THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 0268 OF 2010

1. BWEFUGYE PATRICK
2. NAMUMPA PATRICK } .....**APPELLANTS**

VERSUS

UGANDA..... RESPONDENT

[Appeal from the Judgment and Orders of His Lordship Lawrence Gidudu given on the 13th day of October 2010, where the applicants were convicted of the offence of murder C/s 188 and 189 of the Penal Code Act]

CORAM:

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE SIMON BYABAKAMA MUGENYI, JA

HON. MR. JUSTICE ALFONSE C. OWINY-DOLLO, JA

JUDGMENT OF THE COURT

Both appellants were on 11th October 2010, convicted of murder by the High Court presided over by *Hon. Justice Lawrence Gidudu, J* and on 13th October 2010, sentenced to life imprisonment. Being dissatisfied with both conviction and

sentence they both appealed to this Court on the following grounds;-

1) ***The learned trial Judge erred in law and fact when he convicted the appellants in the absence of incriminating evidence.***

2) ***The learned trial Judge erred in law and fact when he failed to find that the prosecution's evidence was full of falsehoods and grave inconsistencies.***

3) ***The learned trial Judge erred in law and fact when he convicted the accused persons on very week circumstantial evidence.***

4) ***The learned trial Judge erred in law when he found that the accused alibi had been destroyed.***

5) ***The learned trial Judge erred in law and fact when he failed to analyze the evidence as a whole thus arriving at a wrong conclusion.***

6) ***The learned trial Judge erred in law when he imposed a sentence that was harsh and manifestly excessive.***

When the appeal came up for hearing on 20th October 2016, at Mbarara, **Mr. Anthony Ahimbisibwe** learned counsel for the appellants sought and was granted leave to amend the

memorandum of appeal and add another ground. The sixth ground of appeal that was added stipulates as follows;-

> ***"The trial Judge erred in law when he imposed a sentence that is harsh and manifestly excessive in the circumstances of the case"***

Ms. Rose Tumuheise learned Principal State Attorney had no objection to the application.

The Appellant's case

Mr. Ahimbisibwe, for the appellant argued ground 4 first. This ground is in respect of the appellant's *alibi*. He submitted that the *alibi* set up by each of the appellants was believable and the learned trial Judge ought to have believed it. Further that the *alibi* had not been destroyed by the prosecution evidence.

Counsel argued that, the first appellant had accounted for his time and whereabouts the whole day the murder took place. At the material time he was at least three miles away from the scene, counsel submitted.

Counsel further argued that the prosecution evidence relied upon by the learned trial Judge to convict the appellants was very weak. He submitted that, PW2's evidence placing the

second appellant at the scene was not corroborated by any other witnesses and ought to have been rejected.

Further, that PW4 who is stated to have seen the appellants near the scene did not identify them. Counsel further submitted that the evidence of PW3 contradicted that of PW4 on the issue of identification.

Learned counsel submitted that the prosecution had failed to establish a common intention between the two appellants and there was no evidence linking both of them to the crime.

Counsel argued, that the conduct of both appellants following the death of the deceased in this case was consistent with their innocence. He submitted that both did not run away and were arrested at their respective homes. Counsel submitted further that the 2nd appellant attended burial of the deceased. He argued that the first appellant's failure to attend the deceased's burial was well explained as he had been informed that he was being suspected to have killed the deceased.

Counsel also contended that the learned trial Judge erred when he took into account the prosecution evidence regarding the motive for the crime as being a land dispute between the family of the 1st appellant and that of the deceased.

He contended that the 1st appellant did not have any land dispute with the deceased but it was his father who did.

He concluded that the circumstantial evidence adduced was insufficient to sustain a conviction and asked this Court to allow the appeal and quash the conviction.

In alternative but without prejudice to the above, he submitted that the sentence of imprisonment for life imposed upon each of the appellants was harsh and manifestly excessive in the circumstances of the case. It was submitted that the appellants were both first offenders, had spent 14 years on remand and deserved a more lenient sentence.

He asked Court to reduce the sentence.

