THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[Coram: Egonda-Ntende, Bamugemereire, Mugenyi, JJA]

CRIMINAL APPEAL NO. 118 OF 2019

(Arising from High Court of Uganda Criminal Session Case No. 51 of 2007 at Fort Portal)

BETWEEN

Turyatunga Jackson==========Appellant

AND

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

(*Appeal from a Judgment of the High Court of Uganda (Chibita, J.,) delivered on the 18th October 2012.*)

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 30th September 2006 at Kataraza village, Bigando Parish, Bufunjo Sub county Kyenjojo District murdered Byebiriho David. He was convicted as charged on 18th October 2012 and sentenced to life Imprisonment.

[2] The appellant appealed against his conviction and sentence in a memorandum of appeal filed in person, on or about 11th July 2013, on the following grounds:

> '1. That the learned trial judge erred in law and fact in failing to properly evaluate the evidence as a whole thereby arriving at wrong conclusion.

> 2. That the learned trial Judge erred in law and fact in sentencing the appellant to 20 years' imprisonment which is deemed illegal, manifestly harsh and excessive in the obtaining circumstances.'

[3] Ms Angella Bahenzire, appeared for the appellant on this appeal. She dropped the appeal against conviction and filed an amended memorandum of appeal with a sole ground against the sentence imposed on the appellant, which stated,

> 'That the learned Trial Judge erred in law and fact when he passed a manifestly harsh and excessive sentence of life imprisonment against the Appellant, thereby occasioning gross miscarriage of justice.'

[4] The respondent was represented by Mr Sam Oola, Senior Assistant Director of Public Prosecutions in the Office of the Director of Public Prosecutions. He opposed the appeal.

[5] Both counsel filed written submissions in the matter which they asked this court to consider before rendering our decision.

[6] Before we could render our decision and after considering the record of the lower court we found it imperative to ask counsel to address us in writing on the following questions which we deemed of fundamental constitutional and legal importance which we could not ignore in light of the obligations of this court vide articles 2 (2) and 20 (2) of the Constitution not withstanding that counsel for the appellant had dropped the appeal against conviction. What is at stake is the appellant's right to a fair trial, pursuant to article 28 of the Constitution, which is non-derogable pursuant to article 44 of the Constitution.

> '(1) Was the appellant competent to conduct his defence at the time this case was heard? Katutsi, J had ordered for his mental examination to address this issue but no evidence of such examination was adduced before the trial court.

(2) In light of the testimony of the witnesses for the prosecution that the accused was suffering from a mental illness at the time the offence was committed, did the prosecution establish that the appellant had the necessary *mens rea*, or intent, to commit the offence of murder?'

[7] Counsel for the both parties responded and filed written submissions addressing the said questions and we shall consider the same as we determine the answer to each question raised. We shall start by setting out the facts of this appeal which are not in dispute.

Facts of the case

[8] The appellant was indicted of murder of David Byebiriho, on the 30th September 2006 at Kataraza village, Bigando parish, Bufunjo Sub County in the district of Kyenjojo. PW1, the sole eye witness to the event, testified that the appellant was known to suffer from mental illness. On 30th September 2006, the appellant was at home with his father, the deceased, and the witness. The appellant got a panga and cut his father who was washing his feet. He dragged the body to the pit latrine and pushed it there. PW1 ran away on seeing what was happening and reported to the LC1 Chairman, PW2.

[9] PW2, the LC1, Chairman arrived at the scene and with the help of other people, they disarmed the appellant, who was threatening to cut anyone that came close to him. At the same time, he appeared to be talking to himself. He was taken to the Police, who re-arrested him. PW2 testified that he had known the appellant for the last 10 years or so and that he was mentally sick. One week prior to the murder the father, now deceased, had taken the appellant to church to be prayed for. He further stated in re-examination that the appellant was sick and that they used to tie him with ropes.

[10] PW3 was the wife of the deceased. She was in the garden when she was called back her home by her daughter. She found her husband had been pushed down the pit latrine. Police came and removed the body from the pit latrine, examined it, and allowed them to bury. She found the appellant

tied up with ropes and he was taken by the police. She knew the appellant. The appellant was sick, including on the day he committed the offence in question. He had a mental problem. They had taken him to church to be prayed for prior to this incident.

[11] PW4 was Jackson Mugarura, a Clinical Officer with Fort Portal Regional Hospital. He was asked to identify the signature of Dr. Twinomujuni Cypriano, a police surgeon, who had examined the appellant soon after his arrest and filled in Police Form No. 22. The defence objected to the tendering in of the said form which objection the court upheld and admitted it only for identification purposes as PID 1. This witness further stated,

> 'It is possible that the accused person could have exhibited mental illness at the time of the murder and to have appeared normal at the time of medical examination. However, I did not participate in the examination of this particular accused person. To establish conclusively whether a person is mentally sick it has to be done over time not just the initial diagnosis.'

[12] Detective Inspector Bwambale was PW5. He visited the scene of crime with the police surgeon. He re-arrested the appellant on the day in question from Bufunjo Police Post and took him to Kyenjojo Police station. He stated that the appellant looked confused. That was the close of the case of the prosecution.

[13] The appellant in his defence stated that he had nothing to say since he knew nothing about the case. He had no witnesses and his case was closed by the court.

Procedural History

[14] Prior to the trial before Chibita, J, (as he then was), which elicited the evidence we have just set out above, the matter was first called before Katusti, J., on the 4th October 2010. The learned judge took plea, appointed assessors and heard the testimony of one witness. At the end of that testimony the judge made the following order.

'**Court:** From the looks of the accused and from the answers he has given to questions put to him by the court, I think it is advisable to refer this accused to psychiatrist to see whether he is capable of following what is going on.
Sgd: J.B.A. Katutsi
Judge'

[15] The learned judge in effect had found that it was necessary to determine if the appellant was capable of, not only following the proceedings against him, but whether he was capable of conducting his defense. When the matter came before Chibita, J., on 17th September 2012 this is what transpired and we shall set out the same verbatim. '

COUNSEL: **My client seems not to hear or understand**.
COURT: Reads indictment, which is explained to accused in Lutooro.
ACCUSED: I have understood the charge.
COURT: PLEA OF NOT GUILTY was taken earlier **but accused was sent for medical examination which indicates that he is fit to stand trial.**
COURT: Our Assessors are: JANE KAHUBIRE, CAROLINE MANDE
ACCUSED: NO OBJECTION
STATE: NO OBJECTION
ASSESSORS TAKE OATH'

[16] The trial then took off and the testimony of witnesses was recorded.

Analysis

Was the Appellant competent to stand trial?

[17] Counsel for the appellant submitted that it was important to establish whether the appellant was in a position to understand the proceedings he was being subjected to before further proceedings in the matter. This was to be done through a medical examination by a psychiatrist. However, the record of the court does not reveal that such an examination took place. Katutsi, J., had ordered for the examination to be carried out. It was not

done. It was therefore an error for the learned trial judge to proceed with the trial without first determining whether the appellant was capable of understanding the proceedings or not. He contended that the resultant trial was therefore illegal and so were the conviction and sentence.

[18] Counsel for the respondent, Mr Sam Oola, referred us to the proceedings of 17th September 2012 before Chibita, J., in which the judge noted that the accused was sent for medical examination which indicated that he is fit to stand trial.

[19] Section 45 of the Trial on Indictments Act governs the proceedings where the soundness of an accused's person's mind to stand trial is in question. It states, in part, as under,

> '(1) When in the course of a trial the High Court has reason to believe that the accused is of unsound mind and consequently incapable of making his or her defence, it shall inquire into the fact of such unsoundness.
>
> (2) Notwithstanding subsection (1), if the court is of the opinion that it is expedient so to do and in the interests of the accused person, the court may postpone the inquiry mentioned in that subsection until any time up to the opening of the case for the defence; and if before the inquiry is made the court acquits the accused person on the count or each of the counts on which he or she is being tried, the inquiry shall not take place.
>
> (3) If, as a result of an inquiry made under this section, the court is of the opinion that the accused person is of unsound mind and consequently incapable of making his or her defence, it shall postpone further proceedings in the case.'

[20] Katusti, J., ordered an inquiry into the soundness of the appellant to stand trial. Chibita, J., took over the case and determined that inquiry on the basis of evidence that was not on record. No hearing took place. He relied on a medical report that was not adduced in evidence. In effect, the learned trial Judge failed to carry out the inquiry ordered by Katusti, J., with regard to the soundness of the mind of the appellant before proceeding with the trial in this matter. In light of the provisions of article 28 (1) and 3 (c) of the

Constitution a trial that proceeds in disregard of the provision of section 45 of the Trial on Indictments Act, would not be a fair hearing, and would contravene the constitutional guarantee of the right to a fair hearing.

[21] We shall set out the relevant portions of article 28 of the Constitution below.

> '**28. Right to a fair hearing**
> (1) In the determination of civil rights and obligations or any criminal charge, **a person shall be entitled to a fair, speedy and public hearing** before an independent and impartial court or tribunal established by law.
> (2) Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society.
> (3) Every person who is charged with a criminal offence shall—
>
> > (a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;
> > (b) be informed immediately, in a language that the person understands, of the nature of the offence;
> > **(c) be given adequate time and facilities for the preparation of his or her defence;**
> > (d) be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice;
> > (e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State;
> > (f) be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial;
> > (g) be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.' (*Emphasis is ours.*)

[22] A criminal trial is an adversarial proceeding with 2 sides; the prosecution and the accused. In order for this proceeding to be fair, both sides must be in a position or state not only to follow the proceedings but to be able to put their case to the court hearing the matter. Where one side, or more specifically, the accused person is not in a position to comprehend the proceedings by reason of unsoundness of mind it would not be possible to have a fair hearing of the matter.

[23] Secondly the right set out in article 28 (3) (c) of the Constitution to afford the accused adequate time and facilities for the preparation of his or her defence would be illusory if by reason of unsoundness of mind an accused is not in a position to comprehend the proceedings and prepare his or her defence.

[24] We agree with counsel for the appellant that the resultant trial and conviction of the appellant were a nullity. So was the resultant sentence. Ordinarily where this court finds that the trial below was a nullity it would order a re-trial unless the interests of justice militated otherwise.

[25] The appellant has been in custody since the 30th September 2006, up to today, a period of slightly more than 17 years. The trial in the court below was only concluded 6 years after the appellant was first arraigned before a court of law on the current charges. This appeal has only been heard and determined after about 11 years since it was filed. The delay in both courts was as inexcusable as it was unjustified. It was egregious and contrary to the appellant's right to a speedy trial pursuant to article 28 (1) of the Constitution.

[26] In any event the failure by the trial court to interrogate the Appellant's mental status would mean that his criminal responsibility for the offence was not established. The fact that this controversy was not resolved for the duration of his 17-year incarceration bespeaks a gross miscarriage of justice.

[27] A re-trial would not serve the interests of justice.

[28] In light of our finding on the first question we raised before the parties it is unnecessary to consider the second question and the appeal against sentence.

Decision

[29] We quash the conviction of the appellant and set aside the sentence imposed upon him. We order the immediate release of the appellant unless he is being held on some other lawful charge.

Signed, dated and delivered this 23rd day of January 2024

Fredrick Egonda-Ntende
Justice of Appeal

Catherine K Bamugemereire
Justice of Appeal

Monica Mugenyi
Justice of Appeal