

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA**

CRIMINAL APPEAL NO 048 OF 2017

**CORAM: [MWANGUSYA, MUGAMBA, BUTEERA, JJSC; NSHIMYE,
TUMWESIGYE, AG. JJSC]**

BETWEEN

**1. OKELLO ALFREDA
2. ODONGO BOSCO
3. OCEN SAM OYUGI :::::::::::::::::::::::::::::::::::APPELLANTS**

AND

UGANDA ::::::::::::::::::::::::::::::::::: RESPONDENT

**[Appeal arising from the decision of the Court of Appeal in Criminal Appeal
No 28 of 2016 at Kampala presided over by Kenneth Kakuru, F.M.S. Egonda-
Ntende, Hellen Obura, JJA dated 07th day of November 2017]**

JUDGMENT OF THE COURT

Introduction

This is a second appeal. The three appellants were originally charged together with 3 others before the High Court with murder contrary to sections 188 and 189 of the Penal Code Act. The six were all convicted and sentenced each to 45 years imprisonment.

They appealed to the Court of Appeal.

The Court of Appeal acquitted 3 of the 6 and upheld the convictions against the present three appellants. The court quashed the trial court sentence of 45 years

imprisonment for being illegal. Instead it sentenced the appellants to 20 years imprisonment and then deducted from the sentence 2 years and 6 months for each appellant being the period spent on remand. In effect it ordered each appellant to serve 17 years and 6 months imprisonment from the date of conviction. The
5 appellants are dissatisfied with the Court of Appeal decision, hence this appeal.

According to the Memorandum of Appeal this appeal comprises only one ground which reads as follows:-

- 10 **1. That the learned Justices of Appeal erred in Law when they failed to re-evaluate the law relating to circumstantial evidence thereby coming to wrong conclusion and convicting the appellants.**

Background

The background facts as accepted by the two lower courts are the following:

15 The deceased, Abura Leo, lived in Aungu Parish in Oyam District, where he had a girlfriend named Harriet Akite. The appellants who were brothers to Harriet Akite, did not approve of the relationship. On 26th of August, 2013 the deceased went to visit the said girlfriend at about 11.00 pm. She was at her home and she allowed him into the house.

20 The 2nd appellant upon realizing that his sister had locked herself in the house with the deceased, came up to the door and demanded that she opens.

When she opened the deceased fled and was pursued by the 2nd appellant.
25 The 1st appellant caught him and restrained him. He called the 3rd appellant to bring a panga. The two were joined by the 2nd appellant. At this point one, Opio Emmanuel (PW2), who had accompanied the deceased to the

home of the girlfriend fled. The next day the deceased's body was found in a cassava plantation next to the homestead of the accused persons.

The 3 appellants and 3 others were arrested and indicted for the offence of murder. After trial they were tried and convicted by the High Court.

Representation

At the hearing of the appeal the appellants were represented by learned counsel, Mrs. Wakabala Sylvia, on state brief, while the respondent was represented by Ms. Tumwikirize Joanita, a State Attorney.

Both counsel filed and adopted their written submissions which we have studied together with the lower courts' records inclusive of the judgments. We have used all those in resolution of this appeal.

Submissions of counsel for the appellants.

Counsel for the appellants submitted that the Justices of Appeal had based their decision solely on circumstantial evidence given that there there was no eye witness to what happened in regard to the killing of the deceased on the night of the offence.

According to counsel the only person who was at the scene of crime was PW2. He said PW2 had testified that he was only able to identify the appellants and other people when they pursued the deceased but that he fled from the scene and did not witness the appellants when they assaulted the deceased.

Counsel submitted that although the appellants had asked for a panga before his flight from the scene of crime there was no evidence to show that the panga which was exhibited as having been found at the scene of crime belonged to any of the appellants or that it was the one used in the murder of the deceased. Counsel
5 further submitted that the Justices of the Court of Appeal relied on soda bottles that were found beside the body of the deceased but he argued that there was no evidence that the deceased had carried sodas for his girlfriend when he visited her house. Counsel contended that the police should have searched the houses of the appellants for evidence linking them to the offence. He said that police should
10 have investigated also when and from where the deceased had bought sodas. He added that police should have investigated and established that the panga belonged to the appellants. Counsel submitted that the Court of Appeal had relied on circumstantial evidence to convict the appellant but that they had not properly evaluated the evidence. He said that if they had done a proper evaluation they
15 would have come to a different conclusion. Counsel submitted further that there was no evidence at all on record to show the participation of the appellants. He prayed that this Court re-evaluates the evidence on record and goes ahead to quash the conviction and set aside the sentence against the three appellants.

20 **Submissions for the respondent**

The respondent opposed the appeal and submitted that the prosecution had proved the case beyond reasonable doubt and that the Justices of Appeal had rightly upheld the trial Judge's conviction of the appellants. He prayed that this Court should uphold the conviction.

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Counsel submitted that the Court of Appeal Justices had properly re-evaluated the evidence adduced before the trial Court. He added that they had properly

addressed themselves to the law of circumstantial evidence which they applied properly to the facts on the current appeal. According to counsel, there was evidence that the three appellants had formed a common intention of killing the deceased which they ruthlessly executed. He submitted that there was sufficient
5 circumstantial evidence justifying their conviction.

Counsel contended that counsel for the appellants submissions for further inquiries that police could have done are redundant as such investigations would not have changed the evidence already gathered by police. He added that the evidence
10 available was sufficient to prove the prosecution case. He argued that the issue of further inquiries was never raised at any of the lower courts.

Counsel prayed Court to uphold the decision of the Court of Appeal.

15 **Consideration by Court**

This is a second appeal. The appeal is only on one ground which is stated as below:-

1. **“That the learned Justices of Appeal erred in law when they failed to re-evaluate the law relating to circumstantial evidence thereby coming to a
20 wrong conclusion and convicting the appellants.”**

Although this ground states that the Justices of the Court of Appeal failed to re-evaluate the law relating to circumstantial evidence, upon careful reading of the written submissions of counsel for the appellant it is clear to us that she was not
25 faulting the Court of Appeal for failure to re-evaluate the law as stated in the Memorandum of Appeal.

In paragraph 2 of counsel's written submissions she stated:

"The learned Justices of Appeal rightly addressed their minds to the law on circumstantial evidence at page 37 of the record."

5 Counsel quoted the case of **Simon Musoke vs R [1957] EA 715** which the Justices of the Court of Appeal relied upon to state the legal principles to be taken into account before a Court can convict on circumstantial evidence. Counsel explained that she had no problem with the Court of Appeal on stating the legal principles in regard to basing a conviction on circumstantial evidence.

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We have assumed that the ground of appeal was on failure by the Court of Appeal to re-evaluate the evidence rather than the law. In any case what would be re-evaluated is the evidence and not the law. We shall proceed to resolve the appeal on that understanding of the ground.

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It was the duty of the Court of Appeal in this case as a first appellate court to re-appraise evidence, to re-hear all the material evidence before the trial Court as a whole and come to its own decision. See **Father Narsensio Begumisa and 3 others v Eric Tibebaga [2004] KALR 236**.

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Our duty as a second appellate court on the other hand was stated by this Court in **Criminal Appeal No.24 of 2015, Kamya Abdullah and 5 Other versus Uganda** (unreported) when the Court held:-

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"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 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.]

We have perused the Court of Appeal record and the record of the trial Court. We find that the Court of Appeal thoroughly re-evaluated the evidence that was available before the trial Court. It is after re-evaluating the evidence that the Court of Appeal quashed the conviction against appellants 5, 6 and 7 then before the Court. This is manifest in paragraph two on page 6 of the Court of Appeal Judgment.

The Court of Appeal correctly stated the law on circumstantial evidence to which counsel for the appellants concedes.

The Court then proceeded to analyse the evidence in respect of the remaining three appellants. The Court re-evaluated the evidence in respect of the three appellants from page 6 to page 9 of the Judgment.

We find that the Court of Appeal Justices elaborately re-evaluated the evidence that was adduced before the lower court and reached their own decision as they are

obliged to do. We shall not repeat the exercise of re-evaluation or re-state what they wrote in their judgment in the process of re-evaluation as we find that unnecessary. We are not obliged to do so.

5 Counsel for the appellants in her submissions goes ahead to list what she considers to be extra work that the police could have done in their investigations. We do not find this to be relevant for the appeal. What was relevant for this appeal on the basis of the only ground that was raised was whether or not the available evidence was properly re-evaluated and whether or not it was sufficient for the conviction of
10 the appellants. What other work police could have done falls in the area of speculation and that would not be relevant for the appeal.

We agree with the Court of Appeal that there was sufficient evidence which both the trial Court and the Court of Appeal properly evaluated and re-evaluated
15 respectively. The Court of appeal was correct in the re-evaluation and in arriving at the conclusions they did and thus convicting the appellants.

There was no appeal on sentence and we shall therefore not discuss it. We dismiss the appeal for the reasons stated above.

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We uphold the decision of the Court of Appeal and confirm both the conviction and sentences of the appellants.

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Dated in Kampala.....^{5th}.....day of December.....2019.

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Hon. Justice E. Mwangusya
JUSTICE OF THE SUPREME COURT

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Hon. Justice P. Mugamba
JUSTICE OF THE SUPREME COURT

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Hon. Justice R. Buteera
JUSTICE OF THE SUPREME COURT

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Hon. Justice A.S. Nshimye
25 AG. JUSTICE F THE SUPREME COURT

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Hon. Justice J. Tumwesigye
AG. JUSTICE OF THE SUPREME COURT