THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT MASAKA

Criminal Appeal No. 424 of 2017

(Appeal against the Judgment of the High Court, Masaka in High Court Criminal Session Case No. 166 of 2012 dated 26th March, 2014 (Margaret Oguli-Oumo, J) and also the other one dated 6th February, 2015 (Rugadya Atwooki, J.)

Kobusingye Allen
Kasibante Joseph
Twinamatsiko Denis :: **Appellants**

versus

Uganda ::**Respondent**

Coram: Hon. Lady Justice Elizabeth Musoke, JA
Hon. Justice Ezekiel Muhanguzi, JA
Hon. Justice Remmy Kasule, Ag. JA

JUDGMENT

The appellants were charged and convicted of murder contrary to Sections 188 and 189 of the Penal Code Act by the High Court at Masaka.

In the course of the trial before the first trial Judge, Lady Justice Margaret Oguli-Oumo, the first appellant pleaded guilty to the charge on 26th March, 2014. A plea of guilt was entered against her on 26th March, 2014 and she was sentenced to 28 years imprisonment on 27th March, 2014.

The second and third appellants denied the charge and a full trial was held before another trial Judge, His Lordship Rugadya-Atwoki, which ended on 6th February, 2015 with both appellants being convicted of the charge and sentenced to imprisonment for life for each one's entire natural life.

Dissatisfied the appellants lodged this appeal on two grounds of appeal, namely:

> ***"1. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence and held that the prosecution proved all the ingredients of murder against the second and third appellants beyond reasonable doubt which decision occasioned a miscarriage of justice.***
>
> ***2. The learned trial Judge erred in law and fact when he sentenced the 1st appellant to 28 years imprisonment which sentence was illegal, harsh and excessive, and the second and third appellants to life imprisonment each, which sentence is harsh and excessive in the***

circumstances hence occasioning a miscarriage of justice."

At the hearing of the appeal, learned Counsel Alexander Lule represented the appellants on State brief, while the learned State Attorney Joanita Twinomucunguzi was for the respondent.

Both Counsel for the appellants and for the respondents filed in Court written submissions for their respective parties to the appeal.

Ground 1 relates only to the second and third appellants and not the first appellant who pleaded guilty to the charge.

Appellants' Counsel submitted that the trial Judge erred when he held that the second and third appellants were placed at the scene of crime by the evidence of only Pw4 Namatovu Judith, a single identifying witness. Her evidence ought not to have been relied upon by the trial Judge because she was a minor, aged only 8 years at the time of the offence; and yet her evidence was not corroborated as required by Section 40(3) of the Trial on Indictments Act.

Counsel contended that as the alleged offence testified to by Pw4 took place in the deceased's house at about 2.00 a.m. in the night when it was dark, and Pw4 claimed to have identified the appellants by aid of light from a "tadooba" lamp that was in the bedroom, these were not factors that favoured a correct identification.

Counsel further argued that the second and third appellants had raised alibis by way of their defence and the same had not been

disproved by the prosecution, but instead, the same had been corroborated by the first appellant who stated to the trial Court that she had killed the deceased on her own, outside the house of the deceased; and that the second and third appellants had not participated in the said killing.

The trial Judge had thus failed in his evaluation of the evidence as a whole, when he found and held that the prosecution had proved beyond reasonable doubt the participation of the second and third appellants in the killing of the deceased. This caused a miscarriage of justice to the second and third appellants. Counsel thus prayed for this Court to allow the appeal and acquit the two appellants of the offence.

Counsel for the respondent maintained that the trial Judge had properly addressed himself to the dangers of relying on the evidence of a single identifying witness, more so a minor, before he proceeded to analyse the evidence of Pw4. The Judge properly examined the prosecution and the defence evidence before he came to the conclusion that the second and third appellants were properly identified by Pw4 at the scene of crime. Counsel prayed this Court to disallow ground 1 of the appeal.

As to ground 2 of the appeal, appellants' Counsel submitted that the sentence of 28 years imprisonment upon the first appellant was illegal in law as the same was passed without the Court first having taken into account the period the first appellant spent on remand.

Counsel further submitted that the trial Judge had also erred when he proceeded to sentence the first appellant to 28 years

imprisonment without any consideration at all of the factors mitigating the sentence in favour of the first appellant. Those factors were that the first appellant was a mother of four children, had no previous criminal record and she had pleaded guilty thus saving the time of the Court. Counsel invited the Court to sentence the first appellant to 10 years imprisonment, less the remand period of 1 year and 9 months, which would leave a sentence of 8 years and 3 months imprisonment.

In respect of the second and third appellants Counsel argued that, in the alternative of this Court finding the said two appellants guilty of murder, then the sentence of life imprisonment for the rest of the whole of one's life in prison be reduced to more lenient sentences for each of the second and third appellants. The second appellant was of advanced age, supported school going children before his conviction and was a first time offender. The third appellant was too a first time offender and had a family with ongoing school children. Counsel prayed Court to reduce the sentence of each of the second and third appellants to 15 years imprisonment less the respective remand period in respect of each one of them.

Counsel for the respondent opposed any reduction of sentence of any of the appellants. As to the first appellant, the trial Court had taken into account the remand period of 1 year and 9 months when the Court sentenced her to 28 years imprisonment. The trial Court had also justified why the first appellant was sentenced to 28 years imprisonment.

In respect to the second and third appellants, the trial Court had sentenced each one of them in strict observance of the law as to sentencing and as such the sentences ought not to be tampered with.

The duty of this Court, as the first appellate Court, is to re-appraise the evidence on record and draw its own inferences and conclusions on the case as a whole; but making allowance for the fact that this Court neither saw nor heard the witnesses testify at trial so as to be able to make an impression of their respective demeanours. This in effect places upon the first appellate Court a duty to re-hear the case. See: **Rule 30(1) of the Judicature (Court of Appeal Rules) Directions** and **Oryem Richard vs Uganda: Supreme Court Criminal Appeal No. 22 of 2014**.

As to ground 1 of the appeal, the re-appraisal of the evidence at trial clearly shows that Pw4 Namatovu Judith, aged 10 years, was the eye witness who identified the appellants as the ones who killed the deceased.

Before she gave her testimony, the learned trial Judge carried out a voire dire on her. The Court found her possessed of sufficient intelligence to justify receiving her evidence by Court, though not on oath. She was cross-examined by Counsel for the second and third appellants.

The essence of the evidence of Pw4 was that she was the daughter of the first appellant and her father was the deceased. She stayed with both her parents in their house at Kansenene. She knew both the second and third appellants before the death of her father. The second appellant stayed nearby in the area of her parents and he

used to often pass by their home. As to the third appellant, she knew him because he was a neighbour to the home of her parents. He had lived there for a long time.

On the night her father was killed, at about 2.00 a.m, both her parents and herself and others were sleeping in the house and the second and third appellants knocked on the door of the house. Pw4 heard the knocking, and then saw her mother, the first appellant go and open the door and then the three, that is the first, the second and the third appellants went to the bedroom where her deceased father was sleeping, started assaulting him with a hoe, an axe, a panga and a knife. They then brought the deceased when he was too weak to the sitting room, put him on a bicycle and then took him out of the house. She was able to see everything because there was a tadooba lamp that was giving light.

Her mother, the first appellant, also went out with the second and third appellants with the body of the deceased. When the mother returned to the house, she collected her and her other siblings in the house and took them that very night to the home of their grandfather, the father of their deceased father. The first appellant, then told the grand father that the deceased had been killed while coming from work. The grandfather reported the death to the police.

The above evidence of Pw4 Judith Namatovu, being the evidence of a child of tender years below the age of 14 years; and the same having been not on oath, was subject to Section 40(3) of the Trial on Indictments Act, Cap 23, which requires such evidence to be corroborated by some other material evidence in support thereof

implicating the accused before it could be acted upon by the Court. See also: **Court of Appeal Criminal Appeal No. 155 of 2009 Opolot Justine and Another vs Uganda** (unreported).

The fact that Pw4 was also the single identifying witness of the appellants also made her evidence to be considered with great care so as for the trial Court to satisfy itself that there is no danger of basing a conviction on mistaken identity. See: **Supreme Court Criminal Appeal No. 17 of 2015: Kazarwa Henry vs Uganda** (unreported).

The learned trial Judge properly addressed himself and the assessors of the need for caution as regards the evidence of Pw4.

The learned Judge then went on to find that Pw4's evidence had been corroborated by that of Pw3 Beyaka John, who confirmed, like Pw4 had stated, that the first appellant had gone to Pw3's house late at night at about 3.00 a.m. with the young children including Pw4. The learned Judge rejected as not reasonable the reason the first appellant gave to Pw3 for moving with the children at that time of night to Pw3's home, namely because her husband, the deceased, had gone away from home with a bicycle at 10.00 p.m. and had not returned.

Pw4's evidence that she knew the second and third appellant prior to the killing of the father, and could therefore identify them clearly as those who killed her father, is also corroborated by the evidence of Pw2 and Pw3 and Dw4 who testified that the second and third appellants lived in the same area as that of the deceased, the first appellant and Pw4 herself.

We have, on re-appraisal of the whole evidence, also found that the medical evidence of Pw1 Dr. Kiiza Isaiah, who carried out the post mortem examination on the deceased, showed that the deceased's body had bruises on the forehead, cut wound on the left cheek, right hand fingers and the elbows, the cause of death being a closed head injury due to being hit by blunt objects. These findings corroborate the testimony of Pw4 as to the struggle and the injuries she saw being administered by the appellants to the deceased, before they put him on a bicycle and took him out of the house.

The first appellant also corroborated the evidence of Pw4 that at the time of the death of the deceased, husband to the first appellant, Pw4 was staying with the said first appellant and also with the deceased.

The evidence of Pw6, Pw7 and that of the first appellant as to the blood stained axe found in the deceased's home also corroborates the evidence of Pw4 that she saw the appellants use an axe to hit her father, the deceased.

The learned trial Judge considered both the prosecution and defence evidence on record, analysed the respective versions of the same and then came to the conclusion that it is the prosecution version that was truthful and the defence versions were not truthful. He particularly came to the conclusion that the conditions of identification under which Pw4 identified the appellants, as the killers of the deceased, were favourable as there was light, she very well knew the appellants, including the first appellant who is her biological mother, and the second and third

appellants being residents of the area of the home of her parents; and also the fact that the assaulting of the deceased before he died was done very close to her (Pw4) in the house and in the room where she stayed with her father, the deceased, and her mother, there first appellant. The possibility of mistaken identity was thus hardly there.

This Court on re-appraising all the evidence both for the prosecution and for the defence, finds no reason for disagreeing with the findings and conclusions of the learned trial Judge. This Court holds that the learned trial Judge came to the right decision that the appellants were properly identified by Pw4 and the totality of the evidence proved beyond reasonable doubt, that the appellants killed the deceased with malice aforethought. This Court finds no merit in ground 1 of the appeal. The same stands disallowed.

Ground 2 of the appeal faulted the learned trial Judge for passing harsh and excessive sentences upon each one of the appellants.

This Court granted the necessary leave to the first appellant, who did not appeal against her conviction in ground 1 of the appeal, to pursue an appeal against sentence only pursuant to Section 132(1)(b) of the Trial on Indictments Act and Rule 43(3)(a) of the Rules of this Court.

The law as to altering sentence on appeal is that an appellate Court will only alter a sentence imposed by the trial Court if it is evident that the trial sentencing Court acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive or so low in view of the circumstances of the case so as

to amount to a miscarriage of Justice or if the sententence is illegal and/or contrary to the law. See: **Court of Appeal Criminal Appeal No. 103 of 2006: Sunday Gordon vs Uganda**. See also: **Court of Appeal Criminal Appeal No. 352 of 2015: Tuhumwire Mary vs Uganda**.

Counsel for the first appellant, submitted that the sentence of 28 years imprisonment passed against the first appellant was illegal because the trial Judge did not take into account the remand period of 1 year and 9 months the first appellant had spent in prison before she was convicted and sentenced.

Further, the trial Judge had also not considered the mitigating factors in favour of the first appellant while determining the sentence that was imposed upon the first appellant. Yet, the sentencing Court had to weigh the aggravating factors against the special factors so as to be able to arrive at the right sentence.

The sentence of 28 years imprisonment for murder was also not in consistency and in uniformity of the sentences passed by the Courts in previous decisions for the same offence. It was far beyond what the Courts in similar cases had imposed. Counsel prayed Court to reduce the sentence of the first appellant to 10 years imprisonment from which the period of remand of 1 year and 9 months be deducted.

As to the second and third appellants, learned Counsel submitted that the learned trial Judge, while passing sentence upon the second and third appellants, had not taken into account the mitigating factors of the advanced age of the second appellant who was aged 80 years, and the fact that both appellants were first

offenders, were supporting their respective families that had school going children.

The learned trial Judge had also put too much emphasis on the assertion of prevalence of the offence in the area of the appellants when there was no credible evidence to that effect. Counsel prayed Court to sentence each one of the second and third appellants to 15 years imprisonment.

The submissions of Counsel for the appellants as to sentence were strongly opposed by Counsel for the respondent for the reasons already ststed.

This Court has carefully considered the submissions of both Counsel, and re-appraised the evidence adduced in the trial Court and considered relevant past Court decisions on the matter.

The Supreme Court decision of **Criminal Appeal No 12 of 2014: Obote William vs Uganda** has the most relevant facts to this case. It is also a recent decision of the Supreme Court, having been delivered on 1st February, 2017. The facts of the case were that the appellant and deceased lived as husband and wife with two children. Due to some misunderstanding between the two the wife temporarily left her home and went to live with her mother. A meeting to reconcile the two was arranged to take place at the home of the mother of the deceased. Members of the families of the deceased and the appellant came for meeting, including the appellant's mother. The appellant too arrived in his motor-vehicle. He demanded for his wife, who was nearby peeling bananas. On receiving no reply, appellant rushed back to his motor-vehicle, picked a gun, cocked it and shot the deceased, his wife, several

times. He then picked the knife, the deceased had been using to peel the bananas and using the same, attacked the mother of the deceased. In the meantime, the appellant's mother picked her son's (appellant) gun and fled the scene with it, only to be intercepted by a security guard at a neighbour's house who removed the gun from her and handed the same to police. The deceased died of gunshot wounds soon after being rushed to hospital. At the trial for murder, the appellant stated in his defence, that the shooting of the deceased had been accidental during a struggle between him and his mother in law, the deceased's mother. The trial Court rejected the said defence as being not truthful. The appellant was convicted and sentenced to life imprisonment. The Court of Appeal and the Supreme Court upheld the said sentence as appropriate, the Supreme Court justifying the sentence thus:

> ***"The appellant ended the life of the mother of his children with reckless abandon for which he could have suffered a death penalty and we see no reason for interfering with the sentence".***

This Court notes that the "reckless abandon" that the Supreme Court refers to in the **Obote William case** (Supra) is even greater in the case of the three appellants in this case under consideration. In this case the first appellant opened the door of their home house; and let in the second and third appellants and then the three started the process of killing her husband, the deceased, by use of a panga, an axe and a knife in the very house where their biological young children were sleeping, and indeed one of them

Pw4, Namatovu Judith, aged about 7 years at the time, was watching them. Then when the deceased was almost dead the three appellants put him on his bicycle and threw him in the acacia trees, as a valueless object. The first appellant then started to tell to others including her own children and her father in law, Pw3, as to how the deceased had left his home on his bicycle and how he had failed to return home; and also how the second and third appellants had not been involved in the deceased's murder.

In another case of the Court of Appeal sitting at Jinja **Criminal Appeal No. 117 of 2009: Kasadda David & 2 Others vs Uganda**, in a decision dated 27.03.2018, this Court upheld a sentence of life imprisonment imposed upon the appellant by the trial Court, as appropriate, for each one of the appellants on the counts of murder and Aggravated Robbery because, in a bid to get rich quickly the appellants had hired the deceased, a taxi driver, and at an arranged place the vehicle stopped, they fatally assaulted the driver, threw his body in river Nile and thus ended the life of an innocent man in a very barbaric way denying the deceased's family to give the deceased a decent burial.

In the appeal before this Court, as regards the first appellant, she pleaded guilty to the charge of the murder of her husband, the deceased. She was convicted on her own plea. The Court in sentencing her took into account as mitigating factors that she pleaded guilty and saved the resources of Court. She was a first offender with no past criminal record. She was young aged 30 years and had spent 1 year and 9 months on remand.

As to the aggravating factors, the trial Court considered the fact that the maximum sentence for murder was death, that the first appellant had taken the axe with which her husband had been murdered; to hide it into the children's room and had participated in having the body of her deceased's husband taken and thrown away as if it was a valueless object.

The first appellant also tried to induce Pw4 her daughter not to tell anyone else what she had seen when her father, the deceased, was being killed. The first appellant also received shs. 50,000= from the third appellant so that she hides the identities of those others with whom she killed the deceased.

The learned Judge after considering all the circumstances as set out above concluded as regards the first appellant that:

"All the above point to the convict who had no feelings for her husband/father of her children but was willing to watch him die and not even report about it. .....this was the behaviour of a callous person who does not deserve any merciful" (sic).

The learned Judge then sentenced the first appellant to 28 years imprisonment.

This Court, on re-appraising all the evidence at trial and on the basis of the decisions of **Obote William vs Uganda** (Supra) and **Kasadda David and 2 Others vs Uganda** (Supra) would have wished that the firs appellant was sentenced to life imprisonment, instead of the 28 years imprisonment. But then the respondent never cross-appealed against the sentence of the trial Court. This Court could also not have increased the sentence of the first appellant without first having given an opportunity to the first

appellant to defend herself against the increase of such sentence. At any rate the principle as to sentencing is that a sentence will not be altered on the mere ground that, if the appellate Court Justices had tried the appellant at trial, they might have passed somewhat a different sentence: See: **Supreme Court Criminal Appeal No. 19 of 1995: Jackson Zita vs Uganda.**

This Court therefore, given the above considerations, finds no reason to interfere with the sentence of 28 years imprisonment passed by the trial Judge upon the first appellant. The same is hereby upheld.

As to the second and third appellants this Court finds that, given the fact that the first appellant who masterminded the murder of her husband, the deceased, has been sentenced to 28 years imprisonment, it is only fair and just that the second and third appellants who were co-accused with the first appellant do not serve a sentence harsher than the one imposed upon the first appellant. The sentence of life imprisonment imposed upon each one of the second and third appellants is harsher than the 28 years imprisonment to which the first appellant was sentenced. It is accordingly harsh and excessive and the same is hereby vacated against each one of the second and third appellant.

The second appellant Kasibante Joseph was aged 50 years at the time of his conviction on 6th February, 2015. He is now getting 55 years old. He was one with family responsibilities with school going children. He spent 2 years and 7 months on remand.

The third appellant, Twinamatsiko Denis was aged 27 years at the time of his conviction, he is currently about 32 years old. Due to

his youthful age he had room to reform into a better person. He was a person with family responsibilities with school going children.

However, the second and third appellants brutally murdered the deceased who was their neighbour. They did so without any regard to the deceased's children, of whom Pw4 saw them carrying out the murder together with her mother, wife of the deceased, the first appellant. This orphaned the deceased's children and traumatized Pw4 through out her life.

This Court has taken into the mitigating and aggravating factors, the submissions of respective Counsel and the relevant Court decisions, sentences each one of the second and third appellants to a sentence of 28 years imprisonment.

Since each of the two appellants spent 2 years and 7 months on remand, the said period is thus deducted from the sentence passed, so that each of the second (Kasibante Joseph) and the third (Twinamatsiko Denis) is to serve a term of imprisonment of 25 years and 5 months as from the date of conviction of 6th February, 2015.

In conclusion, this appeal is partly allowed and partly dismissed. Ground 2 of the appeal is dismissed as against the first appellant, but allowed in respect of the second and third appellants with the following orders as to sentence.

1. The first appellant, Kobusingye Allen, is sentenced to a term of imprisonment of 28 years as from the date of her conviction which is 26th March, 2014.

2. The second appellant Kasibante Joseph is sentenced to a term of imprisonment of 25 years and 5 months as from the date of his conviction of 6th February, 2015.

3. The third appellant Twinamatsiko Denis is sentenced to a term of imprisonment of 25 years and 5 months as from the date of his conviction of 6th February, 2015.

It is so ordered.

Dated at Masaka this 22 day of Jan. 2020.

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Elizabeth Musoke
Justice of Appeal

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Ezekiel Muhanguzi
Justice of Appeal

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Remmy Kasule
Ag. Justice of Appeal