THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO.23 OF 2019

AYER ISAAC..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(An appeal from the decision of the High Court at Lira before Hon. Lady Justice Dr. Winfred Nabisinde dated the 28th day of June, 2018 in Criminal Case No. 37 of 2016)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Lady Justice Percy Night Tuhaise, JA

Hon. Mr. Justice Remmy Kasule, Ag. JA

JUDGMENT OF THE COURT

This is an appeal from the Judgment of the High Court in High Court Criminal Case No. 37 of 2016 at Lira before Hon. Lady Justice Dr. Winfred Nabisinde, dated 28th June, 2018 in which the appellant was convicted of the offence of murder contrary to *Section s 188* and *189* of Penal Code Act and sentenced to 20 years and 8 months imprisonment.

The appellant being aggrieved by the decision of the High Court now appeals to this Court on the following grounds:-

1. *The learned trial Judge erred in law and facts when she held that there was sufficient circumstantial evidence to convict the appellant, thereby occasioning a miscarriage of justice.*

2. *The learned trial judge erred in law and fact when she imposed a harsh and excessive sentence in the circumstances of the offence, thereby occasioning a gross miscarriage of justice to the Appellant*

Representation

At the hearing of this appeal *Mr. Paul Ochaya Achellam* learned Counsel appeared for the appellant on state brief while *Mr. Martin Rukundo* learned Assistant Director of Public Prosecutions appeared for the respondent. The appellant was present.

Appellant's case

The appellant's Counsel submitted that:- The prosecution case against the appellant was purely circumstantial. There were no eye witnesses to the offence. The circumstantial evidence adduced was insufficient to sustain a conviction against the appellant.

The appellant was well known to the deceased Odyek Daniel. They had a drink together and parted ways on 12th September 2014. Four days later on 16th September 2014, the appellant's decomposing body was found in his home on his bed covered with bed sheets. The postmortem reports clearly show that he had been murdered. The only evidence against the appellant is that he had been heard threatening to kill the deceased.

It was also the prosecution case that the appellant had been trying to flee the village upon releasing that he was about to be arrested for the murder of the deceased. Upon his arrest he was found with a bag containing a blood stained bedsheet.

During the trial, an exhibit slip was produced showing that the said bedsheet had been submitted to the Government Analytical Laboratory (GAL) at wandegeya for examination. However the trial ended before results were obtained. In the absence of any evidence linking the blood stained bedsheet to the appellant, Counsel submitted that the remaining evidence was insufficient to sustain the charge.

Further, Counsel contended that, the appellant ably explained in his defence that the said bedsheet belonged to him and the blood stains on it were his own. The same had been stained with his blood following an incident in which he had been assaulted. He had kept the blood stained bedsheet on advice of the police to be used in future as an exhibit. He was fleeing from his home village because a mob had attacked his home on suspicion that he had killed the deceased and he feared for his life. He picked the bedsheet for his use as he was in a hurry.

Counsel contended that, the death of the deceased could have been caused by others as there was no sufficient evidence to prove that it was the appellant who killed him.

He prayed this Court to allow this appeal, quash the conviction and set aside the sentence.

Respondent's reply

Mr. Rukundo for the respondent opposed the appeal and supported the sentence. He submitted that, although the conviction was based only on circumstantial evidence, the offence had been sufficiently proved against the appellant. He contended that, when the different pieces of evidence are considered together and not in isolation of each other, they justify the conclusion arrived at by the learned trial Judge that the appellant was responsible for the murder of the deceased Adyek Daniel, on 12th September 2014. The pieces of evidence, Counsel submitted, were, the grudge the appellant had against the deceased in respect of a motorcycle, the fact that it was the appellant who was last seen with the deceased on the night of 12th September 2014 and that the appellant had issued threats against the deceased. There was also the evidence of the appellant's conduct after the body of the deceased had been found, when he attempted to flee from his own village and district to elsewhere on a motorcycle. Finally, upon his arrest the appellant was

found to be in possession of a blood stained bedsheet, which was suspected to have belonged to the deceased.

The explanation of the appellant, Counsel submitted, was insufficient to explain the circumstances under which he came to be in possession a blood stained bedsheet.

He prayed Court to considered the authorities submitted to Court and the evidence on record, and up hold the decision of the trial Judge.

Resolution

We have carefully considered the submissions of both Counsel and have also studied the Court record and the authorities cited to us.

We have a duty as a first appellant Court to re-appraise all the evidence adduced at the trial and to make our own inferences on issues of both fact and law. See:-*Rule 30(1)* of the Rules of this Court, *Kifamunte Henry vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997* and *Bogere Moses vs Uganda Supreme Court Criminal Appeal No. 1 of 1997.*

It is common ground that the appellant's conviction was based solely upon circumstantial evidence.

The learned trial Judge set out the evidence at trial for both the prosecution and defence, in detail. She went on to analyse the evidence before arriving at the conclusion that she did.

In *Akbar Hussein Godi vs Uganda, Supreme Court Criminal Appeal No. 03 of 2013* , the Supreme Court re-echoed the long standing principles of the law in respect of circumstantial evidence 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 ALL ER 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".

In *Katende Semakula vs Uganda, Supreme Court Criminal Appeal No 11 of 1994* the Supreme Court emphasised the requirement to subject the circumstantial evidence to close scrutiny as follows:-

"Another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another. It is therefore necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference..."

In *Waihi and Anor Vs Uganda (1968) E.A. 278 at p. 280*, the East African Court of Appeal stated:-

"Evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of murder, but its probative value varies greatly and may be very small or even amount to nothing. Regard must be had to the manner in which a threat is uttered, whether it is spoken bitterly or of impulsively in sudden anger or jokingly, and reason for the threat, if given, and the length of time between the threat and the killing are also material. Being admissible and being evidence tending to connect the accused person

with the offence charged, a prior threat is, we think capable of corroborating a confession..."

