THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MASAKA
CRIMINAL APPEAL NO. 0771 OF 2014
(Arising from High Court of Uganda at Kampala (Criminal Division) Session Case No. 0135/2014 (Re-sentencing) also arising from High Court of Uganda at Mpigi Criminal Session Case No. 543 of 2001).

SEBYALA RONALD :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala before Alidviza J. delivered on 30th July, 2014 in Criminal Session Case No. 0135 of 2014 (resentencing Court) and the decision of the High Court of Uganda at Masaka before C.A Okello J. (as she then was) delivered on 21st November, 2003 in Criminal Session Case No. 0543 of 2001 (trial Court)).

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA
HON. MR. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF THE COURT

This is a first appeal against the decisions of the High Court of Uganda mentioned hereinafter. The appellant was originally tried before C.A Okello, J. (as she then was) at the High Court of Uganda at Mpigi on an indictment containing two counts of the offence of murder contrary to sections 183 and 184 of the Penal Code Act, Cap 120. He was accordingly convicted and sentenced to suffer, what at the time was the mandatory death penalty. Following the decision in **Attorney General vs. Susan Kigula & 417 others, Supreme Court Constitutional Appeal No. 003 of 2006**, wherein the mandatory death sentence was declared to be unconstitutional and the directions made therein that convicts who had been sentenced to serve the mandatory death penalty be heard in mitigation and re-sentenced, his file was referred back to the trial Court for mitigation of sentence. The appellant was accordingly heard and sentenced to serve a term of imprisonment of 34 years by Alividza, J, the learned re-sentencing Judge.

The following is the brief background:
In the trial Court, it was the case for the prosecution in count 1 that the appellant, on or about the 10th day of May, 2000 at Muguluka Village, Wakiso district murdered Madlena Namusoke. In count 2, the case for the prosecution was that on or about the same day indicated in count 1, at the same village, the appellant murdered Brian Nakabale. Although the appellant denied any involvement in the murder of the said deceased persons, the learned trial Judge believed the prosecution case and convicted the appellant as indicted and sentenced him to suffer death which was the mandatory punishment upon conviction for murder. As earlier mentioned, the appellant was later heard in mitigation and sentenced to imprisonment for 34 years. Being dissatisfied with the above decision, the appellant appealed to this Court on grounds which were set forth in a supplementary memorandum of appeal which was admitted on the court record after the relevant leave of this Court was obtained. The grounds were that:

"1. **The learned trial Judge erred in law and fact when she decided that prosecution had proved its case beyond reasonable doubt using circumstantial evidence and reached a wrong decision, thus occasioning a miscarriage of justice.**

2. **The learned trial Judge erred in law and fact when she sentenced the appellant to 34 years of imprisonment (sic), which sentence is harsh to the appellant who is remorseful, and it occasioned a miscarriage of justice."**

Representation

At the hearing of the appeal, learned Counsel Lule Alexander represented the appellant on State Brief, while, Mr. Peter Mugisha, learned State Attorney from the Office of the Director of Public Prosecutions, represented the respondent. Counsel for each party made oral submissions.

Appellant's case

In ground 1, the case for the appellant was that the learned trial Judge, had, in convicting the appellant relied on circumstantial evidence which was

insufficient to warrant the said conviction. The circumstantial evidence consisted of the evidence of possession of a pick axe, which was the alleged murder weapon; and evidence of the conduct of the appellant in the aftermath of the murder in question.

Appellant's counsel pointed out that a pick axe was indeed found in the appellant's house upon a search being carried out there. It was found to have had blood stains of the "O" group. No tests were carried out to determine precisely whom that blood belonged to which would have supported the learned trial Judge's findings that the blood thereon was for the deceased persons and therefore the murder weapon. He contended that as PW7 had testified that the blood group "O" was predominant among Africans, the failure to ascertain whether the blood belonged to the deceased should have raised a doubt which doubt should have been determined in favour of the appellant.

On the evidence concerning the conduct of the appellant, counsel submitted that it was erroneous for the learned trial Judge to hold that the conduct of the appellant after the murders in question revealed a man in quandary. He further submitted that the finding that, "...he (the appellant) wanted the murder of Madalena discovered soon but he was concerned that he should not be the one to make the discovery..." was not supported by the evidence on record. On the contrary, counsel contended that the appellant had shown the responsibility and commitment to ensure that the murder of the deceased persons was looked into by the Police Officers since he had reported the incident to the Police.

