THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 028 OF 2016

1. **OKELLO ALFRED**
2. **ODONG BOSCO**
3. **OCEN SAM OYUGI**
4. **OKELLO TOM**
5. **OPIO JAMES**
6. **ODOCH CHARLES.....APPELLANTS**

VERSUS

UGANDA.....RESPONDENT

(Appeal from the Judgment, conviction and sentence of Her Lordship Hon. Justice Dr. Winifred Nabisinde , of the High Court of Uganda at Lira dated the 10th day of February 2016))

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

This appeal arises from the Judgment of Her Lordship Dr. Winifred Nabisinde, J in High Court Criminal Case No. 147 of 2015 at Lira, dated 10th February 2016, in which all the appellants were convicted of the offence of murder and each sentenced to 45 years imprisonment without remission.

Brief Background

Sometime in August, 2013 the deceased who lived in Aungu Parish in Oyam District, had a girl friend named Harriet Akite who lived in the same neighbourhood. It appears that the appellants who were brothers to the girl did not approve of their

relationship. On 26th of August, 2013 the deceased went to visit the said girlfriend Harriet at about 11:00 pm. She was at her home, when the deceased came and she allowed him into the house.

The 2nd appellant upon realizing that his sister had locked herself in the house with the deceased, came up to the door and demanded that she opens.

When she opened the door the deceased fled and was pursued by the 2nd appellant. The 1st appellant caught him and restrained him. He called the 3rd appellant to bring a panga. The two were joined by the 2nd appellant. At this point the eye witness fled. The next day the deceased's body was found next to the homestead of the accused persons.

The appellants were arrested, indicted of the offence of murder, tried, convicted and each sentenced to 45 years imprisonment, without remission.

Being dissatisfied with the decision they now appealed jointly against it on the following grounds;-

1. *That the learned trial Judge erred in law and fact when she convicted the appellant on the basis unsatisfactory circumstantial evidence.*
2. *That the learned trial Judge erred in law and fact when disregarding the major inconsistencies and contradiction in the prosecution hence reaching a wrong decision*
3. *That the learned trial Judge erred in law and fact when he sentenced the appellant to prison for 45 years, which is illegal, harsh and manifestly excessive in the circumstances.*

When this appeal was called for hearing *Mr. Geoffrey Boris Anyuru* appeared for the appellants on state brief while *Mr. Patrick Omia* Senior State Attorney appeared for the respondent.

The Appellant's case

It was submitted by Mr. Anyuru for the appellants that, the appellants were convicted only on circumstantial evidence, which was insufficient to sustain a conviction.

He submitted further that;-

PW2, who was with the deceased the night he was killed, was only able to identify appellants, 1, 2 and 3 as the people who pursued the deceased upon his flight from the house of Harriet. However, no one witnessed the said appellants 1, 2 and 3 assault the deceased.

Further that, circumstantial evidence relied upon by the lower Court was that, the deceased had a love relationship with one Harriet Akite, a sister to the appellants, whose photograph was recovered from the deceased's belongings. Harriet Akite in her testimony in Court as a defence witness denied having ever given her photograph to the deceased and stated that, it could have been lost when her properly was stolen after the incident.

Counsel also submitted that, the prosecution had failed to prove the existence of a love affair between Akite and the deceased and faulted the trial Judge for having believed that such a relationship existed . Counsel further pointed to the evidence of Akite, which was to the effect that, on the fateful night she was not at home, but was away at Church, in a choir practice. This evidence Counsel submitted is corroborated by that of the head of the Church Choir who confirmed the presence of Akite at the Church on the fateful night.

Counsel submitted further that, there was no evidence adduced at the trial implicating appellants 4, 5 and 6 except that, their homes were in close proximity within the place where the deceased's body was recovered the morning following the incident. Further that, there was nothing to link any of the appellants

to the panga that was recovered from the place where the body was found as no finger prints were lifted from it for comparison. He also pointed out that, the testimony of PW2 upon which the trial Judge largely based the conviction was riddled with contradictions and inconsistencies. He pointed them out to be the following:-

PW2 had testified that, when the deceased, fled from Akite's hut he saw the 2nd appellant pursue him. Being very scared the witness hid in the bush until the following morning. The same witness stated that, in the morning he had been able to hear the appellants talking and saying they were going to take the deceased to the Local Council Chairperson. At one time PW2 said he had seen 4 bottles of soda, next to the body of the deceased but later changed his testimony and said the bottles were three. He asked Court to find that, the testimony of this witness was unreliable and should not have been believed by the trial Judge. He cited the decision of this Court in *Musunguzi Jones vs Uganda, Court of Appeal Criminal Appeal No. 149 of 2004* for the proposition that Court ought not to rely on evidence that is full of inconsistencies and contradictions.

He asked this Court to allow this ground, quash the conviction and set aside the sentences.

In the alternative and without prejudice to the above, Counsel submitted that, the sentence imposed upon the appellants was illegal as the trial Judge while passing the sentence did not take into account the period the appellants had spent on remand.

Secondly, that, the sentence of 45 years imprisonment without remission was harsh and excessive in the circumstances of this case. He asked Court to find so and to set aside the sentence and to substitute it with a lesser and more appropriate sentence of 18 years imprisonment.

The Respondent's reply

Mr. Omia for the respondent conceded that no evidence had been adduced at the trial to sustain a conviction against the appellants 4, 5 and 6.

However, he submitted that, there was sufficient circumstantial evidence to sustain a conviction against the first three appellants. He submitted that, the proximity of the house of A2 from that where Akite Harriet was that night, as set out in the sketch plan corroborated evidence of PW2 who stated that, he saw Odongo the second appellant emerge from his house to that where the deceased was.

He was able to identify the 2nd appellant because there was moon light. He saw the deceased run out of the house being pursued by Odongo, the second appellant and when he was caught by Okello the first appellant, he heard Odongo's voice which he recognized. The 1st appellant Okello, was heard by PW2 telling the 3rd appellant, Ocen Sam to bring a panga. The 3rd appellant brought a panga, where upon their father tried to dissuade them from harming the deceased but PW1 threatened him and he backed off. The body of the deceased was discovered the next day with a panga lying beside it.

Appellant 1, 2 and 3 were the last people seen with the deceased alive, the night before his dead body was recovered from near their homes. The inconsistencies and contradictions were minor and the trial Judge correctly ignored them. He asked Court to find that, the evidence adduced at the trial was sufficient to sustain the conviction and to confirm it.

Counsel submitted that, the sentence was legal and was also appropriate in the circumstances. He asked Court to uphold it.

Resolution

This is a first appeal and as such we are required by the law to re-evaluate the evidence at the trial and come up with our own decision on all matters of law and fact. This requirement is set out in *Rule 30 (1)* of the Rules of this Court. See;- *Fr. Narcensio Begumisa & Others vs Eric Tibebaaga, Supreme Court Civil Appeal No. 17 of 2002* also *Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997, Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997,*

We shall proceed to do so.

The trial Court convicted the appellants on the basis of circumstantial evidence as to their participation in the commission of the crime. Upon re-evaluation of the evidence we found that, there was nothing on record implicating the appellants 5, 6 and 7, Okello Tom, Opio James and Odoch Charles. This was conceded to by Mr. Omia for the respondent. We immediately quashed their respective convictions and set aside each of their sentences. We set them free and the appeal proceeded only in respect of the Appellants 1, 2 and 3.

The rest of this Judgment therefore is in respect of the first three appellants, Okello Alfred, Odongo Bosco and Ocen Sam. The evidence against the three appellants is circumstantial. The principles to be taken into account before a Court can convict on circumstantial evidence were set out in *Simoni Musoke Vs R [1957] EA 715* as follows;-

> *"In a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon 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. Teper v. R., [1952] 2 All ER 447, followed."*

While analyzing the evidence, the learned trial Judge in her lengthy but well written Judgment stated as follows at page 30.

> *"It is my finding that the deceased was last seen apprehended by AI, A2, and A3 in their compound by PW2. I have critically examined pw2's three statements admitted as D. Exhibits No. 1. While defence counsel dwelt on his making three statements before telling court in the last one what he witnessed that night, I find his response in cross examination as to why he recorded three statements logical."*

At page 31, the Judge continued as follows;-

> *"Secondly, the court took time to listen to his testimony before court; he was put under intense cross examination and stood by his evidence of what he witnessed that night. He particularly was sure that one Akite Harriet was in her hut and opened for the deceased. He also heard the exchange of words between them and also between her and her uncle PWI whom PW2 saw clearly. My conclusion is that Akite Harriet although she claimed to have been elsewhere, she was in her hut that night and indeed the deceased had gone to visit her."*

At page 33 she observed and held as follows:-

> *"In this case, the prosecution's evidence is that the accused persons AI, A2 and A3 were seen at the scene of crime by PW2. After carefully analyzing this evidence, it is my finding that there is a very close proximity between the homes of all the accused persons in this case. This is evidenced in the sketch plan drawn at the scene of crime admitted as P. Exhibit No.10. I find it unbelievable that the rest of the accused persons did not know what happened to the deceased in their compound looking at the closeness of their homesteads. This court also took note of the evidence during the cross examination of the prosecution witnesses in this case who were accused of having been paid and received blood compensation from the clan head of the accused persons. "*

We have carefully studied the record and specifically the evidence adduced at the trial.

PW2 testified that, he knew all the appellants, well and he was a friend of the deceased Abura Leo. All the appellants lived in the PW2's neighbourhood. That fateful night he had escorted his friend the deceased to visit Akite his girl friend, who lived in the same compound with the appellants but in separate huts. The huts were about 30 meters from each other.

He saw the deceased enter Akite's hut. He saw the 2nd appellant emerge from his hut and move to that of Akite inquiring what was going on. He saw Akite open the door and upon which the deceased fled from her hut. The deceased was pursued by the 2nd appellant and was caught by the 1st appellant who restrained him.

The first appellant is said to have called out the 3rd appellant to bring a panga. He brought the panga and gave it to the 1st appellant, whereupon their father pleaded with them not to harm the deceased. The 1st appellant then, threatened to cut his father instead. At that point the witness PW2 ran away, fleeing for his life.

The next time he saw his friend was the following day. His body lay lifeless with 3 bottles of soda besides him. He stated that, they were the same bottles he and the deceased had carried on their fateful visit to Harriet Akite. There was also a panga next to the body. The deceased's left hand and mouth had been cut.

Dr. Asiime Moses who carried out the postmortem on the deceased's body and testified as PW1 told Court that, the body was grossly distended with multiple cut wounds over the head. There was a deep wound over the head extending to be back. There was a cut wound extending from the mouth to ear. One hand was cut off. He concluded that, the wounds had been caused by a sharp object applied with force such a panga. PW3 the Police Officer who first saw the body of the deceased described the wound in the same way as PW1 the Doctor.

He produced as exhibits in Court the items recovered from the place when the body lay. These were a panga, a green plastic bag, which contained 3 bottles of Mountain Dew soda and a cover of a black mobile phone.

According to PW6 the body was found lying in a cassava garden without any evidence of a scuffle. Indicating it must have been carried there on a bicycle from elsewhere, as there were bicycle tyre marks in the garden. The 1st appellant in his defence stated that, he had passed by that garden with a bicycle the night the deceased was killed.

We have carefully looked at the other evidence in addition to what we have set above. We find that, the prosecution adduced sufficient evidence to prove beyond reasonable doubt the participation of the 3 appellants in the commission of the crime. They formed common intention of killing the deceased which they ruthlessly executed.

The learned trial Judge rightly rejected their *alibis.* The inculpatory facts in this case are incompatible with the innocence of the 3 appellants and are incapable of explanation upon any other reasonable hypothesis other than their guilty.

We find no merit in grounds 1 and 2 of appeal which are hereby dismissed. The conviction against all the appellants are upheld.

In respect of the appeal against sentence, this Court has limited discretion to interfere with the decision of the trial Court on sentence.

In *Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No.143 of 2001.*

It was held that;-

> *"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."

Each of the appellants were sentenced to 45 years imprisonment without remission. Remission is a statutory right, provided under *Section 47* of the Prisons Act, and as such it cannot be taken away by Court. To that extent we find that the sentences imposed by the trial Court are illegal. On that account alone we set aside the sentences and invoke *Section 11* of the Judicature Act which permits this Court to exercise the powers of the trial Court in such circumstances, to impose sentence of our own.

The appellants were first offenders and relatively young men at the time. They appear to have acted in the heat of the moment. They all appear to be capable of reform and as such they require a measure of leniency

On the other hand, they took away life of an innocent young man in a brutal and gruesome manner.

We take into account the fact that the maximum penalty for the offence of murder is death. We also take into account the decisions of this Court and the Supreme Court below in similar cases in regard to sentences.

In *Marani Adam & Another Vs Uganda, Court of Appeal Criminal Appeal No. 829 of 2014,* the appellant was convicted of murder and sentenced 40 years imprisonment. This Court reduced the sentence to 27 years imprisonment.

In *Twikireze Alice Vs Uganda, Court of Appeal Criminal Appeal No. 0764 of 2014,* the appellant was convicted of murder and sentenced 37 years imprisonment. This Court reduced the sentence to 25 years imprisonment.

In *Opio Daniel Vs Uganda, Court of Appeal Criminal Appeal No. 0032 of 2011*, the appellant was convicted of murder and sentenced to 25 years imprisonment. This Court reduced the sentence to 20 years imprisonment.

Having taken all the above factors into account, we consider a sentence of 20 years to be appropriate for each of the appellants. From this we deduct 2 years and 6 months each appellant had spent on remand and order that each of them serves 17 years and 6 months imprisonment from 9th February 2016, the date when they were convicted.

Dated at Gulu, this 7th day of November 2017.

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HON. JUSTICE KENNETH KAKURU
JUSTCE OF APPEAL

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

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HON. LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL