THE REPUBLIC OF UGANDA
COURT OF APPEAL OF UGANDA SITTING AT GULU
CRIMINAL APPEAL No.001 of 2019

CORAM:

[Egonda-Ntende, Bamugemereire & Mulyagonja, JJA]

EVADE MOSES BOSCO:: APPELLANT.

VERSUS

UGANDA:: RESPONDENT

(Appeal from the Decision of Anthony Ojok Oyuko J, dated 14th June 2018 in High Court Criminal Session Case No.1126 of 2014 at Arua)

JUDGMENT OF THE COURT

The appellant was indicted for the offence of Murder contrary to sections 188 and 189 of the Penal Code Act. It was alleged that on the night of 22nd July 2014 at Ekarakafe village in the Arua District, the appellant unlawfully murdered a one Florence Candiru.

Background

The background to this appeal as ascertained from the lower court record is that the deceased was the appellant's first wife. The appellant lived with his two wives in the same homestead. On 21st July 2014 at about 10:00 pm, they all left home for a relative's burial within the same village. The two wives returned home later that evening, leaving the appellant at the funeral. It was alleged that on the night of 22nd July 2014, the two wives slept in the same room, with the first wife sleeping on the floor while her co-wife took her bed. It is further alleged that when the appellant returned and

knocked at the door, no one opened for him. It is also alleged that the appellant pounced upon his wives beating them severely. The second wife was able to escape and spent the night in the bush. Unfortunately, the deceased was slow and did not escape in time. She only managed to run a short distance of two hundred metres, collapsed and died. The matter was reported to the police. Upon medical examination, it was established that the deceased died due to a ruptured spleen which was as a result of domestic violence. The appellant fled the scene but was arrested at Arua Park in Kampala weeks later and transported back to Arua Police where he was charged with murder.

On arraignment, the appellant pleaded not guilty and upon a full trial was convicted of murder and sentenced to 36 years and 4 months imprisonment. Dissatisfied, the appellant lodged this appeal with two grounds contained in the Memorandum of Appeal below: -

Grounds of Appeal

1. **That the learned trial Judge erred in law and fact in failing to properly evaluate the prosecution and defence evidence on record and also disregarded the appellant's alibi thereby arriving at a wrong decision.**
2. **That the learned trial Judge erred in law and fact when he sentenced the appellant to 40 years imprisonment which is deemed illegal, manifestly harsh and excessive in the circumstances.**

Representation

At the hearing of the appeal, Joanitah Tumwikiriza, a State Attorney appeared for the respondent while Mr. Joseph Sabiti Omara represented the appellant on state brief.

Submissions for the Appellant

Regarding the 1st ground of appeal, Counsel for the appellant contested the appellant's participation in the unlawful killing of the deceased person with malice aforethought. It was counsel's contention that during trial there was no evidence whether direct or circumstantial linking the appellant to the unlawful death of the deceased.

Counsel submitted that the only witness who could have linked the appellant to the unlawful death of the deceased was **PW2** who testified in court that she only got information of her death from a source that she failed to disclose to court. The claimed source was never called by prosecution. He argued that PW3 Moses Anguyo and PW4 in their testimony, did not implicate and/or link the appellant to the said unlawful death of the deceased.

Counsel further submitted that the appellant, in his defence, raised an alibi. His testimony was that on the fateful day he boarded a Gaaga bus and travelled to Kampala. The appellant was aggrieved because although his alibi was never discredited by prosecution, the trial judge still found him guilty.

It was counsel's contention that the trial Judge should have acquitted the appellant after a ruling on a prima facie case. The submission for the appellant was that he should never have been put to his defence. Counsel argued that had the trial Judge addressed himself on the law and procedure in respect of prima facie case, he would have discharged the appellant at no-case-to-answer.

Regarding the submission that the alibi was never rebutted, counsel relied on **Ainomugisha v Uganda SCCA No. 19 of 2015** where the Supreme Court laid down two ways in which the defence of an alibi can be disproved. The first is by investigating its genuineness and the second is by the prosecution adducing cogent evidence, which places the accused squarely at the scene of crime.

