THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA
CRIMINAL APPEAL NO. 63 OF 2015

(Coram: *Katureebe, C.J., Tumwesigye, Kisaakye, Mwangusya, Opio Aweri; JJ.S.C.)*

Between

MPAGI GODFREY .....APPELLAN

And

UGANDA ……..RESPONDENT

(Appeal against the judgment of the Court of Appeal, Criminal Appeal No. 91 of 2012 before Hon. Justices Kasule, Mwondha, and Kakuru JJA dated 7th October 2015)

Judgment of the Court

Mpagi Godfrey, the appellant, was tried by the High Court and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to thirty four years imprisonment. His appeal to the Court of Appeal against both conviction and sentence was dismissed, hence this appeal.

The facts of the case as found by the trial Court and the Court of Appeal are as follows:-

> The deceased, Andrew Muhumuza, was living with his mother, Marjorie Kumunda (PW1), at Nsambya Railway Quarters. On the night of 17th May 2010 the deceased left home to go and meet someone who owed him money which he had promised to pay. He did not return home.
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> On 18th May 2010 at about 1:00 a.m. Kumunda PW1, was called by her niece who informed her that the deceased had been involved in an accident. She traced the deceased in Kibuli where she found him lying by the roadside. She took him to Mulago Hospital where he died on arrival. A

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post-mortem examination performed on the body of the deceased revealed that externally the body had bruises and lacerations on lower limbs, laceration/bruises right occiput and sharp entry deep wound (about 1 - 2 cm)both legs anterior tibial aspect. Internally, there was fracture on left tibial fibula, and right subdural haemotoma. He died from the above injuries.

According to Mary Kiwanuka (PW2), on 18.05.2010 she was sleeping when she was attracted by noise from outside her house. She went out to check what was happening and on reaching outside she found the deceased being assaulted by the appellant and others. The deceased was appealing to the appellant to take him to the Police if he had committed any crime. The witness also told the appellant not to take the law in his own hands to no avail. It was as a result of the injuries sustained in the assault that the deceased died.

In his defence the appellant denied having participated in the assault of the deceased. He stated that he had left for Fort Portal on 18.05.2010 at 8:00 p.m. to deliver Newspapers for New Vision so he could not have participated in the assault of the deceased. He called his wife Ahumuza Catherine (DW2) who supported his story that he was not at home as alleged by the prosecution but had gone to Fort Portal.

The High Court, after evaluating the evidence including the appellant's alibi found the appellant guilty of murder and sentenced him to thirty four years imprisonment. On appeal to the Court of Appeal the Court upheld both the conviction and sentence passed by the trial Court. The Appellant contests the concurrent findings of the two Courts below.

In his memorandum of appeal the appellant raised the following grounds:-

1. That the learned Justices of appeal erred in law when they misapplied the law on alibi thereby disregarding the appellant's defence which led them to uphold his conviction erroneously.

2. That the learned Justices of Appeal erred in Law when they upheld the appellant's conviction which was erroneously arrived at by the trial Court when it conducted his trial on the 28th March 2012 in the absence of assessors thereby infringing his right to a fair hearing and occasioning a miscarriage of justice.

3. The Learned Justices of Appeal erred In law when they upheld the appellant's conviction which was erroneously arrived at by the trial Court when it ordered prosecution and defence to file written final submissions which procedure is a violation of the applicant's rights to attend his trial and fair hearing thereby occasioning a miscarriage of justice.

The appellant prayed Court to quash the conviction and set aside the sentence.

The appellant was represented by Mr. Sebugwawo Andrew, Counsel on State Brief, while the respondent was represented by Mr. Brian Kalinaki, Principal State Attorney, Directorate of Public Prosecutions.

On ground one, Mr. Sebugwawo submitted that according to the indictment the murder took place on 18th May 2010. This was supported by PW2 whom he describes as a single indentifying witness who stated that the incident took place between 11:00 p.m. and 12:00 midnight. He referred Court to the defence of the appellant to the effect that on 18:05 2010 he had travelled to Fort Portal at 8:00 p.m. and did not return to Kampala till the 21.05.2010 at 6:30 p.m. The appellant's alibi was supported by his wife who testified to his journey to Fort Portal on 18.05.2010 at 8:00 p.m. but according to her, did not return home until after six months.

On the other hand Counsel for the Respondent submitted that the Court of Appeal after a re-evaluation of the evidence regarding the appellant's defence of alibi, rightly rejected it. The High Court finding had been that Kiwanuka Mary (P.W.2) had properly identified the appellant as one of the assailants. She had known him for about four years and there was light from the

nearby buildings that enabled her identify him. She approached him and told him not to take the law in his own hands but the appellant persisted in assaulting the deceased.

The Court of Appea1's own finding on the defence of alibi was a follows:-

"The prosecution evidence is that the deceased was killed around 1 :00 a.m. on 18th May 2010 by the appellant. The appellant in his own words did not leave Kampala until 8:00 p.m. that day 18th May 2010. So he must have left 19 hours after the incident, since it took place at 1:00 a.m. on the morning of 18th May 2010 and he left Kampala at 8:00 p.m. **on the evening of that day. His alibi therefore collapses."**

We agree with the above finding of the Court on Appeal that the deceased was killed on the morning of 18/05/2010. The deceased's mother stated that she picked the deceased from the road where he had been dumped and took him to Mulago Hospital where he died on arrival. The post mortem report which was adduced in evidence by the prosecution indicates that the body arrived at the City Mortuary on 18.05.2010 at 9:50 a.m. where it was examined on the same day at 10:00 a.m.

This evidence shows clearly that by the time the appellant left for Fort Portal at 8:00 p.m. the deceased had already been killed. This still leaves the question of the participation of the appellant in the killing of the deceased to be determined.

The Court of Appeal in the analysis of the evidence relating to the presence of the appellant at the scene and his participation in the assault of the deceased, cited with approval, the following passage from the judgment of the trial judge-

"In the present case, given that PW2 was a single indentifying witness this Court is cognisant of the need for and duly warns itself of the need for special caution before relying on her evidence for a conviction. Be that as it may, I find that the conditions of identification were

favourable for correct identification. Further this Court found the evidence of PW2 to be cogent and credible, and indeed observed the said witness to have had a truthful demeanour. In contrast, the defence evidence presented numerous inconsistencies and contradictions. I shall cite but a few. First the accused gave sworn evidence in which he testified to having returned from Fort Portal on 21st May 2010 at 6:30 p.m. and was thereupon informed by a one Peter of the events that had allegedly unfolded at his home in his absence. However, DW2 an unemployed housewife who would quite reasonably have been expected to be at home at that time of the day, testified that the accused left his home on 18th May 2010 and only returned to Kampala six months later."

We wish to reiterate the guidelines given by the Supreme Court of Uganda in the case of Moses Bogere and (Supreme Court Criminal Appeal No. 1 of 1997) when considering evidence of identification by a single witness or a multiple of witnesses:

"This Court has in many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eyewitnesses in criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The Court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the Court must consider the evidence as a whole namely the evidence if any, of factors favouring correct identification together with those rendering it difficult. It is trite law that no piece of evidence should be weighed except in relation to the rest of the evidence. See Suleman Katushabe Vs Uganda SC Cr Appeal No 7 of 1991 (unreported)"

The conditions which Court may consider when determining as to whether or not the prevailing conditions favoured an identification free of error were discussed in the case of **Abdulla Nabudere and another Vs Uganda (Court of Appeal Criminal Appeal No.9 of 1978)** reported in (1979) HCB 77 and are as follows:

> **"Where the case against the 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 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 distance, the light, the familiarity of the witness with accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger.**
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> **When the quality is good, as for example, when the identification is made after a long time of observation or in satisfactory conditions by a person who knew the accused before a Court can safely convict even though there is no other evidence to support the identification provided the Court warns itself of the special need for caution."**

The trial Judge believed the evidence of Mary Kiwanuka (PW2) the sole witness produced by the prosecution to relate as to what happened when the deceased was killed. The Court of Appeal re-evaluated the same evidence to come to the same finding that the conditions under which PW2 claimed to have identified the appellant favoured a correct identification being made. The basis for the concurrent finding was that the witness was aided by light from the nearby house to observe the appellant whom she had known for over four years. She observed him at a distance of only five

metres and approached him to advise him not to take the law in his own hands but to take the deceased to Police if he was a thief. The incident lasted about thirty minutes further ruling out the possibility of mistaken identity especially when the witness and the appellant knew each other very well. While acknowledging that he was well known to PW2 the appellant hastened to add that there was a grudge between them to the extent that she never used to greet him whenever they met in the village. According to him the grudge had arisen because PW2 has thought that the appellant had been bribed not to press for an access road for another neighbour. The appellant's wife who testified as DW2 stated that by the time she married the appellant in the year 2008 the relationship between PW2 and the appellant's family was not good.

