THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0030 OF 2014

(Coram: Katureebe; CJ, Tumwesigye; Arach-Amoko; Mwangusya; Tibatemwa-Ekirikubinza; JJ.S.C)

Between

1. KATO JOHN KYAMBADDE .....APPELLANTS

2. BUKEERA GEOFREY

And

UGANDA .....RESPONDENT

(Appealfrom the decision of the Court of Appeal of Uganda at Kampala before Nshirnije, Buteera and Kakuru JJA) on the 1st day of July 2014 in Criminal Appeal No.0190 of2009)

JUDGMENT OF COURT

This is a second appeal from the decision of the Court Appeal dismissing the appellants' appeal against their conviction for murder by the High Court sitting at Mubende.

The background to the case leading to the conviction of the appellants is as follows:-

The first appellant, Kato John Kyambadde and the deceased, Senkubuge Hillary were brothers. Upon the death of their father the deceased obtained Letters of Administration of the estate which included a piece of land. The first appellant wanted to sell the piece of land but the deceased objected.

The appellant is alleged to have made death threats against the deceased as a result of the wrangle.

On the 24th April 2008 the deceased was seen going to his customary land (kibanja) by Namuli Margaret (PWl), Sentalo Peter (PW2) and Mawanda Charles (PW4) at different times. Then at 1:00 p.m. PWI saw the appellants with a third person going in the direction of the deceased's Kibanja. She saw them again at 2:00p.m. coming back from the deceased's banana plantation where Mayambala Kityo (PW3) claims to have seen them dragging the deceased. PW3 had branched at the home of the deceased for assistance as he had got a flat bicycle tyre. He heard voices behind the deceased's house and when he went to check what was happening he saw the two appellants, dragging the deceased towards a coffee tree. The first appellant was armed with a spear. Later the body of the deceased was found tied by the neck on a coffee tree. He had been badly beaten and stabbed in the neck. Both appellants did not attend his burial.

At the trial both appellants denied having killed the deceased.

In his defence the first appellant advanced a defence of alibi. He testified that on 24th April 2008 at about 2:00p.m. he had a patient whom he took to hospital. He returned home at about 3:00 p.m. and stayed home until 6:00p.m. when one of his sisters called him to inform him that his brother was dead. He denied having gone to the home of the deceased on that day and neither had he previously threatened to kill him. He explained that he had not attended the burial of the deceased out of fear because he was being mentioned as one of the killers.

The second appellant testified that he was in a bar at Kayembe when he heard of the deceased's death. He went to the scene where he saw the body of the deceased. He explained that he did not bury the deceased because he had been buried far from his home and he did not have money for transport. He was arrested 4 - 5 days after the incident and charged with an offence he never committed.

At the conclusion of the trial the two appellants were convicted by the High Court and sentenced to seventeen years imprisonment. They appealed to

the Court of Appeal which dismissed their appeal and being dissatisfied with the judgment of the Court of Appeal, appealed to this Court with a prayer to allow the appeal, quash the conviction and set aside the sentence.

The memorandum of appeal filed by the appellants raises only one ground of appeal. This is that the Learned Justices of Appeal erred in Law when they failed to adequately re-evaluate the evidence on record as regards identification thereby coming to an erroneous decision.

The appellants were represented by Mr. Henry Kunya on state brief while Mr. Brian Kalinaki, Principal State Attorney, represented the respondent. Both Counsel filed written submissions which they adopted at the hearing.

Mr. Henry Kunya submitted that the Court of Appeal as a first appellate Court failed in its duty to adequately subject the evidence on record to a fresh re-evaluation and invited this Court to re-evaluate the evidence on record.

He submitted that he was fully aware that the Supreme Court on a second appeal can only re evaluate evidence and interfere with the concurrent findings of the lower Courts where it is apparent that the Court of Appeal has failed in its duty or in circumstances where the findings are not supported by cogent evidence.

On the evidence adduced by the prosecution, he submitted that it was circumstantial because none of the six prosecution witnesses actually saw the appellants kill the deceased. He added that there were other existing circumstances which would weaken or destroy the inference. He referred Court to the evidence of PWI who testified that he saw the appellants leave at 2:00p.m. and yet the alarms were made at 5 - 6 p.m. which means that other persons could have killed the deceased during the interval. These persons included the deceased's wife who was the first person to raise an alarm and PW3 who claimed to have witnessed an incident where the deceased was being dragged to a coffee tree but did not report the incident to anyone.

He also submitted that the prosecution evidence was full of inconsistencies especially regarding the time when some of the prosecution witnesses claim to have met the appellants and a third person who was not identified. He drew Court's attention to the evidence of PW 1 who testified that she saw the appellants at 1 :00 p.m. passing through the boundary going towards the deceased's Kibanja and PW2 who testified that he had seen the appellants following the deceased at about 9:00p.m. Furthermore PW3 testified that he saw the appellants dragging the deceased behind his house between 2-3 pm when PW 1 had testified that she saw the appellants going away from the deceased's Kibanja at 2:00p.m. He also urged this Court to draw an adverse in reference to the fact that the prosecution did not call the wife of the deceased who had discovered the body and raised an alarm.

In response Counsel for the respondent submitted that the Court of Appeal had clearly and exhaustively re-evaluated the evidence adduced during trial and had no reason to interfere with findings of the trial Court. He prayed this Court not to interfere with decision of the Court of Appeal arising out of a thorough re-evaluation of the evidence.

On the evidence adduced by the prosecution he submitted that the appellants had been properly identified by Mayambala Kityo (PW3) who saw them pulling the deceased from a distance of 60 meters. He knew the appellants very well and the incident was in broad daylight. There was evidence that the two appellants had been seen going to the deceased's plantation and coming out. He also urged Court to take into account the fact that although the first appellant and deceased were brothers he never attended his burial.

We will begin with the appellant's assertion that the Court of Appeal failed to adequately re-evaluate the evidence on record as regards identification thereby coming to an erroneous decision. The duty of a first appellate Court and that of a second appellate Court, which this Court is, has been spelt out in a number of decisions of this Court including **Bogere Moses &**

Another vs Uganda Criminal Appeal No. 97 where this Court had this to say:

> "What causes concern to us about the judgment, however, is that it is not apparent that the Court of Appeal subjected the evidence as a whole to scrutiny as it ought to have done. And in particular it is not indicated anywhere in the judgment that the material issues raised in the appeal received the Court's due consideration. While we would not attempt to prescribe any format in which a judgment of the Court should be written we think that where a material issue of objection is raised on appeal, the appellant is entitled to receive an adjudication on such issue from the appellate Court even if the adjudication is handed out in summary form. ... In our recent decision in Kifamunte Henry vs Uganda we reiterated that it was the duty of the first appellate Court to rehear the case on appeal by reconsidering all the materials which were before the trial Court and make up its own mind. Needless to say that failure by a first appellate Court to evaluate the material evidence as a whole constitutes an error in Law." (Underlining for emphasis)

In the judgment of Kifamunte Henry vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997 this Court held:-

> "We have not been persuaded that the learned judges erred in Law or in mixed fact and law to justify our intervention.
>
> Once it has been established that there was some competent evidence to support a finding of fact, it is not open on a second appeal to go into the sufficiency of that evidence or reasonableness of the finding. Even if a Court of first instance has wrongly directed itself on a point and the first appellate Court has wrongly held that the trial Court correctly directed itself, yet, if the Court of first appeal has correctly directed itself on the point,

the second appellate Court cannot take a different view R Mohamed all Hasham vs R (1941) 8 EACA 93.

On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probably that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law. Re vs Hassan Bin Said (1942) 9 EACA 62"
(underlining for emphasis).

The two authorities bring out two elements that would help a second appellate Court determine the issue as to whether or not a first appellate Court has met the requirement to re-evaluate the evidence and come to its own conclusion. The first element is whether as a matter of fact the Court did a re-evaluation. Out of this element an issue as to whether the re-evaluation was adequate arises as pointed out in the memorandum of appeal. The second element is whether upon a re-evaluation of the evidence there was evidence to support the concurrent finding that the two appellants are the ones who had killed the deceased. Counsel's contention being that the Court of Appeal did not adequately re-evaluate the evidence regarding identification.

On the first consideration our perusal of the record shows that seven grounds of appeal were raised. All the grounds were argued by the appellants' Counsel and all of them were adjudicated upon by the Court of Appeal. Counsel for the appellants did not demonstrate how the Court of Appeal had failed to re-evaluate the evidence and it is not enough for appellant/ appellants to make an allegation that Court failed in its duty without demonstrating the failure. We shall consider in detail the re-evaluation by the Court of Appeal especially the evidence of identification in order to determine the adequacy of the evaluation.

As rightly pointed out by both Counsel the case against the appellants was mainly dependant on circumstantial evidence. There are many decided cases which set out the principles which Courts apply in deciding cases based on circumstantial evidence. These were set out in the case of **Janet Mureeba and two others vs Uganda** where this Court stated as follows:

> **"Generally in a criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused. In R vs Kipkering Arap Koske and Another (1949) 16 EACA. 135 it was stated that in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory the facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. That statement of law was approved by the EA Court of Appeal in Simon Musoke Vs R (1958) EA 715 [and see Bogere Charles case (supra) .... "**

In the instant case, the learned trial judge and the Court of Appeal evaluated the circumstantial evidence and applied the tests set out in the above decision.

In order to determine whether upon re-evaluation there was evidence to support the concurrent finding that the two appellants were the ones who killed the deceased we shall set out the evidence relied on by the Courts below.

The first piece of evidence relied on by the Courts below to convict the appellants is that there was a grudge between the 1st appellant and the deceased resulting from a dispute over land inherited from their father.

According to Section8 (3) of the Penal Code Act, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility. However, in the case of **Godfrey Tinkamanyire and Another Versus Uganda Supreme Court Criminal Appeal No. 5 of 1988** it was observed that while motive was

irrelevant in a criminal prosecution, it was always useful since a person in his normal faculties would not commit a crime without a reason or motive. The existence of a motive made it more likely that an accused person did in fact commit the offence charged. It is one of the factors that may be taken into account.

The second piece of evidence to be taken into account is that following the above misunderstanding the first appellant threatened to kill the deceased because he was standing in his way to make money. The evidence of the threats was given by Charles Mwanda (PW4) who was Chairman LCI Kitigoma. According to this witness the deceased used to report the threats to his life to him and he in return reported them to the Police who never did anything. The value to be attached to evidence of a prior threat was discussed in the case of **Waihi and Another vs Uganda [1968] EA 278 at page 280** where the East African Court of Appeal stated as under:-

> **"Evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of murder, but its probative value varies greatly and may be very small or even amount to nothing. Regard must be had to the manner in which a threat is uttered, whether it is spoken bitterly or impulsively in sudden anger or jokingly and reason for the threat, if given, and the length of time between the threat and the killing are also material. Being admissible and being evidence tending to connect the accused person with the offence charged, a prior threat is, we think capable of corroborating a confession .... "**

In the instant case the deceased took the threats seriously and reported to the L.C.I and Police, who unfortunately did not take any action. The reason for the threats was also known because of the motive already discussed. Therefore when the case against the appellants is considered, the threats cannot be ignored and like in the case of **Waihi v. Uganda** (Supra) where a

prior threat was used to corroborate a confession, the threats in this case may be used to corroborate the other evidence tending to link the appellants with offence for which they were convicted.

It should be observed that the evidence of motive and prior threat concerns only the first appellant. However, if the evidence that on 23.04.2008 the two appellants were seen together in a bar and that on 24.04.2008 they were seen together with a third person dragging the deceased in his plantation is to be believed, then the principle of common intention to which we shall revert in this judgment may be applied.

The events of 24.04.2008 are narrated by four witnesses whose evidence was attacked by Counsel for the appellants as being full of contradictions and inconsistencies. The first of these witnesses is Sentalo Peter (PW2) who saw the deceased heading to his banana plantation at *8:00t.m.* and the first appellant following him on his motorcycle. Namuli Margaret (PWl) who saw the deceased going to his plantation at 11 :00 a.m. and saw the appellants and a third person going to the deceased's plantation at 1 :00 p.m. and coming out at 2:00 p.m. Then Mayambala Kityo (PW3) who branched at the deceased's home after getting a bicycle tyre puncture. He heard persons talking behind the deceased's house between 2:00 p.m. - 3:00 p.m. He went to check what was happening. He heard a voice of someone saying 'cut'. He saw three people whom he identified as the two appellants. The first appellant was armed with a spear. The deceased was dragged towards a coffee tree and that was when the witness got away feared that he would be seen. When the body was found, two witnesses, namely Namuli Margaret (PW 1) and Mawanda Charles who viewed the body found that the deceased had been badly beaten and had been stabbed on the neck. He had been tied on a coffee tree and in a sitting position.

The inference to be drawn from PW3's testimony is that the three persons who were seen in broad day light dragging the deceased are the ones who had beaten him and stabbed him with a spear which the first appellant was seen holding. We find the suggestion that either the deceased's wife who

had discovered the body or PW3 who claimed to have seen the three assailants but failed to report them to the authorities are the ones who had killed the deceased farfetched.

Counsel submitted that the prosecution witnesses who claimed to have seen the two appellants at the home of the deceased should not have been believed because they contradicted each other as to the time when they saw him. We shall set out the evidence of the prosecution witnesses because we see no contradiction in their testimony. They only saw the appellants at different times.

According to PW2 he saw the deceased going to his Kibanja at 8:00 a.m. and saw the first appellant following him. PW4 also claimed to have seen the deceased going to his plantation at 9:30 a.m. These encounters may be relevant to the killing of the deceased because according to PW3 he saw his assailants dragging him between 2:00 p.m. and 3:00 p.m.

The witnesses who claim to have seen the appellants at the time the deceased was killed are Namuli Margaret (PWl) who stated that she saw the deceased going to his plantation at 11 :00 a.m. and saw the appellants and a third person taking the same direction at 1 :00 p.m. She saw the appellants going away at 2:00 p.m. On the other hand PW3 stated that he branched at the deceased's home between 2:00 p.m. and 3:00 p.m. which is an indication that he is not certain of the exact time. He, therefore, cannot be said to have contradicted a witness, who may also not be exact, when she says that she saw the appellants going away at 2:00p.m.

The law of contradictions and inconsistencies is well settled.

Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away.

Minor ones on the other hand will only lead to rejection of the evidence if they point to deliberate untruthfulness (see **Alfred Tajar Vs Uganda EACA Dr. Appeal No. 167 of 1969** (unreported). We have explained what Counsel described as grave inconsistencies relating to the time the appellants went

to the deceased's plantation. We consider it very minor and inconsequential as far as the events leading to the death of the deceased are concerned.

The appellants' Counsel also complained about the failure of the prosecution to call the wife of the deceased who discovered the body. The law regarding the duty of the Director of Public Prosecutions to call material witnesses is also well settled. In the case of **Bukenya and others vs Uganda [1972]** EA 549 the Court of Appeal for East Africa set the principle which has Since been followed by our Courts as follows:

> **"it is well established that the Director has a discretion to decide who are the material witness and whom to call but this needs to be qualified in three ways. First, there is duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right but the duty to call any person whose evidence appears essential to the just decision of the case (Trial on indictments Decree, S.37). Thirdly while the Director is not required to call a superfluity of witnesses if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution case,"**

In the first place we do not think that the wife of the deceased was such a material witness that the failure by the prosecution to call her was fatal to the prosecution case. The discovery of the body was never in issue. Secondly we do not think that the prosecution deliberately intended to conceal the evidence for Court to draw an adverse inference that the evidence was unfavorable to the prosecution.

The other aspect of the case we wish to comment on is that two of the pieces of evidence relied on to convict the appellants, notably, the motive and prior

threat concern only the first appellant. However, according to Ssonko Edward (P.W.5) the two appellants were seen together in Sepi's bar on 22.04.2008 with another man whom he did not know. Then on 24.04.2008 the two appellants were seen entering the deceased's plantation together with another person. The two were seen together dragging the deceased towards a coffee tree. The first appellant was armed with a spear. In terms of section 20 of the Penal Code Act the three were acting in concert. Section 20 provides as follows:-

"Joint offenders in prosecution of common purpose

When two or more persons form a common intention to prosecute unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence"

The doctrine of common intention is well defined in the case of **No. 441 P.C. Kisegerwa and Anor Vs Uganda SCCA No.6 of 1978 as under:-**

"In order to make the doctrine of common intention applicable it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose, an offence is committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter. It is now settled that an unlawful common intention does not imply a pre-arranged plan. See R vs Okute [1941] 8 EACA at p. 80. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to

dissociate himself from the assault. See R. vs Tabulayenka (Supra)

In our view the doctrine of common intention is applicable in this case. The first appellant was the one who had a reason to kill the deceased but the second appellant was seen with the first appellant dragging the deceased in his plantation. The first appellant was the one armed with a spear but the second appellant did not dissociate himself from the actions of the first appellant. In other words they were acting in concert and there is no way their actions can be separated. That is the essence of the doctrine of Common Intention.

The two appellants raised defences of alibi which were considered by both Courts especially the Court of Appeal which made an exhaustive analysis of the law regarding the defence of alibi and correctly applied it to the facts of this case. In his defence the first appellant had stated that on 24. 04. 2008 he had taken a patient to Kiboga and was not at the scene of crime as alleged by the prosecution. The second appellant stated that at the time he is alleged to have killed the deceased he was in Sepi's bar at Kayembe in Kigoma and not at the scene of crime as alleged by the prosecution.

In respect of the first appellant he was seen by various prosecution witnesses at 7:00 a.m. and 11:00 a.m. and between 1.00 p.m. and 2:00 p.m. when the deceased was killed. He had a motor cycle and the incident did not take such a long time that it would prevent him from going about his other errands before and after the killing of the deceased.

The same applies to the second appellant who, before or after the killing of the deceased could have gone to have a drink in a nearby bar.

In conclusion, we hold that there was ample evidence to justify the conviction of the appellants. The Court of Appeal was justified in upholding the conviction and sentence against the appellants by the learned trial judge. As a second appellate Court we find no reason for interfering with the concurrent findings of the two Courts that the appellants were

responsible for the death of the deceased. The basis of this finding is the strong circumstantial evidence as evaluated by the two Courts and as analysed in this judgment.

Therefore we find no merit in this appeal. It is accordingly dismissed.

Dated this ... 15th.. day of *September 2017*

Katureebe,
CHIEF JUSTICE

Tumwesigye
JUSTICE OF THE SUPREME COURT

Arach Amoko,
JUSTICE OF THE SUPREME COURT

Mwangusya
JUSTICE OF THE SUPREME COURT

Tibatemwa-Ekirikubinza
JUSTICE OF THE SUPREME COURT