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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 533 OF 2014
(Coram: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi JJA)

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BONGOMIN KENNEDY APPELLANT

VERSUS

UGANDA.....RESPONDENT

(An appeal from the decision of the High Court holden at Nakawa before His Lordship Hon. Justice Wilson Musene Musalu dated 13th June, 2014 in Criminal Session Case No. 34 of 2010)

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JUDGMENT OF THE COURT

This appeal arises from the decision of His Lordship Wilson Musene Musalu, J in High Court Criminal Session Case No. 34 of 2010 delivered on 13th June 2014, in which the appellant
 20 was convicted of the offence of murder contrary to Section 188 and 189 of the Penal Code Act (CAP 120) and sentenced to 30 years imprisonment.

The brief facts as accepted by the learned trial Judge were that on the 21st day of October, 2010 at Kirombe, Zone A, Butabika Parish Nakawa Division, the accused, now appellant, engaged in a serious domestic fight with the deceased, Awachi Doreen for several hours. On
 25 27th October, 2010 the appellant again fought the deceased seriously causing her serious injuries. On 28th October, 2010, the deceased was taken to a nearby clinic and then referred to Mulago Hospital where she consequently died on 30th October, 2010. The appellant was accordingly charged with the offence of murder contrary to Section 188 and 189 of the Penal Code Act. He was tried, convicted and sentenced to 30 years imprisonment.

30 The appellant being dissatisfied with both conviction and sentence appealed to this Court on the following ground:-

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1. *That the learned trial Judge erred in law and fact when he held that malice aforethought had been proved against the appellant*
 2. *That the learned trial Judge erred in law and fact when he sentenced the appellant to 30 years imprisonment term, a sentence considered illegal, harsh and excessive in the circumstances of the case.*
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3. *The learned trial Judge erred in law and fact when he convicted the appellant in a trial conducted in the absence of selected and sworn assessors.*

Representations

At the hearing of this appeal, the appellant was represented by *Ms. Suzan Sylvia Wakabala* on state brief while learned Senior State Attorney *Ms. Annette Namatovu Ddungu* appeared
15 for the respondent.

Appellant's case

Ms. Wakabala argued ground 3 first, then grounds 1 and 2 respectively. In respect of ground 3, she submitted that the two assessors, who had been duly appointed, failed to attend the whole trial as required by the law. She contended that the record of proceedings does not
20 indicate the presence of the assessors on several dates of the hearing. The presence of the assessors was indicated on 10th September, 2013 the day they were sworn in, 12th May, 2014, 14th May 2014 and on 23rd May, 2014. Counsel further contended that the joint opinion of the assessors was given by a Ms. Nakayima Oliver who was never part of the assessors appointed by Court and as such it amounted to an illegality which occasioned a miscarriage
25 of justice to the appellant. She asked Court to allow this ground of appeal and subsequently order for an acquittal. For the above proposition she relied on ***Abdu Komakech vs Uganda [1992 -93] HCB 21.***

In respect of ground 1, Counsel submitted that, the element of malice aforethought was not sufficiently proved against the appellant. She contended that for a person to be convicted of



5 the offence of murder all the elements of murder have to be proved beyond reasonable doubt, but in this case the element of malice aforethought was not proved and as such the learned trial Judge ought to have reduced the offence to manslaughter. She relied on ***Livingstone Kakooza vs Uganda, Supreme Court Criminal Appeal No. 17 of 1993.***


10 On ground 2, it was contended that, the sentence imposed by the learned trial Judge was illegal, harsh and manifestly excessive in the circumstances of the case. Counsel submitted that the learned trial Judge erred in law when he failed to comply with the provisions of *Article 23 (8)* of the Constitution. She asked Court to set aside the sentence and impose its own. She proposed a sentence of 15 years imprisonment from which the period he spent on remand be deducted.

15 **Respondent's reply**

In respect of ground 3, counsel for the respondent conceded to the fact that there was an irregularity in the way the proceedings were conducted in respect of the assessors. However she differed with the prayer of acquittal as sought by Counsel for the appellant and asked Court to order for a retrial.

20 In respect of ground 1, Counsel submitted that there was sufficient evidence which proved that the appellant had malice aforethought to murder the deceased as PW4 Flavia Labol testified in Court that, she found the accused squeezing the neck of the deceased and in the process he inflicted grave injuries upon her. PW4 further stated that the appellant disappeared at the time the deceased was hospitalized yet he was the one responsible. Counsel
25 contended that all the evidence adduced at the trial by the prosecution proved malice aforethought. She asked Court to uphold the conviction of murder.

On ground 2, counsel conceded that the learned trial Judge had erred when he imposed a sentence on the appellant without taking into consideration the period spent on remand and this contravened *Article 23(8)* of the Constitution and as such the sentence imposed was



5 illegal. She asked Court to set aside the illegal sentence and substitute it with a legal sentence. She proposed 30 years imprisonment relying on the case of *Ssemanda and another vs Uganda, Court of Appeal Criminal Appeal No. 77 of 2010* in which this Court upheld the sentence of 35 years imprisonment as an appropriate sentence.

Resolution

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

15 We shall first determine ground 3. Ms. Wakabala pointed out an irregularity in the proceedings before the trial Court which we think is a substantive issue. It was contended that the assessors were absent during part of the hearings of the case and that the assessors' joint opinion was presented by a person who was never sworn in as an assessor. She contended that such an irregularity was fatal to the whole trial.

20 From the outset we wish to point out that absence of assessors from a trial is not merely a procedural irregularity but a legal matter as it is governed by *Section 69 (1)* of the Trial on Indictments Act which provides as follows:-

25 *"(1) If, in the course of a trial before the High Court at any time before the verdict, any assessor is from sufficient cause prevented from attending throughout the trial, or absents himself or herself, and it is not practicable immediately to enforce his or her attendance, the trial shall proceed with the aid of the other assessors.*

(2) If more than one of the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of different assessors"



5 The issue of an assessor missing or being wrongly substituted was considered in **Abdu Komakech vs Uganda (supra)**. In that case, the trial started with two assessors and the prosecution examined its witnesses and closed its case. Then there was a further adjournment. When the matter came up on the adjourned date, it was discovered that one of the original assessors had not been participating in the trial as he had been sitting with a
10 different Judge in a different case. Another assessor had taken the place of the absent assessor at the insistence of that absent assessor without the knowledge of the learned trial Judge and the counsel. Upon discovering this development, the learned trial Judge acted under section 67 (1) of the Trial on Indictment Decree and dismissed the substitute assessor and the trial proceeded with the remaining assessor throughout.

15 On appeal, the Supreme Court held that, *“the second assessor acted as an Assessor fraudulently. This irregularity was fundamental as it went to the jurisdiction of the court. It occasioned a miscarriage of justice and was therefore not curable under section 137 of the Trial on Indictments Decree (T.I.D). Further, the court had discretion to order a retrial where the original trial was defective or illegal and the interest of justice requires it.”*

20 Turning to the instant case, we note that the trial commenced on 10th September, 2013 and the appellant took plea. Two assessors, Semakalu Dennis and Ssekito Christopher were introduced and the appellant indicated that he had no objection to them. The trial was adjourned to 11th October, 2013. The record of proceedings indicates that the matter came up for hearing on 30/10/2013 but prosecution reported that none of the witnesses had come
25 and prayed for adjournment. Counsel for defence submitted that the appellant had been on remand for 3 years and prayed that the charges be dismissed. His prayers were granted and the appellant was discharged.

However, later on, the complainants turned up and on 6th December, 2013 the appellant was brought to court under a warrant of arrest and his trial commenced on 16th January, 2014.

30 When the trial commenced, the court stated thus;



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"Assessors duly sworn"

The names and particulars of the assessors were not stated and there is no indication on record that the appellant and his counsel did not object to the assessors.

In our well-considered view, the omission by the learned trial Judge to state the particulars of the assessors who were duly sworn when the trial commenced was a fundamental irregularity which occasioned a miscarriage of justice to the appellant. This is because the purpose of giving the names and particulars of the assessors is to give an opportunity to the accused person to challenge the assessor pursuant to section 68 of the Trial on Indictments Act (TIA) which states as follows;

"68. Challenge for cause.

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(1) The accused person or his or her advocate, and the prosecutor may, before an assessor is sworn, challenge the assessor for cause on any of the following grounds— (a) presumed or actual partiality; (b) personal cause such as infancy, old age, deafness, blindness or infirmity; (c) his or her character, in that he or she has been convicted of an offence which, in the opinion of the judge, renders him or her unfit to serve as an assessor; (d) his or her inability adequately to understand the language of the court.

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(2) When a challenge is disputed, the issue shall be tried by the judge and the person challenged may be examined on oath."

Section 139 of the TIA gives this Court the power to reverse or alter a sentence on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial where a failure of justice is occasioned.

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For the above reason, we are inclined to allow the appeal, quash the appellant's conviction and set aside the sentence of 30 years imprisonment imposed upon him. We order a retrial before a different Judge and direct the Assistant Registrar of this Court in charge of the Criminal Registry to bring the matter to the immediate attention of the Resident Judge at

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5 Nakawa so that the retrial is conducted in the next convenient criminal session. We are also
mindful that the appellant has been in custody for a period of more than 9 years, that is, since
30th October, 2010. For that reason, we direct that as the appellant awaits his retrial, he should
be released on bail, subject to fulfillment of the bail conditions which he will be given by the
Registrar High Court at Nakawa. He is hereby ordered to appear before the Registrar High
10 Court for that purpose.

In the premises, we find no point in considering the other grounds of appeal.

We so order.

Dated at Kampala this.....day of2020.

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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