THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL FOR UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 45 OF 2010

ADONGO HADOLINE……APPELLANT
VERSUS
UGANDA……RESPONDENT

(Appeal from the Judgment of Hon Lady Justice C. A Okello at the High Court at Lira in criminal session case No. 89 of 2006)

CORAM:
HONORABLE JUSTICE S B K KAVUMA AG. DCJ
HONORABLE JUSTICE ELDAD MWANGUSYA, JA
HONORABLE LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

JUDGMENT OF THE COURT

The High Court convicted the appellant of murder contrary to ***Sections 188*** and ***189 of the Penal Code Act*** and sentenced her to 17 years' imprisonment. She appealed against both conviction and sentence.

The brief facts of the case as found by the learned trial Judge are that on July 3, 2006, at Abwal "B" Cell in Atigolwok Parish, Chegere Sub-County in Apac District, the appellant murdered Mudukayo Okello. Briefly, the circumstances of his death were that there were no eyewitnesses. PW5, Milly Akao, a resident of Abwal "B" village testified that the deceased was well known to her. He passed her home riding a bicycle on July 3, 2006. A few minutes later, she heard an alarm from the direction the deceased had taken. She answered the alarm and found the deceased with injuries on his head, neck, and a tear between

the thumb and the rest of the fingers. She talked to him and was present when PW1 and PW5 arrived at the scene.

The deceased was assaulted in a wetland. On hearing the alarm, PW1 William Agada ran to the scene. He found the deceased with serious injuries to the head and hand. He reported the matter to PW2, Mr. Victor Odongo, the Chairperson of the village, and was present when PW3, Mr. Jimmy Okullo, the Chairperson of the Local Council II recorded a statement from the deceased tendered in evidence as Exh. 1. PW3 confirmed that he went to the scene and talked to the deceased about the assault. He confronted the appellant with the information the deceased gave him that implicated her but she denied it. He advised the appellant to go to the sub-county headquarters for protective custody. The deceased died the next day.

The appellant proffered an alibi and called her daughter Judith Akullo (DW1) to account for her movements on that day between 3.00pm to about 7.30pm. Her account was that she and her mother the appellant were with one Mr. Alex Eleng (DW2) at that material time, harvesting groundnuts several kilometers away from the scene of crime. DW2 on his part testified that between 4.00pm and 7.30pm on that day, he was with the appellant and DW2 harvesting groundnuts and that when they returned, the appellant was arrested.

The parties did not contest the fact of the death of the deceased, or the fact that it was unlawful. The only questions the learned trial Judge had to determine were; who killed the deceased, and whether the person who killed the deceased did so with malice aforethought.

The memorandum of appeal contained four grounds of appeal, namely;

1. That the learned trial Judge erred in law and fact when she convicted the appellant on the basis of an unsatisfactory dying declaration.
2. That the learned trial Judge erred in law and fact when she disregarded the appellant's defense of alibi which was credible.
3. That the learned trial Judge erred in law and fact when she failed to adequately evaluate all the material evidence adduced at trial and hence reached an erroneous decision which resulted into a serious miscarriage of justice.
4. That the learned trial Judge erred in law and fact when she failed to consider the period the appellant had spent on remand whilst sentencing the appellant.

The appellant prayed that this Court be pleased to allow the appeal, quash the conviction and set aside the sentence. In the alternative, the appellant prayed that the sentence be judiciously revised downwards.

Mr. Henry Kunya, on state brief, represented the appellant. Ms. Tuhaise Rose, Principal State Attorney, represented the Respondent.

Submissions of the parties

Counsel for the appellant argued that; the evidence of the dying declaration was unsatisfactory and uncorroborated. There was no eyewitness account on how the deceased was assailed. The mental and physical condition of the deceased was not known. The cuts inflicted on the deceased were concentrated on the head. In the process, he could not have been able to identify who the assailants were. The time of the attack was also not established; identification evidence was therefore lacking. The

dying declaration was not corroborated in any way. The learned trial Judge erred to convict the appellant on the uncorroborated evidence of a dying declaration.

On the appellant's alibi, the learned trial Judge failed to evaluate the evidence and opted to disbelieve the appellant. The learned trial Judge also failed to evaluate the evidence of the conduct of the appellant. Had he done so, he would have found that other suspects murdered the deceased.

On sentence, learned counsel submitted that the learned trial Judge's remarks on sentence lacked clarity and were contrary to ***Article 23(8) of the Constitution***.

Counsel for the respondent submitted that; the Court should uphold the conviction and sentence as the prosecution had proved the case beyond reasonable doubt. The deceased reported to all who responded to his alarm that it was the appellant that had assaulted him. There was corroborating evidence of the dying declaration in that other evidence indicated that the appellant and the deceased knew each other. They had had disputes on land and the appellant had been ordered to vacate the land in issue. Even if the dying declaration was not corroborated, court could still convict on an uncorroborated dying declaration.

On the alibi, the learned trial Judge rightly rejected the alibi because the evidence put the appellant at the scene of crime. On sentence, it was neither harsh nor excessive.

This is a first appeal and the duty of this Court as a first appellate court is to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses

testify. (See ***Pandya v R [1957] EA p.336 and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997 and COA Criminal Appeal No. 39 of 1996.*** In the latter case, the Supreme Court held that;

"***We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."***

We have kept these principles in mind in resolving this appeal.

We shall resolve the grounds of appeal in the order in which the parties argued them.

The learned trial Judge found that there was abundant evidence to establish that the person who killed the deceased did so with malice aforethought. She found that the deceased suffered serious injuries on his forehead, left and right temporal zones, the neck and the right hand. The witnesses who saw the injuries testified that they must have been inflicted with a sharp weapon/instrument. The deceased told PW1, PW2 and PW3 that he was cut up with a panga (machete). The appellant does not contest this finding.

We are of the considered opinion that the learned trial Judge's finding in this regard is fully supported by the evidence of the injuries that were inflicted on the deceased and by the post mortem report which clearly corroborates the witnesses' evidence that the deceased sustained multiple cut wounds on the head and neck. The post mortem report further indicated that the cause of death was due to excessive bleeding due to

multiple deep cut wounds with a sharp object. This evidence also proves beyond reasonable doubt that the death of the deceased was unlawfully caused. We therefore see no error in this regard in her evaluation of this evidence.

The only issue raised by the grounds of appeal, based on the submission of the parties is who killed the deceased? This hinges on the dying declaration of the deceased and the alibi put forward by the appellant and the evaluation of the evidence by the learned trial Judge concerning these particular aspects.

The dying declaration

Counsel for the appellant has attacked the dying declaration as unsatisfactory and uncorroborated. He submitted that the learned trial Judge did not examine what amounts to a dying declaration.

The jurisprudence on what constitutes a dying declaration was stated in the case of **Oyee George Vs Uganda Court of Appeal Criminal Appeal No. 159 of 2003** in which the learned Justices quoted ***Section 30 of the Evidence Act (Cap 6 Laws of Uganda).*** That section governs the admission of dying declaration made by a person who is dead as to the cause of death. It provides as follows:

"Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant in the following cases-

(a) when the statement is made by a person as to the cause of his or her death, or as to any circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the statements are

relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and, whatever may be the nature of the proceedings in which the cause of his or her death comes into question."

We have closely examined the dying declaration made by the deceased. We have also closely scrutinized the learned trial Judge's findings. We consider that although the learned trial Judge did not examine the content vis-à-vis the law, this omission was not fatal as the utterances made by the deceased amount to a dying declaration (See Ex. P1 and its translation marked pages 11c of the record).

We consider that at pages 5 and 6 of her judgment, the learned trial judge properly directed herself on the law regarding the treatment and assessment of a dying declaration. The principles are that; such evidence has to be handled with great care; see ***Tindigwihura v. Uganda Criminal Appeal No. 9 of 1987***,***Oyee George v Uganda (supra) which quoted Jasinga Akum v R 1954 21 EACA Pg 334.*** Repetition to different witnesses is not a guarantee of the accuracy of a dying declaration as it may amount to mere consistency on the part of the deceased. (See ***Okethi Okale and others v. R [1965] EA 555*** and ***Mdiu Mande v. R [1965] EA 193).*** In practice, such evidence requires corroboration. We should add that in law, a court may convict on the uncorroborated evidence of a dying declaration, if circumstances exist that show that the deceased was not mistaken (see ***Mibulo Edward v Uganda Supreme Court Criminal Appeal No. 17 of 1995)***

We have carefully scrutinized the dying declaration. We consider that as it is the evidence that implicates the appellant, it must be examined along side the evidence of the alibi already set out in this judgment. The learned trial Judge took the same approach, at page 7 of her judgment. She considered the law

that; the court must give reasons for rejecting alibi evidence (see ***Sekitoleko v. Uganda [1967] EA 53***).

The learned trial Judge had this to say:

"Considering the prosecution evidence and that for the defense, I find the following facts common. The deceased and the accused were not strangers; they knew each other so well that the accused told court that he used to assist her financially from time to time. Because of their apparent good relationship, it is unlikely that the deceased would have falsely implicated her in the commission of an offence. The deceased had land disputes with several people in the village including the accused. However, he identified only the accused as his assailant to witnesses who answered his alarm and in his written statement. Having scrutinized the available evidence, I am convinced that as the attack on the deceased was before sunset, it was possible for him to observe the identity of his assailant, especially if that person was already known to him as the accused was. The deceased was not cut only once. He was cut several times. The attack must have taken time, giving the deceased opportunity to observe and identify his attacker."

The learned trial Judge then observed that evidence in support of the alibi was not consistent. Alex Oleng (DW2) testified that he had known the accused for sometime, but he did not know the name of the accused's daughter (DW2), with whom he harvested the accused's groundnuts in the evening of the attack on the deceased.

DW1 introduced herself as a niece of DW2, and therefore her name ought to have been known to DW2. The learned trial Judge further noted that the two also contradicted each other on the number of bicycles used to travel to the groundnuts field. She concluded that DW1 would not have forgotten the number of bicycles used if the trip had been made.

She further found that according to the testimony of DW2, two alarms were made that evening. The first alarm was made before the two set out for the groundnuts garden while the second one was made at the time the accused was arrested. Neither DW1 nor the accused answered the first alarm.

The learned trial Judge further considered the fact that the appellant had a motive to assault the deceased because of the land dispute between them that she lost. We agree with her findings in this regard as they are fully supported by the evidence.

On the condition of the deceased at the time he made the dying declaration, we note that PW1 found him sitting down and despite his injuries, he was talking well. PW1 talked to him and asked him what had happened. He answered that the appellant had cut him with a panga. The deceased even told him about the details of the land dispute that existed between them, of how he had won it, and the orders that were given to the appellant to vacate the land. The existence of the land dispute was confirmed by PW2. We consider that as the deceased was able to recount to PW1 the dispute in detail, he could not have been delirious or unconscious.

PW5 Milly Akao saw the deceased riding his bicycle and passing by her home and returning to his home, around 6pm on the day of the assault. Not long after he had greeted her and passed, she heard an alarm coming towards her home, which is only about 2 meters from the swamp where the deceased was assaulted. She saw the deceased coming towards her home, with blood flowing from his wounds on the head and neck in her home. He could walk and talk. He told her that the appellant had cut him. He also repeated to PW3 in the presence of PW5 that the appellant had cut her.

In his evidence PW2 stated that at the time he arrived at Ongola's home, the sun was still visible. He asked the deceased, who was sitting and not lying down, who had cut him. The deceased told him that it was the appellant. The appellant told him that he had been assaulted at 6pm. The deceased's condition started to deteriorate around 2 am.

We also find the testimony of PW1 credible when he testified that he and PW2 Victor Odongo the LC 2 Chairperson, Atigolwok Parish, asked the deceased whether he could walk slowly to the home of Ongola Richard that was nearby and the deceased was able to walk slowly there. PW1 called PW2, to the scene of crime, and it is he who recorded the first statement from the deceased. Subsequently, when PW3, the Chairperson of LC1 Abwal 'B' Village, Okullo Tommy arrived at the home of Ongola Richard, he recorded another statement from the deceased. The deceased repeated that it is the appellant who had assaulted him. The two LC Chairmen then selected people to go and arrest the appellant. He explained that two other people were arrested on the orders of the police. Police asked them to identify other people with who the deceased had land wrangles.

The defense did not challenge the above evidence, which we find credible. It is therefore our judgment that there was no error in the conclusion of the learned trial Judge that the deceased would have been able to identify his assailant, and name her, given the circumstances. This evidence dilutes the appellant's alibi, and places her at the scene of the crime. It is also curious that the appellant and DW2 heard the alarm, but did not respond. They allegedly stayed at the appellant's home and set off for the groundnuts field, unconcerned about the alarm.

We consider that the conditions favored correct identification. The events occurred before sun set. This fact is corroborated by PW2, who stated that at the time he arrived at the home of Ongola Richard, where the deceased had been taken, the sun was still visible. Moreover, this was sometime after the assault on the deceased. Furthermore, the evidence of DW2 offered further corroboration, in that he stated that he, the appellant and DW1 left for the groundnuts field after the first alarm had been sounded. The first alarm is the one that signaled the assault on the deceased. The trio of the appellant, DW1 and DW2 could not have left for the groundnuts field, about 3 kilometers away, if they could not see what they were going to harvest or where they were going.

Also, the appellant conceded that the deceased knew her well. In conclusion on this matter, we do not find any error in the learned trial Judge's reliance on the dying declaration, her disregard of the appellant's alibi, and her assessment of the evidence in this regard.

In our view, the grounds of appeal have not been substantiated. We therefore dismiss all three and uphold the conviction of the appellant for the murder of the deceased.

With regard to sentence, the appellant challenged what he called a failure on the part of the learned trial Judge to consider the remand period whilst sentencing the appellant. The court's assessment of the mitigating factors was rather short. One has to refer to the submissions of the parties to identify the mitigating factors that the learned trial Judge was referring to. In mitigation, the appellant prayed for mercy, based on the fact that she had children who needed her care and she had been in custody for four years. No sentencing hearing was held. The learned trial Judge then stated:

"The offence of murder is one of the most serious ones in the laws of Uganda as it carries the maximum sentence of death. There are mitigating factors in this case. It means that I shall not pass the maximum sentence. Be that as it may, court cannot condone murder. The sentence of the court has to reflect the seriousness of the offence."

It is not clear to us what mitigating factors the learned trial Judge had in mind. Suffice it to state that it is desirable for the trial court to hold a sentencing hearing and based on it; consider both mitigating and aggravating circumstances before passing sentence.

Furthermore, the record should clearly indicate that the trial Court has taken into account the period the accused spent on remand. This is a constitutional imperative. (See ***Article 23(8) Constitution***).

We therefore consider that as the learned trial Judge did not indicate that she took into account the remand period, the sentence she imposed is illegal. We therefore set it aside.

After taking into account the personal circumstances of the appellant, namely that she has young children, and that she had spent 4 years on remand, and the circumstances in which the offence was committed, we sentence the appellant to 16 years imprisonment.

Dated this 3rd day of December 2014

Signed by:

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HONORABLE JUSTICE S B K KAVUMA AG. DCJ

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HONORABLE JUSTICE ELDAD MWANGUSYA, JA

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HONORABLE LADY JUSTICE SOLOMY BALUNGI BOSSA, JA