THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 0558 OF 2014

(Appeal from the Judgment of Henry Kawesa, J; delivered on the 11th of June 2014 in Criminal Session case No.171 of 2013 High Court of Uganda, Tororo)

MWIMA SOWALI alias MAGENDA ::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::RESPONDENT

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

JUDGMENT OF COURT

Introduction

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 23 years' imprisonment.

Background

On the 26th day of January 2012, at around 1.00pm the Appellant, Sowali Magenda, together with Haji Famba went to the home of Mulongo Fatina Lunyolo while in possession of a small hoe. They

used that small hoe to break into the house of her son, one Were Aramazan, in his absence. Famba is an uncle to Aramazan. At around 5.00 pm, the Appellant and Haji Famba were heard calling someone on phone directing him to go to the said House. Shortly after, the deceased arrived while riding a motor cycle registration No. UDT 019X red in color. He was taken into the grass thatched house where they purportedly performed rituals on him. During the performance of the said rituals, there was a lot of noise inside the house which raised concern amongst the public and they decided to inform the police.

On their way to the scene, police met Hajji Famba riding the red motor cycle belonging to the deceased, he was stopped but he jumped off and ran away. The police later proceeded to the scene and found the Appellant standing near the door where the deceased was laying. On sighting the police, the Appellant also ran away. The deceased was found unconscious laying in a pool of blood with multiple injuries on his head and there was a small hoe stained with fresh blood besides him. He was carried to Busolwe hospital where he passed on.

The Appellant was arrested, indicted and convicted of the offence of murder. He now appeals to this court against both conviction and sentence on the following grounds;

1. **The learned trial Judge erred in law and fact when he held that the accused person had been properly identified thus occasioning a miscarriage of justice.**

2. **The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and relied on the prosecution evidence which was full of contradictions, hearsay and lies thus occasioning a miscarriage of justice.**
3. **The learned trial Judge erred in law and fact when he sentenced the accused person to a harsh sentence of 23 years without taking into account the period spent on remand.**

Representation

At the hearing of the appeal, Ms. Faith Luchiyia appeared for the Appellant while Ms. Fatinah Nakafeero and Ms. Lydia Nakato appeared for the Respondent. Both parties filed written submissions which were adopted.

Duty of a first Appellate Court

Before delving into the grounds of appeal it is necessary to remind ourselves of the duty of this court as a first appellate court. Being a first appellate court, the law enjoins it to review and re-evaluate the evidence as a whole, closely scrutinize it, draw its own inferences, and come to its conclusion on the matter. This duty is recognized in **Rule 30(1) (a)** of the Rules of this Court.

> *30. Power to reappraise evidence and to take additional evidence.*
>
> *(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*

(a) reappraise the evidence and draw inferences of fact; and

(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.

The cases of **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997** have also succinctly re-stated this principle. We have borne these principles in mind in resolving this appeal.

Ground one

Appellant's submissions

Counsel submitted that the evidence of PW1 was based on the information from his alleged informant whom he never disclosed. That the evidence of the prosecution witnesses was not sufficiently pointing to the Appellant as having committed the offence. PW4 stated that he questioned the Appellant about the murder and he confessed to him, which according to counsel, was a baseless statement with no evidence to support it.

Counsel relied on the decision in **Kakeeto Vs Uganda, Criminal Appeal No. 370 of 2019** on the test for proper identification and submitted that the considerations for identification are whether the accused was known to the witness prior to commission of the offence, the lighting used, distance from which the identification was made and the length of time during which the accused was identified. Counsel submitted that the factors for proper identification were not

present in this case and as such, the Appellant was not properly identified.

Respondent's submissions

Counsel submitted that PW1 was familiar with the Appellant and observed him at a close distance and thus there was no possibility of mistaken identity. In addition, PW3 had a torch which he flashed at the assailant and identified him as Sowali whom he knew as the man that sells meat at Butalejja and had earlier interacted with him. Counsel prayed that court finds that the Appellant was properly identified by PW3.

When the police arrived at the scene of crime, it was only the Appellant that ran out of the house and the body of the deceased was found lying on the ground. Counsel argued that the witnesses were familiar with the Appellant and they knew him as a butcher in Butaleja and as such, was properly identified.

Consideration of ground 1

The Appellant faults the learned trial Judge for having found that there was proper identification. The prosecution relied on the evidence of PW1, PW2, PW3, PW5 and PW6, who all testified that the Appellant was in the hut where the deceased was assaulted. PW1, a police officer testified that he was on his way from having supper and was tipped off by someone of an impending problem and was told the Appellant and one Hajji had locked themselves in the hut. He went to the police station and got back up and moved to the scene of crime.

At the junction, he met Hajji on a motorcycle and when Hajji saw the officers, he ran away. They headed to the hut and the Appellant came out of the house end ran away. They entered the house with CPC Nanku and Arapai and saw someone laying on an old mat. He testified that they were using motorcycle flash light and saw a lot of blood where the victim was lying. PW1 testified that he knew the Appellant very well and used to see him at the butcher's. The testimonies of PW2, PW3, PW5 and PW6 all give the same narration of events that transpired the night the offence was committed.

The evidence of PWI, PW2, PW3, PW5 and PW6, indicated that the Appellant was well known to them and also, that there was use of a motorcycle flash light to identify the Appellant. The evidence of PW1, PW3, PW5 and PW6 was that the Appellant was well known to them prior to commission of the offence as a man that owned a butchery in Butalejja town. PW3 also testified that he had a torch, which he flashed at the Appellant and identified him as Sowali whom he knew and interacted with at his butchery.

The principles of identification were well settled in the case of **Abdulla Nabulere and others Vs Uganda, Criminal Appeal No. 9 of 1978.** The Court of Appeal held that;

> *"Where the case against an 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 that even a number of such witnesses can all be mistaken. 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. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.

In our judgment, when the quality of identification is good, as for example, 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 to identification evidence; provided the court adequately warns itself of the special need for caution." (Emphasis added)

Applying the above principles to the present case, it is our considered view that the quality of identification was good, there was light from the motorcycle flash light and the Appellant was well known to PW1, PW3, PW5 and PW6 as someone that operated a butchery in Butalejja town. The Appellant was thus properly identified by PWI, PW2, PW3, PW5 and PW6. Ground one accordingly fails.

Ground 2

Appellant's submissions

Counsel submitted that the evidence of PW5 was contradictory to that of the other prosecution witnesses. PW5 stated that they found the Appellant standing in front of the grass thatched house and when they called his name, the Appellant run away, which was contradictory to the evidence of the other prosecution witnesses. That PW5 stated that they received a call from the LC1 Chairman that some strange people had come to his village while PW6 stated that they received information that the Appellant and Hajji had a visitor that they had locked in the grass thatched house. Counsel submitted that these contradictions point to deliberate untruthfulness and cannot be taken for granted.

Counsel relied on the decision in **Kamyuka Ivan Vs Uganda (Criminal Appeal No. 56 of 2018** for the proposition that the effect of contradictions in prosecution evidence is that grave inconsistencies or contradictions will, unless satisfactorily explained, usually, but not necessarily result in the evidence of a witness being rejected. Counsel argued that the evidence of the prosecution witnesses was hearsay and cannot be admissible as against the Appellant.

Respondent's submissions

Counsel relied on the evidence of PW1, PW3, PW5 and PW6 in response to counsel for the Appellant's submissions on contradictory

evidence. Counsel submitted that PW1 testified on page 10 paragraph 2 that when the officers arrived and asked the women listening to music on as Radio Cassette whether there was a problem, the Appellant came out of the house and ran away. That similar evidence was given by PW3 who testified that on arrival, they saw the Appellant ran out of the grass thatched house and PW3 flashed a torch at him and identified him as the Appellant.

Counsel argued that the evidence of the prosecution witnesses was consistently corroborating each other on identification of the Appellant and there were no contradictions referred to by the Appellant's counsel. Counsel argued that the contradictions on how the information was obtained were minor and failure to disclose the source of information was inconsequential to the trial. Counsel submitted that the Appellant was properly identified by the prosecution witnesses.

Consideration of Ground 2

The evidence of PW1 was that when they arrived at the scene of crime, there were women listening to music on a Radio Cassette and when they asked what the problem was, the Appellant came out of the house and ran away. The evidence of PW3 and PW6 was also to the same effect save for the fact that PW3 had a flash light which he used to identify the Appellant. PW5 is the only witness that gave a slightly different version of what transpired. He testified that the Appellant was standing in front of the door of the grass thatched house.

This contradiction is, in our view, a minor one that does not point to deliberate untruthfulness.

This Court and the Supreme Court have laid down the principles governing the law on contractions and inconsistencies in the Prosecution evidence. In **Obwalatum Francis vs. Uganda, Criminal Appeal No.30 of 2015,** the Supreme Court held that;

> *"The law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained." It is therefore settled law that grave contradictions and discrepancies unless satisfactorily explained, will usually but not necessarily result into the rejection of that witness's evidence. See* **Alfred Tajar v Uganda, EACA. Cr. Appeal No. 167 of 1969.**

We must point out that there is no standard rule on measuring degree of inconsistencies, since each case is handled on its own facts. It is always the duty of the trial Court to establish whether such contradiction is material to the facts of the case before it, considering the weight of that contradiction against material aspects that the prosecution relies on to prove their case beyond reasonable doubt.

The contradiction in this case is in the evidence of PW5 who is the only witness that gave a slightly different version of what transpired,

having testified that the Appellant was standing in front of the door of the grass thatched house. We find this a minor inconsistency that would not warrant rejection of the witness' evidence. In addition, the Appellant's counsel argues that the source of information to the prosecution witnesses was not disclosed and also gave different versions. PW1 testified that he got tipped off that there was an impending problem in the village while PW2 testified that they had been informed about a stolen motorcycle in Butaleja Town Centre. PW5 on the other hand stated that they had received a phone call from the Chairman LC1 Busasi Village that some strange people had gone to the village with a motorcycle. The Appellant's counsel submitted that the different versions of the source of information amount to major contradictions that created loopholes in the prosecution evidence.

We note that all the prosecution witnesses were police officers and they had different sources of information that led to the arrest of the Appellant at the scene of crime. We have however already found that the Appellant was properly identified and placed at the scene of crime. It is our considered view that the source of the information by the various prosecution witnesses was inconsequential to the prosecution evidence.

Ground 3

Appellant's submissions

Counsel submitted that while sentencing, the learned trial Judge did not take into account the period that the appellant had spent on

remand and as such, the sentence passed by the trial court is an illegal sentence. Counsel relied on the decision in **Kakeeto v Uganda ,Criminal Appeal No. 370 of 2019 [2022] UGCA 276** for the proposition that where a person is convicted and sentenced to a term of imprisonment for an offence, any period spent in lawful custody in respect of that offence shall be taken into account in imposing the term of imprisonment.

Respondent's submissions

In reply, counsel submitted that the learned trial Judge put into consideration the period the appellant had spent on remand, which was two and a half years. Counsel submitted that the Appellant was sentenced on 11th June 2014, before the mandatory requirement of arithmetic calculation of the time spent on remand was introduced in **Rwabugande Moses Vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014** which was delivered on 3rd March 2017.

Consideration of ground 3

The issue for this court to determine is whether the decision in **Rwabugande Moses Vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014** applied to sentences already passed prior to 3rd March 2017. As far as the submission of the Appellant's counsel is concerned, counsel relied on the decision of the Supreme Court in **Rwabugande Moses v Uganda** (supra) for the proposition that taking into account had to be arithmetic and the words used by the trial judge did not show that the period the appellant had spent on remand had been deducted. It is not in dispute that the Appellant

had spent a period of two years and six months before his conviction and sentence to a term of 23 years' imprisonment.

This court has addressed the issue in the case of **Kajooba Vacencia Vs Uganda, Criminal Appeal No. 0118 of 2014** and held as follows;

> *"According to the learned Principal Assistant DPP, the decision in* ***Rwabugande Moses v Uganda*** *(supra) had not yet been delivered by 4th April 2014 and could not have been binding on the learned trial judge. While the argument is plausible, it misses the essential point that Article 23 (8) of the Constitution of the Republic of Uganda was in existence and had been promulgated together with the constitution on 8th October 1995. The decision in* ***Rwabugande Moses v Uganda*** *(supra) was an attempt to interpret the constitutional provision for purposes of its application by the trial courts in taking into account the period that the Appellant had spent on pre-trial detention prior to his conviction and sentence. Secondly, the decision of the Supreme Court in* ***Abelle Asuman v Uganda*** *(supra) was another attempt to give direction to the trial courts in arriving at an appropriate sentence of imprisonment for a definite term in terms of Article 23 (8) of the Constitution of the Republic of Uganda. At best the decisions of the Supreme Court cited immediately above dealt with the method to be applied for taking into account the period a convict who has been sentenced had spent on pre-trial detention before his sentence.*

Article 23 (8) *of the Constitution of the Republic of Uganda provides that: (8) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment. A literal reading of Article 23 (8) of the Constitution of the Republic of Uganda clearly requires that after conviction and where the court intends to sentence the convict to a term of imprisonment, any period he or she spent in lawful custody in respect of the offence shall be taken into account. The controversy is on how it is to be taken into account in imposing the term of imprisonment. Where it is not taken into account, this sentence would be illegal for violation of article 23 (8) of the Constitution of the Republic of Uganda and would be set aside for illegality."*

The above excerpt reiterates the need for the trial court to indicate that the period a convict has spent on remand has been put into consideration in sentencing. This is in accordance to **Article 23 (8)** of the Constitution which makes it mandatory for the remand period to be deducted by the trial Judge while sentencing.

Article 23 (8) of the **Constitution** of the Republic of Uganda provides that:

"(8) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful

custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment"

As he passed sentence the trial Judge stated as follows;

"SENTENCE AND REASONS

Accused/convict is said to be a first offender. His been on remand for about 2 1/2 yrs. However, the offence is grave and rampant. There is need for deterrence sentence and to ensure reformation and rehabilitation. Accused will be sentenced with that in mind. Life can't be replaced. Given the circumstances of this offence, the mitigations and the aggravations the convict will be sentenced to a custodial period of 23 years. I so order."

We have carefully considered the wording used by the learned trial Judge. We find that the learned trial Judge considered the period the Appellant had spent on remand and we find no reason to fault him. In **Abelle Asuman v Uganda; [2018] UGSC 10**, the Supreme Court, while not departing from **Rwabugande Moses v Uganda** (supra) held that the essence of Article 23 (8) of the Constitution of the Republic of Uganda is fulfilled where the trial court demonstrates that the period the Appellant had spent in lawful custody had been taken into account. They held that:

"The Constitution provides that the sentencing Court must take into account the period spent on remand. It does not provide that the taking into account has to be done in an arithmetical way. The constitutional command in Article 23 (8) of the Constitution is

for the court to lake into account the period spent on remand.... Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or justices used different words in the Judgement or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be flouted when in effect the Court has complied with the constitutional obligation in Article 23 (8) of the Constitution."

We therefore find that the learned trial Judge considered the period the appellant had spent on remand and as such, ground 3 also fails.

Given that all the grounds of appeal have failed, we find that this appeal is void of merit and is therefore dismissed.

We so order

Delivered and dated this 8th day of April 2023

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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