THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL No. 276 OF 2017

(Coram: Elizabeth Musoke, Barishaki Cheborion and Hellen Obura, JJA)

NSUBUGA ALI AKA COBRA:::APPELLANT

VERSUS

UGANDA::RESPONDENT

*[Appeal from the decision of the High Court of Uganda sitting at Mukono **(Hon. Lady Justice Mutonyi Margret)** dated on 1st August 2017 in Criminal Session Case No. 445 of 2017]*

JUDGMENT OF THE COURT

Introduction

The appellant was tried and convicted of Murder of Nakiguli Aidah contrary to sections 188 and 189 of the Penal Code Act Cap 120 and sentenced to 30 years' imprisonment.

It was alleged that on 23rd March, 2021 at Butebe Village, the appellant murdered Nakiguli Aidah. He was indicted and pleaded not guilty. He later changed his plea to plea of guilty after one prosecution witness implicated him in his testimony. He was convicted and sentenced to 30 years imprisonment.

Being dissatisfied with the decision of the trial court, the appellant appealed to this Court on the following grounds:-

1. ***The learned trial Judge erred in law when he convicted the appellant on his plea of guilty without following the right procedure.***
2. ***The trial Judge erred in law and fact when he gave a harsh and excessive sentence of 30 years imprisonment to the appellant.***

At the hearing, the appellant was represented by Mr. Kyozira David Samuel on State Brief; while Mr. Edward Muhumuza, Chief State Attorney, represented the respondent.

The appellant attended the proceedings via video link to Prison. Both parties sought, and were granted leave to proceed by way of written submissions.

It was submitted for the appellant that sections 60 and 63 of the Trial on Indictment Act provides for the procedure to be followed before and after recording a plea of guilt. That the appellant pleaded not guilty and a plea of not guilty was entered and later, he changed his plea from not guilty to guilty. Counsel contended that the ingredients of the offense were not read to the appellant and this was in contravention of the principles for the procedure of recording a plea spelt out in **Adan v. Republic (1973) EA. 445** and **Rv Yonasani Egalu & others (1994) 9 ECACA.** That the charge and all essential ingredients of the offence should be explained to the accused in his language or in a language he understands but this was not done in the present case. That Article 28(3) of the constitution requires that a person charged with a criminal offence should be informed of the charges in a language the person understands. That it is

reflected that the appellant was a Muganda by tribe and from the record no mention was made of an interpreter, no explanation of the nature of ingredients of the offence was made which was a contravention of the appellant`s right to a fair hearing and that the right procedure for plea taking was not followed.

On ground 2, it was submitted for the appellant that the learned trial Judge did not take into account the appellant`s mitigating factors. That he was 22 years old, a father of 2 children who were in custody of their grandfather who later died and were now under the care of a distant relative. That under the 2nd schedule of the Constitution (sentencing Guidelines for Court of judicature) (Practice Directions, 2013 provision is made for mitigating factors in imposing sentences which include age, social status, family status and background of the convict. Counsel further submitted that one of the purposes of sentencing is to assist in the rehabilitation and re-integration of the accused into society and that a lesser sentence could achieve the rehabilitation of the accused since he is a young man.

In reply, it was conceded for the respondent that indeed the particulars of the charge of murder are not reflected on the record but counsel contended that the indictment was read to the appellant and he admitted the offence. That clerks who type court proceedings usually summarize the plea taking procedure and he invited court to look at the original version of the record.

Counsel further submitted that the appellant was already aware of the charge preferred against him which was read and explained to him and had he not

understood the charge, he would not have pleaded not guilty in the first place and later change his plea to guilty after listening to the prosecution witness who implicated him. Further, that although the appellant was a Muganda and there was no evidence of an interpreter on record, there was no evidence showing that he did not understand English because the record showed that the appellant understood the charge read and explained to him.

Counsel argued that in the alternative there was no miscarriage of justice since the appellant was aware of the substantiality of the charge of murder preferred against him. He cited **Section 34 of the Criminal Procedure Code Act which is** to that effect and invited court to dismiss the appeal.

On ground 2, the learned Chief State Attorney submitted for the respondent that the 30 years imprisonment was justifiable and the learned trial judge had considered both the aggravating and mitigating factors before passing the sentence of 30 years. That Guideline 19 Third schedule Part 1 of the Sentencing Guidelines provides the range for murder as 30 years imprisonment up to death. That factors existed which aggravated the sentence as set out in guideline 20 of the sentencing guidelines to wit; the appellant belonged to a gang, murder was premeditated and gruesome, deceased sustained severe injuries, succumbed to brain injury, the deceased was sexually abused before she was killed, there was loss of life and that the appellant was unremorseful. That the mitigating factors were that, he was a first offender, pleaded guilty after witnesses implicated him and that less weight be attached to such a plea, he was youthful man, has 2

children and had been on remand for 5 years. That the learned trial judge ably considered both factors before sentencing the appellant to 30 years imprisonment and given that the sentence for murder is death, the sentence of 30 years was justifiable. He referred to ***Opolot Justine and Agamet Richard v. Uganda SCCA No. 31/2014.***

Counsel cited ***Abaasa Jonson & Anor v Uganda COA NO.33/201, Aharikundira Yusitina v Uganda SCCA No. 27/2015 Nsabimana v. Uganda Cr App No. 189/2013*** to show that the sentence was consistent with other sentences for similar offences and met the principle of uniformity.

We have considered the submissions of both Counsel and carefully perused the court record. We bear in mind our duty as the first appellate court to re-appraise the evidence adduced at trial and draw inferences there from, bearing in mind that we did not have the opportunity to observe the demeanor of witnesses at the trial. ***See Rule 30(1) (a) of the rules of this Court and Bogere Moses V Uganda, and Supreme Court Criminal Appeal No.1 of 1997.***

On ground one, the learned trial Judge is faulted for having failed to follow the plea taking procedure. That the ingredients of the offence of murder were not explained to the appellant as required in **Adan vs. Republic** (Supra) and because the appellant was a Muganda there is no evidence of interpretation from English to Luganda in the record.

The respondent conceded that the ingredients of the offence of murder were not explained to the appellant after he changed his plea as required by law.

Section 60 of the Trial on Indictments Act provides that the accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or by the Chief Registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of court; and the accused person shall be required to plead.

In ***Namara Daphine V Uganda, Criminal Appeal No. 030 of 2013***, court stated that an accused must plead to each ingredient of the offence and generalized statements such as 'I plead guilty" were insufficient in plea taking.

The record of proceedings shows that on 19th July 2017, after PW2 had been examined in chief and was about to be cross examined, defence counsel informed court that his client wished to exercise his right of change of plea and court read out the indictment to the appellant again in the following words;

Have you heard and understood? What is your plea?

Accused: *I committed the offence my Lord*

Court: *Plea of guilty is entered.*

Thereafter, the state read out the brief facts of the case to the appellant and when asked by court on what he had to say about the facts, he replied that they

were true and thereafter court went ahead to convict him of murder on his own plea of guilty.

The procedure of plea taking was set out in ***Adan V Republic (Supra) Spry*** V.P. at page 446 that; *when a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded.*

A plea of guilty must be properly received and the results recorded. The appellant's admission must be recorded as nearly as possible in the words used by him or her. The trial Judge must not record "plea of guilty entered" or that

"the accused pleads guilty" when the statement made by the accused is equivocal. It has to be unequivocal for this to be done.

We have carefully read the authorities cited by Counsel for the appellant, and we are convinced that by the trial Judge recording, the words of the appellant: "I committed the offence my Lord" after the indictment was read to him the said words did not err as there was no need at that point to explain the ingredients of the offence which is done after the facts of the case are read to an accused person before he confirms it's true or not, then if true a conviction is entered.

From the record specifically page 19 the facts that were read to the appellant didnot bring out the ingredients of the offence. It focused mainly on the circumstances that led to the arrest of the appellant. The trial judge did not help matters because instead of explaining the ingredients of murder to the appellant she also focused on the circumstances that led to the appellant`s arrest.

The learned trial Judge stated as follows;

> *"In short the state Attorney is saying that Nakiguli Idah was murdered and investigations through tracking the call data connected you to the offence. The circumstances under which the call data was established that you were connected with the offence but it is most likely that the people who used the deceased`s phone at that time are people who murdered her and you happen to be one of those people. What do you say to those facts?"*

The learned Judge was required to explain all essential ingredients of the offence of murder to the accused in a way that left no room for doubt. In the instant case, the element or ingredients of the offence were never explained to the appellant and he never admitted to each of them.

When the charge was read afresh to the appellant after the examination in chief of PW2 D/sgt Mwaye Ronald the leaned trial Judge ought to have after reading out the indictment and after the state had read the facts, explained the ingredients of the offence of murder again before the appellant pleaded guilty. This was not done. We therefore find that the trial Judge did not comply with the procedure of plea taking and that omission occasioned a miscarriage of justice to the appellant because he was not given an opportunity to confirm whether he admitted each ingredient of the offence. We therefore fault the learned trial judge on that ground.

Regarding the issue of the language, it was submitted for the appellant that he is a Muganda but from the record there is no mention of an interpreter. In reply it was submitted for the respondent that although the appellant was a Muganda and there had been no mention of an interpreter on record, no evidence was lead to indicate that he did not understand English.

We note from the record of proceedings that there was no indication that an interpreter was present in court. It is also clear that the language in which the proceedings were interpreted or translated for the appellant to follow was not indicated.

It is clear from the record that the appellant understood English. This is the language of court and was being used from the beginning. The prosecution led its first witness in this language and to show that the appellant understood it, he changed his plea from not guilty to guilty. Counsel for the appellant`s submission that the appellant is a Muganda and evidence of an interpreter ought to be evident on record in our view was an afterthought. Throughout the proceedings, the language used by court and with which the appellant took his pleas was English. While we accept counsel for the appellant's contention that there is nothing on record to show that the language the appellant was conversant with was used and that an interpreter of that language was provided, we note that there was no complaint raised by either the appellant himself or his counsel that he did not follow the proceedings. We instead find that the appellant responded to the questions put to him by the trial Judge implying that he understood the proceedings and followed them in English.

In our view the omission to record the language of the appellant and whether or not there was an interpreter in Court did not per se occasion any miscarriage of justice to the appellant. We find no reason to fault the learned trial judge.

On the whole, ground one of the appeal succeeds for the reasons stated above.

We find no reason to delve into the second ground.

We quash the conviction, set aside the sentence.

It is imperative that we discuss the conditions for ordering a re-trial here.

In **Rev Father Santos Wapokra versus Uganda C.A, Criminal Appeal No. 204 of 2012** Court stated as follows;

"The overriding purpose of a re-trial is to ensure that the cause of justice is done in a case before court. A serious error committed as to the conduct of a trial or 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.

An order for a retrial is as a result of the judicious exercise of the court`s discretion. This discretion must be exercised with great care and not randomly, but upon principles that have been developed over time by the courts; see; ***Fatehali Manji v R [1966] EA 343.***

One of the considerations for ordering a retrial is when the original trial was illegal or defective; ***see Ahmed Ali Dharamsi Sumar v R [1964] EA 3.****The court must however first investigate whether the irregularity is reason enough to warrant an order of retrial;* ***Ratilal Shahur [1958] EA 3***

However, before ordering a retrial, the court handling the case must address itself to the rule of law that;

" a man shall not be twice vexed for one and the same cause. Nemo bis vexari debet pro eadem causa"

A retrial must not be used by the prosecution as an opportunity to lead evidence that it had not led at the original trial and to take a stand different from that it took at the original trial. The prosecution must not fill up gaps in its evidence that it originally produced at the first trial; see; ***Muyimbo v R EA 433.***

A retrial is not to be ordered merely because of insufficiency of evidence or where it will obviously result into an injustice, that is where it will deprive the accused/appellant of the chance of an acquittal; see; ***M'Kanake v R [1973] EA 67.***

Where an accused was convicted of an offence other than the one with which he was either charged or ought to have been charged, a retrial will be ordered; ***Tamano v R [1969] EA 126.***

Other considerations are; the 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. Accordingly each case depends on its particular facts and circumstances."

In the instant case, the offence of murder is a capital offence. We also find both the prosecution and defence cases are sound and substantial. If a proper trial of the case, is carried out.

In **Rev Father Santos Wapokra versus Uganda (Supra)** court further stated;

> *"As to whether the appellant shall be subjected to a double jeopardy if a retrial is ordered, we appreciate that any criminal trial is an ordeal, we appreciate that any criminal is an ordeal for an accused in terms of resources expended, the discomfort of having a criminal charge hanging over the accused and being subjected to court attendance and, where one is not on bail, being on remand. On the other hand, where one is alleged to have committed a serious crime against society, the interests of justice demanded that such a one subjected to a criminal trial, where his/her innocence or guilt may be established. This is depending on the facts of the particular case, even where it involves a re- trial of the case."*

In the instant case, given that murder is a grave offence, we are persuaded to hold that the interests of justice will be best served by a re-trial. We therefore order that the appellant be retried. Since the offence was committed in 2012, the retrial should be expeditious. The Registrar of this Court is directed to draw the attention of the Director of Public Prosecutions to this judgment so as to expedite the re-trial.

We so order

Delivered at Jinja ..... this 23rd day of ..... March ..... 2022.

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Elizabeth Musoke

JUSTICE OF APPEAL

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Cheborion Barishaki

JUSTICE OF APPEAL

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Hellen Obura

JUSTICE OF APPEAL