THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO: 17 OF 2014

(Appeal from the judgment of the Court of Appeal at Kampala, before Justice Remmy Kasule, Solomy Bosa and Geoffrey Kiryabwire, JA, dated 27th June 2014).

MAGEZI GAD.....APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: TUMWESIGYE; KISAAKYE; MWANGUSYA; OPIO-AWERI; MWONDHA; J.J.S.C.

JUDGMENT OF THE COURT

Introduction

This is an appeal from the decision of the Court of Appeal which dismissed an appeal against conviction and sentence by the High Court for the appellant for murder contrary to Sections 188 and 189 of the Penal Code Act Cap 120 amended.

Back ground of the case.

On the 28th January 2008 at around 7:30pm, two strangers (the appellant and another person (now deceased), went to the home of a one Kabuzi Daudi (the deceased and victim) claiming to be his relatives who wanted to spend the night at his home.

They were welcomed by PW5 (Nshabirye), a granddaughter to the deceased. The deceased failed to recognize the visitors but nevertheless entertained them. After a while, the deceased left for the kitchen and the appellant's colleague followed him with the excuse that he wanted to speak to him. PW4 (daughter to the deceased) stayed chatting with the appellant.

When Nshabirye (PW5) returned from the shop, she found the deceased dead in the kitchen. On seeing that the door to the main house was not open, she proceeded to inform her uncle Rubasa (PW3) about the death of

[1]

the deceased. PW3 went to the crime scene, forced open the door to the main house and announced the death to PW4 and the appellant. Upon hearing the sad news, the appellant got up, opened the main door and fled.

Being at night, the appellant got lost in the village and was arrested under suspicion of being a wrong character. The appellant was taken to the chairman (PW8) who interrogated him and upon being satisfied about his identity as Magezi s/o Sebbi of Kitojo, gave him direction to Kitojo Village. The appellant was later arrested from his home in Rubare, Ntungamo District and identified vide an identification parade at Kabale Police Station.

Dr. Mugabi Mathia (PW2) of Mporo Health Centre carried out a postmortem examination on the deceased vide police form 48B and established that the deceased had two deep cuts on the head into the brain and it was extending to the right and left ear with the skull bones cut through. He concluded that the deceased died from hemorrhagic shock and the weapon used was a panga. The same Doctor also examined the appellant and found that he was normal and had a minor abrasion in the left palatial area. The appellant was consequently indicted together with his colleague for murder contrary to Sections 188 and 189 of the Penal Code Act in the High Court at Kabale. His colleague however died before the conclusion of the trial.

At the trial, the prosecution led a total of 11 witnesses to prove the ingredients of murder.

The accused pleaded alibi in defense and claimed that he was in his village all the while. He also stated that he was identified by a young girl (PW5) only after being pointed at by a certain woman.

On the 20th April 2009, the appellant was convicted for murder contrary to Sections 188 and 189 of the Penal Code Act and sentenced to life imprisonment.

Being dissatisfied with the High Court decision, the appellant appealed to the Court of Appeal vide Criminal Appeal No. **61** of 2009 against both conviction and sentence on the following grounds:

1) That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence as a whole and consequently arrived at a wrong decision.

2) That the learned trial judge erred in law and fact when he erroneously concluded that, on the evidence on record, the appellant was correctly identified and placed at the scene of crime and positively linked to the offence charged.

3) That the leaned trial judge erred in law and fact when he concluded that the chain of identification by the prosecution witnesses rendered the appellant's alibi and issue of contradictions in the manner of dressing by the accused person irrelevant.

4) That the learned trial judge erred in law and fact when he concluded that common intention to commit the offence charged had been proved against the appellant.

5) That the learned trial judge erred in law and fact when he sentenced the appellant to life imprisonment which was manifestly excessive in the circumstances of this particular case.

On the 2yth of June 2014, the Court of Appeal dismissed all the grounds of appeal and confirmed the decision of the High Court. The appellant dissatisfied with the decision of the Court of Appeal, lodged this appeal on the 6th day of May, 2016.

The memorandum of appeal contained the following grounds:-

1) The Honorable Justices of the Court of Appeal erred in law when they failed to properly re-evaluate the evidence in this case and so reached a wrong decision.

2) The Honorable Justices of the Court of Appeal erred in law when they rejected the appellant's alibi and instead confirmed that he had been placed at the scene of crime.

3) The Honorable Justice of the Court of Appeal erred in law when they concurred with the High Court that common intention to commit the offence had been proved against the appellant.

8

4) The Honorable Justices of the Court of Appeal erred in law when they confirmed the sentence of the life imprisonment which was manifestly excessive in the circumstances of the case.

The appellant thus prayed this honorable court to quash the conviction, set aside the sentence of life imprisonment and in the alternative, reduce the sentence of life imprisonment.

16 Representation.

The appellant was represented by Senkezi Steven on state brief while the respondent was represented by Betty Khisa, the Deputy DPP. Both counsel made oral submissions.

Submissions of counsel.

Counsel for the appellant argued grounds 1, 2 and 3 together since they all concern participation of the appellant in the crime.

Counsel argued that the learned Justices of the Court of Appeal did not
24 abide by their duty to properly re-evaluate the evidence which was lacking in many areas which included:-

a) The appellant was identified vide an identification parade which was not properly conducted.

b) That PW3 and PW4 in their testimonies as eye witnesses stated that on the date in question when the offence was committed, it was their first time to see the appellant and they next saw him in court.

c) That the conditions for identification were that, it was dark and the only
32 lighting was a candle in the main house.

He further contended that the Justices of the Court of Appeal erred when they observed that the appellant spent close to two hours with PW4 and PW5, and yet no evidence on record showed the time that the appellant spent with the witnesses, especially PW5.

Counsel concluded that there was no proper conditions for identification and thus prayed this honorable court to quash conviction of the appellant.

In response to the above submissions, the Deputy DPP contended that

8 evidence on record was properly re-evaluated by the Court of Appeal and therefore saw no need for this honorable court to re-evaluate this evidence again. She thus prayed court to dismiss these grounds.

COURT'S FINDINGS.

The duty of the Court of Appeal as a first appellate court is provided under Rule 30 (1) of the Court of Appeal Rules as follows>

"On any appeal from a decision of the High Court acting in the exercise of the original jurisdiction, the court may,'

16 *Reappraise the evidence and draw conclusion of fact".*

The Supreme Court in the case of Kifamunte Henry VS Uganda, SCCA No.1 0 of 1997 held that it is 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 its own mind. Failure to do so amounts to an error of law; Also see Bogere Moses and Another VS Uganda, Supreme Court, Criminal Appeal No. 1 of 1997".

This being a second appeal, this court does not have the duty to re-

24 evaluate evidence on record unless it has been shown that the first appellate court did not re-evaluate the evidence on record. In Areet Sam VS Uganda, Criminal Appeal No. 20 of 2005, the Supreme Court reiterated the above duty in the following terms:-

"We also agree with counsel for the respondent that it is trite law that as a second appellate court we are not expected to re-evaluate the evidence or question the concurrent findings of facts by the High Court and Court of Appeal. However, where it is shown that they did not evaluate or re-evaluate

32 the evidence or where they are proved manifestly wrong on findings of fact, this court is obliged to do so and to ensure that Justice is properly and truly served".

In dealing with the evidence of identification, alibi, common intention and contradictions, the learned trial judge, in a very well reasoned judgment, stated as follows-

"If I analyze this evidence against the defence submission that PW4, PW5 and PW6 were mistaken about the identity of the accused, I establish the following facts. That the visitors to the deceased's home went there when it was still day time and when they started conversing with the deceased, one could still see. It is later that the deceased called for a candle, secondly, the time the two spent with the deceased and PW4, was not a brief encounter like is the case in a sudden attack. Though the visitors were strangers to the family members of the deceased, they engaged in a friendly conversation that offered the witnesses ample opportunity to observe their visitors.

When PW6 met them and they asked him about where they could buy peas, he knew or recognized the accused and one Ngurusi who was pushing their bicycle. He knew the accused by name as Magezi son of Sebbi and this is what he told PW4 when he answered the alarm announcing the death of Kabizi. When this evidence is taken together with that of PW3 that when he entered and found PW4 having a conversation with a man as soon as he informed that Kabizi is dead, the man got up and ran away. Why could a visitor run away upon being told that the host is dead, unless the visitor is aware of the circumstances of that death?

This evidence when compared with that of PW8 who interrogated the accused at 9:00pm which is the time from the running away from Kabizi's home, and the subsequent revelation by the accused that he is Magezi son of Sebbi makes the prosecution evidence credible that the Magezi son of Sebbi that PW6 saw go to the deceased's home is the same one who ran away from that home got lost along the village paths and is the same one PW8 interrogated and after establishing his identity released him and gave him directions on how to reach his fathers' village. The evidence of PW4, PW5, PW6 and PW8 accounts for the movement of the accused with certainty. The bicycle that PW6 saw with Magezi son of Sebbi is the bicycle that was found in the bush by PW7 and exhibited in court.

Again this piece of circumstantial evidence raises strong inference of guilt beyond mere suspicion. The chain of identification from PW4, PW5, PW6 and

PW8 renders the alibi and the issue of contradictions in the manner of dress irrelevant. The thread or chain of evidence places the accused in the home of the deceased on the evening and early night of 28/01/2005".

8 The Court of Appeal after re-evaluating the evidence on record, agreed with the trial judge that the appellant was correctly identified as found by the trial judge. The court also agreed with the trial judge that the contradictions raised by the appellant as to the time, descriptions of dressing and colour of the bicycle seat did not raise any doubt in the prosecution case because the appellant was correctly identified by PW4 PW5 PW6 and PW8 and that the evidence did place the applicant at the scene thereby destroying his alibi.

16 **Submissions of both counsel.**

After perusing the submissions of both counsel, we agree with the conclusions of the trial judge and the Court of Appeal in holding that the appellant was correctly identified at the scene through the evidence of PW4, PW5, PW6 and PW8 which evidence amply placed the applicant squarely at the scene of crime to the extent that the appellant could not have been seen at the scene at 8:00pm and be at his home village far away at 9:00pm. We also agree with the conclusion of the Court of Appeal that the contradictions

24 as to the time, descriptions of dressings and the colour of the bicycle seat were minor and did not raise any doubt in the prosecution case because the appellant was correctly identified by PW4, PW5, PW6 and PW8.

With regard to common intention both the trial Judge and Justices of the Court of Appeal were alive in the application of the law on common intention as provided under Section 20 of the Penal Code Act. Both courts concluded that the appellant was with his colleague who murdered the deceased and disappeared. The two were seen together at the home of the deceased.

32 They had a discussion together. The appellant first tried to send pw4 away to go and buy them drinks but pw4 refused to go. Further proof of common intention was that as soon as PW3 broke the news that the deceased was dead, the appellant ran away from the scene. That scheme was intended to create opportunity to have the deceased killed quietly. In further pursuance to allow the assailant chance to be alone with the deceased, the appellant stopped pw4 from joining the company of the deceased in the kitchen. That

was not a natural conduct. The only plausible inference is that the appellant ran in fear because he was part and parcel of the scheme to kill the deceased. We agree with the conclusion of the trial judge and the Court of

8 Appeal that the conduct of the appellant as summarized above laid the strategy through which his colleague murdered the deceased while his running away was proof of his guilt. In short both the appellant and his colleague had a common intention to kill the deceased; **see Charles Komwisa VS Uganda [1997] HCB 86.**

In conclusion, we find that grounds 1, 2 and 3 must fail.

Ground 4

Harsh and Excessive sentencing.

16 Counsel for the appellant argued that the sentence of imprisonment for life was excessive given the circumstances of the case. His argument was that since the appellant did not commit the murder himself, his sentence should be reconsidered and substituted for a lighter sentence. He further contended that Article 23 (8) of the Constitution implores courts while sentencing to consider the period spent by an accused on remand. That this was not considered by the lower courts yet it was manifestly addressed by appellant's counsel. He prayed that court should reduce the sentence.

24 In response, the learned Deputy DPP argued that in line with the facts of the case, the deceased was brutally killed yet he was a helpless old man. She contended that life imprisonment was justified. Counsel however conceded to the fact that the period the appellant spent on remand should have been considered by the lower courts. She thus prayed court to issue guidance on this point.

Court's findings.

After perusing the court record and both counsel's submissions, we now

32 proceed to consider the above grounds.

The main complaint was that the sentence of life imprisonment was harsh and that the Court of Appeal erred in law for confirming it without considering the period of five years the appellant had spent on remand, contrary to Article 23 (8) of the Constitution.

It is a well established principle in our jurisprudence that an appellate court is not required to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the

8 discretion is such that it results in the sentence imposed being manifestly excessive or so low as to amount to a miscarriage of 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 imposed is wrong in principle; see **Kiwalabye Benard VS Uganda; Supreme Court, Criminal Appeal No. 143 of 2001.**

In confirming the sentence imposed by the trial court, the Court of Appeal had this to say;

16 "In the instant case, the appellant was sentenced to life imprisonment for the offence of murder. It is argued that it was excessive since the appellant was not actively involved in the murder of the deceased. However, in consonance with S. 20 of the Penal Code ACT, CAP 120 the appellant is presumed to have committed the offence. In light of that, we too agree with the trial Judge that life imprisonment sentence is appropriate in the circumstance of this case. The sentence of the trial judge is hereby upheld as we see no valid reason to interfere with it".

24 We agree with the above conclusion. The Court of Appeal did apply correct principle and did re-evaluate the mitigation of sentence and rightly came to the conclusion that the sentence of life imprisonment imposed by the Trial Judge in the case of murder was appropriate in the circumstances.

We therefore have no reason to interfere with the above conclusion.

It was further contended that the learned trial judge in passing sentence of life imprisonment did not take into account the period of five years the appellant had spent on remand contrary to Article 23 (8) of the Constitution.

32 The above Article provides as follows:-

"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment".

The above Article is about legality of sentence. It is mandatory for a trial court sentencing a convicted person to take into account the period spent in custody; see 8ashir Ssali VS Uganda, Criminal Appeal No. 40 of 2003 (SC), where a trial judge fails to comply with Article 23 (8) of the Constitution, the Supreme Court even in its own motion can correct the sentence by considering the period spent in lawful custody before conviction; see **Sebide VS Uganda, Criminal Appeal No. 22 OF 2002 (SC).**

We are of the considered view that like a sentence for murder, life imprisonment is not amenable to Article 23 (8) of the Constitution. The above Article applies only where sentence is for a term of imprisonment ie. a quantified period of time which is deductable. This is not the case with life or death sentences.

For the above reasons we find no merit in this ground of appeal. In the result, we dismiss the appeal and confirm the decision of the trial court and the Court of Appeal.

Dated at Kololo this-: 17th day of May .2017.

Hon. Justice Jotham Tumwesigye, JSC

Hon. Justice Dr. Esther Kisaakye, JSC

Hon. Justice Eldad Mwangusy ,JSC

Hon. Justice Opio-Aweri JSC

Hon. Justice Faith Mwondha, JSC