THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[*Coram:* Barishaki, Gashirabake & Kihika, *JJA*]

CRIMINAL APPEAL NO. 0052 of 2020

(Arising from the judgment of the High Court of Uganda [Batema N.D.A, J], in Criminal Session Case No. 0027 of 2014 at Soroti, delivered on the 18th day of September 2019)

ELUNGU MILTON EMETU ==========Appellant

VERSUS

UGANDA ==========Respondent

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted for the offense of murder contrary to sections 188 and 189 of the Penal Code Act Cap 120. The particulars of the offense were that on the 15th day of August 2013 at Ojareta village, Ogalai sub-county, Amuria District, the appellant with malice aforethought caused the death of Irieu Alusibera.

[2] On 17th September 2019, the learned trial Judge convicted the appellant. On 18th September 2019, the learned trial Judge sentenced the appellant to 50 years imprisonment. The judge deducted 6 years spent on remand and ordered the appellant to serve 44 years.

[3] The appellant appealed against the conviction and sentence. Two grounds of appeal were raised.

i) *That the learned Trial Judge erred in Law and fact when he failed to properly evaluate the evidence on record thereby concluding that the appellant had committed the offense of murder.*

ii) That the learned Trial Judge erred in law when he passed a manifestly harsh and excessive sentence of 50 years.

[4] The respondent opposed the appeal on the grounds that the learned trial judge properly evaluated the evidence thereby arriving at the right conclusion. Concerning the sentence, the respondent contended that it was within the range of sentences prescribed by the law and was neither harsh nor excessive.

Submissions

Appellant's Submissions.

[5] At the hearing of this appeal, Mr. Aliwaali Kizoto, Chief State Attorney in the Office of the Director of Public Prosecutions appeared for the respondent while Mr. Nappa Geoffrey appeared for the appellant as Advocate on state brief.

[6] Counsel for the appellant contended that there was no direct evidence linking the accused to the murder. He summarised the evidence of the state witnesses Pw1, Pw2, and Pw3 and stated that none of them saw the appellant commit the offense. He submitted that Pw4, the police officer who visited the scene and allegedly recovered the axe did not subject it to forensic examination to prove that the weapon was used to commit the offense and that no other person except the appellant used it.

[7] That the conviction was based on circumstantial evidence which was not reliable. Counsel cited the case of ***Byaruhanga Fodori V Uganda, SCCA No. 18 of 2005[2005]1 ULSR*** in which it was held that before a Court decides on a conviction based on circumstantial evidence, it must find the inculpatory facts incompatible with the innocence of the accused and incapable of explanation on any other hypothesis than that of guilt. In ***Tindigwihura Mbahe V Uganda, SCCA 009 of 1987***,

the Court noted that circumstantial evidence must be treated with caution and thoroughly examined because evidence of this kind can easily be fabricated. Counsel prayed that the conviction be quashed.

[8] In respect to the sentence, the appellant faulted the trial judge for not taking into account mitigating factors including the mental status of the appellant and the sentencing range for murder that starts at 30 years as provided in guideline 6(c) of the sentencing guidelines. He relied on the case of ***Aharikunda Yusitina V Uganda, SCCA No. 27 of 2015*** in which the Supreme Court substituted a sentence of life imprisonment that had been confirmed by the Court of Appeal with a sentence of 30 years imprisonment for murder.

[9] The appellant further relied on ***Nabende Kenneth V Uganda, CACA No. 23 & 149 of 2017*** where the Court of Appeal substituted a sentence of 60 years for an appellant who cut a 13-year-old into pieces with a sentence of 26 years imprisonment. Other cases cited were ***Manige Lamu Vs Uganda, Criminal Appeal No. 384 of 2017*** where the court substituted the sentence of 44 years imprisonment with 21 years, and ***Tusingwire Samuel Vs Uganda UGCA [2016] 53,*** where a sentence of life imprisonment was substituted with 30 years imprisonment. Counsel prayed that the sentence be set aside and substituted with a lenient sentence.

[10] Concerning the sentence, the appellant challenged the failure of the learned trial judge to take into account mitigating factors and to deduct the period spent on remand resulting in an excessive sentence. He cited the case of **Kiwalabye Benard Vs. Uganda, Criminal Appeal No. 143 of 2001** for the proposition that the appellate Court is not to interfere with a sentence imposed by a trial Court which has exercised its discretion on sentence unless the exercise of discretion is such that it results in a manifestly harsh and excessive sentence, or so low a sentence as to amount to a miscarriage of justice, or where court ignored to consider an important matter or circumstance which ought to be considered in passing a sentence or where a sentence passed is

wrong in principle. He therefore prayed that this ground be allowed and the sentence be reduced to 10 years' imprisonment.

Submissions for the respondent.

[11] The learned trial judge properly evaluated the evidence as a whole and in particular, the evidence of participation which was the only ingredient contested, and concluded that the appellant was guilty. Counsel for the respondent referred the court to the evidence of Pw1, Pw2, Pw3, and Pw4 on pages 10 to 14 of the record of appeal and argued that Pw1 who saw the appellant drag the deceased's headless body to the bush, and later the head, alerted people to the commission of the offense. Her testimony was corroborated by that of Pw2 and Pw3, and later Pw4 who recovered the headless body and with the help of the appellant recovered the head. Pw4 testified that the appellant admitted using an axe.

[12] Counsel for the respondent submitted that the appellant who opted to remain silent in his defense, attempted to act insane but the trial judge investigated and made a finding that the appellant could stand trial. Both the direct and circumstantial were evaluated by the trial judge on pages 29, 30, and 31 of the record of appeal. The respondent referred to page 32 of the record where the trial judge wrote: "***In absence of any defense to the murder of the deceased, this court finds the prosecution case proved beyond a reasonable doubt . . .. He planned the murder and executed it with precision. After cutting off the head he hid both the body and the head in the bush. He washed his axe clean and remained with no blood stain on his body."***

[13] All identifying witnesses knew the appellant and saw him in the close distance in broad daylight, at the scene of crime. The evidence irresistably points to the appellant and there were no other existing circumstances to destroy the inference of guilt.

[14] On sentencing, the respondent contended that an appropriate sentence is a matter of discretion for the sentencing Judge, and each case presents its facts upon which the Judge exercises discretion. He

referred to the case of ***Kyalimpa Edward V Uganda, SCCA No. 10 of 1995***. The respondent also cited the case of ***Kiwalabye Bernard V Uganda, SCCA No. 143 of 20021*** and ***Blasio Sekawooya V Uganda, SCCA No. 107 of 2009***, for the proposition that courts will only interfere with a sentence imposed by a trial court if it's evident that it acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive given the circumstances of the case. The trial judge looked at mitigating and aggravating factors on pages 22 and 23 of the record of appeal, reduced the 6 years the appellant spent on remand, and gave an appropriate sentence of 44 years. The respondent cited cases of murder where enhanced sentences were confirmed by the appellate court and prayed that the appeal be dismissed.

Court's consideration.

[15] The first appellate court must re-appraise the evidence at the trial court and come to its conclusion. See **Rule 30(1)(a) of the Judicature(Court of Appeal) Rules.** However, we have to bear in mind that we did not have the opportunity to see and hear the witnesses as they testified. See **Bogere Moses Vs Uganda[1998]UGSC 22**; **Selle & Another Vs Associated Motor Boat Co[1968] E.A 123, Pandya Vs R[1957]E.A336 and Kifamutwe Henry Vs Uganda, [1998]UGSC 20**

Ground 1

[16] We have reviewed the evidence in light of the submissions by both parties. The conviction was based on the evidence of 4 prosecution witnesses. But Counsel for the appellant argued that none of the witnesses saw the appellant commit the crime and that the circumstantial evidence relied upon was not credible. Pw1 testified that she was in the garden early in the morning when she saw the appellant drag the headless body of the deceased to the bush

near the borehole. He hurriedly got the head and dumped it where he had dumped the body, then hurriedly went away while carrying an axe. Pw1 called people. Those people came, arrested the appellant, and handed him to the police(Pw4) who had come to the scene.

[17] In cross-examination, Pw1 testified that she was about 60 meters from the appellant when she observed him pulling the deceased's headless body. She had seen the deceased alive that morning as the deceased went towards the borehole. Pw1 had known the appellant for one week, they used to meet at the Ojereta borehole. She denied telling the police that the appellant was mad. In re-examination, Pw1 testified that the deceased went to the borehole first before the appellant.

[18] Pw2 and Pw3 were plowing at about 7.30 am when they saw the appellant hurriedly walking with an axe. Pw3 had accommodated the appellant for one week. Pw3 directed his son, Pw2, to follow the appellant and see what he was doing. Pw2 followed the appellant and found him at the borehole. Pw2 saw blood near the borehole basement and asked the appellant what had happened. When the appellant did not respond, Pw2 feared and ran to where Pw1 was, nearby. That Pw1 informed Pw2 that the appellant had killed the old woman and hidden her body. As the appellant tried to move away, Pw2 raised an alarm saying the appellant had killed Illeu.

[19] In cross-examination, PW2 testified that he did not see the appellant cut the deceased. The deceased passed by Pw2 and Pw3, when they were plowing going to the direction of the borehole. Pw3 accommodated the appellant who had gone to him asking for food. The appellant had lived in the home of Pw3 for a week. Pw3 also testified that the deceased had also spent a night at Pw3's home before she was killed the next morning. When Pw2 reported back to the father, Pw3 reported to the LC1 chairperson and the Apeulai police post.

[20] Pw3 returned to the scene with police and found the appellant had been arrested and legs tied. Police(Pw4) re-arrested the appellant,

recovered the body from the bush, and with the help of the appellant recovered the head of the deceased from the bush too. The body was taken to Pw3's home and later to police. In cross-examination, Pw3 stated that he learned later that the appellant's mental instability was on and off. Pw4 testified that Pw3 recovered a clean axe from a millet garden near his home and the appellant admitted cleaning it. In cross-examination, Pw4 admitted that he did not lift fingerprints on the axe, and did not examine whether the footmarks at the scene belonged to the appellant. The appellant remained silent.

[21] The court noted on page 32 paragraph 1, that the appellant pretended to be mad and the court investigated his sanity and found the appellant capable of standing trial. The court further noted that the defense did not tender any evidence of medical reports to suggest that the appellant was under any mental disability when he committed the crime, and therefore court concluded that the appellant was of normal mental status. The trial judge further found "***In the absence of any defense to the murder of the deceased, this court finds the prosecution case proved beyond a reasonable doubt. All the acts of the accused and reactions at the scene of the crime prove that he was sober and knew what he was doing. He planned the murder and executed it with precision. After cutting off the head he hid both the body and the head in the bush. He washed his axe clean and remained with no blood stain on his body. When an alarm was raised he fled the scene of crime and threw away the axe. These were not acts of a madman."***

[22] The trial judge further concluded that when the police rescued the appellant from being lynched by the mob, the appellant was grateful and relieved, he complained of being tortured, and when the police assured him of safety he stopped crying. He was cooperative in leading police to recover the body and the head that had been hidden in different places. The judge held " ***that kind of memory and reaction is all but of a sane person. He was properly netted at the scene of the crime, the identification is not doubted at all.***

All identification witnesses knew the accused and saw him at close distances in broad daylight at the scene of the crime. He had no defense at all."

[23] Although an accused has a right to remain silent in criminal proceedings, the right is not absolute because an adverse inference can be drawn from that silence. In ***Sande Martin V Uganda, Criminal Appeal 278 of 2003***, the appellant had opted to remain silent in his defense. He appealed against conviction and the Court of Appeal held that "***the law is now settled that though the accused has no duty to prove his innocence, he must by cross-examination challenge the evidence of the prosecution that implicates him. Failure to cross-examine leads to the inference that the evidence is accepted as being true."***

[24] In this case, the prosecution witnesses were cross-examined. One consistent element in cross-examination was the mental status of the appellant. On Page 10 of the record, Pw1 denied telling the police that the appellant was mad. She stated that the accused was not known to be mentally sick. Pw2 testified in cross-examination on page 12 of the record that the appellant was not a madman. Pw3 testified that the appellant went to his home looking for food. He sheltered him for one night and the next day notified the LCs about the appellant's presence. LCs interrogated the appellant and allowed him to stay with Pw3 as they searched for his relatives. Pw3 testified during examination in chief on page 13 of the record that the appellant would at times "move away into exclusion and talk to himself." In cross-examination on page 14, Pw3 said "I have not said that he is not mad, even me now I can believe so". In re-examination, Pw3 said that the appellant's conduct changed whenever the appellant took alcohol.

[25] The prosecution witnesses were dealing with a stranger. Someone who wandered to Pw3's home and sheltered for a week. When the case first came up for hearing, the trial judge referred the appellant for psychiatric evaluation as reflected on pages 6 and 7 of the record. When the report was availed, Counsel on state brief and

the Prosecution consented to the discharge of the appellant. The court ruled on 8th February 2018 after considering the medical opinion on the mental status of the appellant on page 7: " . . . ***the accused is still suffering from mental disorders. I will not discharge him. Instead, I will order that he be transferred to Butabika Hospital for treatment. When he is healed, this court may make the necessary order for his discharge. The prison superintendent will give this court a report on 17/12/2018."*** The medical report from Soroti Regional Referal Hospital showed that the appellant has a major mental illness that had a gradual onset.

[26] In a surprising turn of events, the case was recalled following the issuance of a production warrant to Butabika Hospital in March 2019, thus a year after the referral. When the Resident State Attorney applied to have the appellant re-examined to ensure his mental status, the court rejected the application stating "***I am convinced he can stand trial."*** The Court on page 9 of the record also rejected Counsel for the appellant's plea that the appellant was insane. There is no report from Butabika Hospital as the judge had directed. There is no record of questions or responses upon which the trial judge concluded that the appellant was sane enough to stand trial.

[27] This court considered a case with similar circumstances in ***Turyatunga Jackson Vs Uganda, Criminal Appeal 118 of 2019[24/01/2024].*** The appellant had been convicted for the offense of murder and sentenced. He appealed against conviction and sentence. In the course of determining the appeal, the court established that the 1st trial judge, Katutsi J. had ordered a psychiatric examination of the appellant to see whether he was capable of following the trial. When Chibita J. took over the matter, Counsel for the appellant notified the judge of the inability of his client to hear or understand. The court read the charges to the appellant and he pleaded not guilty. The judge ruled that the appellant was fit for trial. He was tried and convicted. The appellate court held that ***failure to conduct an inquiry on the soundness of mind of the***

appellant before proceeding with the trial as had been ordered, rendered the trial and conviction a nullity. The trial was conducted in disregard of section 45 of the Trial on Indictment Act which mandates a trial court to inquire into the unsoundness of the accused where cause has been established.

[28] In this case, the initial report concluded that the appellant was mentally unsound. The trial Judge referred him to Butabika Hospital and made an order that the hospital avails a report. A year later, the trial judge issued a warrant for the production of the appellant and the trial proceeded without a report from Butabika Hospital, against the prayers made by the prosecution and defense, who maintained that the appellant may be mentally unstable. As indicated the record has no notes to determine how the trial judge concluded that the appellant was of sound mind, a departure from the medical report tendered by a qualified psychiatrist. The failure to conduct the inquiry rendered the trial and resultant conviction null because it offended the basic tenets of a fair hearing under Article 28 (1) and (3)(c) of the Constitution and disregarded section 45 of the TID.

[29] Where this court finds that the trial below was null, it would ordinarily order a retrial unless the interests of justice militate otherwise. The appellant has been in custody from 30th August 2013 to date, a period of over 10 years. The trial in the lower court was concluded six years after the appellant was arraigned, and the appeal was determined 4 years after it was filed. The failure of the trial court to interrogate the appellant's mental status means that his criminal responsibility was not established, and yet he was in incarceration. This delayed justice is counter to the rights of the appellant and bespeaks a gross miscarriage of justice.

[30] A re-trial would not serve the interests of justice. We quash the conviction of the appellant and set aside the sentence imposed on him. We order his immediate release unless he is being held on other lawful charges.

Dated at Kampala this ....22nd.....day of ....Feb.....2024.

Cheborion Barishaka

Justice of Appeal

Christopher Gashirabake

Justice of Appeal

Oscar J. Kihika

Justice of Appeal