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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL**

**CRIMINAL APPEAL NO. 0233 OF 2012**

**1. ATUGONZA TONY Alias AKIHIKI**

**2. BYARUHANGA DAVID Alias BIZIMUNGU**

10 **3. BALEKERENDA Alias ATEENYI**

**4. BAGUMA SWALEH**

**5. BUSOBOZI MOSES ..... APPELLANTS**

**VERSUS**

**UGANDA ..... RESPONDENT**

15

*(Appeal against sentence by High Court of Uganda sitting at Masindi delivered by Her Lordship Hon. Elizabeth Ibanda Nahamya, Judge on the 19<sup>th</sup> day of December, 2012 in Criminal Session Case NO.0142 of 2011.)*

20 **CORAM: Hon. Mr. Justice Kenneth Kakuru, JA**

**Hon. Mr. Justice F.M.S Egonda -Ntende, JA**

**Hon. Lady Justice Elizabeth Musoke, JA**

**JUDGMENT OF THE COURT**

25 The five appellants were indicated with the offence of murder contrary to *Sections 188* and *189* of the Penal Code on count one and with the offence of rape contrary to *Sections 123* and *124* on count two.

At the hearing the prosecution called 10 witnesses to prove that the 5 appellants on the 9<sup>th</sup> day of January 2011 at Kijungu village in Masindi District murdered

30 one Biferamunda Hamida.

5 Further, that before the said offence of murder was committed each of the 5 appellants on the same date, at the same place raped the said Biferamunda Hamida now deceased.

Each of the appellants denied having participated in the commission of the offences.

10 The trial Judge having been satisfied with the evidence adduced against them convicted each of the appellants on both counts and sentenced each to life imprisonment on each count to run concurrently.

Being dissatisfied with the decision of the trial Judge, the appellant filed this appeal.

15 **Appearances**

At the hearing *Mr. Emmanuel Muwonge* appeared for the 1<sup>st</sup> and 4<sup>th</sup> while *Ms. Angella Behenzire* appeared for the 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> appellants. *Mr. Isaiah Wanamama* Senior State Attorney appeared for the respondent.

20 The 1<sup>st</sup> and 4<sup>th</sup> appellants appealed against conviction and sentence on the following grounds:-

1. *The learned trial Judge erred in law and fact when she convicted the 1<sup>st</sup> and 4<sup>th</sup> Appellant in the absence of incriminating evidence.*
  2. *The learned trial Judge erred in law and fact when she convicted the 1<sup>st</sup> and 4<sup>th</sup> Appellant based on uncorroborated accomplice evidence which was full of falsehoods and grave inconsistencies.*
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5 3. *The learned trial Judge erred in law and fact when she disputed the 1<sup>st</sup> and 4<sup>th</sup> Appellant's alibi based on very weak prosecution evidence.*

4. *The learned trial Judge erred in law and fact she imposed a sentence of life imprisonment on each of the counts of rape and murder respectively, with both sentences to run concurrently against the 1<sup>st</sup> and 4<sup>th</sup> appellants which are deemed to be illegal, manifestly harsh and excessive in the circumstances of the case without taking into consideration the appellants' age and other mitigating factors before sentencing.*

15 The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> appellant's memorandum of appeal sets out their grounds of the as follows:-

a. *The Learned trial Judge erred in Law and fact when she exclusively relied on circumstantial evidence in convicting the accused that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.*

*In the alternative;*

b. *The learned trial Judge erred in law when he did not put into consideration the period spent on remand while sentencing the appellants thereby passing an illegal sentence against the appellant*

*In the alternative;*

c. *The learned Trial Judge erred in Law in passing a harsh and excessive sentence in the circumstances.*

30 **The 1<sup>st</sup> and 4<sup>th</sup> appellants' case**

It was submitted for the 1<sup>st</sup> and 4<sup>th</sup> appellants by Mr. Muwonge that:-

5 There was no evidence adduced at the trial to prove the participation of the two appellants in the commission of any of the offences set out in the indictment.

The evidence relied upon to convict the appellants was that of PW4 Aligaba who was an accomplice. This testimony was full of inconsistencies and falsehoods.

That the evidence of PW4 as to who first called the deceased and whose phone  
10 had been used was inconsistent with what he had earlier stated in his extra-judicial statement.

PW4 Aligaba, who at the trial pleaded guilty to the offences and upon conviction became a prosecution witness is the one who killed the deceased but tried to falsely implicate the appellants. PW4 planned alone to kill his wife the deceased  
15 and went ahead to do it. There is no evidence at all implicating the 1<sup>st</sup> and 4<sup>th</sup> appellants with the offences save that of PW4.

Although PW4 stated that he had planned to kill "his wife" the deceased, in his testimony in Court, he insisted that he had been forced to participate in the crime by the other appellants.

20 Counsel faulted the trial Judge in the manner in which she applied the principle of common intention and submitted that no evidence of common intention had been satisfactorily proved to implicate appellants 1 and 4.

Baguma Swaleh the 4<sup>th</sup> appellant was never placed at the scene of crime. There is no evidence implicating him at all. PW4 got to know the 4<sup>th</sup> appellant from the  
25 Police station. He did not know him before that. He clearly stated in Court that he did not know the 4<sup>th</sup> appellant at all. The Judge wrongly convicted him. His *alibi* was never challenged.

5 The evidence against the 1<sup>st</sup> appellant was largely hearsay. He was never placed at the scene. Pw4 failed to describe the attire donned by the 1<sup>st</sup> and 4<sup>th</sup> appellants at the time the crime was committed, but was able only to describe in detail what the deceased was wearing at that time. Counsel asked Court to quash the conviction and set aside the sentences.

10 On the alternative ground of sentence Counsel submitted that:-

The sentence was illegal as it did not comply with the provisions of *Article 23 (8)* of the Constitution.

He asked the Court to reduce the sentence to 20 years imprisonment on each count

15 **The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Appellants' case**

Mrs. Bahenzire for 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> appellants associated herself with the submissions of Mr. Muwonge and in addition submitted that:-

20 There was no evidence adduced to prove the participation of the appellants in the commission of the offence. The evidence was largely hearsay. The evidence of PW4 being accomplice evidence was weak and that, the trial Judge should never have relied on it, as it was full of contradictions and falsehoods.

The evidence of common intention was circumstantial and insufficient to connect the appellants to the crime.

25 The trial Judge erred when she did not find that appellants had been wrongly charged as joint offenders. PW5 Busobozi was at the time of commission of the offence in prison and could not have participated in its commission. She asked

5 Court to allow the 1<sup>st</sup> ground and quash the convictions and set aside the sentences.

In respect of sentences Counsel submitted that the sentences were manifestly harsh and excessive. She asked Court to reduce them.

**Respondent's reply**

10 Mr. Wanamama opposed the appeal and supported the sentences. He submitted that:-

An accomplice is a competent witness against an accused person and a conviction is not illegal merely because it based upon the uncorroborated testimonies of an accomplice.

15 The confession of PW4 Aligaba, and his testimony in Court implicated the 1<sup>st</sup> and 4<sup>th</sup> appellants. The said witness reservedly confessed his own share of the guilt and implicated himself substantially as his co-accused persons.

The confession is detailed, and it showed Court clearly what happened before and at the time the deceased was killed. There is no evidence that Busobozi the 5<sup>th</sup>  
20 appellant was in prison at the time of the commission of the offence. The 4<sup>th</sup> appellant Swaleh is implicated by PW4, in his extra-judicial statement. The *alibi* setup by 1<sup>st</sup> appellant was disapproved in Court by PW8. The 2<sup>nd</sup> appellant is implicated by the DNA evidence. The deceased's scarf was recovered from his house and had his DNA. The doctrine of recent possession would apply.

25 Counsel asked Court to dismiss the appeal and to confirm the sentence.

5 **Resolution**

We have listened to both Counsel. We have studied the record and read the authorities. As a first appellate court, we are required to re-appraise all the evidence adduced at the trial and to make our own inferences on all issues of law and fact.

10 *Rule 30 (1)* of the Rules of this Court, provides as follows;-

*(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*

*(a) reappraise the evidence and draw inferences of fact; and*

15 *(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.*

The Supreme Court in *Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997*, held as follows;-

20 *“The first appellate Court has a duty to rehear the case and reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on the manner and demeanour, the appellate Court must be guided by the impressions made*  
25 *on the Judge who saw the witness, but there may be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a Court in differing from*

5            *the Judge even on a question of fact turning on credibility of a witness  
              which the appellate Court has not seen."*

The question we are required to determine is the participation of the appellants in the commission of the offence.

We note from the onset that the learned trial Judge was alive to the law regarding  
10 the burden of proof. She carefully evaluated all the evidence on record and all the ingredients of the offence of murder. In her Judgment at pages 5, 6, 7, 8, 9, 10, 11 and 12, the learned trial Judge explained and evaluated in depth all the ingredients of the offence of murder

The learned trial Judge was also alive to the law on circumstantial evidence at  
15 page 13 of her judgment. At pages 14, 15, 16 and 17 she gave a detailed analysis on the doctrine of common intention and we have found nothing to fault her in respect of the position of law regarding all issues of law raised in this appeal. We have found no reason to reproduce the law applicable here the same having been well set out by the learned trial Judge. We also note that the grounds of appeal  
20 did not specifically raise an issue exclusively on a point of law. This appeal therefore revolves largely on issues of fact.

The prosecution's star witness was PW4. He had been previously charged together with the 5 appellants. He opted to plead guilty. He was convicted on both counts of murder and rape on his own plea of guilt. Therefore at the time of  
25 the trial he was no longer a co-accused person with the 5 appellants having already been convicted. He had before then recorded an extra-judicial statement before a Magistrate admitting to the commission of the offences. This statement was admitted in Court as *Prosecution Exhibit 1*. He went on to testify in Court.



5 We have carefully perused the confession statement and also the evidence this witness adduced in Court. Although there are variations, these are minor. The testimony in Court largely follows the confession statement. The contradictions are minor and could be attributed in our view to the lapse of time and the quality of the examination in chief and cross examination. This apart, his testimony in  
10 Court was straight forward and even more detailed than his written confession. The contradictions raised by both Counsel for the appellants regarding the details of this witnesses statement are very minor and do not go to the root of the case. It is immaterial in our view as to whether it was the 1<sup>st</sup> appellant or PW4 who called the deceased inviting her to join them for an evening outing. What is not disputed  
15 is that indeed the deceased received a phone call from one of the appellants or PW4, she went to join them for an outing and she never returned. Her lifeless body was recovered naked the following day.

The 2<sup>nd</sup> appellant was implicated by the testimony and confession statement of Pw4. In addition a number of items were recovered by the Police from his house.  
20 They included a scarf belonging to the deceased. Upon examination of the scarf it was found that it contained the DNA from his semen. The DNA evidence is sufficient to link him to the crime. A part from the scarf the deceased wore the night she was killed he was found with other items including blood stained clothes under his bed. He could not explain the circumstances under which he  
25 obtained the deceased's scarf. Under the doctrine of recent possession, it is well established that a Court may presume that a man in possession of stolen goods soon after the theft is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession. See;- *Kantilal Jivraj &*

5 *Another Vs R. [1961], E.A. 6 at p. 7 and R vs Jassani s/o Mohammed [1948], 15*  
*E.A.C.A. 121.*

This is merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against an accused must be incompatible with innocence and incapable of explanation upon any other reasonable hypothesis.

10 See:- *Simoni Musoke Vs R [1958] E.A. 715.*

In *R Vs Abramovitch [1914-15] All England Law Reports 2004*, Court stated that, when a person charged with handling stolen goods is found in possession of or dealing with goods that have been stolen, a jury may infer that he is guilty if he offers no explanation of his possession or if they do not believe the given  
15 explanation.

In respect of the 1<sup>st</sup> appellant the evidence of PW4 implicates him. His *alibi* that he was at the time in a lodge with his girlfriend was disapproved by the evidence of the girlfriend DW9, and PWS the owner of the lodge. He was not at the lodge with DW9 at the time the crime was committed.

20 In his defence he denied ever knowing the deceased. However, PW5 who owned a bar frequented by the 1<sup>st</sup> appellant testified that the deceased and the 1<sup>st</sup> appellant were friends. She used to see him visit the deceased at least 3 times a week. In PW3's testimony she confirmed that the 1<sup>st</sup> appellant was a well known friend of the deceased, and he used to visit her frequently. Further PW6 detective Corporal  
25 Oyet testified that he had recovered a black wallet at the scene of the crime. He was the investigating officer. The wallet had in it a piece of a paper which contained a number of names. Among the names on the paper were Balekerenda (3<sup>rd</sup> appellant), Tony (1<sup>st</sup> appellant), Swaleh (4<sup>th</sup> appellant).

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According to this witness, this wallet had been dropped at the scene by the 1<sup>st</sup> appellant. This was revealed by PW4. The evidence of a wallet recovered from the scene containing names of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants corroborates the evidence of PW4 independently. It is the information from this wallet that led to the arrest of the 3<sup>rd</sup> appellant. The arrest of the 3<sup>rd</sup> appellant led to the arrest of the 2<sup>nd</sup> appellant. It is from the 2<sup>nd</sup> appellant's home that the deceased's scarf was recovered together with a number of other items including blood stained clothes under his bed. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants were all arrested on 10<sup>th</sup> January 2011 and 11<sup>th</sup> January 2011 following the murder of the deceased on 9<sup>th</sup> January 2011. The evidence that led to their arrest had nothing to do with PW4 as he had not yet been arrested. He was arrested much later on 27<sup>th</sup> February 2011 after the Police had tracked the phone of the deceased and found him to be in its possession. It is at that time that he confessed to the crime. The Police could not have used his confession to implicate the other appellants since they had already been arrested on basis of evidence independently obtained from the scene. His evidence confirmed that the Police were already on the right track and helped tie the loose ends.

In respect of the 4<sup>th</sup> appellant Baguma Swaleh the learned trial Judge found as follows at P. 46-47 of her Judgment:-

*"The Defence submitted that no evidence was adduced by the Prosecution to show that he participated in the murder of the deceased. The Defence Counsel argued that in PW4's own words, he admitted that he did not know DW5 before the arrest but only heard his name being called out at the Police Station. In PW4's oral testimony, he states that he never met*

5 *DW5 on the night of the death of his wife. The Defence submitted that the testimonies of PW4 and PW6 are mixed up concerning the role of DW5. The Defence argues that although PW4 exonerates DW5 from the scene, PW6 places him at the scene. Defence submits that the evidence of PW4 and PW6 is full of contradictions in regard to the participation of DW5 and his role at the scene of crime. However, I note the following facts concerning DW5 and the evidence led against him by PW6. DW5 is incriminated by PW4 in the extra judicial statement (P.Exh.1B). PW4's extra judicial statement incriminates DW5. The facts that are stated therein are within the knowledge of PW4 only. During the trial of the Accused persons in this matter, I noted that there was a problem of intimidation of witnesses including the Investigation*

*Officer and this emanated from relatives of DW5. This fact was exposed by the Investigating Officer (PW6) and I adjourned the matter for a week. Unfortunately PW4 may have feared to raise it at the time of his testimony. I am of the strong opinion that PW4 in his oral testimony was under the same threats that he would not openly reveal the role played by DW4. I am equally enjoined to refer to the evidence of PW10 No. 7731 Corporal Kule Ponsiano, a Prison Officer, who testified that there was a problem of threatening to poison PW4, when he revealed his desire to confess to the charges against him. I find PW4's extra judicial statement to be strong corroborative evidence to that of PW6 that DW5 participated in the murder of the deceased. I therefore have no hesitation to hold that the Prosecution managed to prove its case against DW5 beyond reasonable doubt. I therefore find you **SWALLEH BAGUMA** guilty as charged and convict."*

5 In his extra-judicial statement PW4 stated as follows in respect of the role played by the 4<sup>th</sup> appellant;-

“...the five of us moved, then at the Post Bank we met with Swaleh who had a motorcycle...

10 ...we followed the road to Kolping and Tony ordered me to sit down and Swaleh also ordered the woman (my wife) to sit down. She sat down.

...Tony was smoking opium and he picked a stone and hit it on her head. Swaleh picked the same stone and used it to hit her head while Moses was holding her legs...”

15 In his testimony in chief PW4 stated as follows regarding the 4<sup>th</sup> appellant Swaleh-

*“The last one with a Muslim hat, I don’t know him. I met him in Masindi Prison, when he was brought from Luzira ...*

20 *...Before meeting A5 (Baguma Swaleh) in prison, I did not know him. I read the record about Baguma at the police and when I went to Masindi Prison I found him there”*

It is evident that the witness PW4 changed his story in Court. The Judge faced with two conflicting versions chose to accept the confession statement and gave the  
25 reasons why. She was well within her right to do so. In instances where a witness’ testimony in Court differs substantially from his or her extra judicial statement which is itself evidence the Court is required to evaluate the evidence as a

5 whole and come up with its own inferences. We find that the trial Judge did exactly that and we have found no reason to fault the conclusion that she reached and we uphold it. See:- *Obwalatum Francis Vs Uganda, Supreme Court Criminal Appeal No. 30 of 2015, Clement Namulambo & Another Vs Uganda Criminal Appeal No. 1 of 1978* (unreported) and *Terekali S/o Korongozi & Others Vs R*  
10 *(1952) 19 EACA 259.*

In respect of the offence of rape, the DNA evidence implicates the 3<sup>rd</sup> appellant Balekerenda. The evidence of PW4 implicates the 1<sup>st</sup> appellant Atungoza, the 2<sup>nd</sup> appellant Byaruhanga and the 3<sup>rd</sup> appellant Balekerenda. We have found no evidence implicating the 4<sup>th</sup> appellant and the 5<sup>th</sup> appellant to the offence of rape.

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We find that although PW4 was an accomplice he was a competent witness, on his evidence alone could sustain a conviction. *Section 132* of the Evidence Act (CAP 6) provides that:-

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*“An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.”*

We have found as did the trial Judge that there existed sufficient evidence to  
25 corroborate the testimony of PW4. The DNA of the 3<sup>rd</sup> appellant found the scarf of the deceased which was recovered from his home. The wallet of the 1<sup>st</sup> appellant recovered from the scene, implicating him together with the 3<sup>rd</sup> and 4<sup>th</sup> appellants. The evidence of PW3 and PW5 who were friends of the deceased render credence to the evidence of PW4 that indeed the 1<sup>st</sup> appellant and the

5 deceased were lovers. This testimony also renders false the defence of 1<sup>st</sup> appellant that he did not know the deceased.

We found that there was sufficient evidence to sustain the conviction on the charge of rape against the 1<sup>st</sup> appellant Atugonza Tony, the 2<sup>nd</sup> appellant Byaruhanga David and 3<sup>rd</sup> appellant Balekerenda Geoffrey. Since we have not  
10 found sufficient evidence to implicate the 4<sup>th</sup> appellant and the 5<sup>th</sup> appellant in respect of the offence of rape, we accordingly quash their convictions and set their respective sentences aside. Their convictions in respect of murder are upheld.

All appellants have appealed against their respective sentence. This Court can  
15 only interfere with the trial Judge's discretion on sentence on limited grounds set out in *Kiwalabye Bernard Vs Uganda: Criminal Appeal No.143 of 2001* (unreported) as follows:

*"The appellate Court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless  
20 the exercise of that 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 the trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle".*

25 We find that the sentences in respect of both counts were legal. We are cognizant of the fact that under the Prisons Act 2006, *Section 86 (3)*, life imprisonment is deemed to be a term of imprisonment for a period of 20 years. We do not find that 20 years imprisonment is harsh and excessive in respect of the offences of

5 murder and rape as both carry a maximum sentence of death. Accordingly we confirm the sentences of life imprisonment imposed by the trial Judge on each appellant on count one in respect of murder. We confirm a sentence of life imprisonment on appellants 1, 2 and 3 in respect of the offence of rape.

10 We set aside the sentence imposed upon the 4<sup>th</sup> appellant Baguma Swaleh in respect of the offence of rape.

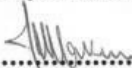
We set aside the sentence of life imprisonment imposed upon the 5<sup>th</sup> appellant Busobozi Moses in respect of the offence of rape.

Each of the 5 appellants, have to serve a sentence of life imprisonment imposed by the trial Court in respect of count one murder, which we have confirmed.

15 In respect of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants their sentences shall run concurrently.

We so order.

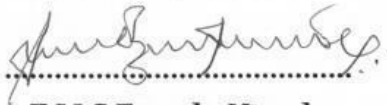
Dated at Fort Portal this ..... 28<sup>th</sup> day of ..... March ..... 2018.

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**Kenneth Kakuru**

**JUSTICE OF APPEAL**


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**F.M.S Egonda-Ntende**

**JUSTICE OF APPEAL**

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**Elizabeth Musoke**

**JUSTICE OF APPEAL**