THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 175 OF 2013

CORAM: Egonda-Ntende, Bamugemereire, Madrama JJA

TURYASINGURA SAJJIAS ..... APPELLANT

VERSUS

UGANDA. ..... RESPONDENT

[Appeal from the Decision of Joseph Murangira J, dated 6th December 2013 at the High Court of Uganda holden at Rukungiri)

JUDGMENT OF THE COURT

The appellant, **Turyasingura Sajjias** was indicted for the offence of Murder contrary to section 188 and 189 of the Penal Code Act. The facts of the case were that on the 18th day of August 2007, at Kibirizi village, Ihunga Parish, Nyarushanje sub-county in Rukungiri District, Orikiriza Doreen and the Appellant murdered Agaba Gaadi. The Appellant was convicted of the offence of Murder and sentenced to 60 years' imprisonment on 6th December 2013.Dissatisfied, the Appellant appealed against both conviction and sentence. The grounds of appeal as per the Memorandum of Appeal are;

Grounds of Appeal

1. **The learned Trial Judge erred in law and fact to convict the Appellant of the offence of murder when the ingredients of malice**

aforethought and participation had not been proved.

2. **The learned Trial Judge erred in law and fact when he convicted the Appellant of the offence of murder without considering the defence of intoxication.**
3. **The learned Trial Judge erred in law and fact for failing to consider the Appellant's mitigating factors.**
4. **The learned Trial Judge erred in law and fact when he sentenced the Appellant to 60 years' imprisonment, which was a harsh sentence.**

Representation

At the hearing of the appeal the Appellant was represented by Ms Specioza Kentaro on state brief while the Respondent was represented by Mr. Joseph Kyomuhendo a Chief State Attorney from the Office of the Director of Public Prosecutions. The Appellant appeared via an audio-visual link from Mbarara Government Prison.

The Appellant's case

In respect of Ground No. 1, Counsel for the Appellant submitted that prosecution did not produce sufficient evidence to prove that the Appellant participated in the commission of the offence. Counsel contended that PW1 who testified that he met the appellant and deceased

fighting stated that it was 9:00 pm and he was drunk. Counsel contended that PW1 who testified that he met the appellant and deceased fighting stated that it was 9:00 pm and he was drunk. Counsel added that the record does not indicate whether there was any source of light that enabled the witness to identify the appellant. Counsel submitted that the evidence of the prosecution witnesses lacked credibility because **PW1** was drunk and **PW2** and **PW3's** evidence was hearsay from A1 which evidence A1 denied.

Counsel contended that from the evidence on court record, both the Appellant and the deceased were drunk and fighting, and that although they were involved in a brawl the Appellant's intention was not to kill the deceased.

Regarding Ground No.2, It was counsel's submission that the Appellant was intoxicated by reason of which he could not have formed the intention to kill the deceased. Counsel referred to S. 12 (4) of the Penal Code Act, which provides that; ***'intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he or she would not be guilty of the offence.'***

Counsel argued Ground No. 3 and Ground No.4 together. He submitted that the Trial Judge did not consider the Appellant's mitigating factors while passing sentence which included the fact that the appellant was a first offender and had been on remand for 2 years and 11 months at the

time of conviction. Counsel prayed that the mitigation factors be considered to find that the sentence of 60 years imprisonment was harsh.

Counsel prayed that the sentence be reduced to 15 years imprisonment.

The respondent's case

In reply to Ground No. 1, Counsel for the respondent submitted that all the conditions that favour correct identification were present and PW1 correctly identified and placed the Appellant at the scene of crime. Counsel referred to **Abdallah Nabulere v Uganda CA No. 12 OF 1981, Abdallah Bin Wendo & anor v R (1963) 20 EACA 166 and Bogere Moses v Uganda CA No. 1 of 1997** on the principle that identification of an accused can be proved by a testimony of a single identifying witness, and that doesn't lessen the need for testing it. It was counsel's submission that all conditions favouring correct identification were present and PW1 correctly saw and placed the appellant at the scene of crime. He added that the appellant was known to PW1 as a village mate prior to the commission of the offence and that he had sufficient time to was able to learn the cause of the fight between the appellant and deceased.

Counsel contended that PW1'S testimony is corroborated by the conduct of the Appellant when he assaulted the deceased and abandoned him at the scene. Counsel argued that his running away from the village for 3 years sums up the evidence that the Appellant intended to cause the deceased's death.

Counsel also submitted that the nature of the injuries suffered by the deceased including bruises on the skull, a swollen head, blood coming out of the ears and a fracture of the skull proved that there was ill motive. Counsel added that the head is a fragile part of the body, which was accosted by a dangerous weapon. It was counsel's submission that the ingredient of malice aforethought was proved beyond reasonable doubt.

In reply to Ground No. 2, it was counsel's submission that the Appellant did not raise the defence of intoxication during his defence. Counsel referred to **S. 12 (2) of the Penal Code Act** which states that intoxication shall be a defence to any criminal charge if by reason of the intoxication the person charged at the time of the act or omission complained of did not know that the act or omission was wrong or did not know what he or she was doing.

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

Counsel contended that the defence of intoxication is not available in the circumstances of this case since the appellant was sane and sober at the time he murdered the deceased.

Counsel argued Grounds No. 3 and No. 4 together. He submitted that the sentence of 60 years imprisonment is lawful and lenient given the circumstances under which the Appellant murdered the deceased. Counsel cited **Kyalimpa Edward v Uganda SCCA No. 10 of 1995 cited**

with approval in Karisa Moses v Uganda SCCA No. 23 of 2015, where the Supreme Court held as follows;

'An appropriate sentence is a matter of discretion of the sentencing judge. Each case presents its own facts upon which the appellate court will not normally interfere with discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly excessive.'

Counsel submitted that the Trail Judge correctly weighed the mitigating factors against the aggravating factors and correctly concluded that the latter outweighed the former. He prayed that the appeal be dismissed and this court upholds the conviction and sentence.

Duty of Court

This court as a 1st Appellate Court has discretion in matters of law and or mixed law and factual controversy to reappraise the evidence contained in the record of proceedings and all other material that was placed before the trial court. It is the duty of this court to subject such evidence to a fresh and exhaustive scrutiny and draw its own inferences on maters of fact bearing in mind that it has neither heard nor seen the witnesses testify unlike the Trial Judge. This court bears in mind the fact that it neither saw nor heard the witnesses first hand. **(See Pandya v R [1957] EA 336, Selle & Anor v Associated Motor Boat Company [1968] EA 123**, as well as **Kifamunte Henry v Uganda SCCA No. 10 of 1997**. The duty of this court in reappraisal of evidence is enabled by Rule 30 (1) (a) of the Judicature

(Court of Appeal Rules) Directions, S1 13-10, which provides that on appeal from the decision of the High Court in the exercise of its original jurisdiction, the court may reappraise the evidence and draw inferences of fact. **Section 11 of the Judicature Act, cap 13** provides as follows on the jurisdiction of the Court of Appeal. 'For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated.' The Trial on Indictments Act lays down both the law and the procedure of handling criminal appeals from the High Court to the Court of Appeal. **Section 132 (1) (a) and (d) of the T.I.A, Cap 23**, stipulates in (1), subject to this section,

a) An accused person may appeal to the Court of Appeal from a conviction and sentence by the High court in the exercise of its original jurisdiction, as of right on a matter of law, fact or mixed law and fact

and the court of Appeal may-

d) Confirm, vary or reverse the sentence and conviction,

Therefore, the Court of Appeal can lawfully reverse, alter, reduce or increase a sentence under **S. 34 (2) of the Criminal Procedure Code Act (Cap 116)**. We shall consider Ground No.1 and No.2 together, that the appellant faults the Trial Judge for convicting him for the offence of murder when the ingredients of malice aforethought and participation had not been proved and that the defence of intoxication was available.

We have carefully reviewed the evidence on court record. It mainly comprises of the testimony of PW1 Tumwijukye Edison which was that on the 18th Day of August 2007, he witnessed a fight between the deceased and the appellant and it was over 'who was the lover of Doreen'. He stated that as the two were fighting, Asiimwe and Doreen looked on. He conceded that on that night he was drunk. He further stated that the cause of the fight was that the appellant had taken over Doreen from the deceased, who had just returned from the army. It was common ground that the deceased was a former lover of Doreen. Apparently, PW1 left them fighting and proceeded to his home which was a short distance from the scene. It was PW1's evidence that around 4:00 am heard someone groaning and when he got out to look, he discovered that the sound was coming from the deceased who was lying down. In cross-examination, PW1 stated that he was drunk. PW1 was a single identifying witness. The rest of the witnesses did not see what transpired. Indeed, the bulk of the evidence relating to the other prosecution witnesses is circumstantial and rotates around how the appellant disappeared from the village for 3 years. Doreen made a statement to the police, which was admitted as Exhibit P3.

Doreen's police statement contradicts what she stated in her during her defence. Doreen was eventually convicted of aiding and abetting the commission of an offence. She was convicted alongside the appellant but got out on a lighter sentence of two years. The circumstantial evidence coupled with the evidence of a single identifying witness was shaky due to the fact that the witness stated that he was drunk at the time the alleged fight took place. This calls attention to his powers of perception, ability to think clearly and retain memory while he was inebriated. This makes his evidence susceptible to illusive imagination and on the whole unreliable. The circumstantial evidence in this case is mainly the conduct of the appellant disappearing from the village for 3 years. Secondly, it is contradicted by the police statement of Doreen, which is exhibit P3.

In our opinion therefore, even if we were to accept that the Appellant had fought with the deceased on that fateful night, that evidence is too weak to pin the appellant to the murder. PW1's evidence that he was drunk at the time he saw the appellant and he deceased fighting was contradicted by PW1 whose evidence was that the deceased and the appellant conversing not fighting. Therefore, even if we were to attach much

importance to the evidence of PW1, we would still find the evidence adduced by the prosecution against the appellant unconvincing. Additionally, the circumstantial evidence relied upon by the trial Judge to convict the appellant was not water tight. The evidence appeared to suggest that there was provocation on the part of the deceased and on the part of the appellant. There is no evidence of malice aforethought since, having discounted PW1, no other eye witness could pin the injuries suffered by the deceased to the fight with the appellant. In **Tindigwihura Mbahe vs. Uganda SCCA No. 9 of 1987** *and* **Katende Semakula v. Uganda SCCA No. 11 of 1994** Court noted that;

'Trial Courts should treat circumstantial evidence with caution, and narrowly examine it, due to the susceptibility of this kind of evidence to fabrication. Therefore, before drawing an inference of the accused's guilt from circumstantial evidence, there is compelling need to ensure that there are no other co-existing circumstances, which would weaken or altogether destroy that inference.'

Similarly, **in Bogere Charles v. Uganda, SCCA No. 10 of 1996,** Court held that; before drawing an inference of the accused's guilt from circumstantial evidence,

the Court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt." Also in the case of **Byaruhanga Fodori v Uganda SCCA No. 18 of 2002**, the Supreme Court spelt out that;

'It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must, before deciding on a 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.'

In the instant case, the circumstantial evidence relied upon by the trial Judge was the disappearance of the appellant from the village for 3 years. The evidence of the appellant was that on that fateful day he went to Omukatojo trading centre at around 5:00 pm and at 7:30 pm he went to his home took supper and slept. He stated that the following day the chairman informed him that there was a plan hatched the residents in which a mob was to lynch him over the death of Agaba, the deceased. He stated that he went to his uncle's home but heard that people armed with machetes were looking for him. His uncle advised him to leave the area.

It was the appellant's defence that he kept away because when he attempted to return home he saw Byarugaba (PW4) with 10 men butchering his cow and cutting down his banana plantation. They also stole and destroyed his house-hold property. His evidence was that he was eventually able to reach out to his wife who advanced him some money which he used to start a new life in Lyantonde. Having become tired of living as a fugitive, he returned home on 6th December 2010. On 11th December 2010, he was arrested.

From the above evidence, this court draws the inference that the circumstances of the appellant's disappearance were justified. Had the trial Judge taken into consideration the defence of the appellant, he would have found that in running away in self-defence.

In criminal cases, the onus is on the prosecution to prove the case against the accused beyond reasonable doubt. This burden remains through out on the prosecution. It was not discharged. In the premises, we find it unsafe to maintain the conviction of murder against the Appellant. It is a cardinal principle of criminal law that the burden to prove a case against the accused lies throughout on the prosecution and does not shift. In

addition, it is the duty of the prosecution to prove the case against the accused beyond reasonable doubt. Any doubt must be resolved in favour of the accused. Further still, an accused person should not be convicted on the weakness of his or her defence but rather on the strength of the prosecution case. See **Sekitoleko v Uganda 1967EA 531** and **Okethi Okale & others v R 1965 EA 585**.

From the above circumstantial evidence there was a likelihood that an alternative hypothesis could easily explain the demise of Agaba Gaadi. We therefore find the circumstantial evidence too weak to draw the inference that it inexorably leads to the guilt of the appellant. The conviction of the appellant hereby quashed. Grounds No. 1 and 2 succeed.

Having set aside the conviction there is no premise upon which we could discuss the sentence under Ground No. 3 and 4. This appeal therefore succeeds.

The appellant is acquitted. He is therefore released from custody unless held on other lawful charges.

Dated and Signed this 23rd Day of March 2022.

Hon. Mr. Justice Fredrick Egonda Ntende
Justice of Appeal

Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal

Hon. Mr. Justice Christopher Madrama
Justice of Appeal