THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

[Coram: Egonda-Ntende, Bamugemereire & Mulyagonja, JJA]

CRIMINAL APPEAL NO. 56 OF 2021

(Arising from High Court of Uganda Criminal Session Case No. 176 of 2019 at Arua)

BETWEEN

Acia Martin==========Appellant

AND

Uganda==========Respondent

(*Appeal from a Judgment of the High Court of Uganda (Byaruhanga, J.) delivered on the 8th October 2020.*)

REASONS FOR JUDGMENT OF THE COURT

Introduction

[1] When this appeal came up for hearing we allowed it and promised to provide our reasons for doing so later. We now do so.

[2] The appellant was initially charged with 6 other persons of 2 counts of murder and robbery before the Chief Magistrates' Court at Arua on 29th March 2018. The particulars of the charges were that the appellant and 6 others on 17th February 2018, at Ombavu village, Arua District, robbed Asara Morfat of a motor cycle and at the time of the robbery used or threatened to use a deadly weapon in the form of a gun. The second count was that the appellant and 6 others, on 17th February 2018, at Ombavu village, Arua District, murdered Afeku Festo.

[3] Subsequently only 4 people were committed for trial to the High Court which included the appellant on the count of robbery. However, at the trial the indictment that was read to the accused persons was for both counts of murder and robbery. It is to this indictment, a copy of which we have not seen, that they pleaded. At the trial the count of aggravated robbery was dropped and they were tried only on the murder charges. The three other persons charged with the appellant were acquitted of the offence of murder. It is only the appellant that was convicted of the offence of murder and sentenced to life imprisonment. He appealed against both conviction and sentence.

[4] The other persons that were acquitted, we were informed from the bar, were subsequently charged with robbery, convicted and sentenced to a term of imprisonment. Records of that trial were not availed to us.

[5] The appellant was represented on appeal by Mr Joseph Sabiti Omara while the respondent was represented by Ms Immaculate Angutuko, Chief State Attorney, in the Office of the Director, Public Prosecutions, for the respondent. Both counsel filed written submissions in this matter. Ms Angutuko opposed the appeal, supported conviction and sentence imposed on the appellant.

Facts of the Case

[6] The facts of this case are that on the evening of 17th February 2018 PW1, Asara Morfat, was riding a motor cycle to Kuluva Hospital to pick a friend. It was after 10.00pm. When he reached Ala Bridge, he met 4 people, 2 of whom were armed with guns, that stopped him. He was able to recognise only the appellant, as one of the persons with a gun, who he knew previously. He dropped the motor cycle and run to his village, where he alerted several persons of the incident. A search party for the robbers was formed and they headed back to Ala Bridge. As they approached they heard gun shots and they moved towards where the gun shots were coming from. They found Afeku Festo who had been shot. Afeku Festo was the younger brother of the Asara

Morfat. They rushed him to Kuluva Hospital and he was later transferred to Arua Regional Referral Hospital. He died on the 18th February 2018.

[7] PW1 stated that a month after the incident he informed his Uncle Atayo Seti about it and he subsequently made a statement to the police. PW2 was the mother of the deceased. On the night of the 17th February 2018 with other persons they found Afeku Festo at the home of Eka. He was still talking. He told them that the appellant had shot at him. They took him to Kuluva Hospital but later transferred him to Arua Hospital. He died and was buried. PW2 made no report to the authorities until the police started investigating the matter. PW4 testified too that she heard the deceased state at Eka's home on the night of 17th February 2018 that it was the appellant that shot him.

[8] PW6, the investigating officer received a report of these crimes on the 23rd February 2018. He visited the scene of crime on 28th March 2018. PW7, Phenehansi Anguyo, worked at Aya Dam. On the following day (presumably 18th February 2018) after the incident at his work place he recovered caps that he stated belonged to the appellant and accused no.4. He handed those caps to the police. PW6 received these caps from the witness on the 28th March 2018, a month after they were recovered by the witness.

Analysis

[9] It is our duty as the first appellate court to re-appraise the evidence adduced at trial and draw our own conclusions of fact and law, bearing in mind that we did not have the opportunity to observe the demeanour of witnesses at the trial. See Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions; Kifamunte Henry v Uganda, [1998] UGSC 20 and Bogere Moses v Uganda, [1998] UGSC 22.

[10] We now do so. The learned trial judge relied on the testimony of PW1, and the dying declaration of the deceased as well as the contradiction in the alibi evidence of the appellant to find that it is the appellant that murdered the

deceased. The finding of the learned trial judge went entirely against the joint advice of the assessors, as he was entitled to do, provided he provided reasons for doing so.

[11] We shall set out verbatim the concise opinion of the assessors.

> 'I go straight to whether A3 and A4 participated in the commission of the offence. PW7 referred to 2 caps. We do not believe in this evidence. The exhibited caps had no specific markings to show that they are unique. These caps are common in our markets. In any case, no other person had ever seen them with these caps. PW7 had these caps for days. We wonder what he was doing with them all this time. The notion of caps is not sufficient to link A3 and A4 to the offence. PW1 stated that he saw A3 with the help of the motorcycle headlight. The recovered gun had no connection with A3 and the murder of Afeku Festo. PW8 testified that upon the shooting he took cover. No lighting condition was revealed by PW2 revealing how the deceased could identify A3. What the deceased said is not a proper dying declaration. PW5 and others who claim to have witnessed the dying declaration. None of the witnesses highlighted how the deceased identified A3. Statements were made after 1 month yet PW1 claimed to have identified the accused persons at the scene. The same apply to the deceased identifying A3 before his death. It is our view that the participation of the accused persons has not been proved. They ought to be acquitted.'

[12] The appellant lived in Ambala village, not far from the where the crime was committed and or where the prosecution witnesses, PW1, PW2, PW4 and PW7 lived. No report was made to the police both by PW1 of the theft of his motor cycle and recognition of the appellant until a month after the incident. There is no explanation provided for this silence. First information in relation to this crime was not tendered in evidence. The police visited the scene of crime only after a month since it was committed, on the 28th March 2018.

[13] We found it particularly odd that the eye witness to the incident of robbery PW1 did not at the first opportunity make a report to the police with regard to the robbery of his motor cycle. And the fact that he had recognised one of the assailants. Neither was the dying declaration revealed to the authorities until one month from the date of the incident which resulted in the death of the deceased in this matter.

[14] The caps that were exhibited and alleged to belong to the appellant and accused no.4 similarly only surfaced about a month after they were allegedly recovered from the scene of the crime. Where the caps were kept from the date of recovery until hand over to the police is not disclosed.

[15] There was no suggestion from the prosecution witnesses that the appellant disappeared from Ambala village. He was present all this while after the crimes were committed. It is only PW7 who suggested that accused no.4 had disappeared about the time of the commission of these crimes. For about 30 days and while the appellant was at home no report was at all made to the Police about his involvement in these 2 crimes. The victim of the robbery was present throughout this period. The family of the deceased, especially those members who heard the dying declaration of the deceased that implicated the appellant in his death made no report to the authorities on their village or the police nor took other steps to denounce or out the known suspects.

[16] Absent an explanation for this delay the evidence of PW1, PW2, PW4 and PW7 becomes suspect. The coincidence that all this evidence surfaces at about the same time, a month later after the crimes were committed, speaks volumes about possible collusion by a family to accuse the appellant of being involved in the commission of these crimes.

[17] PW6, the investigating officer, received a report of this crime on 23rd February 2018, just one week after it was committed. He visited the scene of crime only on the 28th March 2018, more than a month after he received the first report.

In any case no evidence was led as to the nature and information contained in the first report and the person who made it.

[18] We also note, given the testimony of the PW6, that A1 and A2, were arrested in relation to these offences and after their arrest they provided information that led to the recovery of a gun, which was exhibited in this case. No connection was established between the appellant and this gun. No connection was made between this gun and the murder of the deceased. No connection was established between the appellant and A1 and A2. Indeed, A1 and A2 were acquitted at the level of no case to answer.

[19] PW6 testified, without providing any records that A1 and A2 were charged with illegal possession of a firearm for which they were convicted and sentenced to 3 years' imprisonment. He further stated that they served this sentence and completed it by the time he was testifying. It was not made clear whether it is the same gun as was exhibited in this trial that was the subject of that prosecution.

[20] We heard from the bar from both counsel for the appellant and respondent that after this trial and after acquittal of the other accused persons of the murder of the deceased those persons acquitted were subsequently charged with robbery of PW1's motor cycle and were convicted. No records were availed to us to support this assertion. We refer to it merely in light of the prosecution theory of this case. The prosecution theory of the occurrence of this crime as can be surmised from the summary of the case attached to the indictment was that the people that stole PW1's motor cycle were the same people involved in the murder of the deceased, who was one of the search party that fanned out at the area where the robbery had occurred to trace the robbers, and was killed in the process. It is odd that the only person who was recognised in that robbery was not prosecuted for that robbery, unless the state was satisfied that he was not involved. If that is the case it begs the question; did he participate in the connected crime of murder in what appeared to be the same transaction of facts?

[21] We were satisfied that the prosecution in this case failed to discharge its burden to adduce sufficient evidence to prove that the appellant participated in the murder of the deceased beyond reasonable doubt. Such evidence as was produced raised more questions than answers. It was insufficient to found a conviction for the offence of murder as charged.

[22] Before we take leave of this matter we note that the learned trial judge ought to have paid greater attention to the joint opinion of the assessors in this case. Section 82 of the Trial on Indictments Act, provides in part,

> **'82. Verdict and sentence**
>
> (1) When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors.
>
> (2) The judge shall then give his or her judgment, but in so doing shall not be bound to conform with the opinions of the assessors.
>
> (3) **Where the judge does not conform with the opinions of the majority of the assessors, he or she shall state his or her reasons for departing from their opinions in his or her judgment**.' [Emphasis is ours.]

[23] Section 82 (3) of the Trial on Indictments Act was considered in the case of Kazooba Godfrey and Anor v Uganda [2018] UGCA 67 by this court. This court held that it was fatal to the conviction if the trial judge failed to comply with these provisions of the law. It was also considered by this court in Nakato Joyce and Anor v Uganda [2022] UGCA 30. In that case there was no majority opinion of assessors. Each assessor gave his opinion and they did not agree. The trial judge agreed with one assessor and disagreed with the other assessor. This court held that this did not occasion a miscarriage of justice. We may add

that clearly in the latter decision section 82 (3) of the Trial on Indictments Act was inapplicable as there was no majority opinion.

[24] As noted above the learned trial Judge was free to depart from the opinion of assessors. However, where he disagreed with the majority opinion of the assessors he was obliged to provide reasons for departing therefrom. Section 82 (3) of the Trial on Indictments Act is couched in mandatory terms. A judge is obliged to give reasons for departing therefrom.

[25] We have examined record of the lower court and the Judgment and found that there was a summing up to the assessors who in turn offered their opinion. The assessors in their concise opinion had advised the learned trial judge to acquit the appellant and his co accused. They provided what we regard as cogent reasons that revealed grave weaknesses and unexplained gaps in the prosecution evidence. The learned trial Judge never hearkened to this advice in respect of the appellant. He acquitted the co accused and convicted the appellant.

[26] The learned trial Judge never provided reasons for disagreeing with their joint opinion. He never discussed the points they raised that made the prosecution case against the appellant weak. The learned judge's failure to provide reasons for differing from the joint opinion of the assessors is in contravention of section 82 (3) of the Trial on Indictments Act which is couched in mandatory terms. Failure to comply with the said provisions, in this particular case, occasioned a miscarriage of justice and is consequently fatal to the conviction.

[27] For the foregoing reasons we acquitted the appellant, quashed the conviction and set him free.

Dated, signed and delivered at Gulu this 25th day of May 2023

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Irene Mulyagonja
Justice of Appeal