

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT ARUA**

**CRIMINAL APPEAL NO. 214 OF 2009**

**LULU                    FESTO.....**

**APPELLANT**

**.....**

**VERSUS**

**UGANDA.....RESPO**

**NDENT**

*(Appeal from the decision of the High Court of Uganda sitting at Adjumani before his Lordship Hon. Justice J.W Kwesiga dated 7<sup>th</sup>/1/2009)*

**CORAM: Hon. Justice Remmy Kasule, JA**

**Hon. Lady Justice Hellen Obura, JA**

**Hon. Justice Simon Byabakama Mugenyi, JA**

## **JUDGEMENT OF THE COURT**

### **Introduction**

This is an appeal against both the conviction and sentence arising from the decision of J.W Kwesiga J whereby the appellant, Lulu Festo was convicted of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act and sentenced to 18 years imprisonment.

### **Background to the Appeal**

The facts giving rise to this appeal as found by the trial Judge were that the appellant and the deceased lived together as husband and wife in a house at pakondo village Adjumani Town Council, Adjumani District. On 28<sup>th</sup> January, 2007 the appellant beat up the deceased in a domestic violent incident. The following morning the deceased was never seen and so was the appellant. Their house was locked from outside. On the third day the house was still locked from outside and a lot of flies surrounded it.

Lulua Joyce (PW1) who lived about 50 metres away from the appellant's home got concerned and looked through a hole in the door and saw the deceased's body apparently hanging in the middle of the house. She reported to the neighbors who gathered around the house. PW1 saw the appellant emerge from a neighboring house that belonged to his brother and he ran away. She confirmed under cross examination that she saw the appellant and recognized him by face as he was running away from his brother's house in the same compound.

Daniel Buga (PW2) the LC3 chairman received information about the incident on 30<sup>th</sup> January, 2007. He came to the scene and saw flies as well as dry blood drops at the door. He looked through a hole in

the door and saw a dead person in a blue T-shirt. He reported to police who came and broke the door. He identified the body as that of Alia Eujenia, the appellant's wife (deceased).

PW2 observed wounds on the lips, the right eye and the right arm of the deceased. The body had a rope loosely tied around the neck and was touching the ground. The rope was tied to a maize cob which was tied to the roof of the house with a weak wire. PW2 last saw the deceased alive on 28<sup>th</sup> January, 2007. He had also last seen the appellant on 29<sup>th</sup> January, 2007.

On 30<sup>th</sup> January, 2007, the day the deceased's body was discovered, the appellant was brought to PW2 by some two people and the appellant told him (PW2) that he had beaten his wife to death and locked her up. He handed over the key to the house door to PW2 who took it to the police together with the appellant who was detained and subsequently indicted, tried and convicted of the offence of murder in the High Court at Adjumani. Being dissatisfied with the decision of the trial Judge, the appellant appealed to this Court against both the conviction and sentence.

### **Grounds of Appeal**

1. The learned trial Judge erred both in law and fact in failing to properly evaluate the evidence before him hence convicting the appellant on uncorroborated circumstantial evidence thereby occasioning a miscarriage of justice.
2. The learned trial Judge erred in law and fact in passing out a harsh and excessive sentence upon the appellant thus occasioning a miscarriage of justice.

### **Legal Representation**

At the hearing of this appeal, Mr. Komakech Denis Atine appeared for the appellant on State brief and Mr. Brian Kalinaki, a Principal State Attorney from the Directorate of Public Prosecutions appeared for the respondent.

On ground 1, Counsel for the appellant submitted that the trial Judge based the conviction on the evidence of PW1, PW2, PW3 and PW4 about the appellant's conduct which he (the trial Judge) said was not of an innocent person. He faulted the trial Judge for relying on the evidence of PW1, that she saw the appellant coming out of one of the houses in the compound and running away, without the same being corroborated.

Counsel further submitted that the appellant had raised a defence of alibi stating that he went away on

28<sup>th</sup> January 2007 and returned in the morning of 30<sup>th</sup> January 2007. He only learnt of the deceased's death by suicide upon his return. Counsel submitted that the evidence of suicide was not ruled out by the trial Judge. He contended that the injuries found on the deceased's body as indicated in the medical report could have been as a result of suicide.

With regard to ground 2, Counsel for the appellant submitted that the period spent on remand was not considered by the trial Judge. He prayed that in the event that this Court finds the appellant not guilty and quashes the conviction, the appellant should be set free. However, if this Court finds that the conviction was proper, Counsel prayed that the sentence be reduced. He further prayed that this Court considers the mitigating factors and an appropriate sentence be given.

Counsel for the respondent opposed the appeal. He supported both the conviction and sentence. He submitted on ground 1 that the trial Judge looked at the evidence as a whole and properly evaluated it thus arriving at a proper conclusion. He submitted that it was PW1's testimony that she saw blood stains on the deceased's clothes and PW2 also testified that he saw dry drops of blood at the door and in the house.

PW2 also said that he saw a wound on the lips of the deceased, her right eye. It was therefore, Counsel's submission that these pieces of evidence plus the medical evidence and the appellant's voluntary confession to PW2 that he killed his wife and locked her up rule out the possibility of suicide.

He further submitted that the appellant in his evidence confirmed what PW1 said that he was at the scene of crime on 30<sup>th</sup> January 2007 at 9.00 am. He contended that all the above evidence coupled with the conduct of the appellant running away from home pointed to his guilt. Counsel further submitted that the trial Judge considered the defence of alibi and the prosecution evidence and found the alibi untrue. He prayed that this Court finds no error on the part of the trial Judge in convicting the appellant and upholds the conviction.

On ground 2, it was Counsel's submission that this Court can only interfere with the sentence of the trial court if it is illegal or excessive. He argued that the maximum sentence for murder is death but the learned trial Judge considered the mitigating factors and gave a sentence of 18 years imprisonment. He further submitted that if this Court is to interfere with the sentence, it should only deduct the period of 1 year and 7 months spent on remand which was not taken into account. He therefore prayed that ground 1 fails and ground 2 succeeds in part.

**Resolution by the Court**

We have carefully studied the court record and considered the submissions of both Counsel and the issues they raised. We are alive to the fact that it is the duty of this Court, as the first appellate Court to re-evaluate all the evidence on record and come to its own conclusion as was held by the Court of Appeal of Tanzania in ***Pandya vs Republic [1957] E.A. 336***. This duty was further clarified by the Supreme Court of Uganda in ***Bogere Moses and Another vs Uganda; Supreme Court Criminal Appeal No.1 of 1997*** where it was stated:-

***“.....As a first appellate court the Court of Appeal has power to take into consideration, evidence lawfully adduced at the trial but overlooked in the judgment of the trial court, and to base its own decision on it. In doing so however, the appellate court must bear in mind that it did not have the opportunity to see and hear the witnesses, and should, where available on record, be guided by impressions of the trial judge on the manner and demeanor of witnesses. What is more, care must be taken not only to scrutinise and re-evaluate that evidence as a whole, but also to be satisfied that the trial court had erred in failing to take that evidence into consideration ”***

It is also trite law that an accused person is convicted on the strength of the prosecution case, and not on the weakness of the defence as was held in ***Israel Epuku S/o Achouseu vs. R. [1934] EACA 166*** and more recently by the Court of Appeal of Uganda in ***Akol Patrick & Others vs. Uganda; Court of Appeal Criminal Appeal No. 60 of 2002***.

Bearing in mind the above principles of law, we shall proceed to consider the first ground of appeal on the alleged failure by the learned trial Judge to properly evaluate the evidence before him hence convicting the appellant on uncorroborated circumstantial evidence.

It is true that there was no eye witness to the offence and so the prosecution relied on circumstantial evidence upon which the trial Judge based the conviction.

The law on circumstantial evidence was well stated by ***Ssekandi J.A*** (as he then was) in his lead judgment in ***Amisi Dhatemwa Alias Waibi vs. Uganda; Court of Appeal Criminal Appeal No. 23 of 1977***, as follows:

***“It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving facts in issue accurately; it is no derogation of evidence to say that it is circumstantial, See: R vrs Taylor, Wever and Donovan, 21 Criminal Appeal R 20. However, it is trite law***

*that circumstantial evidence must always be narrowly examined, only because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See: Teper vrs P.(1952) A.C 480 at p 489 See also: Simon Musoke vrs R (1958) E.A 715, cited with approval in Yowana Serwadda vrs Uganda Cr. Appl. No. 11 of 1977 (U.C.A).*

*The burden of proof in criminal cases is always upon the prosecution and a case based on a chain of circumstantial evidence is only as strong as its weakest link."*

The Supreme Court re-affirmed the above position of the law in the case of Janet Mureeba and 2 others vs. Uganda; Supreme Court Criminal Appeal No. 13 of 2003 in the following words:

*"There are many decided cases which set out tests to be applied in relying on circumstantial evidence. Generally, in a criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused. In R -vs.- Kipkering Arap Koske and Another [1949] 16 EACA 135 it was stated that in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. That statement of the law was approved by the E.A Court of Appeal in Simon Musoke vs R [1958]EA 715 and see Bogere's case (supra)."*

In *Bogere Charles vs. Uganda; Supreme Court Criminal Appeal No. 10 of 1998*, the Supreme Court referred to a passage in Taylor on Evidence 11<sup>th</sup> Edition page 74 which states;

*"The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."*

The above authorities clearly set out how courts should deal with circumstantial evidence. Having stated that position of the law, we now proceed to appraise the evidence on record.

In the instant case, PW1 stated that she peeped through the hole in the door and saw somebody hanging on the rope with a T-shirt which looked like that of the appellant. Furthermore, that the door to the house was locked from outside with a padlock and when the police came, it was opened and she realized<sup>6</sup> that it was the deceased who was hanging

on the rope.

PW1 testified further that there were blood stains on the clothes the deceased was putting on. She had seen the appellant running away from his brother's house and she had managed to identify him by the clothes he was wearing. She had also seen his face.

PW2 who was the LC 3 councilor of the appellant's village also testified that the appellant was brought to him as a government official, by two people from the village of Kozeza village. The appellant confessed to him before his arrest, that he had beaten the deceased to death and locked her up. The appellant had then handed over the key of the house to him, whereupon he (PW2) had handed it to the police.

It was also PW2's testimony that he noticed wounds on the lips, right eye and right arm of the deceased whose body was touching the ground. He also observed that the body of the deceased did not have any scratch marks on the neck and the rope was loose.

The post mortem report made by PW5 revealed that the deceased died of a neck fracture and lung injuries. It further revealed that the deceased was beaten repeatedly using a blunt object and the joint between the neck and head was dislocated.

Counsel for the appellant argued that the possibility of suicide was not ruled out by the trial Judge. We do not accept this argument. This is because the evidence of PW1 and PW2 that the house where the deceased was found was locked from outside, the presence of the dry drops of blood in the house, the blood stains on the T-Shirt the deceased was putting on, as well as the injuries PW 2 saw on the deceased

PW2 saw on the deceased's body and those detailed in the post mortem report, all lead to the inference that the death of the deceased was caused unlawfully by another person other than by suicide. Therefore we cannot fault the trial Judge for finding so.

We now turn to consider the ingredient of participation of the appellant. The evidence upon which he was convicted was circumstantial. The appellant raised the defence of alibi and stated that he had gone to repair the house of a one Margaret. He testified at page 22 of the record that he left on 28<sup>th</sup> January, 2007 at around 1:00 pm with his brother Tiondi to go and help Margaret build her house. It was his evidence that Margaret told them that the building materials were not ready and she requested them to help her transport the same from a place called Agogo.

Furthermore, that on 29<sup>th</sup> January 2007 he (appellant) and Tiondi took the Cart to Margaret to carry the material and they spent the whole of that day at her home and returned on 30<sup>th</sup> January, 2007. He further stated that upon his return he found his wife dead and he learnt that the deceased's relatives were beating up people, and so he fled in fear of being beaten.

Upon careful re-evaluation of the appellant's evidence, we find that although he said he went to Margaret's home on 28<sup>th</sup> January 2007, the appellant said they could not carry out the construction of the house because there were no building materials. He said they had to mobilise transport and go back the following day.

PW2 who stated that his home is about 300 metres from the appellant's home testified that on 29<sup>th</sup> January 2007 he saw the appellant on the road side because his (PW2's) home is near the road. This evidence was not challenged during cross-examination of PW2 thus rendering the appellant's claim that he was away between 28<sup>th</sup> and 30<sup>th</sup> January 2007 untrue.

In the circumstances, it is our considered view that the trial Judge was justified in coming to the conclusion he made after properly evaluating the appellant's evidence of alibi against the prosecution evidence, that the alibi was a lie.

We also find that there was other circumstantial evidence pointing to the accused's participation in the offence which corroborated the evidence of PW1 that she saw the



appellant running away from the scene of crime on the morning of 30<sup>th</sup> January 2007 when the body of the deceased was discovered and people gathered at the home.

The appellant himself stated that he came back home that morning at about 9.00 am and had to flee for his life since the deceased's relatives were beating people. This evidence corroborated the evidence of PW1 that she saw the appellant running away at the same time.

Although the appellant alleged that he fled due to fear of being beaten, we find that this is not consistent with the conduct of an innocent husband who finds his wife dead. At least he should have reported the incident to the police and taken refuge there instead of fleeing to another village before making a report.

In *Remegious Kiwanuka vs. Uganda; Supreme Court Criminal Appeal No. 41 of 1995*, it was held that the disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence. This is because sudden disappearance from the area is incompatible with the innocence of such a person.

The evidence of PW2 that the house in which the deceased's body was found was locked from outside with a padlock also corroborated the evidence of PW1 on that matter. The appellant handed over the keys to the padlock to PW2.

PW2's testimony that the appellant confessed to him at his home that he killed his wife and locked her up was never challenged in cross-examination. This confession is said to have been made voluntarily since the appellant was not yet under arrest. It therefore corroborated the other pieces of circumstantial evidence highlighted above that point to the appellant's guilt.

In the result, on ground 1 we hold that evidence to sustain a conviction and the learned trial judge properly evaluated the evidence on record and came to the right conclusion that the appellant committed the offence of murder.

Ground 1 therefore fails.

On ground 2, it was contended for the appellant that the sentence of 18 years' imprisonment was too harsh and manifestly excessive. This Court was urged to reduce it. It is true that this Court has the power to reduce a sentence imposed by the lower court when that is found to be the appropriate thing to do. This Court, however, does not interfere with the sentence imposed by the lower court only on established principles that were stated by the Supreme Court in the case of *Kiwalabye Bernard vs Uganda: Criminal Appeal No. 143 of 2001 (unreported)* as follows:

***“The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of***

***that 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 the trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle.”***

Bearing in mind the above stated principles, we have perused the record and more particularly, the judgment of the trial Judge and the sentencing proceedings with a view of finding whether there any grounds for interfering with the sentence. We note that the trial Judge considered a number of both mitigating and aggravating factors to justify the term of imprisonment of 18 years.

However, it appears the trial Judge did not consider some of the mitigating factors that favored the appellant, namely; that the appellant was a first offender who was suffering from TB and had lost his first wife who left him with children to support.

It is also apparent that the period of 1 year and 7 months spent on remand by the appellant was not taken into account by the trial Judge as required by Article 23 (8) of the Constitution. In the premises, we find that the trial Judge erred in failing to take into account that period in the sentencing. Therefore, the sentence of 18 years imprisonment imposed was wrong in law and we accordingly vacate the same.

We have considered the fact that the appellant was a first offender and that he was suffering from TB and had children who needed his support. We have also considered the fact that the offence of murder is serious with a maximum sentence of death and that it was committed in a cruel manner.

Considering all the above factors and taking into account the period of 1 year and 7 months spent on remand by the appellant, we find that the ends of justice will be met by sentencing the appellant to a term of imprisonment of 17 years effective from the conviction of 7<sup>th</sup> November, 2009.

Accordingly, we dismiss the appeal against conviction and partly allow the appeal as to sentence in the terms stated above.

We so order.

***Dated at Arua*** this 6<sup>th</sup> day of June 2016

***Hon. Justice Remmy Kasule***

***JUSTICE OF APPEAL***

Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon. Justice Simon Byabakama Mugenyi

JUSTICE OF APPEAL