THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

[Coram: Barishaki, Mugenyi &Gashirabake, JJA]

CRIMINAL APPEAL NO. 128 OF 2018

(Arising from High Court Criminal Case No.0066 of 2016)

1. **AGUPIYO SIMON**
2. **ABIRIGA ALEX**
3. **ENZAMA DAVID**
4. **EGABE CHARLES**
5. **AGUTA TOM..... APPELLANTS**

AND

UGANDA ..... RESPONDENT

(Appeal from the judgment of the High Court of Uganda Holden at Arua, before OYUKO ANTHONY OJOK. J delivered on the 28th June 2018)

JUDGMENT OF THE COURT

Introduction

On the 24th May 2013, at around 4:30 a.m., the deceased Mundua Reuben, his wife Asam Noah (PW2) and his daughter Monday Scovia (PW3) were at home sleeping. Allegedly Agupiyo Simon (1st Appellant) and Abiriga Alex (2nd Appellant) went to the deceased's house, knocked on the door and on waking up, they told him that Fenhas Obitre, one of the elders in their family was about to die and needed to talk to him. The deceased who was accompanied by his wife and PW 2 left his house and moved with the 1st and 2nd Appellants.

On reaching the house of the said Obitre, the deceased proposed to pray for the former but the Appellants pounced on him and assaulted him several times. The 1st Appellant cut him on the head with a panga, the 5th Appellant cut the deceased's head with an axe.

The Appellants vanished from the village but they were arrested after one year. According to the post-mortem report that was tendered as a prosecution exhibit, the deceased succumbed to a head injury resulting from blunt force trauma.

The Appellants were convicted for the offence of murder contrary to Sections 188 and189 of the Penal Code Act Cap 120. The Appellants were sentenced accordingly. Dissatisfied by the judgment and sentence of the trial court the Appellants appealed to this court on two grounds that:

1. The learned trial judge erred in law and fact to conclude that the Appellants were properly identified committing the offence of murder in very unfavourable circumstances thereby making a wrong conclusion.
2. The learned trial judge erred in law and fact to pass a manifestly harsh and excessive sentence thereby occasioning a miscarriage of justice.

Representation.

The Appellants were represented by Mr. Paul Abeti. While the Respondents were represented by Mr. Omia Patrick.

Duty of this court.

This court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. See **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10**

Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR,with regard to the duty of the first appellate court it was stated;

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

In **Peters v Sunday Post Ltd [1958] EA 424**, the Court held that;

> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular

conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"

Ground 1

Submissions for counsel of the Appellant.

Counsel submitted that the circumstances under which the Appellants were identified by **PW2** an **PW3** were unfavourable conditions for proper identification. He additionally submitted that it was dark for proper identification even though the witnesses testified that there was a source of light, a torch and phone light. He submitted that this was insufficient for proper identification of the Appellants herein given the dense darkness at the time.

Counsel argued that the trial judge failed to warn himself of the dangers of mistaken identity. **PW2's** identification of the persons was only corroborated by **PW3** only as far as the 1st Appellant was concerned. Furthermore, the evidence of the single identifying witness **PW2** was never corroborated. **PW2** was suffering from the trauma of losing her husband to a mob and her vision could have been clouded in that moment, making it a possibility that her identification was not credible much as she had torch. **PW3** stated that she was never at the scene of crime. Counsel further relied on the case of **Abdalla Nabulere V Uganda COA Crim. Appeal No. 9 of 1978** where court established the rules of a single identifying witness.

Counsel submitted that this honourable court be pleased to revaluate the whole prosecution evidence as regards to the identification of the accused persons especially as regards to their participation in killing the deceased while in the dark compound of mzee Obitre.

Furthermore, the 2nd and 6th Appellants, they were never placed at the scene of crime by any of the prosecution witness, additionally, they had an alibi and **PW2** never identified them let alone did any prosecution witness.

Submissions by counsel for the Respondent.

Counsel referred to the case of **Woolmington V DPP, [1935] UKHL and Miller V Minister of Pensions, [1947]2 ALLER 372** which brings out the fact that burden of proof lies on the prosecution and the standard of proof is beyond reasonable doubt and not beyond a shadow of doubt as was portrayed in the submission by counsel.

Counsel further indicated that the trial judge was alive to the principles that are followed when determining cases involving identification where the conditions are deemed to be unfavourable and he properly analysed the evidence on record, applied the law to the facts at hand and arrived at the right conclusion

In the case of **Abdallah Nabulere V Uganda CA No. 12/1981**, **Abdallah Bin Wendo and Anor V Uganda CA No.1/199**, it was held that while identification of an accused can be proved by a testimony of a single identifying witness, this does not lessen the need for testifying. Counsel therefore submitted that the learned trial judge came to a correct conclusion that **PW2** and **PW1** identified all the accused positively. Furthermore, **PW2** and **PW3** told court that they know all the accused. They testified that the accused persons were relatives and had known the accused persons for a long time. The evidence of **PW2** is corroborated by the evidence of **PW3**, Monday Scovia who told court that on 21/05/2013, she was at her home with **PW2** together with the deceased when the 1st and 2nd Appellant knocked at their door. **PW3**, **PW2**, the deceased, 1st and 2nd Appellant went to the late Obitre Fenhas' house. **PW2** had a torch. Her father the deceased had a phone with light. **PW2, PW3** and the six Appellants were acquaintances. the light from the phone and torch aided **PW2** and **PW3** to identify all the six Appellants. The two witnesses identified the Appellants by both their faces and voices, and therefore there is no possibility of mistaken identity.

Additionally, **PW2** and **PW3's** testimonies are corroborated in various aspects. The testimony of **PW2** regarding her conversation with **A2** is corroborated perfectly by the latter, when the 2nd Appellant told court on page 33 of the record

of proceedings, that they had a conversation, which also means that they knew each other very well.

The second aspect of corroboration is found in the conduct of the Appellants after committing the offence whereby they disappeared from the village unceremoniously and they were arrested after one year. The evidence of running away is circumstantial and passes the laid down test. In the case of **Musoke V Republic 1952 EA 489** it was held that before drawing an inference of the accused guilt from circumstantial evidence, the court must be sure that there is no other existing circumstances which would weaken or destroy the inference.

Furthermore, in the case of **George Wilson Ssimbwa V Uganda No. 371995**, it was held that the accused /Appellants conduct of running away from the village shortly after the murder was incompatible with his innocence, hence the Appellants conduct of running away after the murder of Mundua Reuben is not one of an innocent man and further buttresses the prosecution case

Counsel further submitted on the issue of motive, and clearly stated that the Appellants murdered the deceased mainly because they suspected him to have caused the death of Fenhas Obitre. After luring the deceased from his home to the home of Obitre. Additionally, in a bid to escape the hand of the law, the Appellants save for the 2nd Appellant told court that they were not at the scene of crime. However, the prosecution destroyed the alibi raised by the Appellants through the testimony of **PW2** and **PW3** who placed them at the scene of crime, the false alibi further corroborated the prosecution case. Counsel relied on the case of **Festo Androa Asenua and another V Uganda SCCA no.1 1998.**

Counsel further submitted on section 20 of the Penal Code Act and added that all the six Appellants worked hand in hand to terminate the life of the late Mundua Reuben, after they conceived the plan to kill him, the 1st and 2nd Appellants went to his house and lured him to the crime scene. The 4th Appellant cut the deceased with an axe, the 1st Appellant cut him with a panga while the remaining Appellants used clubs to assault the deceased, none of the counterparts stopped

another from assaulting the deceased mainly because they already had a common cause and that was to murder the late deceased.

Consideration of Court.

Courts have set rules for a single identification witnesses or where the circumstances of the identification are difficult. In **Abdalla Bin Wendo and Another V. R. (1953), 20 EACA 166 cited with approval in Roria v. R. (1967) EA 583** at page 168. —

> "(a) The testimony of a single witness regarding identification must be tested with the greatest care.
>
> (b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.
>
> (c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.
>
> (d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone."

In **Abdalla Nabulere V Uganda COA Crim. Appeal No. 9 of 1978,** court had this to state:

> "The safe—guards laid down in "enc1o are in our view adequate, if properly applied, to reduce the possibility of a miscarriage of justice occurring. It will be observed that there is no requirement in law or practice for corroboration. In applying Wendo there have sometimes been references to the need for corroboration where the only evidence connecting the accused with the offence is the identification of a single witness. We think that this is not correct. First, there is clear statutory provision that for the proof of any fact, a plurality of witnesses is not necessary: see s. 132 of The Evidence Act (cap.43). Secondly, there is no particular magic in having two or more witnesses testifying to the identity of the accused in similar circumstances. What is important is the quality of the identification. If the quality of the

identification in not good, a number of witnesses will not cure the danger of mistaken identity, hence the requirement to look for 'other evidence'.

Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger."

In proving proper identification, the prosecution, relied on the evidence of PW2 and PW3. Considering the evidence of these two witnesses, the witnesses and the Appellants stayed in the same village. This means that they were familiar with each other. The case presented favourable atmosphere of identification. It was not an atmosphere of tension not to favour the witnesses to have proper identification. Rather it was a friendly atmosphere that enabled the witnesses have time to identify the Appellants. PW2 and PW3 both testified that the Appellants came and knocked the door requesting the deceased to go to the late Obitre's home such that they forgive each other. This conversation enabled the witnesses to identify the Appellants through voice and physical identity. The light was also sufficient. The deceased had light from the phone and PW2 had light from a torch.

According to PW4, when he wanted to drum to notify the community about the death of Mr Obitre, he was stopped by A3 on ground that the people had refused but the drums were later hit after the death of Mr Mandau Reuben. This was done to lure the deceased into believing their trick.

Considering the test of proper identification set out in Abdalla Nabulere (supra) there was proper identification of the Appellants by PW2 and PW3.

Ground two

Submissions by counsel for the Appellants

Counsel relied on the case **of Kiwalabye V Uganda SC APP NO. 143 of 2001** which was cited in **Kimera Zaverio V Uganda (COA CR APP NO. 427 OF 2014)** and submitted that the said sentence of 30 years imprisonment imposed on the 3rd Appellant and the sentence of 40 years imprisonment imposed on the 1st, 2nd, 4th, 5th, and 6th, Appellants by the trial judge was not only manifestly harsh and excessive but was handed without regard to the principle of uniformity and proportionality which requires that similar sentences should be imposed on similar offences which bears similar facts. The sentences are therefore out of the sentencing range for similar offence. Counsel prayed that this honourable court be pleased to review the respective sentences of the Appellants as they don't conform to the principles of uniformity.

Counsel submitted that had the learned trial Judge given due consideration to the compelling mitigating factors which were readily available to the Appellants, he could not have imposed such harsh sentences and the said sentences imposed by the trial judge were issued in error.

Counsel also submitted on the **Sentencing Guideline 6(c) of the Constitution (sentencing guidelines) Direction, Legal Notice No. 8 of 2018** where courts are enjoined to consider the need for consistency when sentencing.

Counsel cited cases where the Supreme Court emphasized the need for uniformity in sentencing when it held in **Aharikundira Yusitina V Uganda SC Crim Appeal No. 27 of 2015** that it is the duty of this court while dealing with appeals regarding sentencing, to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation.

In **Mbunya Godfrey V Uganda SC Crim Appeal No. 004 of 2011**, the Supreme Court *substituted a sentence for death for an Appellant who had killed his wife with a sentence of 25 years imprisonment*, furthermore in **Tumwesigye Anthony V Uganda CACA no. 046 of 2012**, *this honourable court substituted a sentence of 32 years to one of 20 years for an Appellant who was convicted of murde*r, and also in **Anywar Patrick V Uganda CACA No. 066 of 2009** *a sentence of life imprisonment imposed on an Appellant was substituted with one of 19 years and 3 month.* Counsel invited court to exercise its powers under S 132(d) of the Trial on Indictment Act Cap 23 to vary and / or reverse the trial court sentence and substitute the same with a more lenient, consistent and uniform sentence of 20 years' imprisonment.

Submissions by counsel for the Respondent

Counsel submitted that a higher court will not interfere with a sentence of the lower court unless it is illegal or excessively harsh, as in the case of **Aharikundira V Uganda,** *(supra)* the court further stated that interfering with a sentence is not a matter of emotions but rather one of law. Counsel submitted that the sentences to the Appellants were fair and justified in the circumstances. The Appellants murdered the deceased in cold blood using pangas, an axe and clubs.

The murder was senseless and could have been avoided. Thus, the honourable court has confirmed harsher deterrent sentences when faced with cases of a similar nature. In **Sunday vs Uganda, CACA NO. 103/2006** *the court of appeal upheld a sentence of life imprisonment for a 35 year old convict who was a part of a mob that attacked a defenceless elderly woman until they killed her, additionally in* **Ssekawoya Blasio SC Criminal appeal No. 24 OF 2014**, *the Appellant was imprisoned for life for a premeditated murder of his three children and lastly in* **Turyahabwe Ezra and 14 others vs. Uganda SCCA No. 50 of 2015**, *this honourable court and the Supreme Court upheld a life imprisonment sentence against some of the Appellants who were convicted of murder.*

Counsel then prayed for dismissal of the appeal and asked court to uphold both the conviction and sentence of the learned trial judge.

Consideration of Court.

It is now settled law that for an appellate court to interfere with the discretion of the trial court while passing sentence, it must be shown that the sentence is illegal or founded upon a wrong principle of the law, or where the trial court failed to take into account an important matter or circumstance, or made an error in principle, or imposed a sentence which is harsh and manifestly excessive in the circumstances. See: **Kiwalabye Bernard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

It has to be appreciated that even in the presence of the sentencing guidelines sentencing is at the discretion of court. This discretion is exercised in consideration of the special facts of each case. **In Kaddu Kavulu Lawrence V Uganda SCCA No. 72 of 2018** the Supreme Court held that:

> "Counsel for appellants presented to court related cases where the appellants were sentenced to lesser imprisonment terms and his view the court of appeal ought to have taken those into consideration and given the appellant a somewhat similar sentence. It is our view that an appropriate sentence is the matter for the discretion of a sentencing court. Each case presents its own facts upon which a court exercises its discretion."

Guideline 6(c) of the (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 provides that:

> "Every court shall when sentencing an offender take into account the need for consistency sentencing an offender take into the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances"

Bashasha Sharif VS Uganda SCCA No. 82 of 2018, where court noted that while upholding a death sentence *"...one of the objectives of sentencing is deterrence. We agree that the manner in which the Appellant killed an innocent*

child and dismembered his body depicts a depraved person devoid of all humanity."

Turyahabwe Ezra & 12 others SCCA NO. 50 of 2015, the Supreme Court upheld a sentence of life imprisonment for a murder that arose out of mob justice.

Considering the facts of this case the deceased died defencelessly before the accused. The events towards the death of the deceased show that the Appellants had premeditated this death. We are hesitant to interfere with the discretion of the trial judge.

We therefore that this Appeal lacks merit.

1. The Appeal is dismissed
2. The conviction of the lower court is upheld.
3. The sentence is also upheld.

We so order

Dated at Arua this 28th **day of** April **2023**

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CHEBORION BARISHAKI
JUSTICE OF APPEAL

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MONICA MUGENYI
JUSTICE OF APPEAL

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CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL