THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram; Katureebe CJ, Arach-Amoko, Opio Aweri, Mwondha, Tibatemwa Ekirikubinza JJSC)

CRIMINAL APPEAL NO. 61 OF 2015

BETWEEN

1. MUTATINA GODFREY
2. MUSHAIJA JAMES.....APPELLANTS

AND

UGANDA.....RESPONDENT

(Appeal arising from the decision of the Court of Appeal Criminal Appeal No. 55 of 2013 at Kampala delivered on the 17th October 2015 by Kavuma DCJ, Mwangusya, Kakuru JJA)

JUDGMENT OF THE COURT

The two appellants were aggrieved and dissatisfied with the decision of the Court of Appeal of Uganda and appealed to this Court against conviction and sentence. The 1st appellant Mutatina Godfrey had 3 grounds as follows:-

1. The learned Justices of the Court of Appeal erred in law, when they failed to properly re-evaluate the evidence adduced at the trial by relying on the uncorroborated evidence of a single identifying witness, hence occasioning a miscarriage of justice.
2. The learned Justices of the Court of Appeal erred in law and fact when they admitted inadmissible charge and caution statements of the appellants.
3. The learned Justices of the Court of Appeal erred in law and fact in imposing an illegal, harsh and excessive sentence of 36 years imprisonment without taking into consideration the period spent on remand and other mitigation factors.

He prayed that (a) this appeal be allowed

(b) the illegal, harsh and excessive sentence be set aside or in the alternative be substituted with a legal and fair sentence.

The 2nd appellant, Mushaija James' memorandum of appeal contained three grounds also as follows:-

(1) The learned Justices of the Court of Appeal erred in law when they upheld the 2nd appellant's conviction relying on the uncorroborated evidence of a single identifying witness, hence occasioning a miscarriage of justice.
(2) The learned Justices of the Court of Appeal erred in law when they failed to find that confession statements were inadmissible having found that they were irregularly recorded and obtained.
(3) The learned Justices of Appeal erred in law when they failed to consider all factors in mitigation of sentence as well as the period the appellant spent on remand thereby arriving at a sentence which was illegal and based on wrong principles of law.

He prayed that the appeal be allowed, conviction quashed and sentence set aside.

Background:-

The two appellants were indicted for murder contrary to sections 188 & 189 of the Penal Code Act together with a one Mayinja Sam who passed on before the trial. Both appellants pleaded not guilty. After a full trial, the court found that the prosecution had discharged its burden and the trial Judge convicted and sentenced each of them to 40 years imprisonment.

The appellants were dissatisfied with the conviction and sentence and they appealed to the Court of Appeal. The Court of Appeal confirmed the conviction, considered the period spent on remand and varied the sentence from 40 years imprisonment to 36 years imprisonment. The appellants were dissatisfied with the decision of the Court of Appeal, hence this appeal against both conviction and sentence.

Representation:-

Mr. Muwonge represented the 1st appellant while Mr. Sebugwawo represented the 2nd appellant on private brief. Ms. Akello Florence, Principal State Attorney represented the respondent.

Submissions:-

Counsel for the 1st appellant in his written submissions submitted on grounds 1 & 2 together. He submitted among other things that though the court of Appeal set out the law governing criminal appeals and the duty of a first appellate court, it reached a wrong conclusion in its judgment. It failed

to rightly execute its duty and as such, led to a miscarriage of justice by upholding the appellants' conviction and sentence.

He referred to various cases of this court, among them **Bogere and another Vs Uganda SCCA No. 9 of 1978** regarding the weight to be attached to the evidence of a single identifying witness.

On admissibility of charge and caution statements recorded by the same police officer, counsel relied on the case of **Ssewankambo Francis Vs Uganda SCCA No.33 of 2001** and submitted that the charge and caution statements of the two appellants had been recorded by one police officer Babu which contravened the rules as set out in that case.

On the 3rd ground, counsel argued that the Court of Appeal Justices did not take into account the period spent on remand by the 1st appellant. He prayed that the appeal be allowed, the conviction quashed and sentence set aside. He further prayed without prejudice to the above, that the sentence be substituted with a lesser one.

The 2nd appellant's counsel submitted that there was one witness who alleged that he identified the 2nd appellant but the Court of Appeal went ahead to confirm conviction and yet the trial Judge had not warned herself of the danger of convicting an accused person basing on evidence of a single identifying witness without corroboration. He faulted the Learned Justices of the Court of Appeal in that regard. He relied on the case of **Bogere Moses & another Vs. Uganda SCCA No I of 1997**. He argued that the single identifying witness was an old man of 75 years of age and it was possible that he just imagined that the same people he saw moving with Mutabazi earlier were the same people who were beating him. So there was a possibility of mistaken identity. He further relied on the case of **Abdullah Nabulere & Others v. Uganda Criminal Appeal No 9 of 1978** where Court held that a conviction based solely on visual identification evidence invariably cause a degree of uneasiness because such evidence can give rise to a miscarriage of justice, that there is a probability, that the witness though honest may be mistaken. He prayed that this ground be allowed

On the 2nd ground, counsel for the 2nd appellant submitted that the Court of Appeal found that the procedure used to record the charge and caution/confession statements, was irregular and the learned trial Judge

ought not to have admitted it for being null and void. That this should have led to the acquittal of the 2nd appellant. The trial Judge used the confessions to corroborate the evidence of the single identifying witness.

On ground 3 Counsel submitted that the Court of Appeal Justices did not reappraise all factors in mitigation and aggravating factors before sentencing. That the Court never made a finding whether the sentence was harsh or manifestly excessive. It only concentrated on the legality of the sentence. He submitted further that the Justices of the Court of Appeal erred in law in that the period the appellant had spent on remand was not taken into account while passing the 36 years imprisonment.

He prayed that the appeal be allowed, conviction quashed and sentence set aside. In the alternative, but without prejudice to the first prayer, he prayed that Court reduces the sentence and finds 20 years imprisonment appropriate in the circumstances.

Respondent's submissions

The respondent's Counsel opposed the appeal and submitted that the Court of Appeal was alive to its duty as a first appellate Court. Counsel submitted that the learned Justices re-evaluated the evidence and found that the confession statements were not properly recorded and could not be relied upon in evidence. However, they relied on the single identifying witness together with the circumstantial evidence. The Court of Appeal Justices agreed with the trial Judge that the principles as set out in the cases of **Bogere Moses & another v. Uganda Supra, Abdullah Bin Wendo & Another v R. [1953] EA at page 116 and Ronia v. Republic [1967] EA 583** had been applied correctly by the trial Judge . He further submitted that the conditions for proper identification of the two appellants (assailants) as brought out by PW4 existed. He supported the learned Justices of Court of Appeal that they came to the right decision when they found that the trial Judge properly evaluated the evidence by using other evidence together with that of a single identifying witness which was sufficient to sustain a conviction.

On the 2nd ground, Counsel for the respondent submitted that it was a misdirection when counsel for the 1st appellant stated that "the learned Justices of the Court of Appeal erred in law and fact when they admitted inadmissible charge and caution statements of the appellants. He argued that the learned Justices at page 6 of the judgment and page 16 of the record of proceedings stated that they found that although the confession statements were properly admitted in evidence after a trial within a trial, no value should have been attached to them given the irregular manner of their recording and that this ground succeeded in the Court of Appeal.

On the third ground, counsel submitted that the Court of Appeal Justices re-evaluated the evidence on the trial court record and reached a conclusion that the sentence it imposed was based on a wrong principle. The Court of Appeal found the sentence of the trial Court omnibus and invoked its powers under **Section11 of the Judicature Act** and **S. 34(2)(c) of the Criminal Procedure Code Act** , set it aside and substituted it with 36 years for A1 after considering the period spent on remand. He prayed that the appeal of the 1st appellant be dismissed as it is without merit.

Counsel opposed the appeal of the 2nd appellant and submitted that the same be dismissed as it was also devoid of merit.

Consideration of the appeal

This is a second appeal and the duty of the second appellate Court is to determine whether a first appellate Court properly re-evaluated the evidence before coming to its own independent decision. Except in the clearest of cases, where a first appellate Court has satisfactorily re-evaluated the evidence, the second appellate Court should not interfere with the decision of the first appellate Court. (**See Henry Kifamunte Vs Uganda (1992) EA 127**.

The memoranda of Appeal of both A1 and A2 had three similar grounds. The only difference was in the wordings but the substance was the same. We

have therefore considered the first and second grounds together and ground three separately.

The complaint as far as the first and second grounds are concerned was that, the Justices of the Court of Appeal like the trial Judge relied on uncorroborated evidence of a single identifying witness and upheld the trial Judge's decision of conviction of the appellants.

We studied the record of appeal including the trial Court proceedings and Judgment respectively. We considered the submissions of both counsel on the appeal before us. In their Judgment, they stated:

As a first appellate Court, we have the duty to re-evaluate the evidence and come to our own conclusion on all issues of law and fact. See Kifamunte Henry Vs Uganda (Supreme Court Criminal Appeal No.10 of 1997) and Rule 30(1) of the Rules of this Court.

The learned Justices quoted what the Trial Judge summarized in the Judgment as follows:-

PW3 saw A1 and the deceased move together after striking a deal when the deceased was offered to go and help A1 take his cows to Tanzania and he would be given a calf. That was at 6:00pm. At 7:00pm both of them surfaced at the compound of A2 where PW4 was visiting at 7:00pm, later they were joined by A2, A3, Tumusiime, Petero and Fred. PW4 had known A1 and A3 for over 10 years. They remained conversing and then left A2's home together. Later on PW4 heard the deceased whom he had known since childhood make an alarm that they are killing me. He moved near the place where the deceased was being assaulted and hid behind a thicket and with the help of moonlight he managed to see the persons assaulting the deceased with sticks. This evidence corroborates A1 and A2's charge and caution statements that they assaulted the deceased after which he died. This evidence goes beyond mere suspicion. That piece of circumstantial evidence alone

creates a lot of certainty that A1 and A2 participated in the killing of the deceased.

The other evidence is that of the single identifying witness PW4 who testified that he had known A1 and A3 for about 10 years and he saw them often. That he saw them in the company of Tumusiime, Petero, Mayinja, A1 and A3 at A2's compound and he saw them on that day 27th November 2009 at Mayinja's compound and after talking to the deceased who A1 had come with, they went away together then he later heard the deceased make an alarm and he responded by going near the place and when he went there he saw the same people A1 and A3 assaulting the deceased who was alarming and though there were thickets around the place where the deceased was being assaulted. The witness saw the participants clearly as there was moonlight and the distance between him and them was about 15-20 meters and though he stayed behind the thicket out of fear he was able to see them clearly and the place was short enough for him to-see that they were assaulting the deceased. (SIC)

The Court of Appeal quoted further what the trial court discussed in respect of the law relating to the evidence of a single identifying witness as follows:-

The law is that where it is known that the conditions surrounding correct identification were difficult, there is greater need for Court to caution itself. (See Abdullah Bin Wendo (supra) where it was held that where conditions surrounding correct identification were not favourable, the Court is required to look for other implicating evidence, direct or circumstantial pointing to the guilt of the accused persons. That even if there is no corroborating evidence subject to well known exceptions, it is lawful to convict an accused person upon evidence of a single identifying witness so long as the Judge warns herself or himself and the assessors of the possible danger of solely relying on the same. In this case, I did warn myself and the gentlemen assessors of the danger and I remain alive to it.

The learned Justices in the Judgment found that the trial court properly re-evaluated the evidence before coming to the independent decision they made. The Court of Appeal found no reason to fault the trial Judge. It considered the evidence of the prosecution to the effect that PW4 heard the deceased making an alarm, saying that he was being killed. The learned Justices found that this evidence was never challenged. PW4 had known the deceased very well before the incident. The Court found the visual identification reliable as the distance between PW4 and the appellants beating the deceased was close enough for proper and correct identification and besides, there was moonlight. The Court of Appeal noted further that PW4 was able to identify the deceased by voice as well, as the deceased was making an alarm while being assaulted by the appellants asking for help.

We are satisfied that the Court of Appeal was alive to its duty and we cannot fault it.

In respect to the complaint that the Court of Appeal accepted the inadmissible confession statements /charge and caution, which caused a miscarriage of Justice.

The learned Justices in the Judgment stated that they carefully studied the Court record and found that both appellants had willingly admitted the charges and had voluntarily thumb-marked their respective charge and caution statements and had no reason to depart from the findings of fact of the trial court.

The learned Justices further stated that their own re-evaluation of evidence on record led them to the same conclusion.

They nevertheless faulted the trial Judge for failure to reject the charge and caution statements because of the irregular manner they were recorded. Referring to the case of **Ssewankambo Francis and others Vs Uganda (supra)** where the Supreme Court observed that it was unsafe to rely on a charge and caution statement recorded by one police officer from two suspects who are charged with the same offence as was the case in the

instant case, the learned Justices of the Court of Appeal found that though the confessions were properly admitted in evidence after a trial within a trial, no value should have been attached to them given the irregular manner of their recording.

From the above foregoing, we agree with the Court of Appeal finding that without the confessions there was sufficient evidence as already referred to above adduced by the prosecution at the trial to convict both appellants for the murder of Godfrey Mutabazi. We therefore find no reason to fault it. Consequently, grounds one and two fail.

The third ground was on the illegality, harsh and excessive sentence of 36 years imprisonment without taking into consideration the period spent on remand and other mitigating factors.

According to the memoranda of appeal in the Court of Appeal, ground three was on the same issue as in this Court. It equally complained of the illegal, harsh and excessive omnibus sentence, among other things.

The learned Justices of the Court of Appeal faulted the trial Judge for sentencing both appellants in one omnibus sentence as she ought to have convicted the appellants separately. The ground was upheld and or allowed and the 40 years imprisonment was set aside.

The Court of Appeal invoked the provisions of **Section11 of the Judicature Act** which grants the Court the same powers as the trial Court to impose a sentence on each of them.

The Judgment of the Court of Appeal stated:

Taking into consideration the circumstances of the case and the manner in which the appellants killed the deceased together, the fact that murder is heinous offence, the maximum penalty of which is death, a severe sentence would meet the ends of Justice. On the other hand the appellants are both young persons who are capable of reform. We shall spare them from the death penalty.

Having taken into account the period of 3 years and 7 months the 1st appellant spent on remand, we now sentence him to 36 years imprisonment. Having taken into account the period the 2nd appellant has spent on remand, we now sentence him to 36 years. The sentences shall run from 30th April 2013 the date on which they were first sentenced.

It is clear from the above that the period the appellants spent on remand was considered and that is why the Court of Appeal reduced it to 36 years imprisonment.

We further note that according to submissions of counsel for the appellants, on this ground, counsel for the 1st appellant conceded that the Justices of Appeal indeed took into consideration the mitigating factors, like the period spent on remand but that they exercised their power wrongly and illegally when they sentenced the appellants to 36 years imprisonment. There was no explanation by counsel on how the Court of Appeal exercised the power wrongly and how the illegality came about. Be as it may, we take cognizance of this Court's decision in **Rwabugande Moses Vs Uganda Criminal Appeal No.25 of 2014**. It was decided that taking into account the period spent on remand by a Court is necessarily arithmetical.

We are also aware of Article 132(4) of the Constitution and the observations of Mulenga JSC (in good memory) in **Attorney General Vs Uganda Law Society, Constitutional Appeal No.1 of 2006** where he stated as follows:

Under the doctrine of stare decisis which is a cardinal rule in our jurisprudence, a court of law is bound to adhere to its previous decision save in exceptional cases where the previous decision is distinguishable or was overruled by a higher court on appeal or was arrived at per incuriam without taking into account a law in force or a binding precedent. In absence of any such exceptional circumstances a panel of an appellate court is bound by previous decisions of other panels of the same court.

However, this is a case which was decided on the 30th April 2013 by the High Court and on 17th October 2015 by the Court of Appeal before the decision in Rwabugande Moses Vs Uganda (supra).

In the case of **Osherura Owen & Tumwesigye Frank Vs Uganda Criminal Appeal No.50 of 2015,** while dealing with a similar issue, this Court decided as follows:

We note also that the appellants in this appeal were convicted and sentenced on 26th April 2012. The Court of Appeal rendered its decision on 20th April 2015. Needless to say it would be moot to suggest as the appellants appear to intimate that either the High Court or the Court of Appeal could possibly have taken cognizance of Rwabugande Moses Vs Uganda (supra) a decision rendered in 2017. Suffice it to say that the decisions of the two lower courts did not depart from the provisions of the Constitution.

It is common knowledge since the decision by this Court in **Attorney General Vs Suzan Kigula & 417 others Constitutional Appeal No.03 of 2006** which was to the effect that the death penalty is no longer mandatory that the next severe penalty is life imprisonment (rest of natural life of a convict) or longer term of imprisonment. We are of the view that a sentence of 36 years cannot be illegal, harsh or excessive considering that the severest sentence of murder is death. The same view/reasoning applies to the imposition of 36 years imprisonment for the 2nd appellant. This ground also fails.

Accordingly, we find no merit in the appeal and it is dismissed. The appellants should continue serving their sentences to completion.

Dated at Kampala this 10th day of January 2019

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KATUREEBE, CJ

JUSTICE OF THE SUPREME COURT

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ARACH AMOKO

JUSTICE OF THE SUPREME COURT

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OPIO AWERI

JUSTICE OF THE SUPREME COURT

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MWONDHA

JUSTICE OF THE SUPREME COURT

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TIBATEMWA EKIRIKUBINZA

JUSTICE OF THE SUPREME COURT