THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 166 OF 2009

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

1. ANYWAR PATRICK
2. OMA JUSTIN::APPELLANTS

VERSUS

UGANDA ::RESPONDENT

(Appeal from the decision of Hon. Justice Paul. K. Mugamba holden at Gulu High Court Criminal Session Case No. 0035 of 2009 delivered on10/08/2009)

JUDGMENT OF THE COURT

Introduction

This is an appeal against the decision of Paul. K. Mugamba, J (as he then was) in which he convicted the appellants of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act and sentenced each of them to life imprisonment.

Background to the Appeal

The facts giving rise to this appeal as far as we could ascertain from the court record were that the appellants were members of a security group entrusted by local residents with keeping law and order in their area where rampant acts of theft and thuggery were common. The head of the group was Anywar Patrick, the 1st appellant. On 28th October, 2008 Abal Charles (the deceased) was arrested by the appellants on the ground that he had insulted them. As a punishment they decided to keep him in their custody overnight. Early the next morning, the 1st appellant informed a one Komakech Bosco (DW3) that the deceased had died. The appellants were arrested as suspects together with DW 3 and one Okello Simon.

The 1st and 2nd appellants led people to a pit near the barracks where the deceased's body was recovered. The suspects were taken to police.

They were indicted, tried and Okello Simon was acquitted on a no case to answer ruling after the prosecution had closed its case. The remaining three accused persons were put to their defence and DW3 was acquitted while the 1st and 2nd appellants were convicted of the offence of murder and each sentenced to life imprisonment. Being dissatisfied with the decision of the trial Judge, the appellants appealed to this Court against both conviction and sentence on the following grounds;

1. *"The learned trial Judge erred in law and fact when he relied on a weak circumstantial evidence to find the appellants guilty of murder thereby occasioning the appellants a miscarriage of justice.*
2. *The learned trial Judge further erred in law and fact when he failed to properly evaluate the evidence on record thereby coming to a wrong conclusion that the appellants murdered the deceased.*
3. *The learned trial Judge further erred in law and fact when he sentenced the appellants to life imprisonment which sentence is harsh and manifestly excessive in the circumstances, thus occasioning a miscarriage of justice."*

Representations

At the hearing of this appeal, Mr. Donge Opar represented the appellants while Mr. Moses Onencan, Principal State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Case for the Appellants

Counsel for the appellants argued grounds 1 and 2 together and ground 3 in the alternative.

On ground 1 and 2, counsel submitted that the evidence that led to the conviction of the appellants being circumstantial had to point to the guilt of the appellants irresistibly. According to counsel, there was no evidence to prove participation of the appellants. He submitted that according to PW3, the appellants were last seen with the deceased at 11:00 pm on 28/10/2008, the day the offence is alleged to have been committed. PW3 also testified that she heard the deceased crying but she did not see him together with the appellants as he cried. He argued that the deceased's body was found at 5:00 am the following morning and there is no evidence that the deceased was with the appellants between 11:00 pm to 5:00 am.

Counsel submitted that PW2 at page 20, last Paragraph, line 3 stated that only the 1st appellant took them to the pit where the body was found. He contended that that evidence contradicted the evidence of the other 2 witnesses (PW1 & PW3) who stated that both appellants took them to the scene. Further, that at page 24, PW3 testified that Jenifer told her that DW3 had informed her that the deceased was dead but she did not say who killed him.

In conclusion, counsel submitted that the circumstantial evidence adduced by the prosecution did not pin down the appellants as being responsible for the murder of the deceased and so it could not sustain a conviction.

Regarding the alternative ground on severity of sentence, counsel submitted that life imprisonment is harsh and illegal because the trial Judge neither took into account the period the appellants spent on remand as required by Article 23 (8) of the Constitution nor the mitigating factors. The appellants were first offenders and had spent 9 months on remand. The 1st appellant was 49 years old and the 2nd appellant was 26 years old at the time of commission of the offence. Counsel cited the decision of this Court in ***Osodio Robert vs Uganda, CACA No. 35 of 2011*** where a sentence of 25 years imprisonment for the offence

of murder was confirmed. Considering the circumstances of the case, he proposed a sentence of 20 years.

The Respondent's reply.

Counsel opposed the appeal on the 1st and 2nd grounds, he contended that the trial Judge properly evaluated the evidence and rightly came to the conclusion that the appellants participated in the murder of the deceased.

He submitted that the evidence of PW1 and PW3 was that the appellants led them to the scene of crime. PW3 testified that she knew the 1st appellant very well. On the fateful night she took the key to the1st appellant and she heard him telling her husband that they had arrested the deceased for abusing them. She further testified that she had heard the deceased crying as he pleaded with the people who had arrested him. Counsel submitted that, if this evidence is looked at as a whole, it clearly shows that the appellants participated in the murder of the deceased.

As for the alleged contradictions, counsel submitted that it depends on where PW2 was standing. PW1 & PW3 testified that it was the appellants who took them to the scene of crime. He prayed that this Court finds that the trial Judge properly evaluated the evidence that was brought before him and reached the right conclusion that the appellants participated in the murder of the deceased.

Regarding sentence, counsel conceded that the trial court did not take into account the aggravating and the mitigating factors and the period of 9 months the appellants had spent on remand.

He prayed that in the event this Court finds the sentence illegal and sets it aside, it should consider the following aggravating factors; that the offence attracts a maximum sentence of

death and the appellants are leaders who were entrusted with the security of the people they endangered. He urged this Court to deduct the period of 9 months the appellant had spent on remand and sentence him to 30 years imprisonment.

Decision of Court

We are aware of our duty as the first appellate Court under ***Rule 30 of the Judicature (Court of Appeal Rules) Directions.*** We have the onus to re-appraise the evidence and draw inferences of fact. This duty of the first appellate court was elaborately stated by the Supreme Court in ***Baguma Fred vs Uganda, SCCA No. 7 of 2004*** as follows;

> *"The first appellate court should reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, come to its own conclusion on that evidence. In so doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court."*

It is also trite law that an accused person is convicted on the strength of the prosecution case, and not on the weakness of the defence as was held in ***Akol Patrick & Others vs Uganda, Court of Appeal Criminal Appeal No. 60 of 2002.*** We are also alive to the cardinal principle of law that the prosecution has to prove the case beyond reasonable doubt.

Bearing in mind the above principles of law, we shall proceed to consider the 3 grounds of appeal. On grounds 1 and 2, the appellants faulted the trial Judge for relying on weak circumstantial evidence to convict them thereby occasioning a miscarriage of justice.

The records indicate that PW1, Okech Taracicio, the deceased's father, testified that on 29/10/2008 at 9:00am, PW2 went to his house and informed him and his wife that DW3 had told him that the 1st appellant and others had killed the deceased. They then set off to the trading center where they arrested the appellants together with DW3 and the appellants led the crowd to a pit near the barracks where they found the deceased's body.

PW2, Okumu Alito Justin, also testified that on 29/10/2008 in the morning, DW3 informed him that the appellants had killed the deceased. He then went and informed PW1 and his wife whereupon they went to the trading center and found the appellants. They were arrested and the 1st appellant led the crowd to a pit next to the barracks from where the deceased's body was recovered.

PW2 further testified that DW3 and the 1st appellant had gone to his home at night for alcohol. He gave the 1st appellant the keys to pick the beer after which he returned the keys to PW2. Further, that the 1st appellant returned for more beer at 6:00 am in the morning and PW2 sent his daughter to give him the beer.

It was PW3's testimony that on the fateful day the 1st appellant went to her house at 11:00 pm asking for a beer. She gave him the keys at the request of her husband, PW2. PW3 further testified that she heard the 1st appellant tell her husband PW2 that they had arrested the deceased for abusing them. According to her, PW2 asked them not to beat the deceased but to hand over him over to the authorities the next morning. According to PW3, the 1st appellant said they would not beat the deceased but he would spend the night with them. PW3 stated that later in the night she heard the deceased crying and pleading with the people who had arrested him.

PW3 further testified that in the morning, DW3 went to her house and told Jenifer that the deceased was dead and that the appellants had taken his body to the barracks. DW3 also informed PW2 who in turn informed the deceased's family. The appellants together with

DW3 were arrested and the appellants led the crowd to a pit in the army barracks where the deceased's body was.

