THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 579 OF 2014

(CORAM: Kenneth Kakuru JA, F.M.S Egonda-Ntende JA and Hellen Obura, JA.)

OKELLO BOSCO::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decisions of Hon. Lady Justice Mary I.D.E Maitum holden at Kampala High Court Criminal Session Case No. 048 of 2004 delivered on 29/11/2004 AND Hon. Justice David K. Mwangutusi holden at Kampala High Court Criminal Session No. 221 of 2013 delivered on 22/11/2013)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted and tried of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. He was on 29th November, 2004 convicted of that offence by the High Court of Uganda at Kampala presided over by Hon. Lady Justice Mary I.D.E Maitum and sentenced to suffer death. However, on 22nd November, 2013 mitigation proceedings where conducted before Justice David K. Mwangutusi and the appellant was sentenced to 37 years imprisonment. He now appeals to this Court against both the conviction and sentence.

Background of the appeal

The background facts as found by the trial Judge were that on 26/7/2001 the appellant and his co accused, Oceng George smashed the door of the deceased's house and shot the deceased at point-blank range. They dragged the deceased outside and beat him with a

pestle and left him for dead. The deceased did not die immediately and was able to tell his children and a Police Officer who his assailants were. The appellant was later arrested by PW3 in 2002 and subsequently indicted of the offence of murder, which he denied. During the trial, the appellant raised a defence of alibi and stated that he was in Hoima tea plantation on that fateful night. The trial Judge found the appellant guilty, convicted him of the offence of murder and sentenced him to suffer death which was mandatory at the time.

Following the Supreme Court decision in ***Attorney General vs Susan Kigula and 417 others, Constitutional Application No. 03 of 2006***, which abolished the mandatory death sentence, the case file was remitted to the High Court for mitigation hearing and re-sentencing. Having heard the submissions of both counsel, the learned Judge sentenced the appellant to 37 years imprisonment.

Being dissatisfied with the decision of the re-sentencing Judge, the appellant appealed to this Court against both the conviction and sentence.

> *"1. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record as a whole thus arriving at a wrong decision that the appellant participated in committing the offence.*
>
> *2. That the death sentence imposed by the learned trial Judge was harsh and manifestly excessive in the circumstance of the case."*

Representations

At the hearing of this appeal, Mr. Simon Ogen represented the appellant on state brief while Ms. Rose Tumuhaise, Principal State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Submissions for the Appellant

At the commencement of the hearing, the appellant was granted leave to amend the 2nd ground of appeal to read as follows:

> *"That the sentence of 37 years imposed by the learned trial Judge was harsh and manifestly excessive in the circumstance of the case."*

On ground 1, counsel submitted that the learned trial Judge in her judgment did not properly evaluate or examine the conditions for identification of the appellant to determine whether they were favourable for proper identification to rule out the case of mistaken identity. He cited the case of ***Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997*** which gives guidelines on the approach to be taken in dealing with evidence of identification of an assailant as follows:

> *"The starting point is that court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been were or were not difficult and to warn itself of the possibility of mistaken identity."*

Counsel argued that the above authority sets out the elements that the trial Judge failed to consider, which include; the lighting conditions at the moment, prior knowledge of the accused person, length of time for observation and the circumstances for the attack. He referred us to page 128 of the judgment where the learned trial Judge stated thus;

> *"I therefore reject their alibi and believe that the deceased knew and identified them on the night of the attack. PW1 identified both by sight and voice."*

Counsel argued that there is no record in his judgment which shows that the trial Judge put the circumstances of identification under scrutiny. He added that had she done so, she would have arrived at a different conclusion. He submitted that both PW1 and PW2 testified that the

attack took place at night between 1:00 am -2:00 am. PW1 stated on page 18 of the record that when the attack took place there was no light other than a torch that was held by the assailants. PW2 testified on page 31 that it was very dark that night and he did not identify the people who chased him, while on his way to the police station. Counsel also submitted that there were contradictions between the evidence of PW3 and PW2 and that the statement made by PW1 on 7/5/2002 cannot be relied upon as it is an afterthought which puts the credibility of the witness in issue. Counsel asked this Court to re-evaluate the evidence as a whole and find that the appellant did not participate in the commission of the offence.

On ground 2, counsel argued that the sentence was ambiguous harsh and excessive. He referred us to page 2, 3 and 4 of the re-sentencing Judge's ruling where after he considered the mitigating factors, he proceeded to sentence the appellant to 37 years imprisonment. Counsel argued that this sentencing is similar to that of ***Turyahika Joseph vs Uganda, CACA No. 0327 of 2014*** in which this Court observed that the trial Judge had intended to impose on the appellant a 50 year sentence. He then considered the period of 3 years the appellant had spent in lawful custody prior to his conviction and the period he had spent in custody from the time of conviction to the time of re-sentencing which was 11 years, and subsequently sentenced the appellant to 36 years imprisonment. On appeal, this Court found the sentence ambiguous and set it aside and substituted it with a sentence of 26 years imprisonment. Counsel prayed that on the basis of that judgment, this Court sets aside the sentence that was imposed based on the wrong application of the law and instead imposes an appropriate sentence after taking into account the mitigation factors and circumstances of this case.

He also cited to us the decisions in ***Hon. Godi Akbar vs Uganda, Supreme Court Criminal Appeal No. 3 of 2013*** where the Supreme Court confirmed a sentence of 25 years imprisonment for murder and in ***Susan Kigula vs Uganda (supra)*** where the Supreme Court reduced a sentence of death to 20 years imprisonment. In ***Muhwezi Obedi vs Uganda,***

Court of Appeal Criminal Appeal No. 147 of 2009 in which the appellant having spent 5 years in lawful custody, was on appeal sentenced to 18 years imprisonment. Counsel submitted that in the above cases the sentences range from 18 to 25 years. He therefore prayed that this Court should consider that and sentence the appellant to a term of imprisonment within the sentencing range of offences of a similar nature.

Submissions for the Respondent

Counsel for the respondent opposed the appeal. She submitted that the prosecution adduced sufficient evidence that warranted the appellant's conviction and sentence. She relied on the case of ***Kalisiti Sebugwawo vs Uganda, Supreme Court Criminal Appeal No. 7 of 1987*** where it was observed that a conviction founded on a dying declaration alone may be good, provided that the Court warns itself of the inherent danger of convicting the accused on the dying declaration of a deceased person not subjected to cross examination. The court further stated that the tests for the truth or a falsehood of a dying declaration are the circumstances favouring or not favouring correct identification by the deceased of the assailant.

Counsel submitted that in the instant case the appellant was placed at the scene of crime. The prosecution adduced the evidence of PW1 Amongin Beatrice, who told court at Page 14, paragraph 2, that the deceased during the attack shouted out the names of his attackers pleading to them not to kill him. Counsel added that PW1 also identified the appellant's voice and she knew the assailants including the appellant because she grew up with them in the same village.

Counsel further submitted that the evidence of PW1, PW2 and PW3 corroborated the evidence of the deceased regarding the identification and participation of the appellant. In addition, counsel submitted that the running away of the appellant from the crime scene after commission of the offence further corroborated the evidence of the deceased.

Counsel also submitted that the conditions for identification of the appellant were favourable to the deceased because the assailants had a torch whose light helped in their proper identification. In conclusion, she submitted that the appellant was properly identified by the deceased at the scene of crime and going by the decision in ***Kalisiti Sebugwawo vs Uganda (supra)*** even in the absence of corroboration, court can base its conviction on the deceased's dying declaration.

On ground 2, counsel prayed that this Court be guided by the principle in ***Rwabugande Moses vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014*** which is to the effect that each case should be determined on its own facts and merit.

Decision of 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 duty of this Court as the first appellate court to review the evidence on record and to reconsider the materials before the trial Judge, and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. See: ***Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10*** **and** ***Kifamunte Henry vs Uganda; SCCA No 10 of 1997.***

The burden to prove a charge of murder against the appellant lays squarely on the prosecution and the guilt of the appellant has to be proved beyond reasonable doubt. The ingredients of the offence of murder that had to be proved at the trial were that the deceased is dead, that the death was unlawful, that there was malice aforethought and finally that the appellant participated in the offence.

The first three ingredients were conceded to by the appellant as having been proved by the respondent beyond reasonable doubt and as such they are not being contested in this appeal.

However, the appellant contends that the last ingredient on participation in the offence was not proved. He specifically challenges the evidence of his identification and faults the trial Judge for failing to properly evaluate the evidence on record as a whole thereby arriving at a wrong decision that the appellant participated in committing the offence.

The law regarding identification has been stated on numerous occasions. In the case of ***Abdulla Bin Wendo & Anor vs R (1953) 20 EACA 166*** the Court held;

> *"Although a fact can be proved by the testimony of a single witness this does not lessen the need for testing with greatest care the evidence of such a witness respecting identification especially when the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error."*

The need for greatest care as emphasized in the above case is not required in respect of a single eye witness only, but is necessary even where there is more than one witness where the basic issue is that of identification. This point was stressed in ***Abudala Nabulere & Anor vs Uganda, Court of Appeal Criminal Appeal No. 9 of 1978 (1979)*** in the following passage in the judgment:

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in*

which the identification came to be made particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.

In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution."

Bearing the above caution in mind, we shall re-appraise the evidence on record with a view of determining whether the trial Judge indeed failed to properly evaluate the same regarding the appellant's identification and came to a wrong conclusion in convicting him.

It is trite law that in arriving at a decision the court is under a duty to take into consideration the evidence as a whole on issues that have to be determined. The court must not selectively consider evidence favouring one side without any regard for that which is unfavourable.

In the instant case, the trial Judge in his judgment at page 128 of the court record held thus;

"I therefore reject their alibi and believe that the deceased knew and identified them on the night of the attack. PW1 identified both by sight and voice. PW2 identified A1 by his voice. The deceased mentioned both accused persons by names to PW3 as he was being taken to Hospital where he died soon after arrival...

In agreement with the Assessors, I find that the Prosecution has proved the case against the accused persons individually beyond reasonable doubt."

The prosecution evidence which the trial Judge relied upon to come to the above conclusion was that the appellant was at the crime scene and he together with his accomplices attacked the deceased. The trial Judge also relied on the dying declaration of the deceased to arrive at his conclusion.

The Supreme Court in ***Tindigwihura Mbahe vs Uganda, Criminal Appeal No.9 of 1987*** held as follows regarding the evidence of a dying declaration;

> *"Evidence of dying declaration must be received with caution because the test of the cross examination may be wholly wanting; and have occurred under circumstances of confusion and surprise; the deceased may have stated this inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Particular caution must be exercised when an attack takes place in darkness when identifications of the assailant is usually more difficult than day light.*
>
> *The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case. It is not guarantee of accuracy. It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the deceased and not subject to cross examination unless there is satisfactory corroboration."*

In the instant appeal, counsel for the appellant argued that the conditions were not favourable for proper identification. However, counsel for the respondent countered this argument and submitted that the appellant was properly identified by the deceased at the scene of crime and that even in the absence of corroboration, court can base its conviction on the deceased's dying declaration.

From the evidence on record, PW3,Detective Constable Oceng Bosco Olukuwode testified that when he found the deceased in the maize garden, he (the deceased) mentioned the appellant and Oceng George as his assailants and the deceased repeated these same names to PW3 while on their way to the hospital.

PW4, Police Constable Opoka also testified that when he went to the deceased's house after receiving a report from PW1 he interviewed the deceased whom he found hidden in the maize garden and he confessed to him that the appellant and Oceng Bosco were the ones who had shot him. This was corroborated by the testimonies of PW1, PW2 and PW5. PW1, Amongin Beatrice, testified at page 14 of the court record that when the assailants attacked her deceased father, he cried out their names saying, *"Okello and Oceng, why are you killing me for nothing."* PW2, Ogwal Lawrence, testified at page 27 of the court record that he heard his deceased father crying for help and saying that the appellant and Oceng were killing him.

PW5, Siclinia Ongom George, the wife to the deceased testified that the deceased, the appellant and Oceng were involved in politics in which they disagreed and that on 27/6/2001 Oceng threw bricks at the deceased and he was injured all over the body. She added that Oceng and the appellant were always together. The trial Judge in his judgment elaborately analysed the law on dying declaration specified in section 30(a) of the Evidence Act and in the cases of ***Uganda vs George Wilson Simbwa, SCCA No. 37/95; Rex vs Woodcock ILeach CC 500*** cited with approval in ***The King vs Perry (1909) 2 KB 697 at 701; R vs Osman 15 Cox CCI.*** Having done so, he accepted the deceased's dying declaration and found that he had properly identified his assailants.

We have also ascertained from the court record that PW1 testified that she was able to identify the appellant by voice since she was familiar with it. **Sarkar on Evidence 14th Edition 1993**, at *page 170* states as follows in relation to identification by voice:

"If the court is satisfied about the identification of persons by evidence of identification of voice alone no rule of law prevents its acceptance as the sole basis for conviction. Possibilities of mistakes in identifying persons by voice especially by those who are closely familiar with voice could arise only when the voices heard are different from the normal voices on account of the situation or when identical voices are possible from other persons also..."

From the above position of the law, the evidence of PW1's identification of the appellant by voice can be relied upon only if she was closely familiar with him. That means the possibility of mistaken identity of the appellant's voice would be ruled out. She testified that she recognized the appellant by his voice because she had known him since 1996 when she was about 6 years old and he used to come to her home with his accomplice Oceng. This means that PW1 had opportunity to interact and talk with the appellant before the incident. Therefore, in our considered view, we find that there was no possibility of mistaken identity by voice since PW1 was very familiar with the appellant and had known him since childhood.

PW1 also testified that the appellant and his accomplices had a torch during the attack which helped her to identify them. At page 13 of the court record, last paragraph, PW1 testified that she identified the appellant as the one who shot her father as his accomplice, Oceng George held the torch and a pestle in his hands.

With regard to proximity between the witnesses and the appellant, PW1 testified that she was in the house with the deceased when the appellant and his accomplices attacked their home. In the 3rd paragraph on page18 of the court record, during her cross examination, PW1 stated that she spent the night in the house where her father was sleeping because of the little child left by her mother. She further testified that when the appellant and his accomplices entered the house, Oceng told the appellant to shoot her but the appellant said that PW1 was a young person and they should first kill the leader. With this evidence, there is no doubt that there

was close proximity between PW1 and the assailants and this aided her to properly identify them.

In his defence, the appellant raised the defence of alibi that on 26/07/2001 he was in Hoima at a tea plantation and came back to Loro in October, 2001. He stated that he was then arrested by PW3 in September, 2002 on charges of committing adultery with the wife of a one Odong Joe. He denied knowing any knowledge of the allegations against him regarding the murder of the deceased.

The trial Judge did not believe his alibi for reasons that had he been in Hoima as he alleged, the police team would not have been told from Amido that the appellant was in Acanpii and from Acanpii that he was in Amidó. The trial Judge found at page 128 of the court record that the appellant might have been in hiding especially since his accomplice had been arrested on the day following the murder. We agree with the trial Judge that the alibi presented by the defence was disproved by the credible and cogent identification evidence of the dying declaration of the deceased and that of PW1 and PW2 which placed the appellant at the scene of crime and was sufficiently corroborated by the testimonies of PW3 and PW4.

Having subjected both the prosecution and the defence evidence to our own scrutiny in relation to the factors set out in ***Abudala Nabulele and anor vs Uganda (supra)*** we are satisfied that conditions favouring correct identification were present. There was adequate light coming from the torch that the assailants had and the distance was close enough for PW1 to properly identify the appellant and his accomplices. In addition PW1 was familiar with the appellant and his voice since she had known him since she was about 6 years old. The deceased was also familiar with his assailants since according to PW5, the appellant and Oceng were involved in politics together with the deceased.

Therefore, we find that the trial Judge was correct to hold that the appellant participated in the murder of the deceased since he was placed at the scene of crime on that fateful night.

Similarly, PW3 and PW4 testified that the appellant disappeared from the village after the incident but he was later arrested. It was also the appellant's testimony that he returned to Loro in October 2001and was arrested in September 2002. To our minds this was not conduct of an innocent person. In ***Remegious Kiwanuka vs Uganda, Supreme Court Criminal Appeal 41 of 1995***, the Supreme Court 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 such sudden disappearance from the area is incompatible with the innocence of such a person.