The trial judge considered the allegation of this grudge. She did not believe that the evidence of PW2 regarding the appellant's participation in the assault of the deceased was actuated by any grudge. She was of the view that there was such limited interaction between PW2 and the appellant and his family that the evidence of PW2 could not have been motivated by the bad relationship alleged by the appellant and his wife. She believed that PW2 had witnessed the assault in which the appellant participated.

The Court of Appeal did not re-evaluate this piece of evidence. In the case **of Kifamunte Henry Vs Uganda (Supreme Court Criminal Appeal No 10 of 1997)** it was reiterated that it was the duty of the first appellate Court to re-hear the case on appeal by re considering all the materials which were before the trial Court and make up its own mind. One of the materials before the trial Court was the allegation of the grudge and the failure by the Court to consider it warrants intervention of this Court playing IS role as a second appellate Court.

The allegation of the grudge was brought up by the appellant during his defence. He is the only one who made an attempt to explain the existence and the genesis of the grudge. The only other witness that would have

testified to the existence of the grudge was PW2 but throughout her cross examination the matter of the grudge was not put to her.

In the case of **James Sawoabiri and Fred Musisi Vs Uganda (Supreme Court Criminal Appeal No 5 of 1990** (unreported) it was held that an omission or neglect to challenge the evidence in Chief on a material or essential point by cross examination would lead to the inference that the evidence is accepted subject to its being assailed as being inherently incredible or palpably untrue. The issue of the grudge was such an essential element in the defence of the appellant that the witness should have been confronted with it. The only inference to be drawn from the failure by the defence to put such a material point to the witness is that the grudge did not exist and was only brought up as an afterthought.

The other aspect of the case considered by the trial Court that was not re-evaluated by the Court of Appeal was that although PW2 testified that the appellant was with others during the assault of the deceased, only the appellant faced the trial resulting in his conviction. The trial judge relied on the case of **Ismail Kisegerwa & Another Vs Uganda (Court of Appeal Criminal Appeal No 6 of 1978** where the doctrine of common intention was described as follows:-

"In order to make a 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 that unlawful purpose an offence was 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. Common Intention may be inferred from the

presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault."

In the instant case the appellant was found to have actively participated in the assault of the deceased. PW2 who was found to be a credible witness tried to stop him from assaulting the deceased to no avail. Although he was not alone in the killing of the deceased, once his participation in the assault was established, he took full responsibility for his role as a participant in the assault of the deceased for which he was rightly convicted.

In addition to the direct evidence of identification by PW2, there are other factors to consider in disproving the appellant's alibi. These are that the appellant lied about his whereabouts on the morning the deceased was killed in addition to lying to Court that from Fort Portal he had returned to Kampala on 21.05.2010 and yet his wife testified that when he left for Fort Portal on 18.05.2010 he did not return home for the next six months. The inference to be drawn from the lie about his return to Kampala is that he was in hiding. In the case of **Moses Bogere and Anor Vs Uganda** (Supra) the Supreme Court cited the case of **Moses Kasana Vs Uganda Cr. App. No 12 of 1981 (1992-93) HCB 47** where the Supreme Court observed as follows:-

"where the conditions favouring correct identification are difficult there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial Court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming the assailant to those who answered the alarm, and of a fabricated alibi."(Underlining provided).

We, like the two Courts below, believe that the quality of the evidence of identification was good and the Court, after cautioning itself on the danger of basing a conviction on a single identifying witness could safely rely on it.

In addition the evidence was corroborated by the false alibi of the appellant. Ground I of the appeal, therefore, fails.

On Ground two Counsel for the appellant submitted that the Court record does not indicate that any of the two assessors attended the trial on 28th March 2012 which renders the entire proceedings a nullity. He submitted further that it occasioned a miscarriage of justice.

In reply Counsel for the Respondent submitted that the issue of absence of the assessors was not raised in the Court of Appeal and should therefore not be raised in this Court. He submitted further that on the date the assessors were allegedly absent Counsel for the appellant was in Court and never raised the issue with the trial Judge and that it did not occasion a miscarriage of justice. In this regard he cited section 139 of the Trial on Indictments Act which provides a follows:-

"S. **139 Reversibility or alteration of finding, sentence or order by reason of error etc**

(1) Subject* to *the provision of any written law, no finding, sentence* or *order passed by the High Court shall* be *reversed* or *altered on appeal on account of any error, omission, irregularity* or *misdirection in the summons, warrant, indictment, order, judgment* or *other proceedings before* or *during the trial unless the error, omission, irregularity* or *misdirection has in fact occasioned* a *miscarriage of justice.

