THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT LIRA

CRIMINAL APPEAL NO. 0157 OF 2010

(Coram: Richard Buteera, DCJ, Hellen Obura, Remmy Kasule, JJA)

ADIGA JOHNSON DAVID::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Arua before Kwesiga, J. delivered on the 29th day of July, 2010 in Criminal Session Case No. 0001 of 2003.)

JUDGMENT OF COURT

Introduction

The appellant was indicted with the offence of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120. He was tried and convicted before the High Court at Arua (Kwesiga, J.) and subsequently sentenced to life imprisonment on 29th July, 2010.

Background to the Appeal

The facts as ascertained from the court record are that on the 4th day of November, 2002, the appellant while at Drimindra village in the Arua District murdered Dorcus Enjekia (the deceased). At the trial, the prosecution evidence was that the deceased went missing and after a brief search, the mother of the deceased PW1 Abako Jane received information that there was a dead body of a girl or woman that had been seen at Micu river. She went to the crime scene and found a body without limbs which she recognised as that of the deceased. She reported the matter to the deceased's father and the police came to the crime scene. The police carried out investigations and arrested the appellant in December 2002 having fled to Kampala. He was charged of murder and subsequently tried and convicted of the offence

and sentenced to life imprisonment. Being dissatisfied with this decision, he has appealed to this Court on the following grounds;

1. *That the learned trial Judge erred in law when he failed to sum up the law and evidence to the assessors which occasioned a miscarriage of justice.*
2. *That the learned trial Judge erred in law and fact when he failed to adequately evaluate the evidence as a whole regarding the charge and caution statement and as a result came to the wrong decision.*
3. *That the learned trial Judge erred in law and fact when he failed to properly evaluate the contradictions in the evidence of PW1 which were major and pointing to deliberate falsehood and hence came to a wrong decision.*
4. *That the learned trial Judge erred in law and in fact when he passed a sentence which was harsh and excessive as to amount to a miscarriage of justice.*

Representations

At the hearing of this appeal Mr. Adar John Patrick represented the appellant on State Brief while Mr. Brian Kalinaki Assistant Director Public Prosecutions represented the respondent. The appellant was not physically present in court, due to the challenge of the Covid 19 pandemic and the Standard Operating Procedures (SOPs) given by the Ministry of Health which prohibit crowding in a place. However, the appellant was facilitated to attend the proceedings from prisons using technology (zoom).

Case for the appellant

At the hearing of this appeal, both counsel filed written submissions.

Counsel for the appellant prayed for validation of the notice of appeal which had been filed out of time by the appellant, who at the time, did not have access to legal representation. This Court granted the prayer and validated the notice of appeal.

On ground 1, counsel submitted that there is no evidence that summing up was done to the assessors or that the notes were detached from the proceedings. He argued that section 82 (1) of the Trial on Indictments Act (TIA) requires the Judge to sum up the law and the evidence

in the case to the assessors and that though the Judge is not bound by the assessor's opinion the provision is couched in a mandatory manner. He added that conformity to mandatory procedural requirement forms part and parcel of the right to a fair hearing provided for under Article 28 of the Constitution of the Republic of Uganda, 1995 and that the learned trial Judge's omission occasioned a miscarriage of justice. He cited the case of ***Bakuye Muzamiru and anor vs Uganda, SCCA No. 56 of 2015*** to support his submissions.

On ground 2, counsel submitted that the appellant maintained that he never made a statement. However when the state prayed to tender the charge and caution statement in, the learned trial Judge quickly admitted the same without conducting a trial within a trial which is contrary to the decision in ***Israeli Kamukolse and others vs R, 23 EACA 521.*** Counsel also submitted that the charge and caution statement was wrongly admitted, the same was repudiated and required corroboration from independent credible evidence which was lacking in this case. He cited the case of ***Twehangane Alfred vs Uganda, CACA No. 1399 of 2001*** to support his submission.

Regarding ground 3, counsel submitted that the gist of PW1's evidence as summarized by the learned trial Judge does not only cause uneasiness but is substantially not truthful and should have been rejected in its entirety. He argued that PW1 does not reveal what distinctive mark or body feature enabled her to recognize the body as that of the deceased. Further that, the learned trial Judge erred when he failed to pay attention to the inconsistencies in PW1's evidence which counsel contends were grave to the extent of adversely affecting the veracity of PW1's testimony. Counsel also submitted that apart from PW1's evidence whose credibility is highly suspect, there is no other evidence confirming that the body which was discovered was that of the deceased. In conclusion, counsel submitted that the prosecution did not prove beyond reasonable doubt that the deceased is actually dead and yet proof of death is one of the essential ingredients of murder which must be proven beyond reasonable doubt.

On the last ground, counsel submitted that in imposing discretionary custodial sentences, there is need that they should be for the shortest term commensurate with the seriousness of the offence. He added that the seriousness of the offence in the instant case is mitigated by a number of factors which include; the appellant is a first offender, he is remorseful and he has Tuberculosis. Counsel submitted that the sentence of life imprisonment imposed by the learned trial Judge though legal was excessive.

In conclusion, counsel submitted that the appeal be allowed, conviction quashed and sentence set aside or in the alternative but without prejudice, a lesser sentence be imposed.

Case for the Respondent

Counsel conceded on ground 1 that summing up to the assessors was not done and that this rendered the whole trial a nullity. To support his submission, he cited the case of ***Agaba Lillian and Amutuheire Patrick vs Uganda, CACA No. 247 &239 of 2017*** and ***Sam Ekolu Obote vs Uganda,[1995] UGSC 7*** where the Supreme Court held that the provision of section 82 (1) of the TIA imposes a statutory obligation on a trial Judge to sum up the law and evidence in a case to the assessors.

Counsel also conceded on ground 2, and submitted that when the appellant disputed the charge and caution statement during trial, the learned trial Judge was supposed to hold a trial within a trial to find out the truthfulness and voluntariness of the statement, which he did not do. He instead went ahead to admit it in evidence and relied on it in his findings which counsel contended was irregular. He also submitted that it was fatal to admit the charge and caution statement in evidence without first subjecting the same to a trial within a trial.

Counsel abandoned his submissions regarding grounds 3 and 4 and prayed that this Court uses its discretion under rule 32 (1) of the Judicature (Court of Appeal) Rules to order for a retrial.

Court's decision

The duty of this Court as a first appellate Court was re-stated by the Supreme Court in the case of ***Oryem Richard vs Uganda, Criminal Appeal No. 22 of 2014 (SC)*** in the following words;

> *"We should point out at this stage that rule 30 (1) of the Court of Appeal Rules places a duty on the Court of Appeal, as first appellate court, to re-appraise the evidence on record and draw its own inference and conclusion on the case as a whole but making allowance for the fact that it has neither seen nor heard the witnesses. This gives the first appellate court the duty to rehear the case."*

The appellant faults the trial Judge for failing to sum up to the assessors. We note from the court record that after the closing submissions of both the state and the defence at pages 41-46, the assessors gave their opinion at pages 46-48. There is no record of the summing up notes by the learned trial Judge to the assessors. Section 82 (1) of the TIA provides as follows;

> *"When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors."*

We agree with both counsel that this provision is couched in mandatory terms and that the failure of the learned trial Judge to adhere to it rendered the trial a nullity and thus occasioned a miscarriage of justice.

Be that as it may, the appellant also faults the learned trial Judge on ground 2 for relying on a repudiated charge and caution statement in arriving at his decision. We note that on page 31 of the record of proceedings, the appellant denied having made the statement though however, at page 32, the learned trial Judge admitted it in evidence without giving the appellant an opportunity to indicate whether he was objecting in which case, if there was an objection he would have conducted a trial within a trial. The purpose of carrying out a trial within a trial is to establish the voluntariness of the statements made by accused persons as

BSR

was found by the Supreme Court in ***Amos Binuge & ors vs Uganda, SCCA No. 23 of 1989***. The court held as follows:

> *"It is trite 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 a trial within a trial is to decide upon the evidence of both sides, whether the confession should be admitted. Court cannot by simply looking at the statement, conclude that it was made voluntarily."*

The procedure for carrying out a trial within a trial was summarized in the case of ***Kinyori s/o Karuditu vs R* (1) (1956), 23 E.A.C.A. 480 at p. 482** in which the Court of Appeal Kenya stated as follows;

> *"For the avoidance of doubt we now summarize the proper procedure at a trial with assessors when the defence desires to dispute the admissibility of any extra-judicial statement, or part thereof, made by the accused either in writing or orally. This same procedure applies equally, of course, to a trial with a jury. If the defence is aware before the commencement of the trial that such an issue will arise the prosecution should then be informed of that fact. The latter will therefore refrain from referring in the presence of the assessors to the statement concerned, or even to the allegation that any such statement was made, unless and until it has been ruled admissible. When the stage is reached at which the issue must be tried the defence should mention to the court that a point of law arises and submit that the assessors be asked to retire. It is important that that should be done before any witness is allowed to testify in any respect which might suggest to the assessors that the accused had made the extra-judicial statement. For example, an interpreter who acted as such at the alleged making of the statement should not enter the witness-box until after the assessors have retired. The assessors having left the court the Crown, upon whom the burden rests of proving the statement to be admissible, will call its witnesses, followed by any evidence or statement from the dock which the defence elects to tender or make. The judge having then delivered his ruling, the assessors will return. If the statement has been held to be admissible the Crown witness to whom it was made will then produce it and put it in if it is in writing, or will testify as to what was said if it was oral. The defence will be entitled, and the judge should make sure that the defence is aware of its right, again to cross-examine that Crown witness as to the circumstances in which the statement was made and*

to have recalled for similar cross-examination the interpreter and any other Crown witness who has given evidence on the issue in the absence of the assessors. Both in the absence and again in the presence of the assessors the normal right to re-examine will arise out of any such cross-examination. When the time comes for the defence to present its case on the general issue, if the accused elects either to testify or to make a statement from the dock thereon he will be entitled also to speak again to any questionable circumstances which he alleges attended the making of his extra-judicial statement and to affirm or to reaffirm any repudiation or retraction upon which he seeks to rely. Indeed, if the accused desires to be heard in his defence either in the witness-box or from the dock he will not be obliged to testify in chief or to speak, as the case may be, to anything more than the matters touching on the issue of admissibility; but, once he elects to testify, however much he then restricts his evidence-in-chief he will be liable to cross-examination not only to credit but also at large upon every matter in issue at the trial. The accused will also be entitled to recall and again to examine any witness who spoke to the issue in the assessors' absence, and to examine any other defence witness thereon."

The broad principle underlying that procedure is that the accused is entitled to present, not merely to the judge but also to the assessors, the whole of his case relating to the alleged extra-judicial statement; for the judge's ruling that it is admissible in evidence is not the end of the matter; it still remains for both judge and assessors individually (or, where there is a jury, for the jurors) to assess the value or weight of any admission or confession thereby disclosed and also the accused is still at liberty to try to persuade them that he has good reason to retract or to repudiate the statement concerned or any part of it.

However, it should be noted that the procedure in the Ugandan jurisdiction does away with the need for the accused person to present his case to the assessors. Be that as it may, in the instant case, it is our considered view that the trial Judge should have assessed the voluntariness of the statement vis-a-viz the appellant's denial and thereafter give reasons for believing the prosecution and not the defence case. He did not do so and therefore we fault him for that fatal omission.

In light of the procedural irregularities we have pointed out herein above, we find that a miscarriage of justice was occasioned to the appellant. According to section 139 of the TIA, a finding based on such irregularities should be reversed. It provides as follows;

> *"Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered 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 unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice."*

It is therefore our conclusion that the finding of the learned trial Judge should be quashed and the sentence set aside on the basis of these irregularities, and we so order.

Where a conviction by a lower court is quashed for being based on a fundamental irregularity in the proceedings which resulted into a mis-trial, or where by reason of an error material to the merits of the case a miscarriage of justice has occurred, the interest of justice normally demands that a retrial be ordered. An order for a retrial is as a result of the judicious exercise of the Court's discretion which should be done with great care and not randomly, but upon principles that have been developed over time by the Courts: ***See: Fatehali Manji vs R, [1966] EA 34***

The overriding purpose of a retrial as stated in the case of ***Rev. Father Santos Wapokra vs Uganda, CACA No. 204 of 2012,*** is to ensure that the cause of justice is served in a case before Court. A serious error committed as to the conduct of a trial or the discovery of new evidence, which was not obtainable at the trial, are the major considerations for ordering a retrial. The Court that has tried a case should be able to correct the errors as to the manner of the conduct of the trial, or to receive other evidence that was then not available. However that must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay and inconvenience by reason of the retrial.

The other considerations to be taken into account before ordering a retrial include; where the

original trial was illegal or defective, the rule of the law that a man shall not be twice vexed for one and the same cause (Nemo bis vexari debet pro eadem causa), where an accused was convicted of an offence other than the one with which he was either charged or ought to have been charged, strength of the prosecution case, the seriousness or otherwise of the offence, whether the original trial was complex and prolonged, the expense of the new trial to the accused, the fact that any criminal trial is an ordeal for the accused, who should not suffer a second trial, unless the interests of justice so require and the length of time between the commission of the offence and the new trial, and whether the evidence will be available at the new trial. ***See: Ahmed Ali Dharamsi Sumar vs R [1964] EA 481; Tamano vs R [1969] EA 126.***

Taking guidance from the above cited authorities, we note that the offence in this appeal was committed on 4th November, 2002 and the appellant was charged and his trial then started on 14th April, 2010. On 29th July, 2010, the judgement was delivered in which the appellant was convicted and sentenced. This appeal was heard in 2020 which is over 18 years since the offence was committed and 10 years since the witnesses testified. Taking into consideration the lapse of time, the likelihood that it might pose difficulty in tracing the witnesses and the possibility that the evidence might not be available at the new trial, it is our considered view, that ordering a retrial would occasion a miscarriage of justice. We also note that the appellant has been in lawful custody for over 18 years now which period, we find, has served the ends of justice given the parity of sentences in similar offences as illustrated here below in some of the previous decisions of this Court and the Supreme Court.

In ***Mbunya Godfrey vs Uganda, SCCA No. 004 of 2011,*** the Supreme Court set aside the death sentence imposed on the appellant for the murder of his wife and substituted it with a sentence of 25 years imprisonment.

In ***Tumwesigye Anthony vs Uganda, CACA No. 46 of 2012***, the appellant was convicted of the offence of murder and sentenced to 32 years imprisonment. On appeal, this Court set aside the sentence of 32 years imprisonment and substituted it with 20 years imprisonment.

In ***Anywar Patrick and anor vs Uganda, CACA 166 of 2009***, this Court set aside a sentence of life imprisonment imposed on the appellants for the offence of murder and substituted it with a sentence of 19 years and 3 months imprisonment.

For the above reasons, we are inclined not to order a re-trial. We order for the immediate release of the appellant unless he is held on some other lawful charges.

We accordingly find no point in considering the other two grounds of appeal.

We so order.

Dated at **Lira** this...25th...day of.....Feb.....2021

.....

Hon. Justice Richard Buteera, DCJ

DEPUTY CHIEF JUSTICE

.....

Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon. Justice Remmy Kasule

JUSTICE OF APPEAL