THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CRIMINAL APPEAL No.005 of 2017
(Coram: Obura, Bamugemereire & Madrama JJA)

STEPHEN WAMBOYA :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision before David Wangutusi J in the High Court of Uganda at Mbale dated 30/12/2016)

Criminal Law – Murder C/s 188 and 189 of The Penal Code Act - Conviction based solely on Circumstantial evidence- no murder weapon.

JUDGMENT OF THE COURT

Introduction

The appellant, Stephen Wamboya was indicted with the offence of Murder contrary to sections 188 and 189 of the Penal Code Act, Cap 10 Laws of Uganda. He was convicted and sentenced to 25 years in prison.

Background

The brief background is that the deceased Francis Namukumbalo stole a bunch of matooke from the garden of Fazil Bwayo and thereafter runaway into hiding. On 21/9/2010, the appellant convinced the deceased to come out of hiding. The deceased promised to make good the theft by refunding in money terms. The deceased proceeded to the home of the appellant with the intention that he escorts him to the home of Fazil who was the owner of the stolen matooke. The last time Francis Namukumbalo was seen was at the home of the appellant. A search was mounted a few days later and his body was found in a riverbank with cuts all over his head and torso. The appellant and others went into hiding. They were later found and arrested and charged with

murder. The appellant entered a plea of not guilty and a full trial was conducted. The appellant was then convicted and sentenced to 25 years imprisonment. Dissatisfied, the appellant appealed to this court on 3 grounds;

1. The Learned Trial Judge erred in law and fact when he solely relied on the evidence of the prosecution which was marred by contradictions and inconsistencies hence causing a miscarriage of justice to the appellant.
2. The Learned Trial Judge erred in law and fact when he ignored the appellant's alibi defence which was plausible.

Alternatively;

3. The Learned Trial Judge erred in law and fact when he sentenced the appellant to 25 years imprisonment which sentence was termed harsh and excessive given the mitigating factors which were tendered by the appellant hence causing a miscarriage of justice to the appellant.

At the hearing of the appeal, the appellant was represented by Eddie Nangulu while the respondent was represented by Vickie Nabisenke an Assistant DPP from the Office of the Director of Public Prosecutions. The appellant was physically present in court. Both counsel relied on written submissions that were relied on by this court in order to arrive at this Judgment.

The Appellant's Submissions

The appellant made submissions on Ground No.1 and 2 jointly and argued Ground No.3 separately. Counsel for the appellant disputed the appellant's participation in the murder. He criticised the Learned Trial Judge for arriving at a conviction of murder without the murder weapon. He argued that in order to accurately determine the manner in which the appellant could have allegedly killed the deceased, he ought to have found the murder weapon.

Counsel further faulted the Learned Trial Judge for ignoring the good relationship that the appellant had with the deceased and that the appellant had no motive to kill the deceased.

On the question of the appellant's disappearance after the murder of the deceased, Counsel relied on the appellant's defence that he left his house because the residents intended to harm him on suspicion of killing the deceased. He contended that the Learned Trial Judge should not have relied on circumstantial evidence to conclude that the appellant was guilty. Counsel cited Namisi Dademwa alias Wayibi v Uganda CACA No.23 of 1997 where this court held that circumstantial evidence must always be thoroughly examined because such evidence could be a fabrication to cast suspicion on another person. He also relied on Seremba Denis v Uganda CACA N o.480 of 2017 where this court held that it is settled law that grave inconsistencies and contradictions, unless satisfactorily explained, will usually result in the evidence of a witness being rejected.

In the alternative and without prejudice, the appellant contended that a sentence of 25 years was harsh and excessive as the Learned Trial Judge did not take into consideration the mitigating factors of the appellant. The appellant prayed that this court allows the appeal and sets aside the conviction and sentence of the trial court in the interest of justice and fairness.

The Respondent's Submissions

The respondent also approached Ground No.1 and No.2 together and Ground N.3 separately. The respondent reinforced the

decision of the Learned Trial Judge. He argued that the trial Judge was correct to find that in this case the respondent relied entirely on circumstantial evidence to prove the appellant's guilt. He contended that the deceased was last seen alive with the appellant on 21/09/2010 and on 28/09/2010, 7 days later, the deceased's body was recovered from a river. Counsel justified the period between 21st and 28th by relying on the Medical Examination Report that supported the fact that the deceased had been dead for a week. Counsel argued that the evidence of PW3 and PW4 corroborated PW1 and PW2's testimonials, that the appellant went into hiding following the disappearance of the deceased. Counsel relied on Remegious Kiwanuka v Uganda SCCA No.41 of 19995 that held that disappearance of accused after crime may provide corroboration to other evidence. Counsel also contended that the Learned Trial Judge acknowledged the appellant's alibi but rejected the same.

The respondent challenged the appellant's representation that he had an affable relationship with the deceased. Counsel prayed that this court finds that the circumstantial evidence proved the appellant's participation in murder.

Regarding the Ground No. 3, Counsel for the respondent did not find any reason to fault the trial Judge. He agreed with the 25-year sentence that was imposed by the learned trial Judge, arguing that it was well-within the sentencing range. The respondent prayed that this court be pleased to dismiss the appeal for lack of merit.

Appellant's Rejoinder

In rejoinder, the appellant contended that section 196 of the Penal Code Act particularly defines murder as death resulting from person's act or omission and the prosecution did not lead evidence to prove this fact beyond reasonable doubt. Counsel submitted that the appellant had no motive to kill the deceased. It was also the appellant's contention that within the 6-day period, between the day the deceased was last seen alive and when his body was discovered, he could have met his death at the hands of anybody. The appellant emphasized that there was evidence on record that he had good relations with the deceased. Counsel argued that there was no correlation between the appellant and the crime. He submitted that prosecution had failed to pin the appellant to the crime.

On Ground No.3 for the appellant insisted that the 25-year sentence was harsh and excessive.

Consideration by Court

We have carefully perused the record of appeal and the submissions of both Counsel with the authorities cited.

We are alive to the duty of this court as a 1st appellate court, to re-evaluate the evidence and make its own inference on issues of law and fact. Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10, See also; Fr. Narcensio Begumisa & Ors 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.

We shall address all the grounds of appeal separately and in the order they were presented.

Ground No.1

> The Learned Trial Judge erred in law and fact when he solely relied on the evidence of the prosecution which was marred by contradictions and inconsistencies hence causing a miscarriage of justice to the appellant.

It was the appellant's contention that the evidence of the prosecution was rife with contradictions and inconsistencies. The appellant in his initial submissions and in his submissions in rejoinder did not point out any particular contradictions and inconsistencies in the prosecution evidence. It is safe to say that there is no particular contradiction or inconsistency put to the attention of this court. We therefore find that this ground was framed in an omnibus manner and possibly was abandoned along the way since it was not supported by any submissions. It is hereby dismissed.

Ground No.2

> The Learned Trial Judge erred in law and fact when he ignored the appellant's alibi defence which was plausible.

The appellant in his defence pleaded an alibi stating that he was not present at the scene of crime. At this point it is evident that the only ingredient of murder in contention was the participation of the appellant. In his judgment, the Learned Trial Judge found that the ingredient of the appellant's participation was proved by the prosecution beyond any reasonable doubt.

The evidence that the Learned Trial Judge relied upon to prove the appellant's participation beyond reasonable doubt was solely

circumstantial. From the judgment of the Learned Trial Judge, it is evident that the Learned Trial Judge addressed his mind to the law on convictions based entirely on circumstantial evidence. Despite this having been the case, the appellant was still dissatisfied with the judgement.

Regarding circumstantial evidence, the court in Byaruhanga Fodori v Uganda S.C.C.A No.18 of 2002, held as follows;

> "It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must before deciding upon a conviction find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt." See also Simon Musoke v R [1958] EA 715 , Teper v R (2) AC 480, Tindigwihura Mbahe v Uganda S.C. C. A No. 9 of 1987, Sharma Kooki & Kumar v Uganda; S.C. C. A No. 44 of 2000.

More still, the court ought to bear in mind the standard of proof in criminal case, beyond reasonable doubt Miller v Minister of Pensions [1947] 2 ALL E.R. 372.

On appeal, the appellant submitted that the evidence had obvious weaknesses, he criticised the Learned Trial Judge for ignoring such pieces of evidence that weakened the conviction of guilt.

Firstly, the appellant contended that there was no evidence on record that proved that he directly inflicted the said injuries on the deceased beyond reasonable doubt. It is our finding, that the Learned Trial Judge solely relied on circumstantial evidence, we

do not expect evidence of the appellant 'directly' inflicting injuries on the accused on record.

Secondly, the appellant contended that the murder weapon that was used to kill the deceased was never retrieved, he found that the court could not fully ascertain how the appellant could have allegedly killed the deceased. We also find that in the circumstances of this case, the murder weapon was immaterial.

Thirdly, the appellant emphasized the good relationship he had with the deceased and that there was no motive for him to kill the deceased. Again, we find that the appellants relationship with the deceased was immaterial in this case. Section 8(3) of the Penal Code Act provides that.

> "Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."

From our analysis of the record of appeal, the major pieces of evidence that link the appellant to the crime are; the fact that the deceased informed his loved ones that he was headed to see the appellant; and indeed, was last seen alive with the appellant and the complainant to the theft of matooke; and the suspicious conduct of the appellant in absconding from the village before and after the discovery of the deceased. We shall treat these pieces of evidence as circumstantial evidence. We are persuaded by the reasoning in Uganda v Nankwanga Fauza & 5 Ors HCCS No.243

of 2015, where the learned judge when dealing with the 'last seen doctrine' held that,

> "it is my opinion that the above doctrine is by its nature circumstantial evidence. The Court in Taylor v R warned that '.....in dealing with the conviction, which is exclusively depended on circumstantial evidence, it is necessary before drawing the inference of the accused's guilt to be sure that there are no other co-existing circumstances which would weaken or destroy the inference'... In addition, the last seen doctrine cannot be applied when the accused was the last person to be seen with the accused but there is no other circumstantial evidence. See Ismail v the State quoted in Criminal Evidence in Nigeria by Jide Bodede 2nd Edition (at www.lawfeildlawyers .com)"

It is on record that the deceased was last seen by the appellant. The evidence of PW1 is helpful in this regard. He was told by the deceased (his son) that he (Francis) was headed to meet with the appellant. PW2 met the Francis with the appellant and 5 others on the night of 21/09/2010 at 8pm. He testified that,

> "...They were about 6 people... I recognized Francis, Stephen Wamboya and somebody called Gimogoyi. When I asked Stephen where they are going, he told me they were going to Fazil's place. Fazil is also a neighbour to me. After they had gone I didn't see Francis. I left the place and came back down this way to treat my father who had been admitted in the hospital."

When PW2 last saw the appellant alive, he was with five others. The witness recognised the deceased, the appellant and somebody

called Gimogoyi. This would lead to the inference that when he met his death, the appellant was not alone with the deceased. There were other people, including Gimogoyi. In our view, this widens the scope of the persons who were last seen with the appellant and who could have been involved, in one way or another, in the murder of the appellant. We believe the testimonies of Gimogoyi and the other people who were with the appellant that night would have been relevant to shed more light on what transpired on the night of 21/09/2015. It is a pity this side of the police investigations never saw the light of day.

The Learned Trial Judge evaluated the conduct of the appellant after the death of the deceased. He found that the appellant fled the village, and later, he also skipped bail. When the appellant disassociated himself from matters concerning the deceased and Fazil the Learned Trial Judge then found that there was no other co-existing circumstance which would weaken or destroy the inference of the accused's participation in the death of the deceased. He found the appellant guilty of murder.

It is on record however that PW1 and PW2 mounted a search for the appellant long before the body of the deceased was discovered. They were looking for the appellant to find out whether he knew the whereabouts of the deceased. The appellant had already disappeared from his home. The witnesses expressed honest belief at this point in the search that both the deceased and the appellant were in some danger. However, it was suspicious that the appellant disappeared from the village before anyone could suspect that Francis had been murdered. The Supreme Court in

Remegious Kiwanuka v Uganda SCCA No.41 of 19995 that held that disappearance of accused after crime may provide corroboration to other evidence.

The deceased had admitted to stealing Fazil's matooke (green plantain). He is said to have asked the appellant to lead him to Fazil so that he could make good his offending, possibly by paying back the worth of the matooke. The fact that the appellant disappeared from the village soon after the deceased had gone to see him; and also the fact that the deceased was last seen with the appellant; coupled with the fact that the appellant was found hiding with a one Fazil Bwayo, the owner of the matooke, leads to the inevitable inference that the appellant participated in the commission of the offence.

It is still a puzzle that Fazil was not arrested and tried when he appears to have been the cause of the motive to kill. The way the deceased was killed and thrown in the river gives sufficient evidence of mens rea and motive. After hacking him and causing a deep injury on his frontal skull, Francis was thrown in a river. Whoever harmed the deceased did not intend that he should remain alive. The only be inference that can be drawn from this fateful encounter is that the appellant lured the deceased into a den of homicidal killers. The group, including the appellant, Gimogoyi, Fazil and others, still at large, were seen walking with their lamb (the deceased) to the slaughter. Francis was never seen again.

We therefore find that the exculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt. Ground No.2 of this appeal fails.

Ground No.3

> The Learned Trial Judge erred in law and fact when he sentenced the appellant to 25 years imprisonment which sentence was termed harsh and excessive given the mitigating factors which were tendered by the appellant hence causing a miscarriage of justice to the appellant.

It is trite that an appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle. (See Kyalimpa Edward v Uganda CACA No. 10 of 1995 and Kyewalabye Bernard v Uganda SCCA No. 143 of 2001.

In his judgment, the Learned Trial Judge held that,

> "the accused is a first offender and he has been on remand for 3 years and 6 months. These are mitigating factors. That notwithstanding the accused ended an innocent life in its youth. The deceased was supposed to be his friend but instead of protecting him, he hurried him to his death.

Having considered the fact that he is a first offender and has been on remand for 3 years and 6 months which period I discount, the accused is sentenced to 25 years in prison."

The appellant's mitigating factors were that he was a first-time offender aged 23 years. he was a sole bread winner and still resourceful to the community. On the other hand, the respondent submitted in aggravation that the appellant was not provoked.

In the Third schedule to the Constitution (Sentencing Guidelines), the sentencing range for murder is from 30 years imprisonment to death penalty which is the maximum penalty upon consideration of the mitigating and aggravating factors. Furthermore, Guideline No. 6(c) of the Sentencing Guidelines provides that.

"Every court shall when sentencing an offender take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances".

The Supreme Court also in Aharikundira Yusitina v Uganda SCCA NO.027 of 2015 emphasized the principle of uniformity and consistency when sentencing. We therefore refer to the sentencing ranges in recent murder cases.

In Turyamuhebwa Deus v Uganda CACA No.172 of 2014, this court substituted a term of life imprisonment with 30 years imprisonment for the offence of Murder. It also held that;

"the Supreme Court and this court have emphasized the need for consistency in sentencing. In this regard both courts have in the recent past established a range, within which sentences for murder of a single person where the appellant is a first offender, the murder was not related to ritual sacrifice, was not pre-mediated and was not coupled with any other offence. The sentences now range between 20 years imprisonment at the lower end of the scale to 35 years imprisonment at the upper end. However, a court may impose a lesser or a more severe sentence depending on the peculiar circumstances of each case."

In Atiku v Uganda CACA No.41 of 2009, the appellant was convicted of the offence of Murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to life imprisonment. On appeal, this court reduced the sentence to 20 years' imprisonment.

In Kia Erin v Uganda CACA No.172 of 2013, the appellant was convicted of the offence of Murder and sentenced to imprisonment for life. On appeal, the sentence was substituted with a sentence of 18 years of imprisonment.

In Tumwesigye Anthony v Uganda CACA No.46 of 2012, the appellant was convicted of Murder and sentenced to 32 years of imprisonment, this court reduced the sentence to 20 years on appeal. This court while reviewing the sentence was of the view that a lesser sentence ought to have been imposed against the appellant given the fact the appellant was a first offender, a young

man aged only 19 years with a chance to reform, was a father of two children and supported two orphans.

In Manige Lamu v Uganda CACA No.354 of 2017, this court substituted a sentence of 44 years and 10 months imprisonment with one of 20 years and 10 months for the offence of murder.

In Onyabo Bosco v Uganda CACA No.737 of 2014, the appellant was indicted and convicted of the offence of Murder contrary to sections 188 and 189 of the Penal Code Act, he was sentenced to 45 years' imprisonment in respect to the offence of murder. On appeal, this court set aside the sentence and sentenced the appellant to 20 years' imprisonment for the offence of murder.

Given the totality of the circumstances of this case, and especially since the appellant was a young man of 23 years who is capable of reform we are of the view that a sentence of 20 years imprisonment is appropriate. After considering Article 23(8) of the Constitution, we deduct the period of 3 years and 6 months spent on remand. The appellant shall serve a sentence of imprisonment of 16 years and 4 months.

Ground No.3 of this appeal succeeds, in part.

We so order.

Dated at Kampala this 16th day of May 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