THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: Tumwesigye, Kisaakye, Opio Aweri, Mwondha, Tibatemwa-Ekirikubinza JJSC)

CRIMINAL APPEAL NO. 03 OF 2015

BETWEEN

RW ALINDA JOHN ..... APPELLANT

AND

UGANDA ..... RESPONDENT

(Arising from the decision of the Court of Appeal at Kampala in Appeal No. 0113 of 2012 delivered on 21st October 2014 by Nshimye, Mwangusya and Kakuru JJA)

JUDGMENT OF THE COURT

The appellant was dissatisfied with the decision of the Court of Appeal and appealed to this Court on two grounds as here below.-

1. The learned Justices of the Court of Appeal failed to re-evaluate the appellant's evidence and as a result came to a wrong decision.

2. The learned Justices of the Court of Appeal erred in law and fact in upholding a harsh and excessive sentence.

He prayed that the conviction and sentence be set aside.

Background

The brief facts are that the appellant was, together with another, indicted on a count of murder ***CIS* 188 and 189 of the Penal Code Act.** It was alleged that on the 30th June 2010 at Kakama Village Kalisizo, Rakai District, the appellant and one Muhwezi Baker murdered Mukiibi Marvin.

In the alternative the appellant and Muhwezi Baker were indicted with kidnapping with intent to murder ***C/S* 243(1) of the Penal Code Act.** It was alleged, that on the same day and place as above stated, the two kidnapped Marvin Mukiibi and took him away against his will with intent that he may be murdered or disposed of as to be put in danger of being murdered.

The appellant denied both counts. The trial proceeded and he was found guilty and convicted of kidnapping with intent to murder, and sentenced to life imprisonment.

He was dissatisfied with the trial Judge's decision and appealed to the Court of Appeal.

The Court of Appeal upheld the conviction and sentence hence this appeal.

Representation

Mr. Emmanuel Bwogi represented the appellant on state brief.

Mrs. Alice Komuhangi Khauka-Senior Principal State Attorney was for the respondent.

Submissions

On the first ground, counsel for the appellant submitted that under section 5(1) (a) of the Judicature Act an appeal shall lie to the Supreme Court where a conviction and sentence have been confirmed by the Court of Appeal on a matter of law or mixed law and fact.

He further submitted that it is the duty of a second appellate court to decide whether the first appellate court on approaching its task applied or failed to review the evidence of the case and to reconsider the materials before the trial judge. He relied on the case of **Kifamunte Henry Vs Uganda SCCA No.10 of 1997.**

He contended that the Justices of the Court of Appeal wrongly evaluated the evidence when it came to the conclusion that there was sufficient corroboration of the evidence of PW6 who was an accomplice and this led to the confirmation of the conviction of the appellant.

He argued that whereas under section 132 of the Evidence Act, Cap 6 Laws of Uganda 2000 an accomplice is a competent witness against an accused person and conviction is not illegal on the ground that it was based on uncorroborated testimony, as a matter of judicial practice, it is prudent that other independent evidence is obtained to corroborate the evidence of an accomplice. He relied on the case of **Mushikowa Watete alias Peter Wakhoka & 3 others Vs Uganda Criminal Appeal No.10 of 2000 [1998-2000] HCB 7,** which held that **it is trite law that in a criminal trial, it is unsafe to rely on accomplice evidence unless it is corroborated. An appellate court will quash a conviction based on accomplice evidence if it is uncorroborated.**

He submitted that he differed from the reasoning of the Court of Appeal to the effect that the appellant was the last person seen with the victim alive. The victim's body was found 4 (four) days after the deceased disappeared. The medical evidence was that the body was mutilated, the neck had been cut open and the lower jaw and the neck were missing. He contended that there was no evidence by the prosecution showing participation by the appellant. The evidence of PW6 was tainted with inconsistencies.

He contended further that an accused person must be convicted on the strength of the prosecution evidence and not on the weakness of the defence

case. He submitted that the evidence could not sustain a conviction of a kidnap charge with intent to murder.

On the other hand, Counsel for the respondent supported the Court of Appeal decision and submitted that the Court of Appeal discharged its duty. She submitted that the Supreme Court defined who an accomplice is in the case of **Nasolo Vs Uganda [2003]1 EA 181(SCU).** The Court said: "in a criminal trial a witness is said to be an accomplice if inter alia he participated as a principal or an accessory in the commission of the offence the subject of the trial. One of the clearest cases of an accomplice is where the witness has confessed to the participation in the offence or has been convicted of the offence either on his own plea of guilty or on the court's finding him guilty after trial. However, even in the absence of such confession or conviction a court may find on the strength of the evidence before it at the trial that a witness participated in the offence in one degree or another. Clearly, where a witness conspired to commit or incited the commission of the offence under trial, he would be regarded as an accomplice".

