 4th appellants coming out, he was close to the door only about 3 meters away. The 2nd and 4th appellants and two other men started running towards the direction of Acokara Hospital.

The evidence above shows clearly that the conditions as to proper and correct identification as were pronounced upon by the Courts in **Abdulla Bin Wendo and Another Versus R (1953) 20 EACA 166**, and also in **Abdalla Nabulere and others Versus Uganda (1978) HCB 79** existed.

The eye witnesses PW2 & PW3 had known the appellants for a long time before the incident. They knew their names and for A1, A2 and A3 they knew their voices. The distance from where they observed them was very short of about 2 ½ to 3 meters. The 4th appellant was even a relative, being an elder brother to PW2's husband.

PW2 had another chance to observe the appellants when they got inside the house after the gunshot. The 1st appellant spoke to her in a serious voice cautioning her not to make any alarm. Inside the house, the appellants took about 2 minutes. They were flashing the torch to help them to see if the deceased was actually dead.

Further PW3 testified to the effect that there was a land dispute between the appellants and one Silvano Ojok PW5, a young brother to the deceased.

PW5 confirmed that he filed a suit against the appellants over the issue of land ownership and that the deceased was his elder brother.

PW5 explained that the 4th appellant wanted to sell the land in dispute. The said 4th appellant was his half brother sharing the same father but with a different mother. The land in dispute was clan land. The deceased was going to be a witness in the land case as he was the person looking after the land and was even cultivating part of it. He was the one going to take care of it since PW5 was living far.

PW4 testified about a quarrel in which the 2nd appellant, his wife and one Opio Sylivesto were involved. This was in April 2004 after the death of the deceased. PW4 saw and heard the 2nd appellant threaten the said Sylivesto Opio with words "Do **you know what I did to Okori lugustino? I will kill you as Okori Augustino**". This piece of evidence was not challenged in cross examination at all, so the inference is that it was accepted as true. See **Samwiri Sewabiri V. Uganda SCCR Appeal No.1 of 1995** unreported.

The defense of each of the appellants was in the nature of an alibi. The 1st appellant stated that on the night the deceased was murdered, he was at his home with his wife. His home was two miles away from that of the deceased. He explained that PW5 took them to Court because the said PW5 likes grabbing people's property.

The 1st appellant's wife DW5 confirmed that the 1st appellant was with her at home at the material time.

The 2nd appellant testified that he did not know when the deceased died. He learnt of the death from the LC that Okori died on 18th January 2002 at midnight. That day he slept at his home in Acokara A.

He did not have any grudge with the deceased. However he had a dispute with PW5 who had taken his land and that of other people in 2000. PW5 was suing 7 people: Okada Raymond, Grace Ogwang, Todi Kaka, Akena Jolly Joe, Ocen Augustine, Opio Sylvesto, and Obua Owera.

The 3rd appellant told court that he knew the deceased who had died on 18th January 2002 at night. On that night, he spent the night with his wife and he was arrested on 19th January 2002. He had learnt of Okori's death at about 10:00a.m on the 19th January 2002. The deceased's home was about 3 miles from his home. He knew-the deceased's wife though not very well. He denied having any grudge with the deceased or any of his relatives. He said that the land which is the subject of the suit had been subdivided among some people including some of the appellants.

The 4th appellant stated that he heard of the murder of the deceased on 19th January 2002 at 1:00a.m. He had spent the night at his home at Acokara "A" village, Acokora parish and that he was with his wife Amongi Biromiko (Veronica). There were no other persons at his home other than his said wife. When the deceased was being buried the 4th appellant was already in prison custody.

The three wives of the 1st, 2nd and 3rd appellants testified in Court and confirmed that their husbands were with them i.e. A1, A2, and A3 at the time the deceased was killed.

This is a case which depended partly on circumstantial and partly on direct evidence to prove beyond reasonable doubt that the appellants were at the scene of crime when the murder occurred.

The law on circumstantial evidence has been stated as hereunder:

"In a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt" see Simon Musoke v. Republic [1958] E.A 715

Also Taylor on evidence 11th Edition at page 74 states "the circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt"

In the case of Teper V. R. (1952) AC 480 at p. 489, it was held that: "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".

The evidence of the prosecution as stated by PW5 the young brother of the deceased, was that there was a dispute within the clan concerning clan land of which the 4th appellant wanted to sell. The dispute was in Court and the deceased was going to be a witness in the case. Besides the deceased was looking after that very land and even cultivating the same for and on behalf of the clan. The prosecution case that the dispute over this land provided the motive for the crime was not rebutted.

As to the alibi evidence, while the charges which were read to the appellants were to the effect that the appellants murdered the deceased on 21st January 2002, the 2nd appellant stated that on 20th January 2002 he was already in police custody and that on the 19th he was not at home. He had gone to the home of his wife to collect simsim and he returned to his home at 6:00p.m. His wife told him that the LC was looking for him because of the death of the deceased. But by the 19th January 2002 the deceased had not yet been murdered.

The same appellant then went on to say that he didn't know when the deceased had been killed but that he learnt from the LC that the deceased had died on 18th January 2002 at night and that on that day and night he had slept in his house with his wife Corina Ayawo.

His wife Corina Ayawo, DW6, on the contrary testified that the deceased died on 20th January 2002 and that it was on that same date that the LCs came at 12:00noon looking for the 2nd appellant over the death of the deceased and she told them that he had not come back. Thus both the 2nd appellant and his wife contradicted themselves making their evidence not reliable.

DW7 a wife to the 3rd appellant testified that her husband was arrested over the death of the deceased on 20th January 2002 at 9:00a.m yet the evidence on record was to the effect that the deceased was murdered at around 1:00a.m on the 21st January 2002. This was a lie. The 3rd appellant could not have been arrested before the death of the deceased. As to the 1st appellant, the evidence of PW2 and PW3 which we accept as truthful squarely put this appellant at the scene of crime in the same way as it did to the other appellants.

In the case of **Bogere Moses and another V. Uganda Criminal Appeal No.1 of 1997 (SC) unreported**, the issue of the

accused to have been put at the scene of crime was stated as here under:

'To hold that such proof has been achieved the court must not base itself upon the isolated evaluation alone of the prosecution evidence but must base itself upon the evaluation of all the evidence as a whole. Whether the accused person was at the scene of crime and the defense does not only deny it but also adduces evidence showing that the accused was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judiciously and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance the other version is unsustainable''

It is thus necessary to consider the whole evidence of both the prosecution and the defense and then resolve whether or not each of the appellants was put on the scene of crime. It is also necessary to consider

Counsel Amumpaire for the state prayed that this Court maintains the sentence of death passed against each of the appellants since no valid ground had been put forward on behalf of the appellants to interfere with the sentence.

We have had the opportunity to read the case of **Mugabe Stephen V. Uganda Supra**. This Court considered the mitigating and aggravating factors and declined to interfere with the lower court's discretion of sentence.

There are principles the Court considers in deciding whether or not to interfere with the trial judge's discretion in sentencing. See Kiwalabye Bernard versus Uganda SCCR. Appeal No.143 of 2001 where it was held that: "sentencing is a discretion of the trial judge so this Court cannot interfere with a sentence imposed by a trial judge unless it is obvious that the judge acted on a wrong principle or overlooked a material factor or the sentence is illegal".

This Court as the first appellate Court may also interfere where the sentence is manifestly harsh and or excessive in the circumstances of the case.

We have not found anything to show in this case that the trial judge acted upon a wrong principle or overlooked any material factor.

However, we are of the view that while the sentence is legal, the death penalty imposed was harsh and excessive considering the fact of the rather advanced age of each of the appellants and the period they spent on remand. The 2nd appellant also showed remorsefulness.

Taking all that into account, the sentence of death is quashed and is substituted with the sentence of life imprisonment for each of the appellants. So this ground succeeds

Accordingly the appeal is allowed only in part on the 3rd ground as regards sentence and fails on the 1st and 2nd grounds. So it is dismissed as far as grounds one and two are concerned. Each of the appellants is sentenced to life imprisonment.

Dated at Kampala this 27th day of May 2015

Hon. Mr. Justice Remmy Kasule JA

Hon. Lady Justice Faith E.K Mwonda JA

Hon. Mr. Justice Richard Buteera JA