THE REPUBIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

[CORAM: Egonda-Ntende, Obura &Musota JJA]

CRIMINAL APPEAL NO. 293 OF 2014

(Arising from High Court Criminal Session Case No.1099 of 2009 at Masaka)

Between

KYAMBADDE FRANCIS==========Appellant No.1

TWESIGYE FRANK==========Appellant No.2

And

UGANDA ==========Respondent

(*An appeal from the judgement of the High Court of Uganda [Mike J. Chibita,J.,] delivered on 28th April 2011*)

JUDGEMENT OF THE COURT

Introduction

1. The appellants were jointly indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that on the 22nd of April 2009 at Kamiti Village in Masaka District, the appellants murdered Yiga Yusuf. On 28th April 2009, the learned trial judge sentenced the appellant no.1 to life imprisonment and the appellant no.2 to serve a period of imprisonment for 14 years.

2. Dissatisfied with the decision of the learned trial judge the appellants now appeal against the conviction and sentence on the following grounds:

> '(1) The learned trial judge erred in both law and in fact to convict and sentence the 1st appellant (Kyambadde Francis) basing on a retracted and repudiated charge and caution statement which had been obtained out of duress.
>
> (2) The learned trial judge erred in fact to sentence the appellant no.1 (Kyambadde Francis) to life imprisonment which was a harsh sentence.
>
> (3) The learned trial judge erred in law and in fact to convict the 2nd appellant (Twesigye Frank) basing on the charge and caution statement of the 1st appellant yet the charge and caution statement does not mention the 2nd appellant.
>
> (4) The learned trial judge erred both in law and in fact to convict the2nd appellant (Twesigye Frank) basing on the mere mention of his name by prosecution witnesses which mention was not satisfactorily evidence which occasioned a miscarriage of justice.'

3. The respondent opposed the appeal.

Submissions of Counsel

4. At the hearing, the appellants were represented by Ms Kentaro Specioza and the respondent by Ms Akasa Amina, State Attorney in the Office of the Director, Public Prosecutions. Ms Kentaro submitted that the record of proceedings is marred by errors. There is no mitigation. The opinion of the assessors and summing up notes are not available on the record. She prayed that the court sets aside the conviction against the appellant and not to order for a retrial.

5. Ms Akasa conceded on this point and brought to the court's attention that there was no submission of counsel on the record yet the matter had been adjourned for submissions. That there is also no ruling for the trial within a trial. She stated that these are grave errors that cannot be over looked. She prayed for an order for a retrial against the appellant no.1 only given the circumstances and the nature of the offence.

6. Ms Akasa conceded on the third and fourth ground and prayed that the conviction against the second appellant be quashed and the sentence set aside on the ground that the prosecution failed to prove its case against the second appellant.

Analysis

7. We are mindful of the duty of this court as a first appellate court pursuant to Rule 30 (1) of the Rules of this court and as held by the Supreme Court in Kifumante Henry V Uganda, SC Criminal Appeal N0. 10 of 1997 (unreported) and Bogere Moses V Uganda, SC Criminal Appeal No. 1 of 1997 (unreported). We are required to re-evaluate the evidence that was

adduced at the trial and reach our own conclusions on all issues of law and fact. We shall proceed to do so.

8. The facts of this case are that on the 22nd of April 2009, the deceased sold his cow to a one Kakooza Hussein and was paid cash amounting to UGX 300,000. Later on that night the deceased and his wife Kerugendo Sauda PW1 were attacked by armed assailants demanding for the money from the sale of the cow.

9. Despite the deceased's plea that he had left the money in town, the assailants continued beating him up and PW1. The deceased's body was found outside in the courtyard by his wife, PW1. The assailants raped PW1. The death of the deceased was reported to the LC1 Chairperson who reported the matter to police. Investigations were carried out whereupon the appellants with other persons were arrested and charged with the murder of the deceased.

10. It was brought to our attention by both counsel for the appellants and the respondent that there are some irregularities on the record that point to a mistrial. We shall proceed to consider the irregularities.

11. We have perused the court record and specifically the proceedings at the trial. At page 11-14 of the record, it appears that a trial within a trial was held to determine the admissibility of the charge and caution statement of the appellant no.1. However, there is no evidence of a ruling having been made and delivered by the learned trial judge.

12. A ruling on the admissibility of a charge and caution statement upon conducting a trial within a trial should be in writing, contain the points of objection to admissibility, the decision of the court and the reasons for that decision. A trial within a trial with no ruling is a nullity.

13. On the record there is no evidence of summing up notes to the assessors. Pages 19 to 26 are missing from the record. So it cannot be ascertained whether the trial judge summed up to the assessors.

14. It should be noted that in our jurisdiction, under section 82(1) of the Trial on Indictment Act, summing up to the assessors is mandatory. The provision states:

> 'When the case on both sides is closed, the Judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his opinion orally and shall record each such opinions. A Judge shall take a note of his sum-up to the assessors'

15. In the case of Sam Ekolu V Uganda, SC Criminal Appeal No 15 of 1994, (unreported) the Supreme Court in reiterating this position held that a failure to comply with the obligatory requirement of section 82 (1) of the Trial on Indictments Act by the learned trial judge was a procedural error that was fatal to the appellant's conviction.

16. In this case there was no evidence that the learned trial judge had summed up to the assessors or that he had taken the opinion of the assessors. This irregularity alone renders the trial a nullity.

17. Ms Akasa, counsel for the respondent, prayed for an order for a retrial against the appellant no.1. Where a conviction by a trial court is set aside on basis of a material irregularity in the proceedings which occasioned a mistrial, this court has the discretion to consider directing a re-trial. In the case of Fatehali Manji v The Republic [1966] 1 EA 343 at page 344, the principles governing an order for a retrial were stated in the following words,

> 'In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it'

18. The trial in the court below was a nullity on account of multiple errors made by the court and not the prosecution. The nature of offence is a grave offence. A person lost his life in a very gruesome manner and it is only proper that whoever could have been responsible be brought to justice. We therefore do order a re-trial of the appellant no.1.

19. We note that the appellants have been in custody for 9 years, both pre-trial remand and since conviction. A retrial will be quite onerous upon the appellant no.1, given that we cannot be certain when it would take place. In light of this we shall admit the appellant no.1 to bail on condition that he produces 2 sureties to be approved by the Deputy Registrar, High Court of Uganda at Masaka.

20. Ms Akasa, counsel for the respondent, conceded the third and fourth grounds on the basis that the prosecution failed to adduce evidence pointing to the guilt of the appellant no.2. The learned trial judge relied on the retracted charge and caution statement of the appellant no.1 to convict the appellant no.2. It should be noted that the charge and caution statement was not properly admitted into evidence as the trial within a trial that was held to determine its admissibility was a nullity. There is no other evidence on record implicating the appellant no.2 in the murder of the deceased.

Decision

21. The conviction of the appellants is quashed and the sentences are hereby set aside. The appellant no.2 is released forthwith unless held on some other lawful charge.

22. We order a re-trial of the appellant no.1. We shall admit the appellant no.1 to bail on condition that he produces 2 sureties to be approved by the Deputy Registrar, High Court of Uganda at Masaka.

Signed, dated and delivered at Masaka this 30th day of July 2018.

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal

Stephen Musota
Justice of Appeal