The Respondent's case

Ms. Tumuheise opposed the appeal and supported both the conviction and sentence. She submitted that the circumstantial evidence adduced at the trial was sufficient to sustain the conviction.

Firstly, counsel submitted that the appellants had been properly identified by persons who knew them well before the incident.

Secondly, that their conduct immediately after the commission of the crime was inconsistent with their innocence. Counsel submitted that the evidence of PW3 showed that the appellants were restless and were seen fleeing the scene of the crime.

Thirdly, that they were seen with blood stained shirts which they had removed and were carrying on their shoulders.

Fourthly, that the appellants were identified by different witnesses at different times hurrying from the scene of crime shortly before the deceased's body was found.

Fifthly, that there was a motive for the crime as there existed a grudge between the family of the deceased and that of the first appellant over land. The land dispute, counsel submitted, had been going on for over 20 (twenty years). Following the dispute counsel argued, the deceased's family was the successful party which triggered a string of attacks and threats against his family and the family of first appellant.

Lastly, that the conduct of appellants after commission of the crime also implicated them as A_1 was found in a shrine of a "witch doctor" with spears and pangas and had attempted to fight the arresting officer.

Counsel asked court to dismiss the appeal against conviction.

On the alternative ground of sentence counsel submitted that, the sentence of life imprisonment was neither harsh nor excessive considering that the maximum penalty for murder is death. She asked court to confirm the sentence.

Resolution

We have carefully listened to the submissions of both counsel. We have also perused the Court record and the authorities cited to us.

This being a first appellate court we are required to re-appraise the evidence and to make to our own inferences on all issues. *See:* ***Rule 30(1)*** of the Rules of this Court, and ***Bogere Moses Vs Uganda: Supreme Court Criminal Appeal No. 1 of 1997.***

We find that the learned trial Judge correctly set out the law relating to circumstantial evidence, inconsistencies in evidence, and *alibi* when at pages 6 and 7 of his Judgement he stated as follows:-

> ***"Where the prosecution case rests upon circumstantial evidence, the test to be applied, which was re-stated in the case of Simoni Musoke vs R [1958] EA 715, is that inculpatory facts must be***

incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt before the court can find the accused guilty. The court must also before drawing the inference of guilt be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt.

The law on inconsistencies is that where they are grave, the evidence may be rejected unless satisfactorily explained, while minor inconsistencies may have no adverse effect on the evidence unless it points to deliberate untruthfulness. See: Uganda vs Abdalla Nasur [1982] HCB 1 and Uganda Vs Sowedi Ndosire [1988-90] HCB 46. And where an accused person raises and alibi as the two in this case, they assume no duty to prove it. It remains the duty of the prosecution to adduce evidence to place the accused at the scene of crime either by direct or circumstantial evidence. Should the alibi be found credible then reasonable doubt is established but if it is found to be false, then prosecution must still prove the case against the accused beyond reasonable doubt. This is the proposition of the law in several cases, including Uganda vs Sabuni [1981] HCB 1 and Sekitoleko vs Uganda [167] EA 531".

What is in issue here is how the trial Judge applied the law to the specific facts of this case. All the ingredients of murder in this case are undisputed except the participation of the appellants.

The participation of the appellants in the commission of the crime was inferred by the trial Judge from the evidence of prosecution witnesses who stated that they had seen both appellants a few moments before the body of the deceased was found floating in a well near his home.

The appellants were stated to have been seen running or hurrying away from the well where the body was found. The appellants on their part stated that they were nowhere near the scene of the crime and as such could not have been seen by the witnesses. They contended that, there exists a land dispute between the family of the appellant and that of the deceased which motivated the witnesses to falsely implicate them in the crime they did not commit.

In his evidence in chief PW1 stated:-

> ***"Mishaki Rushere died on 27/5/2005. On that day 27/5/2005 at about 1:00 p.m. I was at home then I went to cut trees in my forest. At about 3:00 p.m. when in the forest, I heard people approach me covering. They were Asiimwe and Bundede. I did not hear the words they were saying. They were about 100 meters away. They were in the forest of Mr. Furai. I saw them with my eyes. One of them had blood stained on the right of his shirt. It was a lot of blood on their shirts. They were about 24 yards when I saw them. When they passed and went ahead I cut on a tree to test their state of mind. Budede ran towards the direction of his home and Asiimwe***

followed. I was suspicious they had slaughtered people's goats because it was a rampant practice in the area".

In cross examination he stated:-

"I used to see Asiimwe regularly because we were neighbours. I did not know his second name. Asiimwe was unemployed. Even Budede was unemployed.

Asiimwe was putting on a white shirt and trousers. I do not remember the color of the trousers. It is that shirt that had blood. Budede also had a white shirt stained with blood. I do not remember color of Budede's trousers. I did not tell anybody that I had seen these two with blood stained shirts.

In his evidence in chief PW2 stated:-

"Mushaki Rushese was my father who died in 2005 on Monday 27th June. He was murdered. At about 1:00 p.m. on that day. I was with the deceased. I was grazing my goats and the deceased was grazing cows. This was about 2:00 p.m.

My father took the cows to drink water. I continued grazing goats. I then saw A2 called Namumpa on an anti-hill. He was observing us. He would stand and

squat. He was about 5 meters high. The anti-hill was in my father's land. He stayed there for about 20 minutes. I left him on alone and continued grazing my goats. I did not talk to A2.While still my son called Daniel Mugisha came and informed me that my father had been killed. He was crying. Mugisha had gone to relieve the deceased by taking over the grazing when he found him dead. I rushed to the scene and on the way I met Namumpa A2 running away from where I was going. He had an earth spear and a hammer. A2 was running through the bush. I asked him why he was running but he never answered."

In cross examination he stated:-

I saw A2 with stick, earth spear, hammer and he was running fast with blood stained shirt. I asked him why he was running. By that time I had been told by my son that my father is dead. I raised an alarm and told people whom were around that I had seen A2 running with those items. I told people like Sekibobo, Gwoyaka, Kato, my mother Nyamatezi Edinansi when the police came I told them about A2 at about 3:00 p.m. I told the Police these words at the scene at the well before I made statement.

The other evidence regarding identification was adduced by PW3 as follows:-

"The deceased was grazing cattle at about 1:00 p.m. I was taking food to Tumusime's porter about half mile away. He was called Matsiko. I used to give him food and he would give me milk. I took food at 1:00 p.m. In the valley I met Bwefugye with two other men. They had removed their shirts and were resting them on their shoulders Bwefugye got shocked moved step back and took different direction. Bweyfugye is A1 in the dock. They had black trousers and white shirts. They had stripes. I was living in the same village with Al. I had known him for about 10 years. I know his father called Kaziima. I was passing through a bush in Tumwine's farm when I met A1and company. There were no paths. It was a bushy farm. I stood where I had seen the people I had met and he said he saw them but did not identify them. On my way back I met a woman called Kurushamlya who is my mother-in-law. She told me that my father –in –law had been killed and thrown in water. I went straight to the scene. I found the body in a well belonging to

the deceased. The scene was half a mile from where I had delivered food to Matsiko."

In cross examination she stated:-

"A1 and Company were about 18 meters away when I met them and Al got shocked. I reorganized the shirt and the stains of blood on A1's shirt. At that distance I saw the blood stains. If it is blood on a white background, it is easy to see and recognize. The blood was on the sleeve of the shirt. The other two had folded their shirts but A1 had sung his on shoulder and sleeve showed the blood stains. I told the Police that we met face to face. The police may not have recorded well but I told them that we met face to face. They were running fast."

PW4 on his part stated:-

"Before the alarm was raised at 2:00p.m., I had meet A1, Kagweri and Rwashale. Kagwire and Rwashale are not in Court. I met them when I was grazing. They were coming from the direction of the home of the deceased going to their home. The deceased's home was 100 meters from where I was grazing from. They were moving very fast. They had put their shirts on

the shoulders. They had their trousers on. I saw them about 8 meters away. They were hurrying so I never spoke to them. I knew the deceased's well. It was 100 meters away. The well is near the road. The well was not in the same direction with the deceased's home. I noticed that they were moving fast and Rwashande's gum boots were stained with blood near the knees. These two observations were strange. They were even not supposed to pass through the farm. The boots were black in color. I saw the blood because the farm was cleared and there were no bushes. I could see clearly 30 meters away on that farm."

PW6 a police officer who went to the scene immediately after the crime had been reported testified as follows:-

"I got information that Namumpa had been seen walking up and down 2 hours before the deceased was found dead. That Namumpa had been seen observing the deceased from an anti-hill. Bwefugye was seen by Kyankoragye running away from the scene with two other people. That they tied their shirts at their waists and when they bumped into Kyankoragye, they were shocked and they run away

in the bush. Namumpa is in a green shirt in the dock Bwefugye is in the T-shirt (A1). I picked interest and wanted to interrogate the accused but they were not in their homes for 3 days."

From the evidence of the witnesses set out above, we are satisfied that both appellants were positively identified running or hurrying away from the place where the deceased's body was found. It was broad day light. Both appellants and the witnesses lived in the same village and were very well known to each other. They were positively identified as the distance between each of the witnesses and the appellants was short.

We find that all the factors were conducive for positive identification.

We agree with the finding of the learned trial Judge that both appellants were correctively identified.

Having been identified running away from the scene of crime is not sufficient to sustain a conviction for the offence of murder. The prosecution had to prove the participation of each of the appellants in the crime.

Both appellants put up a defence of *alibi* and therefore disassociated themselves from the crime completely.

We have found that the evidence sufficiently put them on the scene. The trial Judge considered their defence and rejected it, we have not found it to be credible either, we also reject it.

From the evidence of prosecution witnesses which we have partially reproduced above, the deceased was killed between 1 pm and 2 pm on 27th June 2005. He was last seen alive about I pm when he went to water his cows. At about 2 pm his body oozing with blood was found floating in the same well where he had gone to water his cows.

The 2nd appellant was seen by PW2 spying on the movement of the deceased shortly before he was killed.

The appellants and others who are still at large were seen between 1 pm and 2 pm on same day running away from the direction where the body was found. The witnesses saw them from a very close distance and PW1 stated he saw the people running away from the direction the body was found. He was about 100 metres away and they had blood stained clothes.

PW1 did not suspect they could have killed anyone. He only suspected that they could have stolen and killed a goat. This points to the truthfulness of this witness. He only related the incident to the murder later when he came to learn that the

deceased had been killed. PW2 also had seen the 2nd appellant apparently spy on the deceased. This witness too did not think much of it until after the death of the deceased. It is then that he realised that the 2nd appellant was spying on the deceased, when he saw him stand and squat on an ant-hill in the deceased's land.

PW3 narrated how she met 1st appellant and other two men hurrying from the direction where the deceased's body was found and they were shocked when they saw him. She too stated that the people she met had removed their shirts and were carrying them or their shoulders. In cross examination she stated that the 1st appellant's shirt was blood stained as he was only about 18 metres from her. PW4 Matsiko's story is also consistent with that of other witnesses.

PW4 had heard an alarm at about 2 pm the afternoon the deceased was killed. He had, just before that, met the 1st appellant and two other persons coming from the direction of the deceased's home. They had removed their shirts which they were carrying on their shoulders. They were only 8 metres away from him and were hurrying away from the direction of the deceased's well which was only 100 metres away from where PW4 met the first appellant and others. He observed

that it was strange for the group to be going through the deceased's farm where there was no path way. They were just hurrying through the bush. The witnesses also narrated what they had seen to the police and made police statements. We agree with the learned trial Judge that inconsistencies and contradictions in the prosecution case were minor and did not go to the root of the case, to cast doubt on the prosecution evidence as a whole. The evidence of conduct of the appellants both before and after the arrest, the existence of long held grudge over land as clearly set out by the learned trial Judge bolstered an already strong prosecution case.

We note that no direct evidence was adduced as to the circumstances the deceased was killed and what exactly happened just before he was killed. The circumstantial evidence however, proved beyond reasonable doubt that both appellants participated in the murder. It is immaterial whether any or both of the appellants delivered the fatal blows that killed the appellant. What is material is that both appellants and others formed a common intention to kill the appellant and executed it.

In this regard *Section 20* of the Penal Code Act stipulates as follows:-

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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".***

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While considering a similar case, the Court of Appeal for East Africa in, ***Dafasi Magayi and Others Vs Uganda [1965] E.A P.670*** held as follows on the question of common intention:-

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> ***"The other question relates to common intention where a number of persons jointly beat another person causing his death and it is not possible to establish which blow actually caused the death none of the persons taking part in the beating may be convicted of murder unless it is proved that he had a common intention with the others to kill or cause grievous harm to the deceased. Common intention is dealt with in S. 22 of the Penal Code (Uganda) .....".***

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We agree with the learned trial Judge's finding that the appellants formed a common intention to murder the deceased and in conjunction with one another prosecuted it.

The common intention in this case is inferred from the conduct of both appellants on the day the deceased was murdered and after, as already set out above in detail. It is also inferred from the failure of any of them to disassociate himself from the crime. They simply denied it. *See:-* ***Andrew Mutebi and Another Vs Uganda [1975] EACA, R versus Tubulayenke S/C Kirya & Other [1943] 10 EACA 4*** and ***Rwabuganda Moses Vs Uganda: Court of Appeal Criminal Appeal No. 297 of 2011.***

We find no reason to fault the learned trial Judge on his findings. The appeal against conviction is hereby dismissed. The conviction of each of the appellants is hereby upheld.

The appellants appealed also against the severity of sentence. This being a first appellate court it, can only interfere with a sentence of the trial court in limited circumstances, and under established principles which have been followed over a considerable period of time and were recently re-echoed by the Supreme Court in ***Kiwalabye Bernard Vs Uganda: Supreme Court Criminal Appeal No.143 of 2001*** 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"

In addition to the above, in the more recent past this court and the Supreme Court have both emphasized the need for consistency in sentencing.

The established authorities indicate that for the offence of murder of a single person, which does not involve torture, ritual sacrifice, is not coupled with another offence and the accused is a first offender, the sentences range from 20 years

at the lower end and 35 years imprisonment at the higher end of the spectrum.

In ***Atuku Margret Opii vs Uganda: Court of Appeal Criminal Appeal No. 123 of 2008,*** this Court reduced the sentence from death to 20 years imprisonment. In that case the appellant had killed a neigbhour's 12 year old daughter by drowning.

In ***Kajungu Emmanuel Vs Uganda: Court of Appeal Criminal Appeal NO. 625 of 2014,*** this Court confirmed a sentence of 30 years imprisonment for murder.

In ***Kisitu Majaidin alias Mpata vs Uganda: Court of appeal Criminal Appeal No. 28 of 2007,*** this Court upheld a sentence of 30 years imprisonment for murder. The appellant had killed his mother.

In ***Kyaterekera George William Vs Uganda: Court of Appeal Criminal Appeal NO. 0113 of 2010,*** this Court upheld a sentence of 30 years imprisonment for murder.

In ***Hon. Godi Akbar vs Uganda: Supreme Court Criminal Appeal No 3 of 2013,*** the Supreme Court confirmed a 25 year imprisonment for murder.

In ***Sunday Gordon Vs Uganda: Court of Appeal Criminal Appeal NO. 0103 of 2006***, this Court confirmed a sentence of life imprisonment for murder.

In ***Tusigwire Samuel Vs Uganda: Court of Appeal Criminal Appeal NO. 110 of 2007*** this Court reduced a sentence of life imprisonment to 30 years for murder.

In this case both appellants are first offenders, they had spent some time on remand, and the murder was not coupled with any other offence neither was it a ritual sacrifice.

Taking into account all the circumstances of this case we set aside the sentence of life imprisonment and impose on each of the appellants a sentence of 30 years imprisonment. The sentence commences on 11th October 2010 when they were convicted.

Dated at **Mbarara** this.....06th.....day of ~~**November**~~ December 2016.

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HON. KENNETH KAKURU
JUSTICE OF APPEAL

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HON. SIMON BYABAKAMA MUGENYI
JUSTICE OF APPEAL

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595 **HON. ALFONSE C. OWINY-DOLLO**
JUSTICE OF APPEAL