She also cited the case **R. vs Baskerville (1916) 2 KB 658** in which it was held that: **corroboration means independent evidence. The evidence does not have to be a kind which proves the offence against the accused. It is sufficient if it connects the accused to the crime. Corroboration does not mean that every detail has to be corroborated .... what is required is that there must be some additional evidence rendering it probable that the story of an accomplice is true and it is reasonably safe to act upon it.**

She argued that the corroboration the Justices of the Court of Appeal found was that of PW2, testified that she saw PW6 take the deceased to the banana plantation and when she followed, PW6 threw stones at her. Corroboration was also found by the Court of Appeal in the evidence of PW3 a police officer who had recorded the statement of PW2 to the effect that PW6 had taken the

victim and did not return home with him. The Justices of the Court of Appeal found corroboration also in the way the victim was murdered, mutilated body as per the medical report, the neck had been cut open, the lower jaw and tongue were missing and found that the killing was characteristic of ritual killing by witch doctors.

Counsel further submitted that there was circumstantial evidence which corroborated PW6 evidence who was an accomplice The circumstantial evidence of PW6 testimony that the appellant promised him 8m/= which was going to be given to him when he returns from Kampala. And the evidence that when PW6 handed over the child to the appellant, the appellant told him to go back to where he was digging in the banana plantation. The appellant's testimony that he was arrested from Kampala corroborated PW6's testimony. She said that considering all the above, the decision of the Court of Appeal should be upheld and the appeal be dismissed.

On the 2nd ground on excessiveness of sentence, Counsel for the appellant submitted that the sentence of life imprisonment for a 67 year old and moreover a first offender was harsh and excessive in the circumstances. The appellant was remorseful and prayed for leniency.

He reiterated the law to the effect that an appellate court will only interfere With the sentence imposed by the trial court if it's evident that it acted on a wrong principle or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case. He relied on the case of

Livingstone Kakooza Vs Uganda Supreme Court Criminal Appeal No.17 of 1993 (Unreported). He submitted that the trial judge overlooked material factors during mitigation of sentence like advanced age of the appellant at 67 years and the fact that he was a first time offender, had a family to care for and had reformed as he had always been remorseful. Failure to consider these factors amounted to an illegality of sentence imposed. He prayed that the

conviction be quashed and sentence be set aside. In the alternative, he prayed that the sentence be reduced.

On the second ground, counsel for the respondent argued that the sentence of life imprisonment is neither excessive nor illegal considering the circumstances of the case. Counsel submitted that the learned Justices of the Court of Appeal considered all the mitigating factors as raised by the appellant and aggravating factors as raised by the prosecution. The seriousness of the offence was considered in view of the fact that the victim was a toddler, was kidnapped and ruthlessly murdered. Some body parts went missing. She further submitted that this was a case which fell in the category of the rarest of the rare which would call for a death penalty against the culprit. Citing the **Suzan Kigula Vs Attorney General Supreme Court No. 1 of 2004,** life imprisonment was lenient given the circumstances of the case. It was not only going to keep the appellant out of the public but would send a message to other ruthless people who have no respect for human life especially the vulnerable children.

She submitted that the second ground lacked merit and so it must fail and appeal dismissed

Consideration of the appeal

This is a second appeal and the duty of a second appellate court was long settled in various cases of this court. In the cases of **Kifamunte Henry Vs Uganda Supreme Court Criminal Appeal No.10 of 1997.** It was held among others, that a 2nd appellate Court can interfere with the conclusions of a first Appellate Court if it appears that in its consideration of the appeal as a first appellate Court it applied or failed to apply the principles set out in such decisions as **Pandya v. R. [1957] 336.** The first appellate Court failed in its duty to review the evidence before the trial Court and make its own conclusions.

There were two grounds of appeal as reproduced in this judgment.

The first ground, was that the learned Justices of the Court of Appeal upheld the conviction after failing to re-evaluate the appellant's evidence.

We had the opportunity to carefully peruse the proceedings and judgment of the Court of Appeal. It was clear that the Court of Appeal as the first appellate court was alive to its duty of re-evaluating all the evidence adduced before the trial Court and subjected it to a fresh scrutiny and made its own inferences on all issues of law and fact as a requirement under Rule 30(1) of the Rules of this Court. Reference was made to the case of **Kifamunte Henry Vs Uganda** (supra).

The learned Justices observed that it was only participation of the appellant which was in contention because the only evidence implicating the appellant was that of PW6 who was a co-accused (accomplice). PW6 had been convicted on his own plea of guilty and sentenced to life imprisonment.

We accept counsel for the respondent's submissions that the learned Justices of Appeal went into great detail re-evaluating the evidence before the trial court. The law in respect of accomplice evidence was considered and the authority of **R vs Baskerville** (supra) was relied on by the Court. In that case the prisoner had been charged with committing acts of gross indecency with two boys contrary to section 11 of the Criminal Law Amendment Act 1885. The only direct evidence of the commission of the acts charged was that of the boys themselves who were accomplices from their own statement in the offence. The letter was produced addressed to one of the boys and contained ten shillings Treasury note. The letter was inviting the boys Harry and Charlie to the appellant's flat at 8 not 7:30 and he (appellant) signed it. The prisoner (appellant) in this case gave evidence and admitted that the boys who were of a humble position in life went to his flat by invitation and he accounted for it. The Jury found the prisoner (appellant) guilty after the judge warned the jury

that they ought not to convict the prisoner upon the evidence of the boys unless it was in their opinion corroborated in some material particular affecting the accused, but told them that the above mentioned letter afforded evidence which they would be entitled to find was sufficient corroboration. At page 658 of the above case it was stated: **... where on the trial of an accused person evidence is given against him by an accomplice, the corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused.**

The Court of Appeal citing with approval the case of **Baskerville** (supra) reproduced the following: "the evidence of an accomplice must be confirmed not only to the circumstances of the crime but also to the identity of the prisoner... (it) does not mean that there must be confirmation of all circumstances of the crime, as we have already stated, that is not necessary. It

is sufficient if there is confirmation as to the material circumstances of the crime and the identity of the accused in relation to the crime. The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection to the crime."

The Supreme Court of India in **Rameshwar v. V.A. (1952) SC. 54** held that there must be additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. The case of **Nasolo Vs Uganda** (supra) held among others that:

" ... a Judge must warn himself and the assessors of the danger of acting on an accomplice's evidence without corroboration. However, failure to warn himself of the necessity for corroboration is not fatal to an accused's conviction if the Judge made a finding that the evidence was corroborated."

The learned Justices of the Court of Appeal put it categorically that, they looked at the evidence as a whole and found that PW6's evidence was generally corroborated. PW2's evidence was to the effect that she saw PW6 Muhwezi Baker take the deceased child into a banana plantation and when she followed him, PW6 threw stones at her and told her to go back. It is clear from the evidence of PW2 she was testifying against PW6 not the appellant.

This could not be corroboration of PW6s evidence in light of the Baskerville case.

It is our view that what is required to be corroborated was in respect of the appellant's participation because PW6 pleaded guilty and that means it was clear that he kidnapped the victim and there was no question of identity as far as PW6 was concerned. So in that respect, the Court of Appeal was in error.

However the evidence of PW6 to the effect that the appellant had offered *Shs.8m* (eight million shillings) because he wanted to take the child to sacrifice it to his gods and the appellant's evidence that he was a witchdoctor and a farmer of Kyenkera Kakora Rakai as per his unsworn statement as defence. The fact that the deceased's body had signs of ritual killings. Also the appellant still in his evidence testified that by the time he was arrested he was$ in Kampala. PW6 had told Court that the appellant had promised to bring the *8m/ =* to him when he returned from Kampala. That was after PW6 had kidnapped the deceased and handed him over to the appellant

The appellant told court that on 5th July 2010 someone rang him that he was wanted when he was already in Kampala. He directed them to where he was in Makindye (Kampala). They got him and told him that he had committed an offence. He said he was arrested handcuffed and taken to Kibuye Police station among others. He made a statement in which he admitted knowing PW6 but that by that time he had sent him (PW6) away from his home about one and a half years ago because of his bad behavior. He then led the police to his home

which was searched but nothing was found. From the above evidence it was clear that the appellant left for Kampala after the commission of the offence which was on 30th June 2010. There was sufficient corroboration by the appellant's own statement of PW6's testimony therefore in the material particular. This is in line with the **R v. Baskerville** case which held among others, that it is sufficient if there's confirmation as to the material circumstance of the crime and the identity of the accused in relation to the crime. The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection to the crime. Also in the case of **Nasolo v. Uganda (supra) citing the case of 0100 v. R [1960] EA 66** corroboration, was defined to mean an independent evidence direct or circumstantial which confirms in some material particular not only that the offence has been committed but also that the defendant committed it. That definition was approved by this Court in the case of **Bikuma v. Uganda Cr. Appeal No. 24 of 1989 (UR).** We therefore, find that there was sufficient corroboration to sustain a conviction.

On the second ground, the complaint of the appellant was that the sentence was harsh and excessive yet the learned Justices of the Court of Appeal upheld it.

It is trite law that under section 5(3) of the Judicature Act that " an appeal against sentence other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order on a matter of law not including the severity of the sentence.

However, in cases of one **Kiwalabye Bernard Vs Uganda** (supra) it was held that **an appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of**

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justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence passed is wrong in principle.

The learned Justices of the Court of Appeal found the sentence neither illegal nor irregular. So they found no reason to interfere with the learned trial Judge's discretion.

The trial Court considered the aggravating and mitigating factors like having been a first offender and took into account the one year and three months he spent on remand, the age of 67 years and prayer for leniency. The trial Judge considered the seriousness of the offence, the death of a toddler, the way the murder was carried out which culminated in the death among others. He passed the sentence of life imprisonment.

We do not consider the sentence of life imprisonment harsh or excessive. So this ground fails.

Accordingly, the conviction and sentence are upheld and the appeal is dismissed.

Dated at Kampala this 06th.....day of.. October.....2017

Tumwesigye
Justice of the Supreme Court

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Kisaakye
Justice of the Supreme

Opio Aweri
Justice of the Supreme Court

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Mwondha

Justice of the Supreme Court

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Tibatemwa - Ekirikubinza
Justice of the Supreme Court