In his defence, the 1st appellant stated that on that fateful day he was at home at Kweyo and at around 9:00 am, a young girl informed him that he was being called at the road side. When he got there, the people brought the 2nd appellant who they had already arrested. He alleged that he was beaten and he did not lead the people to the place where the deceased's body was as his relatives had already found him.

He further stated that he went to buy beer from PW2's home at around 7.00 pm and not 11:00 pm as alleged by PW3. He denied being a commander of any organization (security group) but stated that he was in the security as one of the members of the Local Council. He also denied the allegations that he informed PW2 that he had arrested the deceased. It was his evidence that he did not know what happened to the deceased.

The 2nd appellant also denied any knowledge of the death of the deceased or putting his body in a pit. He raised the defence of alibi that on 28/10/2008 he was in Alero collecting beans which he took to Koch Kweyo on 29/10/2008 at 2.00 pm. Thereafter he proceeded to the trading center from where he was arrested by the police. He insisted that he was arrested in the afternoon and not in the morning as testified by the 1st appellant. He also denied being tied or beaten by the mob.

DW3, testified that on 28/10/2008 at about 9.00 pm the 1st appellant went to him and said that he had arrested the deceased because he had abused him and he would spend the night there until morning when he would hand him over to the LC. On cross examination, DW3 stated that the 1st appellant told him where he had taken the deceased and invited him to go and see him. He went and found the deceased tied by the hands at the verandah of a bar belonging to PW2. That is when DW3 last saw the deceased alive with the 1st appellant on 28/10/2008 at around 9.30 pm. He further stated that he went and told PW2

that the 1st appellant went to him at about 6:00 am and informed him that the deceased was dead. The appellants and DW3 were arrested that morning.

The learned trial Judge correctly observed that there was no direct evidence to point to the person or persons who took part in the killing of the deceased. However, he evaluated the above pieces of circumstantial evidence and arrived at a conclusion that the appellants had participated in the offence and he accordingly convicted them. The learned trial Judge at pages 65-66 of the court record stated as follows;

> *"I have considered the evidence as assembled. I am in no doubt A1 and A3 led others to the pit where the body was recovered. There is no evidence to implicate A4 similarly. Whoever led others to the place where the body was hidden must have hidden it himself or in the company of others. He must have had the knowledge that the body was there. A1 and A3 knew where the body was deposited and must have participated in the killing of the deceased. There is no other explanation."*

It is clear from the evidence adduced in court and the observation of the learned trial Judge that this case was based purely on circumstantial evidence. The principles which courts apply in deciding cases based on circumstantial evidence were well summarised by the Supreme Court in ***Akbar Hussein Godi vs Uganda, SCCA No. 03 of 2013***, as follows:

> *"There are many decided cases which set out the relevant principles which courts apply in deciding cases based on circumstantial evidence. In the case of Simon Musoke vs R. (1958) E.A. 715 at page 718H, the Court of Appeal for East Africa held that in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon 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. See also Teper vs R. (1952) 2 ALLER 447. Also see Andrea Obonyo & Others vs R. (1962) E.A. 542 where the principles governing the application by courts of circumstantial evidence were considered."

The Supreme Court in ***Janet Mureeba and 2 others vs Uganda, Supreme Court Criminal Appeal No. 13 of 2003*** stated that;

"Generally, in a criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused."

To find a conviction based on circumstantial evidence, the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. See: ***Bogere Charles vs Uganda, Supreme Court Criminal Appeal No. 10 of 1998***.

The above authorities clearly set out how courts ought to deal with circumstantial evidence. Having stated that position of the law, we now proceed to re-appraise the evidence on record and come with our own conclusion as to whether the inculpatory facts in this case are incompatible with the innocence of the appellants, and incapable of explanation upon any other reasonable hypothesis than that of guilt.

As regards the 1st appellant, the evidence of PW2 and PW3 were to the effect that on the fateful night he (the 1st appellant) went to their home to get a beer. The 1st appellant himself does not deny the allegation except that while PW3 said it was at around 11.00 pm, the 1st appellant said he went at around 7.00 (during examination in chief) and 7.30 pm (on cross examination). PW2 testified that he left the bar from where he had been drinking with the deceased at 8.00 pm and went home. Meanwhile, PW3 testified that she returned from the hospital where she had gone to visit her mother at about 7.30 pm and she was already sleeping when the 1st appellant came.

It is clear from the evidence of PW2 and PW3 that when the 1st appellant came for the beer the couple was already sleeping and that is why the appellant was given the key to go and pick the beer from the bar by himself. So it is not possible that the appellant could have come for the beer at 7.00 pm or 7.30 pm. It must have been long after 8.00 pm, the time PW2 left the drinking place, went home and slept perhaps after taking a bath and having dinner.

PW3 further testified that when the appellant came for the beer in the company of the 2nd appellant, whom she did not see but whose voice she heard and identified, the 1st appellant told her husband, PW2 that he had arrested the deceased and her husband told them not to beat the deceased. We take note, as the learned trial Judge also did, of the fact that this evidence was not corroborated by PW2 who is alleged to have been informed and he urged the appellants not to beat the deceased. It cannot therefore be relied upon as being credible.

Be that as it may, the evidence of DW3 who, according to his own testimony was part of the local security arrangement in the village and was on duty that fateful night, is very pertinent. He testified that the 1st appellant came and informed him that he had arrested the deceased for abusing him and he was going to let him spend the night there until morning when he would hand him over to the local council. The 1st appellant told him to go and see where the deceased was and when he went, he found the deceased's hands tied and he was at the verandah of PW2's bar.

DW3 further testified that it was the 1st appellant who informed him at around 6.00 am in the morning that the deceased was dead and he in turn informed PW2. This evidence was not challenged by the defence in cross examination.

From the evidence of DW3, the deceased was last seen with the appellant in a helpless state when his liberty had been curtailed by his hands being tied. DW3 further testified

that PW2 lived in a room behind his (PW2's) bar. The fact that PW2 and his wife PW3 lived in a room behind their bar where the deceased was allegedly held lends credence to the evidence of PW3 that she heard the deceased crying and pleading with his assailants that night.

In addition, PW1, PW2 and PW3 all testified that it was the 1st appellant who led people to the pit where the deceased's body was found. Although the 1st appellant denied this in his evidence, we find that these vital pieces of evidence point irresistibly to the guilt of the 1st appellant.

In ***Mwanga Francis vs Uganda, Supreme Court Criminal Appeal No. 28 of 2003***, the appellant was last seen walking with the deceased and he was the one who led the police to where the remains of the deceased's body were recovered. Although the appellant denied leading the police to that location, the trial court found the appellant guilty and convicted him based on that evidence and the appellant's confession in a repudiated charge and caution statement that was admitted in evidence by consent of the defence counsel.

On appeal to this Court, the charge and caution statement was held to be inadmissible on the ground that failure by the trial Judge to inquire from the appellant whether the statement was voluntarily made or not occasioned a miscarriage of justice. However, upon re-evaluation of the evidence on record, this Court found that there were two sets of evidence which incriminated the appellant with the offence of murder. The first one was that the appellant was last seen with the deceased while she was still alive and the second one was the discovery of the deceased's remains at the location pointed out by the appellant. On that basis, the appellant's conviction was upheld.

On a 2nd appeal, the Supreme Court held that this Court rightly upheld the appellant's conviction based on the two sets of evidence.

The facts of ***Mwanga Francis vs Uganda*** case (supra) are similar to those in the instant case where the 1st appellant was last seen with the deceased when he was alive and he was the one who led people to the pit where the deceased's body was found.

From the two sets of evidence, we find that the trial Judge rightly convicted the 1st appellant because the inculpatory facts are incompatible with his innocence, and incapable of explanation upon any other reasonable hypothesis than that of guilt. We accordingly uphold the 1st appellant's conviction on that basis.

As regards the 2nd appellant, he put up a defence of alibi that on 28/10/2008 he was in Alero collecting beans which he took to Koch Kweyo on 29/10/2008 at 2.00 pm. Thereafter he proceeded to the trading center from where he was arrested by the police. The law is well settled that when an accused person puts up a defence of alibi the duty is upon the prosecution to destroy that defence by adducing evidence which puts the accused at the scene of crime at the time the offence was being committed. ***See: Sekitoleko Vs Uganda, (1967) EA 531.***

The mode of evaluation of evidence in a case where the accused person raises an *alibi* in his defence was succinctly stated by the Supreme Court of Uganda in the case of ***Moses Bogere & Another vs Uganda, Criminal Appeal No. 1 of 1997*** as follows:

> *"Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, but adduces the evidence, showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted."*

Upon our careful re-evaluation of both the prosecution and defence evidence, we find that the prosecution adduced evidence that disproved the 2nd appellant's *alibi*. The 2nd appellant claimed that he came to the trading centre after 2. 00 pm and he was arrested

by the police. He insisted that he was arrested in the afternoon and not in the morning. However, there is ample evidence on record by PW1, PW2, PW3, PW4 and DW3 that the 2nd appellant was arrested together with the 1st appellant and DW3 in the morning of 29/10/2008 immediately after information was got that the deceased had been killed.

PW3 also testified that when the 1st appellant came for beer at night, he was in the company of the 2nd appellant whose voice she heard. This showed that he was in the vicinity of the scene of crime on the fateful night and not in Alero. Both PW1 and PW3 testified that the 2nd appellant also led people to the pit where the deceased's body was found. We cannot therefore fault the trial Judge for his finding that the 2nd appellant's alibi was disproved and for convicting him on the circumstantial evidence that irresistibly pointed to his guilt.

In the result, grounds 1 and 2 of this appeal fail and we dismiss the appeal on those two grounds and uphold the conviction of the appellants.

On ground 2, it was conceded by counsel for the respondent that the trial Judge did not take into account the period the appellant spent on remand and deducted it from the sentenced she imposed on the appellant. We have ourselves perused the sentencing record and we accept that indeed the period of 9 months the appellants spent on remand were not considered and deducted from the sentenced passed by the trial Judge. This contravened ***Article 28 (3) of the Constitution of Uganda.***

The Supreme Court in the case of ***Rwabugande Moses vs Uganda SCCA No. 25 of 2014*** held that a sentence arrived at without taking into account the period spent on remand is illegal for failure to comply with a mandatory constitutional provision.

For that reason, we set aside the sentence of life imprisonment imposed on the appellants for being illegal and invoke ***section 11 of the Judicature Act,*** which permits this Court to exercise the powers of the trial court to impose a sentence of its own.

Before arriving at an appropriate sentence, we shall proceed to consider the mitigating and aggravating factors and the range of sentences in offences of similar nature. The mitigating factors pleaded for the appellants are that; the 1st appellant is 50 years old and the sole bread winner of his family. He had been on remand for 9 months, he is remorseful and has no previous criminal record. He has 2 children who have dropped out of school and their mother is handicapped in a wheel chair. The 2nd appellant has two wives and 4 children with no one taking care of them and paying their school fees. Both appellants have no previous record of conviction. The aggravating factors presented are that the life of the deceased was taken away unjustifiably as he was helpless and the maximum penalty for murder is death.

In ***Tumwesigye Anthony vs Uganda, Court of Appeal Criminal Appeal No. 46 of 2012***, the appellant was convicted of the offence of murder and sentenced to 32 years imprisonment. On appeal, this Court set aside the sentence of 32 years imprisonment and substituted it with 20 years imprisonment.

In ***Mbunya Godfrey vs Uganda, SCCA No. 004 of 2011,*** the Supreme Court set aside the death sentence imposed on the appellant for the murder of his wife and substituted it with a sentence of 25 years imprisonment.

Taking into account the above mitigating and aggravating factors and the range of sentences in similar offences, we are of the considered view that a sentence of 20 years will meet the ends of justice. We now deduct the 9 months the appellants spent on remand from the 20 years imprisonment. In the circumstances, we sentence each of the appellants to 19 years and 3 months imprisonment effective from the date of conviction, that is, 10th August 2009.

On the whole, the appeal against conviction is disallowed and the appeal against sentence is allowed in the terms stated above.

We so order.

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