THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi JJA)

CRIMINAL APPEAL NO. 72 of 2016

SEMANDA GEOFFREY MWESIGE:::APPELLANT

VERSUS

UGANDA :::RESPONDENT

(Appeal from the decision of Hon. Justice Joseph Murangira holden at High Court of Uganda at Luweero in Criminal Session Case No. 111 of 2016 delivered on 22.04.2016)

JUDGMENT OF THE COURT

This appeal is against both conviction and sentence of the High Court at Luweero (Joseph Murangira,J) wherein the appellant was tried and convicted of the offence of murder contrary to section 188 and 189 of the Penal Code Act and sentenced to 10 years imprisonment.

Background to the appeal

The facts as found on court record are that on 29.04.2012, at around Bamusuta village Kakooge Town Council in Nakasongola District, the deceased was apprehended by residents of Bamusuta on allegations that he had stolen a motorcycle. The residents decided to take the deceased to Kakooge Police Post. While on their way, the group was intercepted by another mob led by the appellant (a Councillor of Kakooge) around Ekitangala road stage-Kakooge Nakasongola District. He (appellant) ordered his group to beat the deceased to death which they did and the appellant threw a heavy stone onto the deceased. The appellant then ordered for petrol upon which he set ablaze the body of the deceased. Police Officers

from Nakasongola Police Headquarters arrived at the scene of the crime and mobilized water to extinguish the fire and the body of the deceased was recovered. It was taken for a post mortem examination which revealed the cause of death to be multiple organ damage and failure together with very severe dehydration due to the burns which led to shock and then death. Subsequently, the appellant was arrested for the offence of murder, he was indicted, tried and convicted of the same and then sentenced to 10 years imprisonment. Being dissatisfied with the decision of the court, he has appealed to this Court on the following grounds;

Grounds of appeal

1. *That the learned trial Judge erred in law and fact when he disregarded the defence of alibi advanced by the appellant, hence leading to a miscarriage of justice.*
2. *That the learned trial Judge erred in law and fact when he failed to rightly apply the law on contradictions and inconsistencies hence coming to a wrong decision.*
3. *That the learned trial Judge erred in law and fact when he overlooked procedural irregularities thereby denying the convict the right to a fair trial.*
4. *The learned trial Judge erred in law and fact when he improperly evaluated evidence on record thereby arriving at a wrong decision.*
5. *The learned trial Judge erred in law and fact when he imposed a harsh and disproportionate sentence on the appellant.*

Representation

At the hearing of this appeal, Ms. Lillian Natukunda represented the appellant on private brief while Ms. Florence Akello Assistant Director Public Prosecution represented the respondent.

Case for the appellant.

At the commencement of the hearing of this appeal counsel for the appellant applied to court to correct the heading of the Record of Appeal to read as *"Criminal Appeal No. 72 of 2016 (Arising from High Court Criminal Session case No. 111 of 2013)"*

Counsel also informed court that she would argue grounds 2 and 4 together and the rest of the grounds independently.

She submitted on grounds 2 and 4 that the evidence of D/ASP Osele Stephan (PW1), D/Sgt Katarikawe Godic (PW3) and ASP Olupot John (PW4) shows that the deceased died as a result of stoning. On the contrary the postmortem report revealed that the cause of death of the deceased was multiple organ damage and failure together with very severe dehydration due to the burns which led to shock and then death. Counsel argued that if the deceased had died earlier of stoning, then he cannot be said to have been dehydrated since he was already dead and thus the learned trial Judge erred when he disregarded the evidence of the post-mortem examination which is of high evidential value compared to the testimonies of the prosecution witnesses.

Further, counsel submitted that there is contradictions in the evidence of PW1 and PW3 regarding the appellant's behavior at the scene of crime and also regarding the transportation of the deceased to the police station. Similarly, that there was contradiction in the prosecution evidence regarding the appellant's identification and participation in committing the crime.

In addition, that the stone allegedly used by the appellant had no blood on it according to PW3 and it was never tendered in court and also there was no fingerprint evidence produced in court.

On ground 1, counsel submitted that it was the appellant's evidence both in chief and cross examination that at the time the incident happened, he was still at the burial and by the time he arrived the deceased had already died.

Ground 3 is on irregularities. Counsel submitted that the learned trial Judge erred when he overlooked the procedural irregularities which included relying on hearsay and failing to consider the law on inconsistencies.

On the last ground on sentence, which was argued in the alternative, counsel submitted that in the event this Court upholds the conviction of the appellant, his sentence be reduced to 3 years imprisonment.

Case for the Respondent

On grounds 2 and 4, counsel conceded that the evidence on the cause of death of the deceased was contradictory since the prosecution witnesses evidence showed that he died of stoning yet the medical evidence revealed that the deceased died of dehydration due to burns. She submitted that these inconsistences were minor and did not go to the root of the case and thus the learned trial Judge cannot be faulted for her findings. She also added that there are no material inconsistencies in this case that should warrant this Court to ignore the witnesses' evidence in regard to the participation of the appellant in this case. She referred to the cases of ***Lutakali Lutwama & 4 ors vs Uganda, SCCA No. 38 of 1989*** and ***Alfred Keshav vs Uganda, Criminal Appeal No. 167 of 1967 [EACA]*** to support her submissions.

In regard to the ground on alibi, counsel submitted that the learned trial Judge duly evaluated the evidence on record and considered both the prosecution and defence evidence particularly that of PW1, PW3 and PW4 who destroyed the appellant's alibi having testified that when the appellant arrived at the crime scene they saw him pick up a huge stone and

throw at the deceased. She prayed that this Court does not fault the learned trial Judge for her findings on this ground.

In regard to the evidence of identification, counsel submitted that the appellant was identified by four prosecution witnesses and not just a single identifying witness and so the errors that could have been there if it were a single identifying witness were eliminated. Counsel also argued that much as the prosecution witnesses did not implicate the appellant in their 1st statements, they repeated during trial what they recorded in their 2nd statement which was subject to scrutiny of the court. She thus prayed that this Court upholds the lower court's decision and sustains the sentence.

In rejoinder, counsel for the appellant reiterated her earlier submissions.

Court's consideration

As a first appellate court, it is our duty to review and re-evaluate the evidence before the trial Court, by subjecting it to a fresh and exhaustive scrutiny, draw inferences and reach our own conclusions, bearing in mind that this Court did not have the opportunity to hear and observe the witnesses testify as the learned trial Judge did. ***See; Rule 30(l) (a) of the Judicature (Court of Appeal Rules) Directions; Bogere Moses & another vs Uganda SCCA No. 1 of 1997; Begumisa & others vs Tibebaga, SCCA No. 17 of 2002.***

We have heard the submissions of both counsel and we shall resolve the ground in the order presented by counsel for the appellant.

On grounds 2 and 4, the appellant faults the learned trial Judge for failing to evaluate the evidence as a whole and to consider the contradictions and inconsistencies in the prosecution evidence. The law on contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand, will only lead to

rejection of the evidence if they point to deliberate untruthfulness on the part of the witness. ***See: Alfred Tajar vs Uganda E.A.C.A Criminal Appeal No. 167 of 1969 (unreported); Sarapio Tinkamalirwe vs Uganda, SCCA No. 27 of 1989 and Twinomugisha Alex and 2 ors vs Uganda, SCCA No. 35 of 2002.***

In his judgement at page 9, the learned trial Judge noted the contradictions in the evidence of PW1, PW3 & PW4 and concluded that they were minor and did not go to the root of the prosecution case. He also observed that such inconsistencies would have been grave if they were pointing at the manner the offence was committed.

It is therefore clear from the record that the learned trial Judge did not address himself to the contradictions in the prosecution's case. Our own re-evaluation of the evidence shows that while it is correct that the evidence of PW1, PW2, PW4 show that the deceased died as a result of stoning, the post mortem report revealed that he died of multiple organ damage and failure together with very severe dehydration due to the burns which led to shock and then death. We note that there is a contradiction on what caused the death of the deceased. Counsel for the appellant faulted the learned trial Judge when he disregarded the medical evidence which is of high evidential value than the testimonies of the prosecution witnesses to convict the appellant. Our understanding of counsel's submission is that she has accorded too much importance to the medical evidence and desires that the courts should rely on it as conclusive and without error. The issue regarding medical evidence was settled by this Court in the case of ***Mujuni Apollo vs Uganda, CACA No. 26/99*** when it found as follows;

> *"It is clear to us that by basing his appeal on the absence of medical evidence, Mr. Bwengye is according medical evidence undue weight, overlooking the fact that it is merely advisory and goes to fact and not law. The court has a discretion to reject it -* ***Rivell (1950) Cr App R 87; R.v.Matheson 42 Cr. App R.145.*** *The court can even convict without medical -evidence*

as long as there is strong direct evidence or when the circumstances of the offence are so cogent and compelling as to leave no ground for reasonable doubt, see ***R V Omufrejczyk (1955) 1 Q.B. 388; 39 Cr. App. R.1*** *where the Conviction for murder was confirmed though the body was never found."*

In the instant case, the medical evidence on the cause of death of the ~~appellant~~ deceased stands contradicted by the testimonies of the prosecution witnesses. In this connection we draw attention to what Lord Goddard, Lord Chief Justice of England said in the case of ***R. v. Matheson (supra at p. 151)*** as follows;

"While it has often been emphasized, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for doctors, the verdict must be founded on evidence. If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, this court would not, and indeed could not, disturb their verdict, but if the doctors' evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be 'a true verdict in accordance with the evidence'."

Be that as it may, it is not disputed that the deceased died at the mercy of the mob which the appellant was a part of. There is evidence on record which links the appellant to having participated in both the stoning and the burning of the deceased, one of which caused the death of the deceased. PW1 testified that he saw the appellant hitting the deceased with a big stone and when he died the appellant mobilized the people to pick up old tyres and firewood and petrol which he (appellant) poured on the deceased and set him ablaze. PW3 also testified that he saw the appellant throwing a big stone at the deceased in the trench where he died and the mob, part of whom was the appellant set his body on fire. PW4 also testified that when the appellant arrived at the scene of crime, he saw him throwing a big stone on the deceased in the trench though he is not sure whether or not the deceased was still alive and then suddenly, he saw fire burning on the deceased.

It should be noted that this was a case of mob justice and the appellant did not disassociate himself from participating in the activities of the mob which resulted in the death of the appellant. From the above evidence, we note that none of these witnesses went close to the deceased's body in the trench to establish whether or not he died immediately after the stoning. They inferred the death of the deceased from the fact that the appellant threw a huge stone on the deceased's head, which to them caused his death. In the circumstances of this case, whether the deceased died of stoning or burning, it is not of much importance given the fact that there is evidence that the appellant participated in both activities. In our well-considered view, this is a minor contradiction which does not go to the root of the case as it was not intended to deceive the court.

On the alleged contradictions, on the aspect of the appellant's behavior at the scene of crime, PW1 testified that after the appellant had hit the deceased with the big stone, he was emotional and fell on the body and started rolling on it. PW3 testified that the appellant was so emotional about the previous incident where the robbers killed Muzafalu and he was crying openly saying that the deceased was the one who killed Muzafalu. In that state of crying emotionally, he joined the mob and threw a stone at the deceased. In cross examination, PW3 stated that the appellant did not roll on the deceased's body. However, in re-examination, he clarified that the appellant had physical body contact with the deceased's body in the trench though he could not follow all the steps he did since there were many people and he had mixed up with them. PW4 testified that before the appellant threw the stone on the deceased, he was yelling and saying some words which he could not pick. We note from the above accounts that the appellant was emotional at the scene of crime and that while PW1 testified that he (appellant) rolled on the deceased's body, PW3 stated that he did not do it though he clarified in his re-examination that the appellant had physical body contact with the deceased's body while in the trench. What we deduce from these testimonies is that there was physical body contact between the appellant and the deceased's body. Whether or

not he rolled on it is an inconsistency we consider minor and does not go to the root of the case.

Regarding the alleged contradictions on transportation of the deceased to the police station, PW1 testified that as the motorcycle which was carrying the deceased reached Ekitangara junction, 2 people jumped on the road and blocked it and they grabbed the deceased, the rider lost control and fell in a ditch on the left hand side of the road to Kakooge. Immediately, the mob started stoning the deceased. On the other hand, PW3 testified that the people who were transporting the deceased to Kakooge Police post were intercepted by a bigger mob at Ekitangara junction who grabbed him from the motorcycle and put him down and started beating him seriously. In our view, we do not see any major contradictions in both accounts that can make us doubt the truthfulness of the witnesses.

The last aspect is on the appellant's identification and participation in committing the crime which we have already handled in our analysis of the evidence of PW1, PW3 and PW4 above and it is our finding that there is no contradiction in the evidence of the appellant's identification as argued by counsel for the appellant.

On the whole, we find that the contradictions pointed out by counsel for the appellant were minor and did not point to deliberate untruthfulness. In the result, grounds 2 and 4 fail.

On ground 1, the appellant faults the learned trial Judge for disregarding his defence of alibi which occasioned a miscarriage of justice. In his defence, the appellant testified that on 29/4/2012 he had gone for burial of a one Muzafalu Kayanja in Ruyabe in Luweero District. During burial information started circulating that one of the thugs that had killed Muzafalu had been captured at Bamusita. After the burial he went to Kakooge-Ekitangara junction where many people were gathered. He then saw a person in the fire, with old tyres, firewood and stones which had been scattered on the road. Then shortly after, police from Nakasongola

came on a white pickup and they started firing in the crowd. He talked to people to move to Kakooge and he also left to his village in Bukabi. On 18/09/2012 when the appellant had gone to Nakasongola Magistrate Court to check on his people, he was called by the District speaker who asked for his whereabouts. In 5 to 10 minutes, the speaker reached the court with police papers from O/C CID Tumwebaze Frank requiring him to appear to the Police Station at Nakasongola on 20/09/2012. He went there on that date and he made a statement on the allegations that he assaulted a one Jingo. He was taken to Nakasongola Chief Magistrate Court where they read to him charges concerning Jingo but he objected to them and was taken back to custody. On 25/9/2019, he was taken back to court where he found Afande Katerega, the O/C Migyeera Police Post who informed him that he had been sent by O/C CID Tumwebaze Frank to get a charge and caution statement from him. He recorded it and was taken back to court and the charges regarding the death of the deceased (Kyendo Ali) were read to him.

We note that the learned trial Judge did not believe the appellant's alibi and found that the prosecution had adduced sufficient evidence to prove that the appellant was at the scene of crime. At page 16 of his judgment, he found as follow;

> *"In addition, I hasten to state that the prosecution evidence is not evidence of a single identifying witness of the accused. This was the evidence of PW1, PW3 and PW4 who properly identified the accused. The factors for proper identification of an accused person by a single identifying witness was well laid down in the case of* ***Abdallah Nabulere & 2 others vs Uganda, Criminal Appeal No. 9 of 1978****. Owing to that authority and the evidence of PW1, PW3 and PW4 the accused was positively put at the scene of crime. Then the accused's defence that he was not at the scene of crime at the time the offence was committed does not create a doubt in the prosecution case...In the instant case, the accused's defence of alibi fails."*

This Court cited with approval the case of ***Bogere Moses and another vs Uganda, SCCA No. 1 of 1997*** where the Supreme Court held as follows:

> *"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time.*
>
> *To hold that such proof has been achieved the court must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence that the accused was at the scene of crime, and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept one version and the hold that because of that acceptance per se the other version is unsustainable."*

In our resolution of grounds 2 and 4, we dealt with the evidence of PW1, PW3 and PW4 who testified that they each identified the appellant at the scene of crime as having been emotional and he picked up a big stone and hit the deceased. Each of them had seen him before the incident.PW1knew him as a person he moved with on duty in the villages. PW3 knew him as a councilor representing Kakooge Sub-county at the District and he would always go to their police post. Similarly, PW4 knew him as a councilor for the people and he usually worked hand in hand with him. PW1, PW3 and PW4 ably identified the appellant, whom they were very familiar with as having been at the scene of crime and participated in assaulting the deceased. We also note from the evidence on record, that the incident took place in broad day light and therefore the possibility of mistaken identity is ruled out. The Supreme Court in ***Alfred Bumbo & 3 ors vs Uganda, SCCA No. 28/1994*** stated that once an accused person has been positively identified during the commission of a crime then his claim that he was elsewhere must fail.

We therefore cannot fault the learned trial Judge for rejecting the appellant's alibi and finding that he was properly placed at the scene of crime by the evidence of PW1, PW3 and PW4. Ground 1 therefore fails.

In regard to ground 3, the appellant faults the learned trial Judge for overlooking procedural irregularities thereby denying the convict the right to a fair trial. In her submission, counsel for the appellant failed to point out the procedural irregularities that the learned trial Judge overlooked and instead referred us to the fact that the learned trial Judge relied on hearsay and also failed to consider the law on inconsistencies. Firstly, hearsay and inconsistencies are matters of law and not procedure and therefore we do not regard them as procedural irregularities. Secondly, we have already dealt with the issue of inconsistencies and we therefore find no need to repeat ourselves in resolving the same. In the result, ground 3 also fails.

Regarding ground 4 on severity of sentence, it was submitted for the appellant that the sentence of 10 years imprisonment is harsh and disproportionate. We note that the learned trial Judge having taken into account all the mitigating factors and the aggravating factors advanced by both counsel, he sentenced the appellant to 10 years imprisonment.

It has been persistently held in both the Supreme Court and this Court that an appellate court will only alter a sentence imposed by the trial court if it is evident that it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. ***See; Kiwalabye Bernard vs Uganda, Criminal Appeal No 143 of 2001.***

In the instant appeal, the appellant was charged with the offence of murder which carries a maximum sentence of death. The factors which were presented in aggravation were that; the appellant was a councilor at the LC5 level who is well knowledgeable of the law and therefore he was expected to be an example to the people. His action was a bad example to his people

since it happened among his people in broad day light. This was an incident of mob justice which incidents are rampant in this jurisdiction and have led to the loss of many lives. The dead in this case lost his life based on suspicion, depriving his relatives of their enjoyment of his life and depriving the deceased of enjoyment of his own life. Throughout this trial, the appellant was not remorseful. A deterrent sentence was prayed for.

On the other hand, the mitigating factors presented were that; the appellant is a first offender. His participation as per the judgment was very minimal. The appellant is a person of responsibility to his community. He has a tender family of 5 kids, the oldest is 6 years. A lenient sentence was prayed for.

The offence was committed in a gruesome and brutal way which would put this case in the ambit of the rarest of the rare cases that attract the death sentence. However, we note that this was a case of mob justice. In ***Kamya Abdullah and 4 others vs. Uganda, Supreme Court Criminal Appeal No. 0024 of 2015***, it was held that convicts in cases involving mob justice cannot be put in the same sentencing plane as other convicts of murder and the Court observed that:

> *"...Counsel for the appellants in his submissions stated that many of those who take part in mob justice do so without thinking. They do so because others are doing so. We agree, furthermore, a mob in its perverted sense of justice thinks it is administering justice while at the same time ignoring the importance of affording the suspects the rights to defend themselves in a formal trial.*
>
> *Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot ignore the fact that, in terms of sheer criminality, such people cannot be and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood."*

In ***Kamya Abdullah (Supra)*** the deceased was killed by a mob, the appellants were accordingly sentenced to 40 years imprisonment, this Court substituted the sentence of 40

years imprisonment with 30 years imprisonment. On further appeal the Supreme Court reduced the sentence to 18 years imprisonment.

According to the above authority, we find that the sentence of 10 years imprisonment imposed upon the appellant by the trial Judge in the instant case for murder through a mob action not harsh and excessive as argued by counsel for the appellant.

However, we note from the sentencing proceedings that the learned trial Judge did not consider the period the appellant spent on remand. It is indicated on the court record that the appellant was arrested on 20.09.2012 and convicted on 22.04.2016 which means he spent a period of 3 years and 7 months spent on remand. This period ought to have been considered by the learned trial Judge pursuant to Article 23 (8) of the Constitution which requires courts while passing sentence to take into account the period a convict spent in lawful custody prior to completion of his trial. We are mindful that this matter has not been raised in this appeal but we feel obliged as an appellate court to deal with it because it is a question of illegality since failure to comply with Article 28 (3) renders the sentence illegal. This was held by the Supreme Court in ***Rwabugande Moses vs Uganda, SCCA No. 25 of 2014***, which stated that:-

> *"A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision."*

We therefore find that the sentence of 10 years imposed upon the appellant was illegal and we thus set it aside. We invoke section 11 of the Judicature Act which permits this Court to exercise the power of the trial court to impose an appropriate sentence.

In so doing, we take into consideration both the aggravating and mitigating factors herein above which were presented in the lower court. We shall also consider the sentencing range in cases of a similar nature in order to meet the ends of justice.

In ***Atukwasa Jonan and 6 ors vs Uganda, Court of Appeal Criminal Appeal No. 168 of 2018,*** the appellants were part of a mob that committed murder. They were tried, convicted and sentenced to 25 years imprisonment. On appeal to this Court, their sentences were substituted with 14 1/2 years imprisonment each.

Taking into consideration both the mitigating and aggravating factors presented at trial as we have reproduced them above, together with the sentences imposed in cases of a similar nature, we find that a sentence of 13 years will meet the ends of justice. We are enjoined by Article 23 (8) of the constitution to deduct the period of 3 years and 7 months the appellant spent on remand. In the result, we sentence the appellant to 9 years and 5 months imprisonment to be served from the date of conviction, which is 22.04.2016.

In conclusion, we dismiss the appeal against conviction for lacking merit and allow the appeal against sentence in the above stated terms.

We so order.

Dated at **Kampala** this 15th day of January 2019

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Elizabeth Musoke

JUSTICE OF APPEAL

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Hellen Obura

JUSTICE OF APPEAL

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Ezekiel Muhanguzi

JUSTICE OF APPEAL