THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

Criminal Appeal No. 0205 of 2010

Coram: Barishaki, Musota, & Tuhaise, JJA

Cwinyaai Gilbert..... Appellant

Versus

Uganda..... Respondent

[Appeal from the decision of the High Court of Uganda at Jinja (Faith Mwondha J, as she then was) delivered on the 23rd September, 2010]

JUDGMENT OF THE COURT

The appellant, Cwinyaai Gilbert, was indicted for murder contrary to sections 188 and 189 of the Penal Code Act. He was convicted and sentenced to 45 years imprisonment. He appealed against the conviction and the sentence, on five grounds, namely:-

1. The learned trial Judge erred in law and fact when she failed to adequately evaluate all material evidence, charge and caution statement, adduced thereby coming to the wrong conclusion that the appellant was guilty of murder.
2. The learned trial judge erred in law and fact when she failed to consider the appellant's defence of provocation and self-defence thereby coming to a wrong conclusion that the appellant was guilty of murder.

3. The learned trial judge erred in law and fact to admit the charge and caution statement without conducting a trial within a trial to the prejudice of the appellant.
4. The learned trial judge erred in law and fact when she passed a sentence without considering the period the appellant had spent on remand.
5. The learned trial Judge erred in law and fact when she passed a harsh and excessive sentence to the prejudice of the appellant.

Background

On 9th April 2009 at 7.30 am, Sserwadda Lawrence (the deceased), a *boda boda* cyclist at Kirinya stage in Jinja District, was stopped by the accused (appellant in this case) to transport him to Caltex Petrol Station on Kirinya Road. There was a scuffle between the appellant and the deceased because of the appellant's failure to pay the fare. After that the appellant shot the deceased in the head. The appellant reported himself to Jinja Police Station with the gun he used to shoot the deceased. The deceased was taken to Jinja Hospital, and was subsequently referred to Mulago Hospital, but he died before reaching Mulago Hospital.

Representation

The appellant was represented by Mr. Mudioble Abed Nasser, learned Counsel, on state brief, while Mr. David Ndamurani Ateenyi, learned Senior Assistant Director of Public Prosecutions, represented the respondent.

Submissions for the Appellant

The appellant's counsel argued grounds 1, 2 and 3 together; and grounds 4 and 5, also together.

On grounds 1, 2 and 3, the appellant's counsel referred this Court to page 13 of the record of appeal, where the prosecution prayed to tender in evidence, the charge and caution statement, to which the defence counsel had no objection, and the same was accordingly admitted and marked exhibit P2. Counsel argued that it was at this point that the learned trial Judge ought to have investigated the circumstances under which the charge and caution statement had been recorded, to establish whether it was voluntarily made, before admitting it in as an exhibit.

Counsel contended that it was an irregularity for the learned trial Judge not to inquire into the recording of the same statement, instead of stating that the environment was free of any torture and that therefore it was voluntary. He argued that relying on such a charge and caution statement to convict the appellant was an irregularity especially where there is absence of the direct evidence placing the accused person at the scene of crime. He contended that there was no eye witness at the scene of crime; that the appellant's gun was not subjected to a forensic expert's examination to establish whether it was the exact gun that fired the killer bullet; and that there was also lack of an expert's report to establish whether the finger prints on the cartridge of the exhibited bullet were on the exhibited gun as well.

Counsel contended that even if the charge and caution statement had become part of the record, the learned trial Judge ought to have examined it as a whole before she indicated that the appellant admitted killing the deceased. He argued that it should be very clear that the appellant admitted all the ingredients of the offence and all the facts relating to it before proceeding to convict him.

Counsel further submitted that even if the charge and caution statement was taken to have been properly admitted, it was not an outright confession since it has exculpatory statements. He argued that the confession raised two defences, that is, self-defence and provocation.

