THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

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

CRIMINAL APPEAL NO. 101 OF 2010

(Arising from High Court of Uganda Criminal Session Case No. 05 of 2009 at Lira)

BETWEEN

Tom Vivid==========Appellant

AND

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

(Appeal from a Judgment of the High Court of Uganda (Byabakama Mugenyi, J.) delivered on the 7th June 2010.)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that on the 10th November 2006 at Irenda Shamba village, Irenda Shamba Central Division, Lira District he murdered Apio Cissy. He was tried and convicted as charged on 7th June 2010. He was sentenced to 30 years' imprisonment.

[2] Dissatisfied with decision, he now appeals against the conviction and sentence on two grounds set out below.

'1. That the learned trial judge erred in law and fact in holding that the Applicant was placed at the scene of crime and rejected Defence of Alibi.

2. The learned trial erred in law and fact in sentencing the appellant to a term of 30 years' imprisonment which is manifestly harsh in the circumstance.'

[3] The respondent opposed the appeal and supports the conviction and sentence of the trial court.

[4] The appellant was represented by Ms. Harriet Otoo. The respondent was represented by Mr. Sam Oala, Senior Assistant Director of Public Prosecutions, in the Office of the Director of Public Prosecutions. Both counsel filed written submissions upon which this appeal proceeded.

Facts of this Case

[5] The appellant and deceased were cohabiting. On the night of 10th November, 2007, the deceased and the appellant had a quarrel. The deceased told the appellant to leave her home. The appellant then asked for his clothes but the deceased refused. The appellant left the deceased's home. Later in the night the deceased was stabbed, and she run to her neighbours, stating that Tom (appellant) had stabbed her. They should rush her to hospital. She was rushed to Roman Clinic where she was pronounced dead soon after arrival.

[6] The appellant was never seen thereafter until his arrest from Mbale a year later. He was arrested and prosecuted for the murder of the deceased. He was convicted after a full trial on the 7th June, 2010 and sentenced to 30 years of imprisonment.

Submissions for the Appellant

[7] Counsel for the appellant submitted that the dying declaration of the deceased that the appellant stabbed her was not corroborated. She stated that no one saw

the appellant at the time the incident happened. She argued that the alibi raised by the appellant was not rebutted by placing him at the scene of crime. Counsel further submitted that the conduct of the appellant of leaving home and staying in Mbale for one year was because he lost interest in the deceased.

[8] Counsel for the appellant submitted that the sentence imposed upon the appellant was harsh and excessive in the circumstances of this case. She stated that the appellant was a first offender. He was aged 26 years at the time of conviction and had spent 2 ½ years on remand before trial. He had children and a mother to take care of. She prayed to court to reduce the sentence of 30 years to a lesser period.

[9] In support of his case, counsel for the appellant referred this Court to Atuku Margret Opii v Uganda Criminal Appeal No. 123 of 2008 (unreported) where on appeal this Court set aside a sentence of death and substituted it with 20 years' imprisonment for murder. (No copy of that decision was made available and we have not been able to lay our hands on it.) She also referred to Twikirize v Uganda [2016] UGCA 81 where this Court reduced a sentence for murder from 37 years to 25 years.

Submissions for the Respondent

[10] Counsel for the respondent submitted that the learned trial judge observed that the evidence adduced by the prosecution was basically circumstantial. This was the dying declaration and the conduct of the appellant after the offence was committed. He stated that the trial Judge further observed that the deceased made two dying declarations before PW1, a neighbour who lived 10 metres from the deceased's home and PW2 who found the deceased on the road.

[11] Counsel for the respondent further submitted that the trial judge rightly found that the deceased's dying declaration was corroborated by the conduct of the appellant of disappearing from the area where he had committed the crime. Counsel for the respondent submitted that the deceased had known the

appellant for about 7 years and they were living together as a couple which factors favoured correct identification. He submitted that according to the evidence of PW1 the appellant was at the scene of crime from 8:00 p.m. to 9:00 p.m. and this was not controverted or challenged in cross examination.

[12] In regard to the alibi set up by the appellant, counsel for the respondent stated that the appellant was seen at home on the fateful day between 8:00 p.m. and 9:00 p.m. quarrelling with the deceased. Counsel stated that the appellant lied to court when he said that he left home after lunch. He submitted that the learned trial judge was justified to conclude that the appellant went back to the deceased's home to pick his bag. Counsel for the respondent argued that the appellant's conduct of spending a whole year in Mbale was not conduct of an innocent person but rather he was trying to run away from the law. He concluded that the conduct of the appellant amounted to independent evidence that sufficiently corroborated the deceased's dying declaration.

[13] Counsel for the respondent further submitted that the sentence imposed on the appellant was neither harsh nor excessive. That in the Court of Appeal decision in Kaddu v Kavulu Lawrence [2018] UGSC 72 the appellant was convicted of the offence of murder. He was sentenced to death and on appeal the Supreme Court reduced it to life imprisonment. That in Nashimolo Paul Kibolo v Uganda (2014) UGSC 754 the appellant was convicted of the offence of murder and sentenced to death but on appeal the Supreme Court reduced the sentence to 30 years' imprisonment.

[14] Counsel for the respondent prayed that the conviction and sentence against the appellant be upheld and the appeal dismissed.

Analysis

[15] This court as the first appellate court is obliged to subject the evidence at the trial to a fresh appraisal and draw its own conclusions from the facts and law, taking into account that it did not have the opportunity to observe the

witnesses testify. See Rule 30 of the Judicature (Court of Appeal Rules) Directions, S.I. 13-10, Bogere Moses v Uganda [1998] UGSC 22 and Kafamunte Henry v Uganda [1998] UGSC 20.

Ground 1

[16] Counsel for the appellant contends, under this ground, that the dying declaration of the deceased was not corroborated by any evidence.

[17] PW1 Etapu Betty stated in her testimony that she knew the appellant who was her neighbour for about three months at Obang Pewanyi. The deceased was a teacher at Greenland Nursery School and residing within the school and her home was about 10 metres from PW1's home. She stated that the appellant and deceased were staying together as a couple. That on 10th November 2006 PW1 found the appellant at home and asked him where the deceased was. The deceased returned home, and they quarrelled from 8.00 to 9.00 p.m. The deceased chased the appellant from her home. The appellant asked for his clothes. However, the deceased refused to hand them over and the appellant went away.

[18] PW1 stated that she went to bed and heard the deceased at around 11p.m. - 12 a.m. crying that *'Tom has stabbed me. Rush me to the hospital.'* She stated that the deceased who was holding her chest with one hand, removed it and blood gushed out. PW1 observed a wound on the chest of the deceased with the help of candlelight and the deceased informed her that it's the appellant who caused the injury. She stated that the deceased went out of her house and walked towards the hospital but she collapsed by the roadside and cried out again that, *'Tom has stabbed me. Rush me to the hospital'*.

[19] She stated that the deceased was eventually taken to Roman Clinic. However, she died a few minutes after she got there. PW1 further stated that the appellant was not seen at the time the incident happened. That the following morning she went to the house of the deceased and found a knife with a black

handle and metallic blade stained with blood. She picked it up and one Acio Lucy took it to PW3 who took it to the Police.

[20] PW2 Okello Patrick, stated in his testimony that he knew the appellant as the husband of the deceased and had known him for 2 ½ years. He stated that on 10th November, 2006 while at his home, Onuk called him out and informed him that the deceased had collapsed on the roadside. He drove to the place Onuk told him and found the deceased lying on the roadside. He stated that the deceased was holding the chest while crying *that 'Tom stabbed me. Rush me to the hospital'*. The witness observed blood following from the injury on the chest of the deceased. He took the deceased to Roman clinic where she died. He stated that they looked for appellant that fateful night in vain.

[21] Upon cross examination he stated that he saw the deceased and the appellant together two days prior to the incident but he did not see him on the day the incident happened.

[22] PW5, stated that on 8th August 2007 he received a call from CID Mbale who informed him that the there was a suspect arrested over a case of obtaining money by false pretences. He proceeded to Mbale on 13th August 2007 and found the appellant charged in the Chief Magistrate Court at Mbale. However, he was advised to wait until conclusion of the case in order to arrest him for this offence. On 22nd November 2007, he received information that the appellant was re-arrested and detained at CPS Mbale. He went to Mbale and re-arrested the appellant and escorted him to Lira where the deceased's relatives identified him as the deceased's husband.

[23] Upon cross examination he stated that the relatives of the deceased informed him that the appellant run away.

[24] The appellant made an unsworn statement that isset out below:

> 'I am Tom Vivid aged 26 years, resident of Mbale Municipality, employee of Nile plywood as marketing officer. As a, marketing officer, I market company products which involved me to move around a lot. I did not tell the deceased. She was my wife having met in 1999 in lira town.
> On 10th November 2007 I was at home with my wife. I told her I was required somewhere but she started quarrelling and said I was not going anywhere. I again told her after lunch that I was needed at my work place. She continued to quarrel and said if I want to go I could go. I picked my bag and left. I proceeded to Mbale where I spent a night. In the morning I went to work. I took a full year without coming back to lira. One day police arrested me and I was informed that I had a case of murder against me. I was escorted to Mbale police station. I was asked if I had a wife in Lira. I was informed that my wife died and I was a suspect, after three days in the cell. I was transferred to Lira police station and charged before court. I don't know why my late wife told people that I stabbed her. That is all.'

[25] We note that the prosecution case entirely rests on circumstantial evidence. It is necessary before court draws an inference of the accused's guilt from the circumstantial evidence to be sure that there are no co-existing circumstancewhich would weaken or destroy the inference of guilt. See Teper v R (2) AC 480.

[26] In Byaruhanga Fodori v Uganda [2004] UGSC 24 the Supreme Court stated as follows:

> 'It is trite law that where the prosecution case depends solely on circumstantial evidence, court must, before finding the conviction, find that the inculpatory facts are incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must be sure that there no other co-existing circumstances, which weaken or destroy the inference.'

[27] PW1 and PW2 testified that the deceased told them that *'Tom stabbed me. Rush me to the hospital.'* The witnesses observed a wound on the chest of the

deceased and the same was bleeding. PW2 took the deceased to Roman Clinic and she was pronounced dead after a few minutes.

[28] In Tindigwihura Mbahe v Uganda Criminal Appeal No. 9 of 1987 (unreported) the Supreme Court stated in part,

> '...evidence of dying declaration must be received with caution because the test of cross examination may be wholly wanting; and the particulars of the violence may have occurred under circumstances of confusion and surprise; the deceased may have stated his inference from facts concerning which he may have omitted important particulars, for not having his attention called to them'
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> ....
>
> 'It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross examination, unless there is satisfactory corroboration.'

[29] In this case the dying declaration names the appellant as the person that stabbed the deceased. The deceased was his wife and they had known each other since 1999. PW1 in her evidence stated that appellant and the deceased had a quarrel on the night of 10th November, 2006 from 8-9 p.m. and the appellant went away. The witness went to bed and at around 11p.m. to 12 a.m. heard the deceased cry that the appellant had stabbed her. The witnesses stated that the appellant and deceased were living together as a couple and this evidence was confirmed by the appellant who stated that the deceased was his wife he having met her in 1999. Considering the above evidence, we are of the view that the appellant was properly identified by the deceased as the person who stabbed her.

[30] The appellant stated that he travelled to Mbale where he spent a night, went to work in the morning and spent a year without going back to Lira. Counsel for the appellant submitted that the appellant stayed away for a year because he lost interest in the deceased. However, this has no foundation since the

appellant did not allude to this in his evidence. PW5 stated that he picked the appellant from Mbale following his arrest on 22nd November 2007 and took him to the deceased's relatives in Lira who identified him as the deceased's husband.

[31] It is not in dispute that the appellant was present in their home the day the deceased was stabbed. Though the appellant claimed in his unsworn statement that he left the home after lunch, he did not precisely state what time he left the home. On the other hand, PW1, talked to the appellant in their home with the deceased at about 8.00pm that evening. The appellant asked PW1 where the deceased was. The deceased then returned home. A quarrel between the appellant and deceased followed. The appellant left. And the witness went to her home and slept. Subsequently, later in the night at about 11.00pm PW1 heard deceased knocking at her door, stating that, *'Tom had stabbed me. Rush me to hospital.'*

[32] The appellant sought, in our view, to create an impression that he left during the day soon after lunch. In light of the testimony of PW1, it is clear that this was false. He was around in the evening of 10th November 2010 and met PW1, at around 8.00pm, and asked her, where his wife was. The wife then appeared, and a quarrel ensued. We are inclined to accept the version of events as narrated by PW1, which are confirmed in material respects by PW2, who took the deceased to the clinic. The evidence of a dying declaration is therefore firmly established.

[33] Disappearance by the appellant for a whole year, until his arrest, from their home the night the deceased was stabbed is not conduct consistent with innocence of the appellant. Neither is the false evidence that the appellant left for Mbale during the day after lunch. There is no other hypothesis to explain both the false account of the appellant's departure from his home and the disappearance thereafter other than pointing to the appellant's participation in the death of his wife. This is sufficient corroboration of the dying declaration by the deceased in the circumstances of this case.

[34] We reject ground 1 of the appeal. It is without merit.

Ground 2

[35] Ground 2 asserts that the sentence imposed upon the appellant of 30 years' imprisonment is harsh. The learned trial judge made the sentencing order below after hearing from the parties.

> 'SENTENCE: -
> I have listened to both sides on sentence. Human life is indeed sacred and nobody has the right to take away the life of another except the law. The evil of domestic violence is so rampant in our society. It is even more abhorrent when it results in the death of one of the spouses. The convict was expected to guard the deceased being his wife or concubine other than slaying her. It is the duty of this court to send a strong warning to all people in homes with such inclinations that domestic issues ought to be resolved in a civil and nonviolent manner. The convict did not show any mercy to the deceased considering the circumstances of this offence. He ought to be put out of society so that he undergoes reformation. Maximum penalty for murder is death.
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> In passing sentence, I take into account the convict is a first offender and at 26 years, he is still young man who ought to be given a chance to re-join society and probably make a worthy contribution. He has been on remand for 2 ½ years. Looking at all the above factors I consider a sentence of 30 years' imprisonment appropriate taking into account the period spent on remand.'

[36] This court will only interfere with the sentence imposed by the trial court where the sentence is illegal or founded on a wrong principle of law. It will equally interfere with the sentence, where the trial court has not considered a material factor in the case or has imposed a sentence which is harsh and manifestly excessive in the circumstances of the particular case. See Livingstone Kakooza v Uganda [1994] UGSC 17 and Kiwalabye V Uganda Supreme Court Criminal Appeal No. 143 of 2007

[37] The appellant contended that the sentence of 30 years' imprisonment is harsh and manifestly excessive in the circumstances of this case. We note that we need consistence and uniformity in sentencing though ordinarily no two offences are exactly similar.

[38] In Kyetegereka George v Uganda [2010] UGCA 110 this court confirmed a sentence of 30 years of imprisonment imposed by the trial judge. In that case the appellant was convicted of murder by stabbing the deceased on the chest with a knife.

[39] In Akbar Hussein Godi v Uganda [2015] UGSC 17 the Supreme Court confirmed a sentence of 25 years' imprisonment imposed by the High Court and affirmed by the Court of Appeal where the appellant was convicted for the murder of his wife.

[40] In Rwabugande v Uganda [2017] UGSC 8 the Supreme Court reduced a sentence of 35 years' imprisonment for murder to 22 years' imprisonment and deducted the one year spent on remand leading to a final sentence of 21 years' imprisonment. The appellant was a first offender who was 24 years old at the time of the offence. The appropriate sentence was one that enabled the offender to reform and be reintegrated in society.

[41] In Jackline Uwera Nsenga v Uganda, [2020] UGCA 2086 the appellant ran her husband over with a car and eventually killed him at the gate of their home. She was convicted of murder and sentenced to 20 years' imprisonment by the trial court. The appeal to this court was only against conviction and it was dismissed.

[42] The appellant in the instant case was a young man aged 23 years at the time of the commission of the offence. He was a first offender. Though he committed what was no doubt a grave offence a sentence that would both allow him to reform, then re-join and contribute to our society as a rehabilitated individual would be appropriate in the circumstances of this case. A term of 30 years' imprisonment is harsh and excessive in the circumstances

of this case. We would reduce the sentence to 20 years' imprisonment less the 2 and ½ years spent on remand.

Decision

[43] We order the appellant to serve a period of 17 years 6 months' imprisonment from 7th June 2010, the date of conviction.

Dated, signed, and delivered this 8th day of June 2023

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Irene Mulyagonja
Justice of Appeal