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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT GULU

CRIMINAL APPEAL NO.749 of 2015

1. **OTEMA LEO**
2. **OGWENG FRANCIS .... APPELLANTS**

10

VERSUS

UGANDA .... RESPONDENT

(An appeal from the decision of the High Court at Apac before Her Lordship Hon. Lady Justice Dr. Winfred Nabisinde dated the 10th day of November, 2014

15 *in Criminal Session Case No. 0083 of 2012)*

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice F.M.S Egonda- Ntende, JA
Hon. Lady Justice Hellen Obura, JA

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JUDGMENT OF THE COURT

This is an appeal from the decision of *Dr. Winifred Nabisinde J*, in High Court Criminal Case No. 0083 of 2012, in which the appellants were tried and convicted of the offence of murder contrary to *Sections 188* and *189* of the Penal Code Act (CAP

25 120) and sentenced to 35 years imprisonment and 25 years imprisonment respectively.

Being dissatisfied with both conviction and sentence they now appeal to this Court on the following grounds:-

5 1. *The learned trial Judge erred in law and fact when she allowed the appellants' trial without effective legal representation in accordance with Article 28(3)(c),(d) and (e) of the Constitution of the Republic of Uganda, 1995, thereby occasioning a miscarriage of justice.*
2. *The learned trial Judge erred in law and fact when she failed to assist the* 10 *appellants call witnesses in accordance with Article 28 (3) (g) of the Constitution of the Republic of Uganda, 1995, thereby occasioning a miscarriage of justice.*
3. *The learned trial Judge erred in law and fact when she convicted the appellants on a single identifying witness whose truthfulness is not credible in the absence* 15 *of corroboration by the testimony of the investigating officer and other witnesses.*
4. *The learned trial Judge erred in law and fact when she admitted unchallenged and incriminating medical evidence without ascertaining from the appellants their knowledge of the consequences of the evidence, thereby occasioning a* 20 *gross miscarriage of justice.*
5. *The learned trial Judge erred in law and fact when she disregarded the defence of alibi without credible evidence thereby occasioning gross miscarriage of justice.*
6. *The learned trial Judge erred in law and fact when she convicted the appellants* 25 *on evidence that does not meet the standard of proof.*
7. *The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence, thereby arriving at the wrong conclusion.*
8. *The learned trial Judge erred in law and fact when she relied on hearsay evidence to convict the appellants, thereby occasioning a gross miscarriage of* 30 *justice*

5 9. *The learned trial Judge erred in law and fact when she convicted the appellants on circumstantial evidence that does not point towards the appellants' guilty, thereby occasioning a gross miscarriage of justice.*

10. *The learned trial Judge erred in law and fact when she failed to properly sum up the law and evidence to the assessors thereby occasioning a miscarriage.*

10 11. *The learned trial Judge erred in law and fact when she proceeded with absence of the assessors.*

12. *The learned trial Judge erred in law and fact when she exhibited bias against the appellants thereby occasioning a gross miscarriage of justice.*

15 *In the Alternative*

13. *The learned trial Judge erred in law and fact when she failed to take into account the period spent in lawful custody in accordance with Article 28 (8) of the Constitution of the Republic of Uganda 1995 thereby rendering the sentence a nullity.*

20 14. *The learned trial Judge erred in law and fact when she failed to properly exercise her discretion in mitigating sentence thereby occasioning a gross miscarriage of Justice.*

15. *The learned trial Judge erred in law and fact when she passed a harsh and excessive sentence of 35 years in respect of the 1st appellant and 25 years in*
25 *respect of the 2nd appellant, thereby occasioning a gross miscarriage of justice.*

Representations

At the hearing of this appeal, *Mr. Daniel Evans Olwoch* together with *Ms. Shamim Amollo* learned Counsel appeared for the appellants while *Mr. Patrick Omia* learned Senior State Attorney appeared for the respondent. The appellants were present.

30 ## Appellants' case

5 Mr. Olwoch proposed to argue grounds 10 and 11 together, grounds 1, 2 and 12 jointly, grounds 3, 4, 5, 6, 7, 8 and 9 then grounds 13, 14 and 15.

In respect of grounds 10 and 11, Counsel submitted that the learned trial Judge erred when she proceeded with the trial in the absence of assessors. He argued that, it is a legal requirement for assessors to be appointed and to attend the whole trial 10 failure of which renders the whole trial a nullity.He further submitted that, the learned trial Judge failed to properly sum up the law and evidence to the assessors this was reflected in the opinion they gave. In their opinion they stated that all the prosecution witnesses and defence witnesses placed the appellants at the scene of the crime yet in actual sense there was only one single identifying witness. He 15 submitted that the trial was a nullity and asked Court to allow the appeal.

On grounds 1, 2 and 12, Counsel contended that, the appellants were denied the right to a fair hearing as provided for under *Article 28(3)(c),(d)* and *(e)* of the Constitution. He contended that, the appellants were not assigned a lawyer on state brief yet they had been indicted with a capital offence. The first lawyer who 20 represented them was Ms. Irene Aber holding brief for Mr. Isaac Okae, did not adequately represent them which made the appellants get a lawyer on private brief at their own expense. Counsel further contended that the lawyer on private brief also failed to represent the appellants as expected which occasioned a miscarriage of justice.

25 In respect of grounds 3, 4, 5, 6, 7, 8 and 9, Counsel argued that, the learned Judge failed to properly evaluate the evidence on record. She convicted the appellants on the evidence of a single identifying witness which was not corroborated and wrongly disregarded the appellants' defence of *alibi*. He asked Court to quash the conviction and set aside the sentence.

30 On grounds 13, 14 and 15, Counsel submitted that, the learned trial Judge while passing sentence failed to take into account the period the appellants had spent on

5 remand which rendered the sentence a nullity. He also contended that, the sentences imposed upon the appellants were harsh and manifestly excessive in the circumstances of the case.

The respondent had to file written submissions in reply within 14 (fourteen) days after the hearing but failed to do so.

10 **Resolution**

We have considered the submissions of Counsel and carefully perused the record. We are alive to the fact that this Court has a duty as the first appellate Court to re-appraise the evidence and come up with its own conclusions. See: -*Rule 30(1)* of the Rules of this Court, *Kifamunte Henry vs Uganda: Supreme Court Criminal Appeal No.*
15 *10 of 1997* and *Bogere Moses vs Uganda: Supreme Court Criminal Appeal No. 1 of 1997.*

In respect of grounds 10 and 11, the learned trial Judge is faulted for conducting the trial in the absence of assessors and also failed to conduct a proper sum up to the assessors. The legal requirement for assessor is provided for under *Section 3* of the
20 Trial on Indictments Act. It stipulates as follows:-

> *"(1) Except as provided by any other written law, all trials before the High Court shall be with the aid of assessors, the number of whom shall be two or more as the court thinks fit."*

From the onset we wish to point out that the above legal requirement is mandatory
25 in nature. Absence of assessors from a trial is not a mere irregularity. *Section 69* of the same Act stipulates that in absence of an assessor the trial proceeds with the aid of the other assessors. If more than one of the assessor are prevented from attending or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of different assessors. See: *Abdu Komakech vs Uganda [1992-93]*
30 *HCB 21.*

5 Counsel for the appellant alleged that, the assessors were absent throughout the whole trial. We have to establish the fact of attendance or non-attendance of the assessors. We have carefully perused the record and it indicates at page 9 that on 4th July, 2014 the assessors were present and at page 11 the assessors were allocated. The summing up for the assessors was conducted on 8th October, 2014 and

10 rendered their opinion on 14th October, 2014. In their joint opinion they advised Court to convict the appellants on ground that the appellants were squarely placed at the scene of the crime.

Upon clear perusal of the record we have noted that the learned trial omitted to record the presence of the assessors, however the issue of absence of the assessors

15 was not raised by Counsel for the appellants at the trial and it is not indicated anywhere on the record that the assessors were absent. The learned trial Judge in her judgment noted that, the two assessors were present throughout the whole trial. Accordingly, it is in our view that this issue was raised as an afterthought and we find that the omission by the learned trial Judge to record the presence of the

20 assessors was due to laxity and as such it did not occasion a miscarriage of justice. *Section 139* of the Trial on indictments Act stipulates as follows:-

> *"Reversibility or alteration of finding, sentence or order by reason of error, etc.*
>
> *(1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of*

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> *any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.*
>
> *(2) In determining whether any error, omission, irregularity or misdirection has*

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> *occasioned a failure of justice, the court shall have regard to the question*

5 *whether the objection could and should have been raised at an earlier stage in the proceedings."*

We find the learned trial Judge's omission to record the presence of the assessors did not occasion a miscarriage of justice.

It was also contended that the learned trial Judge did not properly sum up to the
10 assessors. From the record, we note that the learned trial Judge while summing up for the assessors properly spelt out the facts, the evidence and the law. We have no reason to fault the learned trial Judge and as such we find no merit in these grounds of appeal.

On grounds 1, 2 and 12 Counsel contended that, the appellants were denied the
15 right to a fair hearing as provided for under *Article 28(3)(c),(d)* and *(e)* of the Constitution. *Article 28(3) (e)* of the Constitution categorically states that where an accused person is facing trial on a charge which carries a sentence of death or life imprisonment, he or she is entitled to legal representation at the expense of the State. This requirement is mandatory. A look at the proceedings of the trial Court
20 reveals that the appellants were represented by Ms. Irene Aber holding brief for Mr. Isaac Okae on state brief. They later notified Court that they had another lawyer to represent them. It is not indicated anywhere on record that they were denied legal representation. We find no merit in these grounds of appeal.

In respect of grounds 3, 4, 5, 6, 7, 8 and 9, the learned trial Judge is faulted for having
25 failed to properly evaluate all the evidence on record. The issues in contention are in respect of evidence of a single identifying witness which was not corroborated and that the defence of *alibi* was wrongly disregarded by the learned trial Judge. The main point in contention is the participation of the appellants in the commission of the offence. The only evidence that implicates the appellants is that of PW3 Ogwal
30 Alex who testified that he identified the assailants as the people who killed the deceased on the 8th day of May 2012.

5 PW3 being a single identifying witness testified in Court that he witnessed the events which transpired in the night the deceased was murdered. In examination in chief he stated as follows:-

"On 8/5/2012, we went to Omale trading centre with Sylvia. It was at 6:00PM. When we were about to reach home it was 7:00PM. Otema Leo came from the
10 *bush with a metal bar and she fell down. He hit the back of her head. He then cut her head with a panga.*

Ogweng also came running and grabbed me and pressed me and told me if I make alarm, they were going to kill me as well. Then they ran away and left me there. I left there and went to my paternal uncle Opio James...

15 *That day, I saw the accused persons cut the deceased at 7:00PM. I could see well, it was not yet very dark...*

The cutting of the deceased did not take long, about 3 minutes. I was at a distance of 2½ metres between me and the old woman."

The legal position on identification was discussed by the Supreme Court in *Bogere*
20 *Moses Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.* Court stated as follows:-

"This Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases. The starting point is that a court ought to satisfy itself from the evidence
25 *whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the court must consider the evidence*
30 *as a whole, namely the evidence if any of factors favouring correct identification*

5 *together with those rendering it difficult. It is trite law that no piece of evidence should be weighed except in relation to all the rest of the evidence (See Sulemani Katusabe vs Uganda, Supreme Court Criminal Appeal No. 7 of 1991 unreported)."*

The conditions which Court may consider when determining as to whether or not
10 the prevailing conditions favoured an identification free of error were discussed in *Abdallah Nabulele & Others -vs- Uganda (1979) HCB 77* as follows:-

"Where the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence disputes, there is need for caution before convicting the accused in reliance on
15 *the correctness of identification. The reason for a special caution is the possibility that a mistaken witness can be a convincing one and a number of such witnesses can all be mistaken. Court should closely examine the circumstances in which the identification came to be made particularly the length of time, distance, the light, familiarity of the witness with accused. All*
20 *these factors go to the quality of the identification evidence. If the quality is good, the danger of mistaken identity is reduced, but the poorer the quality, the greater the danger. When the quality is good, as for example, when the identification is made after a long time of observation or in satisfactory conditions by the person who knew the accused before. A Court can safely*
25 *convict even though there is no other evidence to support the identification provided the Court warns itself of the special need for caution."*

In the instant case, PW3 testified to have recognised the appellants who were 2½ metres away with the aid of moonlight and light emitting from the burning hut. We consider the distance of 2½ metres to be close enough for proper identification of
30 the appellants who were well known to the witness. The appellants were not strangers, they were residing in the same village and the witness knew the 1st

5 appellant personally since they used to work together. We find that, the presence of moonlight was a favourable factor which aided positive identification of the appellants as the assailants at the scene of the crime. We find that, the conditions under which the appellants were identified favoured correct identification.

It was further contended by Counsel for the appellants that, there was need for 10 corroboration of the evidence of a single identifying witness. In *Abdalla Bin Wendo & Another vs R. (1953), 20 EACA 166,* the East African Court of Appeal held that:-

> *"(a) The testimony of a single witness regarding identification must be tested with the greatest care.*
>
> *(b) The need for caution is even greater when it is known that the conditions 15 favouring correct identification were difficult.*
>
> *(c)Where the conditions are difficult, what is need before convicting is other evidence pointing to guilt.*
>
> *(d) Otherwise, subject to certain well known exceptions, it is lawful to convict on identification of a single witness so long as the Judge adverts to the danger of 20 basing a conviction on such evidence alone."*

The legal position is that the Court can convict on the basis of evidence of a single identifying witness alone. However, the Court should always warn itself of the danger of possibility of mistaken identity in such case. This is particularly important in cases where there were factors which presented difficulties for identification at 25 the material time. The Court must in every such case examine the testimony of the single witness with the greatest care and where possible look for corroborating or other supportive evidence, so that it can be sure that there is no mistake in the identification. If, after so warning itself and scrutinising the evidence, the Court finds no corroboration for the identification evidence it can still convict if it is sure that 30 there is no mistaken identity. Corroboration therefore is only a form of aid required

5 where conditions favouring correct identification are difficult. See: *Abdala Nabulere & Another vs Uganda (Supra) Moses Kasana vs Uganda (1992 - 93) HCB 47* and *Bogere Moses & Another vs Uganda (Supra).*

In the instant case we have found that conditions under which PW3 identified the appellants favoured correct identification. The evidence of PW3 therefore did not 10 require corroboration it could alone hold the conviction. We note that the learned trial Judge considered the sole identification evidence by PW3 accurately and came to the correct conclusion that the conditions favoured correct identification, there was sufficient light provided by the moon. The witness observed the appellants for a reasonable length of time, besides he had known the appellants before the night 15 they killed the deceased. We find the evidence relied on by the learned trial Judge was so cogent and safe to base a conviction on.

It was also argued that, the appellants' defence of *alibi* was wrongly disregarded. The learned trial Judge disregarded the defence of *alibi* basing on testimony of PW3 who squarely placed the appellants at the scene of the crime. In *Festo Androa Asenua* 20 *& Another vs Uganda, Supreme Court Criminal Appeal No.91 of 1998,* it was held that:-

> *"It is trite law that by setting up an alibi, an accused does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case... The burden of the person setting up the defence of alibi is to account for so much of time of the transaction in question as to render it impossible as to have* 25 *committed the imputed act."*

The appellants denied having participated in the offence, stating that they were in different places and not at the scene of the crime. The 1st appellant stated that on 8th May 2012, he was at his home on the material day and never left until next day when he was arrested by the Police and Local Council 1. The second appellant stated 30 that, on 8th May, 2012 he was at his home up to 3:00PM. He went to the trading Centre at Omale and left it at 7:30PM.

5 The defence of *alibi* can be discredited either by prosecution which squarely places an accused at the scene of the crime or by prosecution evidence which directly negates or counteracts the accused's testimony that he was in a particular place other than at the scene of the crime. The latter can be by the prosecution presenting witnesses to testify that, they were at the particular place where the accused says he 10 was but he was not present in the said place. The defence of *alibi* can also be discredited when the witnesses who testify in support of the accused having been in a place other than the scene of the crime are rendered untruthful. See: *Kazarwa Henry vs Uganda, Supreme Court Criminal Appeal No. 17 of 2015.*

The other way of disposing of an *alibi* is for the prosecution to adduce cogent 15 evidence which puts the accused at the scene of crime. As already noted above, that the appellants were correctly identified by PW3, we find that, it was sufficient evidence that squarely placed the appellants at the scene of the crime and defence of *alibi* was adequately destroyed. We have no reason to fault the learned trial Judge's findings, PW3 had identified and placed the appellants at the scene of the crime and 20 the learned trial Judge adequately evaluated all the evidence on record. These grounds accordingly fail. The conviction is hereby upheld

In respect of the alternative grounds on sentence, Counsel for the appellants contended that, the sentences imposed were harsh and manifestly excessive in the circumstances of the case.

25 As an appellate Court, we are constrained in the exercise of the powers we have to interfere with sentence handed down by a trial Court. The Supreme Court has laid down the principles that this Court has to take into account before interfering with the trial Court's sentencing discretion. In *Kyalimpa Edward vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995,* the Court spelt out the principles as follows: –

30 *"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a Judge exercises his discretion. It is*

5 *the practice that as an appellate Court, this Court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal, or unless Court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs R. (1954) 21 E.A.C.A. 126, R. vs Mohamedali Jamal (1948) 15 E.A.C.A. 126."*

10 See also *Livingstone Kakooza vs Uganda, Supreme Court Criminal Appeal No. 17 of 1993* and *Kiwalabye Bernard vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001.*

Mindful of the above principles of law and considering the decisions of this Court and the Supreme Court on sentencing, we find that sentences of 35 years

15 imprisonment in respect of the 1st appellant 25 years imprisonment in respect of the 2nd appellant were harsh and manifestly excessive in the circumstances of this case.There is need to have uniformity and consistency in sentencing. We therefore have to take into consideration the sentences this Court and the Supreme Court have imposed on offenders in similar circumstances.

20 Accordingly we set aside the sentences. Having found so, we now invoke *Section 11* of the Judicature Act (CAP 13) and impose a sentence we consider appropriate in the circumstances of this appeal.

Section 11 of the Judicature Act provides as follows;-

"For the purpose of hearing and determining an appeal, the Court of Appeal

25 *shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."*

The sentences for murder in respect of years, since the annulment of the mandatory death penalty in 2009 range from 18-35 years imprisonment, depending on the

30 circumstances of each case. The appellants in this case premediated the murder and

5 killed the deceased in a very gruesome manner. The appellants were also closely related to the deceased. However, there are mitigating factors in favour of the appellants. They were both first offenders, they were relatively young aged 24 years and 30 years respectively at the time of the commission of the offence. They had spent 2 years and 5 months on remand.

10 In *Osherura Owen and Another vs Uganda, Supreme Court Criminal Appeal No. 50 of 2015,* the appellant was tried and convicted of the offence of murder and was accordingly sentenced to 25 years imprisonment. On appeal, both this Court and the Supreme Court upheld the sentence of 25 years imprisonment.

In *Marani Adam & Another vs Uganda, Court of Appeal Criminal Appeal No. 829 of*
15 *2014,* the appellant was convicted of murder and sentenced to 40 years imprisonment. This Court reduced the sentence to 27 years imprisonment.

In *Kosayi Wambwa vs Uganda, Court of Appeal Criminal Appeal No. 747 of 2011,* this Court reduced a sentence of 35 years imprisonment to 25 years imprisonment for the offence of murder.

20 Taking into account the gravity of the offence, and the sentencing range established by this Court and the Supreme Court, we consider that a term of 20 years imprisonment to be appropriate considering that the appellants had spent 2 years and 5 months on pre- trial detention which we have taken into account. Their sentence will run from the 30th day of October, 2014 the date of their conviction.

25 We so order.

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Dated at **Gulu** this ....2nd..........day of ....May.......... 2019.

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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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Hellen Obura
JUSTICE OF APPEAL

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