It was counsel's submission that there was no evidence adduced to place the appellant at the scene of crime and therefore the prosecution did not prove that the accused participated in the said crime. Counsel prayed that this court allows Ground No. 1.

Regarding the 2nd ground, counsel for the appellant contended that the trial Judge did not give adequate weight to the mitigating factors in favour of the appellant at the time of conviction. Counsel submitted that the learned trial Judge in sentencing the appellant relied more on the aggravating factors as opposed to the mitigating factors.

Counsel cited **Kasaija David v Uganda CACA No. 128 of 2008** where court reduced a sentence of Life imprisonment to 18 years

imprisonment for the offence of murder basing on the mitigating factor that the appellant was a first-time offender.

Counsel further cited **Kabatera Steven v Uganda CACA No. 123 of 2001** where the Court of Appeal found that failure to consider the age of the Appellant caused a miscarriage of justice. He contended that in the instant case, the youthfulness of the appellant was not considered.

He further submitted that the time spent on remand though mentioned was not deducted from the final sentence as required under **Article 23 (8) of the Constitution**. Counsel argued that a sentence arrived at without considering the period spent on remand is illegal. He prayed that the 2nd ground be answered in the affirmative and the sentence be set aside or reduced to 10 years imprisonment.

Submissions for the Respondent

In reply to ground No. 1 counsel for the respondent contended that the alibi was disproved by the prosecution. Counsel relied on the evidence of **PW3** who in cross-examination stated that the incident happened when the appellant was at home meaning that **PW3** had seen the appellant in the area. Counsel also relied on the evidence of **PW4** who testified that the appellant was arrested in Arua Park while trying to escape and such conduct can only infer his guilt thus this court should find the appellant's lies inconsistent with his innocence. Counsel applied **Chesakati Matayo v Uganda CACA No. 95 of 2004** where the court found that lies on the part of an accused

person proved can be used to corroborate the prosecution evidence. He prayed that the conviction be upheld.

In reply to the 2nd ground, counsel for the respondent submitted that the trial court referred to the 3 years and 8 months the appellant had spent on remand and deducted the same from the sentence of 40 years meted out to the appellant. Counsel submitted that since the period spent on remand was deducted, there was no illegality in the sentence.

Counsel contended that the trial Judge considered all the mitigating factors listed by the defence counsel and in light of the fact that the maximum sentence for murder is death, the trial Judge exercised his discretion correctly and gave an appropriate sentence of 40 years imprisonment. Counsel cited **Bakubye Muzamiru & Anor v Uganda SCCA No. 56 of 2015** where the Supreme Court confirmed a sentence of 40 years imprisonment for the offence of murder. He prayed that this court finds that the sentence imposed was appropriate in the circumstances and uphold the same and dismiss the appeal.

The Decision of the Court

We are conscious that as a first appellate court, we are required to re-appraise all the evidence adduced at the trial and draw inferences on questions of law and fact and arrive at our own conclusions. We are mindful that we did not see the witnesses testify. **See; Fr. Narcensio Begumisa & Others v Eric Tibebaaga**

SCCA No.17 of 2002, Kifamunte Henry v Uganda SCCA No. 10 of 1997, The Executive Director of National Environmental Management Authority (NEMA) v Solid State Limited SCCA No.15 of 2015 (unreported) and Pandya Vs R [1957] EA 336.

Regarding the 1st Ground, the appellant contended that there was no direct or circumstantial evidence linking him to the unlawful death of the deceased and that his alibi was not disproved by prosecution. The respondent on the other hand submitted that the appellant's conduct of disappearing from the scene of crime and being arrested in Kampala was inconsistent with his innocence.

We have analysed the entire record and the submissions of both counsel. In resolving the first ground, we gauged that the point of contention was the participation of the appellant in the murder of the deceased.

The appellant's participation can only be confirmed by direct and/or circumstantial evidence placing him at the scene of crime. The direct evidence in this case would be the evidence of witnesses who alleged to have seen the appellant during the incident. In this case, **PW2** an aunt to the deceased testified that on 22nd July 2014 at 8:00 am, she got information that the appellant had killed Florence Candiru. She stated that she did not know the person who gave her the information. **PW3** the LC1 Chairman stated that he was at his home when he heard people crying and shouting from the home of the appellant. He went to the appellant's home and found that the deceased had passed on.

We note that the evidence of **PW2** and **PW3** is based on hearsay and not on direct evidence of the witnesses who saw what transpired between the appellant and the deceased.

Counsel for the respondent urged us to rely on the conduct of the appellant and alleged that the appellant was found at Arua Park while trying to escape and such conduct can only infer his guilt thus this court should find the appellant's lies inconsistent with his innocence.

The appellant raised a defence of an alibi that on the fateful day, he boarded Gaaga bus and travelled to Kampala.

When the accused person raises a defence, the duty remains upon the prosecution to prove that despite the defence, the offence was committed and that the accused person committed it. (See **Woolmington v DPP (1935) AC 462 and Miller v Minister of Pensions [1967] 2 ALLER 373)**

In **Kibale v Uganda (1990) EA 148,** it was held that where an accused sets up an alibi as a defence, he/she does not assume any responsibility for proving the alibi but it was upon the prosecution to negative the alibi by evidence.

In **Bogere Moses & Anor v Uganda SCCA No. 1 of 1997** the court noted that:

> "Where the prosecution adduces, evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is

incumbent on the court to evaluate both versions judicially (and) give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable."

In the instant case, the appellant testified that on 21st July 2014, he resolved issues with his two wives in the presence of his father and that on the same day at 9:30 pm, he boarded Gaaga bus and travelled to Kampala and arrived on 22nd July 2014. He stated that his father called him on 23rd July 2014 and informed him that the women had fought again and that his wife was found dead the following day near a cassava plantation.

The appellant further stated that in the morning of 22nd July 2014, his father called him about the death of his wife, and he went to Arua park to board a bus where he was arrested and taken to Arua police post then later transferred to Central Police station.

The trial Judge in his judgment while examining the appellant's alibi noted that the appellant was in the village that fateful day because he was seen by PW2. The trial Judge laid emphasis on the appellant not being present at the burial of the deceased and based on the same to conclude that his conduct was not of an innocent person. Further, the trial Judge noted that **PW3** in his evidence stated that there was no one at the scene of crime thus the appellant and whoever helped him had escaped. It was on that basis that the trial Judge convicted the appellant.

Judging from the above analysis of the trial Judge's findings, we are hesitant to agree that indeed the appellant was properly placed at the scene of crime. The appellant maintained that he had travelled to Kampala where he was arrested thus the reason, he missed the burial was because he was in police custody. PW4 the investigating officer stated that on 24th July 2014, they received information that the appellant was in police custody in Kampala and on 25th July 2014, he reached Central Police station in Kampala and the appellant was handed over to him. This confirms the appellant's story that he was arrested and kept in police custody from 22nd July 2014 until he was handed over to PW4 the investigating officer and could not therefore be present at the burial, which took place on 23rd July 2014.

We find that the quality of the evidence (already analysed), which allegedly put the appellant at the scene of crime lacked the cogency that would disprove the accused's alibi and establish beyond reasonable doubt that he participated in the killing of the deceased. It is trite that the prosecution should not create any lingering doubt in its evidence and should there be any doubt, it should be resolved in favour of the accused person.

In our view, had the trial Judge carefully considered the entire evidence adduced before him he would not have found the appellant guilty of the murder of the deceased as he did; and would not have convicted him. In the result, we find that the appeal has merit. The conviction cannot stand, and we therefore quash it. It follows then

that the sentence imposed on the appellant is also accordingly set aside. The appellant is herewith set at liberty unless held on other lawful charges.

We so order

Dated at Kampala this.....12th.....day of.....June.....2023.

Fredrick Egonda-Ntende
JUSTICE OF APPEAL

Catherine Bamugemereire
JUSTICE OF APPEAL

Irene Mulyagonja
JUSTICE OF APPEAL