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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT ARUA

[Coram: Barishaki, Mugenyi & Gashirabake, JJA]

CRIMINAL APPEAL NO. 327 OF 2019

(Arising from Criminal Case No. 535 of 2006)

10 **BETWEEN**

1. **ADUPA RONALD**
2. **ONINI PETER**
3. **OKAKA ALEX**
4. **INGUR GEOGREY (deceased)**
5. **OYUKU MOSES.... .... APPELLANTS**

15

AND

UGANDA .... RESPONDENT

[Arising from the decision of BYABAKAMA MUGYENYI SIMON, J of the High Court of Uganda sitting at Lira in Criminal Case No. 535 of 2006 dated 2nd February 2010]

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JUDGMENT OF COURT

Brief facts

The Appellants, **Onini Peter**, **Adupa Ronald**, **Ingur Geofrey(deceased)**, 25 **Okaka Alex** and **Oyura Moses** were convicted of one count of murder contrary to Section **188** and **189** of the Penal Code Act, Cap 120 by the High Court of Uganda sitting at Lira and subsequently sentenced 25 years imprisonment. It was contented at the trial that the five accused/ Appellants murdered a one Odongo David on the 25th of April 2006 at Otwal internally displaced camp in Apac 30 district. They all denied the charge.

Introduction

The prosecution case was that on the fateful day the deceased was in his house, apparently drunk and grumbling to himself. That time was after 11pm. The

5 accused persons who were on patrol night around the camp heard him making noise and went to his house.

It was alleged they ordered him to stop making noise at night and when the deceased failed to take heed, they kicked his door open and stormed into his house. They assaulted the deceased and cut him on the left leg with a bayonet.
10 That the following morning the deceased was discovered dead in house. It is said that he died from severe bleeding.

The accused persons and others on night patrol were all arrested as first suspects and taken to Police. The rest were released by Police, but the accused were detained and charged with the offence of murder.

15 All the accused persons gave sworn evidence at trial and each of them denied killing the deceased or being on patrol duty in the camp that night. Each raised a defence of Alibi that was rejected by the trial Judge who found them guilty and convicted of the offence of murder contrary to Section 188 and 189 of the Penal Code Act, Cap 120 and sentenced them each to serve 25 years imprisonment.
20 Dissatisfied with the decision of court, the Appellants appealed on grounds that:

1. The learned trial Judge erred in law when he convicted the Appellants on insufficient evidence on record adduced by the prosecution which falls far short of discharging the burden of proof to the required standard required in law, to prove a charge of Murder.
25
2. The learned trial Judge erred in law and in fact when he sentenced the Appellants to an excessive prison sentence.

Representation

The Appellant was represented by Mr. Jimmy Madira. The Respondent by Mr. Sam Oola.

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5 **Duty of the Appellant Court**

The duty of this court as the first appellate court is provided for under Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directives S.I 13-10 (Rules of this court) which provides thus:

> "On any appeal from a decision of the High Court acting in the
> 10 exercise of its original jurisdiction, the court may—
> reappraise the evidence and draw inferences of fact;"

This was re-echoed in **Fr. Narsensio Begumisa and 3 others vs. Eric Kibebaga SCCA No.17 of 2002,** where court held that:

> "The legal obligation of the 1st appellate court to reappraise the evdeince is
> 15 founded in the common law rather than rules of procedure. It is well settled principle that on a 1st appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in case of conflicting evdeince, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witness"

20 The above principle will guide this court in the determination of the grounds of appeal as below.

Additionally, the court bears in mind that in evaluating the evidence on record, the burden of proof is upon the prosecution to prove the guilty of the accused/Appellants beyond reasonable doubt. The prosecution is enjoined to
25 prove all the ingredients of the various offences to the required standard. Even where there is more than one accused person as in this current case the participation of each one of them must be proved. See **Woolmington Vs. Dpp (1935) AC 462.**

In **Miller vs. Minister of Pensions [1947]2 ALLER 373,** court held that the
30 standard should not be beyond a shadow of doubt, however the prosecution evidence should be of such standard as leaves no other logical explanation to be

5 derived from the facts other than that the accused persons committed the said offence.

Ground 1

Submissions of counsel for the Appellant

On ground one, counsel submitted that the position of the law is settled under
10 Section 103 of the Evidence Act Cap 6 which provides that the burden of proof as to a particular fact lies on the person who wishes court to believe in its existence, unless it is provided by law the proof of the fact shall lie on any particular person. The prosecution can only succeed on the strength of the prosecution case and not on the weakness of the defence case as was in the case
15 of **Sekitoleko V Uganda (1967) EA 531, Woolmington V DPP (1965) AC 462, Okethi Okale & Others V Uganda (1965) EA 555.**

Counsel emphasized that the applicable ingredients to the offence of murder that the prosecution must prove beyond reasonable doubt are:

a) That a human being died i.e. Odongo David in this case.
20 b) That the deceased person was killed through unlawful act or omission.
c) That the death was caused with malice aforethought
d) That it is the accused persons indicted who either alone or with others caused the death of the deceased. As was in the case of **Uganda V Kassim Obura & others [1981] HCB 9**

However, in the final submission counsel for the Appellants in the lower court
25 conceded to the first ingredient being the death of the deceased but contested the rest of the ingredients of the offence as indicted. As a matter of fact, the trial Judge found that the deceased died by relying on the testimony of **PW2**, **PW3**, **PW4** and others who found the body of the deceased lying in his house. This was also confirmed by **PW6**, the clinical officer who carried out a post-mortem
30 examination on the body of the deceased.

5 On the second ingredient, the deceased was killed through an unlawful act or omission, counsel submitted that this element wasn't sufficiently proved by the evidence on record and prosecution failed to discharge its burden to the required standard and there isn't evidence on record to prove the same. The wound sustained by the deceased was not described in sufficient, to add on the clinical 10 officer, **PW6** who carried out the post-mortem was not an expert, and his opinions were erroneously admitted as expert opinion. Exhibit **PE1**, was very shallow and unhelpful to make an informed decision, however the trial judge relied on this witness without any proof. There is nothing to show that **PW6** undertook any instruction or received training in the field of pathology, hence couldn't give an 15 opinion as to what instruments could have been used to cause such an injury the deceased is alleged to have sustained. In the absence of such evidence, it cannot be concluded that the death of the deceased was unlawfully caused.

Counsel submitted further that there isn't evidence to prove that the accused persons caused the death of the deceased. The event took place at night and the 20 conditions for identification were very difficult, the assault on the accused took place in grass thatched house, none of the witnesses saw the events inside the house, immediately they heard the scuffle they left the scene. The alleged eyewitnesses **PW1**, and **PW2** never saw the actual assault for they were outside the house, they had no source of light to aid them as well. The witnesses confessed 25 in the testimonies that they did not know the accused persons. **PW1** could not state the name of the accused person, whereas **PW2** also confessed to not knowing the names of the accused persons hence failing to identify the accused persons. Additionally, the correct conditions for the identification of the accused person did not exist as was clarified in the case of **Abdalla Bin Wendo & Anor.** 30 **V R. (1953) EACA 166, Abdallah Nabulere, Bogere Moses & Anor. V Uganda SC CR APP. 1/1997**. The prosecution should have directed the police

to carry out an identification parade for prosecution witness to clear the doubts about the identification of the accused persons.

Counsel further submitted that the accused person raised the defence of alibi, that they were in various places and not at the scene of the alleged crime. The position on the law of alibi has been settled in several case to the effect that when an accused person sets up the defence of alibi, he doesn't assume the duty to prove it, the onus shifts on the prosecution to bring evidence to prove otherwise as seen in **Sentale V Uganda (1969) EA 365 and Bogere Moses V Uganda CACA No. 1 of 1997.**

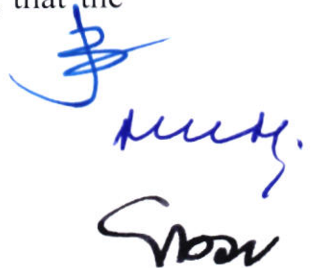
Counsel further submitted that **PW1** and **PW2** were also suspects in this case and at one time they were arrested and detained together with the accused persons in the police cells. Their evidence amounted to evidence of an accomplice and must be treated with greatest caution as there could be a possibility of using such witness to frame the accused persons. The trial Judge did not address his mind to this possibility, had he considered the same he would probably have come to a different conclusion.

Furthermore, counsel submitted that the trial Judge did not adequately evaluate the evidence of the participation of the accused person on record. Had the Trial Judge properly addressed his mind to the facts and the law he would have come to a different conclusion.

Submissions of counsel for the Respondent

Counsel for the Respondent submitted that the learned trial Judge properly found that the evidence adduced by the prosecution proved the charge of murder against all the accused person beyond reasonable doubt.

Counsel submitted that it was evident from the record of proceedings that **PW6** at the time of trial had been in service for 14 years and his duties among others included performing post-mortem and assault cases, therefore stating that the



5 cause of death was severe haemorrhage because of the major blood vessels of the left leg was cut. The learned trial judge properly found that PW6 was a competent witness. Additionally, the unlawful death was occasioned by the said cut wound. Hence the learned trial Judge cannot be faulted on this finding and that therefore death of the deceased was unlawful.

10 Counsel further submitted that **PW1** had known the accused persons before and saw the accused beating the deceased. **PW1** stated that he had spent an hour with the accused person that night and was able to identify the Appellants with the help of the torch light which emitted bright light. **PW2** also stated that he knew the 1st Appellant but got to know the rest on the day of question. He further stated 15 that he saw the accused enter the house of the deceased and started beating him hence emphatically identifying the Appellants. Counsel submitted that the trial judge ably evaluated the evidence of **PW1** and **PW2** against all the Appellants and rightly concluded that the Appellants were properly identified by **PW1** and **PW2**, and therefore the learned trial Judge cannot be faulted on his findings.

20 **Consideration of Court**

This court has been invited to evaluate the evidence on record against the law and find if all the ingredients were proved beyond reasonable doubt by the prosecution. The prosecution had the duty to prove that:

1. Death of the deceased occurred
2. Death was the result of an unlawful act or omission, (25)
3. Malice aforethought.
4. Participation of the Accused

Regarding the first requirement, the Appellants did not contest it. What is left for this court to determine are the other three ingredients of this offence.

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5 **Whether death was due to an unlawful Act**

The word *unlawful* is defined in the Black's law dictionary as *"violation of law, an illegality."* To prove this the prosecution several witnesses. PW1 averred that he saw Onini Peter holding Ogwal David's leg while piercing Ogwal David with a bayonet on the left leg.PW3 testified that when he entered the deceased's house,
10 he observed the body, and it had a wound at the back of his left leg and there was blood on the floor. PW 4 on the other hand stated that the night of the incident she had the deceased say, "*you have left me with a serious wound on my leg*" and the following day he was dead with a wound on his left leg. PW 5 stated that the deceased had a deep cut on the left leg. PW6 also testified that he has conducted
15 many post-mortem reports and examined different cases with deep cuts. He averred that in this case he was invited and when he checked the deceased's body the left leg had a deep cut wound. He explained that externally there was a deep cut wound on the left leg but there was no internal injury. The cause of death was server haemorrhage because of the major vessels of the left leg was cut.

20 With the above evidence we are convinced that the cut was unlawful. The evidence of PW6 cannot be questioned because he averred that he has been carrying such examinations and even gone as far as testifying in different courts whenever he conducts any such related examination. Even when this evidence was disputed by the Appellants at the hearing it is believable and admissible in
25 this matter because of the undisputed experience of the said witness. PW6's evidence does not stand alone but it is corroborated by the evidence of PW1, PW3, PW4 and PW5.

It is therefore our finding that this requirement was proved beyond reasonable doubt.

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5 **Malice aforethought.**

Malice afore thought is defined by Section 191 of the Penal Code Act as Either an intention to cause death of a person or knowledge that the act causing death of a person will probably cause the death of some person. Malice a fore thought is a mental element is therefore very hard to establish it through direct evidence.
10 Courts usually assess it basing on the weapon used or even the part of the body injured.

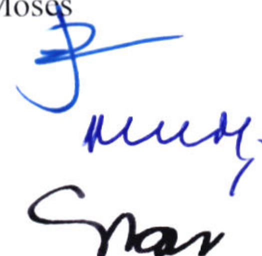
In the instant case the bayonet was used to inflict the deceased with a fatal cut on the that has many veins which led to severe bleeding and then death. The prosecution has therefore proved beyond reasonable doubt that the death of
15 Odongo David.

Participation of the Accused persons

This requirement requires the prosecution to place the accused person at the scene of the crime. In this case all the Appellants pleaded an alibi. By this, the prosecution had to adduce evidence to prove that they were present at the scene
20 of the crime. (See **Festo Androa Asenua and Another v. Ug, S.C. Criminal Appeal No.1 of 1998)**

To disprove the defence of alibi raised by the accused persons, the prosecution relied on the evidence of PW1 and PW2 who were eye witnesses of the events as they unfolded. These events unfolded at night approximately between 9pm and
25 11pm. Where prosecution is based on the evidence of an identifying witness under difficult circumstances, the court must exercise great care to satisfy itself that there is no danger of mistaken identity. (See **Abdalla Bin Wendo and Another v R (1953) E.A.C.A 166.)**

In the instant case both PW1 and PW2 testified that they knew all the accused
30 persons. PW1 stated that on the fateful day at around 11pm, A5 Oyuku Moses called him out of his house to go on duty. He stated that he found Oyuku Moses



5 with four soldiers. He acknowledged that he knew the soldiers physically but not their names. He testified that he knew Peter Onini who is the first accused. He stated that he was able to identify them with the help of a bright torch light in the hands of Peter. He further testified that he saw Onini Peter holding Ogwal David's leg while piercing Ogwal David with a bayonet on the left leg.

10 PW2 testified that he knew all the accused persons. He specifically stated that he worked with A5 Moses Oyuku in the camp. He stated that he got to know the other accused on 26 April 2006. He testified that the other accused persons where soldiers under Peter Onini PW1. He also testified that Peter Onini had a torch which helped him to recognise him. They used no other light but the torch. When 15 they reached David Odongo's house they had him talk to himself. Peter Onini asked why he was making such noise, then he was told that is the way he behaves when is drunk. Then Peter Onini kicked the door and entered and Oyuku Moses and other soldiers followed. he stated that he was 10 meters away from the house. He saw the Peter Onini beat the deceased and the other soldiers. Then he had the 20 deceased cry out *"Oyuku you know me, and you are letting the soldiers to kill me."*

While assessing this evidence the trial Judge noticed that the defence by A1that he could not be deployed because of his injured arm was an afterthought. The Judge held that:

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> "In his testimony Onini (A1) stated he could not be deployed as his right arm was shot and injured, implying he could not use his right hand. Yet when PW1 testified that he saw him holding the deceased's leg and piercing it with a bayonet, it was never put to PW1 that A1 could not do this on account of his incapacitation. The challenge rather was that A1 could not hold a gun, a torch, lift the deceased's leg and stab it with knife all at the same time."

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The Judge went ahead and cautioned himself on the quality of light while identifying the accused persons/ Appellants. He had this to say:

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> "I should point out this case is different from the majority of cases where identification evidence is in issue. In those other cases the witnesses are under attack by the assailants and are therefore subjected to fear or physical harassment. In the instant case PW1 and PW2 were in the company of the accused in that they were on one mission, to patrol around the camp. The two witnesses were therefore not under any pressure or fear from the accused persons. In my view they in a relaxed stance as they moved and mingled freely with the accused while patrolling the camp. They were able to observe them with the help of the light torch light for about one hour."

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Considering the evidence on record we are satisfied that the trial Court properly found that the evidence of PW1 and PW2 placed the accused/ Appellants at the scene of the crime.

15

This ground fails.

Ground two

Submissions of counsel for the Appellant

20 Counsel stated that the trial Judge passed a harsh and excessive sentence of imprisonment when he ordered them to serve each 25 years in prison. During mitigation counsel for the Accused / Appellants stated that all the five offenders were first time offenders and prayed for lenience although the maximum sentence for murder is death. In the case of **Wofeda Steven V Uganda, CACA No. 169/2003** it was held that a first-time offender does not deserve a maximum sentence, hence the Appellant's humble submission that all the accused persons did not deserve a maximum sentence.

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Counsel further stated that at the time of sentencing the Accused/Appellants were all youths and implored the trial judge to exercise leniency since all the accused persons were now practicing Christians and are willing to reform and avoid committing crimes since they can still play a positive role in nation building.

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5 Additionally, all five Appellants stated their mitigating factors, however these were not considered by the trial Judge and had he done so would have come up with a much lenient sentence against the Appellants. Counsel cited **Aguipi Isaac alia Zako V Uganda, Criminal Appeal CACA No. 281/2016,** where court relied on **Kyalimpa Edward V Uganda, Criminal Appeal no. 10 of 1995**, the
10 Supreme Court referred to **R V Haviland (1983)5 Cr. Appeal R(s) 109** that:

> "An appropriate sentence is a matter for discretion of the sentencing judge. Each case presents its own fact upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or
15 unless court is satisfied that the judge was manifestly so excessive as to amount to an injustice."

Counsel further submitted **Article 23(8)** of the Constitution of the Republic of Uganda 1995, as amended provides that where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends
20 in lawful custody\ in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment as was in the case of **Byamukama Herbert V Uganda, Criminal Appeal no.21 of 2017** while citing with approval the case of **Abele Asuman V Uganda, Criminal Appeal No. 66 of 2016.** Basing on the above provision counsel submitted that the
25 above were not considered which prejudiced the Appellants amounting to an injustice hence finding the sentence of 25 years imprisonment harsh and excessive in the circumstances.

Counsel prayed that this honourable court be persuaded by the arguments raised and find merit in favour of the Appellants that the appeal is allowed hence issue
30 an order quashing the conviction and sentence of the trial court and acquittal of the appellants.

5 **Submissions of counsel for the Respondent**

Counsel for the Respondent submitted that the sentence of 25 years imprisonment meted out against each of the Appellants was neither excessive nor manifestly harsh. It is evident that the trial Judge considered the aggravating factors against the accused persons before arriving at the sentence of 25 years
10 imprisonment against each of the Appellants. Counsel cited **Uwihauimana Molly v Uganda, Criminal Appeal No. 103 of 2009,** where the Appellant was charged with murder and sentenced to death, but this honourable court substituted the death sentence against the Appellant with 30 years' imprisonment. While citing the case of **James Yaram V Rex 1995 (18) EACA 147 at page 149**,
15 counsel submitted that the learned trial Judge took into account all the mitigating and aggravating factors in favour of the appellants and rightly came to the findings that the 25-year imprisonment was appropriate in the circumstances, hence his findings cannot be disturbed.

Counsel prayed that this honourable court dismisses the appeal and uphold the
20 conviction and sentences passed against the appellants.

Consideration of Court

The sentencing regime in this country is guided by Constitution, statutes, Practice Direction and case law. Before a convict is sentenced the trial court is obliged to exercise its discretion by considering all the mitigating and aggravating factors.
25 It must be noted that the sentencing guidelines do not rob court of its discretion while sentencing.

In **Kyalimpa Edward vs. Uganda, SCCA No. 10 of 1995,** where the Supreme Court held that:

> "An appropriate sentence is a matter for the discretion of the sentencing
30 judge. Each case presents its own facts upon which a judge exercises his /her discretion. It is the practice that as an appellate court, this court will

5 not normally interfere with the discretion of the sentencing judge unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."

In considering whether the sentence is harsh or excessive the court is guided by the principle of consistency. The sentencing court is guided by the principle of

10 consistency and uniformity when sentencing. **Guideline No.6(c) of the Sentencing Guidelines** provides that;

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

15 committed in similar circumstances"

To ensure this consistency the guidelines provide for ranges to guide the sentencing judge. **Guideline 19(1) of the Constitution (Sentencing Guideline)** provides for sentencing range for capital offences. It provides that:

> "The court shall be guided by the sentencing range specified

20 in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence."

When imposing a custodial sentence on a person convicted of the offence of murder, the third schedule of The **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, item 3 of part 1** the

25 sentencing range for murder starts from 35 years to death sentence. This can be reduced or increased depending on the mitigating and aggravating factors.

In **Aharikundira vs. Uganda SCCA No.27 of 2015**, the Supreme Court reduced a sentence from a death sentence to 30 years imprisonment.

In **Mbunya Godfrey vs. Uganda, SCCA No.004 of 2011**, the Supreme Court set

30 aside the death sentence imposed on the Appellant for the murder of his wife and substituted it with a sentence of 25 years imprisonment.

5 In exercising its discretion court is expected to consider the mitigating and aggravating factors, the trial court in this matter rightly did this weighing the evidence on record against the law it would therefore be unjust to set aside such a sentence. The starting point for sentencing murder cases is 35 years and in this case the court sentenced the Appellants to 25 years imprisonment. This was not
10 excessive and harsh considering the circumstances of the case.

This ground fails.

On the whole this appeal therefore fails.

1. The conviction of the trial court is upheld
2. The sentence of the trial court is upheld

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We so order.

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

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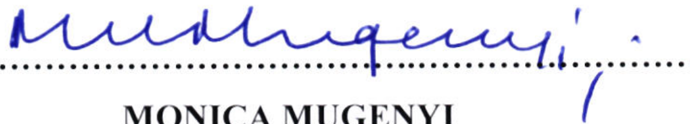
CHEBORION BARISHAKI

JUSTICE OF APPEAL



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25 **MONICA MUGENYI**

JUSTICE OF APPEAL

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CHRISTOPHER GASHIRABAKE

30 **JUSTICE OF APPEAL**