THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 24 OF 2015

(***Coram***: *Tumwesigye, Kisaakye, Mwangusya, Opio Aweri, Mwondha JJSC)*

Between

1. Kamya Abdullah
2. Emirikwa John
3. Batwala Kenneth
4. Kateregga Jimmy
5. Mugalu Shaban

.... Appellants

And

Uganda ..... Respondent

[Appeal against the judgment of the Court of Appeal, at Kampala Criminal Appeal No. 251 of 2013 delivered on the 17th December 2014 by Kasule, Buteera and Kakuru JJA]

JUDGMENT OF THE COURT

This is second appeal in which all the five appellants having been dissatisfied with the judgment of the Court of Appeal appealed to this Court.

They were indicted, tried and convicted of murder C/s 188 & 189 of the Penal Code Act.

The 1st Appellant appealed on two grounds separately from the four appellants and the memorandum of appeal contained the grounds as follows:-

1. The Justices of Appeal erred in law when they failed to adequately re-evaluate all material evidence relating to the uncorroborated and contradicting evidence of PW1.

2. The Learned Justices of Appeal erred in law when they reduced the sentence from 40 years to 30 years only in total disregard to mitigation and the circumstances surrounding the case. He prayed that the conviction be quashed and sentence set aside.

The four appellants 2, 3, 4, and 5 appealed on two grounds as follows:-

(1)The learned Justices of the Court of Appeal erred in Law by failing to judiciously re-evaluate and re-appraise the evidence of PW1 Mbalayo Araisha a single identifying witness, occasioning a miscarriage of justice thereby wrongly confirmed the appellants conviction.

(2)The Learned Justices of the Court of Appeal erred in Law when they failed to judiciously exercise inherent power of the Court not to consider manslaughter and thereby imposed a harsh, and excessive sentence of 30 years imprisonment against the appellant.

The Background:-

It was alleged that one Ayubu Sokoma (deceased) was arrested for allegedly stealing household items of one Naluwoza Annet. A mob gathered which consisted of the appellants and others who beat the deceased to death.

The appellants were consequently indicted, tried and convicted for murder C/S 188 and 189 of the Penal Code Act. They were all sentenced to 40 years imprisonment each by the trial Court. They appealed to the Court of Appeal which confirmed and upheld the conviction but substituted the sentence of 40 years with 30 years imprisonment each.

Representation:-

Counsel Susan Wakabala represented the 1st Appellant on private brief.

Counsel Seith Rukundo represented the 2nd, 3rd, 4th and 5th appellants on state brief.

Principal State Attorney Tumuheise Rose represented the State/ Respondent.

Submissions:-

Ground one

Counsel for the 1st Appellant submitted that the Court rightly addressed itself on its duty as a first appellate Court and the law governing the evidence of a single identifying witness as stated in the case of **Uganda v. Wilson Simbwa Criminal Appeal No. 37 of 1995 at page 84 – 87.** She however argued that the Court

failed to apply the true test as quoted at page 56 of the record paragraph 5. She submitted that the true test was that laid down in the case above referred to which is "**whether the evidence can be accepted as free from the possibility of error**."

She contended that the 1st appellant never denied having been at the scene of crime but admitted that he was there in his capacity as an LC Chairman. What was in contention was his participation in the beating which resulted in the death of the deceased.

She submitted that PW1's testimony was full of contradictions and the sticks PW1 saw the 1st appellant break off from the tree and allegedly used to beat the deceased were not described. For instance the sizes of the sticks were not established to enable Court form an opinion as to whether the sticks could have caused the death of the deceased. She contended that as a custom people use sticks to chastise criminals but not with the aim of killing them. She contended further that PW1 in her testimony said that she saw the 1st appellant use the stone to hit the deceased and only saw A3 carrying a sickle, PW1 further testified that A3 and others were seen hitting the deceased with sticks and stones. But later during cross examination she (PW1) stated that it was Tom who boxed the deceased and the 1st appellant didn't use his fist at all. PW1 further testified that the 1st appellant picked a knife and stabbed the deceased on the head yet in her evidence in chief she stated that she didn't want to see what was going to happen and ran away.

Counsel cited and relied on the case of **Abdu Komakech v. Uganda SCCA No 1 of 1988** which involved a robbery and identification by a single identifying witness.

She further submitted that there was contention as to the exact time the events took place because PW1 testified that she came to the trading centre at 5:30p.m. and left at 7:30p.m. While the first appellant said that he went to the trading centre at 7:20 p.m., and the time of the 1st appellant was corroborated by PWIs Police statement where she stated the time to have been 7:30p.m. which time would make the conditions for identification difficult. She faulted the Justices of the Court Appeal for failure to address themselves to the law as laid down in the case of **Mulindwa James v. Uganda SCCA No. 23 of 2014** where the Supreme Court quoted the case of **Nomensio Tiberanga SCCA No 17 of 2007** and held

"it is a well settled principle that on first appeal the parties are entitled to obtain from the appeal Court its own decision on issues of fact as well as law. Although in case of conflicting evidence the appeal Court has to make due allowance for the fact that it has neither seen nor heard the witness. It must weigh the conflicting evidence and draw its own inference and conclusion" She submitted that the conviction should be quashed. Counsel argued that the sentence imposed of 30 years by the Court of Appeal was harsh and excessive. She prayed that this Court set aside the sentence against the 1st Appellant or substitute a commensurate sentence considering the role he played.

Counsel for 2nd, 3rd, 4th, and 5th appellants faulted the Justices of Court of Appeal for having convicted the appellants on the evidence of a single indentifying witness. He submitted that the witness PW1 didn't know all the accused persons. He quoted at length the testimony of PW1 but most important facts among others were that PW1 was a sister to the deceased. She testified that A7 hit the deceased with a bench he removed from the veranda and she was standing in a distance of 5 meters from the scene of crime. He submitted that there was no evidence against A_6 Kazibwe Mutwalubu and A_1 Kamya was at the scene of crime because of his role as an LC1 Chairperson. He contended that PW1 the single identifying witness didn't properly indentify A_1, A_2, A_3 and A_7. She did not place them on the scene of crime.

He relied on the case of **Bogere Moses and Another v. Uganda (SC) Criminal Appeal No. I of 1997** (unreported) which stated what amounts to put an accused person at the scene of crime.

On ground two Counsel for the appellants complained of the harsh and excessive sentence of 30 years. He also complained of not considering manslaughter. He further argued that there was no proof of common intention to cause the death of the deceased. He contended that conviction of murder on the basis of common intention was therefore not supported by the evidence. He submitted that ground two should succeed and the 30 years imprisonment should be reduced.

Counsel for the respondent opposed the appeal and supported the decisions of Court of Appeal as per the judgment. She argued on the first ground that the Court of Appeal Justices rightly

upheld the conviction after executing its duty of re-evaluation of the evidence and subjecting it to fresh scrutiny on the 1st ground.

On the 2nd ground, Counsel submitted among others that the principle of interfering with Court discretion has long been settled in the case of **Kiwalabye Bernard v. Uganda Supreme Court Criminal Appeal No 142 of 2007** and **Kizito Senkula v. Uganda SC criminal Appeal No 24 of 2007**. Where it was stated:- "**An appellate Court is not to interfere with 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 the trial Court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence passed is wrong in principle**."

She asserted that the appellant's case did not meet any of the standards set out in the above authorities.

She relied also on the case of **Obote William v. Uganda Supreme Court Criminal Appeal No 12 of 2014** which upheld a sentence of life imprisonment against an appellant who was convicted of murdering his wife by shooting. In the instant case she contented that the sentence of 30 years imprisonment was not harsh and excessive considering the circumstances of the case so this ground would fail.

Consideration of the Appeal

This is a second appeal and the duty of the 2nd appellate Court is to determine whether the 1st Appellate Court properly re-evaluated the evidence before coming to its own conclusion except in the clearest of cases where the first appellate Court has not satisfactorily re evaluated the evidence, the appellate Court should not interfere with the decision of the trial Court. See Criminal Justice Bench Book 1st Edn. 2017 pages 283 and 284. See Also the case of **Kifamunte Henry v. Uganda SC Criminal Appeal No. 10 of 1997** where it was held:- **"On 2nd appeal the Court of Appeal is precluded from questioning the findings of the trial Court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support finding of fact,----------" [R. v Hassan Bin Said (1942) 9 (EACA] 62.**

Although the appellants filed separate Memorandums of Appeal they were in substance similar and will be resolved likewise.

Ground one was that the Justices of the Court of Appeal erred in law when they failed to judiciously evaluate the evidence of PW1 Mbalayo Araisa a single indentifying witness and wrongly confirmed the appellant's conviction.

The law on the evidence of a single indentifying witness has long been settled by the various decisions of this Court such as

Abdulla Bin Wendo v. R. [1953] EACA 166 and Abdalla Nabulere & Anor v. Uganda Criminal Appeal No. 9 of 1978 (unreported).

It was stated in **Abdulla Nabulere** (Supra) that **"where the case against an accused depends wholly or substantially on correctness of one or more identification of the accused, which the defence disputes, the Judge should warn himself and the assessors of the special need to 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 the 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 identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger.**

It was not in dispute that the beatings of the deceased took place during day/evening at around 6:30 to 7:30 p.m. according to the evidence of PW1. As soon as she was dropped from the motorcycle (bodaboda) at Kyerima trading centre she saw a group of people and she identified A_1 Kamya Abdulla who was very familiar to her. She saw A_1 move from the group of people and went near where she was standing and broke 3 sticks from the acacia tree and returned to the group. According to the record of

Appeal page 108 paragraph 4 and 5 she was standing about 20 meters from the group. She followed A_1 and one Katende told her that her brother the deceased had been arrested for stealing plates belonging to Florence. The deceased and one Florence were seated on one motor cycle. She saw A_2 (Tom) boxing the deceased. She saw Kamya A_1 beating the deceased with a stick all over the body and A_5 Kateregga hitting the deceased with a table and resulted in the deceased falling down. She stated that the deceased was asking them not to kill him. A_1, A_2, A_3, and A_5 continued to beat him and A_3 said they were tired of thieves. A_7 also was seen hitting the deceased with a bench he had pulled from the veranda. She was standing by that time at a distance of 8 meters from the scene of crime. She testified that there was electricity light in all the shops and one could see properly. She said the beating continued and though there were many people she managed to identify those she mentioned because she/knew them. After that she heard voices telling people to switch off the lights. She further testified that she saw A_3 picking a cycle from a hardware shop but A1removed it from him. When A_1 aimed at the deceased she didn't want to see what was going to happen so she ran way towards her home. Later A_6 Kazibwe Mutwalibu called her on her cell phone and informed her that her brother was dead. She had saved his number and Mutwalibu had her number too. A_1 Kamya stated in his examination in chief that there was light and he could see what was going on during the time the deceased was being beaten. He also said that when stones were being thrown he ran away to a safe place. He was at

the scene of crime at the time. The evidence of DW3 and DW2 was to the same effect that there was light.

The Court of Appeal re-evaluated and reconsidered the evidence of the prosecution and the defence and came to the conclusion that it was the appellants who committed the murder. The Justices of Appeal were alive to the law governing identification by a single witness and they applied the test correctly. The appellants A_1, A_2, A_3, A_5 and A_7 were properly indentified and put at the scene of crime by the evidence of PW1 and so the defence of alibi could not stand. See **Moses Bogere v. Uganda Supreme Court Criminal Appeal No. 1 of 1997.**

There was cogent evidence that the conditions for proper and positive identification devoid of mistaken identity existed and this fact was supported by the defence evidence of A_1 (there being light). The evidence was clear that the offence was committed during the evening at 6:30 p.m. when there was still the sunlight.

PW1 who was a single identifying witness knew the appellants very well and she observed them from a distance of between 5–20 meters. In circumstances we find that there was no mistaken identity. We therefore find no justification in faulting the Justices of the Court of Appeal. This ground must fail.

The 2nd ground had two limbs.

The first limb was the complaint that the Court of Appeal failed to exercise its inherent judicial power to consider manslaughter.

The Court of Appeal after re-evaluation of the evidence came to the conclusion that the appellants had a common intention to

beat and kill the deceased S. 20 of Penal Code Act provides, that **"when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of that purpose an offence is committed of such a nature that the commission was a probable consequence of the prosecution of that purpose each of them is deemed to have committed the offence"**.

And also in the case of **Uganda v. Beino Mugisha & Another Cr Session case No 64 of 1998** and **R. v. Okule& Others [1941] 8 EACA 80**, it was held, "**for the principle of common intention to operate it is not necessary to establish that the two first sat to agree on a special plan. Whether or not the accused was part of the common intention can be deduced from his or her presence at the scene of crime and his or her actions or failure to disassociate himself from the pursuit of the common intention. It is even irrelevant whether the accused person did physically participate in the actual commission of the offences or not. It is sufficient to show that he associated himself with the unlawful purposes"**

The evidence of the prosecution as already discussed in this judgment was that A3 said that they were tired of thieves, A_1 Kamya the LC Chairman stated that he had arrested the deceased several times. All the five appellants were at the scene of crime seen by PW1 and they did not deny it. They were seen beating the deceased with different objects including sticks. This resulted into the death of the deceased.

The trial Court and the Court of Appeal rightly found that there was malice aforethought and common intention by the participation of the appellants. So there was no room for consideration of manslaughter and therefore section 87 of TIA which gives Court discretion to convict an accused person for a minor cognate offence though she or he has not been charged with it was not applicable.

Ground 2 on Sentence

On sentence, the 1st appellant's ground of appeal was that the learned Justices of Appeal erred in law when they reduced the sentence from 40 years to 30 years only in total disregard to the mitigation and circumstances surrounding the case. Other appellants' memorandum of appeal on sentence was that the learned Justices of Appeal erred by imposing a harsh and excessive sentence of 30 years' imprisonment upon the appellants.

In sentencing the appellants, the trial judge stated:

> **All the mitigating factors for the sentence advanced by both counsel for the parties are considered. It is noted that the cases of such nature of mob justice are rampant in this area. Hence, the sentence to be passed must tend to kill or reduce or/and curb this ever growing criminal attitude not only in this jurisdiction but also the entire area in the whole of Uganda. People's lives are now at risk when a person is alleged of committing a small offence, the people in the area take the law in their own hands and in the name of mob**

justice. In fact such actions amount to injustice and violate the rights of people... From the facts of the case and the evidence on record, the deceased was brutally killed by the convicts and others still at large by stoning him to death as if they were killing a snake... The entire society and family of the deceased lost their dear one. They want the accused to be seriously punished so as to bring sanity in the entire society. There is also another vice which happened to the deceased according to the evidence of PW1, that is, a few days after the burial of the deceased, the deceased's body was exhumed, his head and limbs cut off by unknown people and taken away. The relatives endured yet another pain of burying the remains of the deceased. Each accused person has been on remand for a period of 2 years. From the way the offence was committed, the accused persons deserve death.

The trial judge sentenced each of the accused to 40 years' imprisonment. In reducing the sentence from 40 years to 30 years' imprisonment, the Court of Appeal stated:

We have considered the sentence of 40 years imposed on the appellants. It is true the offence was committed by the appellants and others that were not available for trial. The murder was committed in a brutal way as stated by the judge. One of the considerations that seems to have been considered by the judge was what

happened to the body of the deceased a few days after the burial of the deceased. The body was exhumed.... This is listed as number six among the reasons the judge considered for sentencing the appellants. This was not an appropriate reason to consider when sentencing since it all happened after the crime for which the appellants were on trial before court. The appellants were not all tried for those acts. There was no reason to consider them. We have considered the circumstances of this offence and the other issues raised in mitigation. We would in the circumstances of this case consider a sentence of 30 years appropriate for the appellants in this case.

In the case of **Ssekitoleko Yudah and others vs. Uganda**, SCCA No. 33 of 2014 this court held as follows:

An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive so as to amount to an injustice.

See also **Ogalo s/o Owura v. R** (1954) 21 EACA 270 and **R v. Mohamedali Jamal** (1948) 15 EACA 126.

In sentencing, a judge should consider the facts and all the circumstances of the case. Counsel for the appellants in his submissions stated that many of those who take part in mob justice do so without thinking. They do so because others are doing so. We agree. Furthermore, a mob in its perverted sense of justice thinks it is administering justice while at the same time ignoring the importance of affording suspects the right to defend themselves in a formal trial.

Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot ignore the fact that, in terms of sheer criminality, such people cannot and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood.

The crowd which assembled at the scene of crime, according to the evidence, consisted of about 50 people. Most of these people participated in beating the deceased to death. Police managed to arrest only a few who included the appellants as identified by the prosecution witness.

When we consider the sentences that were passed against those who committed similar crimes as individuals we come to the

conclusion that the two courts below did not properly review sentencing precedents of convicts of similar crimes. We think that if they had done so, they would have passed an appropriate sentence against the appellants. Considering the circumstances as above stated. We have considered, for example, the following cases so as to contrast. In **Susan Kigula vs. Uganda**, HCT-00-CR-0115, the convict secretly bought a panga, covered it in a polythene bag and hid it under the bed. At 2:30 a.m. while her husband was sleeping, she got the panga from under the bed and, with her maid holding the legs of her husband, cut his neck and arms with the panga, thereby killing him instantly. After the judgment in **Attorney General vs. Susan Kigula**, Const. Appeal No. 03 of 2006, which declared a mandatory death sentence to be unconstitutional, Susan Kigula was given a sentence of 20 years' imprisonment.

In **Akbar Hussein Godi vs. Uganda**, SCCA No. 03 of 2013, the convict shot his wife to death. He had earlier been threatening to kill her. The deceased had informed her relatives and friends that her life was in danger. The convict eventually executed his plan. He was convicted and sentenced to 25 years' imprisonment.

In **Rwabugande vs. Uganda**, SCCA No. 25 of 2014, the convict's cattle trespassed on the deceased's land and destroyed his crops. The deceased seized the accused's cattle and took them to his home with the intention of calling the local council chairman of the village to come and settle the matter. The appellant came to the deceased's home and demanded release of his cows and when

the deceased declined to do so, he and his herdsmen beat him to death. The trial court sentenced him to 35 years' imprisonment but on appeal this court reduced the sentence to 21 years' imprisonment.

With such precedents as indicated above, we are of the view that a sentence of 30 years' imprisonment against each of the appellants, considering the circumstances of this case, was not a proper exercise of discretion in sentencing. Discretion in passing sentences against convicts must be exercised judicially by taking into consideration all the factors circumstances of the case and precedents set by this court for similar offences. It is our view that the courts below did not do this.

Therefore, we consider this to be an appropriate case in which we should reduce the sentence. Accordingly the sentence of 30 years' imprisonment is reduced to 18 years' imprisonment for each appellant.

Dated this ..... day of 2018

Signed .....

Tumwesigye
Justice of the Supreme Court

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Kisaakye
Justice of the Supreme Court

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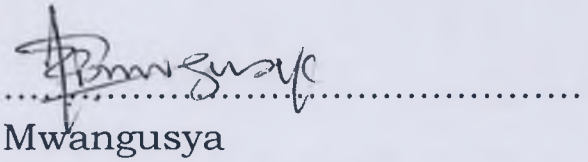

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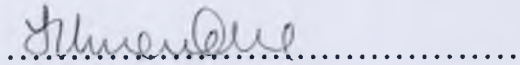

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