THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CRIMINAL APPEAL NO.091 OF 2012

MPAGI GODFREY…… APPELLANT

VERSUS

UGANDA ……RESPONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA

HON. LADY JUSTICE FAITH E.K MWONDHA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

(An appeal from conviction and sentence of the High Court Holden at Kampala before Hon. Lady Justice Monica K. Mugenyi dated 10th day April of 2012.)

JUDGMENT OF THE COURT

This is an appeal from the decision of Hon. Justice Monica K. Mugenyi J, dated 10th April 2012 in which the appellant was convicted of the offence of Murder and sentenced to 34 years imprisonment.

This appeal first came up for hearing on 22nd November 2012, before Kavuma JA, (as he then was), Nshimye JA, and Arach Amoko JA, (as she then was). After the hearing of the appeal the Court reserved its Judgment to be delivered, on notice to the parties. However, before the Judgment could be delivered, one of the Justices on the Coram was elevated to the Supreme Court.

At that time Mr. Duncan Ondim appeared for the appellant while Ms. Betty Khisa appeared for the respondent. It therefore became necessary to constitute a new Coram, the current one.

When the appeal came up for re-hearing on 8th September, 2015 before this Coram, **Ms. Janet Nakakande** appeared for the appellant while **Ms. Jacquelyn Okui** appeared for the respondent. Both counsel sought and were granted permission to adopt the submissions made earlier at the first hearing. The appeal was then adjourned pending Judgment to be delivered on notice to the parties.

Brief Background

The appellant was indicted for the offence of Murder. It was stated in the indictment that on 18th May 2010 at Kalina Zone, Wabigalo, Makindye Division at about 1:00am, the appellant and others still at large unlawfully caused the death of Muhwezi Andrew.

The prosecution called 4 witnesses who testified against the appellant. Of the 4 witnesses only one, PW4, is said to have seen the appellant assault the deceased who was pleading for mercy.

The appellant denied having committed the offence and set up the defence of *alibi.* The learned trial Judge believed the prosecution case and rejected that of the appellant. The appellant was convicted and sentenced to 34 years imprisonment.

The appellant now appeals against both the conviction and the sentence on the following grounds.

1. ***That the learned Judge erred in law and fact when she rejected the defence of alibi by the appellant thus arriving at a wrong decision occasioning miscarriage of justice.***

2. ***That the learned Judge erred in law and fact in holding that the appellant had been properly identified thus arriving at a wrong decision occasioning miscarriage of justice***

3. ***That the learned Judge erred in law and in fact when she failed to properly evaluate the evidence thus arriving at a wrong decision occasioning miscarriage of justice***

4. ***That the learned Judge erred in law and in fact when she imposed harsh and excessive sentence thereby occasioning miscarriage of justice*****.** *(Sic)*

Ground 1

It is the appellant's case that the learned trial Judge erred in law and in fact when she rejected his defence of *alibi* and thereby arrived at a wrong decision.

It was submitted for the appellant that on the 18th of May 2010, when the deceased was killed, the appellant was not in Kampala, where the crime was committed. That he was in Fort Portal and did not return to Kampala until the 21st May 2010. That when he

came back, he reported himself to the Police Station nearest to his residence from where he learnt of what had happened while he was away.

He submitted that the learned trial Judge erred when she rejected the appellant's *alibi* as she had not properly evaluated the evidence.

In reply Ms. Khisa, the learned Assistant Director of Public Prosecution, opposed this ground and asked court to uphold the finding of the trial court.

She submitted that the trial Judge had properly evaluated the evidence and had believed the prosecution. That the Judge, having believed the eye witness PW4 and having been satisfied that the appellant had been positively identified as the assailant, the defence of *alibi* fell by the way side.

As a first appellate court we are required to re-appraise 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 ***Order 30(1) of the Rules of this Court.*** We shall now proceed to do so.

We have carefully studied the court record. The defence of *alibi* is set out by the appellant who is DW1. He states in his unsworn evidence as follows;-

"***DW1-MPAGI GODFREY (29)***

Was a resident of Kibuye. I was a special hire driver. Self employed. <u>On 18/5/2010 I left home at 8:00pm</u> and went to New vision Corporation. The company had hired me to take its Newspapers to Fort-portal. I was given the Newspapers and left for Fort-portal that night.

In Fort-Portal I gave the Newspapers to a man called Mpanga. This was on the morning of 19/5/2010. I then returned to Kampala. When I reached Kyenjojo town my car broke down. I first tried to get mechanic but failed so I decided to repair it myself. I failed to repair the car so I spent the night in Kyenjojo by the road.

Next morning on 20/5/2010 I got a mechanic from Kyenjojo town called George. He still failed to repair the car but advised me to drive slowly to Kampala. I drove slowly and reached Kampala on 21st May 2010 at 6:30 a.m. It was a Friday."

The appellant states that he left for Fort portal to deliver news papers on 18th May 2010 at 8: 00 pm. That he arrived in Fort Portal the next day on 19th May 2010. That he did not return to Kampala until 21st May 2010.

The prosecution evidence is that the deceased was killed around 1:00 am on 18th May 2010 by the appellant. The appellant, in his own words, did not leave Kampala until 8: 00 pm that day, 18th

May 2010. So he must have left 19 hours after the incident, since it took place at 1:00 am on the morning of 18th May 2010 and he left Kampala at 8:00 pm on the evening of that day. His *alibi* therefore collapses.

Even if this Court was to believe the defence that the appellant had left Kampala at 8:00 pm on the 17th May 2010, his evidence still remains unconvincing. The New vision news paper for 18th May 2010, a Tuesday, is unlikely to have been ready for delivery at 8:00p.m on 17th May 2010. If there was an error in respect of dates, no attempt was made to correct it, both at this court and at the lower Court. His evidence in respect of the dates was clear and consistent. He testified that he left Kampala on 18th May 2010 in the evening, was in Fort portal on 19th May 2015 and was back in Kampala on 21st May 2015. We have no basis for assuming there was an error. We infer untruthfulness in the appellant in this regard.

Be that as it may, an accused person is not under any duty to prove his /her *alibi*. The duty remains on the prosecution to disprove the *alibi* and to prove its case beyond reasonable doubt. The burden of proof never shifts See;-***Woolmington vs DPP 1963 A/C 462.***

In this particular case, counsel for the appellant concedes that the learned trial Judge properly set out the law relating to

identification by a single witness. We have not found it necessary therefore to reproduce that law.

The learned counsel contended that the learned trial Judge did not properly apply the law to the facts at hand. At page 6 of her Judgment, the trial Judge finds as follows;-

> ***"In the present case, given that PW2 was a single identifying witness this court is cognisant of the need for and duly warns itself of the need for special caution before relying upon her evidence for a conviction. Be that as it may, I do find that the conditions of identification were favourable for correct identification. Further, this court found the evidence of PW2 to be cogent and credible, and indeed observed the said witness to have had a very truthful demeanour. In contrast, the defence evidence presented numerous inconsistencies and contradictions. I shall cite but a few. First, the accused gave unsworn evidence in which he testified to having returned home from Fort Portal on 21st May 2010 at 6.30 am and was thereupon informed by a one Peter of the events that had allegedly unfolded at his home in his absence. However, DW2 - an unemployed housewife who would quite reasonably have been expected to be at home at that time of the day, testified that the accused left his home on 18th May 2010 and only returned to Kampala 6 months later."***

PW2, the single identifying witness, states as follows in her examination in chief.

"On 18th/5/2010, I was asleep then I hear people running. I had holiday students and grandchildren at home so I was worried that something had happened to them.

I went out of the house and started calling my grandchildren but couldn't see them. I found them at the neighbours home. There was shouting at his house. There were some sun burnt blocks built like wall but incomplete. I stood at that incomplete wall and saw someone being beaten. I saw accused beating the person. I couldn't see what he was beating the person with.

The boy they were beating said if I have committed a crime take me to police. I told accused not to take the law into his hands, but to take the young man to police if he was a thief.

The beating took place about 5 metres from where I was standing. Accused did not respond to my advice not to take the law in his hands. It was about 11:00 – 12:00 p.m in the night. I identified the accused using lights from a nearby house. I have known accused as a neighbor for about 4 years. I was at the scene of crime for about 30 minutes. I was trying to convince accused to leave the young man. I didn't see the

person they were beating but he was screaming and calling for his mother." *(Sic)*

This witness whom the Judge found truthful was consistent in her testimony and even in cross examination. She had known the appellant very well before the incident, for 4 years. She was only 5 metres away and could see what was going on. Although it was at night, the place was lit by an electric light from a nearby house. She could hear what the victim was saying clearly, confirming she was not far from where the scuffle was taking place.

We find that the learned trial Judge properly evaluated the evidence. She considered both the evidence of the prosecution and that of the defence on the material issues of fact. She was at all times aware of the danger of relying on the evidence of a single identifying witness. She went on to find that the evidence of PW2 was collaborated by that of PW3.

The trial Judge saw and heard the witnesses. She observed and noted their demeanor. We have no reason to fault her on her findings of fact.

The prosecution having put the appellant at the scene of crime, his *alibi* could not stand. The learned trial Judge correctly rejected it. We uphold her finding in this regard.

We find no merit in this ground and it fails.

Ground 2 has been disposed of during the resolution of ground one.

It also therefore also fails.

Ground 3 complains of the learned trial Judge having failed to properly evaluate the evidence thus arriving at a wrong decision occasioning miscarriage of justice. Apart from the said ground being too vague, we have subjected all the evidence to fresh scrutiny and we find that the trial Judge properly analysed and evaluated the same and arrived at correct conclusions

We accordingly find no merit in ground 3.

In respect of ground 4, the appellant contends that the sentence of of 34 years imprisonment is excessive and occasioned a miscarriage of justice.

We have heard the submissions of both counsel. We have also carefully perused the court record and the Judgment of the trial Judge. Taking into account all the circumstances of this case, we uphold the principle upon which this Court can interfere with the trial Judge's discretion in imposing punishment on a convicted person. The Court of Appeal for Eastern Africa had this to say on this principle in **James S/o Yoram versus Rex 1950 [EACA] 18 P.147**.

"It may be that had this Court been trying the appellant it might have imposed a less severe sentence but that by itself is not a ground for interference and this Court will not ordinarily interfere with the discretion exercised by a trial judge in the matter of sentence. Unless it is evident that the Judge had acted on some wrong principle or over looked some material factor" (Underlying ours)

In the above cited case, a sentence of 15 years on three separate counts of burglaries was upheld. In the case of **Ogalo versus Owoura [1954] 24 EACA 270** the same court reduced to six years a 10 year sentence imposed by the High Court on the appellant who had been convicted of manslaughter. The appellant in that case had killed the deceased upon provocation whilst both of them were drunk. In that case the appellant had hit the deceased with a sisal pole once on the head. The court followed the principle set out in **James versus R** (Supra).

The **Supreme Court in Kiwalabye versus Uganda Criminal Appeal No. 143 of 2001 (SC)** has also followed the principle set out in the above cited authorities. In that case, it held on this issue as follows;-

"The 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 a

trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle" (Sic).

We accept the submissions by learned counsel for the respondent that the learned trial Judge took into account all the mitigating and the aggravating factors before imposing the sentence of 34 years imprisonment. The Judge also took into account the time the appellant had spent on remand. We have no reasons therefore to interfere with her discretion as she did not act on a wrong principle nor did she overlook any material factor in mitigation.

This ground therefore fails.

In the result, we find no merit in this appeal which is accordingly dismissed.

Dated at Kampala this **7th** day of **October** 2015.

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HON. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

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HON. JUSTICE FAITH E.K MWONDHA
JUSTICE OF APPEAL

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HON. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL