THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 88 OF 2021

(Appeal from the judgment of Hon. Justice Musalu Musene delivered on the 3rd of February 2021 High Court of Uganda at Soroti in Criminal Session Case No: 001 Of 2020)

1. OKODI JULIUS
2. OPOLOT BARNABAS
3. ONYANGATUM GILBERT **:::::::::::::::::::::::::: APPELLANTS**
4. OMUGETUM PETER
5. OLUPOT JACKSON
6. OONYU ASUMAN

VERSUS

UGANDA **:::::::::::::::::::::::::::::::::::: RESPONDENT**

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA
HON. JUSTICE CHRISTOPHER GASHIRABAKE, JA
HON. JUSTICE OSCAR KIHIKA, JA

JUDGMENT OF COURT

The Appellants were indicted and convicted of the offence of Murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 25 years' imprisonment for the 1st, 2nd, 3rd, 4th and 6th Appellants while the 5th Appellant was sentenced to 15 years' imprisonment.

The Appellants were dissatisfied with the decision of the trial court and filed this appeal on the sole ground that;

The learned trial Judge erred in law and in fact when he relied on insufficient circumstantial evidence in arriving at the decision that the prosecution proved beyond reasonable doubt that the Appellants had participated in the commission of the Murder.

Background

On the 25th of February 2017, at about 8:30 Pm, the deceased was at his house with his family members watching TV. The deceased then moved out of the house to the latrine to ease himself but on his way back to the house, he was attacked by assailants who had waylaid him and stabbed him several times until he collapsed. He made an alarm but by the time his family members and neighbours reached where he was, the assailants had fled unidentified and he was lying in a pool of blood just outside the latrine. The deceased sustained several deep cut wounds on the head and other parts of the body and died almost instantly.

Police investigations revealed that the deceased had been receiving death threats from Al and A7 for a long time over his role as a caretaker of a piece of land which was the subject of a dispute between Al, SP Opiko Charles, and the family of a one George Oumo. The deceased was a long serving LC I chairman for Kachaboi village in Kachumbala Sub-County, Bukedea District. The 5th Appellant, Olupot Jackson also had personal interest in the land and he immediately escaped from the village to Gulu where he was arrested from the Police barracks where his son was employed. The deceased

had been listed as one of the key witnesses against Al's claim in the Civil Suit. He was murdered before he could testify. After the commission of the offence, A2, A3, A4, A5, A6, A7 and A8 all abandoned their homes and went into hiding in various places where they were later arrested from. A8 was arrested in October, 2019 from Mbale after an intense search by security agencies and relatives of the deceased.

Representations

At the hearing of the appeal, Mr. Allan Mooli represented the Appellants; while Ms. Immaculate Angutoko, holding brief for Mr. Sam Oola, represented the Respondent. Both parties filed written submissions which were adopted with the leave of court.

Consideration of the appeal

This being a first appeal, it must be recalled that the duty of a first appellate court is to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses testify. (See **Pandya v R [1957] EA p.336 and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997.** In the latter case, the Supreme Court held that;

> *"We agree that on a first appeal, from a conviction by a Judge the Appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review*

the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

We have kept these principles in mind in resolving this sole ground of appeal.

Ground of Appeal

The learned trial Judge erred in law and in fact when he relied on insufficient circumstantial evidence in arriving at the decision that the prosecution proved beyond reasonable doubt that the Appellants had participated in the commission of the Murder.

It is trite law that the prosecution has the duty to prove each element of an offence beyond reasonable doubt. For the Appellants to be convicted of murder, the prosecution must prove, beyond reasonable doubt the following elements;

1. That there was death of a human being.
2. The death was caused by some unlawful act.
3. The unlawful act was actuated by malice aforethought;
4. It was the accused who caused the unlawful death.

In the present case, the first three elements are not in contention. The Appellant's appeal hinges on the issue of the Appellant's participation in the murder. In this regard, the Appellant's Counsel

submitted that the learned trial Judge relied on insufficient circumstantial evidence and arrived at the decision that the prosecution had proved the Appellants' participation in the commission of the murder beyond reasonable doubt. Counsel argued that this case hinges largely on circumstantial evidence as there was no direct eye witness to the murder.

Counsel argued that the period between the time the threats were allegedly uttered and the time the deceased was murdered was 5 years and that this could not constitute previous threat. In addition, counsel submitted that had the threats been made, the deceased should have reported the same to the police. In absence of a reference that the matter was reported to police, it raises doubt as to whether indeed such threats were ever uttered as alleged.

For the Respondent, counsel admitted that this case is entirely based on circumstantial evidence and relied on the decision in **Simoni Musoke vs R (1958) EA 715 at 718**, for the proposition that in a case depending exclusively upon circumstantial evidence, the court must find, before deciding upon conviction, that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

The prosecution produced 17 witnesses to prove the case against the Appellants. From the evidence of the prosecution witnesses, it is clear that none of them witnessed the killing of the deceased. It follows then that prosecution evidence relied solely on circumstantial evidence.

The pieces of evidence relied on by the prosecution include the following; the evidence of previous threats, evidence of PW3 and PW4 who testified that they met A3, A6 and A8 moving from the direction of the deceased's home, the canine evidence, evidence of the Moslem hut that allegedly belonged to A8 and conduct of the Appellants after the death of the deceased. We find it pertinent to evaluate each of these pieces of evidence in the way in which the parties submitted on them.

The evidence of PW3 and PW4

PW3, Angura John testified that he had known all the Appellants since childhood and on 25/02/2017 at around 8:00pm, he heard people screaming. He rang PW2, who told him the deceased had been killed. As PW3 was rushing to the scene, he met the 1st, 4th, 6th Appellants and another person he did not identify moving away from the direction of the deceased's home, which was less than a kilometre from the scene of crime. He flashed a torch light from his mobile phone in their faces and identified them as the 1st, 4th and 6th Appellants and that the 6th appellant was holding a panga. When PW3 stopped them and asked where the alarm was coming from, the fourth appellant replied that Mzee Echodu had been killed.

PW4, Okiria Michael testified that on the 25th day of February 2017 at around 8:00pm, he heard people screaming and crying and that forty minutes later he moved towards that alarm but before reaching there, he met A8, Oonyu Asuman and A3 Okodi Julius wearing black clothes and that they were hurrying towards Oonyu's (6th Appellant)

place. He testified that he greeted them but they did not answer and that he continued moving towards the deceased's home where he found many people at the scene and that he saw cut wounds on the hand, face and throat of the deceased. On the 26th day of February 2017, as he was discussing with his wife Adeke Loy, she told him that the daughters of Oonyu Asuman told her that their father was washing pangas and bathing in the well and that is why PW4 thinks Asuman killed the deceased.

The evidence of PW3 led to the identification of the 1st, 4th and 6th Appellants. The Appellant argued that the evidence of PW3 was contradictory regarding the colour of clothes the 1st, 4th and 6th Appellants had worn (whether red or black). In this regard, the learned trial Judge found that it was a minor contradiction that did not go to the root of the identification of the Appellants by PW3. We find no reason to fault the finding by the learned trial Judge. What was crucial was that PW3 had properly identified the three Appellants and the conditions favored proper identification especially because the 3 Appellants were already known to PW3 prior to the commission of the offence.

Canine evidence

The other piece of circumstantial evidence was evidence of PW1 (dog handler) concerning the tracker/sniffer dog. PW13 testified that the particular tracker dog which he took to the scene on 25/02/2017 had undergone training at Nsambya police college and that both him and the tracker dog had handled about 1500 cases of murder, arson,

burglary, store breaking and theft over a period of seven years. He explained that the scene had been preserved by cordoning off and the dog visited the scene within a few hours after the incident and as such, that the performance of the dog was not therefore interfered with by any factor.

PW13 testified that the dog picked the scent at the scene and tracked it all the way to some neighboring homes up to a homestead consisting of 10 huts. The dog concentrated on the homestead but there was no person in the compound. The dog zeroed on four of the houses in the compound. The doors were locked but the dog scratched the doors and tried to force itself inside. PW13 indicated that he involved the Secretary for Defence LC1 (PW2) who told him the names of the persons who were the owners of the huts where the dog concentrated and these were the 1st, 2nd, 4th and 6th Appellants.

It was also the evidence of PW17 at page 56 of the record that the dog led the handler to a certain home where he and the team stayed up to 26/02/2017. The evidence of sniffer dogs must be admitted with caution.

This Court, in **Wilson Kyakurugaba Vs Uganda, C.A.C.A No. 51 of 2014** cited the Kenyan case of ***Omondi & Anor vs R. [1967] E.A. 802,*** where at p. 807 the High Court observed as follows with regard to sniffer dog evidence: -

> *"But we think it proper to sound a note of warning about what, without due levity, we may call the evidence of dogs. It is evidence which we think should be admitted with caution, and if*

admitted should be treated with great care. Before the evidence is admitted, the Court should, we think, ask for evidence as to how the dog has been trained, and.) for evidence as to the dog's reliability.

To say that a dog has a thousand arrests to its credit is clearly, by itself, quite unconvincing. Clear evidence that the dog had repeatedly and faultlessly followed a scent over difficult country would be required, we think, to render this kind of evidence admissible. But having received the evidence that the dog was, if we might so describe it, a reasonably reliable tracking machine, the Court must never forget that even a pack of hounds can change foxes and that this kind of evidence is quite obviously fallible."

This Court in **Mazuku Jonathan and another Vs Uganda, Criminal Appeal No. 39 and 129 of 2020** cited, with approval, the decision by Gaswaga J., in **Uganda vs Muheirwe & Anor - Mbarara High Court Crim. Session Case No. 11 of 2012,** where the learned judge recast and proposed the following principles to guide trial Courts with regard to admissibility and reliance on dog evidence; as follows: -

"l. The evidence must be treated with utmost care (caution) by Court and given the fullest sort of explanation by the prosecution.

2. There must be material before the Court establishing the experience and qualifications of the dog handler.

3. The reputation, skill and training of the tracker dog is required to be proved before the Court (of course by the handler/trainer who is familiar with the characteristics of the dog).

4. The circumstances relating to the actual trailing must be demonstrated. Preservation of the scene is crucial. And the trail must not have become stale.

5. The human handler must not try to explore the inner workings of the animal's mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might properly be drawn from a particular action by the dog.

6. The Court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from material not subject to the truth- eliciting process of cross-examination."

After approving of these proposed principles, the Court then stated as follows: -

"We wish to add that there are two aspects that are important to be observed. Firstly, what is the threshold for such evidence to be received by the trial Court? Secondly after the reception or admissibility how is such evidence to be considered? In the first place, with regard to admissibility, we regard it essential that the

training and experience of the dog handler and his association with the dog in question be established.

Secondly, there must be established in evidence the nature of training, skill and performance of the dog in question with regard to the particular subject at hand, be it tracking scents, or drugs, or whatever specialized skills it allegedly possesses so as to establish its credentials for that skill. The foregoing are prerequisites before the admissibility of such evidence. Nevertheless, once admitted, it is clear that such evidence must be treated with caution as it is possible that it may be fallible."

The learned trial Judge found that the evidence of PW13 (dog handler) corroborated the other circumstantial evidence connecting the 1st, 2nd, 4th and 6th Appellants to the killing of the deceased. We agree with the finding of the leaned trial Judge that the evidence of the sniffer dog corroborated the evidence of PW3 and PW4 together with the other circumstantial evidence that placed the 1st, 2nd, 4th and 6th Appellants at the scene of crime.

Disappearance of the 3rd, 4th , 5th and 6th Appellants.

The conduct of the 3rd, 4th, 5th and 6th Appellants in disappearing from their home and the village immediately after the murder of the deceased. It was the evidence of the 3rd appellant that he was arrested on 27/02/2017 along the road when he was returning from Kulakutur village where he had gone to pick documents for hiring out gardens from their land. However, PW8 testified that he arrested the 3rd Appellant following information that he was escaping with the

cows of Opiko. This was corroborated by the evidence of PW17 who testified that the 3rd Appellant was arrested while fleeing from his home.

The 4th Appellant testified that he was at home preparing to attend burial when he saw PW3, PW5 and other persons chasing the 1st and 2nd Appellants. That one of the people pointed at him and he ran and hid in the bush till late in the evening when he returned home. He testified that a neighbor told him that they were looking for him so he slept in the bush and the following day he went to his brother's home in Soroti. That he spent there four days and he was arrested from Soroti taxi park. The 4th Appellant stated that he feared to report to the police but did not explain why he feared to report to the police. The evidence of PW17 corroborated that of the 4th Appellant when he testified that the 4th Appellant was not at home and was arrested from Soroti one week later.

The 5th Appellant testified that he went to the deceased's home on 26/02/2017 after being informed about the funeral by one of his wives at Kachoboi. He later ran away after receiving information that he was being looked for and hid in the latrine. That he later went to the roadside from where he boarded a vehicle to Gulu, at his son's workplace but was arrested the following day. However, the evidence of PW3 and PW4 was that none of the accused persons was at the deceased's home on 26/02/2017. From the testimony of PW17, the 5th Appellant was arrested from Gulu in March 2017. The 5th

Appellant's disappearance was an indication that he was simply trying to evade justice.

The 6th Appellant testified that upon receiving information that the police were looking for him, he ran away and hid in the bush on 27/02/2017 and he went to Mbale where he spent two weeks before returning to Kachoboi village where he stayed until he was arrested from Mbale market. It was the evidence of PW11 that he arrested the 6th Appellant at Mbale bus park from a vehicle that was heading to Kampala.

It is trite law that the conduct of the accused immediately after the death of a deceased in running away from the scene of crime clearly showed a guilty mind. The Supreme Court in **Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41 of 1995 (Unreported)**, held 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. This is because such sudden disappearance from the area is incompatible with innocent conduct of such a person."*

In the instant case, disappearance from the area of crime was corroborated by other evidence as re-evaluated above, pointing to the guilt of the Appellants.

To this end, we find that these circumstances pointed to the guilt of Appellants and we find that the Prosecution has proved beyond reasonable doubt that they participated in the killing of the deceased.

This appeal therefore fails. The Appellants having not appealed against the sentence passed by the trial court, the convictions and sentences passed by the trial Court are hereby accordingly upheld.

We So Order.

Delivered and dated this ..... day of 2024

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CHEBORION BARISHAKI

Justice of Appeal

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CHRISTOPHER GASHIRABAKE

Justice of Appeal

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OSCAR JOHN KIHIKA

Justice of Appeal