THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI CJ, ODER, TSEKOOKO, MULENGA AND KATO JJ.SC)

CRIMINAL APPEAL NO. 20 OF 2001

BETWEEN

BIREMBO SEBASTIAN.....)
NYONZIMA MARIKO.....)
.....
.....
.....APPELLANTS

AND

UGANDA

RESPONDENT

(Appeal from the decision o f the Court o f Appeal (Mpagi- Bahigeine, Engwau and Kitumba JJ.A dated 1 June 2001 in Criminal Appeal No. 81 o f 1999)

JUDGMENT OF THE COURT:

This is a second appeal.

The two appellants were jointly indicted in the High Court with the offence of murder contrary to Section 183 of the Penal Code, and in the alternative, with robbery contrary to sections 272 and 273(2) of the same Code. Both appellants were convicted of murder and sentenced to death. No finding was made on the alternative count of robbery. They appealed to the Court of Appeal against conviction and sentence, but the appeal was dismissed.

The facts as accepted by the lower courts were that both appellants were villagemates. The deceased was an agent of one Senyonjo Richard (PW5), who was a coffee trader. On 7th June 1998, a day before the deceased met his death, he collected Shs. 45,000/=, a bicycle, a kaveera (polythene) and a weighing scale from PW5 for the purpose of buying coffee from the appellants. The following day the second appellant, Nyonzima Marko, went to the home of the deceased. He found the deceased at home with his mother, Namatovu Harriet (PW1) and his wife, Nannyombi Sarah (PW2). The second appellant asked the deceased to go with him to the home of the first appellant where the alleged coffee for sale was being kept. The deceased agreed and went with the money, bicycle, kaveera (polythene) and a weighing scale.

On the way, at around 11.00 a.m. a neighbour, Wiringuye Dorotia (PW3) met both appellants in the company of the deceased. PW3 saw the deceased with a bicycle, the polythene and a weighing scale. The deceased never returned home. The following day, the bicycle was found abandoned at the roadside. Two days later the body of the deceased was found buried in a shallow pit with one of his hands protruding. This was at the boundary of the banana garden belonging to the first appellant. It was this very spot which the first appellant mentioned to a police officer, Detective Constable Kule (PW6) at Bukya Police Post. From the information obtained from the first appellant, PW6 recovered a hoe which had been used in digging the grave, from where it was hidden behind the house of the first appellant. PW6 also recovered part of the money robbed from the deceased from a radio, on information received from the second appellant.

In their unsworn statements, both appellants denied the offence, and any involvement in the death of the deceased. The learned judge disbelieved their side and convicted them as indicated at the beginning of this judgement.

In their appeal to the Court of Appeal, the appellants who filed separate memoranda of appeal, challenged the decision of the trial judge on various grounds including misdirection on circumstantial evidence and error in finding that the appellants were 18 years of age at the time of commission of the offence.

The learned Justices of Appeal held that the circumstantial evidence was sufficient to prove the guilt of both appellants. They also held that on the basis of the expert evidence of Dr. Obuku which they accepted, the appellants were not below 18 years at the time of the commission of the offence.

In this court, the first appellant has appealed on three grounds, namely,

1. *The learned Justices o f Appeal erred in law to uphold the conviction o f the first appellant o f murder basing on circumstantial evidence.*

2. *The learned Justices o f Appeal erred in law to uphold a finding o f the trial court that the first appellant's alibi had been disproved.*

3. *The learned Justices o f Appeal erred in law to hold that the deceased was killed by the appellants jointly.*

On the other hand the second appellant has appealed on two grounds stated as follows:

1. *The Honourable Justices erred in law and fact when they relied on circumstantial evidence to confirm the conviction whereas such circumstantial evidence was inconsistent and did not point to guilt o f the second appellant.*

2. *The Honourable Justices erred in law and fact in confirming the sentence o f death as prescribed by law without carefully scrutinising the age o f the second appellant*

Mr Tayebwa, learned counsel for the first appellant submitted on ground one that the circumstantial evidence upon which the learned Justices of Appeal based their decision to confirm the judgment of the learned trial judge was insufficient. He argued that while the learned trial judge correctly directed herself on the law relating to circumstantial evidence as laid down in the case of *Musoke v R* (1957) EA. 715, she wrongly applied the facts of the case to the principles enunciated in that case. It was his contention that there were circumstances in the case which weakened the inference of guilt. These were found in the inconsistencies between the evidence of PW2, Nannyombi Sarah, the deceased's wife, and PW3, Wiringiye Dorotia, a neighbour.

Counsel's complaint was that whereas PW2 said that her husband did not take anything with him, PW3 said that the deceased had a bicycle, a kaveera and a weighing scale. Learned counsel conceded that there was no contradiction because PW2 had actually stated that when her husband was going away he did not take anything except the things the person he was working for had given him, namely a bicycle, a kaveera and a weighing scale.

The second contradiction relied on by learned counsel was between the evidence of PW3 and PW4. He submitted that whereas PW3 testified that the body was found the following day when a search was carried out, PW4 stated that the body was found on the second day of the search.

Mr Tayebwa submitted further that nothing was found in the home of the first appellant and that the evidence of PW6 should not have been admitted because it was an extrajudicial statement. It was his contention that the Court ought to have established whether the statement was voluntarily made.

Mr. Elem Ogwal, Assistant Director of Public Prosecutions, supported the decision of the Court of Appeal. He submitted that the first appellant's statement to PW6 was admissible because it led to the discovery of the hoe used to bury the deceased.

The objection to the admissibility of the extra judicial statement made by the first appellant to PW6 was not raised either at the trial or in the Court of Appeal. It seems it was an afterthought. The information given to PW6 by the first appellant was incriminatory but it was information leading to discovery of a fact and was therefore admissible under Section 29A of the Evidence Act notwithstanding that it was made to a Police Constable and was a confession.

As regards the cogency of circumstantial evidence against the first appellant, the Court of Appeal reappraised the evidence and came to the conclusion that it was sufficient. This is what the Court said,

> *"As regards the circumstantial evidence, Mr. Elem Ogwal submitted that the appellants were the last people seen in the company of the deceased alive. According to the Chairman LC1 of the area one Mukasa Charles (PW4) the second appellant admitted having sold a chisel (lander) and not coffee at shs. 2000 to the deceased on the fateful day. Whereas the 1st appellant had denied selling coffee or seeing the deceased on that day, Mr. Elem argued that his (appellants') conduct was not compatible with his innocence. He directed the search team to the forest whereas he knew where the body of the deceased was. Later on he revealed to D/C Kule (PW6) where the body was and gave details of how both of them killed the deceased by using a panga. The body was subsequently found where he stated (in his garden) and the wounds inflicted were exactly what he had described. He also revealed where a hoe was hidden. This was the hoe the appellants used for burying the body of the deceased".*

The Justices of Appeal concluded,

> *"After robing the deceased of his money, both appellants shared the money and the 2nd appellant told PW6 that part of his share was in a radio in his house. This information led to the recovery of the money. In the circumstances the Principal State Attorney submitted rightly, in our view that the appellants lied before Court and such lies supported the circumstantial evidence. He relied on the authority of Babvebuza Swaibu vs Uganda Criminal Appeal No. 99 of 1999 (CA) (unreported). In conclusion Mr Elem submitted that circumstantial evidence here was sufficient to prove the guilt of the 1st appellant. We agree with him. Ground 1 and 2 must fail."*

We are unable to fault the conclusion reached by the Justices of Appeal confirming the decision of the learned trial judge that the circumstantial evidence was sufficient to establish the guilt of the 1st appellant. We have been unable to find any co-existing factors which weaken the irresistible inference pointing to the guilt of the 1st appellant. We therefore, find no merit in the first ground of appeal which accordingly fails.

In the second ground of appeal, the 1st appellant complains that the learned Justices of Appeal erred in law to uphold a finding of the trial court that the first appellant's alibi had been disproved. Mr Tayebwa's contention was that the trial judge did not evaluate the evidence of both sides before disbelieving the defence of alibi as a pack of lies. Learned counsel submitted that the alibi should have been evaluated since the date of the deceased's death was not

established and the 1st appellant had pleaded that he was not at his home at the time the offence was committed.

In her judgment the learned trial judge considered the appellant's unsworn statement, and correctly directed herself on his defence of alibi when she stated,

> *"I have carefully considered the accused's alibi. However I believe that they have (sic) have been weakened or destroyed by the prosecution evidence by putting the accused at the scene o f crime."*

Although this complaint was raised in the Court of Appeal, it did not form a specific ground of appeal and the learned Justices of Appeal did not specifically consider it. In our view the Court of Appeal would have come to the same conclusion had it specifically referred to it in view of the overwhelming evidence against the 1st appellant. Ground two also fails.

The third complaint by the 1st appellant is that the learned Justices of Appeal erred in law to hold that the deceased was killed by the appellants jointly. Mr Tayebwa for the1st appellant submitted that apart from being seen with the deceased and the 2nd appellant saying that he was going to buy coffee from the 1st appellant, there was no evidence to prove that the two jointly participated in causing the deceased's death.

Mr Elem, for the State submitted that common intention could be inferred from the evidence of PW2 who stated that the 1st appellant collected the deceased from his home to go to the home of the 2nd appellant where they would sell coffee to him. It could also be inferred from the evidence of PW5 who testified that the deceased came and told him that he should give him money so that he goes to buy coffee from the two appellants. It was learned counsel's contention that there was a prior arrangement between the two appellants to kill the deceased.

The learned Justices of Appeal, after reviewing the evidence, came to this conclusion:

"It seems to us that this was a very well planned plot to rob and kill the deceased o f his money".

We entirely agree with that conclusion with the result that the third ground fails. Accordingly, we find no merit in the appeal against the conviction of the 1st appellant.

We now turn to the appeal by the second appellant. In his first ground of appeal, the 2nd appellant complains that the learned Justices of Appeal erred in law and fact when they relied on circumstantial evidence to confirm the conviction whereas such circumstantial evidence was inconsistent and did not point to his guilt.

Ms Musoke, for the 2nd appellant, submitted, that there were co-existing circumstances which weakened the finding that the 2nd appellant participated in the crime. It was her contention that since PW2 testified that the second appellant told the deceased that they would meet at the home of the first appellant, it is not clear whether the deceased left his home with the second appellant. Counsel submitted that the second co-existing circumstance was that the postmortem report did not show whether the body was decomposed.

We find no merit in this complaint. The two lower courts made two concurrent findings on the basis of the evidence of PW2 and PW3 that the deceased left his home with the second appellant and was seen moving in the company of the two appellants with his bicycle, weighing scale and a "Kaveera". He did not return home. We find no inconsistency between the evidence of PW2 and PW3. We are unable to disturb the two concurrent findings of fact on this point by the two lower courts.

As regards the postmortem report, learned counsel for the 2nd appellant should not complain about its contents since it was admitted by consent. There was no requirement, as Mr. Elem submitted, for the report to state the condition of the body. If the defence had wanted to question the contents of the postmortem or to clarify some of the findings or opinion of the doctor who performed the autopsy, they should not have admitted the report by consent, thus denying themselves the opportunity to cross-examine the doctor. In any

case, the fact whether the body of the deceased was decomposed or not at the time the autopsy was carried out, was not raised in the lower courts, and did not raise any doubt as to when and how the deceased died.

As we have earlier pointed out while considering the appeal by the 1st appellant, we are satisfied that the Court of Appeal properly re-evaluated the circumstantial evidence and came to the proper conclusion that the evidence was sufficient to support the conviction of the second appellant. Therefore the first ground of appeal of the second appellant fails.

The complaint in the second ground of the second appellant is that the learned Justices of Appeal erred in law and in fact in confirming the sentence of death as prescribed by law without carefully scrutinizing the age of the second appellant.

Ms. Musoke, for the second appellant, submitted that the second appellant was not 18 years when he committed the offence, and therefore the Court of Appeal was in error in confirming the sentence of death.

Learned counsel pointed out that the second appellant stated in court that he was 17 years at the time of the offence whereas the doctor who examined him testified that he was 19 years at the time of examination, at the time of trial. She observed that the Court of Appeal accepted the evidence of Dr. Obuku as

~~She observed that the Court of Appeal accepted the evidence of Dr. O~~buku as unchallenged and confirmed the trial judges' finding that the 2nd appellant must have been at least 18 years. On the other hand, Mr Elem for the respondent, maintained that the doctor testified that the second appellant was at least 19 years at the time of examination.

In dealing with the issue of the age of appellants, the learned Justice of Appeal stated,

> *"On ground 2, Mr Mpungu submitted that at the trial the 2nd appellant had put her age at 17 years. He was not challenged on that point. The doctor who was not certain put his age at 19 years. This was one year after the*

commission of this offence. Learned counsel argued therefore that the death sentence should not have been imposed. Learned Principal State Attorney reiterated his earlier submissions when dealing with the 1st appellant on this issue of age. Like the learned trial judge, we are of the view that an expert evidence of Dr Obuku John Brian, which was not challenged on this matter, should be accepted. In the circumstances ground 2 also fails."

It seems that the appellants were not medically examined at the time of their arrest, as they ought to have been to establish among others, their age. On 30 June 1999 after their conviction in court the previous day, they were examined by Dr Obuku John Brian. The doctor was called by the Court to assist in ascertaining the age of the appellants. The substance of his evidence was as follows:

"I have a Bachelors Degree in Medicine and surgery (MBChB) from Makerere University 1973. I have practiced for 25 years. In my duties I examine people at Police. Today I examined two people at the request of Police. The first one was Niyonzima Mariko. I examined him today in the morning 30th June 1999 at around 10:30 am. I examined him to establish his age as requested by police, Mubende. My examination indicated that his age is at least 19 years. He could be older than 19 but that is difficult to establish exactly. The criteria used in this case was dental development. The wisdom teeth or the 3 molars in a person do not come out before 18 years. They take about 1 year for all 4 to come out. So in this case Niyonzima Mariko had all his wisdom teeth fully come out. This means that they started coming out at 18. Today he should be at least 19 years."

As regards the second appellant, Dr Obuku stated,

> "The *2nd person I examined was Birembo Sebastiano. He was also sent to ascertain his age. Examination o f Birembo Sebastiano showed that he is at least 19 years o f age. I used the same principle again that is dental development. The last molar and the third molars are all out. That puts his age at least 19 years. He could be older than that."*

When the doctor was cross-examined he asserted that "There is no possibility that the age could be less".

The offence was committed on 8 June 1998. The appellants were examined on 30 June 1999 and found to be at least 19 years. If they were 19 years on 30 June 1999, they were less than 18 years by 22 days at the time the offence was committed. The medical evidence was not conclusive as to how older than 19 years they were at the time of examination. The doctor admitted that it is difficult to establish this fact.

The second appellant stated in his unsworn statement that he was 18 years at the time of trial. The doctor estimated his age to be at least 19 years. We think that the medical evidence did not establish beyond reasonable doubt that the second appellant was 18 years at the time he committed the offence. There was no other evidence relied on by the two lower courts to prove the age of the second appellant. We therefore find merit in ground two which succeeds.

The first appellant has not appealed against sentence, but we think that it would be an injustice to him if we did not consider the question of his age in view of the unsatisfactorily evidence on record regarding proof of his age. Although he stated, in his unsworn statement that he was 18 years at the time of trial, the doctor's evidence did not establish conclusively that he was 18 years at the time he committed the offence.

Under section 104 of the Trial on Indictments Decree 1971, a sentence of death cannot be imposed against a person convicted of an offence, if it appears to the court that at the time when the offence was committed, he was under the age of eighteen years. In lieu of the sentence of death, the same section provides that the court shall order such a person to be detained in safe custody it thinks fit, pending an order made by the Minister as to the suitable place of detention.

However, section 105 of the Family and Children Statute 2000 provides;

> *"(2) Where a child is tried jointly with an adult in the High Court, the child shall be remitted to the Family and Children Court for an appropriate order to be made if the offence is proved against the child.*
>
> *(3) In any proceedings before the High Court in which a child is involved, the High Court shall have regard to the child's age and the provisions of the law relating to the procedure of trials involving children".*

Section 95 of the Family and Children Statute provides for orders which a Family and Children Court may impose. They include;

> *"(g) detention for a maximum of three months for a child under sixteen years of age, and a maximum of twelve months for a child above sixteen years and in case of an offence punishable by death, three years in respect of any child."*

The appropriate orders to make in this case therefore are to remit this case to the Family and Children Court for the Court to impose appropriate sentence. In the meantime the appellants shall be detained in safe custody in an appropriate place.

In the result the appeal by both appellants succeeds in part. The appeal against conviction fails and is dismissed. The appeal against sentence succeeds, with orders as indicated above.

Dated at Mengo this 20th day of December 2002

B J Odoki

CHIEF JUSTICE

A H O Oder

JUSTICE OF THE SUPREME COURT

J. W. N. Tsekooko.

JUSTICE OF THE SUPREME COURT.

J N Mulenga

JUSTICE OF THE SUPREME COURT

C M Kato

JUSTICE OF THE SUPREME COURT