THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 048 OF 2010

ODONG RONALD .....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(An appeal from the decision of the High Court at Lira before Hon. Lady Justice C.A Okello dated 29th April, 2010 in Criminal Case No. 055 of 2008)

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE F.M.S EGONDA -NTENDE, JA

HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

The appellant was on the 29th day of April, 2010 convicted of the offence of murder contrary to *Sections 188* and *189* of the Penal Code Act (CAP 120) and sentenced to suffer death, by Hon Lady Justice C.A Okello in High Court Criminal Case No. 055 of 2008 at Lira.

Brief facts

On 27th August, 2008 at Ageri village, in Apac District, two brothers Awanyo Geoffrey and Oruru Bonny while on their way home were shot dead by unknown assailants, at about 8:30 pm. PW3 and PW4 the wives of Awanyo Geoffrey who were at their home not far away from where the two were killed heard gun shots at about 8 pm on the evening of 27th August 2008. Soon afterwards the appellant and another, Aguma Alfred Ogwal were seen by PW3 and PW4 passing by their home, with a gun and dressed in dark rain coats. The two men are said to have told the witnesses that *"the big people are finished."*

The following day, the two men were arrested. The appellant later on led the Police to the place where they recovered a gun, live ammunition, empty bullet magazines and a rain coat all buried in the ground. The Police also recovered spent bullet cartridges at the scene and later a mobile phone which was said to have belonged to one of the deceased persons. The appellant and Aguma were charged with the murder of the two deceased persons. However, Aguma died before the trial. The appellant was convicted of murder and sentenced to suffer death.

He now appeals against both conviction and sentence on the following grounds.

1. *That the learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record thus arriving at an erroneous decision that the appellant had participated in the commission of the offence.*

2. *That the death sentence imposed by the learned trial Judge was harsh and manifestly excessive in the circumstance of the case.*

At the hearing of this appeal learned Counsel *Mr. Simon Ogen* appeared for the appellant while learned Principal State Attorney *Mr. Moses Onencan* appeared for the respondent. The appellant was present in Court

The Appellant's case

It was submitted for the appellant that the evidence adduced at the trial was insufficient to sustain a conviction against the appellant. Counsel contended that, the appellant had not been sufficiently identified by any of the prosecution witnesses and as such his participation in the commission of the crime had not been proved to the required standard.

Further that, there being no direct evidence to link the appellant to the offence, the learned trial Judge relied entirely on circumstantial evidence to convict the appellant, which evidence was entirely lacking and insufficient, in so far as it did not prove the appellant's participation in the commission of the offence.

Counsel submitted that the evidence did not link the appellant to the weapon used in the crime. Further that, the prosecution failed to prove that the gun exhibited in Court was in fact the murder weapon.

He further faulted the Judge for having accepted the prosecution evidence on identification of the appellant, without having properly evaluated evidence in respect of identification. He contended that the Judge disregarded the fact that the crime having been committed at night, the conditions for positive identification were unfavourable. Had he properly evaluated the evidence he would have found that, it was dark, the distance between the witnesses and the scene of crime was far.

He would also have found that the prosecution witnesses had not positively identified the appellant as one of the people seen at the scene on the night of the murder but could only have speculated it. The Judge failed to consider the fact that there was an existing land dispute between the family of the deceased persons and that of the appellant, which could have influenced the witnesses to speculate or give false testimony.

In respect of ground 2, Counsel submitted in the alternative that, a sentence of death imposed upon the appellant was manifestly harsh and excessive. He argued that, the appellant being a first offender, and of young age, ought to have been given a lesser sentence.

He asked Court to reduce the sentence to at least 10 (ten) years imprisonment.

Respondent's reply

Mr. Onencan opposed the appeal. He submitted that although there was no direct evidence linking the appellant to the crime, the circumstantial evidence adduced at

the trial sufficiently proved the offence against the appellant beyond reasonable doubt.

Counsel submitted, that the evidence of PW3 and PW4 the widows of one of the two deceased persons clearly indicated that the two witnesses had seen the appellant together with another person Aguma (now deceased), the night of the murder walking away from the direction from where they had just heard gun shots. The two walked past the witnesses, who were able to identify them.

Further that, the appellant and Aguma had talked to the witnesses boasting about the killing that had just taken place. The respondent's Counsel went on to stress that both men were well known to the witnesses, as they were closely related to their deceased husbands and lived in the same village. He submitted further that, the witnesses and the appellants were only 4-5 metres apart when they were identified. He supported the trial Judge's finding that the appellant had been properly and positively identified by the prosecution witnesses.

Counsel submitted further that, the fact that the appellant was seen by the two witnesses walking away from the direction where the gun shots had been heard, was fortified by the discovery of the bodies of the two deceased the following morning from that very direction.

Counsel submitted that, there was further evidence implicating the appellant in the commission of the crime which included, the recovery of a mobile phone belonging to one of the deceased persons from the appellant, which phone was identified by PW4 the deceased's wife and exhibited in Court.

He submitted further that the recovery of the deceased's phone from the appellant corroborated the evidence of PW3 and PW4. Counsel also pointed out that the

appellant had led the police to the place where the crime weapon, a gun was recovered, further strengthening the evidence against him.

He asked this Court to uphold the findings of the trial Judge and to dismiss this appeal.

In respect of sentence, Counsel conceded that the sentence of death imposed upon the appellant was harsh and excessive in the circumstances and proposed instead, one of 40 years imprisonment.

In rejoinder, Mr. Ogen pointed out that the phone referred to by Mr. Onencan was not admitted in evidence and had not been recovered by PW_2 who testified about it, as he was not the arresting officer. He reiterated his earlier prayers and submissions.

Resolution of issues

This being a first appeal, we are required to retry the case, by re-evaluating all the evidence adduced at the trial and coming up with our own inferences on all issues of law and fact.

See; *Rule 30(1)* of the Rules of this Court, *Bogere Moses Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997 , Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997. Fr. Narsensio Begumisa and 3 Others Vs Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2002.*

In this case, the appellant's conviction was entirely based on circumstantial evidence. None of the witnesses who testified at the trial saw the appellant kill the deceased persons. The witnesses, PW3 and PW4 who testified of having seen the appellant walking away from the direction of the scene of the crime with Aguma the co-accused (now deceased) did not actually witness the murder. Their evidence forms only part of the circumstantial evidence and is relevant only to that extent.

It is no derogation that the evidence adduced to prove a case is circumstantial. Circumstantial evidence maybe the best evidence. *See: R. vs Taylor wear and Donovar [1928] 21 CR App. R. 20, Musoke vs R [1958] EA 715, Tumuhairwe vs Uganda [1967] EA 328, Janet Mureeba and 2 Others vs Uganda, Supreme Court Criminal Application NO. 13 of 2003* (unreported).

However, it is always important for the Court to keep in mind that circumstantial evidence maybe fabricated to cast suspicion on a person. Therefore, before any inferences of guilt can be drawn from such evidence, the Court must be satisfied that there are no co-existing circumstances that either weaken or destroy the inference of guilt.

This position of the law has been set out in many authorities of the Court of Appeal for East Africa, the predecessor to the Supreme Court of Uganda notably in *Simon Musoke vs R [1958] EA 751* and has been followed since that,

> *" it is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt."*

See also:-*Sharma & Kumar vs. Uganda, Supreme Court Criminal Appeal No.* 44 of *2000 (unreported), Byaruhanga Fodori vs. Uganda, Supreme Court Criminal Appeal No.* 18 of *2002* (unreported), *Janet Mareeba and 2 others vs Uganda, Supreme Court Criminal Application No. 13 of 2003 (unreported).*

It appears clearly to us that, the learned trial Judge was alive to this position of the law.

For emphasis only we wish to add that, before;-

A Court can pass a conviction based entirely on circumstantial evidence the evidence adduced must;

(a) Produce moral certainty to the exclusion of all reasonable doubt,

(b) be inconsistent with the innocence of the accused;

(c) be incapable of explanation on any other reasonable hypothesis than that of guilt;

(d) be such that the inculpatory facts are incompatible with the innocence of the accused;

(e) lead to the irresistible inference that the accused committed the crime.

In this appeal before us, the appellant contends in ground one that his conviction was based on insufficient evidence, as there was none to prove his participation in the commission of the offence.

In her testimony, PW3, Lucy Awino testified that she knew the appellant well because they lived in the same village and one of the deceased Awanyo Geoffrey was her husband. She further testified that her husband together with his brother Oruru Bonny were both shot and killed in the evening of 27th August, 2008 near their home at Akali, in Abongomola, in Apac District. She told Court that while she was at her home at about 8.00 P.m she heard gun shots from the direction of the road leading to her home. The gun shots appeared to have been about 200 metres away. She was with three other women and her father in-law one Joseph Awanyo. Soon thereafter, two people passed by their home, from the direction the gun shots had just been heard.

She said she was able to identify the two persons one of whom was the appellant. She narrated what she witnessed in her examination in chief as follows;-

"As the accused passed they said. "These strong people today we have finished them". We were sitting near the door and they were telling us of the killing. The strong people "the big bulls" were our husbands. They passed while holding a gun. They passed by about 1/2 hour after the gun shots. I said we were sitting outside the door when all this happened.

I recognized them because it was light from moon that was bright.

Both were wearing rain coats. They each had a gun. The rain coat was military type. They did not talk to us for long. It was only about 2 minutes. They passed us at a distance of about 4 - 5 metres as the road passes near. When I heard shots, I did nothing."

PW4 Akello Toan testified that she was also a wife to Awanyo Geoffrey, who she stated was killed together with his brother on 27th August, 2008 near their home at Akali village, Abongomola in Apac District.

She stated that the two were killed by the appellant and one Aguma now deceased. She testified that her husband was killed at a road junction leading to their home. Further that, on the night of 27th August 2008, while at her home she heard gun shots, from that direction. She said the firing was rapid. The witness was together with PW3 and Aroo the wife of Oruru her brother in- law who was also killed with her husband when after the gun shots had been heard, the appellant with Aguma passed by and said;-

"these big people who used to show off are finished".

The witnesses said the words were uttered by the appellant and were directed at her and her children and in the presence of PW3 Awino. PW4 identified the appellant in Court, as the person who uttered the said words when he was just 5 metres away from her. She stated further that, she was able to identify them because there was moon light. She testified further that, both the appellant and Aguma were dressed in dark clothes. In cross examination, the witnesses stated that the appellant and Aguma had guns. She repeated this statement again when she was

examined by Court, that the appellant and Aguma had a gun when she saw them pass near her home the night her husband was killed.

In his testimony, PW1 Inspector of Police Nicholas Opito stated that he had worked as a Police Officer for 30 years and was at the time of the incident the officer in charge of Aduku Police station, when he was informed about the murder of the two persons in Akali and directed to commence investigations. When he arrived at the scene he found two bodies laying along the road leading to Adendongo Primary School and stated that the same road, led to the homes of the two deceased persons who were identified as Awanyo Geoffrey and his brother Oruru Bonny. He stated that he interviewed potential witnesses and recorded statements from them. He stated further that, the information gathered from the witnesses was consistent.

He found that the bodies were riddled with 18 bullets. His team collected 36 spent cartridges from the scene of crime. He further stated that on that very day at 3 P.m he received a phone call from the Local Council III Chairperson of Akali, one Otim informing him that the appellant had been arrested. The witness found the appellant at Akalu Police post, in custody.

He interrogated the appellant who denied having killed the two deceased persons, but stated that, they had been killed by his brother. The witnesses questioned the appellant about the gun used in the murder. The appellant told the witnesses that the gun had been hidden in a garden under a tree locally known as "Abata". The appellant led the witnesses and the police team to the home of his brother. The witnesses testified further as follows:-

> *"We arrived at the home of the brother. He took us to a garden on the other side of the brother's home. The brother was not present, but his wife was present. She told us she did not know where her husband was.*
>
> *At the garden, we found a part that had been freshly dug that morning. Odongo Ronald told us to dig the part that had been freshly dug. The L.C. and myself dug*

the part and found a gun. We pulled it out and found it wrapped in Police Rain Coat. There were also two empty magazines and fifty two live ammunition in a pouch.

We asked Odongo whether that was the gun used and he answered "Yes". To confirm that it was in working condition, Ceasaer cocked it. We confirmed that it was in working condition after going through procedure for firing.

We checked the muzzle to confirm that the gun had been used. We discovered black soot inside. The soot emanates from a fired bullet.

We rushed Odongo to Aduku Police together with the gun for fear that he may be killed. Next morning, Odongo and all exhibits related to case were brought to Apac Police and handed them to O/C CID.

- *SMG*
- *Two empty magazines.*
- *Fifty two live ammunitions.*
- *Thirty six spent cartridges."*

The items set out above were produced in Court and identified by the witnesses. He further testified that a sketch plan was drawn and photographs were taken of the scene of crime.

PW2 CPL Odongo David's testimony is similar to that of PW1 but is peculiar in some aspects which we find necessary to recount. The two deceased persons were personally known to him. Further that, he was part of the investigating team, and had found the appellant at Akalu police post already under arrest. He narrated what happened at the police post as follows;-

"We found him with two phones when searched him a Nokia 3310. I cannot recall its serial number. It was long 2nd one was Kabiriti the serial number of which I also don't recall because of its length.

Wife of Awanyo Geoffrey told me the Nokia 3310 was her husband's. She told us to call the phone number of her husband. I cannot recall the number. But the Parish Chief called the number and it rang in the Nokia.

The Parish Chief got the number from the wife. The Kabiriti was that of Odongo Ronald. We learnt of this from wife of the deceased and other people in the area. We did not ask Odongo about the phones our concern at the point was the gun used in the murder"(sic).

In cross examination the witnesses stated;-

"True, Parish Chief who had the deceased's phone number rang the Nokia and it rang. I did not ask the Parish Chief what the number was. We had a lot of work to do."

The phones that were recovered from the appellant were both produced in Court. They were identified by this witness and admitted in Court as exhibits. The Court admitted as exhibits 54 live ammunition, 36 empty cartridges, 4 magazines, a green army porch, a Nokia Phone, a second phone, two exhibit slip one for the two phones the other for the rest of the exhibits.

PW6 testified that the two phones had been recovered from the appellant by the local council authorities of Akulu in Akali.

The appellant gave his defence on oath. He admitted that he was a resident of Akali Parish, Ageri village. He denied having participated in the murder of the deceased persons. He stated that on 27th August ,2008 he was not at home, as he was in Lira and that on his way home the following day, he found people near his home and was told not to proceed as the situation at home was not good. He was later arrested and taken to Akali Police station and later he was taken to Aduku Police where he was tortured by the officer in charge, and interrogated by soldiers from Lira Army Barracks.

He denied having led the Police to the recovery of the gun and other items exhibited in Court. He denied having had anything to do with phones that had been exhibited and said he never owned a phone.

An accused person who sets out a defence of alibi has no duty to prove it. The onus and the burden of proof lies with the prosecution throughout the case. *See; Sekitoleko vs Uganda [1967] 1 EA 531 (HCU).*

The appellant was identified by PW3 and PW4 as he passed by their homes, shortly after both had heard gun shots. He was coming from the direction from where the witnesses had just heard gun shots. Both were able to positively identify him, because he was related to their husband and lived in their neighbourhood. He spoke to them for about 2 minutes. He was close enough to them, about 5 metres away when he spoke to them. They must have recognised his voice having known him for a long time.

Both witnesses stated that there was moonlight, and that the appellants carried a gun. Both stated that he was wearing a rain Coat.

Indeed, the following morning, two bodies of the deceased persons were found at a road junction leading to the home of the two witnesses. The bodies were riddled with bullets. The road along which the bodies were found is the same road and direction from which the two witnesses saw the appellant coming from, 30 minutes after they had heard the gun shots. They expected information about the gun shots as their husband and his brother were away. The news they received from the appellant is *"the big people who used to show off are finished".*

They later that morning found out that, their husband and his brother were no more. They had died in a hail of gun fire the previous evening. The above evidence

on its own is not sufficient to prove that the appellant killed the deceased persons as none of the two witnesses saw him do so.

PW_5 did testify that, upon arrest and interrogation the appellant told him and other police officers that, he knew who had killed the deceased persons and where the murder weapon had been hidden. He told them while still at the police station that the gun was hidden under a tree locally known as "Abata" in a garden. He led the police to a place where he pointed to the ground which was freshly dug.

Upon excavation, the following items were recovered, an AK 47 sub-machine gun, two empty bullet magazines, fifty two live ammunition, thirty six spent cartridges and an army green rain coat. The items were admitted in Court as exhibits without any objection for the defence. The evidence leading to their recovery and chain leading to their production in Court was never contested or in any way put in issue. The gun was checked and tested and found to have been recently fired and was capable of discharging bullets.

The statement by the appellant to PW5 a Police Officer that he knew who had killed the deceased and where the murder weapon was, is admissible in evidence, under *Section 29* of the Evidence Act (CAP 6).

That Section states as follows;-

> *"Notwithstanding sections 23 and 24, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of that information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

While discussing the above law the Supreme Court in *Kedi Martin Vs Uganda, Supreme Court Criminal Appeal No. 11 of 2001* held as follows;-

> *"The basic law governing the admissibility of a confession made by a person accused of a criminal offence, as evidence in his or her trial, is contained in*

Sections 24, 25 and 26 of the Evidence Act. Needless to say at the outset that the said law comes into play when the accused person retracts or repudiates a confession attributed to him or her. Section 24 renders inadmissible, any confession made by a person in custody of a police officer, unless it is made in the immediate presence of a magistrate or a Police Officer of or above the rank of Assistant Inspector. It does not apply to a confession made by a person who is not in custody, or who is in the custody of anyone other than a Police Officer. See Babyebuza Swaibu Vs Uganda, Supreme Court Criminal Appeal No. 47 of 2000 (unreported) which we decided in the same session. Section 25 however, applies to all confessions by accused persons wherever and whenever made, and renders inadmissible, notwithstanding of the provisions of Section 24 and 25, so much of any information, (including a confession), received from an accused person, as distinctly leads to the discovery of a material fact which id disposed to at his trial as so discovered. The ultimate objective underlying these provision is to avoid receiving in evidence, and receiving upon, false confessions. This is underscored by the provisions of Section 29 A whose rationale must be that the discovery of the 'fact' confirms the truth of the 'information'; See Babyebuza Swaibu Vs Uganda (supra)".

The finding of the gun and ammunition at the place and location first described by the appellant to PW5 D/Sgt Kilama Ben speaks volumes for the credibility of that information, because only a person who participated in the commission of the crime could have given details leading to the discovery of the gun, live ammunition, and the rain coat that had been described by other witnesses. The appellant volunteered the information, and led the search party to the place where the gun was found without any apparent coercion, leading to the irresistible conclusion that his statements were true and the inference of his guilt.

The evidence of PW1 therefore corroborates the evidence of PW3 and PW4 who saw the appellant with a gun on the night of the murder in company of Aguma. The appellant wore a green army rain coat (pouch). The gun and ammunition recovered by PW1 were found wrapped in a green army rain coat.

There is also some other relevant evidence that appears to have been over looked at the trial. Although the spent cartridges recovered from the scene of crime were not proved to have been discharged from the gun that was recovered by PW1, there is no doubt they could only have been fired by gun of similar make AK 47 sub-machine gun.

The spent cartridges recovered from the scene number are 36 while the live ammunition recovered together with gun, numbered 54 making a total of 90, an interesting coincidence considering that a gun of that type carries 30 rounds of ammunitions in one magazine. Four empty magazines were recovered together with the gun. Although the person who recovered the mobile telephone sets was not called to testify, the undisputed evidence is that, the appellant was at all time in the hands of authorities right from the time of arrest, until he was interrogated by PW_1. The persons who arrested him appear to have had no contact with the deceased Awanyo. When the appellant was searched he was found with two phones.

The wife of the deceased Awanyo provided his phone number to the parish Chief and when he dialled that number in the presence of PW_1, the Nokia phone that had been recovered from the appellant rang in response to the call. The Nokia phone was exhibited. Even if the trial Judge had accepted the defence objection not to exhibit the phone due to a break in the chain of exhibits that would not have destroyed the evidence of PW1, that he recovered a phone from the appellant and when the deceased's number was called from another phone, the recovered phone rang.

Although the prosecution is not required to prove motive. In this case the prosecution proved the existence of a land dispute between the family of the deceased person and of the appellant. There was also a grudge between the appellant and the deceased Awanyo then later having reported the offence to the authorities of illegal possession of a gun, which was recovered from him.

The appellant put up a defence of *Alibi.* The law regarding *alibi* was exhaustively discussed by the trial Judge in her judgment and we find no reason to repeat it here. Suffice to say that the positive identification of the appellant by PW3, Lucy Awino and PW4, Akello Toan at home on the night of 27th August 2008 at about 8:30 pm destroys his *alibi,* and we find so.

We find that the prosecution proved the case against the appellant beyond reasonable doubt. We uphold the findings of the trial Judge.

This appeal is accordingly dismissed. The conviction is hereby upheld. The appellant was sentenced to death on count one and the sentence on count two was suspended.

Both Counsel are in agreement with each other, that the death sentence is manifestly harsh and excessive in the circumstance of this case.

Taking into account the fact that appellant is a first offender, and was only 20 years at the time. We find that the death sentence was manifestly harsh and excessive. We hereby set it aside.

The appellant was a first offender, he was 20 years old at the time and he ought to be given an opportunity to reform. However, murder is a heinous and serious offence that carries a maximum sentence of death.

In *Uwihayimaana Molly vs Uganda: Court of Appeal Criminal No. 103 of 2009* in which the appellant had murdered her husband by hacking, this Court reduced her sentence from death to 30 years imprisonment.

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 *Bwarenga Adonia vs Uganda, Court of Appeal Criminal Appeal No. 276 of 2009*, the appellant murdered two people and was sentenced to suffer death. On appeal, this Court reduced the sentence to 30 years imprisonment.

Taking into account all the circumstances of this case, we consider a sentence of 20 years imprisonment on each count to be appropriate, since the appellant spent one year and 8 months on remand, he shall now serve a term of 18 years and 4 months imprisonment, on each count commencing from 29th April, 2010 when he was convicted. Both sentences to run concurrently.

Dated at **Gulu** this.....6th.....day of .....November.....2017.

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. MR. JUSTICE F.M.S EGONDA -NTENDE
JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL