THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CRIMINAL APPEAL NO.055 OF 2013

1. **MUTATIINA GODFREY**
2. **MUSHAIJA JAMES……..…….……..…… APPELLANTS**

VERSUS

UGANDA ……..……RESPONDENT

[Appeal from the decision of the High Court at Masaka before Hon. Lady Justice Margret C. Oguli Oumo dated 30/4/2013)

CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, DCJ

HON. MR. JUSTICE ELDAD MWANGUSYA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

This appeal arises from the decision of the High Court of Uganda at Masaka delivered by Hon. Lady Justice Margret C. Oguli Oumo J, on 30/4/2013, in which the appellants were convicted of murder and each sentenced to 40 years imprisonment.

Brief background

At the trial, evidence was adduced by the prosecution to prove that the appellants, on 27th November, 2009 at Sango Bay, Rakai District, murdered one Frank Mutabazi. The court relied on a charge and caution statement which had been retracted by the appellants.

It also relied on evidence of five prosecution witnesses. Both appellants gave unsworn evidence denying the charge of murder and called no witnesses.

They now appeal against both conviction and sentence on the following grounds;-

1. ***The learned trial Judge erred in law and in fact when she admitted confession statements that were inadmissible.***

2. ***The learned trial Judge erred in law and in fact when she failed to properly evaluate the evidence adduced thereby wrongly convicting the accused person.***

3. ***The learned trial Judge erred in law and in fact when she convicted the accused person jointly and passed an omnibus sentence which was illegal, ambiguous and excessive.***

On 10th September 2015, when the appeal came up for hearing, Mr. Ronald Muhwezi represented the 1st appellant while Ms. Jennifer Nakakande represented the 2nd appellant Ms. Jacqueline Okui represented the respondent.

At that time, all the parties sought and were granted leave to file written submissions, which they did. It is on the basis of those written submission that this appeal is being determined.

Ground 1

The gist of this ground is the appellant's complaint that the learned trial Judge admitted into evidence inadmissible confession statement.

It was submitted for the appellants that the charge and caution statements attributed to each of the appellants had not been made voluntarily. They were said to have both been recorded by PW5, Assistant Inspector of Police, one Babu, which procedure was irregular. That the appellants denied having made the statements contending that they were only forced to thumb mark already prepared statements.

Learned counsel contended that the learned Judge erred when he admitted the said statements even after a trial within a trial had been conducted because those statements had been recorded by one police officer. Counsel contended that this was an irregularity the trial Judge had failed to notice.

He contended further that the statements contained crossings and did not appear authentic and as such the trial Judge ought to have rejected them. He relied on the authority of ***Ssewankambo Francis and 2 others vs Uganda [SCCA NO. 33 of 2004.]*** (Unreported)

In reply, it was submitted for the respondent that the learned Judge had correctly admitted the statements having conducted a trial within a trial. That during the trial within a trial the prosecution had proved that the appellants had not been tortured contrary to what they had claimed.

On the crossings in the statements, counsel contended that the deceased's second name, Godfrey, was crossed from the statements because the appellants had referred to him only as Mutabazi.

On the issue of the statement having been recorded by one police officer, counsel contended that this issue had not been raised at the trial and that the statements were not identical as the facts in each of the statements had been narrated differently. She contended further that the fact that the statements, having been recorded by one police officer, did not cause any miscarriage of justice.

As a first appellate court we have a 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.***

We shall therefore proceed to do so.

We have carefully studied the Court record. We have found that the learned Judge, after conducting a trial within a trial, had come to the right conclusion that none of the appellants had been tortured. She had also correctly come to the conclusion that both appellants had willingly admitted to the charges and had voluntarily thumb marked their respective charge and caution statements. We have found no reason to depart from his findings of fact in this regard. Our own re-evaluation of the evidence on record leads us to the same conclusion.

However, it is common ground that the statements from each of the appellants were separately recorded by a single police officer Assistant Inspector of Police Babu. It is contended for the appellants that the procedure to record the statements was irregular and as such, the learned trial Judge ought to have rejected those statements on that account alone.

On this question of a single police officer recording charge and caution statements from two accused person the Supreme Court in the case of ***Ssewankambo Francis and other versus Uganda [SCCA No. 33 of 2001]*** had this to say at page 9-10 of the Judgment.

> ***"A part from the failure by the trial Judge to ascertain from the appellants whether the confessions could be admitted, there are other unsatisfactory features in the case which affect the voluntariness of these confessions. First, we think that it is irregular for one Police Officer to record alleged confession statements from two suspects charged with the same offence arising from the same incident. The temptation on the part of the policeman to use contents of statement to record a subsequent statement cannot be ruled out. In the instant case, we note that A.I.P. Otim (PV.) recorded the alleged***

confession of the second appellant after he had recorded a similar confession from the first appellant."

We take guidance from the observation made by the Supreme Court in the above case that it is 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 observed in the case of ***Ssewankambo Francis*** *(Supra)*, a perusal of the statements shows similarities which would be avoided if the statements were recorded by different officers.

We find, therefore, that the procedure used to record the statements was irregular. With all due respect to the learned trial Judge, we observe that she did not carefully consider this particular issue. She ought to have done so, even if it had not been brought to her attention. In the result we find 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.

This ground therefore succeeds.

Ground 2

The learned trial Judge in her Judgment relied on the evidence of PW4 who was a single indentifying witness. The incident is said to have taken place at about 8:00 pm in the evening at a place not far from the witness's home. The learned trial Judge found that the circumstances favoured correct identification and relied on that evidence in addition to other evidence to convict the appellants.

For the appellant it was submitted that the learned trial Judge failed to properly evaluate the evidence and that had she done so, she would not have convicted the appellants of the offence of murder.

It was contended that PW4, the only witness who identified the appellants as the persons who assaulted the deceased, gave contradictory evidence in Court.

That he had not told the whole story at the earliest possible time. When he did, he did not give the full story. He had at first only mentioned that he had seen the 1st appellant with the deceased and had not mentioned the 2nd appellant.

PW1 did not mention having recorded any information from PW4 regarding the death of the deceased. That the conditions were not favourable for correct identification.

Counsel faulted the trial Judge for having relied on the evidence of PW4, a single identifying witness, when the conditions for identification were difficult.

Counsel also contended that the investigating officer and another witness, Bitama Phoebe, the first person to link the appellants with the death of the deceased, were not called to testify and as such Court ought to have drawn adverse inference to the prosecution case.

For the respondent, it was submitted at length that the learned Judge had properly evaluated the evidence before coming to the decision that she did. While evaluating the evidence the learned Judge found as follows at page 6 of the Judgment.

"PW3 saw A1 and the deceased move together after striking a deal when the deceased was offered to go and help A1take his cows to Tanzania and he would be given a calf. That was at 6:00p.m at 7:00p.m 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 hide behind a thicket and with the help of moon light 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 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 Al 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 assaultin (sic) 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)*

At Page 7 she went on to discuss the law relating to the evidence of a single identifying witnesses as follows;-

> ***"the law is that, where it is known that the conditions surrounding correct identification were" difficult there's greater need for court to caution itself (see Abdallah 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's no corroborating evidence subject to well known exceptions it is lawful to convict an accused person upon the evidence of a single identifying witness so long as the Judge warns himself or herself 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 Judge relied on the authority of ***Abdallah Bin Wendo and Another vs Uganda (1979) HCB 79*** and ***Roria vs R (1953) EA 583.***

We have ourselves carefully looked at the evidence as set out on the trial court record. We have found that the learned trial Judge properly evaluated the evidence before coming to the decision that she did. We find no reason to fault her.

We are satisfied therefore, that even without the confessions, there was sufficient evidence adduced by the prosecution at the trial to convict both appellants for the murder of Godfrey Mutabazi.

The evidence by the prosecution that PW4 had heard the deceased making an alarm and saying that he was being killed was never challenged. PW4 had known the deceased well before the incident. The visual identification was reliable as the distance between this witness and where the scuffle was taking place was close enough for proper identification and as there was moonlight. In addition the witness was able to identify the deceased by his voice as the person who was being assaulted by the appellants. This same person's lifeless body was later found near the place he was calling help from.

This ground therefore fails as it has no merit.

In the result we uphold the conviction of each of the appellants on the offence of murder.

Ground 3

The appellant contends that the learned trial Judge erred in law and in fact when she passed on omnibus sentence against the appellants. That she ought to have passed separate sentences against each of them.

This ground therefore relates only to the legality of the sentences.

While passing the sentence, the learned trial Judge stated as follows at page 11 of her Judgment.

> ***"I sentence the convicts to 40 (forty) years imprisonment"***

With all due respect to the learned trial Judge, we find that she erred when she sentenced both appellants in one omnibus sentence. She ought to have convicted and sentenced each appellant separately.

On that account this ground is upheld.

The sentence of 40 years imprisonment imposed by the trial Judge is hereby set aside.

We now invoke the provisions of **Section 11** of the Judicature Act, which grants this Court the same powers as the trial court to impose a sentence on each of the appellants.

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 spent on remand we now sentence him to 36 years imprisonment.

The sentences shall each run from 30th April 2013, the date on which they were first sentenced.

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

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HON. JUSTICE S.B.K. KAVUMA, DCJ
JUSTICE OF APPEAL

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HON. JUSTICE ELDAD MWANGUSYA
JUSTICE OF APPEAL

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL