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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

**[CORAM: KATUREEBE, CJ; ARACH-AMOKO, NSHIMYE, OPIO-AWERI AND
MWONDHA, JJSC]**

CRIMINAL APPEAL NO 23 OF 2014

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BETWEEN

MULINDWA JAMES.....APPELLANT

AND

UGANDA.....RESPONDENT

(An appeal from the judgment of the Court of Appeal (Kasule, Mwangusya and Buteera JJA)

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dated 31st October, 2014 in Criminal Appeal No.95 of 2009.)

JUDGMENT OF THE COURT

The appellant, Mulindwa James, was convicted by the High Court of Uganda at Mbarara
20 (Gidudu J), for the offence of murder contrary to sections 188 and 189 of the Penal Code Act .
He was sentenced to life imprisonment. It was alleged that he and one Molly Nyamwijja together
with others who were still at large, on the 26th of April 2005, at Kanyadoli Cell, in Mbarara
District, murdered Byamukama Charles (hereinafter called “the deceased”).

His appeal to the Court of Appeal against the conviction and sentence was dismissed, hence this
25 second and last appeal.

The background to the case as found by the courts below is as follows: On the 26th April 2005, at
Kanyagonyi village, Bugamba County in Mbarara District, when Barigye Fred(PW2) was taking
his sick child to the clinic, he met the appellant with the deceased, his elder brother. They talked

and the deceased who was apparently concerned about the child's condition told Pw2 to pass by his home after the clinic to brief him about the child's condition.

Pw2 passed by the deceased's home as agreed but Nyamwijja Molly the deceased's wife (A2) told him that the deceased had not returned home. Pw2 told her that they could have gone to the home of the appellant to finish the waragi which he had seen the appellant carrying in a fanta bottle when he met them earlier that evening.

The following morning, A2 went to Pw2 and informed him that the deceased never returned home the previous night. Pw2 informed neighbours who included the appellant and a search was mounted. During the search, they came across a scene of struggle and blood stains, marks of tyre sandals and a match box. A further search revealed the body of the deceased lying in a stream. The deceased's body appeared to have been strangled before it was dumped in the river. The post mortem report confirmed death by strangulation.

The appellant was suspected of murdering the deceased because they were last seen moving together from a bar in the evening of 26th April, 2005. Moreover he was wearing the same t-shirt he had worn the previous day which appeared to be blood stained. He was arrested by the LC1 to explain how he had parted with the deceased. He was charged with murder together with A2. However, A2 was discharged on a no case to answer. The appellant was tried, convicted and sentenced as earlier stated, on the basis of circumstantial evidence.

In the Memorandum of Appeal in this Court, the appellant raised two grounds, namely that:

- 20 **1. The learned Justices of the Court of Appeal erred in law by failing to adequately re-evaluate all material alleged circumstantial evidence adduced before the trial court occasioning a miscarriage of justice and thereby wrongly confirmed the appellant's conviction of murder.(sic)**

- 25 **2. The learned Justices of the Court of Appeal erred in law by failing to re-evaluate mitigation of sentence basing on circumstances of the case and thereby wrongly dismissed the appellant's appeal against life imprisonment sentence.(sic)**

Learned Counsel Rukundo Henry represented the appellant, while Senior Principal State Attorney Samali Wakholi appeared for the State. Both parties filed written submissions which they highlighted on the hearing date before the Court.

5 **Summary of submissions by learned Counsel**

On ground 1, Mr Rukundo submitted that the learned Justices of the Court of Appeal failed in their duty as a first appellate Court to re-evaluate and re-appraise the alleged circumstantial evidence which resulted into a miscarriage of justice. According to counsel Rukundo, there was in fact no circumstantial evidence at all to prove that the appellant was the one who murdered the
10 deceased. The deceased was sober that evening and it was the appellant who was staggering because he was drunk. There was in fact a possibility that the deceased committed suicide by throwing himself into the stream of running water.

The deceased's body having been found in a flowing stream of water could have been subjected to friction from water objects, stones, trees or aquatic animals which could have tampered with it
15 and caused bruises, fractures and suffocation. The matchbox found at the scene of the scuffle was not conclusive evidence because Pw3 stated that she had sold similar matchboxes to at least 5 other customers. The empty fanta bottle found in the appellant's house was a common object. The Court of Appeal should have rejected this evidence because the two items were not proved to be the appellant's properties.

20 The appellant being the last person to be seen with the deceased was not circumstantial evidence that the appellant murdered the deceased. The evidence of the grudge between Pw2 and the appellant could not have been admitted as circumstantial evidence. The blood stains on the t-shirt were not scientifically proved. Lastly, the appellant did not run away. He was among the people that searched for the deceased's body.

25 On ground 2, Mr. Rukundo faulted the learned Justices of the Court of Appeal for failing to re-evaluate the evidence of mitigation of the sentence put forward by the appellant before the trial judge and thereby wrongly dismissed his appeal against sentence. Regarding the sentence, Counsel faulted the learned Justices of the Court of Appeal for failure to address the question whether life imprisonment meant imprisonment for the natural life of the appellant as per **Tigo v**
30 **Uganda (2009)** or 20 years with remission as per **Livingstone Kakooza v Uganda (1993)**.

Mr. Rukundo prayed that the appeal succeeds and the appellant be set free, or in the alternative, ground 2 of appeal succeeds and the sentence of life imprisonment be set aside and substituted with a lighter sentence.

5 Counsel for the state opposed the appeal and supported the conviction and sentence as confirmed by the learned Justices of the Court of Appeal.

On ground 1, counsel submitted that the learned Justices of the Court of Appeal duly executed their duty by evaluating all the evidence on record and considering the submissions of counsel before coming up with correct findings and decision.

10 She submitted that there was sufficient circumstantial evidence to support the finding that the appellant murdered the deceased and threw the body in the stream. These were:

- a) The evidence of the appellant being the last person to have been seen with the deceased;
- b) The distance between the scene of the struggle, the place where the body was found and the home of the appellant being after the home of the deceased;
- 15 c) The exhibit of the matchbox which the appellant purchased from the bar being found at the scene of the struggle;
- d) The empty fanta bottle that was recovered from the house of the appellant;

20 She described the argument that the deceased could have committed suicide by drowning himself in the stream as unsustainable because according to PW1, people who would fall into the stream would come out alive since it was shallow. There was also no possibility of drowning since the deceased was sober, while the appellant was the one who was drunk. A staggering person cannot reach safely to his home while a sober person drowns in a stream. The Post Mortem Report was also very clear. The cause of death of the deceased was manual and not drowning or suffocation. This supports the inference that the deceased was killed before being thrown into the stream.

Regarding the purported grudge, counsel described it as uncorroborated and irrelevant.

25 Counsel submitted that the evidence of the blood stain on the t-shirt was discarded by the learned Justices of the Court of Appeal. There was thus no need to raise it before this Court.

On ground 2, counsel contended that none of the circumstances that could warrant the Court of Appeal to interfere or vary the sentence of the trial court were brought out before the Court of Appeal. The circumstances include where the sentence is manifestly excessive or where the trial judge had failed to consider an important matter which ought to have been considered while passing the sentence or where the sentence is based on a wrong principle or principles.

She prayed that the appeal be dismissed.

Consideration of the grounds by Court

Ground 1:

This ground raises two issues; firstly, whether the learned Justices of the Court of Appeal failed in their duty as a first appellate court to adequately re-evaluate all material alleged circumstantial evidence adduced before the trial court and secondly, whether they wrongly confirmed the appellant's conviction of murder, thereby occasioning a miscarriage of justice.

The first issue is not difficult to establish. It is a matter of perusing the relevant part of the judgment of the Court of Appeal which is entitled "*Court's resolution of the case*". Upon perusal of that part of the judgment:

We find first, that the learned Justices of the Court of Appeal started by reminding themselves of their duty as a first appellate court under Rule 30 of the Court of Appeal Rules and referred to the case of **Father Nomensio Tiberanga SCCA NO 17 of 2002 (22.6.04 at Mengo)** from **CACA 47 OF 2000 [2004] KALR 236** in which the Supreme Court held that:

"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

The bone of contention was the applicability of circumstantial evidence to the case. The learned Justices of the Court of Appeal proceeded to state the law on circumstantial evidence, starting with the statement of the law by the former East African Court of Appeal in **Simon Musoke vs R [1958] EA 715**, where the Court held that:

“ ...In a case depending exclusively upon circumstantial evidence, he must find before deciding upon conviction that the exculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. As is put in Tailor on Evidence (11th Edn.) p74.

5 **The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt.”**

The learned Justices of the Court of Appeal further referred to the principle stated in the judgment of the Privy Council in **Teper v R (2)**, [1952] AC 480 at page 487 as follows:

10 **“ It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inferences.”**

The learned Justices of the Court of Appeal then stated that circumstantial evidence is useful evidence as was held in **R v Taylor, Weaver and Danovanu (1928) Cr. App. R 20** which was cited in **Tumuhairwe v Uganda [1967] EA 328** that:

15 **“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination, is capable of proving the proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”**

20 The court record then shows that the learned Justices of the Court of Appeal proceeded to re-examine the evidence and analyse it, and applied the above principles, to assess whether the trial judge was correct or not in arriving at the decision in the instant case.

Based on this finding, we agree with the learned Principal State Attorney that the Court of appeal properly re-evaluated the evidence which was adduced before the trial judge.

25 This brings us to the second and most important issue, namely, whether the learned Justices of the Court of Appeal came to the right conclusion when they upheld the conviction by the trial judge.

The trial judge based his conviction on the following pieces of evidence:

- a) That the appellant was the last person with the deceased;
- b) The exhibits of a match-box that was found at the scene of struggle;
- c) The exhibit of the fanta bottle that was recovered at the appellant's house
- d) The exhibit of the blood stained t-shirt belonging to the appellant
- 5 e) A rumour that the appellant used to buy for the deceased waragi and would leave him drinking as he would then go on to have sex with A2.

In their judgment, the learned Justices of the Court of Appeal rightly discarded the evidence of the t-shirt on the ground that the stain on the t-shirt was not scientifically proven to be the blood of either a human being or that of the same group as that of the deceased and faulted the
10 investigating officer for failing in his duty to seek scientific proof of the suspected stain of blood.

With regard to the match box and the fanta bottle, the learned Justices of the Court of Appeal had this to say:

**“Counsel for the appellant argued that the match box and the fanta bottle are common items and there is nothing exclusive about them to lead to any inference of guilt. We agree
15 that these are common items and so did the trial judge. But the circumstances of the case are that when they considered with other evidence, they cease being simply common items”**

The “other” evidence consisted of the evidence of PW3 who testified that she gave the appellant waragi in a fanta bottle and the denial by the appellant that he bought beer, not waragi from PW3. Then the evidence of PW2 who testified that he met the appellant and the deceased when
20 the appellant had waragi in a fanta bottle and the fact that this bottle was recovered from the appellant's house the following morning. The trial judge further considered the evidence by PW3 that she sold a matchbox to the appellant when he was with the deceased.

Ordinarily, this 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
25 its duty or in circumstances where the findings are not supported by competent evidence. (**See: Bogere Charles v Uganda, Criminal Appeal No. 10 of 1998(SC).**)

We have perused the court record and concluded that this is a case where this court should proceed to re-evaluate the evidence on record to establish whether or not the concurrent findings of the trial judge and the learned Justices of the Court of Appeal are supported by evidence.

5 The match box and the fanta bottle are indeed common items. Pw3 testified that the appellant was the 5th buyer of that type of matchbox that day. The story about the affair between the appellant and the deceased wife was in our view also a mere rumour on which a court of law cannot base a conviction. We are also constrained to take into consideration the appellant's conduct. He was among the people involved in searching for the deceased the following morning. He did not run away.

10 We have evaluated the evidence as we are entitled to at great length and found nothing to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but the law is clear and settled. Suspicion however strong it may be is not sufficient to fix a person with criminal responsibility. This legal principle was stated in the case of **R v Israel Epuku s/o Achietu (1934) 1 EACA 166.**

15 The prosecution must prove its case against the accused beyond any reasonable doubt. In our judgment, the evidence does not satisfy the legal requirement of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on record.

We are therefore unable to uphold the conviction as entered by the learned trial judge and confirmed by the learned Justices of the Court of Appeal. Consequently we disagree with the
20 courts below that the prosecution proved its case against the appellant beyond reasonable doubt.

That being our view of the matter, Ground 1 of the appeal therefore succeeds.

Ground 2:

In light of our holding on ground 1 above, we find no reason to discuss ground 2.

Decision:

25 In the result, we allow the appeal, quash the appellant's conviction and set aside the sentence. We order that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

Dated at Kampala this 14th day of February 2017

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B.M.KATUREEBE

CHIEF JUSTICE

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ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

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A. NSHIMYE

15 JUSTICE OF THE SUPREME COURT

.....

OPIO -AWERI

20 JUSTICE OF THE SUPREME COURT

.....

F. MWONDHA

JUSTICE OF THE SUPREME COURT