

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 08 OF 2012

AYIKANYING

CHARLES

.....

.....APPELL

ANT

VERSES

UGANDA.....

.....

.....RESPONDENT

*(Appeal from the decision of the High Court of Uganda at Arua before his Lordship
Hon. Justice Lameck N. Mukasa dated 1st & 01. 2012)*

CORAM: **Hon. Justice Remmy Kasule, JA**
 Hon. Lady Justice Hellen Obura, JA Hon. Justice
 Simon Byabakama Mugenyi, JA

JUDGEMENT OF THE COURT

This is an appeal against both conviction and sentence arising from the decision of His Lordship Lameck N. Mukasa delivered on 16th January, 2012, whereby the appellant, Ayikanying Charles was convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 25 years imprisonment.

The facts as found by the trial Judge were that the appellant and the deceased had a land dispute whereupon the court ruled in the deceased's favor. On the 15th day of December, 2008, the appellant's house was demolished by a group of court brokers and at about 4.00pm the appellant and other assailants attacked the deceased on his way from home and killed him. PW2 and PW3 who were the deceased's wife and granddaughter respectively testified that they saw the appellant stab the deceased and he died on the spot. They made an alarm but no one answered it. The appellant ran away after killing the deceased and PW3 ran to the LC to report the incident and later reported to police. The appellant was arrested from his brother in-law's place at Jupakeolu on 24th December, 2008. He was subsequently charged with murder.

The appellant was tried and convicted of the offence of murder. Being dissatisfied with the decision of the trial Judge, he appealed to this Court against both conviction and sentence on the following two grounds;

1. The learned trial Judge erred in law and fact when he convicted the appellant based on evidence that did not satisfy the standard of participation expected of the accused.
2. The learned trial Judge erred in law and fact by imposing a severe sentence of 25 years.

At the hearing of this appeal, Mr. Henry Odama appeared for the appellant on State brief and Mr. Sam Oola, Senior Principal State Attorney, appeared for the respondent.

Counsel for the appellant contended that the evidence of PW2 exonerated the appellant from the

commission of the offence. He argued that PW2's evidence was to the effect that she found Oroma beating the deceased. According to counsel, PW2 did not state that the appellant fully participated in beating the deceased as she only singled out Oroma. Counsel contended that much as the appellant in his evidence stated that he stoned the deceased that did not prove that he actually participated in stabbing the deceased.

Counsel further argued that, had the evidence been properly evaluated, the appellant would have been exonerated from participating in the offence. He invited this Court to look at the contradictions in the evidence of PW2 and PW3. Counsel submitted that while PW3 testified that the appellant was at the scene of crime and he was the first person to hit the deceased, PW2 in her evidence stated that Oroma was the first to hit the deceased. Counsel concluded, on this ground, that prosecution did not prove the ingredients of participation of the appellant beyond reasonable doubt.

On ground 2, counsel submitted that the appellant should have been convicted of manslaughter and sentenced to 15 years imprisonment since the prosecution failed to prove his participation fully. He cited the case of *Tumwesigye Anthony vs Uganda; Criminal Appeal No. 46 of 2012* where this Court considered the circumstances of the case and concluded that the sentence of 32 years imprisonment was harsh and manifestly excessive and accordingly set it aside. He urged this Court to take that authority into consideration.

Counsel for the respondent opposed the appeal. He supported both the conviction and sentence. He submitted on ground 1, that the evidence of PW2 did not exonerate the appellant but rather implicated him. Counsel argued that it was PW2's testimony that when she came out of the kitchen, she saw the appellant stabbing the deceased on the left side of his ribs. This, he argued, was corroborated by the evidence of PW1, the medical doctor, who found that there were several stab and cut wounds on the deceased's body including the left side of the ribs.

Counsel argued that there was no contradiction in the evidence of PW2 and PW3 because both of them testified that the appellant and the assailants had with them bows, arrows and clubs which they used to stab the deceased.

Counsel also submitted that the appellant's defence of self defence could not hold because he was not justified to attack the deceased since he was not in any danger, the deceased having fallen down. He prayed this Court to find that the prosecution proved the ingredient of participation of the appellant in the crime beyond reasonable doubt.

On ground 2, it was counsel's submission that the sentence of 25 years was appropriate, the trial Judge having taken into account both the aggravating and mitigating factors. He prayed that the appeal be dismissed.

The duty of this Court as a first appellate court is to re-evaluate all the evidence on record and come to its own conclusions as was held in the case of *Oryem Richard vs Uganda; Criminal Appeal No.22 of 2014 (SC)* .We have carefully studied the court record and considered the submissions of both counsel. We are also alive to the standard of proof in criminal cases and the principle that an accused person should be convicted on the strength of the prosecution case, and not on the weakness of the defence. See: *Akol Patrick & Others vs. Uganda; Court of Appeal Criminal Appeal No.60 of 2002*

The first ground of this appeal faults the learned trial Judge for convicting the appellant based on evidence that did not satisfy the standard of participation expected of an accused person. We have found this ground of appeal superfluous because we are not aware of any law that prescribes the standard of participation in a crime expected of an accused person. Counsel for the appellant himself did not address us on such standard. In conclusion of his submission, counsel stated that participation of the appellant in the offence had not been proved fully. That, in our understanding, is a standard of proof and not a standard of participation as the first ground of appeal suggests.

From the submissions of counsel, the only ingredient in contention is participation of the appellant. It is not disputed that the appellant had an encounter with the deceased as he (the appellant) admitted in his defence. He stated;

“.....I left to go to my father. I met my father on the way, when he had left his home about 100 meters.....he immediately started coming towards me.....when he continued coming closer to me I picked a stone and threw it at him and it landed on his neck. He fell down and I ran away as he was struggling to get up.....”

The medical evidence and the evidence of PW2, PW3, PW6 and PW7 all point to the fact that the deceased was stabbed with sharp objects. In his testimony PW1 (the medical officer) who carried out the post mortem examination upon the deceased's body stated;

“.....However, the most likely occurrence was a sharp knife and a club in view of the deep cut involved a club which caused the fracture of the mandibular (jaw).

”

We find this evidence consistent with the evidence of PW2 and PW3, who testified that they saw the appellant and the other assailants stabbing the deceased.

PW2 testified that when she heard Oroma quarrelling with the deceased, she came out of the kitchen and found Oroma beating the deceased. When Oroma kicked the deceased down the appellant and another assailant also arrived and the deceased tried to get up but Oroma kicked him again and he fell down in a cassava garden. She saw the appellant and the other two assailants bending on him and his neck had been stabbed. She saw them stabbing him. Odubi stabbed the appellant on the side of the eye while the appellant stabbed him on the left side of the ribs and Oroma cut him on the neck. Oroma pulled the knife from his pocket. He did not see what Odubi used to hit the deceased on the eye. It was her evidence that the appellant might have used a knife but they were all targeted on the deceased.

During cross-examination, PW2 confirmed that the appellant participated in assaulting the deceased.

PW3's evidence was to the effect that when the appellant and the other assailants arrived, the deceased sent her to go and call his brother called Eliya. She did not find Eliya and so she came back. The deceased picked his book and said he was going to the LC. He walked for just a short distance and they hit him with clubs. The appellant was the first to hit the deceased. Oroma pulled out a knife and stabbed the deceased on the neck and on the ribs. After the deceased's death, they found an arrow stick on the side of his ear. The appellant came with a bow and arrow. Oroma also had a bow and arrow. Odubi was holding a club. They assaulted the deceased to death and walked away. She was at the material time at a mango tree. The deceased was killed in a cassava field. PW3 stated that she was about 15 meters from the scene of assault.

From the above evidence, the appellant was properly identified as one of the assailants who assaulted the deceased to death. The evidence of PW2 and PW3 proved that they knew the appellant very well since they were both relatives of the appellant. PW3 is a niece to the appellant while PW2 is his step mother. Each of them was familiar with the appellant. The incident happened during broad day light at around 4.00 p.m. These facts were not challenged and no question of mistaken identification was raised.

In our re-evaluation of the evidence of the eye witnesses PW2 and PW3, we find that the appellant participated in assaulting the deceased to death. This evidence is corroborated by the evidence of PW1, PW6 and PW7 which proved that the deceased had deep cut stab wounds.

It was contended for the appellant that the evidence of PW2 and PW3 was inconsistent as relates to the person who first hit the deceased. The law is now well settled that inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be ignored if they do not affect the main substance of the prosecution's case, save where there is a perception that they were deliberate untruths. See ***ALFRED TAJAR VS. UGANDA EACA CRIMINAL APPEAL NO. 167 OF 1969*** and ***SARAPIO TINKAMALIRWE VS. UGANDA SUPR. COURT CRIMINAL APPEAL NO. 27 OF 1989***.

Counsel for the appellant submitted that PW3 tried to bring the appellant to the scene of crime and mentioned the appellant as the first person to hit the deceased whereas PW2 testified that it was Oroma who hit the deceased first.

While we note that there were some inconsistencies in the evidence of PW2 and PW3 as to who of the assailants first hit the deceased, we find that those inconsistencies do not go to the substance of the case. What is material in this case is the deceased's being assaulted to death by his assailants who included the appellant in execution of their common intention. The person who hit him first is immaterial.

Under the doctrine of common intention the appellant need not have participated in the offence for him to be found guilty. *See: Andrea Mutebi and Anor vs Uganda; Criminal Appeal 144 of 1975 EACA.* The common intention may be inferred from the accused person's presence, his/her action and the failure to disassociate oneself from the crime as was held in *R vs Tibulyenkaso Kiryandothers (1943) 10EACA51.*

For the above reasons, we find no merit in the appellant's argument on inconsistencies and we hold that they were minor in that they did not go to the root of the case and so the trial Judge was justified in ignoring them.

We also find the evidence of PW2 and PW3 on participation of the appellant further corroborated by the appellant's own testimony where he admitted to throwing a stone at the deceased. By that testimony, the appellant placed himself at the scene of crime and impliedly conceded that he participated in the offence although not in the manner described by PW2 and PW3.

There is also evidence on record that the appellant fled from the scene of crime after realising that the deceased was dead. The appellant himself admitted in his testimony that he ran to his brother-in-law's place and stayed there. The Supreme Court in the case of *Remegious Kwanuka vs. Uganda Criminal Appeal No. 41 of 1995*, observed that the disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence. This is because such sudden disappearance from the area is incompatible with innocence of such a person.

On the basis of that authority, we find that the appellant's the area of crime provided more corroboration to the other on his participation in the offence.

According to the evidence, the appellant possessed a club, a bow and arrow which he was seen using to stab the deceased. The act of stabbing the deceased by the appellant and his accomplices contributed to the severe wounds found on the deceased's body which caused his death instantly.

We note that the trial Judge in finding the appellant guilty of the offence of murder stated;

“Mr. Oyarmoi, counsel for the accused person, argued that though A1 admitted conflicting with the deceased, he acted in self defence when he threw a stone at the deceased. However, the findings at the scene do not support A1's testimony. There is no evidence of a stone found at the scene of death. The arrows were not found away from the spot where the deceased had fallen. The evidence shows that the deceased's body had stabbed or cut wounds. According to PW2 an arrow was found stuck at the side of the deceased's ear. According to PW6 and PW7 they recovered two arrows from the spot where the deceased's body had been recovered. Arrows shot out by the deceased should have been away from him and not on his body or at the spot where his body had fallen. I therefore do not believe A1's version that he acted in self defence. I accordingly find that the prosecution has proved beyond reasonable doubt that A1 participated in causing OVURU Niknea's death.”

The learned trial Judge, in our view, properly evaluated all the evidence on record and came to the correct conclusion that there was proof beyond reasonable doubt that the appellant participated in causing the death of the deceased. Our own re- evaluation of the evidence also leads us to the same conclusion. In the premises,

We find no reason to fault him on his finding. The first ground of appeal therefore fails.

On ground 2, it was contended for the appellant that the sentence of 25 years imposed on him was severe and should be reduced by this Court. Counsel for the appellant proposed that the sentence be reduced to 12 years imprisonment.

On the other hand, counsel for the respondent argued that the trial Judge having considered the mitigating factors, a sentence of 25 years was appropriate and he prayed that this Court upholds the conviction and sentence.

This Court has the power to reduce a sentence imposed by the lower court when that is found to be the appropriate thing to do. This happens in circumstances where the sentence imposed is manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. See *Kivalbye Bernard vs Uganda; Criminal Appeal No. 143 of 2001 (unreported)*

In the instant case, the appellant was convicted of the offence of murder which carries a maximum penalty of death. However, in the exercise of his discretion, the trial Judge sentenced the appellant to 25 years. We have perused the record and studied the judgment of the trial Judge and the reasons stated therein during sentencing. We agree with the reasoning of the trial Judge and the sentence imposed. We do not find any matter, circumstance or principle that the trial Judge ignored and as such, we find no reason to interfere with his discretion.

On the whole, we find no merit in this appeal. We uphold both the conviction and sentence and dismiss the appeal.

We so order.

Dated at Arua this 7th day of June.....2016.

Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

Hon.Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon.Justice Simon Byabakama Mugenyi

JUSTICE OF APPEAL