# THE REPUBLIC OF UGANDA

## IN THE COURT OF APPEAL OF UGANDA SITTING AT MBARARA

# CRIMINAL APPEAL NO. 591 OF 2015

**NIWAMANYA JAMES :::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**UGANDA:::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

*(Appeal arising from the decision of the High Court of Uganda at Kabale before Hon. Justice Michael Elubu delivered on 26th day of June, 2014 in Kabale Criminal Session Case No. 46 of 2011).*

**CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**HON. JUSTICE REMMY KASULE, AG. JA**

**JUDGMENT OF COURT**

The appellant was charged, tried and convicted of the offence of murder c/s188 and 189 of the Penal Code Act, Cap 120 and sentenced to 45 years imprisonment. The appellant was dissatisfied with the judgment of the trial court and filed this appeal against both conviction and sentence on the following grounds;

1. That the learned trial Judge erred in law and fact when he held that the identification of the appellant was properly conducted, and yet it was not.

2. That the learned trial Judge erred in law and fact when he found that evidence of PW2 the native doctor amounted to a valid confession.
3. That the learned trial Judge erred in law and fact when he disregarded the appellant's defense of *alibi* which occasioned a miscarriage of justice.
4. That the learned trial Judge erred in law and fact when he failed to properly evaluate the circumstantial evidence adduced at trial to come up with his conclusion.
5. That the learned trial Judge erred in law and fact when he imposed an illegal and manifestly excessive and harsh sentence in the obtaining circumstances. (Sic)

**Background**

The facts of the case, as accepted by the learned trial Judge, were that on the 12th day of November 2011 at around 9:00am, the deceased left his home with his grandson one Kato Onesmus and the two went to graze cattle on the deceased's farm at Karugarama. At around 7:00 pm, the deceased and Kato locked up the cows and tied up the calves at the kraal ready to return to their home. The deceased advised Kato to go ahead of him as Kato was meant to first fetch water for domestic use. The deceased told Kato, that he would follow him because he wanted to return home with a bunch of banana. Kato left the kraal ahead of the deceased. As the deceased was returning to his home, he was attacked and killed. The attackers inflicted upon the deceased several deep cut wounds on the head leading to his death. When the deceased's wife saw Kato at home without the deceased, she accused Kato of leaving behind the deceased in the night yet the deceased was facing death threats from the appellant and the appellant's family members.

She immediately asked her grandchildren Kato Onesmus and Kakuru Junior Asiimwe to go back and find their grandfather, the deceased, so that they could come back home with him. Kakuru and Kato took the path they expected the deceased to use while returning home and when the two boys reached their neighbor's Eucalyptus

tree plantation, they saw the body of the deceased lying beside the foot path in a pool of blood. The bunch of banana which the deceased was carrying was besides the dead body.

Kato and Kakuru rushed back home and informed their grandmother about the death of the deceased. The two boys rushed to the home of area LC.1 Chairperson and reported the matter. The area LC.1 Chairperson in return reported this incident to Bukinda Police Post and investigations into the matter commenced which led to the arrest of the appellant.

**Representation**

At the hearing of the appeal, Mr. Tumwebaze Emmanuel appeared for the appellant while Ms. Nabisenke Vicky, appeared for the respondent.

**Appellant's submissions**

Counsel submitted that the circumstances surrounding the identification did not favor proper identification of the appellant and the identification parade was not properly conducted. Counsel relied on the Supreme Court decision in **Abdulla Nabulere and another Vs Uganda; C.O.A Criminal Appeal No. 09 of 1978** on the circumstances governing proper identification like the length of time, the distance, light and familiarity with the witness to avoid mistaken identity. From the testimony of PW12, it was at around 8:00pm when the appellant is said to have come for cleansing and it was dark with only a lamp as the source of light. PW12 could not have properly identified the appellant whom she had seen for the first time. Counsel argued that the principles enunciated in **Abdulla Nabulere and another Vs Uganda** (supra) were not in existence in the present case and therefore the trial Judge was wrong to hold that the appellant had been properly identified as the one who killed the deceased.

In addition, counsel submitted that the identification parade was not carried out according to the established principles laid out in the case of **Ssesanga Stephen Vs Uganda; (C.O.A) Criminal Appeal No. 85 of 2000**. PW12 testified that she first saw the appellant standing

outside the gate before the identification parade was conducted. The appellant was placed among inmates who had been in prison for a long time and it was not hard for PW12 to identify him.

Counsel argued that the learned trial Judge found that the evidence of PW12, the native doctor, was a confession without due regard to what amounts to a valid confession. A confession is an admission of guilt made to another by a person charged with a crime and in this case, there was no such admission. The appellant raised an *alibi* that was never disproved by the prosecution yet the trial Judge injudiciously discredited it. An *alibi* raised by an accused person places a duty on the prosecution to disprove the *alibi.*

Regarding the sentence, counsel argued that the sentence passed on the appellant was an illegal, harsh and excessive sentence. The learned trial Judge did not put into consideration both the aggravating and mitigating factors while imposing on the appellant a harsh sentence of 45 years imprisonment.

**Respondent's submissions**

In reply, counsel for the respondent submitted that an appellate court shall not interfere with the sentence of a trial court unless it results in the sentence being manifestly excessive or is so low as to amount to a miscarriage of justice.

**Resolution of the appeal**

This is a first appeal and this court takes cognisance of the established principles regarding the role of a first appellate court. The cases of **Kifamunte Henry v Uganda; Supreme Court Criminal Appeal No. 10 of 1997** and **Bogere Moses and Another v. Uganda; Supreme Court Criminal Appeal No. 1 of 1997** in essence have established that a first appellate court must review/rehear the evidence and consider all the materials which were before the trial Court, and come to its own conclusion regarding the facts, taking into account that it has neither seen nor heard the witnesses; and in this regard, it should be guided by the observations of the trial court regarding demeanour of witnesses.

**Rule 30** of the **Judicature (Court of Appeal Rules) Directions SI 13-10** is also relevant. It provides that;

*30. Power to reappraise evidence and to take additional evidence*

*(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*

*(a) Reappraise the evidence and draw inferences of fact; and*

*(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.*

We have been guided by the above principles in resolving this appeal. We have also taken into consideration the submissions made by the parties and the authorities cited.

The ingredients of the offence of murder are; death of a human being, the death was unlawful, the death was as a result of malice aforethought and lastly, the accused/appellant is the person who caused the death of the deceased.

As far as the first ingredient of the offence is concerned, there is no doubt that Rwagara Jackson is dead. The post mortem report tendered in at the trial confirmed the death of the deceased and cause of death being severe deep cuts on the head. PW1 testified that her husband had been murdered and in the premises, we find and hold that the first ingredient of the offence has been proved by the prosecution beyond reasonable doubt. Death is always presumed to be unlawful unless caused by accident, or by an act of God. See **R vs Gusambizi S/O Wesonga (1948) E.A.C.A 65.** In the present case, the post-mortem report revealed external injuries of severe deep cuts on the head and arms. The death was therefore caused by an unlawful act.

We now turn to the third ingredient of malice aforethought. Malice aforethought is defined under **Section 191 of the Penal Code Act** to mean an intention to cause death of any person, whether such person is the one actually killed or not. Malice aforethought, being a

mental element of the offence of murder can be inferred from the surrounding circumstances of the offence, such as the nature of the weapon used, the part of the body targeted and the manner in which the weapon was used. We have already found above that the body was found with severe deep cuts on the head and as such, whoever inflicted those injuries intended to or knew that the injuries would result into the death of the deceased. In the premises, we find that the element of malice aforethought was also proved by the prosecution.

The last ingredient of the offence is whether it was the appellant who caused the death of the deceased. The prosecution mainly relied on the testimonies of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10, PW11, PW12 and PW13.

PW1, the wife to the deceased testified that the appellant is her grandson and that the appellant and his brother had threatened to kill the deceased before Christmas. The deceased was killed while returning from grazing cattle with Kato. She testified that the appellant had a problem with his grandfather (the deceased) over sharing of property. PW1 was informed about the death of the deceased by Kato after finding his grandfather dead near a shamba tree. The LC1 Chairman testified as PW2 and stated that the deceased had earlier informed him of death threats from Alexander, Niwamanya and Herbert.

PW4, a son to the deceased, testified that in October 2011, he came home to the village and while going back, he passed by the home of the appellant and the appellant told him that he would kill the deceased because of land issues and he informed the LC1 of Kabaare.

PW5 testified that on 11th November 2011, he found his grandfather at the kraal at around 6:00pm and the deceased told PW5 to go home. When he got home, his grandmother sent him back to pick the deceased because of the threats he had been receiving. When he returned, he found his grandfather dead along the road.

PW6 testified that in 2011, he had a case with the mother of the appellant about getting a share of the father's land which was taken to Legal Aid Project. The deceased had threats from many family members including Amos, Herbert, Kedress, Byaruhanga Rogers and Peace.

PW7 is the police officer who visited the scene of crime and recorded a statement from PW12, the witch doctor, to whom the appellant went for cleansing and made a confession. PW7 further testified that the witch doctor narrated the circumstances under which the appellant had murdered his grandfather and there was similarity with the scene of crime.

PW11 is a grandson to the deceased and a UPDF soldier and he testified that on 10th November 2011, he travelled to Bukinda by bus and found the deceased was not at home. At 8:30pm the deceased returned home and told PW11 that he had a problem with his late son's children and that they had attempted several times to kill him. In the morning on 12th November 2011, PW11 went to Muhanga town and returned at around 7:30 – 8:00pm and met Kato and Kakuru crying with their grandmother saying the deceased had been cut to death. He reported to police and a search was commenced for the suspects. The suspects had escaped to Isingiro where they had bought land. They then got information about one herbalist who said a person came to her looking for medicine to protect him because he had murdered a person.

PW11 looked for the herbalist and she narrated to him what she had been told by the appellant. They then looked for the appellant at the land he had bought in Isingiro. When the appellant saw PW11, he admitted the allegations and said that he had killed the deceased because of anger and because the deceased had killed the appellant's late father through witchcraft.

PW12 testified that she is a herbalist and on 13th November 2011, the appellant whom she recognized by face came to her home at around 8:00pm on a motorcycle and asked for medicine for cleansing himself because he had killed his grandfather called Rwagara and he

said he was coming from Bukinda. He narrated that he had left his motorcycle in Muhanga, went and killed the deceased and got his motorcycle and left. She said she did not have the medicine and then reported to the defence secretary.

In his defence, the appellant denied the allegations and testified that PW12 knew him because he used to ride her on his motorcycle and she was also the caretaker of a piece of land that the appellant's uncle had bought. On the day the identification was carried out, the appellant was called out of the prison cell and on reaching out, he saw his uncle Nkurunungi and Mary (PW12) standing there. The warden called for seven other people and PW12 was told to pick out the appellant which she did.

**Confession to PW12**

The appellant was placed at the scene pf the crime by the alleged 'confession' of the herbalist (PW12). The learned trial Judge found on page 61 of the record of appeal that;

> *"the accused here admitted killing his grandfather to PW12 as stated earlier. Prima facie this statement is a confession. The accused did not specifically challenge the statement however for prudence this court will only act on this confession if it is corroborated in some material particulars."*

From the above excerpt, the learned trial judge relied on the admission to PW12 and admitted it as a confession. In the case **of Swami v The Emperor (1939) 1 ALL ER 396,** the principle was confirmed that a confession must either admit the offence or all facts which constitute the offence.

**Section 23** of the **Evidence Act** provides that;

> *23. Confessions to police officers and power of Minister to make rules.*
>
> *(1) No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of—*

*(a) a police officer of or above the rank of assistant inspector; or*

*(b) a magistrate,*

*but no person shall be convicted of an offence solely on the basis of a confession made under paragraph (b), unless the confession is corroborated by other material evidence in support of the confession implicating that person.*

The alleged confession in this case was made to PW12 at the time when the appellant was seeking to cleanse himself of the murder committed. Whereas the procedure of taking a confession was not followed in the instant case, the Supreme Court decision in **Festo Androa Asenua and another Vs Uganda; S.C.C.A No. 1 of 1998** addressed this issue extensively. The confession in Androa Asenua was made to a witch doctor before the murder was committed and again to the same witch doctor after the murder so that the appellants could be cleansed of the spirits of the deceased. The confession was heard by the wife to the witch doctor who testified in court. The Supreme Court held that;

*It has been held, and we agree with the view, that a confession connotes an unequivocal admission of having committed an act which in law amounts to a crime: See R vs Kifungu s/o Nusurupia (1941) 8 E.A.C.A 89. A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence: See R. vs. Kituyan s/o Swandetti (1941) 8 E.A.C.A. 56. In this case the statement made by A1 to Ali after the murder of Mudhola is a full confession.*

We therefore find that the confession to PW12 was properly admitted into evidence by the learned trial Judge.

**Identification of the appellant**

This is a case based on circumstantial evidence since there was no eye witness to the murder of the deceased. The evidence of PW1, PW2, PW4 and PW6 was that the deceased had received several threats

from his grandchildren owing to the land dispute. There is no direct evidence whether any of the grandchildren or the appellant executed the threats and killed the deceased.

The principles which Courts apply in deciding cases based on circumstantial evidence as was re-stated in the case of **Akbar Hussein Godi Vs Uganda; (Supreme Court) Criminal Appeal No 03 of 2013)** are as follows:-

> *"There are many decided cases which set out the relevant principles which Courts apply in deciding cases based on circumstantial evidence. In the case of* ***Simon Musoke Vs R. (1958) E.A. 715*** *at page 718H, the Court of Appeal for East Africa held that in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt "see also Teper Vs R. (1952) 2 ALL ER 447. Also see Andrea Obonyo & Others Vs R. (1962) E.A. 542 where the principles governing the application by Courts of circumstantial evidence were considered".*

The circumstantial evidence relied on by the learned trial Judge was the threats communicated to the family members by the deceased.

The requirement to subject circumstantial evidence to close scrutiny was emphasized in the case of **Katende Semakula vs. Uganda Supreme Court Criminal Appeal No. 11/ 200 1994)** where it was stated as follows:-

> *"Another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another. It is therefore 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 inference ..."*

The first piece of circumstantial evidence relied on to connect the appellant with the offence was a threat allegedly uttered by the appellant to the deceased.

The value to be attached to evidence of a prior threat was discussed in the case of **Waihi and Anor Vs Uganda (1968) E.A. 278 at p. *280*** *where the East African Court of Appeal stated:-*

> *"Evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of murder, but its probative value varies greatly and may be very small or even amount to nothing. Regard must be had to the manner in which a threat is uttered, whether it is spoken bitterly or of impulsively in sudden anger or jokingly, and reason for the threat, if given, and the length of time between the threat and the killing are also material. Being admissible and being evidence tending to connect the accused person with the offence charged, a prior threat is, we think capable of corroborating a confession.... "*

The evidence of prior death threats was also discussed by the Supreme Court in **Janet Mureeba and 2 others Vs Uganda; Criminal Appeal No. 13 of 2003**. In that case, the prosecution adduced evidence to the effect that the first deceased was a long-time girlfriend (or customary wife) of Charles Mureeba who was the husband of the first appellant. It is not clear when the first deceased and Charles started cohabiting as wife and husband. However, the evidence shows that in 1996, when the first deceased was working at the Uganda Population Secretariat as a telephone operator/receptionist, Charles hired a house for her in Kamwokya, a suburb of Kampala where she had a neighbour called Kato Muhammad. At some point in time she introduced Charles Mureeba to Muhammad Kato.

In 1997, the first deceased informed PW1 about A1's threats to her life, A1 was regularly sighted in Kamwokya. The deceased informed Muhammad that because of A1's threats to her life, she wanted to relocate to another place. She later moved to Najjanankumbi,

another suburb of Kampala. Shortly after moving there, she again sighted the first appellant in her new place. Once more the deceased informed PW1 in 1998 that she must again relocate to yet another place.

By that time the first deceased appears to have become so scared and frightened of the alleged menacing threats of the 1st appellant to her life that she persuaded her cousin, Kasabiti Rosette, (PW3) to join her and live with her in her new residence at Najjanankumbi. PW3 joined the first deceased about November, 1998. By then the first deceased had become overwhelmed by the fear that the first appellant would kill her. So on 31/12/1998, the first deceased and PW3 relocated to a new residence at Ntinda. The deceased was murdered at the Ntinda residence.

The Supreme Court upheld the finding of the Court of Appeal and held that;

> *We think that the conclusions of the learned trial judge and the upholding thereof by the Court of Appeal are justified. In our opinion the reports made by the deceased to PWs 1, 3, 4 and 8 are those envisaged by section 30(a) of the Evidence Act.*
>
> *S.30 (a) of the Evidence Act states: -*
>
> ***"Statements, written or verbal of relevant facts made by a person who is dead.....are themselves relevant facts in the following cases.***
>
> ***(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that persons death comes into question and such statements are relevant whether the person who made them was or was not at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."***

*The conduct of A1 soon after the murder as testified to by PW6 and the reports of the four witnesses summarised earlier in this judgment, irresistibly point to the guilt of the first appellant.*

In this case, the LC1 Chairman testified as PW2 and stated that the deceased had earlier informed him of death threats from Alexander, Niwamanya and Herbert. The wife of the deceased also testified of the constant threats to the deceased by the appellant and his siblings. The appellant had threatened to kill the deceased because he believed the deceased had killed his father (the deceased's son) with witchcraft.

As we observed at the beginning of this judgment, the case against the appellant is dependent on circumstantial evidence. We find that the circumstantial evidence in this case points irresistibly to the guilt of the accused/appellant. We find no reason to interfere with the decision of the learned trial Judge. All the grounds of appeal as to conviction having failed, the appeal of the appellant against conviction is therefore dismissed.

**Review of sentence**

This court as an appellate court can only interfere with the discretion of a trial court in imposing a sentence if the trial court acted on a wrong principle or overlooked a material factor or where the sentence is illegal or manifestly excessive or too low to amount to a miscarriage of Justice See: **Kyalimpa Edward v. Uganda SC Cr. App No. 10 of 1995, and Kyewalabye Bernard v. Uganda Criminal App. No. 143 of 2001).**

The sentencing order of the learned trial judge stated that;

*"The accused shall be treated as a first offender.*

*He has spent 2½ years on remand.*

*He is a young man and his family situation shall be taken into consideration.*

*This court has taken note of the fact that the convict killed his own grandfather who rather than respect he paid in with the worst currency of death.*

*The court has considered that the convict first traumatized the deceased by continuously threatening him before finally taking his life.*

*The convict has shown no remorse and even now protests innocent when court has found him guilty in the face of the glaring evidence.*

*The death of the deceased has severely affected the family as seen from the evidence of PW1 and the statements made from the family as victim statements.*

*The deceased was killed in horrible and gruesome circumstances.*

*Therefore having considered the remand period and other mitigating factors and also considered the aggravating factors I find that a sentence of 45 years is appropriate."*

The appellant's counsel argued that the learned trial Judge did not arithmetically calculate and subtract the period the appellant had spent on remand as was held by the Supreme Court in **Rwabugande Moses Vs Uganda; Criminal Appeal No. 25 of 2014**. However, the Supreme Court, in a later case of **Abelle Asuman Vs Uganda S.C.C.A No. 66 of 2016**, held that what is material is that the period spent in lawful custody prior to the trial and sentencing of a convict should be credited to the convict. Further, that where a sentencing court has clearly demonstrated that it has taken into account the period spent on remand, the sentence would not be interfered with by the appellate court.

From the sentencing order of the learned trial Judge, it is clear that the period the appellant had spent on remand was taken into account by the learned trial Judge. The appellant's argument on illegality of sentence has to be dismissed.

Objective 3 (e) of the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013**, states that the Guidelines should enhance a mechanism that will promote uniformity, consistency and transparency in sentencing.

In the case of **Wafula Robert Vs Uganda; Criminal Appeal No. 42 of 2017**, the appellant had sworn, while with his two brothers, to kill his grandmother. This was however not the first time he was swearing to kill the grandmother. The following day, the deceased was found dead in her house. The Supreme Court upheld a sentence of 25 years imprisonment that had been confirmed by the Court of Appeal.

This case has quite similar circumstances to those in **Wafula Robert Vs Uganda (supra)** in which the appellant was sentenced to 25 years imprisonment. We accordingly find that the sentence of 45 years imprisonment is therefore harsh and excessive and ought, therefore, to be set aside. Having considered the time the appellant spent on remand and all the mitigating and aggravating factors of the case and in conformity with the principle of maintaining uniformity, we find that the sentence of 25 years' imprisonment will meet the ends of justice.

Dated this 20th day of November 2020

**Hon. Justice Elizabeth Musoke, JA**

**Hon. Justice Stephen Musota, JA**

**Hon. Lady Justice Remmy Kasule, Ag. JA**