THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT FORT PORTAL

(Coram: Egonda-Ntende; Bamugemereire & Mugenyi, JJA)

CRIMINAL APPEAL NO. 204 OF 2015

KIIZA SWAIB ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the High Court of Uganda holden at Fort Portal (Okwanga, J) in Criminal Case No. 142 of 2013)

JUDGMENT OF THE COURT

A. Introduction

1. Mr. Swaib Kiiza alias Bakiisa ('the Appellant') was on 19th February 2015 convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120. The facts of the offence as garnered from the record of appeal are that on 11th February 2013 at Nyakagongo, Buhesi sub-county in Kabarole District, the Appellant attacked Enid Kanyunyuzi ('the Deceased') with a panga and cut her repeatedly before fleeing the scene of crime. The deceased was rushed to hospital in critical condition but she later succumbed to her injuries and died.

2. Upon conviction for murder, the Appellant was sentenced to 37 years' imprisonment. He has since lodged the present Appeal challenging his conviction and sentence on the following amended grounds:

    I. *That the learned trial Judge erred in law and fact when he convicted the Appellant on evidence riddled with inconsistencies.*

    II. *That the learned trial Judge erred in law and fact when he imposed a manifestly harsh and excessive sentence against the appellant.*

3. Mr. Geoffrey Chan Masereka represented the Appellant at the hearing, while the Respondent was represented by Ms. Happiness Ainebyona, a Chief State Attorney.

B. Parties Legal Arguments

4. Under *Ground 1* of the Appeal the trial judge is faulted for improperly evaluating the identification evidence on record and disregarding the Appellant's alibi in arriving at his decision. It is argued that Kellen Kamakune (PW2) and John Bamanya (PW4) that purportedly identified the Appellant as the deceased's attacker neither stated the distance between them and the scene of crime during the course of the attack, nor did they observe the Appellant for sufficient time as he fled as they drew closer to the scene of crime. It is argued that the Elizabeth Kansiime (PW5), the only other identification witness, was closer to the scene of crime but was unable to identify the Appellant, only identifying the deceased's voice as the one under attack. On the authority of the factors favouring correct

identification as laid out in **Abdalla Nabulere vs Uganda, Criminal Appeal No. 9 of 1978**, it is further argued that the time between 7.30 – 8.30 pm during which the attack ensued did not favour correct identification, and to the extent that PW5 had not attested to there having been moonlight, it is unlikely that the Appellant was correctly identified by PW2 and PW4.

5. In relation to *Ground 2* of the Appeal, the case of **Aharikundira Yustina vs Uganda, Criminal Appeal No. 27 of 2015** (SC) is cited for the proposition that where a sentencing court does not weigh the mitigating factors against the aggravating factors (as supposedly happened in this case), it behoves this Court to do so. The same authority is cited in support of the need for consistency at sentencing to ensure that cases with similar facts attract similar sentences. However, learned Counsel for the Appellant then purports to draw a comparison between the sentence handed down in this case and sentences reduced by this Court in respect of the offence of aggravated defilement. We are constrained to observe that such a comparison would not be tenable given that the matter before us presently arises from a conviction for murder not aggravated defilement. Be that as it may, the trial judge is further faulted for neither considering the time the Appellant had spent on remand.

6. Conversely, in response to *Ground 1*, learned State Counsel contends that the Appellant was positively identified by PW2 under circumstances that were so favourable for correct identification as to rule out mistaken identity, to wit, bright moonlight and torch light and prior knowledge of the Appellant. The identification witnesses' evidence is further supported on the premise that PW2 attested to having seen the Appellant fleeing the scene of crime as they reached it and clearly described how he was dressed. The deceased's utterance during the attack as attested to by PW5 are opined to amount to a dying declaration that is admissible under section 30(a) of the Evidence Act, Cap. 6. In Counsel's view, the dying declaration was corroborated by the identification of the Appellant as he fled the scene of crime. It is further opined that the alibi set up by the Appellant at trial was destroyed by the identification evidence and the deceased's dying declaration that squarely put the Appellant at the scene of crime. The trial judge is thus supported for his finding that the Appellant's conduct of disappearing from the village after the

murder was inconsistent with his innocence, and further corroborated the identification evidence and dying declaration.

7. With regard to *Ground 2*, State Counsel proposes that not only is sentencing a matter for the discretion of the sentencing judge, in this case the trial judge considered both the mitigating and aggravating factors in sentencing the Appellant as he did. The trial judge is supported for his finding that the aggravating factors outweighed the mitigating factors. Urging us to confirm the 37-year sentence imposed on the Appellant, Counsel relies on this Court's decision in **Ssemaganda Sperito vs Uganda, Criminal Appeal No. 456 of 2016** where a sentence of 50 years for murder under similarly brutal circumstances was upheld. In the same vein, reference is made to **Budebo Casto vs Uganda, Criminal Appeal No. 94 of 2009** and **Opendi Michael & Another vs Uganda, Criminal Appeal No. 211 of 2011** where this Court confirmed sentences of life imprisonment for the offence of murder.

C. **Determination**

8. It is well settled law that a first appellate court is under a duty to reconsider all the material evidence that was before the trial court and, giving allowance for the fact that it neither saw nor heard the witnesses, come to its own conclusion on that evidence. In so doing, the first appellate court should consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. *See* ***Baguma Fred vs. Uganda, Criminal Appeal No. 7 of 2004*** *(Supreme Court)* and **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997**. On the question of evidence, a first appellate court should, where available on the record, be guided by the impression of the trial judge on the manner and demeanor of the witnesses. See **Bogere Moses & Another vs. Uganda, Criminal Appeal No. 1 of 1997** (Supreme Court).

9. In relation to the identification evidence, the trial court rendered itself as follows:

> *According to the evidence PW2, on the fateful day the deceased had left her home at Nyakagongo village in Buhesi sub-County at around 7.30 pm to escort a friend who*

had come to visit her. On realising the deceased had over delayed, PW2 her elder daughter together with PW4 followed the deceased along the road she had followed only to meet PW5 who told them that their mother was being cut by Bakisa so they rushed to the scene only to see the accused fleeing from the scene on seeing them. … The two witnesses were able to describe the accused's dressing at the time of the crime. According to PW2, accused was putting on a pair of black trousers and a black shirt. They were able to recognise the murder weapon that he had with his (sic) as a panga which he ran away with in his hand. Both PW2 and PW2 knew the accused very well before that incident. They each identified the accused when conditions favourable to current identification existed at the time and therefore the possibilities of mistaken identity were greatly minimized. These two witnesses knew the accused very well before that incident. There were to source (sic) of light. The bright moonlight and the hand held torch they carried with them. They recognised the accused at a distance of 40-40 meters away.

10. Not only was the above identification considered to have corroborated the deceased's dying declaration, both pieces of evidence were adjudged to have been corroborated by the accused's conduct, the trial judge observing the said conduct to have been incompatible with innocence in the following terms:

> *Accused conduct in running away from Buhesi village to hide in Kampala from where he was arrested and brought back to Fort Portal hospital after more than ten (10) days is conduct not of an innocent person it is guilty conduct which also corroborates the two eye witnesses evidence against him (PW2 and PW4) and also the dying declaration of the deceased as well.*

11. On the other hand, of the Appellant's alibi, the trial court held:

> *I find that the evidence of identification by the two eye witnesses clearly puts the accused at the scene of crime when the crime was being committed.* **Bogere Moses & Another vs Uganda Criminal Appeal No. 01 of 1997 (SC)**. *The prosecution evidence having put the accused at the scene of crime at the time when it was being committed, I find that alibi of the accused has been property (sic) destroyed and so I reject it as such.*

12. The *locus classicus* on correct identification in a criminal trial was laid out in **Abdala Nabulere & Another vs Uganda Crim. Appeal No. 9 of 1978** as follows:

> The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the

distance between the witness and the accused, the lighting and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good then the danger of mistaken identity is reduced. The poorer the quality, the greater the danger.

13. On the other hand, the law on alibis was restated by the Supreme Court in **Festo Androa Asenua & Another vs Uganda (1998) UGSC 23** as follows:

> It is trite that by setting up an alibi, an accused person does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case. See Ntale vs. Uganda (1968) E.A. 206. In the case of R. vs. Chemulon Were Olancro (1973) 4 E.A.C.A, it was stated:
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> "The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act." See also Ezekia vs Republic (1972) E.A. 42 at 48 on proof of alibi.

14. Therefore, the defence of alibi would not negate the burden of proof upon the prosecution to prove its case to the required standard, neither does it place a burden upon an accused person to so prove its truth as to raise a doubt in the prosecution case. The only duty placed upon an accused person is '**to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act**.' Thus, the accused person must account for his/ her whereabouts during the material time a crime was committed in such a manner so as to render it impossible for him/ her to have participated in its commission. *See* ***R vs Chemulon Wero Olancro (1937) 4 EACA 46***.

15. In this case, upon careful reconsideration of the evidence on record we find that there were three identification witnesses in this case, PW2, PW4 and PW5. Whereas PW5 had by-passed the deceased by 10 metres only to hear her crying that the Appellant was killing her; PW2 and PW4 both witnessed the Appellant fleeing the scene of crime upon seeing them approaching. Although PW2 testified that the Appellant fled the scene of crime after he saw them, PW4 clearly attested to having 'found' the Appellant killing the deceased before he fled the scene of crime. PW2 affirmed under cross examination and in response to a question from the trial judge that she was sure the Appellant was the person that she saw fleeing

the scene of crime under conditions of bright moonlight, while PW4 testified that in addition to the moonlight he was carrying a lit torch and previously knew the Appellant as a man that continually followed the deceased around, demanding for his child. The latter witness was not subjected to any cross examination therefore his evidence remained unchallenged. The totality of the foregoing evidence supports the view that there was sufficient light for the identification of the deceased's accoster, which identification is supported by PW4's prior intricate knowledge of the Appellant.

16. Additionally, the two witnesses' evidence is corroborated by that of PW5 in two material respects. First, it was PW5's evidence that the Appellant was dressed in full black attire when she witnessed him dragging the deceased as the deceased cried out that he was killing her, thus corroborating PW2's evidence that he was dressed in a black trouser and black shirt as he fled the scene of crime. The dying declaration that was heard by both PW2 and PW4 as they arrived at the scene of crime is further corroborated by the evidence of PW5, who had heard a similar dying declaration shortly after she passed by the deceased immediately before the attack. Therefore, although the distance between the identifying witnesses and the Appellant was not directly attested to and they clearly observed him at the scene of crime for a fairly short time, the uncontroverted evidence on record from a witness that knew the Appellant before and identified him with bright moonlight and torch light is that the deceased was attacked by the Appellant with a panga and she made a dying declaration that the Appellant was her accoster. In addition to the foregoing identification evidence and in agreement with the trial court, we find that his conduct before and after the attack, to wit following the deceased around demanding for his child and fleeing both the scene of crime and the village, is not compatible with his innocence.

17. Conversely, in relation to his defence of alibi, the Appellant adduced evidence that was riddled with significant inconsistencies. He testified to having been a resident of Wakiso district and was in Kampala at the time the deceased was attacked but, in the same breath acknowledged PW3 (the LC I Chairman of Nyakagongo village, Buhesi sub-county, Kabarole District) as his LC I Chairman. He did also admit that the deceased had been his physical lover until her death, as opposed to a long

distance relationship over the phone, which he denied; and affirmed that PW2 was indeed the deceased's child and knew him as her mother's lover. It would be rather implausible that the Appellant could have acknowledged PW3 as his LC I Chairman yet he was ordinarily resident elsewhere in Kampala; neither is it readily apparent how he could have had an ongoing physical sexual relationship with the deceased till the time of her death from his supposed abode in Kampala. To compound matters, the sole defence witness that sought to support the Appellant's alibi claimed to have found him in a hospital in Kampala a day after his arrest, yet the Appellant had testified to having been taken to Kisenyi and Old Kampala police posts upon arrest, then subsequently transferred to Buhinga hospital in Fort Portal. These contradictions further dent the credibility of the defence evidence.

18. We therefore find that the Appellant fell short on the duty upon him to account for the material time during which the attack on the deceased ensued so as to render it impossible for him to have participated in it. Consequently, we would disallow the alibi set up by the Appellant and are satisfied that he was properly identified and placed at the scene of crime in this matter. We thus find no merit in *Ground 1* of this appeal.

19. With regard to the contested sentence, we are alive to the decision in **Kiwalabye vs Uganda, Criminal Appeal No.143 of 2001** (Supreme Court) that sentencing is at the discretion of a trial judge and an appellate court should only interfere with a sentence so imposed if it is evident that the trial court acted on a wrong principle or overlooked some material fact, or if the sentence is manifestly harsh and excessive. *See also* ***Kyalimpa Edward vs Uganda, Criminal Appeal No.10 of 1995*** *(Supreme Court).*

20. In terms of mitigating factors, the trial judge observed that the accused was a first offender and a young man of 34 years. He then cited the following aggravating factors:

> *The accused/ convict caused the death of a woman who was his lover, a married woman who had her own husband and children of her own who are now widowed and orphaned respectively. He had literally destroyed an entire hitherto happy family. The manner in which the convict committed the offence was the most* ..... (missing word)

he caused the death of this woman by cutting her several times on her face, mouth, head ..... (missing word) *as she cried for mercy in his name and accused could not feel emotion empathy for such mean of a dying person even as she pleaded for the right of leaving her children orphaned and helpless such conduct is the most inhuman heartless feeling of revenge and hatred I have ever witnessed. The accused showed no remorse at all for his crime and he merely prays to be cautioned. ... This court should mete out a sentence that would be deterrent enough to act as a warning to deter others who take human life lightly and yet they value their own.*

21. In relation to the period spent on remand, the trial judge observed:

> *Taking into account all these factors and the time of three (3) years this convict which period I have already deducted here from has spent on remand, I do sentence the convict to thirty-seven years' imprisonment.*

22. It seems to us that the trial judge did consider both the mitigating and aggravating factors in this case but considered the latter to outweigh former. Considering the caution in **Bogere Moses & Another vs. Uganda** (supra) for an appellate court to defer to the trial court's observations with regard to the demeanour of a witness, we take the view that the same deference would extend to the demeanour of an accused person at sentencing. In this case, the Appellant was observed to be remorseless after conviction for so grave an offence that was executed in an undoubtedly gruesome manner.

23. Nonetheless, we consider 27 years to be the average term sentence for such gruesome murders and would thus adjudge the 37-year sentence handed down in this case to be harsh and excessive. Furthermore, we note from the record of appeal that the Appellant was arrested in February 2013 and convicted by the trial court on 19th February 2015. That would mean that the period spent on remand was 2 years and not 3 years as adjudged by the trial judge.

C. **Disposition**

24. In the result, this Appeal is partially allowed with the following orders:

    I. **The Appellant's conviction for the offence of murder contrary to sections 188 and 189 of the Penal Code Act is hereby upheld.**

II. **The Appellant's sentence is quashed and substituted with a 27-year custodial sentence, from which we deduct the 2 years he spent on remand to yield a sentence of 25 years to run from the date of his conviction.**

It is so ordered.

Dated and delivered at Kampala this 9th day of NOV, 2023.

Fredrick M. S. Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Monica K. Mugenyi
Justice of Appeal