THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 172 OF 2012

1. NTAKIRWA APOLLO

5 **2. MUYINGIRA MOSES :::::::::::::::::::::::::::::::: APPELLANTS**

VERSUS

UGANDA :: RESPONDENT

(Arising from the judgment of the High Court before Justice Mike
10 *Chibita in Masaka Criminal Session case No. 10 of 2009)*

CORAM: HON. JUSTICE EGONDA NTENDE, JA
HON. JUSTICE HELLEN OBURA, JA
HON. JUSTICE STEPHEN MUSOTA JA

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JUDGMENT OF COURT

The appellants were indicted and convicted of the offence of murder contrary to section 188 and 189 of the Penal Code Act and sentenced as follows; the 1st appellant, Ntakirwa Appollo, to 14 years
20 imprisonment and the 2nd appellant, Muyingira Moses, to life imprisonment.

Background

On the 25th of May 2009, the deceased was sent by his mother to buy maize flour at around 7pm and he never returned. At about 6:30 am,
25 the deceased's parents received information from one Musa that Shaban had been murdered and his body was lying in the forest. Information was revealed that the deceased was killed using a sharp object and that the appellants were involved in the murder of the deceased. The accused were arrested, charged and convicted of
30 murder C/S 188 and 189 of the Penal Code Act and the 1st appellant was sentenced to life imprisonment while the 2nd appellant was sentenced to 14 years imprisonment.

Being dissatisfied with the decision of the High Court, the appellants filed this appeal on the following amended grounds;

1. That the trial court erred in fact and in law when it relied on the evidence of PW8 to convict the appellants and whereas it was established at trial that PW8 had been serving a sentence at the time the offence is alleged to have been committed.
2. That the trial court erred in law and fact when it passed a harsh sentence against the 1st appellant.

Representation

At the hearing of the appeal, Mr. Jurugo Isaac appeared on state brief for the appellants while Mr. Bakibinga David Baxter, a senior state attorney. appeared for the respondent.

Submissions of the appellants

Counsel for the appellants sought leave to amend the Memorandum of Appeal and rephrase the first ground of appeal as stated above.

Counsel paraphrased the evidence of PW8 in which he testified that on that fateful night at around 8.30pm, he was at the borehole near the forest and he heard an alarm. He walked slowly and found Moses and Ntakirwa Shaban and about 4 others. Moses and Ntakirwa were beating Shaban and he was crying. He didn't take it seriously since he knew they were brothers and he went back. The next morning, news came in that Shaban had been killed.

He also further says that he went to Mzee Abdu and told him that it was Moses and Ntakirwa and others who were beating Shaban, the deceased in the forest. That the accused persons raised an issue that Junju Tadeo who testified in court had been serving a sentence and that he was not in the village around that time when this offense occurred. That the learned trial Judge erred on relying on the evidence of PW8 to make a finding that he was a competent witness and therefore his evidence was key in the determination of this matter.

On ground 2, counsel submitted that the sentence passed on the 2nd appellant was harsh and excessive. The trial judge held that the 2nd

appellant deserves life imprisonment because he is the one who was the ring leader and he misled the 1st appellant. That there was no evidence on court record to show that A1 was the ring leader or was the one who led A2 to commit this offense. Further, that what is on record is that PW8 saw both of them beating the deceased.

Counsel prayed that this court allows the appeal and/or gives both appellants a uniform sentence.

Submissions of the respondents

In reply, counsel for the respondent submitted that PW8 was re-called to court to ascertain whether he was the Tadeo Junju who was in prison at the time the offence was committed since the matter had been tried by two judges. Subsequently, the learned trial Judge, Justice Singh Choudry, made a ruling that the person who was in custody in respect of the charge sheet was not the person who was being talked about as Tadeo Junju.

Counsel referred court to the evidence of PW7 who testified that he met A1 looking for the deceased near what turned out to be the scene of crime. He submitted that court can re-evaluate the evidence and find that the appellants were properly identified and court properly relied on the circumstantial evidence to convict the appellants.

Resolution of the appeal

This being a first appellate court, it has a duty to re-evaluate the evidence, weighing conflicting evidence, and reaching its own conclusion on the evidence, bearing in mind that it did not see and hear the witnesses. In ***Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997*** court stated that:

We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully

weighing and considering it. See also the cases of ***Pandya v. R [1957] EA 336, Bogere Moses v. Uganda SCCA No. 1 of 1997 and Rule 30(1) of the Court of Appeal Rules*** that are of the same effect.

We shall resolve the grounds in the way in which the parties have 5 argued them.

Ground one centres around the evidence of PW8, Jjunju Tadeo who, according to the appellant's case, was in prison at the time the offence was committed and could therefore not have witnessed the appellants beat up the deceased. The learned trial Judge, Justice 10 Anup Singh Choudry, made a finding that the record in the Prison Registration book and the commitment warrant dated 29th June 2008 relating to Junju Tadeo does not relate to the other Jjunju Tadeo who had also been summoned to court. He thus adjourned the matter to the next session to enable the prosecution produce additional 15 witnesses to prove that PW8 was the one in prison which the prosecution did not do.

Justice Mike Chibita completed the trial of the appellants and in his judgment relied on the evidence of PW7. PW7, a bodaboda cyclist, testified that he met the 2nd appellant and spoke to him at the spot 20 where the murder was later committed. The 1st appellant told PW7 that if he finds the deceased, he should tell him that he (1st appellant) is waiting for him. That very night, he met the deceased coming towards where the 1st appellant was waiting for him. The next day, he heard the news of the death of the deceased. The learned trial 25 Judge found PW7 to be a confident witness.

PW2 testified that the deceased called him on phone and informed him that the 1st appellant had informed him of a sick mother. On his way home, PW2 passed a man wearing an overcoat similar to the one the 1st appellant was wearing at the burial of the deceased. PW2 also 30 testified that the two appellants implicated each other at different times while talking to him.

PW9 testified that he recovered the spear and an iron bar from the house of the 2nd appellant which had been demolished by the residents. The learned trial Judge, after considering all the evidence

presented to court and the conditions for convicting on evidence of a single identifying witness, found that the appellants had been placed at the scene of the crime.

Having re-evaluated the evidence on record, we find no reason to fault the learned trial Judge on his finding. The appellants fault the trial Judge for relying on the evidence of PW8 to convict them but in our view, there was other evidence relied on at the trial which rightly placed the appellants at the scene of the crime. For instance the evidence of PW7, PW2 and the weapons that were found at the home of the 2nd appellant. It is our considered view that this evidence corroborated the evidence of PW8 and rightly placed the appellants at the scene of the crime. Consequently, ground one of the memorandum of appeal fails.

Ground two was in regard to the sentence passed on the appellants which they contend was harsh and excessive. The 1st appellant was sentenced to 14 years imprisonment while the 2nd appellant was sentenced to life imprisonment because, according to the sentencing Judge, he was the ring leader in the commission of the crime.

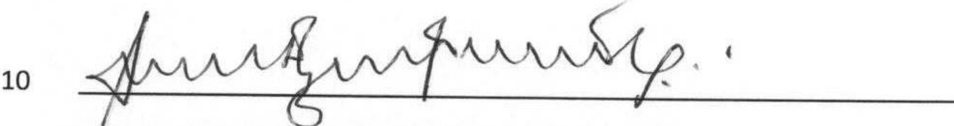
We must note that an appellate court should not interfere with the discretion of a trial court in the determination of a sentence imposed by that trial court unless that trial court acted on a wrong principle or overlooked a material factor or the sentence is illegal or manifestly excessive. (See **Kyalimpa Edward v. Uganda, SCCA No. 10 of 1995 and Kyewalabye Bernard v. Uganda, Criminal Appeal No. 143 of 2001(S.C).**

In this respect, we do not agree with the learned trial Judge who passed different sentences for both appellants. Sentencing, as a punishment for an offence is meant to be a retribution as well as a deterrent. It is also meant to rehabilitate the offender. Both the 1st and the 2nd appellant were convicted of murdering the same person in the same circumstances and in our view, they should both receive the same sentence for the offence they both committed. Owing to the above, and having regard to the period of 3 years and 2 months the appellants spent on remand, we substitute the 2nd appellant's life

imprisonment sentence to 14 years' imprisonment from the date of conviction which is 26/07/2012. The 1st appellant's sentence of 14 years imprisonment is hereby upheld. The second ground of appeal also fails.

5 We so order.

Dated this .....30th.. Day of ....July........ 2018



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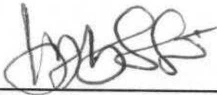
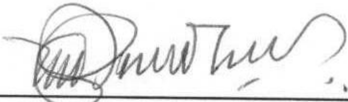
Hon. Justice Egonda Ntende, JA



15 **Hon. Justice Hellen Obura, JA**



Hon. Justice Stephen Musota JA

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