

**THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 066 OF 2011

1. MUHEREZA BOSCO

2. KATUREEBE BOAZ .....APPELLANTS

VS

UGANDA.....RESPONDENT

*[Appeal from the conviction and sentence of the High Court of Uganda at Mbarara Hon. Justice Eldad Mwangusya dated 4<sup>th</sup> day February 2011 in Criminal Case No. HCT-05- 20 CR-SC-0-0120-2008]*

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

This is an appeal against the decision of the High Court at Mbarara in *Criminal Case No.0120 of 2008* before *Hon. Justice Eldad Mwangusya, J* (as he then was) dated 4<sup>th</sup> February 2011, in which the appellants were both convicted of murder contrary to *Sections 188 and 189* of the Penal Code Act and sentenced to suffer death.

The appellants both being aggrieved by the said decision appealed jointly to this court on the following grounds.

**1.     *The learned trial Judge erred in law and fact when he invoked the doctrine of common intention on the part of the 2<sup>nd</sup> appellant in the commission of murder and this occasioned a miscarriage of justice.***

**2.     *The learned trial Judge failed to properly evaluate the evidence on record as a***

*whole and came to a wrong decision.*

**3. *The learned trial Judge erred in law and fact by imposing a death penalty on the appellants which sentence was harsh and excessive in the circumstances of the case.***

Representation

At the hearing of this appeal the appellants who were both present were represented by learned counsel Ms. Enoch Twinamatsiko on state brief while Ms. Barbara Masinde learned Senior State Attorney represented the respondent.

The Appellants' case

The only issue in contention in this appeal is the participation of the appellants in the commission of the offence. Counsel submitted on ground one of the appeal that the 2<sup>nd</sup> appellant did not participate in any way in the commission of the offence. He contended that although the 2<sup>nd</sup> appellant witnessed from a distance the murder of this deceased he was not party to it in anyway.

Counsel submitted that, from the evidence on record the 2<sup>nd</sup> appellant who was a herdsman was asked by the deceased and others whether or not he had a cow to sell. The deceased was interested in buying a cow from him. However, the two could not agree on a price, upon which the deceased left with the people he had come with who include the 1<sup>st</sup> appellant and two sons of one Butera the 2<sup>nd</sup> appellant's employer.

Counsel submitted further that the prosecution evidence indicates that the group that had come to purchase the cow then left, leaving the 2<sup>nd</sup> appellant. While still in the 2<sup>nd</sup> appellants view one of Butera's sons in the group pulled a panga from his trousers and cut the deceased upon which the 2<sup>nd</sup> appellant being in shock fled.

Counsel submitted that, no evidence was adduced to link the appellant to the offence and there was no proof provided by the prosecution that the 2<sup>nd</sup> appellant had formed a common intention with persons who killed the deceased. He asked this so Court to find so and quash his conviction.

In respect of sentence counsel submitted that in the circumstances of this case, the appellants being first offenders a sentence of death was harsh and manifestly excessive. He asked this court to reduce it to 25 years for the 1<sup>st</sup> appellant 85 and 15 years for the second appellant.

The Respondent's case

Ms. Masinde for the respondent opposed the appeal, she asked Court to uphold the conviction and confirm the sentence.

She submitted that, the 2<sup>nd</sup> appellant in his charge and caution statement confirmed that both appellants were together when the deceased was killed.

Counsel argued further that the 2<sup>nd</sup> appellant who had just witnessed the deceased being harked to death simply went back to his home and thereafter did nothing and told nobody about the gruesome murder.

Counsel pointed out that the 2<sup>nd</sup> appellant was aware that the people with whom he was and who had just killed a person one Tugume and Bateza the sons of Buteera had gone to watch a football match at a public place, nearby after which they all came back home where he was and nothing was said of the incident.

Counsel argued further that the above facts confirm that the appellants and others had formed a common intention to kill the deceased and they prosecuted that criminal act. She submitted that the appellants did not at any time disassociate themselves from the crime at all. None of them raised an alarm, or reported the matter to the police or any other authorities.

She asked the Court to uphold the conviction and confirm the sentence.

On the alternative ground of sentence counsel submitted that although the sentence of death was imposed on the appellants was legal. She noted however, that in circumstances of this case, courts have imposed lesser sentences. She proposed a sentence of 35 years for each of the appellants.

