THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 311 OF 2016

1. PC JADEN ASHRAF

2. NAKUNGU SANDRA.....APPELLANT

VERSUS

UGANDA .....RESPONDENT

(Appeal against judgment of the High Court at Kampala in Criminal Session case No. 0104 of 2015 before Hon. Justice Wilson Masalu Musene dated 12/10/2015)

Coram: **Hon. Lady Justice Elizabeth Musoke, JA**

Hon. Lady Justice Hellen Obura, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

JUDGMENT OF THE COURT

Introduction

The appellants herein were indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced each to 20 years imprisonment.

Brief background

The facts of this case as accepted by the learned trial Judge are that on 17th day of October 2014, the appellants and one Nabikolo Sarah Sebunya at Diplomat Zone, Muyenga in Kampala District with malice aforethought killed Sebunya Eriya Bugembe Kasiwukira.

At the trial the appellants denied the charges. Court heard and determined the case and convicted the appellants as charged but acquitted Nabikolo Sarah Sebunya. Being dissatisfied with their conviction, the appellants appealed to this court on the following grounds:-

1. ***The learned trial Judge erred in law when he convicted the appellants on a defective indictment.***
2. ***The learned trial Judge erred in law and fact to have found that the deceased's death was caused by an unlawful act.***
3. ***The learned trial Judge erred in law and fact to have found that it is the appellants that unlawfully caused the death of the deceased with malice aforethought.***
4. ***The learned trial Judge erred in law to have refused the appellants the opportunity to represent their witnesses thereby denying them their constitutional right and entitlement to a fair trial.***
5. ***The learned trial Judge erred in law and fact in failing to consider the defence of the appellants at all and in only considering the prosecution case thereby causing a failure of justice.***
6. ***The learned trial Judge erred in law when he failed to take into account the major contradictions and inconsistencies in the prosecution's case thereby leading to a miscarriage of justice.***
7. ***The learned trial Judge erred in law and fact in failing to judiciously subject the entire evidence on record to adequate scrutiny and thereby wrongly convicted the appellants.***

The appellants prayed that the appeal be allowed, the conviction be quashed, sentence and judgment of the trial court be set aside and the appellants be set free.

Representation

At the hearing of the appeal, the appellants were represented by Mr. Ladislous Rwakafuzi, learned counsel and the respondent was

represented by Ms. Josephine Namatovu, learned Assistant Director of Public Prosecutions. The appellants were present.

Submissions by the appellants

Counsel for the appellants argued grounds one, four, five separately and grounds two, three, six, and seven together.

On the first ground, counsel submitted that the indictment was defective because it did not disclose how the appellants committed the offence of murder. He argued that the indictment ought to have stated that the first appellant drove the second appellant's vehicle and knocked the deceased deliberately in a premediated act of killing the deceased. Mr. Rwakafuzi contended that the appellants were not given sufficient notice required to prepare their defenses. He relied on section 139 of the Trial on Indictments Act and submitted that the omissions in the indictment caused a miscarriage of justice.

On ground four, counsel submitted that the first appellant was denied an opportunity to present his witnesses in court. Counsel pointed out that failure of the learned trial Judge to give an opportunity to the first appellant to present his witnesses was prejudicial to him and violated Article 28 of the Constitution and thus the first appellant did not have a fair trial. Counsel further submitted that Section 168(1) and 168(2) of the Magistrates Courts Act which provide for committal proceedings do not require an accused person to mention his/her witnesses.

Counsel submitted on ground 5 that the learned trial Judge appeared biased when he noted that PW6 was a steady and truthful witness. Counsel argued that it was implied from the start that the learned trial Judge had already believed the prosecution case without hearing the case for the appellants. Further that since he had already formed his

decision, which was the reason why he denied the first appellant to present his witnesses which was prejudicial to him.

On grounds 2, 3, 6 and 7 on evaluation of evidence, counsel submitted that the learned trial Judge did not, with due respect, direct himself on the law of circumstantial evidence. He pointed out that the vehicle turned on the right because of a pothole and there was a possibility that the deceased was killed in a hit and run accident.

On the issue of contradictions, counsel submitted that PW6's evidence (the eye witness) was contradictory in nature. He pointed out that PW6's statement at police contradicts his evidence in court as to the type of car he saw at the scene. Counsel argued that in his statement which was exhibited as PE2, PW6 stated that he saw a Land Cruiser and later in court stated that he saw a Pajero. Counsel further submitted that PW4's evidence as an eye witness was insufficient because he stated that he did not see who knocked the deceased but made an assumption that the vehicle UAE 018A Pajero Wagon owned by the second appellant he earlier saw with a man could have been the one that knocked the deceased dead. Counsel urged court to re-evaluate the whole evidence and reach at a right decision.

Submission by the respondent

In reply to ground one, counsel for the respondent relied on Section 139 (2) of the Trial on Indictments Act and submitted that learned counsel for the appellants at trial did not raise an objection to the allegedly defective indictment. She pointed out that this was an issue that would have been brought to the attention of the court at trial.

Further, counsel submitted that the charge was read and explained to the appellants before they took their plea and thus were put to notice of what they were charged with. Counsel argued that the 2nd appellant

did admit that the vehicle in question belonged to her but at the time of her arrest, she had lost the sale agreement which explained its absence in the summary of the case. She submitted that failure to include such evidence in the summary of the case did not occasion a miscarriage of justice.

On grounds 4 and 5, counsel submitted that the trial court's refusal to allow the first appellant to present his witnesses was not prejudicial to the appellant. She relied on Section 133 of the Evidence Act and submitted that there is no particular number of witnesses required to prove a fact and that since he had raised a defence of alibi, the burden was now on the prosecution to lead evidence and disprove his alibi which in this case the prosecution did by adducing evidence that put the appellants at the scene of crime.

On grounds 2, 3, 6 and 7 on evaluation of evidence, counsel argued that the learned trial Judge properly evaluated the evidence before he convicted the appellants for the offence of murder. She submitted further that the learned trial Judge evaluated evidence of both parties and rightly found that the death of the deceased was unlawfully caused with malice aforethought.

Counsel contended further that the learned trial Judge relied on the evidence of PW4 and PW5 and PExh 5 and came to a right decision that the deceased was knocked at the opposite direction from where the appellants were driving and that according to PW4, the pothole was a bit far from the point where the deceased was knocked.

Further that PW4 was able to identify the first appellant because PExh 5 shows that the road was straight. She submitted that the contradictions in PW6's evidence in regard to identification did not go to the root of the matter because he described the vehicle as a layman. Further that his evidence was corroborated by PW5 an inspector of vehicles who

testified that the vehicle was a Mitsubishi Pajero Reg. No. UAE 018A. She prayed court to dismiss the appeal and uphold the trial court's findings on conviction and sentences.

Consideration by court

We have carefully listened and read the submissions of both counsel and also considered the evidence on record and authorities cited to us.

This being a first appellate court we are enjoined to re-appraise all the evidence and come up with our own conclusion on all matters of law and fact. This is a requirement of law under Rule 30 (1) of the Rules of this court. See also: ***Pandya V R,*** *(1957) EA 336,* ***Bogere Moses V Uganda,*** *Supreme Court Criminal Appeal No. 1 of 1997,* and ***Kifamunte Henry V. Uganda,*** *Supreme Court Criminal Appeal No. 10 of 1997.*

We shall resolve the grounds of the appeal in the order they were argued by counsel.

Ground one

Counsel for the appellant argued that the appellants were convicted on a defective indictment which did not disclose the manner in which the offence charged was committed which denied them sufficient notice to prepare their defence.

We have looked at the indictment on Pages 6 and 7 of the record of appeal. It states both the statement of the offence and the particulars of the offence. It states as follows:-

"THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

Court Case No:
Police Case No: KABALAGALA 1452/2014
DPP Case No. HQS-CO-0765-2014

INDICTMENT

The.....Day of.....20.....

At the session of the High Court Holden at Kampala the court is informed that NO. 51472 PC JADEN ASHRAF, NANKUNGU SANDRA AND NABIKOLO SARAH SEBUNYA are charged with the following offence.

STATEMENT OF OFFENCE

MURDER Contrary to section 188 and 189 of the Penal Code Act

PARTICULARS OF OFFENCE

NO. 51472 PC JADEN ASHRAF, NAKUNGU SANDRA AND NABIKOLO SARAH SEBUNYA on the 17th of October 2014 at Diplomate Zone, Muyenga in Kampala District, with malice aforethought killed SEBUNYA ERIYA BUGEMBE KASIWUKIRA.

.....

Jane Okuo
Senior Principal Attorney
For: DIRECTOR OF PUBLIC PROSECUTIONS

.....

To NO. 51472 PC JADEN ASHRAF
NAKUNGU SANDRA
NABIKOLO SARAH SEBUNYA

TAKE NOTICE that you will be tried on the above indictment on the.....day of.....20.....at.....o'clock in the forenoon.

.....

REGISTRAR (CRIME)"

Section 22 of the Trial on Indictments Act Cap 23 states as follows:

"22. Contents of indictment.

Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused

person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

We find that the indictment in this case complied with the above provision of the law because it contains the statement of offence and its particulars. Ground one therefore has no merit and it is hereby dismissed.

Ground 4

On this ground, counsel for the appellant submitted that the first appellant was not granted a fair hearing because he was denied an opportunity to bring his witnesses in his defence. We have perused the court record and find on Page 147 of the record of appeal that counsel for the first appellant at trial mentioned that he had two witnesses namely ASP Arnold Arinaitwe, stationed at Nkumba Entebbe and his daughter Fatuma Nanziri. Ms. Komuhangi, learned counsel who represented the state at trial brought to the attention of court that the appellant had not mentioned that he had witnesses during committal and at the beginning of his defence at trial. She cited Section 75 of the Trial on Indictments Act. The proceedings are reproduced hereunder for ease of reference.

"MR. RWAKAFUZI

I have two witnesses:

(1) ASP/Arnold Arinaitwe, stationed at Nkumba, Entebbe.

(2) Fatuma Nanziri.

JUDGE.

MR. KABEGA

I shall not call witnesses.

JUDGE

MR. MUBIRU

I shall not call any witnesses.

JUDGE

M/S KOMUHANGI FOR STATE

The witnesses never mentioned during committal and at the beginning of defence. (Sic) This is under S. 75.

JUDGE

MR. RWAKAFUZI

S. 168 and S. 169 of MCA does not talk about witnesses. Committal is section 75 is redundant. Secondly, A1 mentioned his daughter and the police officer he was with during patrol. The law does not expect disclosure. (Sic)

JUDGE

COURT: Hearing adjourned. To 22. 09. 2016, at 10:00am.

(Submissions in particular)

JUDGE."

Section 75 of the Trial on Indictments Act relied on by the state at trial provides as follows:-

"75. Witnesses for the defence.

The accused person shall be allowed to examine any witness if the witness is in attendance, but he or she shall not be entitled as of right to have any witness summoned other than the witnesses whom he or she named to the magistrate's court committing him or her for trial as witnesses whom he or she desired to be summoned."

In our view, we find the above provision mandatory in nature. It is therefore clear that an accused person shall not be allowed to call witnesses for which he/she did not mention during committal

proceedings in the magistrate's court. However, the first appellant had the right to present his defence as granted under Article 28 (3) (c) of the Constitution. It provides as follows:

> ***"28. Right to a fair hearing.***
>
> ***(3) Every person who is charged with a criminal offence shall—***
>
> ***(a) .....***
>
> ***(b) .....***
>
> ***(c) be given adequate time and facilities for the preparation of his or her defence."***

The above Article is mandatory in nature. The Constitution of the republic of Uganda is the supreme law of the land (*See: Article 2 of the constitution).* We therefore find and hold that the first appellant was not accorded a fair hearing. This contravenes Article 28 (3) (c) of the constitution. Article 44(c) of the constitution is to the effect that the right to fair hearing is non-derogable.

In ***Charles Harry Twagira V Attorney General,*** *Constitutional Petition No. 7 of 2005*, court stated that:-

> ***"To determine whether a fair hearing has been conducted or that there was a violation of the right to fair hearing, the proceedings must be completed, that is to say: the prosecution and defence must conclude their cases and the court makes a decision on the matter."***

In the instant case, the learned trial Judge decided the matter without the 1st appellant's defence contrary to the above reproduced Articles of the constitution. Be that as it may, we have to determine whether the denial by the court to have the first appellant, who had in fact defended himself on oath, produce witnesses to testify on his behalf had occasioned a miscarriage of justice. To determine whether the defect in court's failure to allow an accused to call witnesses to testify

on his/her behalf amounts to a miscarriage of justice depends on the facts and the circumstances of each case. In this case, the first appellant's need to call his witnesses was to prove his *alibi* and in instances where an accused person raises a defence of *alibi*, the burden of proof does not shift to him/ her to prove so but rests on the prosecution to prove its case against the accused beyond reasonable doubt. The first appellant therefore needed not to call witnesses to prove his *alibi*. In our considered view, failure by the trial court to grant an opportunity to the first appellant to present his witnesses did not cause a miscarriage of justice. This ground fails and it is hereby dismissed.

Ground 5

The appellant's argument on this ground is that the learned trial Judge appeared biased when he noted that PW6 was a steady and truthful witness. We do not agree with this submission and in our opinion, we find the statement by the learned trial Judge a fair observation and perception of a witness' character. Being the trial Judge, he had the opportunity to see the witnesses testify in court and observe their demeanor. This did not prejudice the appellants in any way. We find no merit in this ground and it is accordingly dismissed.

Grounds 2, 3, 6 and 7.

It was submitted for the appellants that the learned trial Judge did not properly evaluate the evidence on record and thus came to a wrong conclusion that the appellants were guilty of the offence they were charged with. It was contended that the prosecution's case was based on contradictory circumstantial evidence, which was insufficient to secure a conviction of murder.

Further that the prosecution did not prove beyond reasonable doubt that the death of the deceased was caused by an unlawful act with malice aforethought in which the appellants participated.

In his judgment at pages 183 to 186 of the record of appeal, the learned trial Judge found that the deceased's death was unlawfully caused with malice aforethought and he stated as follows:-

> ***"I now come to the second ingredient as to whether the death of the deceased was unlawful. Since the decision of the former East African Court of Appeal in the case of R. Gusambizi s/o Wesonga (1948) 15 EACA 65, it is now settled that all homicides are presumed unlawful unless excused by law. And more recently, in the case of Akol Patrick, Ekwaku s/o Edeu Odongo Samuel Omotojo s/o Ogwang and Ekoot Michael v Uganda, Criminal Appeal No. 60 of 2002, reported in (2006) HCB Vol. 1, page 4, the court of appeal of Uganda reiterated that in homicide cases, death is always presumed unlawfully caused unless it was accidentally caused in circumstances which make it excusable.***
>
> ***In the present case, the testimony of PW2, Dr. William Male Mutumba had already been summarised. It gave detailed injuries, including fracture of the skull. The deceased also had fractured ribs and cause of death was multiple crush injuries. Some witnesses like PW3, Mugwere Fredrick and PW4, No. 43452 Sgt. Byamigisha Aloysious found the injured body at the scene of crime.***
>
> ***Similar testimony was given by PW5, No. 31604 W/Sgt. Achan Betty and PW6, Komaketch Richard. PW6 not only saw a car parked on the left hand side of the road, but he saw the deceased in pair of shorts and red t-shirt and heard a bang behind him. PW6 saw and realized that the same vehicle which had parked had knocked the very man (deceased) whom he by-passed.***
>
> ***Given the above circumstances, it is overwhelmingly clear that the death of the deceased was unlawfully caused.***

The third ingredient is whether whoever killed the deceased had malice aforethought. Malice aforethought is defined under section 191 of the Penal Code Act to mean:-

a) An intention to cause death of any person, whether such person is killed or not; or

b) Knowledge that the act of omission causing death will probably cause the death of some person, whether such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused.

In the present case, and according to PW6, Komaketch Richard, the killer vehicle was parked on the left side of the road. The car was giving double indicators (a sign of danger or trouble ahead). It was said to have a silver guard in-front and when it knocked the person PW6 had by-passed, the man fell on the bonnet of the car and then in the middle of the road. PW6's further testimony was that the man was knocked on the right hand side of the road and the car sped away. PW6 described the killer vehicle in details. The testimony of PW6 was corroborated by PW7, Kibwota Edward.

When the above testimonies of PW6 and PW7 as compared together with that of PW3, PW4 and PW5, coupled with the nature of injuries on the deceased, this court is left in no doubt whatsoever that whoever injured and killed the deceased had malice aforethought. The third ingredient of the offence has therefore been proved beyond reasonable doubt."

In our view, we find and hold that the learned trial Judge properly applied the law to the facts of this case and rightly found that the death of the deceased was unlawfully caused with malice aforethought. We therefore do not agree with learned counsel for the appellants that the learned trial Judge failed to evaluate the evidence properly on the two contested ingredients of the offence of murder above.

On the aspect of the contradictions in the prosecution case, counsel for the appellants pointed out that the evidence of PW6 was contradictory

in nature in as far as the description of the vehicle identified at the crime scene. PW6 stated that he saw a Land Cruiser (Prado) and then later stated in court that he saw a Pajero. The law is now well settled that inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be ignored if they do not affect the main substance of the prosecution's case, save where there is a perception that they were deliberate untruths. See: ***Alfred Tajar V Uganda, EACA Criminal Appeal No. 167 OF 1969*** and ***Sarapio Tinkamalirwe V Uganda, Supreme Court Criminal Appeal No. 27 of 1989***.

While we note that there were some inconsistencies in the evidence of PW6 as to which car model knocked the deceased, we find that those inconsistencies are minor and do not go to the substance of the case. We find no merit in the appellant's argument on inconsistencies and we hold that they were minor in that they did not go to the root of the case and so the learned trial Judge was justified in ignoring them.

We also find the evidence of PW14, Kimansule Bosco and PW6, Komaketch Richard the eye witnesses on participation of the appellants further corroborated by the evidence of PW20, Byamukama Richard and PW16, Awuyo Geofrey who were approached by the appellants to murder the deceased. In his judgment at page 186 of the record of proceedings, the learned trial Judge directed himself to law on circumstantial evidence and we cannot fault him on that issue. We find that the learned trial Judge properly evaluated the evidence on record. Grounds 2, 3, 6 and 7 therefore fail and are accordingly dismissed.

Conclusion.

In the result, we find no merit in this appeal and we hereby dismiss it. We uphold the conviction and sentence of the trial court. It is so ordered.

Dated at Kampala this 3rd day of February 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.