THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 232 OF 2012

(CORAM: F.M.S Egonda-Ntende, JA, Hellen Obura, JA and Stephen Musota, JA)

1. MUKUYE SAMUEL

2. SSENYONGA JOSEPH ::APPELLANTS

VERSUS

UGANDA:: RESPONDENT

(Appeal from the decision of Hon. Lady Justice Margaret C. Oguli holden at Masaka High Court in Criminal Session Case No.119 of 2009 delivered on 15/12/2012)

JUDGMENT OF THE COURT

Introduction

This appeal is against both conviction and sentence arising from the decision of Her Lordship Margret C. Oguli Oumo J delivered on the 15th day of December, 2012 sitting at Masaka High Court in which the appellants were convicted of the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act Cap 120 and sentenced to 60 years imprisonment.

Background to the Appeal

The facts as found by the trial Judge are that on 20/04/ 2009 the appellants while at Lukungu Landing site, Nangoma Parish, Kyebe Sub-county in Rakai District murdered Kalyango (the deceased). The prosecution case was that the deceased and Abdul Lubega met the appellants stealing fish from their nets. A quarrel erupted between them which ended up in a fight and in the process the deceased was murdered while Abdul Lubega escaped. The appellants were arrested and charged with murder.

During trial, the appellants gave sworn evidence and denied the offence while the prosecution adduced evidence of 5 witnesses to prove its case. At the end of the trial, the appellants were convicted of murder and sentenced to 60 years imprisonment. Being dissatisfied with the decision of the trial Judge, the appellants appealed to this court against both conviction and sentence on the following grounds;

1. *That the learned trial Judge erred in law and fact when she held that the conditions for proper identification of the appellants were present.*
2. *The learned trial Judge erred in law and fact when she convicted the appellants of the charge of murder other than manslaughter.*
3. *The learned trial Judge erred in law and fact when she failed to evaluate the contradictions and the inconsistencies in the prosecution evidence.*
4. *The learned trial judge erred in law and fact when she sentenced the appellants to 60 years imprisonment which was excessive in the circumstances.*

Representations

At the hearing of this appeal, the appellants were represented by Ms. Margaret Nansubuga on state brief while Ms. Aminah Akasa, learned State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Case for the Appellants

At the commencement of the appeal, counsel for the appellants abandoned ground 2 of the appeal and sought leave to amend the memorandum of appeal and introduce a new ground, which was granted. The new ground stated as follows;

"That the trial Judge erred in law and fact when she held that the evidence of PW5 was corroborated by the fact that three days after the witness' narration to the police, the deceased's body was found at the shore of the lake."

On ground 1, she submitted that there were no conditions for proper identification of the assailants and that the trial Judge erred in law when she found that the appellants had been properly identified. She argued that there is no evidence on record to show the source of light used to identify the appellants since the incident happened between 5:00- 5:30 am. She referred to the case of ***Bogere Moses and anor vs Uganda, SCCA No. 1 of 1997*** in which the Supreme Court set out the principles to be considered in cases of identification and in the instant case counsel contended that the conditions for correct identification were not proper.

On ground 3, she submitted that there were contradictions and inconsistences in the prosecution evidence. She pointed out that the principle witness PW5, Abdul Lubega gave contradicting evidence when he stated that he actually witnessed the murder of the deceased yet in his statement he clearly stated that on seeing the deceased being hit with the oar, he jumped out of the boat and ran to save his life as they wanted to assault him as well. This statement in counsel's view contradicts the earlier statement he made when he stated that he was not able to see because he had taken off to protect his life. She added that there was another contradiction when PW5 testified that his mouth was cut and he got a scar on the mouth and thigh and yet PW1 Sentalo Daniel testified that during the time when PW5 was making a statement, he didn't observe anything wrong with him and neither did he see any injuries on his body. She also pointed out that there were contradictions regarding the place where the appellants were arrested from.

On ground 5, counsel submitted that there was no evidence to corroborate PW5's testimony of identification upon which the appellants were convicted. She contended that the fact that the deceased's body was found at the shore of the lake three days after the witness' narration

to the police, was not corroborative of PW5's testimony and she faulted the trial Judge for finding that it was.

Regarding the sentence, counsel relied on the case of ***Kiwalabye Benard vs Uganda, SCCA No. 143 of 2001*** and submitted that the sentence of 60 year imprisonment is harsh and excessive in the circumstances of the case. She implored this court to exercise its discretion and reduce the sentence.

Case for the Respondent

Counsel for the respondent opposed the appeal and submitted on ground 1 that there was no error on the part of the trial Judge in finding that the proper conditions for identification were present. She argued that the learned trial Judge properly addressed her mind to the law on identification when she cited the case of ***Uganda vs George Wilson Simbwa, SCCA No. 37 of 1995*** and considered all the factors that favor correct identification alongside the evidence on record and as a result, she arrived at the right conclusion.

Regarding the contradictions and inconsistencies, counsel submitted that most of the issues which were raised in arguing this ground did not amount to contradictions. The only contradiction counsel conceded to was the one regarding the place of arrest of the appellants. She, however, argued that this contradiction did not go to the root of the case as it was minor and she urged this Court to disregard it.

Regarding the ground on the evidence of PW5, counsel submitted that there was no error on the part of the trial Judge in so finding since the subsequent finding of the body of the deceased in the water was only corroborating what PW5 had narrated to the police.

On the ground of sentence, counsel submitted that the sentence imposed on the appellants was not severe given the circumstances of the case. However, she pointed out that the trial Judge erred in sentencing the appellants to 60 years imprisonment without taking into

consideration the mitigating and aggravating factors. She prayed that in the event that this Court is inclined to alter the sentence in favor of the appellants, the period of 3 years and 4 months the appellants spent on remand be considered and a sentence of 56 years and 8 months be imposed.

Court's Consideration

As a first appellate court we are enjoined to re-evaluate the evidence on record and come to our own conclusion on findings of fact and Law. *See; Rule 30(1)* of the Rules of this Court, the Supreme Court decisions of ***Kifamunte Henry vs Uganda, SCCA No. 10 of 1997*** and ***Bogere Moses vs Uganda, SCCA No. 1 of 1997.***

We have carefully studied the court record, the submissions of both counsel and the authorities cited to us. However, in view of what later became apparent as a defect in the trial, regarding the learned trial Judge's decision to assign a 2nd assessor midway the trial, it is our considered view that we should tackle this first before considering the merits of the case.

When counsel for the respondent made her submission in reply to the effect that she was opposing the appeal, we drew her attention to the fact that at the beginning of the trial in the lower court, 2 assessors were appointed by court and then later mid-way the trial, another assessor was assigned to substitute one of the previously appointed assessors. In our view, this is a point which the appellants could perhaps, have taken as a ground of appeal, but he did not do so. Counsel for the respondent prayed that should this Court find this an irregularity, a re-trial be ordered.

We note on page 9 of the court proceedings that the trial court proposed Mr. Dominic Wasswa and Mr. John Katongole as assessors. They were not objected to and were sworn in and they heard the evidence of PW1, PW2, PW3 and PW4. Later on at Page 38, when it came to hearing the evidence of PW5, the court appointed a new assessor Mr. Ndinoha Ronald to

replace Mr. John Katongole and proceeded with hearing the evidence of PW5. We further note that Mr. Ndinoha continued being part of the trial till the end and even gave his opinion on which the trial Judge took into account while convicting the appellants. In our view, this was an irregularity which was fatal to the whole trial.

The law governing absence of an assessor in a trial before the High Court is provided under section 69 of the Trial on Indictments Act (TIA) which provides as follows reads:

1. *"If, in the course of a trial before the High Court at any time before the verdict, any assessor is from sufficient cause prevented from attending throughout the trial, or absents himself or herself, and it is not practicable immediately to enforce his or her attendance, the trial shall proceed with the aid of the other assessors.*
2. *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."*

In the case of ***Bwengye Patrick vs Uganda, CACA No. 54*** an appeal was made against the irregularity of proceedings before the trial court where the Judge permitted an assessor, who had partly absented herself during the trial and consequently missed evidence of one witness to give an opinion at the end of the trial. Reference was made to the case of ***Abdu Komakech vs Uganda, [1992-1993] HCB 21*** where the trial started with two assessors. The prosecution examined its witnesses and closed its case. Then there was a further adjournment. It was then that it was discovered that one of the original assessors had not been participating in the trial as he had been sitting with a different Judge in a different case. At the absent assessor's instance, another assessor had taken his place. Neither the Judge nor the counsel was aware of this arrangement. On discovering this, the trial Judge dismissed the substitute assessor and the trial proceeded with the remaining assessor throughout. It was however not clear exactly when the rightful assessor was replaced by the substitute assessor. The appellant was convicted.

On appeal, the Supreme Court held that the second assessor acted as an assessor fraudulently and this irregularity was fundamental as it went to the jurisdiction of the court and therefore it occasioned a miscarriage of justice. The court had discretion to order a re-trial where the original trial was defective or illegal and the interest of justice requires it.

Under to section 69 of the TIA, Mr. John Katongole having absented himself from part of the trial and did not hear PW5's evidence, the court should have proceeded with the remaining one assessor (Mr. Dominic Wasswa) and not assigned a new assessor Mr. Ndinoha Ronald to replace him and give an opinion in the matter. Like in ***Abdul Komakech (supra)***, allowing Mr. Ndinoha to substitute Mr. Katongole and accepting his opinion was a fundamental irregularity which resulted in a mistrial.

Where a conviction by a lower court was based on a fundamental irregularity in the proceedings which occasioned a mistrial, or where by reason of an error material to the merits of the case a miscarriage of justice has occurred, the interest of justice demands that a retrial be ordered. The considerations for making such an order were laid out by this Court in ***Rev. Father Santos Wapokra vs Uganda, CACA No. 204 of 2012*** where it stated thus;

> *"The overriding purpose of a retrial is to ensure that the cause of justice is done in a case before court. A serious error committed as to the conduct of a trial or the discovery of new evidence, which was not obtainable at the trial, are the major considerations for ordering a retrial. The Court that has tried a case should be able to correct the errors as to the manner of the conduct of the trial, or to receive other evidence that was then not available. However that must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay and inconvenience by reason of the retrial.*
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> *An order for a retrial is as a result of the judicious exercise of the Court's discretion. This discretion must be exercised with great care and not randomly, but upon*

principles that have been developed over time by the Courts: See: Fatehali Manji v. R [1966] EA 343.

One of the considerations for ordering a retrial is when the original trial was illegal or defective; See: Ahmed Ali Dharamsi Sumar v R [1964] EA 481. The Court must however first investigate whether the irregularity is reason enough to warrant an order of a retrial: Ratilal Shahur [1958] EA 3. However, before ordering a retrial, the Court handling the case must address itself to the rule of the law that:

> *"a man shall not be twice vexed for one and the same cause: Nemo bis vexari debet pro eadem causa".*

A re-trial must not be used by the prosecution as an opportunity to lead evidence that it had not led at the original trial and to take a stand different from that it took at the original trial. The prosecution must not fill up gaps in its evidence that it originally produced at the first trial: See: Muyimbo v. R [1969] EA 433. A retrial is not to be ordered merely because of insufficiency of evidence or where it will obviously result into an injustice, that is where it will deprive the accused / appellant of the chance of an acquittal: See: M'kanake v. R [1973] EA 67. Where an accused was convicted of an offence other than the one with which he was either charged or ought to have been charged, a retrial will be ordered: Tamano v R [1969] EA 126.

Other considerations are; the strength of the prosecution case, the seriousness or otherwise of the offence, whether the original trial was complex and prolonged, the expense of the new trial to the accused, the fact that any criminal trial is an ordeal for the accused, who should not suffer a second trial, unless the interests of justice so require and the length of time between the commission of the offence

and the new trial, and whether the evidence will be available at the new trial. Accordingly each case depends on its particular facts and circumstances."

Taking guidance from the considerations in the above cited authorities, we are of the view that a retrial should be ordered in the instant appeal to meet the ends of justice.

Section 139 of the TIA gives this Court the power to alter or reverse a sentence 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 where a failure of justice is occasioned.

In the premises, we allow the appeal, quash the appellants' conviction and set aside the sentence of 60 years imprisonment imposed upon them. We order a retrial before a different judge and direct the Assistant Registrar of this Court in charge of the Criminal Registry to bring this matter to the immediate attention of the Resident Judge at Masaka so that the retrial is conducted in the next convenient criminal session. The appellants shall remain in custody pending the retrial, subject to their right to apply for bail from the High Court at Masaka, and the said court in the exercise of its discretion may or may not release him on bail.

As a result, we find no point in considering the grounds of appeal.

We so order.

Dated at **Masaka** this 30th day of July 2018

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Hon. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

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Hon. Justice Stephen Musota

JUSTICE OF APPEAL