Counsel cited section 15 of the Penal Code Act and the case of **Mumbere Julius V Uganda, Supreme Court Criminal Appeal No. 15 of 2014** to highlight the circumstances under which self-defence may be raised as a defence. He also submitted that the charge and caution statement raised the defence of provocation when it stated that the deceased held the appellant by the collar of his shirt, wrestled him down, pulled him and wanted to grab his rifle. That the appellant was helpless as the deceased was muscular, and that he struggled with the deceased. Counsel cited sections 192 and 193 of the Penal Code Act and contended that before a charge of murder can be reduced to manslaughter on the ground of provocation, death must have been caused in the heat of passion before there was time to cool down. He also cited the case of **Obote William V Uganda,**

Supreme Court Criminal Appeal No. 12 of 2014 to support his submissions.

On grounds 4 and 5, the appellant's counsel submitted that the sentence was illegal since the learned trial Judge, when sentencing the appellant, did not take into account the period of 1 year and 5 months the appellant spent on remand. He also submitted that the sentence passed against the appellant was harsh and excessive in the circumstances of the case.

The appellant's counsel prayed to this Court to set aside the judgement of the High court and substitute the same with an order acquitting the appellant of the offence of murder. In the alternative, he prayed to this Court to set aside the sentence and replace the same with a more lenient one.

Submissions for the Respondent

On grounds 1, 2 and 3, the respondent's counsel submitted that court would only proceed to conduct a trial within a trial if the defence had objected to the prosecution's tendering in evidence, of the charge and caution statement, that is, when there is a retracted charge and caution statement. Then, a trial within a trial would be conducted to determine whether the same had been taken voluntarily. Counsel submitted that, in the instant case, the defence did not object to the prosecution's tendering in evidence, of the charge and caution statement, and that there was no retraction or repudiation of the charge and caution statement, which was accordingly rightly and properly admitted in evidence.

Regarding the appellant's counsel's allusions to the gun not being tested to prove that it was the gun which fired the shots that led to the death of the deceased, the respondent's counsel referred this Court to the evidence of PW5 Sergeant Naika. He submitted that PW5 explained in detail how the appellant reported himself to police while running away from mob justice; how he recovered the rifle from the appellant and detained him; and how the same gun was identified as SAR No. 2201701. He contended that it was the same gun that was tendered in court by the officer in charge of the exhibits at the time of trial, without breaking the chain of evidence.

Counsel submitted that the evidence of PW2 and PW5 regarding the killer weapon was not challenged or questioned. He argued that when evidence is received in court and it is not challenged, the presumption is that it is admitted.

Counsel further submitted that the deceased was not armed, and that therefore there was no need for the defences of provocation and self-defence to apply. He also submitted that the appellant responded to the deceased by shooting him on the head and not any part of the body, clearly to kill not to demobilize him. He contended that the appellant's denial of the act of shooting meant that even the defences of self-defence and provocation would collapse.

Resolution of the Appeal by Court

This Court, as the first appellate Court, is mandated under rule 30(1) of the Judicature (Court of Appeal Rules) Directions to re-evaluate the evidence presented to the trial Court and reach its own

conclusions. However, it should bear in mind that it did not observe the witnesses testify, in which case it has to rely on the observations of the trial Court regarding issues of demeanour of such witnesses. See **Pandya V R [1957] EA 336**.

We shall resolve grounds 1, 2, and 3 together, then grounds 4 and 5 together, in the order in which they were submitted upon by both counsel.

Grounds 1, 2 and 3

We shall first resolve the question of whether the learned trial Judge ought to have investigated the circumstances under which the charge and caution statement was recorded, in order to establish whether it was done voluntarily before admitting it in evidence as exhibit P2.

It was stated by the Supreme Court in **Amos Binuge and Another V Uganda, Supreme Court Criminal Appeal No. 23 of 1989** as follows:-

> *"It is trite law that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to establish by evidence, his grounds of objection. This is done through a trial within a trial... the purpose of the trial within a trial is to decide upon the evidence of both sides, whether the confession should be admitted."*

In **Eldam Enterprise Ltd V SGS (U) Ltd, Supreme Court Criminal Appeal No. 5 of 2005**, the Supreme Court held that evidence which is not challenged in cross examination must be taken as true.

In the instant case, the record of appeal shows on page 13 that the defence did not object to the prosecution's tendering in evidence, of the charge and caution statement, upon which the trial court admitted it in evidence as exhibit P2. PW4 the Police Officer who recorded the statement stated during cross examination that:-

> *"There was no force. I was independent....There was no sign of torture."*

Thus, based on the foregoing authorities and the evidence on record, we do not fault the learned trial Judge for not conducting a trial within a trial, since the appellant or his counsel did not object to the tendering of the charge and caution statement in evidence. The appellant neither repudiated nor retracted the charge and caution statement. The evidence which was not objected to or challenged must be taken as true. The learned trial Judge was therefore correct to rely on the charge and caution statement because it formed part of the evidence on the record.

It was contended for the appellant that the learned trial Judge ought to have examined the charge and caution statement (exhibit P2) as a whole; that the confession was not an outright confession since it had exculpatory statements raising two defences of self-defence and provocation.

In **Mumbere Julius V Uganda, Supreme Court Criminal Appeal No.15 of 2014**, the Supreme Court held that the trial court and the first appellate court had a duty to examine the charge and caution statement in relation to any other evidence available to help shed

some light on the possible circumstances under which the shooting of the deceased could have occurred, and reach an appropriate finding.

In the instant appeal, the appellant faulted the trial court for relying on the part of his charge and caution statement relating to his admission to the act of shooting, while at the same time ignoring or disbelieving the part relating to his explanation of the circumstances under which the shooting took place. He contended that it is from the part which the trial court did not consider that the defences of provocation and self-defence were raised.

In **Gabriel Byabagambi V Uganda, Supreme Court Criminal Appeal No. 16 2002**, it was held that both defences of provocation and self-defence can be available to the accused at the same time, and that where both self-defence and provocation exist, the inference of malice aforethought is rebutted.

Regarding the defence of self-defence, section 15 of the Penal Code Act provides that subject to any express provision in the Penal Code Act or any other law in force in Uganda, criminal responsibility for the use of force in the defence of person and property and, in respect of rash, reckless or negligent acts shall be determined according to the principles of English law.

The law on self-defence was stated clearly by the then Court of Appeal for Eastern Africa in **Selemani V Republic [1962] EA 442**. The Court stated that if a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the

attacker, the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious.

It would appear that in such a case, there is no duty to retreat, though, no doubt, questions of opportunity of avoidance or disengagement would be relevant to the question of reasonable necessity for the killing.

Regarding the defence of provocation, section 192 of the Penal Code Act provides that when a person who kills another in circumstances which, but for the provision of the section, would constitute murder, does an act which causes death in the heat of passion caused by sudden provocation and before there is time for his passion to cool, is guilty of manslaughter only.

Section 193 of the Penal Code Act defines provocation as meaning and including for purposes of cases such as the present, any wrongful act or insult of such a nature as to be likely when done or offered to an ordinary person to deprive him of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the insult is done or offered. A lawful act is not provocation for an assault.

The Supreme Court, in **Mumbere Julius V Uganda, Supreme Court Criminal Appeal No. 15 of 2014**, interpreted sections 192 and 193 of the Penal Code Act as meaning that, before a charge of murder can

be reduced to manslaughter on ground of provocation, the following conditions must be satisfied:-

1. The death must have been caused in the heat of passion before there is time to cool;
2. The provocation must be sudden;
3. The provocation must have been caused by a wrongful act or insult;
4. The wrongful act or insult must be of such nature as would be likely to deprive an ordinary person of the class to which the accused belongs of the power of self-control;
5. The provocation must be such as to induce the person (by whom) provoked to assault the person by whom the act or insult was done or offered.

The onus of proof is on the prosecution to destroy the appellant's defence of self-defence. In **Oloo s/o Gai V R [1960] EA 86**, the then Court of Appeal for Eastern Africa cited with approval the decision of the Privy Council in **Chan Kau V R (2) [1955]2 WLR 192** which states the law as follows:-

> *"In the cases where the evidence discloses a possible defence of self-defence, the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence provocation or any defence apart from that of insanity."*

We have carefully perused the relevant pages which bring out the appellant's defence of self-defence. Our fresh consideration of the

adduced evidence reveals that the appellant, in his charge and caution statement, stated as follows:-

> *"....he resorted to wrestling me down, pulling me and wanted to grab me by the collars and struggled him. On seeing that the cyclist had decided to harm or take his rifle, he resisted so much, also put him down. When he was there, he rolled side away, he raised his rifle up and shot him because his aim was to demobilise him...."*

This evidence however is rebutted or destroyed by the post mortem report, exhibit P1, which shows that the deceased had external injuries which were laceration on the left temporal and the right temporal. The internal injuries sustained by deceased were a fractured skull and brain. The evidence of PW1 and PW2 also confirm that the deceased was shot in the head. The cause of death was increased intracranial pressure due to celebral oedema following the above injuries sustained by fast moving missile most probably a bullet.

The statement by the appellant in his charge and caution statement that he shot the deceased only to demobilise him, cannot therefore be correct, basing on the adduced evidence on record. The adduced evidence also shows that while the appellant was armed with a rifle, the deceased was not armed. The appellant, who was a trained security guard, did not have to shoot the deceased in the head since the deceased was not armed. The force he used was therefore disproportionate.

The circumstances of this case, as revealed by the adduced evidence, would therefore rule out self-defence and provocation which the appellant attempts to raise as defences in his charge and caution statement. The appellant shot the deceased on a very vulnerable part of the body, that is, the head. This, combined with the nature of the weapon used, which was a gun, proves beyond reasonable doubt that there was malice aforethought on the part of the appellant.

We therefore agree with the learned trial Judge that the defences of provocation and self-defence which the accused tried to raise in the charge and caution statement were too farfetched in the circumstances under which the appellant shot the deceased.

Regarding the appellant's claims that the learned trial Judge ignored to address the appellant's defences of self-defence and provocation raised in his charge and caution statement, we have noted from pages 28 and 29 of the record, that the learned trial Judge considered exhibit P2 in its totality. She did not ignore the defences of self-defence and provocation as contended by the appellant. According to the trial Judge:-

> *"The defence of provocation and self-defence which the accused tried to raise in the charge and caution was too farfetched because the deceased did not have anything he was fighting with."*

Thus, based on the above, we do not agree with the appellant that the learned trial Judge only considered part of the charge and caution

statement relating to his admission to the shooting but ignored the part that raised two defences of provocation and self-defence.

Consequently, based on the above, it is our finding that grounds 1, 2, and 3 of this appeal have no merit and they accordingly fail.

Grounds 4 and 5

The appellant faulted the learned trial Judge for passing a sentence without considering the period the appellant had spent on remand, and for passing a manifestly harsh and excessive sentence to the prejudice of the appellant.

The legal position is that an appellate court will only interfere with a sentence imposed by the trial court in the exercise of the trial court's discretion, if that sentence is illegal, or unless the appellate court is satisfied that the sentence was manifestly so excessive, or so low as to amount to a miscarriage of justice, where the trial court failed to consider a circumstance or factor that was relevant to the sentence. The fact that, had the appellate court been the one that had tried the case it would have imposed a different sentence, is irrelevant as a consideration. See **Kyalimpa Edward V Uganda, Supreme Court Criminal Appeal No. 10 of 1995.**

In the instant case, the record of appeal shows on page 23 that the learned trial Judge, when sentencing the appellant, stated as follows:-

> *"The convict is a first offender.* ***He has been on remand for 1 year and 5 months.*** *The offence he has been convicted of*

carries a maximum sentence of death. Murder is so rampant in this country. ***Taking all the above into account****, he is sentenced to 45 years imprisonment." (our emphasis).*

It is clear from the learned trial Judge's statements that she took into account the period the appellant spent on remand when sentencing him.

Ground 4 of this appeal therefore has no merit and it fails.

Regarding the question of whether the learned trial Judge passed a manifestly harsh and excessive sentence to the prejudice of the appellant, we take into account the fact that, since the decision in **Attorney General V Suzan Kigula and 417 Others, Constitutional Appeal No. 03/2006**, the death penalty is no longer mandatory as a penalty for murder, though it is the maximum penalty.

In the case from which this appeal arises, the learned trial Judge passed a sentence of 45 years imprisonment against the appellant. As a first appellate court, we have taken into consideration the circumstances of this case and the manner in which the appellant killed the deceased, together with the fact that murder is a heinous offence, the maximum penalty of which is death. However, we must also consider the mitigating factors and the aggravating factors in this case, as guided by the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, and the sentencing ranges of superior court decisions. We are of the considered opinion that, in addition to addressing the mitigating and aggravating factors when sentencing, there is necessity for courts to maintain

consistency and uniformity in sentencing, taking into account the circumstances under which offences are committed.

The record shows that during sentencing of the appellant, the prosecution (respondent) prayed for a harsh and deterrent sentence if not the maximum sentence, because the convict had killed a cyclist for only refusing to pay Uganda shillings 500/= (five hundred). It stated that the convict was a very dangerous person who is likely to kill others if he is not kept away from society. The mitigating factors were that the appellant was a first offender.

In **Mutatina Godfrey and Another V Uganda, Supreme Court Criminal Appeal No. 61 of 2015**, the Supreme Court upheld a sentence of 36 years imprisonment where the appellants were convicted of murder.

In **Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No. 25 of 2014**, the Supreme Court, while agreeing that the offence of murder committed by the appellant was grave, and that the sentence given should reflect the enormity of the accused's unlawful conduct, nevertheless considered that the appellant was a first offender and was aged 24 years of age. The Court imposed against him a sentence of 22 years imprisonment as an appropriate sentence which would enable him to reform and be re integrated back into society.

In circumstances of this case, we note that the appellant shot the ~~appellant~~ deceased to death under unprovoked circumstances. However, he was a first offender. In our considered opinion, guided by the

Sentencing Guidelines and contemporary case decisions by superior courts, we find the sentence of 45 years imprisonment imposed by the learned trial Judge against the appellant to be manifestly harsh and excessive. The appellant should be given a sentence which will enable him to reform and be re-integrated in society. To that extent, ground 5 of this appeal succeeds.

In the result, we uphold the conviction of the appellant by the trial court, but set aside the learned trial Judge's sentence of 45 years imprisonment imposed against the appellant, on grounds that it was manifestly harsh and excessive. We, in exercise of our powers under section 11 of the Judicature Act, substitute the sentence of 45 years imprisonment with a sentence of 20 years imprisonment. However, considering that the appellant spent 1 year and 5 months on remand prior to his conviction, this period shall be deducted from the 20 years imprisonment pursuant to Article 23(8) of the Constitution of Uganda.

Accordingly, the appellant is to serve a sentence of 18 years and 7 months imprisonment, starting from the date of conviction, which is 23rd September 2010.

We so order.

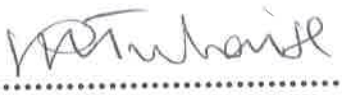
Dated at Jinja this.....10th.....day of.....February.....2020

.....

Cheborion Barishaki
Justice of Appeal

.....

Stephen Musota
Justice of Appeal



.....

Percy Night Tuhaise
Justice of Appeal