FTHE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT FORTPORTAL
CRIMINAL APPEAL NO. 0253 OF 2010

BAGUMA SILVANO :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Arising from the decision of the High Court by JBA Katutsi, J, in High Court Criminal case No.069 of 2008, dated the 8th day of October 2010)

CORAM: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Lady Justice Irene Mulyagonja, JA
Hon. Lady Justice Eva K. Luswata, JA

JUDGMENT OF THE COURT

Introduction

The appellant, Baguma Silvano, was convicted of the offence of Murder c/ss **188 and 189 of the Penal Code Act,** and sentenced to suffer **death**.

Brief facts

The brief facts according to the prosecution were that; the deceased, Balinda Erinest, was a resident of Nyakatooke village, Nyamabuga Parish, Bugaaki Sub County in Mwenge County in the Kyenjojo District. The accused was a carpenter and resident of the same village.

On the 28th day of February, 2008, at about 2000hours, the deceased was coming from Kinyere Trading Centre, moving to his home when he met the appellant with another man. The appellant was wearing a long white overcoat while the other man had no shirt.

The appellant and the unidentified man started beating the deceased using a hammer. They broke his legs and he fell down. The deceased made an alarm but nobody came to his rescue.

The appellant and the unidentified man left the deceased by the roadside where he remained till the morning of the 29th of February, 2008.

The deceased was found on the roadside near the appellant's home lying in a pool of blood while sobbing. He was found by Mwanguhya Ernest and others including Mwesige Lawrence.

When the deceased was asked as to what had happened, he replied that the appellant and another person who was not wearing a shirt attacked him. This he told to Kabasomi Jakie, Mwanguhya Ernest, Mwesige Lawrence, and Kwikiriza Rwakasenyi.

That the assailants first used sticks to beat him and then the appellant brought a hammer and told the deceased that he (deceased) should not play with him next time.

The deceased and the appellant had a misunderstanding where the appellant blamed the deceased for starting a fire that consumed his eucalyptus trees and his sister's grass.

The deceased was taken to Buhinga hospital and admitted till the 19th of April 2008 when he died.

The appellant was arrested on 29th February, 2008 and taken to Rugombe Police Post.

The deceased was medically examined and found to have open cuts on his limbs. The cause of death was found to be overwhelming sepsis, bilateral cut wounds to the knees and prolonged recumbence in old age.

The appellant was medically examined and found to be mentally normal.

The appellant was indicted for murder, tried and convicted. He was sentenced to death. Being dissatisfied with the court's decision, the appellant appealed against conviction and sentence.

Grounds of Appeal

1. The learned trial Judge erred in law and fact by convicting the appellant solely on an uncorroborated dying declaration evidence, thus causing an injustice.

2. The learned trial Judge erred in law and fact by ignoring the major contradicting evidence of PW2, thus occasioning an injustice.
3. The learned trial Judge erred in law and fact when he passed an unlawful sentence, thus causing a serious injustice to the appellant.
4. In the alternative, the learned trial Judge erred in law and fact when he passed a harsh and excessive sentence in the circumstances thereby occasioning a serious miscarriage of justice.

The appellant thus prayed that:

a) The appeal be allowed and the conviction be quashed and sentence set aside and that the appellant be acquitted and set free.
b) In the alternative, that the death sentence be set aside and substituted with such sentence as the court may deem fit.

Representation

At the hearing of the Appeal, the appellant was represented by Mr. Cosma A. Kateeba, while the respondent was represented by Ms. Caroline Hope Nabaasa, a Principal Assistant DPP. Both counsel applied to court to adopt their written submissions and it is these that Court shall consider, together with the lower court record and the relevant laws and authorities for the resolution of the Appeal.

Case for the appellant

Counsel for the appellant referred to Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions regarding the duty of the first appellate court. He also cited the case of ***Kifamunte v Uganda; SCCA No. 10 of 1997***, where the Supreme Court restated the duty of a first appellate court.

Ground 1

Counsel for the appellant contended that the learned trial Judge erred in law and fact when he relied on an uncorroborated dying declaration. He stated that the deceased only told his relatives that it was the appellant who had beaten him with a hammer. To him, this was evidence of a single

identifying witness and the same should have been subjected to the test laid out in ***Ntirenganya Joseph v Uganda; CACA No. 109 of 2017***.

Counsel pointed out that this evidence of beating with a hammer was inconsistent with the wounds described by the medical evidence of PW1 as cut wounds on the knees of the deceased.

He also pointed out that there were inconsistencies in the prosecution evidence regarding where the deceased had been found in the morning and as to who he said had beaten him. He stated that PW2, wife of the deceased, testified that the deceased told him that it was one Petero Itima who had beaten him while PW3 and PW4 told Court that the deceased told them that it was the appellant who had beaten him and broken his legs using a hammer.

Still on inconsistencies, counsel contended that whereas PW2 testified that she found her husband in the appellant's compound and named Petero Itima as the person who had beaten him, PW3 stated that the deceased was found near the home of the appellant.

Counsel argued that the incident occurred at night and there was no evidence as to the nature and state of the light that enabled the deceased to identify his attackers.

He noted that the learned trial Judge relied on the evidence of there existing a grudge between the deceased and the appellant which information was only known to PW4. He added that it was said by PW2 that the deceased had even declared in a will that the appellant was the one who attacked him yet this will was never produced in evidence.

It was counsel's argument that it was not possible that the deceased only told his close relatives; wife and children, that it was the appellant who attacked him yet did not tell the doctors who treated him for two months or even the Police.

To counsel, the learned trial Judge premised the appellant's conviction on circumstantial evidence yet there were other co- existing circumstances which would weaken or destroy the inference of the appellant's guilt.

He thus invited this court to find that the dying declaration was of no evidential value, that the prosecution evidence was riddled with so many inconsistencies, and that the case wholly depended on circumstantial evidence yet this was also not credible enough as to leave no inference of doubt about the appellant's guilt. He cited the case of ***Simoni Musoke v R [1958] E.A 715*** on circumstantial evidence.

Ground 2

Counsel for the appellant faulted the learned trial Judge for having relied on the prosecution evidence which was full of inconsistencies and contradictions. He made reference to the evidence of PW2 in cross-examination that the deceased named Petero Itima as the man that had beaten him.

He noted that there were the inconsistences regarding the exact location of the deceased when found by the witnesses. Plus, the nature of the injuries sustained by the deceased were not consistent with the use of a hammer which was not produced or which ordinarily is not adapted for cutting yet the deceased was being treated for cut- wounds.

He cited ***Alfred Tajar v Uganda; E.A.C.A. Cr. Appeal No. 167 of 1969***, and submitted that the law is that major contradictions and inconsistencies lead to rejection of the witness evidence while minor ones lead to rejection of the evidence if they point to deliberate untruthfulness on the part of the witness.

He contended that had the learned trial Judge properly evaluated the evidence, he would not have relied on the evidence with contradictions to convict the appellant.

Ground 3

Counsel for the appellant abandoned this ground in his written submissions. Counsel for the respondent stated that the abandoned ground was not reflected in the Memorandum of Appeal they received. Since both counsel did not address this issue, we find it unnecessary to consider it.

Ground 4

Counsel submitted that whereas the offence of murder attracts a maximum sentence of death, in light of the case of ***Attorney General v Susan Kigula & 416 others; Supreme Court Constitutional Appeal No. 3 of 2006***, the punishment of death was no longer mandatory. To counsel, that meant that courts ought to pass custodial sentences thus making a death sentence extremely harsh and excessive. He invited this court to set the death sentence aside and substitute it with an appropriate lesser sentence.

He submitted that in deciding what is appropriate, court should be guided by the current sentencing practices in cases of a similar offence. He cited ***Kia Erin v Uganda; CACA No. 172 of 2013***, where the appellant who had been convicted of murder of a three-year-old child had been sentenced to death. That following the abolition of the mandatory death sentence in June 2005, he was sentenced to life imprisonment. On appeal to this court, the sentence of life imprisonment was set aside and substituted with a sentence of 18 years.

He also cited ***Epuat Richard v Uganda; CACA No. 199 of 2011***, where a sentence of 30 years' imprisonment was set aside and substituted with one of 15 years. In ***Ariko Francis v Uganda; CACA No. 2241 of 2011***, a 17 years' imprisonment for murder was confirmed.

Counsel noted that in the present case, the trial Judge ignored the mitigating factors, that is; the appellant was an elderly man of 72 years and a first offender, that death sentence was no longer mandatory and that this was not the rarest of the rare cases for which the death sentence may

be imposed and that he had been in lawful custody for 2 years and 8 months.

He thus invited Court to invoke Section 11 of the Judicature Act which vests this court with the powers of the court that had original jurisdiction to impose its own sentence taking into account the time that the appellant had spent on remand. He proposed that in view of the precedents cited and the circumstances of this case, a sentence of 16 years' imprisonment would be appropriate and upon deducting the remand period, it would leave a period of 13 years and 4 months' imprisonment to run from October, 8 2010; the date of conviction.

Case for the respondent

Ground 1

Counsel for the respondent submitted that it was not a rule of law that a dying declaration must be corroborated before convicting upon it. She noted that in fact the law under Section 30 of the Evidence Act provided for admissibility of a dying declaration without any provisos.

She stated that the learned trial Judge was alive to the legal requirement on corroboration and exercised care while accepting the available evidence.

Counsel appreciated that the lower court did not indicate evaluation of the available circumstantial evidence that tended to offer the requisite corroboration but disagreed with counsel for the appellant that the medical evidence did not offer such corroboration. She submitted that PW2 found the deceased in a pool of blood with the bones at the knee protruding and PW3 with PW4 corroborated this account when they testified that they found the deceased in a pool of blood and the deceased told them that the appellant broke his legs using a hammer.

Counsel further pointed out that the above evidence was borne out by the medical certificate that indicated that the injury was '*bilateral cut wounds to the knees*'. It was thus counsel's contention that the counsel for the

appellant's argument that '*a hammer does not cause cut wounds*' was devoid of merit. She added that the fact that the weapon was never produced in court did not vitiate the fact that the deceased saw the kind of weapon used on his legs and told the witnesses with such certainty.

She contended that whereas additional evidence to that of the witnesses was desirable, its absence did not in any way weaken the prosecution case. She stated that what mattered was the quality of evidence and not quantity, making reference to Section 133 of the Evidence Act. She submitted that the deceased was consistent in his account of who inflicted the fatal injuries on him. She cited the case of ***Namanya Ezra v Uganda; CACA No. 0153 of 2013***, where this Court set its position on the issue of repeated dying declaration to several witnesses.

Counsel invited this court to exercise its powers under Rule 30 (1)(a) of the Rules of this Court to reappraise the evidence as a whole and clearly pronounce that in the instant case, the dying declaration can stand alone to convict and in case of need for corroboration, the same could be found in the medical certificate and the consistency of the declaration to PW2, PW3 and PW4. She prayed that ground 1 fails.

Ground 2

Counsel submitted that the inconsistencies cited by counsel for the appellant did not measure up to such intensity as to go to the root of the prosecution case. She stated that PW2 testified that she was told about two men and one of them was the appellant. She stated that a look at the original record of the trial court showed that there was a typographical error in the first sentence of cross examination of PW2. That the original text indicated: '*my late husband named accused Petero Itima as the men that had beaten him. He even put those people in his Will as those responsible for his death*'. Counsel thus contended that in the typed record, 'men' was replaced with 'man' and 'those people' replaced with 'these men'. To counsel, it was clear that the witness talked about Petero Itima as

the second assailant. She invited court to look at the original record and prove this.

She stated that PW2's testimony on the appellant's participation was corroborated by PW3 who stated that the deceased had told him that the appellant broke his legs and it was on that basis that he reported to Police on that same day causing the appellant's arrest. She further stated that PW4's account corroborated the testimony of the two witnesses regarding the appellant's participation and their account on the nature of the injuries was equally corroborated by the medical certificate. To counsel, the claim by counsel for the appellant that a hammer could not inflict such injury was devoid of merit since any object such as a hammer was capable of causing cut to a human body when its impact caused bones to protrude through skin as testified by PW2.

Regarding the alleged contradiction on where the deceased was found, counsel submitted that all the witnesses confirmed that the deceased was found in the appellant's compound. She pointed out that PW2 called it '*in the compound of the accused*', PW3 called it '*near the home* of the accused', while PW4 called it '*near the compound of accused*'. Counsel thus contended that that evidence described the same place and showed no major contradiction relating to the location where the deceased was found by the witnesses. She invited Court to apply the same principles espoused in the authority of ***Alfred Tajar v Uganda*** (supra).

She argued that counsel for the appellant had not demonstrated how the witnesses were deliberately untruthful in testifying about what they had heard from the deceased that had even led to the immediate arrest of the appellant. Counsel thus implored this court to regard whatever may seem inconsistent too minor to go to the root of the case and find that this ground was devoid of merit and therefore disallow it.

Ground 4

Counsel pointed out that the Supreme Court and this Court have stated the law regarding when an appellate court may interfere with the sentencing

discretion of a trial court. She stated that **manifest excessiveness** was one of the grounds available for an appellate court to interfere with the trial Judge's sentencing discretion. Counsel conceded that, in the circumstances, a death sentence was on the excessive side. She agreed with the proposals of the appellant's counsel, however, noting that a sentence less than 18 years would be a mockery seeing that a life was lost. Counsel cited ***Ssebuwufu Mohammed & others v Uganda; Consolidated Appeal Nos. 158 and 191 of 2019***, where upon the analysis of other previous decisions with somewhat similar facts, court reduced a sentence of 40 years to 19 years' imprisonment. She thus proposed 19 years, and taking off the 2 years and 6 months that the appellant had spent on remand, that would leave 16 and a half years' imprisonment with the same running from the date of conviction.

In the end result, she prayed that the Appeal against conviction be dismissed and the sentence be adjusted as proposed.

Court's consideration

Duty of the appellate court

It is our duty as the first appellate court to re-appraise the evidence at the trial court and come to our own conclusion. See **Rule 30 (1) (a) of the Judicature (Court of Appeal) Rules.** However, we have to bear in mind that we did not have the opportunity to see and hear the witnesses as they testified. See ***Selle and Another vs Associated Motor Boat Co. [1968] EA 123, Pandya vs R. [1957] EA 336, Ruwala vs R [1957] EA 570,*** **and** ***Kifamunte Henry vs Uganda Criminal Appeal No. 10 of 1997 (Supreme Court).***

Ground 1

This ground revolves around the quality of evidence that was relied upon by the trial Judge to convict the appellant. It was the argument of counsel for the appellant that the learned trial Judge wrongly relied on an

uncorroborated dying declaration of the deceased and more so because the attack was at night making it difficult for correct identification.

Section 30 (a) of the Evidence Act, Cap 6, provides for statements made by persons who die. It provides:

> **30. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.**
>
> **Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases—**
>
> **(a) <u>when the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death</u>, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question;** (Emphasis added)

In the instant case, it was the testimony of PW2, PW3 and PW4 that they discovered the deceased on the morning of 29th February 2008 and he informed them that he had been attacked by the appellant who broke his knees using a hammer. The prosecution evidence recorded that the deceased died about 2 months after. The learned trial Judge in convicting the appellant stated that he had meticulously observed the witnesses during trial and believed without hesitation that the deceased told them that it was the appellant who had attacked and broken his knees. The

learned trial Judge listened to the witnesses in court and we have no reason to disagree with his observation and finding that the witnesses were telling the truth. He evaluated the evidence and believed the witnesses. We have studied the court record and evaluated the evidence ourselves.

The law that governs dying declarations and what Court considers before relying on that kind of evidence is well established. In the case of ***Tumuhairwe Moses v Uganda; Supreme Court Criminal Appeal No. 17 of 1999***, Court stated thus:

> **"With regard to the dying declaration it is true dying declarations must always be received with caution because the test of cross examination may be wanting and the particulars of the violence may have occurred in circumstances of confusion and surprise. Generally speaking it is very unsafe to base a conviction solely on the dying declaration of a deceased person unless there is satisfactory corroboration."** (Sic)

In this case, the deceased revealed the identity of the persons who attacked him to PW2, PW3 and PW4, and that information was consistent. We make reference to this Court's decision in ***Namanya Ezra v Uganda; CACA No. 0153 of 2013***, where this Court set its position on the issue of a repeated dying declaration to several witnesses. It stated:

> **"We would state that we reject the contentions by counsel for the appellant to the effect that the consistency of the deceased in repeating the same declaration to several witnesses counts for nothing in this case. We are of the considered opinion that the consistency of the deceased pointed to the truthfulness of his dying declaration and served to rule out the possibility that the appellant had been mistakenly identified as the appellant's assailant."**

The deceased mentioned to PW2, PW3 and PW4 that it was the appellant who attacked him and broke his knees using a hammer. Although corroboration is not necessary as a matter of law, judicial practice requires that corroboration is sought. In ***R v Eligu s/o Odel & Epongu s/o Ewunyu (1943) 10 EACA 90,*** the East African Court of Appeal observed:

> **"Corroboration is desirable, of course, though we do not say that it is always necessary to support a conviction. To say so would be to place such evidence on the same plane as accomplice evidence and that would be incorrect."**

In this case, we find corroboration of the deceased's dying declaration in the medical evidence which showed that the deceased had bilateral cut wounds to the knees, which eventually claimed his life. These injuries matched the deceased's explanations to the witnesses listed above of the way the appellant had broken his knees using a hammer. We would, therefore, find that the learned trial Judge rightly relied on the available evidence to find that it was indeed the appellant who attacked the deceased. We accordingly dismiss this ground for lack of merit.

Ground 2

It was the prosecution evidence that the deceased mentioned to the witnesses that he had been attacked by two people and ably identified the appellant. As counsel for the respondent clarified that there was a typographic error regarding that PW2 mentioned Petero as the attacker, we find it credible evidence that the deceased mentioned that the two people attacked him and broke his knees using a hammer. We would, in the circumstances not find merit in the contention that the deceased made mention of the appellant as his attacker to PW3 and PW4 and yet mentioned to PW2 that he was attacked by Petero Itima. This was clarified.

As to where the deceased was found, a look at the record of the lower court shows that PW2 testified that she found her husband in the compound of the appellant. PW3 testified that his mother called him that his father had been found beaten. That he went where he was and this was along the road

near the home of the accused. PW4 equally testified that on the morning of 29/ 02/ 2008, he found his father near the compound of the accused lying in a pool of blood.

From the evidence of the three witnesses, it is clear that the deceased was found near the appellant's compound. We do not find merit in the argument that '*compound*' and '*near the compound*' are so different as to amount to a major inconsistency that would warrant overturning a conviction. We accordingly find no merit in this ground as well.

Ground 4

In this case, the learned trial Judge sentenced the appellant to death. Whereas counsel for the appellant righty submitted that the ***Susan Kigula*** (supra) case declared the mandatory death sentence to be unconstitutional, it is not true that that meant that courts ought to pass custodial sentences only as was contended by counsel. In that case, the Supreme Court held:

> **"We are of the view that the learned Justices of the Constitutional Court properly addressed this matter and came to the right conclusion. We therefore agree with the Constitutional Court that all those laws on the statute book in Uganda which provide for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency. Such mandatory sentence can only be regarded as a maximum sentence. In the result, grounds 1. 2, 6 and 7 of the appeal must fail."**

The Court held that the mandatory death sentence was unconstitutional. However, the Court did not hold that imposing a death sentence at the discretion of court was unconstitutional. This is made clear when the court gave guidelines in regard to sentencing appellants whose cases were still pending in appellate courts. The Supreme Court found that an accused

must be heard on mitigation and then court can order the sentence it deems fit, and in our view that includes the death sentence. It directed:

> **"For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law."**

That aside, the law governing sentencing and when an appellate court may interfere with the sentencing discretion of the trial court is well established. In ***Kiwalabye Bernard v Uganda, Criminal Appeal No.143 of 2001*** (unreported), the Supreme Court gave guidelines about when the appellate court may exercise its delicate discretion of tampering with a trial court's sentencing. Court had this to say:

> **"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the 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 principle."** (Emphasis ours)

In the instant Appeal, counsel for the appellant argued that the death sentence passed by the trial Judge was extremely harsh and excessive. Counsel for the respondent conceded that indeed the sentence was manifestly excessive. In passing sentence, the learned trial Judge stated:

> **'There is no scintilla of reason why the maximum sentence should not be imposed'.**

This he stated after considering the mitigating factors that had been raised for the appellant. We are alive to the fact that at the time of his conviction, the appellant was of advanced age, that is 72 years. That is a fact that could have been considered as a mitigating factor. In light of that fact alone, we would find the death sentence manifestly harsh and excessive. We also note that the appellant had no previous record. For those reasons, we find the death sentence excessively harsh. We accordingly quash and set it aside.

Counsel for the appellant proposed a sentence of 16 years' imprisonment having taken into account the 2 years and 6 months the appellant had spent on remand. Counsel for the respondent proposed a sentence of 19 years' imprisonment. Given that the appellant's advanced age and the fact that he was a first offender, we exercise the powers, authority and jurisdiction bestowed upon this court under Section 11 of the Judicature Act, Cap 13, to sentence him to a term of imprisonment of 20 years and 6 months. From that, we subtract the period of 2 years and 6 months that the appellant had spent on remand prior to his conviction. The appellant shall, therefore, serve a sentence of 18 years' imprisonment. The sentence shall begin to run from 8th October 2010; the date of his conviction.

In the result, we hereby dismiss grounds 1 and 2 and allow ground 4 on sentencing.

Dated at Fort Portal this 14th day of October 2022

Richard Buteera
Deputy Chief Justice

Irene Mulyagonja
Justice of Appeal

Eva K. Luswata
Justice of Appeal