Resolution

***This being a first appeal, we are required to re-appraise all the evidence adduced at the trial and make our own inferences on all issues. See;- Rule 30(1) of the Rules of this Court, Fr. Narcensio Begumisa & Others vs Eric Tibebuga (Supreme Court Civil Appeal No. 17 of***

2002), *Bogere Moses Vs Uganda Supreme Court Criminal Appeal No. 1 of 1997* and *Kifamunte Henry Vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997*.

*The 1<sup>st</sup> appellant has not appealed against conviction. His appeal is only in respect of sentence. The 1<sup>st</sup> ground of appeal relates only to the 2<sup>nd</sup> appellant. The second ground of appeal is too general and was not even argued by counsel for the appellants. In any event it is superfluous as this court has a duty to re-evaluate the evidence as a first appellate court. We would strike it out as it offends Rule 66 (2) of the Rules of this Court which requires that a memorandum of appeal sets forth concisely and without argument the grounds of objection to the decision appealed against specifically the points of law or mixed fact and law which is alleged to have been wrongly decided.*

The second appellant on his part contends that he was an innocent bystander who had no role in the murder. He contends further that the prosecution failed to prove his participation in the commission of the crime. Further that, the prosecution failed to prove that he had formed a common intention with the 1<sup>st</sup> appellant and others to murder the deceased.

The 2<sup>nd</sup> appellant made a charge and caution statement which was admitted in evidence. He did not repudiate it, neither did he retract it. He did not testify in court as he opted to keep quiet after all options had been explained to him by the court.

The 1<sup>st</sup> appellant also recorded a charge and caution statement, which he retracted at the trial. A trial within a trial was held and the court found that the said charge and caution had been made by the 1<sup>st</sup> appellant and that he had done so voluntarily.

The law relating to the evidential value of repudiated or retracted statement was elaborately set out by the Court of Appeal of East Africa in *Tuwamoi versus Uganda 1967 IEA 84* as follows

***“A trial Court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all circumstances of the case the confession is true”***

See also *Komora vs Republic (1983) KLR 583*, Court of Appeal of Kenya. In *Tuwamoi (supra)* the Court explained the difference between a statement “retracted and a statement “repudiated” as follows

“The basic difference is of course, that a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to recant it, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that the

statement was not a voluntary one. On the other hand a repudiated statement is one which the  
» accused person avers he never made”

In this case we find that the trial Judge was justified when he relied on the extra judicial statements of both appellants to convict them although the first appellant had retracted his.

We also find that there existed other independent evidence that corroborated the statement in material particulars. This includes the evidence of the medical doctor who examined the body and established the cause of death. PW4 who last saw the 2<sup>nd</sup> appellant with the deceased at the time the deceased was borrowing money to buy a cow from the son of Buteera and the conduct of both appellants immediately before and immediately after the death of the deceased.

From the prosecution evidence and the charge and caution statements of both appellants, it appears clearly that the first appellant together with two other person one Tugume and another Muteza Edward the sons of one Buteera, master minded the murder of Tibarondwa the deceased.

On 3<sup>rd</sup> November 2007, the two sons of Buteera went with the 1<sup>st</sup> appellant to Ngombe village where the deceased lived, apparently this was some distance away from where Buteera’s son lived and where the 1<sup>st</sup> appellant lived. The 1<sup>st</sup> appellant did not know Tibarondwa and/never been to his village. Tugume showed the 1<sup>st</sup> appellant the deceased’s home and informed the deceased that Tugume wanted him as he had cows to sell. Tibarondwa the deceased was a local cattle trader, but at the time he was not looking for any cattle to buy. He had no money on him and had to borrow it from some-else, according to the testimony of PW4.

It is the 1<sup>st</sup> appellant who then brought the deceased to Buteera’s home where he found Tugume and his brother Edward Bateza. They proceeded to the place where the cows were grazing which appears to have been an isolated grazing range the cows belonged to Buteera’s family and were being grazed by A2 who was A1’s brother. A2 was Buteera’s employee. It was broad day light, after 9:00 am in the morning.

The 1<sup>st</sup> appellant, Tugume and Bateza all knew that Tibarondwa had money on him. The inference we make from this evidence is that the whole plan by the trio and another unknown person was to rob the deceased money and not to sell him cattle. The cattle were being grazed by the 2<sup>nd</sup> appellant a brother to the 1<sup>st</sup> appellant who clearly appears to have been aware of the scheme. They pretended to negotiate the price for one cow. The offer made by the deceased was half the price the trio were asking. It may be inferred that the high price set by Tugume and his brother was to ensure that no agreement would be reached. When

indeed no agreement on the price was reached the three the 1<sup>st</sup> appellant, Tugume and Bateze led the deceased to an even more isolated place in a valley where Tugume pulled a panga from his trousers and harked Tibarondwa to death. The 1<sup>st</sup> appellant was there when this happened. The second appellant was a short distance away.

Tugume and Bateza went back to their home and later went to watch a football match returning home later. The 2<sup>nd</sup> appellant who was their herdsman continued looking after the cattle, went home later but said nothing. The 1<sup>st</sup> appellant run away back to his home and told nobody. In the meantime the relatives of the deceased were frantically looking for him. The search led to Buteera's home, where they found the 2<sup>nd</sup> appellant of whom they inquired the whereabouts of his brother with whom the relatives of the deceased had last seen with the deceased.

The deceased's body was two days later found in the forest. An angry mob lynched Tugume and Buteza. The second appellant was arrested and survived lynching. The 1<sup>st</sup> appellant upon getting to know of what had happened to the two sons of Buteera fled to Mubende hundreds of miles away where he was arrested and eventually charged with the murder.

We agree with the learned trial Judge's finding that both appellants with others formed a common intention to murder the deceased. The motive appears clearly to have been to rob him of his money upon luring him into a trap, which they did. The conduct of the 1<sup>st</sup> appellant before and after the murder was inconsistent with his innocence so was that of 2<sup>nd</sup> appellant.

It took two days to find the body of the deceased yet both 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant knew very well that he was dead and who had killed him. During this time the deceased's family was tactically looking for him a fact that ought to have been known by both appellants. They never reported the matter to the police or to anyone else. None of the appellants tried to disassociate himself from the crime instead they covered it up by keeping quiet. The law relating to doctrine of common intention is set out in **Section 20** of the Penal Code Act as follows

***“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***

It is immaterial that none of the appellants actually harked the deceased to death. They both took part in the plan to kill the deceased, none of them disassociated himself from the crime yet they had ample time at least two days, to do so. ***See: Rwabuganda Moses vs Uganda: Court of***

*Appeal Criminal Appeal No. 297 of 2011, Turyahabwe Ezra & 13 Others Vs Uganda: Court of Appeal Criminal Appeal No. 0156 of 2010 and Dafasi Magayi and Others Vs Uganda [1965] E.A P.670.*

We find no reason to fault the decision of the trial Judge's finding that the prosecution proved the case against both appellants beyond reasonable doubt. Ground one of appeal is hereby dismissed. Both appellants' conviction is hereby upheld.

On the alternative ground of sentence, we find that a sentence of death imposed on each of the appellants is harsh and manifestly excessive in the circumstances of the case.

The appellants were both first offenders. They are young and capable of reform. However, there are aggravating factors. First the murder was premeditated having been planned over time. It was unprovoked. The motive appears to have been robbery with violence. This would attract a higher sentence. This Court and the Supreme Court have now established a sentencing range for murder of a single person, where the convict is a first offender and the murder was not coupled with other offences or related to ritual sacrifice. The sentences now range from 20 years imprisonment at the lower end to 35 years at the upper end. The sentence may be higher or lower depending on the peculiar circumstances of each case.

***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.

Taking into account the above authorities and the need to maintain consistency in sentencing, we now reduce the sentence of 1<sup>st</sup> appellant from death to 35 years imprisonment and that of 2<sup>nd</sup> appellant from death to 30 years imprisonment as he played a lesser role in this heinous crime. The sentences shall commence on 4<sup>th</sup> February 2011 the date of conviction.

Dated this 6<sup>th</sup> day of December 2016

HON.KENNETH KAKURU

JUSTICE OF APPEAL

HON, SIMON BYABAKAMA MUGENYI

JUSTICE OF APPEAL

HON.ALFONSE C. OWINY-DOLLO

JUSTICE OF APPEAL



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