THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT JINJA
CRIMINAL APPEAL NO. 224 OF 2014

Coram: Cheborion Barishaki, Stephen Musota, Percy Night Tuhaise, JJA

Egesa John..... Appellant

V

Uganda..... Respondent

(Appeal from the judgment of Hon. Lady Justice Alividza Elizabeth Jane in High Court Criminal Session Case No. 192 of 2011 at Iganga dated 30/4/2014)

JUDGMENT OF COURT

The appellant was convicted of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that the appellant on 20th July 2011 at Mwango Village in Namayingo District, unlawfully killed Binaisa Godfrey. The appellant was sentenced to 17 years imprisonment. Dissatisfied with the conviction and sentence, he appealed to this Court on the following grounds:-

1. That the learned trial Judge erred in law and fact when she passed an excessively harsh sentence against the appellant without considering several mitigating factors hence occasioning a miscarriage of justice.
2. That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record, thus erroneously convicting the appellant.

3. That the learned trial Judge erred in law and fact when she found the appellant guilty without proof of malice aforethought.

Background

The brief background to this case is that the appellant was a fisherman resident in Mwango Village Lolwe East Sub County Sigulu Namayingo District. He was aged 45 years at the time of committing the offence. The deceased and the appellant were known to each other as fishermen. On 20th July 2011, while at a bar, the appellant and the deceased got into a fight that left the deceased pierced in the head and stomach. The deceased bled and was rushed to clinic and later to hospital where he was pronounced dead. The appellant was arrested and taken to Kadege Police.

Representation

At the hearing of this appeal, Mr. Dhakaba Ishaq represented the appellant. Mr. Ssemalemba Simon, Assistant Director of Public Prosecutions, represented respondent. The appellant was in court at the hearing of his appeal.

Submissions for the Appellant

Mr. Dhakaba Ishaq submitted that the appellant denied having committed the crime, which left the prosecution to prove their case beyond reasonable doubt as set out in **Woolmington V DPP [1935] AC 462**. Counsel submitted that the prosecution evidence was full of lies and tainted with irregularities which do not even place the appellant at the scene of crime as required by law, since the appellant pleaded alibi. He cited **Obwalatum V Uganda Criminal Case No. 30 of 2015** and submitted that it is incumbent for the trial court and the Court of Appeal to determine whether or not the appellant was put at the scene of crime.

The appellant's counsel also submitted that the prosecution brought only two witnesses, namely PW1, a fish monger who claimed to have witnessed the commission of the crime, and PW2, the Investigating Officer (IO). According to Counsel, while PW1 confirms that the killing of the deceased happened in a public place, a bar, he was the only eye witness who testified in Court.

Counsel further submitted, in the alternative, that, in case it is true the appellant killed or caused death of the deceased person, it was not a pre-meditated murder, in that the death was caused without malice aforethought. He argued that the appellant did not willingly kill the deceased person; and that he was intoxicated and/or provoked by the deceased person. He cited **Okwang William V Uganda Criminal Appeal No. 69 of 2002** where provocation was defined as meaning any act which causes one to lose self-control, and the death must have occurred during a heat of passion. Counsel argued that in the instant case, PW1 testified that the appellant had been thrown down by the deceased amidst a fight at a bar, that the deceased is the one who boxed him. According to Counsel, the testimony of PW1 indicates that there was an element of provocation by the deceased.

The appellant's counsel submitted that the sentence of 17 years imprisonment passed against the appellant by the learned Judge was harsh and was given without considering the weaknesses in the prosecution's case. Counsel argued that the prosecution had an obligation to prove all the ingredients of murder beyond reasonable doubt, which it failed to do when it failed to place the appellant at the scene of crime.

Counsel submitted that courts have in previous cases substituted a harsh sentence with more convenient sentences. He cited **Tumwesigye Anthony V Uganda, Criminal Appeal No. 46 of 2012** and **Ndyomugenyi V Uganda, Criminal Appeal No. 57 of 2016** to support this position.

The appellant's counsel prayed that this court reduces the sentence of murder to manslaughter, or sets aside the conviction and acquit the appellant. In the alternative the appellant's counsel prayed that the appellant's custodial sentence of 17 years be set aside and substituted with a much lesser sentence. He suggested that a custodial sentence of about 5 years would be enough for the appellant to reform and become a better person and citizen.

Submissions for the Respondent

Mr. Ssemalemba submitted for the respondent that the appellant was properly convicted, and that the sentence meted out on him was justified in the circumstances. He submitted that in the instant case, the death was unlawful, as shown by the evidence of PW1 who saw the appellant killing the deceased. He contended that there were unlawful injuries inflicted on the deceased which caused his death, and that the act of inflicting the injuries was unlawful. He submitted that the learned trial judge properly dealt with this issue.

Regarding the participation of the appellant and the number of witnesses produced in court by the prosecution, the respondent's counsel submitted that section 133 of the Evidence Act provides that there is no particular number of witnesses required to prove a fact. He argued that it was not fatal for the prosecution to produce one witness. He submitted that PW1 saw the accused person whom he knew before, and that the offence was committed at around 6 pm.

Counsel argued that the learned trial Judge addressed herself on the law as to whether the single identifying witness (PW1) was well known to the appellant. He also submitted that the trial Judge addressed herself to the conditions of lighting at 6 pm, the distance between the witness and the accused at the time of identification, as well as the length of time of identification. He contended that the foregoing factors were all properly

evaluated by the learned trial judge who properly came to the proper conclusion that it is the appellant who killed the deceased.

Regarding the sentence, the respondent's counsel submitted that the learned trial judge considered the period the appellant had spent on remand, which was 4 years. He also submitted that the trial Judge also considered the fact that the appellant was a first offender, and that she removed 10 years from the sentence. He submitted that the trial Judge considered the fact that the appellant was remorseful, which left a balance of 17 years. He in addition argued that the appellant has not shown that the sentence was manifestly excessive or even illegal.

The respondent's counsel concluded that the sentence given by the learned trial Judge against the appellant was, in the circumstances, justified. He prayed that this court does not interfere with the sentence passed by the lower court, and that conviction and sentence should be upheld.

Consideration of the appeal.

This is a first appeal. The duty of this Court, as a first appellate court, is to re-evaluate the evidence adduced at the trial and come to its own conclusion, as required under rule 30 (1) of the Rules of the Judicature (Court of Appeal Rules) Directions 2005. However this Court should bear in mind that, unlike the trial court, it did not have the opportunity to see and hear the witnesses as they testified. See **Pandya V R [1957] EA 336; Henry Kifamunte V Uganda, Supreme Court Criminal Appeal No. 10/1997; Bogere Moses V Uganda, Supreme Court Criminal Appeal No. 1 of 1997**.

We shall first address grounds 2 and 3 together since they all concern evaluation of evidence on record, which includes proof of malice aforethought raised by the appellant in ground 3 of his appeal. Ground 1 will be dealt with last as it deals with sentence.

Grounds 2 and 3

The ingredients of the offence of murder are the death of a human being; the unlawfulness of the killing; the death being accompanied by malice aforethought; and the participation of the accused in the unlawful killing. It is a strict requirement of the law that for a conviction to be held, the prosecution must prove all the said ingredients beyond reasonable doubt.

The first ingredient of the offence that there was death of a human being, in this case Binaisa Godfrey, was proved beyond reasonable doubt by the prosecution. It was an agreed fact, and a post mortem report was tendered in Court as **PX1**.

The second ingredient of the death being caused unlawfully was challenged by the appellant whose counsel submitted that there was an element of provocation from the deceased, and that both deceased and the appellant were intoxicated.

The death of all human beings are presumed to be unlawful except when they are excusable by law. Both sides agreed on this position of the law. The four excusable circumstances are that the death was occasioned in defence of self or property; that it was an accidental death; that the death was occasioned under extreme provocation; or that the death was occasioned in the execution of a lawful sentence.

The adduced evidence on record, in form of exhibit (**PX1** the post mortem report), shows that the deceased's death was caused by injuries, that is, one open wound on the left hand just below the elbow, one wound on the frontal region just superior to the left eye, and two wounds on the left hypochondrial region. The trial Judge therefore correctly found that the ingredient of the death being unlawful was proved by the prosecution beyond reasonable doubt.

The third ingredient of the offence of murder is that the death was caused with malice aforethought. The appellant in ground 3 of this appeal faulted

the learned trial Judge for finding the appellant guilty of murder without proof of malice aforethought.

Section 191 of the Penal Code Act provides as follows:-

> *"Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances—*
> *(a) an intention to cause the death of any person, whether such person is the person actually killed or not; or*
> *(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused."*

Malice aforethought relates to the mind of the accused at the time of commission of the offence. In ***Nandudu Grace & Another V Uganda, Criminal Appeal No.4 of 2009*** the Supreme Court reiterated the earlier decision of this Court in ***Francis Coke V Uganda [1992-93] HCB 43*** that the existence of malice aforethought is not a question of opinion, but one of fact to be determined from the available evidence. The Court stated that in determining whether the prosecution has proved malice aforethought, the Court has to examine the circumstances surrounding each case. These circumstances include the nature of the wounds inflicted; the part of the body injured; the type of weapon used; the conduct of the accused person immediately before and after the injuries causing death were inflicted; and the manner in which the weapon was used, for instance, whether the weapon was used repeatedly or not.

In the instant case, PW1 testified during trial that the appellant was fighting with the deceased. The appellant boxed the deceased in the face and the stomach with his fist which had a knife. He then disappeared in the bush.

When he was apprehended, he was found with a knife covered with blood. He was handed over to the Kadege police with the knife, which was exhibited in court as **PX4**.

The nature of the weapon used, in this case a knife, the parts of the body attacked, in this case the head and the stomach which are very delicate and sensitive, and the conduct of the appellant after the act, that is, running away in the bushes, all prove beyond reasonable doubt that the death of the deceased was caused with malice aforethought.

We note that the appellant's counsel in his submissions introduced the defence of provocation which was not raised at trial. The adduced evidence on record at pages 16 and 17 is very clear that the appellant raised the defence of alibi. The appellant did not raise the defence of provocation at trial. He cannot therefore raise it before this Court at appellate level because the prosecution did not have an opportunity to produce evidence in rebuttal or respond to it at trial.

The fourth ingredient of the offence of murder is the participation of the appellant. The appellant pleaded alibi that he was out mending his nets at his home at the time the deceased was killed. His counsel strongly submitted that his client was not placed at the scene of the crime. However, the evidence of PW1, which was credible and consistent, placed the appellant squarely at the scene of crime, effectively destroying his alibi.

We note that the evidence of PW1 which placed the appellant at the scene of crime was by a single identifying witness. The conditions under which the identification was made were conducive for positive identification, as set out in **Nabulere & Others V Uganda [1979] HCB 77**. These, as deduced from the adduced evidence, were that PW1 the single identifying witness knew the appellant as a fisherman in the area; the incident happened at 6 pm when it was not yet dark; and the fighting between the appellant and the deceased was only 30 meters away from PW1.

The record shows on page 29 that the learned trial judge warned herself of the dangers of relying on the evidence of a single identifying witness whom she found to be credible and consistent. We agree with the trial Judge that PW1 positively identified the appellant whom he knew, and placed him at the scene of crime hence discrediting his alibi.

The appellant faults the prosecution for having called one eye witness claiming that since the place where the deceased was killed was a public place (a bar), there should have been many witnesses. The record shows that the prosecution called two witnesses, that is, PW1 who was an eye witness, and PW2 the investigating officer. The evidence of PW1, even though it can stand on its own, was nonetheless corroborated by that of PW2 the investigation officer, and by exhibits **PX1, PX2, PX3 PX4**.

Section 133 of the Evidence Act states that there is no particular number of witnesses required to prove a fact. It was therefore not fatal for the prosecution to produce one witness. We agree with the respondent's counsel that no particular number of witnesses is required to prove a piece of evidence.

Thus, based on the evidence on record, which we subjected to fresh scrutiny, and the law applicable to this case, we are satisfied beyond reasonable doubt that the learned trial judge properly evaluated the evidence and came to a right conclusion that the prosecution had proved the case of murder against the appellant beyond reasonable doubt.

We find no merit in grounds 2 and 3 of this appeal.

Ground 1

In **Kiwalabye Bernard V Uganda, SCCA No. 143 of 2001**, the Supreme Court stated the principle that the appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on

sentence, unless the exercise of the 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 a trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle.

The record shows on pages 30 and 31 that, in sentencing the appellant, the trial judge stated at follows:-

> *"The offence carries a sentence of death but I will start from 35 years as per sentencing guidelines. I will remove 4 years as period spent on remand leaving 31 years. I will remove 10 years to cover the fact that the convict is a first offender leaving a balance of 21 years. The accused is remorseful, I will remove 3 leaving a balance of 17 years. The use of violence as a way to sort problems should be punished and therefore I sentence the convict to 17 years imprisonment".*

Thus, based on the foregoing statements, we are of the considered opinion that, at least in principle, the learned trial judge considered all the mitigating factors and the aggravating factors, plus the period the appellant had spent on remand, and rightly sentenced the appellant.

We find no merit in ground 1 of this appeal and it fails.

This appeal therefore fails on all grounds and is hereby dismissed. We uphold both the conviction and the sentence of 17 years imprisonment against the appellant.

Dated at Jinja this ....8th.....day of .....Oct.....2019

Hon. Mr. Justice Cheborion Barishaki
Justice of Appeal

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Hon. Mr. Justice Stephen Musota

Justice of Appeal

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10 **Hon. Lady Justice Percy Night Tuhaise**

Justice of Appeal