THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

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

CRIMINAL APPEAL NO. 188 & 330 OF 2017

(Arising from High Court of Uganda Criminal Session Case No. 136 of 2014 at Lira)

BETWEEN

Ekong Godfrey==========Appellant No.1
Owii Abdu==========Appellant No.2
Hellen Otim Apili==========Appellant No.3

AND

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

(*Appeal from a Judgment of the High Court of Uganda (Nabisinde, J.) delivered on the3rd August 2017*)

JUDGMENT OF THE COURT

Introduction

[1] The three appellants in these appeals were indicted in the court below for the offence of murder. The particulars of the offence were that the appellants on the 7th December 2012 at Alaku village in Amolotar District murdered Otim Peter. All the three initially pleaded not guilty. However just before the trial started Appellant No. 1, Ekong Godfrey, changed his plea to guilty and was convicted on his own plea and sentenced to serve a term of imprisonment of 20 years. The other 2 appellants were tried, convicted, and sentenced to serve a term of 25- and 30-years imprisonment respectively. The appellant No. appealed against sentence. Appellants No.2 and No.3 appealed against

conviction and sentence. The respondent opposed the appeals and supported the decisions of the court below.

[2] Appeal No. 188 of 2019 was by Hellen Otim Apili, appellant no.3. Appeal No. 330 of 2017 was by appellant no. 1 and no. 2. We consolidated both appeals as they arose from the same original trial in the court below. Later on we shall consider first the appeal by appellant no.1 as his conviction was on his own plea of guilty. We shall then consider the appeals of appellants no.2 and no.3 which are against both conviction and sentence which were handed down after a full trial.

[3] At the hearing of this appeal the appellants were represented by Mr Paul Layoo Julius. The respondent was represented by Ms Alleluya, State Attorney, in the Office of the Director of Public Prosecutions. Both counsel in the matter filed written submissions.

Duty of a First Appellate Court

[4] It is our duty, as a first appellate court, to review and re-evaluate the evidence adduced at the trial and reach our own conclusions of fact and law, bearing in mind that we did not have the opportunity to hear and see witnesses testify. See Rule 30 (1) (a) of the Rules of this Court; Pandya v R [1975] E A 336; Kifamunte Henry v Uganda [1998] UGSC 20; and Bogere Moses and Anor v Uganda [1998] UGSC 22.

Appeal by Appellant No. 1 Ekong Godfrey

[5] On the 24th May 2017 all the appellants pleaded not guilty and the case was fixed for hearing on the 6th June of 2017. On that date the appellant no.1 changed his plea to guilty. He was convicted on his own plea of guilty. He was sentenced to 20 years imprisonment. Before we consider the appeal, we are faced with an incomplete record. The proceedings of 6th June 2017 when

the appellant no.1 changed his plea are not available on the court record. There is therefore no record of the taking of his plea, conviction, and sentence.

[6] We made strenuous efforts to search for the missing records including calling for the oral recording of the proceedings of that day. Unfortunately, they did not include the proceedings related to this case though there were records of other cases heard on that day. Whether there was no electricity at the time the case was called, and the trial judge had to make handwritten notes we could not ascertain. The original court record did not have such handwritten notes.

[7] In the circumstances there is no record upon which this appeal can proceed. A similar situation was considered by this court in Ephraim Mwesigwa Kamugwa v The Management Committee of Nyamirima Primary School [2019] UGCA 2015 in the words below.

> '[14] What is the law with regard to an incomplete record on appeal? The law on missing record of proceedings has long been established. Where a record of trial is incomplete by reason of parts having been omitted or gone missing, or where the entire record goes missing, in such circumstances, the appellate court has the power to either order a retrial or reconstruction of the record by the trial court. See fast African Steel Corporation Ltd v. Statewide Insurance Co. Ltd [1998-2001] HCB 33.
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> [15] Where reconstruction of the missing part of the record is impossible for whatever reason but the court forms the opinion that all the available material on record is sufficient to take the proceedings to its logical end, the court may proceed with the partial record as long as none of the parties to the appeal is prejudiced. See Jacob Mutabazi v. The Seventh Day Adventist Church, Court of Appeal Civil Appeal No. 088 of 2011.
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> [16] However, where reconstruction of the missing part of the record is impossible and court forms the opinion that all the available material on record is insufficient to take the

proceedings to its logical end, a re-trial should be ordered. See Nsimbe Godfrey v. Uganda, Court of Appeal Criminal Appeal No. 361 of 2014 (unreported), and East African Steel Corporation Ltd v. Statewide Insurance Co, Ltd T1998-2001 HCB 3311.'

[8] The record of the trial court cannot be reconstituted. And this appeal cannot proceed without the record. Is this the kind of matter where this court should order a retrial?

[9] The appellant was first arrested on or about the 8th December 2012 soon after the offence in question was reported. He has been in custody since then to date. This is a period of more than 10 years in custody. The record has suggested that he had pleaded guilty. In our view the interests of justice would militate against ordering a retrial in the circumstances of this case. The period the appellant has been in detention would have been sufficient sentence for one who has pleaded guilty to a charge of murder.

[10] We therefore decline to order a re trial as the Ms Alleluya for the respondent had sought. We quash the conviction of the appellant and set aside the sentence imposed on him. We order his immediate release unless he is held on some other lawful charge.

Appeal by Appellants No. 2 and No. 3

[11] The appeal by appellant no.2 was basically against sentence. Before we consider the same, we note that there are no proceedings available in relation to the sentencing of the appellant no.2 and no.3 who were tried. The only sentencing order we have seen is in respect of appellant no.1 who pled guilty and was convicted on his own plea. The only evidence available that sentences were imposed on the appellants no. 2 and no.3 are the commitment warrants signed by the learned trial judge.

[12] There are no records upon which we can consider the sentences imposed by the trial court upon the 2 appellants. As the records are missing, we are left with no alternative but to set aside such sentences and shall exercise the powers vested in this court under section 11 of the Judicature Act and sentence the appellants afresh.

[13] However, before we do so we must dispose of the appeal of the appellant no.3 against conviction. This is set forth as follows:

> 'The learned trial judge erred in law and fact when she held that the appellant was properly identified and place (*sic*) at the scene of crime by the victim, hence occasioning a miscarriage of justice.'

[14] In his written submissions counsel for the appellant contended that the conditions for identification of the perpetrators were difficult to enable PW3 to properly identify the perpetrators of the crime. From the testimony of PW3 it was clear that the whole process was like a movie that did not give him proper time to identify the suspects. When the witness flashed his torch he was threatened by the assailants and made off, in a state of fear. He referred to Abdulla Nabulerere and Anor v Uganda [1979] HCB 77 in support of his submissions. He further submitted that the appellant did not have a grudge with the deceased to motivate her into participating in the crime.

[15] Counsel for the respondent referred to Abdulla Nabulerere and Anor v Uganda (supra) as the leading authority on the evidence of a single identifying witness. She submitted that the conditions for identification of the assailants by PW3 were favourable. The witness was only 8 metres away from the scene of crime. He had switched on torch light and was able to see and identify the appellant holding the deceased's leg. He described how she was dressed including the colour of the jacket she was wearing. The quality of identification was good enough to leave no room for mistaken identity.

[16] It appears to us that the learned trial in considering whether the appellant participated in the murder of the deceased she considered whether there was other evidence apart from the evidence of PW3 the only eyewitness to the commission of the crime that corroborated the testimony of PW3. Whether this was from abundance of caution, or she felt that it was essential to have other evidence corroborate the evidence of PW3 we do not know. She does not discuss this aspect of the case.

[17] What is of concern is the type of evidence that she found corroborates the testimony of PW3 in respect of the appellant no.3. We need not discuss the evidence in respect of appellant no. 1 and no. 2 as the former pled guilty and the latter did not appeal against his conviction much as it may have had questions too. Regarding appellant no. 3 the learned trial judge stated,

> 'Further, the evidence of PW7 who investigated this case reveals that A3 was part of the plot to kill her husband together with her son A1 and A2. She had domestic issues with him and had the motive to kill him as well.'

[18] Earlier on in her judgment, the learned trial judge revealed where this information had come from. She stated,

> 'PW7 also confirmed that the clan leaders searched the homes of A1 and A2 and recovered a jacket, plus a t-shirt with blood stain at the home of Owii Abudu. He also stated that other clan leaders came and they started receiving more information that Ekong and the mother Apili Hellen A3 had a plan of killing the late. They handed clothes and knife which were recovered from the home of the two people and he exhibited them; and handed over from Namasale Police Station to Amolatar. He also ascertained later on that the deceased had separated with Apili Hellen and they had a misunderstanding and that it was his finding on the ground that they had planned to kill him so that she takes over the property with her children.'

[19] The testimony of PW7 about appellant no.3 and her participation in this crime was inadmissible as it was entirely hearsay. It was simply a pack of rumours spread in the crowd without reference to an individual source. It is incomprehensible that an investigating officer could give such testimony in court and that evidence relied on by the learned trial judge to amount to corroborating evidence. This evidence brings to my mind the admonishment in the bible Exodus 23 verse 2 which states, '*Do not follow the crowd in doing wrong. When you give testimony in a law suit, do not pervert justice by siding with the crowd, …..*'

[20] Given the prevailing atmosphere after the discovery of the death of the deceased and the known bad blood between father and son it might not be surprising the mother was associated with the crime of her son in spite of the absence of evidence to that effect. We cannot discount the possible effect of the rumours upon the testimony of PW3, the only eyewitness, and brother to the deceased.

[21] In these circumstances it was right to look for other evidence that would corroborate the evidence of PW3. This was not just because the conditions favouring correct identification were suspect but the group effect on individual testimony to achieve justice as perceived by the crowd which information the investigating officer in this case harkened to and the court relied upon.

[22] There was no other independent evidence to corroborate the appellant no. 3's participation in this crime. The initial information about a plot involving the appellant no. 3 as attested to by the investigating officer, PW6, had no factual basis.

[23] At the same time the appellant no.3 testified on oath stating that she had been at home that evening that her husband had been murdered. Her husband had left her home that evening and went to his other home from which he left that evening that he was killed. This testimony was largely unshaken on cross

examination. It was consistent with parts of the testimony of the prosecution witness no. 4. What we have here was evidence on oath against evidence on oath. One version on oath against another version on oath. Both could not be correct.

[24] We are satisfied that in the circumstances of this case a conviction against the appellant no.3 based on the evidence of PW3 and PW6 was unsafe. We would quash that conviction and order the immediate release of the appellant no.3 unless she is held on some other lawful charges.

[25] We now turn to the appeal against sentence by the appellant no. 2. As noted earlier above we shall sentence the appellant no. 2 afresh in light of our powers under section 11 of the Judicature Act. He was convicted of murder which is punishable by a maximum punishment of death. However, the maximum punishment is for the rarest of the rare cases. And ordinarily a first offender would not attract the maximum punishment. See Livingstone Kakooza v Uganda [1994] UGSC 17.

[26] In the circumstances of this case, we are satisfied that a sentence of 20 years' imprisonment would be the appropriate sentence in this case. We note from the trial record that the appellant had spent 5 years on pre-trial detention. In accordance with article 28 (3) of the Constitution, we shall deduct this from the period of 20 years leaving him to serve a period of 15 years' imprisonment from the date of conviction, 3rd August 2017. We so order.

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

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Irene Mulyagonja
Justice of Appeal