THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT JINJA

(Coram: Elizabeth Musoke, Barishaki Cheborion and Hellen Obura, JJA)

CRIMINAL APPEAL NO. 082 OF 2018

1. **KAKAIRE GODFREY**
2. **KIROME SULA::APPELLANTS**

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Iganga delivered on 18th July, 2018 in Criminal Case No.0159 of 2013 by Hon. Justice Michael Elubu)

JUDGMENT OF COURT

This is an appeal from the decision of the High Court sitting at Iganga by Michael Elubu, J wherein, the appellants were indicted and convicted of murder contrary to Sections 188 and 189 of the Penal Code Act and sentenced to 29 and 27 years imprisonment respectively. Dissatisfied with the decision, the appellants appealed to this court against both conviction and sentence on grounds that:

1. ***The learned trial Judge erred in law and in fact when he found that the appellants had been positively identified.***
2. ***The learned trial judge erred in law and fact when he found that the appellants` alibi had been destroyed.***

3. The learned trial judge erred in law and fact when he imposed manifestly harsh and excessive sentences against the appellants.

Briefly, the facts are that on the night of 9th January, 2013, the appellants together with a one Kirya Godfrey were among a group of persons who raided the home of one Magoola Rashid located at Buligi, Malongo in Mayuge District and left him dead after severally cutting him. The incident was witnessed by the wife of the deceased who testified as PW1. The appellants denied committing the offence and each of them raised a defence of alibi. Their respective wives testified as DW2 and DW4 in support of the said defences of alibi.

The trial court believed the prosecution case and ultimately the 2 were convicted and sentenced to 29 years and 27 years respectively whereas Kirya Godfrey was acquitted.

Being dissatisfied with the decision of the learned trial judge, the appellants appealed against both conviction and sentence.

At the hearing of the appeal, Mr. Henry Kunya appeared for both appellants on state brief while the respondent was represented by Nyanzi Macleana Gladys Asst. DPP holding brief for Vicky Nabinseke Asst. DPP.

The first 3 ingredients of the offence of murder namely; death, death being unlawfully caused and existence of malice aforethought were never contested by both parties. However, it was argued for the appellants that they never participated in the commission of the offence.

On ground one of the appeal, counsel for the appellant submitted that there was no credible evidence on record linking the appellants to the commission of the said murder. He contended that the only direct evidence or eye witness account linking the appellants to the commission of the said offence was given by PW1 Zilia Magola.

He further submitted that the learned trial judge only considered the identification evidence of PW1. That there existed difficult conditions under which it was done as highlighted herein below and wherein, the prospects of mistake or error were not completely ruled out. He argued that this was grossly erroneous for the most apt course of action would have been to judiciously consider all the relevant factors bound to affect the said identification before making an appropriate conclusion.

Further, that the learned trial judge also relied on the police witness statements recorded by PW1 Zilia Magola and which was admitted in evidence as D Exhs 1 and 2. That the very first police statement which was recorded in the morning hours following the said attack, PW1 only mentioned the names; Yose, Godfrey and Sula. That the additional statement was then recorded 2 weeks (14 days) later on 24/02/2013 and thus one is left wondering if PW1 actually knew the identity of the assailants and why she did not get their full details soon after the attack other than waiting for their arrest which was on 15/01/2013.

He also contended that the identification evidence of the appellants in relation to the said attack is so wanting and lacking that it should not have formed the basis for their arrest, arraignment, trial and subsequent conviction and resultant sentencing.

On ground two, counsel submitted that a close scrutiny of the record of appeal revealed the fact that both appellants not only denied having participated in the commission of the said offence but also adduced evidence of their respective wives in support of their defence(s) of alibi. That A1 had intimated that on the material day/night he was at home nursing a toothache, A2 on the other hand was at home following an exhausting day in the garden prior to going out to fish.

Counsel for the appellants submitted that the learned trial judge was alive to the law relating to the defence of alibi but that unfortunately, and to the prejudice of the appellants, his interpretation and the resultant application thereof was erroneous.

On ground three, Counsel for the appellants cited the case of **Kiwalabye Benard Vs Uganda, SCCA No. 143 of 2001** for the proposition that the appellate Court is not to interfere with the sentence imposed by the trial Court which has exercised its discretion unless the exercise of this discretion is such that it results into a sentence which is manifestly harsh and excessive or so low to amount to a miscarriage of justice.

Counsel further submitted that the sentence levied/passed against the appellants on that score alone, was premised on a wrong principle which lacked any factual, authentic and statistical basis. He therefore prayed that the appeal be allowed, the said conviction be quashed and the sentence set aside.

In response, counsel for the respondent cited **Rwabuganda Moses Vs. Uganda, SCCA No. 25 of 2014** for the preposition that it's the duty of the appellant court to reconsider all material evidence that is laid before the court while making

allowance for the fact that they neither saw nor heard the witnesses and come to its own conclusion on that evidence.

Counsel argued grounds one and two together and submitted that the trial judge extensively analyzed the evidence of participation of the appellant as well as the defence and came to a conclusion that the prosecution had proved its case beyond reasonable doubt that the appellant had participated in the murder of Magoola Richard. That the trial judge went into great details analyzing the evidence of participation and noted that in order to avert the dangers of mistaken identity, it was necessary for him to look at the circumstances under which the identification had been made. He averred that the evidence of PW1 Zilia Magola which stated that there was adequate light in the room, the assailants were right next to her bed and were all very familiar to her.

He also submitted that a close scrutiny of evidence adduced before the trial Court reveals that not only were the appellants positively identified by PW2 Magooli Harik but were also positively identified by PW1 Zilia Magola, the wife of the deceased who testified that on the fateful night, she and the deceased were woken up by the assailants, with the aid of the lamp in the room and torches held and flashed by the assailants she managed to identify among them the appellants whom she had known for eight years. PW1 also said the deceased had an ongoing land dispute with the appellants and other people in the villagers. PW2, Magooli Harik also testified that on the fateful night, he heard his step mother PW1 Zilia Magoola raising an alarm, and when he got out of his house which was just 15 meters away from the deceased's house, he flashed a torch at a group of about 10 people and he managed to identify the appellants among the

assailants. He was also aided by the moonlight to identify the appellants who were armed with pangas and were standing 13 meters away from him and that the assailants tried chasing him but he fled to a neighbor's house while raising an alarm which forced the assailants to run away. That PW3 the investigating officer also testified and confirmed the scene of crime as a small single-room grass thatched house and she confirmed that PW1 had identified the appellants among the assailants with the aid of the torch.

Counsel for the respondent submitted that there is consistency in the statements and testimonies of PW1 and PW2 about the identity of the two appellants as part of the group of the assailants who attacked and murdered the deceased. He cited **Opolot Justine & Another vs Uganda, Supreme Court Criminal Appeal No. 31 of 2014** for the preposition that a person cannot be in two places at the same time. The learned trial judge, having believed the prosecution witnesses and having found that the appellants had been placed at the scene of crime, had no option but to reject the appellant's alibi.

On ground three, Counsel for the respondent submitted that this Court as well as the Supreme Court have on numerous occasions decided that the appellate court should only alter the trial court's sentence if the said trial court acted on wrong principle, over looked some material factor, or the sentence is harsh or manifestly excessive.

She also submitted that before the trial court passed the sentence, it analyzed the mitigating factors raised on behalf of the appellants such as the fact that they were remorseful, were first time offenders, had large families and A1 was 42 years and concluded that this was however, a gruesome revenge killing since the

deceased was restrained in the presence of his wife and young before he was brutally cut with a panga. He therefore considered the 6 years that the appellants had spent on remand, and taking into account their respect ages, sentenced A1 to 29 years and A2 to 27 years.

She further submitted that considering the circumstances of this case, the sentence of 29 years and 27 respectively were appropriate. Counsel cited **Muhwezi Bayon Vs Uganda, CACA No. 198 of 2013**, for the preposition that the term of imprisonment for murder of a single person ranges between 20 to 35 years of imprisonment. He therefore prayed that this honorable Court upholds the conviction of the appellants, sustain the sentences passed by the trial judge and accordingly dismiss the appeal.

We have carefully studied the court record and considered the submissions of both counsel and the issues they raised. We are alive to the duty of this Court as the first appellate court to review the evidence on record and to reconsider the materials before the trial Judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. See: ***Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10*** and ***Kifamunte Henry vs Uganda; SCCA No 10 of 1997.***

The burden to prove a charge of murder against the appellant laid squarely on the prosecution and the guilt of the appellant had to be proved beyond reasonable doubt. The ingredients of the offence of murder that had to be proved at the trial were that the deceased is dead, that the death was unlawful, that

there was malice aforethought and finally that the appellant participated in the offence.

The first three ingredients were conceded to by the appellant as having been proved by the respondent beyond reasonable doubt and as such they are not being contested in this appeal.

In resolving issue one, the law with regard to identification has been stated on numerous occasions. In the case of ***Abdulla Bin Wendo & Another vs R (1953) 20 EACA 166*** the Court held;

> *"Although a fact can be proved by the testimony of a single witness this does not lessen the need for testing with greatest care the evidence of such a witness respecting identification especially when the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error."*

The need for greatest care as emphasized in the above case is not required in respect of a single eye witness only, but is necessary even where there is more than one witness where the basic issue is that of identification. This point was stressed in **Abudala Nabulere & Anor Vs Uganda, Court of Appeal Criminal Appeal No. 9 of I978 (1979)** in the following passage in the judgment:

> ***"....****Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the*

special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger. In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution...."

Bearing the above caution in mind, we have reappraised the evidence on record with a view of determining whether the trial Judge indeed failed to properly evaluate the same and came to a wrong conclusion in convicting the appellant. PW1 on pages 10-18 of the record of appeal stated that they were woken up by the assailants and with the aid of the lamp in the room and with the torches flashed at her by the assailants she managed to identify the appellants whom she had known for 8 years. This testimony was corroborated by the testimony of PW2, who stated that he heard his stepmother raise an alarm, when he got out

of his house which is just 15 meters away from the deceased's house he flashed a torch at a group of about 10 people and managed to identify the two appellants who were armed with pangas.

In the case of **Haji Musa Sebirumbi Vs Uganda, SCCA No. 10 of 1989.** The Supreme Court set clear principles concerning contradictions and discrepancies and stated as follows:

"the principle upon which a trial judge should approach contradictions and discrepancies in the evidence of a witness or witnesses are now well settled in this Country. They are stated .... In a well-known case of Alfred Tajar Vs Uganda, EACA Cr. App No. 167/ 1969 (unreported) and followed in many subsequent cases. The substance of these decisions is that in assessing the evidence of a witness his consistency or inconsistency; unless satisfactorily explained will usually, but not necessarily; result in evidence of a witness being rejected; minor inconsistencies will not usually have the same effect unless the trial judge thinks that they point to deliberate untruthfulness. Moreover, it is open to a trial judge to find that a witness has been substantively truthful, even though he lied in some particular respect. The principles apply to contradictions and discrepancies in the evidence of a single or more witnesses supporting the same case"

Counsel for the appellants submitted at page 3 of his submission that the evidence of PW1 was suspect and could not form the basis for the conviction of the appellants since the very first police statement in the morning hours following the said attack, PW1 only mentioned the names; Yose, Godfrey and Sula and the additional statement was then recorded two weeks later on 24/02/2013.

PW1 further testified that she had known the appellants for 8 years and they knew her well. This proved that she was familiar with the appellants. PW2 said that he flashed a torch at the appellants who were 13 meters away and there was also moon light that also aided him in identifying the appellant.

With regard to proximity between the witnesses and the appellants, PW1 testified that they were surrounded by the appellants.

Furthermore, any contradictions in the evidence of the two witnesses (PW3 and PW5) were not major, nor did they undermine evidence of proof of essential ingredients of the offence of murder. As pointed out by this court in **Twehangane Alfred vs Uganda, Criminal Appeal No. 139 of 2001**, regarding contradictions in the Prosecution's case, the law is that the Court will ignore minor contradictions unless it thinks that they point to deliberate untruthfulness. We are convinced that the inconsistencies are minor and in no way go to the root of the case.

Having subjected both the prosecution and the defence evidence to our own scrutiny in relation to the factors set out in **Abudala Nabulele and anor vs Uganda** (*supra),* we are satisfied that conditions favoring correct identification were present. There was adequate light coming from the lamp and the torch together with the moonlight that aided PW2`s identification. All the two identifying witnesses were able to properly see the appellants and identify them.

Grounds one of the appeal fail.

On ground two, Counsel for the appellants faulted the trial judge when he found that the defence of alibi had been destroyed. He submitted that the learned trial

Judge was alive to the law relating to the defence of alibi but unfortunately and to the prejudice of the appellants, his interpretation and resultant application of the relevant principles unsatisfying.

The appellants put up an alibi and gave sworn testimony in which they stated that at the material time of attack of the deceased, they were at home. They adduced evidence of witnesses to support their assertions and proved that they were not at the scene of crime.

Putting an accused at the scene of crime means proof to the required standard that the accused was at the scene of the crime at the material time. To do so the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused was at the scene of crime, and the accused not only denies it, but also adduces evidence showing that the accused was elsewhere at the material time it is incumbent on the court to evaluate both versions judicially and give reason why one and not the other version is accepted. It is a misdirection to accept one version and then hold that because of that acceptance per se the other version is unsustainable.

See: Bogere & Another Vs Uganda, CR. App. No. 1 of 1997.

Counsel for the appellants submitted that all the defence witnesses maintained consistency in their testimonies that the appellants were not present at the scene of crime. That they were in their respective homes, he said that A1 intimated that on that fateful day/night he was at home nursing pains of toothache, A2 on the other hand was at home following an exhaustive day in the garden prior to going out to fish.

DW2 the wife to A1, at page 38 of the record of appeal stated that her husband was home and sick. DW4 the wife to A2 at page 42 of the record of appeal also testified that on the 9th January 2013, they were home with her husband very tired because they had spent the previous day in the garden picking tomatoes.

On the other hand, Counsel for the respondent submitted that there was consistency in the statements and testimonies of PW1 Zilia and PW2 Magooli Harik about the identity of the appellants. He referred to the decision in **Opolot Justine & Another Vs Uganda, CACA No. 155 of 2009,** for the preposition that since the appellants had been positively identified, their alibi could not stand. This court in that case held that *"A person cannot be in two places at the same time"* The learned trial judge having believed the prosecution witnesses and having found that the appellants had been placed at the scene of crime the judge had no option but to reject the appellant's alibi.

In our view, the evidence referred to by the trial judge in the above paragraph puts the appellant squarely at the scene of crime and points irresistibly to the appellants` guilt and is incompatible with his innocence. We agree with the trial judge`s findings that the prosecution`s evidence placed the appellant squarely at the scene of crime and his alibi could not stand.

Grounds two of the appeal fails.

On ground 3 of the appeal, it was contended for the appellants that the sentences of 29 and 27 years imprisonment respectively imposed on the appellants were harsh and excessive. Counsel proposed that the appeal be allowed, the conviction quashed and sentence set aside.

On the other hand, counsel for the respondent argued that in the circumstances of this case the sentence of 29 and 27 years of imprisonment respectively by the learned trial judge were appropriate, uniform and consistent with the current sentencing ranges approved by this honourable court and prayed that this court upholds the conviction, sustains sentence and accordingly dismisses the appeal.

The principles upon which an appellate Court can interfere with a sentence were considered in numerous cases; such as ***Kiwalabye Bernard V Uganda Criminal Appeal No.143 of 2001, Jackson Zita V Uganda Supreme Court Criminal Appeal No.19 of 1995, James V R (1950) 18 E.A.C.A 147, Kizito Senkula V Uganda Supreme Court Criminal Appeal No.24 of 2001, Bashir Ssali V Uganda Supreme Court Criminal Appeal No.40 of 2003*** and ***Ninsiima Gilbert V Uganda Court of Appeal Criminal Appeal No.180 of 2010.***

In ***Ogalo s/o Owuora V R (1954) 24 E.A.C.A 270,*** Court held as follows:-

"The principles upon which an appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James V R (1950) 18 E.A.C.A 114 it is evident that the Judge has acted upon some wrong principle, or overlooked some material factor. To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."

The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 make provision of a starting point of a sentence of 35 years imprisonment for murder when death penalty is not imposed. In the instant case, the learned trial judge sentenced the appellants to 29 and 27 years imprisonment way below the starting point.

Regarding consistency and uniformity in sentencing, the Supreme Court has in **Mbunya Godfrey v. Uganda, Supreme Court Criminal Appeal No. 4 of 2011**, emphasized the need to maintain consistency while sentencing persons convicted of similar offences. Court stated that; *"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing."*

Guideline 6 (c) of the Constitution sentencing guide lines (Practice Directions) 2003 provides that every court shall when sentencing an offender take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances.

In **Adupa Dickens Vs Uganda, C.A.C.A. No. 267 of 2017**, where this court upheld the sentence of 35 years imprisonment and held that it was neither harsh, nor manifestly excessive to warrant the intervention of the Appellate Court.

In **Semanda Christopher & another versus Uganda, CACA NO.77 OF 2010**, the deceased was assaulted by the appellant and he later died in hospital. They

were sentenced to 35 years imprisonment for murder and on appeal, this Court upheld the sentence.

In **Bakubye Muzamiru and Another versus Uganda, SCCA No. 56 of 2015** cited with **Okello Goeffrey vs Uganda, SCCA No 34 2014** court stated that the sentences of more than 20 years imprisonment for capital offences cannot be said to be illegal because they are less than the maximum sentence which is death. Courts have powers to pass appropriate sentences as long as they do not exceed the maximum sentences provided by law.

Having regards to the circumstances of the instant case, we are of the strong view that the sentences of 29 and 27 years imprisonment meted out against the appellants were within the sentencing range of similar offences and squarely fall within the consistency and uniformity principle. The sentences were neither harsh nor excessive and we find no reason to fault the learned trial Judge in deciding to sentence the appellants the way he did. We uphold the trial court`s sentences of 29 and 27 years imprisonment against the 1st and 2nd appellants respectively.

Ground 3 fails.

This appeal is hereby dismissed.

We so order

Dated at ~~Jinja this~~ Kampala this 30th day of Jan 2023.

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HON. LADY JUSTICE ELIZABETH MUSOKE
JUSTICE OF APPEAL

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HON. MR. JUSTICE CHEBORION BARISHAKI
JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL