THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CRIMINAL APPEAL NO. 85 OF 2010

(An Appeal arising from the Judgment of the High Court delivered by the Hon. Justice Ralph W. Ochan J, dated the 01.03.2010 at Masindi, in Criminal Session Case No. 141 of 2005)

TUMUSIIME HENRY .....APPELLANT

VERSUS

UGANDA .....RESPONDENT

CORAM: HON. MR. JUSTICE A.S. NSHIMYE, JA
HON. MR. JUSTICE REMMY KASULE, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

The appellant and the one Rose Mpairwe were both convicted of murder of one Innocent Kirungi by the High Court of Uganda at Masindi.

Rose Mpairwe who was an adult at the time of the offence was convicted and sentenced to 10 years imprisonment. She did not appeal. The appellant was a minor at the time of the commission of the offence, was place on a 12 months probation but was released from the remand home before the hearing of this appeal.

Although the appellant had already served the sentence, at the time this appeal was heard, he was dissatisfied with both the conviction and sentence and appealed to this Court on the grounds that:

1. ***The learned trial Judge erred in law when he convicted the appellant on insufficient evidence.***

2. ***The learned trial Judge erred in law and fact when he failed to take into consideration the issue of conflict of interest leading to a miscarriage of justice to the second accused/appellant and deprivation of him of his right to a fair hearing.***

3. ***The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on the record.***

The brief facts giving rise to this appeal may be summarized as follows:-

Ms. Rose Mpairwe in 2009 worked as a cook and matron at Ihungu Remand home, where the appellant, a juvenile offender, was detained at the time. The appellant was in charge of the other inmates numbering about 30. One Innocent Kirungi, now deceased, was remanded at the same remand home where he found the appellant acting as in charge of other inmates.

It appears that the inmates of that remand home were routinely taken out to work in people's gardens either for pay to the remand home administration or for obtaining food. On 3rd December 2009 Rose Mpairwe took the inmates including the appellant and the deceased to work in someone's garden. The deceased, who appeared to have been weak and sickly, was unable to work as hard and as fast as the others. He was severely assaulted by both the appellant and Rose Mpairwe, made to lay in a ditch, where he was covered with soil and 'buried alive' so to say. He was only saved by the intervention of the local leaders and residents. Later that night,

the deceased was again severely assaulted by Ms. Mpairwe and the appellant while at the remand home.

The next day the deceased was again forced to go with the other inmates again to dig at the same garden. That day he tried to escape. He was arrested and seriously assaulted severally by the same people. He later died. The two were arrested charged with murder and convicted.

When this appeal first came for hearing on 12.03.2013 the appellant was represented by an American Lawyer Mr. Jim Allan Gash who appeared together with learned Counsel Mr. Kato Sekabanja. The respondent was represented by Ms. Betty Khisa, Assistant Director of Public Prosecutions.

There was a change in the Coram that first heard the appeal (Kavuma, Arach Amoko, Kasule, JJA) with the Hon. Justice Arach Amoko, JA, soon after the first hearing, being elevated to the Supreme Court before the Judgment was ready. This necessitated a re-hearing of the appeal before the present Coram of Justices. The appeal came up for hearing on 04.06.2014 with Mr. Kato Ssekabanja for the appellant and Ms. Betty Khisa, Assistant Director of Public Prosecutions for the State. Both Counsel had no fresh submissions to make, apart from those that were already on Court record. Court therefore resolved to prepare Judgment on the basis of those submissions, proceedings and authorities already on record.

We have considered the grounds of appeal as set out in the memorandum of appeal, which grounds we have already reproduced.

We note that grounds 1 and 3 are too general and offend the provisions of Rule 66(2) of the Rules of this Court which stipulates as follows:-

"(2) The Memorandum of Appeal shall set forth concisely and under distinct heads, numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great public or general importance wrongly decided."

The above rule requires the Memorandum of Appeal to set out concisely, without being argumentative or narrative, the grounds of objection to the decision appealed against, specifying the points of law or fact or mixed law and fact, which are alleged to have been wrongly decided.

Both grounds 1 and 3 of the Memorandum of Appeal do not specify the grounds of objection to the decision appealed from which is alleged to have been wrongly decided. This rule is mandatory and must be complied with. It is not merely regulatory. A ground of appeal that does not conform with the above Rule ought to be struck out. ***See: Edward Katumba Byaruhanga v Daniel Kyewalabye Musoke: Court of Appeal Civil Appeal No. 2 of 1998 and Magara Ramadhan vs Uganda Court of Appeal Criminal Appeal No. 146 of 2009.***

We accordingly strike out grounds 1 and 3 of the appeal.

Only ground 2 of the appeal therefore remains.

As a first appellate Court we are required to re-evaluate the evidence on issues of fact as well as law and make our own conclusions, if we find that the trial Judge was in error whether on the facts or on the law of on both. See Rule 30 (1) of the Rules of

this Court and the Supreme Court decision of ***Kifamunte Henry vs Uganda Criminal Appeal No. 10 of 1997.***

We shall therefore proceed to re-evaluate the evidence in resolving ground 2 of the appeal, keeping in mind, the fact that we did not have the opportunity of seeing and listening to the witnesses so as to assess their demeanor, which opportunity the trial Judge had.

Learned Counsel for the appellant in his written submissions contended that the appellant had been prejudiced at his trial and thus denied the right to a fair trial. This was, because since the appellant was charged with a crime of murder carrying a capital sentence, Court provided him with Counsel to conduct his defence. This was mandatory under the law. Rose Mpairwe (A1) the co-accused in the same charge of murder was also assigned by Court a lawyer to represent her. However, even though their defences were inconsistent with one another's, both the appellant and the co-accused, Rose Mpairwe, were assigned the same Counsel to represent them in the very same case.

For her part, Rose Mpairwe's (A1) interest was in transferring responsibility for the offence from herself to the appellant. Thus at the witness stand at the trial, she testified against the appellant, declaring that it was the appellant who, administered the punishment upon the deceased and that she (Rose Mpairwe) had tried to stop him.

Because it was the same advocate who represented the appellant who also represented Rose Mpairwe (A1), the said advocate chose to have A1 testify unsworn and by reason thereof the appellant was prevented from cross-examining Rose Mpairwe (A1) to test the veracity of her testimony.

Yet, the appellant's case was that he did not participate in the punishment of the deceased on that date, but instead, it was Rose

Mpairwe (A1) who ordered the punishment, which was administered upon the deceased by four other inmates.

Therefore, the appellant was not permitted by his advocate to testify to rebut the evidence his very own advocate elicited from his co-accused implicating him. This, created an inherent and inescapable conflict of interest as between the appellant and Rose Mpairwe, the co-accused, since each one's defence implicated the other of having committed the offence charged. This conflict of interest rendered the advocate incapable of providing effective defence to both accused persons.

Appellant's Counsel submitted that what the defence Counsel did, at the trial, was to represent A1's interests over those of the appellant because, as an adult, Rose Mpairwe (A1) faced the potential for a much harsher sentence than did the appellant, then a minor. By doing so, Counsel contended, the advocate intentionally undermined the appellant's interests which, in turn, led to a manifest miscarriage of justice. Counsel invited Court to consider the decision of this Court of ***Tumuhairwe Jonah v. Uganda, Criminal Appeal No. 26 of 2008*** where it was held that conflict of interest constitutes a sufficient ground for quashing a conviction.

Appellant's Counsel also relied on the English case of ***David George Morris (2005) EWCA CRIM 1246, Court of Appeal Criminal Division,*** in which a conviction was quashed because of the defence lawyer's apparent conflict of interest at the trial. Counsel also cited a number of statutes in common law jurisdictions that prohibit advocates from presenting clients with conflicting interests.

Counsel contended that the appellant was not accorded a fair trial as guaranteed by Article 28 of the Constitution and that this denial constituted a miscarriage of justice. The appellant was entitled to be represented by an advocate who would ensure that his (appellant) interests were fully protected.

In reply, the learned Assistant Director of Prosecutions, Ms. Betty Khisa, submitted that no evidence had been adduced to show that there was a conflict of interest in respect of the advocate who represented both the appellant and the co-accused, Rose Mpairwe, at the trial stage.

The appellant had been accorded by the State a defence lawyer as of right and he had raised no objection relating to the issue of conflict of interest, or at all, throughout the trial.

There is also evidence on record to show that, at trial, the appellant had discussed the defence options with his advocate. The appellant then freely chose to remain silent, while his co-accused, Rose Mpairwe, opted to make an unsworn statement. Therefore the appellant and the co-accused voluntarily exercised their constitutional rights and there is no evidence that they had been forced by their advocate to choose the options that they chose.

Further, the trial Court had explained to the appellant his right to call witnesses in his defence, but he had declined to do so. There was no evidence on record to show that there were any witnesses in Court ready to testify on behalf of the appellant and were not allowed to do so.

At any rate, the trial Judge did not rely on the evidence of the appellant's co-accused when convicting the appellant of the offence charged, but rather the trial Judge relied on other evidence of other independent prosecution witnesses.

Counsel for the respondent further submitted that there was no legal requirement that each accused person should have his or her own lawyer at the trial. She accordingly prayed court to dismiss this ground of appeal as having no merit.

We have carefully considered the submissions of both Counsel as well as their written submissions and authorities.

The issue raised in this appeal appears to have been resolved earlier by this Court in the case of ***Tumuhairwe Jonah vs Uganda*** *(Supra)* when the Court stated in its Judgment that:-

> *"it is also true that Counsel who defended the accused persons in the High Court had a problem representing accused persons with conflicting interests. As a result the appellant was not ably represented and in some cases badly represented. This too could have justified questioning the conviction."*

The right of every person to be accorded a fair hearing is one of the non-derogable rights set out under Article 44 of the Constitution. The Article stipulates as follows:-

> ***44. Prohibition of derogation from particular human rights and freedoms.***
>
> ***Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms.***
>
> ***(a) freedom from torture and cruel, inhuman degrading treatment or punishment;***
>
> ***(b) freedom from slavery or servitude;***
>
> ***(c) the right to fair hearing;***
>
> ***(d) the right to an order of habeas corpus*** *(Emphasis added).*

It means therefore that a right to a fair hearing is an absolute right that is not subject to the limitations imposed on other rights in the Bill of Rights under Article 43 of the Constitution. In that regard it cannot be subjected to any limitation or abridgment.

At a criminal trial, a person who is not ably represented or who is represented in such a way that the case of that person cannot properly and clearly come out to be fully appreciated by Court by reason of absence of proper legal representation, cannot be said to have been accorded a fair hearing.

It is not in contention that, at the trial giving rise to this appeal, one same advocate, Counsel Tugume K.B. Moses, represented both the appellant and his co-accused on the State brief. It is also not in contention that the two, that is the appellant and the co-accused, had conflicting interests by way of their respective defences to the charge in that when Rose Mpairwe, the co-accused (A1) was called upon by the advocate representing the appellant to give her defence she testified against the appellant. The appellant was not accorded any opportunity to cross examine the co-accused who, upon the advice of the very same advocate, had made an unsworn statement, thus being immune from cross-examination by the appellant.

Again, the appellant, upon the advice of his advocate, opted to remain silent thereby depriving himself of the opportunity to tell his own version of events and to refute the allegations made against him by his co-accused and by the other witnesses.

It is not farfetched to assume that the advocate was more concerned about the case against A1 than against the appellant. As submitted by Counsel for the appellant, whereas the appellant, being a minor could only get a maximum sentence of 3 years imprisonment, his co-accused, as an adult, could face the death penalty. It was only natural for the defending advocate to concentrate on the case of the adult co-accused, Rose Mpairwe, so as to save her from being convicted and sentenced to death, and to pay less attention to the case of the minor appellant, who stood only to be sentenced to a maximum of three (3) years in case of a conviction.

We therefore find that it was not possible, in the circumstances of this case, for the same advocate to have ably and fairly represented both the appellant and the co-accused, Rose Mpairwe (A1) without causing prejudice to the case of one of them.

We find that, in this case, the appellant was not accorded a fair hearing and we so hold.

The trial and conviction of the appellant contravened Articles 28 and 44 of the Constitution and was therefore a nullity.

On that account we hereby quash the conviction and set aside the sentence imposed upon the appellant, by the Children's Court, Masindi, the fact that he has already served the same, notwithstanding. For the same reason, we also rule out an order of a re-trial of the appellant.

Dated at Kampala this 19th day of June 2015.

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

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HON. MR. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL