THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MBALE
CRIMINAL APPEAL NO.290 OF 2019
(CORAM: Obura, Bamugemereire & Madrama, JJA)

ODONG DAVID OGEN ..... APPELLANT

VERSUS

UGANDA. ..... RESPONDENT

(Appeal from the Judgment of Stephen Musota J (as he then was) dated 23rd November 2010 in Criminal Session Case No. 40 of 2010 holden at Tororo High Court)

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 the appellant on the 13th day of July 2008 at Pakong Plain Zone in Tororo district, with malice aforethought unlawfully caused the death of Rosemary Atyang Akello.

Background

The brief facts leading to this appeal are that on the 13th day of July 2008 the accused and deceased, who was his girlfriend, went to attend funeral rights and the two stayed at the funeral drinking till 8:00 pm when they left together. It was alleged that at around 10:00 pm a one Annet Owora heard an alarm from a woman saying "you are killing me"; whereupon she called and informed her father in law; Yovan Owino who got up and ran to the scene which was near his home. At the scene Owino noticed someone bending and when he raised his head up, by the help of the moonlight, Owino recognised him as the appellant. It is further alleged that the appellant immediately made off into the cassava plantation and was arrested sometime after when police heard that he was back in the village. The appellant was indicted, tried and was convicted and sentenced to life imprisonment.

Dissatisfied, the appellant appealed against both conviction and sentence.

Grounds of Appeal

1. That the learned trial Judge erred in law and fact when he held that the appellant had been properly identified.
2. That the sentence given by the learned trial Judge was illegal, manifestly excessive, harsh and unfair in the circumstances.

Representation

At the hearing of the appeal the Appellant was represented by Mr. Geoffrey Nappa on State Brief while Mr. Sam Oola, an Assistant Director of Public Prosecutions represented the Respondent.

Both counsel filed their written submissions, which we have considered in this judgment.

The Appellant's Submissions

On Ground No.1 concerning identification of the assailant; it was counsel's submission that the circumstances leading to the proper identification of the assailant were unfavourable leading to a wrongful conviction. Counsel for the appellant submitted that the trial Judge erred by believing the evidence of PW2. He submitted that the witness could not have properly identified the assailant in the dark cassava garden while the witness was 10 metres away. Equally, counsel invited this court to find that the trial Judge erred when he relied on circumstantial evidence of the appellant's disappearance from the village. He asked this court to allow this ground.

On Ground No. 2, counsel for the appellant submitted that the appellant was sentenced to life imprisonment, a sentence that was harsh. He submitted that the appellant was a young person aged 27 years at the time he committed the offence, and he was a first offender. Counsel contended that the purpose of a custodial sentence is to reform the convict and therefore a shorter sentence would have served the purpose of rehabilitating him.

It was counsel's submission that courts have overtime maintained the principle of consistency in sentencing. He cited **Aharikundira Yustina v Uganda SCCA No. 27 of 2015** to that effect. Counsel referred to **Rwabugande v Uganda SCCA No. 25 of 2014** where the Supreme Court set aside a sentence of 35 years and sentenced the appellant to 21 years for the offence of murder.

Counsel submitted that this court should take into account the period the appellant had spent on remand and deduct the same from the sentence to be given by the court.

The Respondent's Submissions

In reply to Ground No. 1, counsel for the respondent invited this court to find that the trial Judge properly analysed the circumstantial evidence as adduced by prosecution and correctly found that it pointed to the appellant as the person who unlawfully and fatally wounded the victim causing her death. Counsel submitted that the conditions were favourable for correct identification that is; the distance of 10 metres; the moonlight and that PW2 chased the appellant in an open field. It was counsel's contention that the appellant was positively identified at the scene.

Further, counsel contended that the trial Judge was mindful of the need for corroboration of the evidence of a single eye witness. It was his submission that the evidence of PW3 and the lies the appellant told PW5 who interrogated appellant immediately after his arrest was corroborative evidence. He relied on **Chesakit Matayo v Uganda CACA No. 95 of 2004** where this court observed that lies are inconsistent with innocence and if proved, can be used to corroborate prosecution evidence.

Regarding Ground No. 2, counsel submitted that the trial Judge did not err when he considered the manner in which the deceased was killed in extreme violence. Counsel added that the sentence of life imprisonment was not harsh.

Counsel invited this court to find that the trial Judge considered the mitigating and aggravating factors before passing the sentence of life imprisonment which sentence was appropriate given the circumstances of the case. He cited **Karisa Moses v Uganda SCCA No. 23 of 2016** and **Kaddu Kavulu Lawrence v Uganda SCCA No. 72 of 2018** where the Supreme Court upheld the sentence of life imprisonment in charges of murder.

It was counsel's submission that the appellant has not advanced any compelling reason upon which court can interfere with the sentence against him. It was counsel's prayer that the conviction and sentence against the appellant be upheld and the appeal be dismissed.

Decision of Court

We have carefully considered the submissions of counsel; the record of appeal and authorities availed to us. This being a first appeal, we are alive to the duty of this court as a first appellate court to reappraise all the evidence adduced at trial and come up with our own inferences of law and fact bearing in mind that we did not see the witnesses first hand see Kifamunte Henry v Uganda SCCA No. 10 of 1997.

On the first ground, the appellant is challenging the evidence of a single identifying witness. **Section 133 of The Evidence Act** provides that; subject to the provisions of any other law in force, no particular number of witnesses in any case is required for the proof of any fact.

Counsel for the appellant also contended that the conditions were not suitable to favour correct identification. We wish to make reference to the famous decision of Abdalah Nabulere & Anor v Uganda (1979) HCB that laid down the rules relating to identification as follows;

"The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. When the

identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support identification evidence; provided the court adequately warns itself of the special need for caution."

We are cognisant of the need to warn ourselves on basing convictions on single identifying witnesses as was elucidated in Abdalah Nabulere & Ors v Uganda (1979) HCB, where Court noted that;

> "Where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and even a number of such witnesses can all be mistaken..."

In the instant case, PW2, the single identifying witness stated that; "there was moonlight. It was very bright that I chased and tried to touch him. It was bright that I could recognize someone 50 meters. I knew the accused very well. He is a son to my brother who is married to the sister to the accused person. In cross-examination he stated that; "He entered the cassava garden and I chased him through the garden. He ended up in an open space. I even held him but he overpowered me and continued running.

From this narration, we observe that the appellant was well known to the identifying witness, PW2 and that there was bright moonlight. PW2 also stated that he was at a close distance to the appellant, about 10 meters and that he chased the appellant for some time and even tried to catch him but out-ran him was able to disappear the cassava garden. This exposed the appellant to the identifying witness for a while and being that he was a person who was well known to him, we rule out the possibility of mistaken identity.

We therefore find that the appellant was properly identified.

We further note that the trial Judge also relied on circumstantial evidence to convict the appellant. The trial Judge relied on the evidence of PW5, Deputy OC/CID who stated that he received a report of a murder case on 13th July 2008 and the appellant was the suspect but he was on the run. He returned after 6 months and was arrested.

In **Tindigwihura Mbahe v Uganda** *SCCA No. 9 of 1987 and* **Katende Semakula v Uganda SCCA No. 11 of 1994** the Supreme Court noted that;

'Trial Courts should treat circumstantial evidence with caution, and narrowly examine it, due to the susceptibility of this kind of evidence to fabrication. Therefore, before drawing an inference of the accused's guilt from circumstantial evidence, there is compelling need to ensure that there are no other co-existing circumstances, which would weaken or altogether destroy that inference."

Similarly, **in Bogere Charles v. Uganda, SCCA No. 10 of 1996,** Court held that; before drawing an inference of the accused's guilt from circumstantial evidence, the Court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt."

We wish to refer to **Remigious Kiwanuka v Uganda CACA No. 41 of 1985** where this court held that;

"This court has held in many cases that the disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence sudden disappearance from the area is incompatible with innocent conduct of such a person."

In the instant matter, the appellant disappeared from the village after the murder and was arrested 6 months after he returned. The appellant did not give any explanation for his disappearance.

Basing on our analysis above and the circumstantial evidence, we are satisfied that the trial Judge rightly held that the appellant had been properly identified.

Ground one of the appeal thus fails.

Regarding Ground No. 2, on the severity of sentence, we note that the principles upon which an appellate court may interfere with a sentence imposed by the trial court were considered in **Kamya Johnson Wavamuno v Uganda SCCA No. 16 of 2000,** where the Supreme Court laid down guidelines as follows;

"...It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to take into account a material consideration, or an error in principle was made. It was not sufficient that the members of the court would have exercised their discretion differently."

In **Kyalimpa Edward v Uganda SCCA No.10 of 1995,** Court noted that;

"It is trite law that an appellate court should not interfere with the discretion of a trial court in imposing a sentence unless the trial court acted on a wrong principle or overlooked a material factor or where the sentence is illegal or manifestly excessive or too low to amount to a miscarriage of justice."

In the instant appeal, counsel for the appellant contended that the custodial sentence of life imprisonment was extremely excessive.

We have had the opportunity to reappraise the sentence passed by the learned Trial Judge in his judgment when he stated that;

"I consider the circumstances under which the offence took place... the convict is a young man capable of reform. It is true the death sentence is still good law but has to be handed down in the extreme of the most extreme cases. Considering this case as a whole, I will sentence the apparently remorseful convict to life imprisonment. "

The Supreme Court in Aharikundira v Uganda SCCA No. 27 of 2015 underlined the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts.

In Katureebe Boaz & Anor v Uganda SCCA No. 066 of 2011 the Supreme Court held that;

"Consistency in sentencing is neither a mitigating nor an aggravating factor, the sentence imposed lies in the discretion of the court which in exercise thereof may consider sentences imposed in other cases of a similar nature."

We are mindful of the fact that there can barely be consistency in the sentences of this court where each case presents its own unique facts that are distinguishable. However, certain decisions with quite similar facts have embraced the consistency principle.

In **Turyahika Joseph v Uganda CACA No. 327 of 2014**, this Court emphasized that sentences ranging from 20-30 years are appropriate in cases involving murder unless there are exceptional circumstances to warrant a higher or lesser sentence.

In **Nkurunziza Robert v Uganda CACA No. 539 of 2016**, the appellant was convicted of murder by strangulation and this honourable court substituted a sentence of life imprisonment with a sentence of 28 years imprisonment.

In **Kaddu Kavulu Lawrence v Uganda SCCA No. 72 of 2018** the Supreme Court upheld a sentence of Life Imprisonment where the appellant injured his former partner to death by hacking her with a panga.

In **Karisa Moses v Uganda SCCA No. 23 of 2016**, the appellant who was 22 years old was convicted for murder of his grandfather. The Supreme Court confirmed a sentence of imprisonment for the rest of his life.

Further in **Rwalinda John v Uganda SCCA No. 03 of 2015,** the appellant who was 67 years old was sentenced to Life Imprisonment and the Supreme Court confirmed his sentence.

Mindful of the above principles of law and considering the earlier decisions of this Court and the Supreme Court on sentencing that we have discussed above, we have taken into consideration the aggravating and mitigating factors and found that a sentence of Life Imprisonment is appropriate in the given circumstances of this case. The trial Judge correctly exercised his discretion and we find no reason to interfere with his sentence.

In conclusion and for the reasons advanced above, we find no merit in this appeal. The conviction and sentence of the trial court are upheld.

The appeal is dismissed.

Dated at Kampala this 1st Day of March 2023

Hon. Lady Justice Hellen Obura
Justice of Appeal

Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal

Hon. Mr Justice Christopher Madrama
Justice of Appeal