We shall proceed to do so.

The evidence against the appellant first relates to threat he is said to have uttered against the deceased. This is considered by the trial Judge at page 14 of her Judgment. However, it is clear from the testimony of PW6 Opule Jasper that threats against the deceased were uttered by one Okwele and not the appellant. Okwele and the appellant had been jointly indicated for the offence. It appears that the trial Judge attributed this to the appellant when she applied the doctrine of common intention. PW6 also talked about a grudge between the appellant and the deceased resulting form an incident in which the deceased was said to have been having sexual relationship with the appellant's sister, which relationship was revulsive to both the appellant and Okwele.

The trial Judge also considered the evidence of PW7 Olet Johnson who testified that, the appellant was drinking alcohol with the deceased and other persons the night he was last seen alive on 12th September 2014. It seems to us that, the learned trial Judge found the evidence of the blood stained bedsheet recovered from the appellant as he fled from his village on the day the deceased's decomposing body was found compelling.

She concluded her detailed analysis as follows at page 27 and 28 of her Judgment as follows;-

> *"In this case, the court has considered the fact that **PW5** saw the accused in the company of the deceased the night he was last seen alive and as he was called away to repair a radio, he saw the accused and his cronies mixing the drinks they were taking with waragi and the wine that the deceased was taking. He*

also was certain that they had all left the bar together that night and it is that the deceased was never seen alive again.

The above is beefed up the evidence of ***PW6 and PW7*** *who all confirmed that there was bad blood between the family of* ***Al*** *and the deceased. I have also found that it is not by coincidence that* ***DWI*** *was arrested with a blood stained bed sheet confirmed to have belonged to the deceased by* ***PW9.***

Having carefully analyzed at all the above pieces of circumstantial evidence, I have not found any explanation as to why the accused was in possession of a blood stained bed sheet which he was fleeing with from the scene except that he intended to hide it since it implicated him. ***It*** *leads me to only one conclusion that the accused person had a hand in killing the deceased; and that he acted in common intention with others still at large. He himself and his witness* ***DW2*** *his father also gave very contradictory evidence as to the date he allegedly sent him to his sister and feigned ignorance of his time of* ***DW1's*** *return after he had allegedly sent him to his stepmother.*

Finally, my own conclusions taking into account all the events in this case and the position of the law under section ***20 PCA*** *is that the defence of* ***DWI*** *was just an afterthought intended to evade justice.*"

We shall first deal with the evidence of the threats. In this case, the threat appears to have been made by Okwele Able and not by the appellant on 12th September 2014 or earlier. Even if the threats had been made by the appellant they were not taken seriously as PW6 stated that, he did not report the threat to the Police. It also appears not to have been made directly to the deceased. The deceased himself appears clearly not to have taken the threats seriously as on 12th September 2014 he was in the company of the appellant and his co-accused at the trial, one Okwele,

who escaped from the prison during trial. The appellant, Okwele and the deceased appear from the prosecution evidence to have been going on along well. They were at a bar drinking together that evening of 12th September, 2014 or 11th September as the appellant put it in his evidence.

Be that as it may, evidence of a threat must be corroborated. The evidence which the learned trial Judge found to have corroborated the threat was that the deceased was last seen alive in company of the appellant and his co-accused. But as stated above this conduct may be interpreted to account for the absence of any threat. The deceased apparently did not feel threatened by the appellant and his co-accused, that evening when he left the bar in their company. We do not consider that the fact that, the appellant was last seen with the deceased is sufficient to corroborate the evidence of a prior threat.

The blood stained bedsheet found in possession of the appellant would have corroborated the threat. However in his defence the appellant stated that the blood was his. This was before the bedsheet had been taken to GAL for tests. The question was whether the blood on that bed sheet was that of the deceased or the appellant.

Even in absence of GAL results, it is not plausable that a person who killed another would keep intact such incriminating evidence in his possession for a period of 5 (five) days. If the bedsheet was that of the deceased and was blood soaked upon his being murdered by the appellant, we find it unreasonable that the appellant would have taken it to his home in the first instance, then try to flee with it after he had known that a mob was chasing him suspecting him of the murder of the deceased. The defence evidence appears to us to be more realistic. The bedsheet belonged to the appellant.

It was blood soaked following an assault on him. He took it to police. He was advised to keep it as an exhibit. When he was fleeing for his life he took it along in a hurry as that is what he could lay his hands on at the critical moment when his life was in danger.

He had to flee, according to his testimony, because a mob was looking for him to kill him in revenge for the death of the deceased. In the absence of the blood results from GAL, we find that the evidence of the blood stained bedsheet on its own is insufficient to link the appellant to the murder of the deceased or to corroborate the evidence of the threats referred to earlier. The trial Judge ought to have found so.

The evidence on record is only sufficient to make the appellant a mere suspect. Suspicion, however strong, cannot be sufficient to sustain a conviction. See: *R vs Israel Epuku S/o of Acheitu (1934)1 EACA 166.*

The death of the deceased in this case is capable of being explained under a number of other hypotheses. Accordingly we find merit in this appeal and we allow it.

The appellant's conviction for the offence of murder is hereby quashed and the sentence imposed upon him is hereby set aside. He is freed from custody unless he is being held on some other lawful charges.

Dated at **Gulu** this.....20th.....day of .....Dec.....2019.

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Kenneth Kakuru

JUSTICE OF APPEAL

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Percy Night Tuhaise

JUSTICE OF APPEAL

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Remmy Kasule

Ag. JUSTICE OF APPEAL