

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[Coram: Egonda-Ntende, Bamugemereire and Mugenyi, JJA]

Criminal Appeal No. 209 of 2015

(Arising from HCT-01-CR-SC-34 of 2013 at Fort Portal)

BETWEEN

Mumbere Samson Zakaliya=====Appellant

AND

Uganda=====Respondent

*(On appeal from the High Court of Uganda at Fort Portal (Okwonga, J.) delivered
on 18th February 2015)*

REASONS FOR JUDGMENT OF THE COURT

Introduction

- [1] When this appeal came up for hearing this appeal, learned counsel for the respondent, Mr Semalemba, Assistant Director of Public Prosecutions in the Office of the Director of Public Prosecutions, conceded the appeal, accepting that there was insufficient evidence to warrant the conviction of the appellant. We allowed the appeal, quashed the conviction, set aside the sentence imposed upon the appellant and ordered his release from custody. We promised to provide our reasons for the judgment and now do so.
- [2] The appellant was indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence were that the appellant on 8th day of August 2012 at Kibiriri village, in Bundibugyo District murdered Muhindo Zephania. He was sentenced to 26 years' imprisonment.
- [3] The appellant appealed against his conviction and sentence and set forth the following grounds of appeal,

‘1. That the Learned Trial Judge erred in law and in fact in holding that there was sufficient evidence proving the participation of the appellant in the commission of the offence he was indicted with and thereby convicted the appellant erroneously.

2. That the Learned Trial Judge erred in law and in fact in holding that the long standing grudge between the appellant and the deceased coupled with quarrels and threats was strong circumstantial evidence linking the appellant to the commission of the offence.

3. That the Learned Trial Judge contrary to Section 82 (3) of the Trial on Indictment Act failed to give reasons why he departed from the opinion of the assessors and this occasioned injustice to the appellant.

4. That the Learned Trial Judge sentenced the appellant to 26 years’ imprisonment which sentence was harsh and manifestly excessive in the circumstances.’

Brief Facts of the Case

- [4] The facts not contested are that the deceased was the father of the appellant. The deceased lived with the appellant’s step mother. Apparently on the fateful day the deceased left home taking his passion fruits to the market for sale. He did not return home on that day. On the following day it was reported that he was lying at a junction badly injured. He was picked and taken to someone’s home. They attempted to feed him on soup but died soon after.
- [5] The police were notified and arrived at the deceased’s home. They carried out a post mortem on the body and allowed the family to bury him. The appellant, who had gone to the deceased’s home on learning of his death, was arrested on the same day and did not attend at the burial of his father. The case for the prosecution relied basically on circumstantial evidence as related by PW3, the step mother of the appellant. It was contended that the appellant had had disagreements with his father over a piece of land and had threatened to kill the deceased. Initially, if the deceased sold the land. And then for failure to give it to the appellant. On the last day he was seen alive he left home with the appellant as they were quarrelling over the same as the deceased went to the market to sell his passion fruits.

- [6] In testimony on oath in his defense the appellant denied the existence of any disagreements with his father and that he had not seen him in the last 4 months. He did not know why his step mother was making up these allegations against him.
- [7] The learned trial judge, contrary to the joint advice of the assessors to acquit the appellant for insufficient evidence, convicted the appellant asserting that the assessors had advised him to convict the appellant. He believed the testimony of PW3 and found it corroborated by the testimony of PW4, holding that the appellant had expressed the motive to kill the deceased and must have done so. He rejected the alibi of the appellant. He sentenced him to 26 years' imprisonment.

Submissions of Counsel

- [8] Mr Bwiruka Richard, appeared for the appellant. He argued grounds 1 and 2 together. He basically contended that there was no direct evidence linking the death of the deceased to the appellant. The alleged threats in the circumstances of this case were insufficient to connect the appellant to the commission of the crime. With regard to ground 3 he submitted that the learned judge did not comply with section 82 (3) of the Trial on Indictments Act by failing to give reasons for departing from the joint opinion of the assessors. He prayed that this appeal be allowed and the conviction quashed; sentence aside and appellant liberated.
- [9] As already noted above the respondent conceded the appeal.

Duty of First appellate court

- [10] It is our duty as a first appellate court to evaluate the evidence and the law in the court below afresh and arrive at our conclusions of fact and the law, taking into account the fact that we did not have the opportunity to see and hear the witnesses testify. See rule 30 of the Judicature (Court of Appeal Rules) Directions, SI 113-10; Bogere Moses v Uganda [1998] UGSC 22 and Kafamute Henry v Uganda [1998] UGSC 20.

Analysis

- [11] As already noted above the evidence in this case is not direct evidence with regard to the participation of the appellant in the commission of the offence in question. It is circumstantial. We must remind ourselves that evidence of this nature must be considered carefully for it is easily liable to fabrication. In Katende Semakula v Uganda [1995] UGSC 4 the Supreme Court stated,

‘Another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore, necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See *Teper v. R.* (1952) A.C. 480 at 489; *Simon Musoke v. R.* (1958) E.A. 715 cited with approval in *Yowana Serwadda v. Uganda*, Crim. Appl. No. 11 of 1977 (U.C.A.) (unreported) and in *Amis Dhatemwa Alia Waibi v. Uganda*, Criminal Appl. No. 23 of 1977 (C.A.U) (unreported).’

- [12] We shall begin by setting out in full the testimony of PW3, the only evidence against the appellant.

‘PW3 Evans Biira female aged 50 years old famer, Kabongo village, Kibiriri parish, Rugoto sub-county Bundibugyo District.

I know the accused person. He is Mumbere Samson. Accused's father was my husband. Accused is my step son. His mother is Masikka. The late Kaswamba Zephania Muhindo was my late husband. He was also the father of the accused as well. Accused started claiming for the deceased's land saying the land belongs to his mother. He wanted to split the land and give part to his brother. He was claiming the land from his father. The very land my late husband gave me when I was married there. The accused started claiming that it belonged to his mother. The deceased said he was going to split that land and give part to the accused's brother one Bwambale Zakayo. The accused disagreed with his father (deceased) not to split the land and give part to his brother. He (accused) then warned that if he (deceased) sold that land he would kill him. From then on the accused become at loggerhead with his father over that piece of land. He kept on complaining to his father over the land since the father had refused to give him land he shouldn't split it and give to his

brother. The accused and deceased were not at peace with each other. That misunderstanding resulted into the death.

The accused then went up into the hills at night. This was on 07/08/2012, on Tuesday towards early morning went his father's place at Kabango and attacked his father over that land saying you wanted to distribute that land and give some to his brother. The deceased insisted on distributing that piece of land and giving part of it to accused's brother but accused refused to this proposal by his father. Accused then warned his father that today you will not return home from where you are going. This was at around 8:00 a.m on 08/8/2012. This was at my home while I was present and hearing all those exchanged with his father. The deceased then left for Buduka trading center, Kaleyaleya to sell his Passion fruits.

The deceased did not come back home that day so I presumed that he was with the accused since the accused had come for him that morning. The accused followed the deceased as they went together to Buduka trading center. Early morning on Wednesday, when Bwambale, accused's brother was going to Kabango, he found his father dead on the road at Kabango about a mile away. Bwamballe told me this at 7:00 a.m I started crying and rushed to the scene. We found him lying by the roadside with his foodstuff scattered around, i.e gnuts and cassava flour. I saw the body it had scratches in the neck, it was lying facing down, there was no blood on him. There was sign of his private parts having been pulled or squeezed the clothes were on him. I found the LC.I chairman Muhindo Yosana, Buresa Matapisi. We then carried the body home and he was buried on 09/08/2012. The doctor come home and examined the body and ordered for burial. Accused didn't attend the burial as he was already arrested. He was arrested on 08/08/2012 at 10: a.m I was not present when he was arrested. I was staying with my mother in another village, at Kasangi village. Accused was staying in Kiserunda village in Mirambi. It is about 4 miles away on the lower slopes of the mountains. We used to stay up the mountains.

Cross examination: I was present when accused warned and threatened his late father. I was with the deceased and the accused who had visited us. It didn't please me at all when accused said that land was for his mother. The deceased wanted to split the land between Bwambale and the accused. Bwambale share the same mother and father with the accused. Accused is the elder between the two. Accused was staying at Kisingule

village brought by accused's mother and the deceased. That is the very land which I had left before.

Accused vowed to kill the deceased at my home while I was hearing. L was present when he said this. This dispute took over 2 months before it resulted into death. Accused and deceased had a long standing grudge even before I shifted from the land where accused and his mother are now staying at Kiseringwe. Accused used to quarrel with his late father but he had never beaten him before. I saw him climb the hill at night as I was at home. I saw him at night as he climbed the hills. I also heard his voice. I didn't go with the deceased downhill. It was the accused who went with the deceased. Me I stayed at home. They went while still quarrelling. Accused is not married. He lives at home alone.

Re-examination: Nil.'

- [13] The other witness for the prosecution that testified, PW4, did not in reality implicate the appellant. His testimony in relation to the alleged disagreements between the appellant and his father was entirely hearsay and of no evidential value. It could not amount to corroboration of the alleged threats to kill the deceased as the learned trial judge held.
- [14] The appellant denied the offence and in his own defence testified on oath. We shall set out his testimony in full.

'DW1 Samson Mumbere Zakaliya male 24 years, former resident Kinsako village, Kasa nze sub-county Bundibugyo district.

I don't know about the allegation of killing the deceased in August 2012. I know PW3 Evanis Biira as my step mother Muhindo Yosani (PW4). I know him because his home is next to my father's home and I pass his home to go to my father's home. My father is dead. L was told that he had died. It is my aunt, wife to uncle Wilson Mugisha who came and told me that my father has died. I don't remember when she told me this. She is called Thungu. I was coming from my home and passing by her home that is when she told me that my father had died. I can't tell the time she told me this she told me this around 9:00 a.m in the morning. I decided to go there to his home with the other uncle. I went to this home in Kibiriri to how he died. I found it was true he had died. I went with uncles like Wilson Mugisha, Kapulepule. As we were still there the police came and examined the body and ordered for burial. He was later buried at

Kasangiri village. It is a family land not his land. I never attended the burial because they had already arrested me. I was arrested on 08/08/2012. I was arrested the very day police came and examined the body. I was arrested from the school playground at Kasanjiri. I was arrested at 12:00 p.m. I couldn't tell me why was arrested. They didn't tell me why I was arrested. I was taken to Bundibugyo police station. After three weeks I was taken to prison, Katojo Fort Portal. At police they didn't tell me why I was arrested.

Cross examination: They didn't tell me why I was arrested. I recorded a statement at police. They didn't read to me the charge why I was being held. I went to prison without knowing the charge. I am still waiting for court to tell me the charge. When I came to court the charge was read to me on 29/09/2014. Since August 2012, up to September 2014 they have never read to me the charge. They read the charge to me once. I can't remember. The charge was read to me on the day of my committed to High court. I went to the scene and found the body in the house of Malapisi his neighbor. That is when the police arrived-we had taken the body where we were going to bury that is when they put me on gun point and arrested me. I didn't run away at all. The road going to the burial place passes through that playground where was arrested from. In 2008, I have never quarreled with my father. I know PW3, as my step mother. Muhindo Yosam know him as a neighbor through where (sic) home I pass going to my father's home. That day I didn't move with my father.....I didn't see my father that day. I didn't see him the previous day as I used not to go there those days. I had not seen my father for 4 months. I don't know what my step mother was saying about my quarrel with my late father the previous evening grudges with Muhindo. I don't know why he said that against me. I have never killed my father.

Re-examination: My father was staying in Kibiriri village. He was staying with my step mother, Evanis Biira. I was staying Kisinko. I could tell the distance between Kisinko. Kibiriri is up the hills and Kisunko is on the lower side. My biological mother died. I was staying in Kisunko with my brothers and friends. I have never quarreled with my father.

Assessors: no questions.

Court: I have land at Kisunko which my father gave me. I have never fought for land. I think she was annoyed because my

father had given me land. I don't know about my father's death.
Evanis is not my real mother.

Mr. Orone: That is the close of the defence.'

- [15] It is clear that this was a case of 'an oath against oath' and of course only one version of the 2 contending versions could be correct.
- [16] Initially according to PW3 the appellant initially threatened his father that if he sold their land he would kill him. However, PW3 did not explain that the deceased had intended to sell the land in question or had ever threatened to do so for such a threat to logically arise. In any case she then embarked on another thread of threats whereby the appellant was demanding for land to be given to him and the father insisting that he will divide it up with between him and his brother which the appellant rejected. And as result on the fateful the appellant told his father that he will not come back alive from his journey. And they left together that morning at about 8.00am.
- [17] It also emerges from the testimony of PW3 that she and her husband had first lived on the land that the deceased had lived on with the appellant's mother but had to vacate the same at some point.
- [18] Considered alone the testimony of PW3 may well be made up given the 2 different strands of alleged disagreement. Was it a threat of sale of land or refusal to give the appellant land that the deceased and his mother had occupied or both? Or even if one believed PW3, is it not possible that the deceased may have been killed by other persons who wanted to rob money off him since that morning he had gone to the market to sell passion fruits?
- [19] Is it not odd that no other witness was called to testify in regard to this alleged 2 months old disagreement which was supposed to be quite public? The defendant denied on oath that he had any disagreement with his father as alleged or that he had uttered the threats as testified by PW3.
- [20] In our view the evidence of the alleged threat to kill the deceased by the respondent was far from established. It was denied by the appellant on oath. In the circumstances of this case for the burden of proof beyond reasonable doubt to be established there had to be some other evidence that would establish that indeed the appellant had made the alleged threats as was

claimed by PW3. No such evidence was adduced. The learned trial judge held that the testimony of PW4 corroborated the evidence of PW3. In our view it clearly did not. It was essentially hearsay on this point.

- [21] In our view we are unable to find that the alleged threats uttered by the appellant were proved. And it is questionable whether the threats if established in the absence of any other evidence pointing to the participation of the appellant would have been sufficient to displace the burden of proof cast upon the prosecution. We say so because in spite of the threats the perpetrators of the crime may well have been other persons, and not the appellant. No effort was made to establish what happened to the deceased once he went to the market to sell his passion fruit in the morning until evening or when he left the market. It is clear he must have sold his passion fruits. He may have been returning home when he was attacked.
- [22] No evidence was adduced to show that the appellant remained with the deceased all day. Or that he was the last person observed to have been with the deceased.
- [23] For the foregoing reasons grounds 1 and 2 were allowed, especially as they had been conceded by counsel for the respondent.

Ground 3

- [24] Under this ground the appellant complains that the learned trial judge erred in law and fact he failed to give reasons in his judgment for differing with the unanimous opinion of the assessors to acquit the appellant contrary to section 82 (3) of the Trial on Indictments Act. In a unanimous opinion by the assessors they advised the learned trial judge to acquit the appellant as they stated that the prosecution had failed to prove its case beyond reasonable doubt.
- [25] The opinion is fairly brief. We shall set it out.

‘16/2/2015

Accused present Mr. Orune Solomon for accused on state brief.

Mr. Makasi Alfred Mwiru-court clerk

Court: Assessors opinions received in court.

MS Sylvia Nyangoma : We shall give a joint opinion. The ingredient of death proved. The ingredient of unlawful death and malice aforethought not proved both of contradictions by PW3 step mother contradictions between PW5 and medical report no suffocation. Another contradictions is where PW5 alleges that deceased privates parts appeared pulled is not seen by the medical officer.

Regarding accused participation. Accused-deceased left together. Prosecutions' caseis circumstantial evidence not eye witness. The deceased had left in the morning. There is a very gap between the time of the scuffle and the time he was found died.

Accused denied the offence. Accused's defence is corroborated Muhindo Yosam. He had ever (*sic*) settled any dispute between accused. Court consider accused defence and accept it as truthful and find accused did not participate. There is.....doubt as to the accused's participation; doubt to be resolved in favour of accused.

MS Beth: That is our joint position.

Court: The matter shall come for judgment at 11:00 a.m.

Accused further remanded.

Signed

(Okwanga Vincent)

Judge'

- [26] Instead of acknowledging the foregoing as the position taken by the assessors, the learned trial judge stated thus in his judgment,

'The two assessors have unanimously advised me to find the accused guilty of murder contrary to sections 188 and 189 of the penal code Act. In full agreement with their unanimous verdict, I find that the prosecution has proved their case against the accused beyond reasonable doubt and I convict him of murder contrary to sections 188 and 189 of the Penal Code Act as charged.'

- [27] We were astounded that learned trial judge could make such an error.

- [28] The duty of the judge is set out in section 82 (3) of the Trial on Indictments Act. We shall set out the provisions of section 82 in full.

'82. Verdict and sentence

(1) When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors.

(2) The judge shall then give his or her judgment, but in so doing shall not be bound to conform with the opinions of the assessors.

(3) Where the judge does not conform with the opinions of the majority of the assessors, he or she shall state his or her reasons for departing from their opinions in his or her judgment.

(4) The assessors may retire to consider their opinions if they so wish and during any such retirement or, at any time during the trial, may consult with one another.


(5) If the accused person is convicted, the judge shall pass sentence on him or her according to law.


(6) If the accused is acquitted, he or she shall be immediately discharged from custody unless he or she is acquitted by reason of insanity.'

[29] The duty of the trial judge under section 82 (3) of the Trial on Indictments Act is to provide reasons why he has disagreed with the unanimous opinion of the assessors. This court has previously held that this duty is mandatory and failure to comply with it is fatal to a conviction. See Kazooba Godfrey and Anor v Uganda [2018] UGCA 67 and Acia Martin v Uganda [2023] UGCA 146. We are bound by the previous decisions of this court.

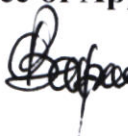
[30] In the case at hand not only did the learned trial judge not comply with this duty he wrongly stated that the assessors had advised him to convict the appellant. This was false. It was perverse. It rendered the verdict a nullity as it was grounded in a falsehood.

[31] For the foregoing reasons we allowed this appeal; quashed the conviction; set aside the sentence and ordered the immediate release of the appellant.

Signed, dated, and delivered at Fort Portal this 16th day of  2023



Fredrick Egonda-Ntende
Justice of Appeal



Catherine Bamugemereire
Justice of Appeal



Monica Mugenyi
Justice of Appeal