THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NUMBER 0103 OF 2006

SUNDAY GORDON .....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(An appeal from the judgment and sentence of the High Court of Uganda at Fort Portal before the Hon. Justice Lugadya Atwoki dated the 22nd day of September 2006 in criminal Case No 0139 of2002)

CORAM :

Hon. Mr. Justice Remmy Kasule, JA
Hon. Mr. Justice Eldad Mwangusya, JA
Hon. Lady Justice Prof. Lillian Ekirikubinza Tibatemwa, JA

JUDGMENT OF THE COURT

The Appellant, SUNDAY GORDON was tried by the High Court sitting at Fort Portal on one count of murder contrary to the Sections 188 and 189 of the Penal Code and two Counts of Assault occasioning actual bodily harm contrary to Sections 236 of the Penal Code In count I, it was alleged that he together with NDYANABO AMOS, KABENGO, SEBUYINZA EMMANUEL, and TEZIMANA THOMAS, and others still at large, on the 27th day of November 2001 at Kakoni A village, Katooke Sub county KYENJOJO DISTRICT murdered KAHUBIRE DOROTIYA. In Count 2 it was alleged that he together

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with NDYANABO AMOS, KABENGO, SEBUYINZA EMMANUEL, TEZIMANA THOMAS and, others still at large, on the 27th November, 2001 assaulted KUGONZA FELESTA thereby occasioning her actual bodily harm. In count 3 it was alleged that the appellant together with NDYANABO AMOS, KABENGO, SEBUYINZA EMMANUEL, TEZIMANA THOMAS and, others still at large, on the 27th day of November, 2001 assaulted TWESIGYE NATHAN thereby occasioning him actual bodily harm.

The case for the prosecution as accepted by the trial Judge was that during the month of November 2001 a tribal clash/conflict erupted between the Batoro and Bakiga/ Bafumbira following the killing of a Mukiga home guard by a Mutooro. The Bakiga / Bafumbira tribesmen who were infuriated by the killing of their tribesman attacked homes of the Batooro including that of DOROTIYA KAHUBIRE (deceased) who was killed and her grandchildren KUGONZA FELESTA and NATHAN TWESIGYE were seriously injured. The appellant was identified as one of the assailants that attacked the deceased at her home and killed her.

The appellant was indicted with others as indicated in this Judgment. At the close of the prosecution case it was found that only the appellant had a case to answer. All his co-accused were acquitted on all the three counts. The appellant was acquitted on counts 2 and 3 relating to the assault of the deceased's grandchildren.

In his defence, given on oath, the appellant testified that on 5th December 2001 at about 2:00 a.m. he was found at his home sleeping when he was arrested on the allegation that he had participated in the killing of the deceased which he vehemently denied. He was assaulted, but he insisted that he had not killed any person. He testified that on 27th November, 2001 when he is alleged to have killed the deceased he was at home with his wife, JOWELINA NTABAGANYI and his sister, PRUDENCE BESHESHA both of whom testified

at the trial to support his alibi. All the three testified that they stayed at home throughout the day and did not go out at all that night.

The trial Judge found that the appellant was one of the persons that attacked the deceased and killed her. He found him guilty and convicted him accordingly. He sentenced him to life imprisonment.

The appellant appeals against both his conviction and sentence. He raises one ground of appeal in relation to the conviction and one ground in relation to the sentence. The grounds are:-

1. The learned trial Judge erred in Law and fact by convicting the appellant of murder instead of convicting him for manslaughter.

2. The learned trial Justice erred in Law and fact by unleashing the harsh punishment of life imprisonment thereby not exercising his discretion judiciously.

He made a prayer that the judgment and conviction for murder be quashed and be substituted with that of manslaughter and the harsh sentence of life imprisonment be replaced by a lighter one of 8 years.

The appellant was represented by Mr. Yunus Kasirivu while the respondent was represented by Ms Faith Turumanya, a Senior State Attorney.

In his address to this Court Mr. Yunus Kasirivu gave a brief background to the conflict between the Bakiga and Batooro which had been simmering for many years. He submitted that the mob which had killed the deceased did not have malice aforethought and the appellant who was part of the mob should not have been convicted of murder but of manslaughter. According to Counsel this was a case of mob justice and a mob cannot form a common intention to kill. In his submission none of the prosecution witnesses who witnessed the incident saw what the appellant used to assault the deceased and as such a murder conviction could not be sustained.

On sentence Mr. Kasirivu submitted that a life sentence was harsh in the circumstances. In mitigation it had been submitted that the appellant was aged 35 years, has a family to look after, was a first offender and had spent four years on remand. He did not run away from his crime and was apologetic. In Counsel’s view the period the appellant had spent

in prison already served as a sufficient punishment and should be given a sentence that would lead to his immediate release.

In her address to the Court Ms. Turumanya Faith for the respondent supported the conviction for murder given that there was animosity between the two communities and the killing of the deceased was an act of revenge.

According to her the mob, of which the appellant was part, set out to attack the deceased and the intention of the mob was to kill her. She referred Court to the case of ***TUBERE VS R (1945) 12 EACA 63*** where it was held that malice aforethought is inferred from the nature of the weapons used, the nature of the injuries inflicted, the part of the body affected and the conduct of the accused before, during and after the attack. She supported the finding by the trial Judge that pangas had been used to cut the deceased, who was cut on the neck and head which are vulnerable parts of the body and the injuries included a sliced right ear and the neck and jaw were cut open. After the deceased had been cut inside the house she was dragged to a plantation where she was finally killed and according to her the manner of the killing supported a finding of murder rather than manslaughter.

On Sentence Counsel submitted that given that the maximum sentence for murder is death, a sentence of life imprisonment was not excessive. The killing of the deceased was gruesome and according to her the trial Judge was lenient to have sentenced the appellant to life imprisonment rather than passing a death penalty.

As a first appellate Court we are enjoined to re-evaluate the evidence of the entire case and come to our own conclusions of findings of fact and Law.

The first question raised by Mr. Kasirivu is whether from the acts of the mob of which the appellant was part the prosecution established common intention. Common Intention is defined by S. 20 of the Penal Code as follows:-

> ***"20. Joint offenders in prosecution of a common purpose.***
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> ***When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence***

The application of the above provision was discussed in the case of DIFASI ***MAGAYI AND***

OTHERS Vs UGANDA [1965] EA 665 where the Court of appeal for East Africa upheld a conviction for murder in a case where a mob had set upon a suspected thief and beat him to death. The provision was also discussed in the case of ***LAWRENCE MWAYI AND FOUR OTHERS (CRIMINAL APPEAL NO 162 OF 2001*** where an angry mob including the appellants set upon the deceased, a suspected thief, and beat him indiscriminately using stones, bricks and a piece of wood till he collapsed and died. This court held that although the trial judge did not address the issue of common intention, it had been proved that the mob including the appellants had formed a common intention within the meaning of S.22 now S. 20 of the Penal Code Act as they executed their threat to kill the deceased, if found.

In the instant case Mr. Kasirivu conceded that the appellant was part of the mob that attacked the deceased and assaulted her till she died. According to KAHWA LEO (PW2) the mob which attacked the deceased was armed with pangas, spears and sticks. After the deceased had been killed he saw the appellant holding a bloodied panga. KUGONZA FELESTE (PW4) testified that she saw the appellant cutting the deceased with a panga on the shoulder before the deceased was dragged out of her house and assaulted. Her body was left in a coffee garden near the compound. FLORA KABADAKI (PW5) confirmed the active participation of the appellant and the post mortem performed by Dr. ARINAITWE MOSES whose evidence was admitted at the commencement of the trial revealed that the body of the deceased was found in a bloodied environment with torn clothes (Gomesi) stained with blood. The body had a deep cut wound on the neck, right hand and scalp and right shoulder, and the cause of death was haemorrhage from the right carotid artery

The mob in this case attacked a defenseless elderly woman and killed her. The mob had set out to prosecute an unlawful purpose. They were acting in concert. The death of the deceased was a probable consequence of the purpose for which the mob attacked the deceased. We reject the proposition of Mr. Kasirivu that a mob cannot form an intention to kill. In the circumstances, like in the case of ***DIFASI MUGAYI AND OTHERS VS R*** (Supra) ***AND LAWRENCE MWAYI AND FOUR OTHERS*** (Supra) we have no doubt that whoever participated in the attack and killing of the deceased had formed the requisite intention to kill her and the trial Judge rightly convicted the appellant of murder and not manslaughter. The first ground of appeal fails.

On the appeal against sentence, the trial Judge considered both the aggravating and the mitigating factors before arriving at the sentence. In favour of the appellant it was submitted that he was a first offender, had been on remand for four years and two months and had a large family for which he
was the sole bread winner. The aggravating factors were that a precious life had been lost in a brutal manner and property had been destroyed. The prosecution prayed for a death penalty while the defence prayed for an appropriate alternative sentence to the death penalty.

In passing sentence the trial Court observed as follows

“Accused is first offender. He was convicted of murder in

respect of an old woman in what was a revenge tribal killing. That is unacceptable conduct. Accused ought to have reported to the police so that the law would take its course instead of engaging in revenge killing.

Accused has spent 4 years and 2 months on remand, which I have duly considered. I believe that the sentence of death would not be punishment as it is final.

I therefore sentence the accused to life imprisonment"

It has been persistently held in both the Supreme Court and this Court that an appellate Court will only alter a sentence imposed by the trial Court if it is evident that it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. See ***KIWALABYE BERNARD VS UGANDA CRIMINAL APPEAL NO 143 OF*** 2001 where the principle was stated 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 circumstances which ought to be considered while passing

the sentence or where the sentence imposed is wrong in principle."

The trial Judge had discretion to pass a death penalty which he opted not to.

He arrived at the sentence imposed after putting into consideration all the

mitigating and aggravating factors including the gruesome manner in which an innocent elderly woman was attacked in her home and killed in cold blood. In consideration of the principles stated in the case of ***KIWALABYE BERNARD VS UGANDA*** (Supra) we see no reason for interfering with the discretion of the trial Judge to impose a life sentence which is neither an illegal sentence nor manifestly excessive or harsh in the circumstances.

In the result we dismiss the appeal and uphold both the conviction and sentence.

DATED AT KAMPALA THIS 2ND DAY OF JUNE 2015

HON. JUSTICE REMMY KASULE

JUSTICE COURT OF APPEAL

HON JUSTICE ELDAD MWANGUSYA

JUSTICE

JUSTICE COURT OF APPEAL

HON .JUSTICE PROFFESSOR LILIAN TIBATEMWA EKIRIKUBINZA

JUSTICE COURT OF APPEAL