Counsel contended that the reliance on the circumstantial evidence in issue did not follow the established rules that were discussed in the previously decided cases, for example; **Baitwabusa Francis vs Uganda, Supreme Court Criminal Appeal No. 0029 of 2015**; and **Mbaguta Ronald & Another vs. Uganda, Court of Appeal Criminal Appeal No. 0061 of 2018.**

It was further the case for the appellant that he had set up an alibi which had established that during the time of the commission of the offences in question the appellant was at home with his wife. The said alibi was not destroyed by the prosecution which further buttressed the appellant's case that he did not participate in the murders in question. Counsel for the appellant then asked this Court to quash the appellant's conviction by the trial Court and to set him free.

In ground 2, counsel asked this Court to interfere with the sentence of 34 years imprisonment. He contended that the sentence had been imposed without taking into account the mitigating factors for the appellant nor the need to maintain consistency in cases of a similar nature. He further contended that the re-sentencing Court had acted illegally when it reopened the second sentence of death which had been suspended by the trial Court. Counsel asked this Court, in the alternative, that if the appellant's conviction is maintained, that this Court deems it fit to impose a lighter sentence in the circumstances.

Respondent's Case

The respondent opposed the appeal. In ground 1, counsel for the respondent submitted that there was sufficient circumstantial evidence before the trial Court to justify the appellant's conviction. The circumstantial evidence had revealed that the appellant had failed to turn up and/or participate in a village meeting where voting had been held to determine the perpetrator of the murders in issue. It had also been revealed that the appellant had been found in possession of the murder weapon which had traces of blood belonging to the deceased persons.

Further, the circumstantial evidence had proved that the appellant had behaved like a person who was interested in concealing the death of the deceased persons when he sent away two young girls who had come to see the deceased Madalena to deliver a message to her at her home. Counsel contended that the circumstantial evidence referred to above, when taken together, had irresistibly pointed to the appellant's participation in the

murder of the deceased persons. Therefore, following proper evaluation of that evidence, the trial Court was justified to convict the appellant. Counsel asked this Court to maintain that conviction.

In ground 2, counsel supported the sentence imposed by the trial Court on grounds that it was neither harsh nor excessive in the circumstances. He contended that the learned re-sentencing Judge had considered the mitigating factors that; the appellant had reformed while in prison; he was a first offender with no previous record of conviction; and the period spent on remand by the appellant. She had also considered the following aggravating factors; the offences in question were grave in nature and attracted the death penalty as a maximum sentence upon conviction; the appellant had carried out the offences in a pre-meditated manner; the appellant had inflicted injuries of a grave nature on the victims. In counsel's view, the facts of the case placed it in the category of the rarest of rare cases as the victims were related to the appellant.

Counsel cited **Bakubye Muzamiru & another vs Uganda, Supreme Court Criminal Appeal No. 0056 of 2015** where a sentence of 40 years was upheld by the Supreme Court in a case of murder. On the basis of that authority, counsel asked this Court to maintain the sentence of 34 years which was imposed on the appellant as the same was lenient.

In conclusion, counsel asked this Court to dismiss the appeal and maintain the conviction and sentence of the appellant.

Rejoinder

Counsel for the appellant contended that his learned friend for the respondent had confirmed that the appellant was arrested because the villagers were suspicious of him in the absence of credible evidence linking him to the murders. Although, other suspects had been identified by the villagers, the case proceeded against the appellant alone. This made him a victim of circumstances.

In rejoinder to the submissions of respondent's counsel about the evidence of a pick axe, counsel submitted that it was not established by the

prosecution that the wounds inflicted on the deceased persons were by a pick axe. Moreover, the blood found on the pick axe was not fresh, meaning that it may have got on the pick axe much earlier than the time of the murder of the deceased persons, which cast doubt on the prosecution case that the pick axe was the murder weapon. Counsel then reiterated his earlier prayer to allow the appeal.

Resolution of Appeal

We have carefully considered the submissions of counsel for each side, the court record as well as the law and authorities cited, and those not cited, which are relevant in the determination of the present appeal. This is a first appeal and we are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with our own inferences. **See: Rule 30 (1) of the Rules of this Court.** In **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997** it was observed that:

> **"...on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to 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 as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses."**

We shall bear the above principles in mind as we proceed to determine the present appeal.

On 12th May, 2000, the bodies of Madalena Namusoke (70 years old) and Nakabale Brian (10 years old) both residents of Muguluka Village, Namagumba Sub-County in Wakiso District were found lying lifeless in the house where they lived. The cause of the former's death was multiple lacerated wounds over the right temple and right forehead while the latter had died as a result of, "a lone external injury, homicidal cut throat and deep

cut through the neck." No one witnessed the commission of the violent events which took place in the deceased persons' home. The bodies of the deceased were discovered by the appellant who sounded an alarm. There was no immediate response to the alarm, but at a later time, several inhabitants of the village responded to the alarm.

The inhabitants of the village gathered at the deceased's home. They entered the home and inspected it. Inside the deceased's home, there were dried blood stains on the wall. The older victim's body was found in her bedroom, it was covered with red ants. The body lay face down and the head was concealed by a bed. The child's body lay in the open. The victims' bodies were removed from the scene of crime and taken away by the police.

On the same day, an ordinary axe was discovered from the scene of crime by the appellant. He confirmed that it belonged to him but said that it had earlier gone missing from his home. The axe appeared to be blood stained so the police retained it as an exhibit. On 15th May, 2000, the appellant was arrested in connection with the murders in question. Later in the day, his house was searched. A pick axe which appeared to have dried blood was recovered under one of the beds there. The appellant confirmed that he owned the pick axe but denied that the substance found on it was blood. He further stated that the pick axe was often rented by other inhabitants of the village who would return it after use. In all, the police had recovered the following exhibits; a pick axe with blood stains recovered from the appellant's house; a different axe with blood stains recovered from the deceased's house; a lump of soil with blood stains got from the house of deceased Namusoke where her lifeless body was found; and a piece of white cloth with blood stains got from the body of Brian Nakabale.

The exhibits were subjected to forensic examination and it was discovered that all the above exhibits were found to contain human blood and of a similar blood grouping ABO type O. It was established by the evidence of PW7, Ali Lugundo, who carried out the forensic examination, that the blood group O is prevalent among most Africans.

Hence the case depended exclusively on circumstantial evidence revolving around the "ordinary" axe and the pick axe as there was no direct evidence to identify the perpetrator.

In his submissions, counsel for the appellant argued mainly that it could not be concluded that the blood stain on the pick axe belonged to the deceased persons. He maintained that the fore going doubt coupled with the defence of alibi raised by the deceased should have led to his acquittal by the learned trial Judge. The contrary finding by the learned trial Judge, was therefore, erroneous.

Counsel for the respondent opposed the appeal. He supported the findings of the learned trial Judge that there was sufficient circumstantial evidence to implicate the appellant in the murders in question. Firstly, that the appellant had refused to participate in a village meeting which had been convened to discuss the suspected perpetrators of the murders in question. Secondly, that the murder weapon and the pick axe retrieved from the appellant's home shortly after the murders in question all contained human blood of the 'O' group. Thirdly, that the accused had conducted himself like a man in a quandary as he wanted the murder of the deceased persons to be discovered soon by other persons, not him. He reasoned that the appellant had said in his defence that he was at the deceased's place on 10th May, 2010, the day when the deceased persons were last seen alive. Therefore, the conduct of the appellant in reporting to the deceased's home was stage managed to exonerate him of the murders which he had committed.

It has been established from the English Common law that the burden of proving the guilt of the accused person in criminal law lies with the prosecution throughout the trial. It was held in the famous case of **Woolmington vs DPP [1935] AC 462** that:

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and**

> **on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal."**

The law on circumstantial evidence has been well settled since the decision in **Simoni Musoke vs. R [1958] 1 EA 715**, where it was held that:

> **"...in a case depending exclusively upon circumstantial evidence, he (the judge) must find before deciding upon conviction 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. As it is put in Taylor on Evidence (11th Edn.), p. 74–**
>
> **"The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt." "**

Before anything can be said about circumstantial evidence, there must exist inculpatory facts against the appellant. Those facts have to be established and proven beyond reasonable doubt. The evidence adduced to implicate the appellant in the deceased persons' murder was that the blood stains on a pick axe obtained from his home shortly after they were murdered and the stains on the murder weapon were those of the deceased persons'. This was based on the conclusion that those facts had been proved beyond reasonable doubt.

As observed earlier, the relevant forensic examination which was carried out revealed that the exhibits, including the murder weapon and the relevant pick axe were found to have blood stains of the blood group 'O'. It did not establish precisely whose blood it was, whether it was for the deceased persons or the appellant's or any other person. This was because, as PW7 testified in cross examination, the laboratory where the relevant forensic examination was conducted lacked the sophisticated technology, facilities and capacity to carry out the tests which would aid in establishing precisely whom the blood on the pick axe belonged to. Had there been means of

establishing that the blood on the pick axe belonged to the deceased persons, it would have been vital to securing a conviction. Those facts would have been established beyond reasonable doubt. Other than that, the fact that the pick axe had the deceased persons' blood would not have been sufficiently proven and the appellant had to be acquitted.

The learned trial Judge had this to say at page 94 of the record:

> **"The finding of two axes at different times and at different places, taken together with the forensic finding that both axes contained human blood of the 'O' grouping. And considering the evidence that Madalena was murdered with a weapon that could have been an axe with the result that there was a lot of blood in her house, leads me to a conclusion that the owner of the two axe (sic) is the person who used the axes to kill Madalena. He forgot to take away the cutting axe but managed to carry away the pick axe that was found in his house. That person without any doubt in my mind is the accused."**

With the greatest of respect, the above conclusions by the learned trial Judge were not justified on the weight of the evidence adduced for the prosecution. True, the murder weapon found at the scene of crime was an axe which belonged to the appellant but it was not established that he had used it at the scene of crime. The appellant had explained that the axe had gone missing from his home. It was, therefore, not justifiable to conclude as the learned trial Judge did, that the two axes were used in the commission of the offences in question by the appellant.

The other piece of circumstantial evidence which was relied on by the learned trial Judge was that the appellant's conduct after the commission of the offences was the conduct of a man in a quandary. This was due to the fact that he wanted the deceased person's murder discovered soon but by other persons so that he did not have to answer questions about his discovery. It was because of the fore going that on 11th May, 2000, he had chosen to receive Madalena's message from the two unidentified girls on her behalf. The learned trial Judge had also found that the appellant's discovery of the deceased persons' bodies was based on "suspense which was too

much for the appellant". The learned trial Judge had this to say at page 94 of the record:

> **"...It is the suspense that drove him to Madalena's home on the 12.05.2000. This time despite apparent absence of people from Madalen's home, and despite the presence of a padlock on the door which indicated to anybody not in the know that the door was locked, the accused knew better. He ignored the outward deceptive appearances and approached the door. He discovered that the lock was infact (sic) locking nothing. He did not stop there as one would expect, he called out for people and established that there was no one at home, but he decided to enter the house all the same. He did so and found his dead grandmother.**
>
> **He did not make an alarm immediately; he entered Brian's room first. The alarm came only when it was clear that Brian to (sic) was dead. Had the accused been innocent, the natural re-action would have been to raise an alarm immediately he saw the body of Madalena.**
>
> **The behavior of the accused taken together with the ownership of the two axes proves without any doubt, that the accused killed Madalena. Accused's admission of ownership of the cutting axe soon after its discovery at the murder someone (sic) only served to divert the attention from him for a while. He knew that owning up to ownership of the axe would at that stage, would lead to all and sundry, who heard him, do so entertain grave doubts concerning his guilt. The reasoning would be that he would have denied ownership if he was guilty of the murder in the home (sic)." (emphasis ours)**

Under the underlined portion of the judgment, the learned trial Judge suggested that the appellant had admitted ownership of the murder weapon to divert attention. However, this was not brought out by the prosecution and only appears in her judgment. It is rather speculative. Furthermore, the trial Court's finding that the appellant in entering the deceased's house, despite it having been locked with a padlock, was indicative of some ulterior motive, was also speculative. The evidence indicated that the deceased persons were his relatives and it was not too wild to expect him to have a good relationship with them. The conclusion reached by the learned trial Judge that the appellant had delayed his alarm until he saw Brian's body is

making a mountain out of a mole hill. There is no established objective standard on how and when an alarm should be raised.

We further find it odd that none of the persons whom the appellant said to have occasionally rented his pick axe were called by the prosecution to find out the veracity of those claims.

All in all, we find that the evidence relied on to convict the appellant was insufficient. We, hereby, accordingly quash the conviction of the appellant of the offence of Murder by the learned trial Judge. He is to be forthwith set free unless he is being held on other lawful charges.

We so order.

Dated at Masaka this 9th day of Dec. 2019.

.....

Elizabeth Musoke

Justice of Appeal

.....

Ezekiel Muhanguzi

Justice of Appeal

.....

Remmy Kasule

Ag. Justice of Appeal