THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

SITTING AT KAMPAL

CRIMINAL APEAL NO. 903 OF 2014

(Appeal from the Decision of the High Court of Uganda at Nakawa before Hon. Lady Justice Elizabeth Nahamya delivered on 17th December, 2014 in Criminal Session Case No. 071 of 2012)

1. Bukenya Muhammad
2. Bakaluba Yassin :::::::::::::::::::::::::::::: **Appellants**
3. Bumbakali Mukiibi

Versus

Uganda ::**Respondent**

Coram: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Lady Justice Catherine Bamugemereire, JA
Hon. Mr. Justice Remmy Kasule, Ag JA

Judgment of the Court

Introduction:

This is an appeal from the decision of the High Court Holden at Nakawa which convicted and sentenced the 1st appellant to life imprisonment for the offence of Murder while the 2nd and 3rd appellants were each sentenced to 20 years imprisonment for the same offence.

Background:

The facts admitted by the appellants and accepted by the trial Court were that on 07.07.2011 at Kalungi village, Butambala District, the 1st appellant together with another murdered Mustafa Kiremye in watch of the 2nd and the 3rd appellants on accusation of witchcraft.

The appeal was argued on the basis of Grounds of Appal in the supplementary Memorandum of Appeal filed in this Court on 08.11.2020.

> ***"1. The learned trial Judge erred in law and fact when she convicted the appellants based on circumstantial evidence that fell short of the legal test and thus occasioned a miscarriage of justice.***
>
> ***2. The learned trial Judge erred in law and fact when she admitted the retracted and repudiated confessions thereby arriving at a wrong conclusion.***
>
> ***3. The learned trial Judge erred in law and fact when she imposed such an excessive sentence of life imprisonment for the 1st appellant and 20 years imprisonment for the 2nd and 3rd appellants that is manifestly excessive in the circumstances".***

Legal Representation:

On appeal the appellant was represented by learned Counsel Ssembuya Magulu Douglas on state brief while learned Attorney Emily Mutuza Ssendawula was for the respondent.

Submissions for the Appellants:

Ground 1:

Learned Counsel for appellants contended that the evidence of prosecution witness Pw3 (Serunjogi Kamanda) consisted of what he allegedly received from Pw4 (Juma Kayinda) through a telephone conversation. This was hearsay evidence of what Pw4 told Pw3 of what had happened at the scene of crime. It was contrary to Section 59 of the Evidence Act.

Further, the assertion that Pw4 received a telephone call from the 1st appellant which led to the arrest, detention and confession of the 1st appellant was not availed to Court as the telephone print outs were never adduced as evidence to the Court at trial. It was therefore unsafe for the trial Court to base its conviction of the appellants on such evidence.

Counsel further submitted that the evidence adduced showed that the sniffer police dogs brought at the scene of crime led the Police to the houses of Issa Semuyaga and Kibedi. They did not go anywhere near the houses of the appellants. This evidence created gaps in the prosecution case of reasonable doubt as to whether the appellants ever participated in the murder of the deceased. Thus the required standard of proof of beyond reasonable doubt was not satisfied as required pursuant to **Ojepan Ignatius vs Uganda, Supreme Court Criminal Appeal No. 25 of 1995**.

Counsel also submitted that the evidence relied on in this case was too weak to support a conviction of the appellants. Indeed in respect of the 2nd appellant, there was no evidence at all putting him at the scene of the crime.

Learned Counsel for the appellants contended that the learned trial Judge was not justified to have completely ignored Dw1 assertion that it was his uncle Kayima who in the company of policemen arrested him as he went to buy cement not, as Kayima alleged, that he (Dw1) was found at his home on the day he was arrested. The learned trial Judge had no basis to reject the version of Dw1.

Learned Counsel for appellants thus prayed this Court to allow all the grounds of the appeal.

Submissions for the Respondent:

Learned Counsel for the respondent supported both the conviction and sentences passed by the trial Judge upon the appellants.

The circumstantial evidence on the record of appeal which the learned trial Judge relied upon to convict the appellants proved the case beyond reasonable doubt against each one of the appellants. Counsel cited the Supreme Court case of **Akbar Hussein Godi vs Uganda: Criminal Appeal No. 03 of 2013** where the Supreme Court cited with approval of the case of Simon Musoke vs R (1958) E.A. 715 at page 718 para H, that; *"in a case depending exclusively upon circumstantial evidence, the Court must before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt".*

Learned Counsel argued that in the case of the appellants their respective convictions were not only dependent on circumstantial evidence alone but also on confessions recorded from the three appellants and admitted on Court record after conducting a trial

within a trial in respect of each appellant. Hence the trial Court properly evaluated the pieces of circumstantial evidence contained in the testimonies of Pw2, Pw3, Pw4, Pw5 and Pw6 together with the respective confessions of the appellants and all this pointed to the guilt of the appellants.

Learned Counsel thus prayed this Court to disallow ground 1 of the appeal.

Ground 2:

Submissions for Appellants:

On ground 2, learned Counsel for the appellants contended that the prosecution's case against the appellants was based on the alleged confessions by the appellants. The learned trial Judge was not justified to rely on those confessions.

The alleged confession of the 1st appellant ought to have been disregarded because it was not an admissible confession. It was false being the result of violence and torture exerted upon the 1st appellant. Its making was also contrary to the law as set out in **Festo Andrea Asenua and Kakooza Devor vs Uganda: Supreme Court Criminal Appeal No. 1 of 1998.**

Learned Counsel for appellants prayed this Court to allow ground 2 of the appeal.

Submissions for Respondent:

In response Counsel for the respondent relied on the case of **Matovu Musa Kassim vs Uganda: Supreme Court Criminal Appeal No. 27 of 2002** wherein the Court reiterated the law governing retracted or repudiated confessions as stated in

Tuwamoi vs Uganda, (1967) E.A. 84. A trial Court should accept any confession which has been retracted or repudiated with caution and must, before founding a conviction on such a confession, be fully satisfied, in all circumstances of the case that the confession if corroborated in some material particular by independent evidence accepted by the Court, unless where the trial Court is satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true, there in such a case the trial Court may act on such a confession even in the absence of any corroboration. It was learned Counsel's submission that in the case of the appellants, the trial Judge rightly evaluated all the evidence and found that the confessions were properly obtained. Counsel prayed this Court to disallow ground 2 of the appeal.

Ground 3:

Submissions for Appellants:

Learned Counsel for the appellants submitted that the trial Jude's sentencing of the 1st appellant to life imprisonment, imposed a harsh and manifestly excessive punishment upon the 1st appellant. Further, the sentencing to 20 years imprisonment of each of the 2nd and 3rd appellants coming to 16 years and 7 months, imprisonment of each appellant after deduction of the remand period, was also harsh and excessive. Since the 2nd and 3rd appellants did not actively participate in the commission of the offence. Counsel for appellants relied on objective 3(3) of the Constitution **(Sentencing Guideline for Court of Judicature) (Practice) Guidelines 2013,** that provides that; *"Guidelines*

should enhance a mechanism that will promote consistency transparency and uniformity in sentencing". Learned Counsel further relied on the Supreme Court decision of Mbunya Godfrey vs Uganda: Supreme Court Criminal Appeal No. 04 of 2011 to the effect that though no two crimes are identical, however, Courts should try as much as possible to have consistency and uniformity in the sentences passed, so that cases of similar facts and circumstances have, as much as it is possible, similar sentences passed against those convicted. Learned Counsel contended that this ground of appeal ought to be allowed by reducing the sentences.

Submissions for the Respondent:

In response learned Counsel for the respondent, maintained that the sentences of life imprisonment for 1st appellant and 20 years imprisonment for the 2nd and 3rd appellants were neither harsh nor excessive since the maximum sentence prescribed for murder is death. Furthermore, the sentences passed against the appellants fall within the stipulated sentencing range for the offense of murder pursuant to the **Constitution Sentencing Guidelines for Courts of Judicature (Practice) Directions, Legal Notice No. 8** of 2013, under the Third Schedule, which provides the sentencing ranges for murder to range from 30 to 35 years imprisonment. Learned Counsel also relied on **Kiwalabye Bernard vs Uganda: Court of Appeal Criminal Appeal No. 143 of 2001** for the legal position that the appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion on sentence unless the exercise of the discretion is such

that it results in the sentence imposed to be manifestly harsh and/or excessive, or to be so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence, or where the sentence imposed is wrong in law or principle. It was Counsel's submission that the learned sentencing Judge had properly proceeded to sentence the appellants without contravening any condition set out in the case of Kiwalabye Case (Supra). Therefore the sentences ought not to be interfered with.

Learned Counsel cited **Semanda Christopher and another vs Uganda Court of Appeal: Criminal Appeal No. 77 of 2010** where this Court upheld a 30 years sentence for murder. Then in **Muhwezi Bayon vs Uganda: Court of Appeal Criminal Appeal No. 198 of 2013,** this court relying on its decision in **Turyahebwe Ezra and 13 Others vs Uganda: Court of Appeal Criminal Appeal No. 0156 of 2010** this Court confirmed a sentence of life imprisonment for the offence of murder. Learned Counsel invited this Court to disallow ground 3 of the appeal and to dismiss the whole appeal.

Resolution by the Court:

Before finding each of the appellants guilty of murder, the trial Judge relied on the evidence of PW3 and PW4.

Pw3 received a telephone call from Juma Kayinda, his brother, who lives in Kampala inquiring about what was going on in the village. Pw3 then informed Juma Kayinda that the "Kire" had been killed. Kayinda inquired whether the murderers were known. Pw3w

stated that they were not known. Then Pw3 was asked by Kayinda to get in touch with the police because Kire's murderer is on the way to Kampala.

This evidence also corresponds with the detailed story stated in the charge and caution statement of Bukenya Mohammed, the 1st appellant, who stated that after killing Kiremye he went to his uncles in Kampala, a one Kayinda Juma and Dirisa Natugo and narrated to them that Ali Bitaro made them kill the deceased.

In the case of **Kenneth Kaawe vs Uganda: Court of Appeal Criminal Appeal 103 of 2011** Court ie. Stated the law as to circumstantial evidence as follows:

i. Inculpatory facts must be incompatible with the accused's innocence.
ii. There must be no other explanation other than that of guilt.
iii. There should be no other co-existing circumstances to weaken or destroy the inference of the accused's guilt.

We find after having re-evaluated and re-appreciated all the evidence at trial, the foregoing circumstantial evidence, which the learned trial Judge took into account, to be incompatible facts with the accused's innocence, giving rise to no other explanation other than that of guilt. In our opinion, there is no other co-existing circumstance to weaken or destroy the inference that the appellants were guilty. In conclusion therefore we find that the circumstantial evidence adduced by the prosecution points to the appellants were guilty of the offences as charged beyond

reasonable doubt. We therefore find no merit in ground 1 of the appeal. The same is dismissed.

On ground 2 Counsel for the appellants faults the trial Court for admitting the retracted and repudiated confessions thereby arriving at a wrong conclusion of the conviction of the appellants.

The propriety of the charge and caution statement comes in question when the appellants claim that A1 was forced to sign the charge and caution statement on the 07.07.2011. It is provided by **Section 24 of the Evidence Act** as *follows "a confession made by an accused is irrelevant if the making of the confession appears to the Court, having regard to the state of mind of the accused person and to all the circumstances to have caused by any violence, force, inducement or promise calculated in the opinion of Court to cause an untrue confession to be made".*

In an earlier decision of Amos **Binuge and Others vs Uganda, Supreme Court Criminal Appeal No. 23 of 1989**, the Supreme Court held that *"it is trite law that when the admissibility of an extra judicial statement is challenged the objecting Counsel must be given a chance to establish by evidence, his grounds of the objection this is done through a trial within a trial. The purpose of a trial with in a trial is to decide upon the evidence of both sides, whether the confession should be admitted".* The trial Judge conducted a trial within a trial to determine the voluntariness of the charge and caution statements of the appellants. The trial Judge after conducting a trial within a trial accepted the charge and caution statement as having been made by the 1st appellant voluntarily. The Judge admitted the same as part of the evidence.

In our appreciation of the evidence on record, adduced at the trial, the charge and caution statements by the Appellants together with the other evidence including that of Pw3 and Pw4 established beyond reasonable doubt the circumstances under which the deceased was killed by the direct participation in the killing of the 1st appellant when he was ordered by Ali Bitalo to cut the deceased while he was going to milk his cattle because he believed that he was bewitching them in the village. This is also corroborated by the post mortem report dated 7th July, 2011 which showed that the deceased body had deep cuts on the facial bone, forehead arm and an amputated toe. The evidence also proves beyond reasonable doubt the participation of the 2nd and 3rd appellants when they were looking out for passers-by on both sides of the path during the commission of the offence. We therefore find that the trial Court properly evaluated the evidence on record and came to the correct conclusion that the evidenced adduced before the Court after being carefully evaluated, proved beyond reasonable doubt that the appellants killed the deceased. We dismiss ground 2 of the appeal.

On the 3rd ground of the appeal where the trial Judge is faulted for imposing excessive sentences of life imprisonment upon the 1st appellant and 20 years imprisonment respectively upon the 2nd and 3rd appellants, we find it worthwhile to observe that while handing down the sentences, the trial Judge stated: *"the 1st appellant played a pivotal role leading those who gruesomely murdered a relative, Mustafa Kiremye. He had his tongue pulled out, his toe cut off, gullet extracted and several injuries on the body. If I consider the general factors in sentencing and 2nd schedule to*

the sentencing guidelines I sentence the appellant to remainder of his natural life".

Article 23(8) of the Constitution requires Court to take into account the period spent by a convict in lawful custody in imposing the term of imprisonment.

The learned trial Judge took into account the period spent on remand in sentencing the appellants. We find that the sentences were properly passed and we have no reason to interfere with the same. Ground 3 of the appeal is also disallowed.

Having disallowed all the grounds of appeal, this appeal stands dismissed. The appellants are to serve their respective sentences with effect from the date of conviction by the High Court that is from 17th December, 2014.

We so order.

Dated at Kampala this ...27th... **day** of ...April... **2021.**

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Richard Buteera
Deputy Chief Justice

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Catherine Bamugemereire
Justice of Appeal

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Remmy Kasule
Ag. Justice of Appeal