We therefore find that the appellant's conduct of disappearing from the area corroborated the evidence that he was present at the scene of crime and participated in attacking the deceased person on that fateful night. This was incompatible with his innocence and is incapable of explanation upon any other reasonable hypothesis than that of guilt. Therefore, we cannot fault the trial court for drawing an inference of guilt of the appellant based on the evidence adduced before him which, in our view, was properly evaluated and led to the right decision to convict the appellant.

Accordingly, ground 1 of this appeal fails.

In regard to ground 2 on severity of sentence, although counsel for the appellant only faulted the trial Judge for passing a harsh and manifestly excessive sentence, we our own upon re-appraising the sentencing proceedings discovered that at page 4, 2nd paragraph, the re-sentencing Judge stated thus;

> *"Taking into account that the convict has been in detention for 13 years, I subtract this from the 50 years and hereby sentence him to 37 years imprisonment."*

We note that the words which the re-sentencing Judge used while imposing the sentence that he actually deducted the period of 13 years which included the 2 years and 2 months that the

appellant spent in pretrial detention and the period he had spent in custody upon conviction as he waited execution of his death sentence. By so doing, the trial Judge did not comply with the mandatory provision of Article 23 (8) of the Constitution which provides thus;

> *"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."*

That article only required the re-sentencing Judge to deduct only the period of 2 years and 2 months which the appellant had spent in lawful custody prior to his conviction and it does not include the period he had been in custody after conviction.

In ***Rwabugande Moses vs Uganda (supra)*** the Supreme Court held that;

> *"A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision."*

In the circumstances, we find that the sentence of 37 years imprisonment that was imposed by the re-sentencing Judge without complying with Article 23 (8) of the Constitution was illegal. We accordingly set it aside.

We now invoke the provisions of ***section 11 of the Judicature Act*** which gives this Court the powers, authority and jurisdiction as that of the trial court to impose a sentence of its own which it considers appropriate. In so doing, we shall consider the aggravating factors and the mitigating factors on court record at pages 1-3 of the sentencing proceedings.

The aggravating factors are that; this offence was clearly premeditated and well planned. The assailants shot the deceased with two bullets and also used a pestle to hit him repeatedly, even when the deceased kept pleading to them they did not heed. Clearly the assailants were

determined to kill the deceased; they even made off with his clothes which were subsequently recovered though, after demanding for money and failing to get it. This is a deserving case where the maximum sentence of death should be imposed. We also take into account the factors presented in mitigation that, the appellant is a parent of 4 children and one wife who he left struggling to take care of themselves. Some of the children have dropped out of school due to financial difficulties. The appellant has achieved education and acquired skills for employment for the time he has been in prison. He has no record of previous conviction and he has suffered the death row syndrome which is cruel, inhumane and degrading. He spent two years on remand prior to his conviction. He is reformed and given the opportunity, he will make a better person since he has already had punishment for the crime he committed.

We have also taken guidance from a number of decisions that provide the sentencing range to be imposed in cases of a similar nature.

In ***Atiku Lino vs Uganda, Court of Appeal Criminal Appeal No. 0041 of 2009***, the appellant was convicted of murder and sentenced to life imprisonment. On appeal, this Court sitting at Arua reduced the sentence to 20 years imprisonment.

In ***Tumwesigye Anthony vs Uganda, CACA No. 046 of 2012,*** the appellant had been convicted of murder and sentenced to 32 years. The Court of Appeal sitting at Mbarara set aside the sentence and substituted it with 20 years imprisonment.

In ***Emeju Juventine vs Uganda, CACA No. 095 of 2014*** where the appellant was convicted of the offence of murder and sentenced to 23 years imprisonment. On appeal, this Court reduced the sentence to 18 years imprisonment.

Taking into consideration the sentencing range in the cases cited above and the aggravating factors and mitigating factors presented, we are of the considered view that the ends of justice will be met by sentencing the appellant to 20 years imprisonment in the circumstances of this

case. However, in view of the Supreme Court decision in ***Rwabagande vs Uganda (supra)*** at pages 15-16, we are enjoined to deduct the period of 2 years and 2 months the appellant spent in lawful custody.

In the result, the appellant shall serve 17 years and 10 months imprisonment from the date of conviction, which is 29/11/2004.

We so order.

Dated at **Gulu** this...7th.....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