(2) In determining whether any error, omission, irregularity* or *misdirection has occasioned* a *failure of justice, the Court shall have regard* to *the question whether the objection could and should have been raised* at *an earlier stage in the proceedings. "

From the outset we wish to point out that absence of assessors from a trial is not a mere irregularity. Under section 3 of the Trial on Indictments Act all trials before the High Court shall be with the aid of assessors and Section

69 of the same Act provides that in absence of an assessor the trial proceeds with the aid of other assessors. If more than one of the assessors are prevented from attending or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of different assessors. See:

Abdu Komakech v. Uganda [1992 - 93] HCB 21.

We have to establish the fact of the attendance or non attendance of the assessors.

We have perused the record of proceedings and it shows that on 28.03.2012 when the assessors were allegedly absent the prosecution closed its case and the appellant was required to give his defence which he did. As already discussed in this judgment his defence was an alibi which was supported by his wife who testified as DW2 on the same day.

The summing up for the assessors was conducted on 30.03.2012 and they rendered their joint opinion on 03.04.2012. In their joint opinion the assessors advised Court to acquit the appellant on the ground that the evidence of PW2 on the participation of the appellant in the commission of the offence lost credibility by the defence of the appellant and DW2. The assessors could not have relied on the evidence of the appellant and his wife if they had not been in Court and heard their testimony on the alibi. This may explain why although the appellant was represented by different Counsel at the High Court and Court of Appeal none of them raised the issue of the absence of the assessors. Accordingly, it is our view that the above issue was raised in this Court as an afterthought and our finding is that the omission by the trial judge to record their presence was due to inadvertence rather than their absence from the trial. We, therefore, find no merit on this ground of appeal which is also dismissed.

On ground three of the appeal the background was that at the close of the case for the defence the trial Court made orders for filing written submissions by the prosecution the following day at 9:30 a.m. and reply by the defence at 5:30 p.m. Counsel for the appellant submitted that the

written submissions were made in absence of the appellant which renders the trial a nullity, He cited Article 23 (5) of the Constitution which requires that a trial of any person takes place in his presence. He also cited the case of **AKHUYA Vs REPUBLIC (E.A. L.R, (2002) 2 EA 323** ((CAK) where the Court of Appeal of Kenya was faced with a case where like in the instant case a trial Magistrate had ordered filing of written submissions in the Court Registry. It found that the trial was improper leading to the quashing of the appellant's conviction.

In response Counsel for the Respondent contended that the filing of written submissions did not contravene the appellant's right to a fair hearing. According to Counsel the right to give a final address to Court can be oral or written and in this case written submissions were filed on behalf of the appellant.

The practice of filing written submissions as opposed to oral submissions is becoming quite common in our Courts. The practice expedites the trial. It is not regulated but it has to be properly managed. In the instant case the prosecution and defence filed their submissions within one day. It is advisable for court to take suggestions from Counsel as to how much time is required to prepare their submissions. It is also advisable to spare time for presentation of the written submissions in open Court. In this way Counsel may, in addition to the written submissions wish to make a few remarks by way of emphasis and then adopt the written submissions in open Court. The question raised by the ground of appeal is whether the failure to take submissions in the presence of the appellant renders the whole trial a nullity as prayed by the appellant or occasioned a miscarriage of Justice.

Under section 139 of the Trial on Indictments Act already cited in this judgment a finding, sentence or order can only be reversed or altered when it has in fact occasioned a miscarriage of Justice. In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the Court shall have regard to the question whether the objection could and should have been raised at the earlier stage in the proceedings.

In our view the omission to take final submissions in open Court was a mere irregularity and did not in fact occasion a miscarriage of justice. The order to file written submissions was made in open Court. The written submissions were filed but more importantly the trial Court evaluated the evidence adduced by the prosecution and the defence before arriving at the verdict that the appellant committed the offence. The same evidence was re-evaluated by the Court of Appeal which came to the same conclusion. So the main emphasis is, and must be the evaluation of the evidence on record which was done. On this consideration we find that the appellant was properly convicted. We find no merit in this ground of appeal which is also dismissed.

In the result the appellants appeal against his conviction is dismissed. There was no appeal against sentence which is confirmed.

Dated this ....15 . day of ..~ September.....2017

Signed .....

Katureebe

Kisaakye
Justice of the Supreme Court

Mwangusya
Justice f the Supreme Court

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Opio-Aweri
Justice of the Supreme Court

Tumwesigye
Justice of the Supreme Court