THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 0643 OF 2014 OF AND 734 OF 2015

BETWEEN

OMODO NORBERT

OPENJA SAMUEL

OPENJA JUDE..... APPELLANTS

AND

UGANDA ..... RESPONDENT.

[Arising from the decision of Hon. Justice Vincent Okwanga of the High Court of Uganda sitting at Arua in Criminal Session Case No.090 of 2012 dated 14th January 2014]

Coram: HON. MR. JUSTICE CHEBORION BASHARIKI, J.A

HON. LADY JUSTICE MONICA MUGENYI, JA

HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF COURT.

Introduction.

The Appellants were jointly indicted of the offence of murder of **Compara Albert** contrary to **Section 188 and 189 of the Penal Code Act.**

It is alleged that on 9th day of 2011 at Pakish East village in Nebbi district murdered **Compara Albert** the deceased. The Appellants denied the offence and pleaded not guilty. Each of the Accused person gave in sworn evidence in their defence and put up the defence of Alibi.

The Appellants were convicted on 09th January 2014. The 1st Appellant was sentenced to 23 years imprisonment while the 2nd Appellant was sentenced to 30 years and the 3rd Appellant to 21 years of imprisonment.

Dissatisfied with the conviction and sentence, the Appellants filed an appeal against the whole sentence and conviction on grounds that:

1. The learned trial Judge erred in law and fact when he failed to evaluate the evdeince properly and judiciously on court record which is full of gross contradictions and reached a wrong decision to convict the Appellant for murder.
2. In the alternative and without prejudice to the above, the sentence delivered against the Accused persons/ Appellant is very hard and excessive.

Representation

The Appellants were represented by Mr. Madira Jimmy. The Respondent was represented by Mr. Okello Richard.

Submissions of counsel for the Appellants

Ground 1

Counsel for the Appellants submitted that in all criminal cases, the burden is on the Prosecution to prove their case beyond reasonable doubt. He further submitted that the prosecution must prove all the ingredients of the offence against the Accused person and where there is doubt in the Prosecution case, it should be resolved in favour of the Accused person.

Counsel argued that the accused persons should be convicted on the strength of the Prosecution case and not on the weakness of the defendant's case. See **Woolington vs. DPP [1935]AC 462**.

Counsel submitted that for the Appellants to be convicted for murder contrary to **Section 188 and 189 of the Penal code**, the prosecution must prove:

1. The deceased (**Compara Albert**) is dead.
2. The death of the deceased is unlawful.
3. The death of the deceased was caused with malice forethought.
4. It is the accused person who caused the unlawfully death of the deceased person.

It is counsel for the Appellants' submission that the Appellants did not cause the death of the deceased person. He argued that the Prosecution evidence on court record is full of gross contradictions on participation of the Appellants and it goes to the root of the case.

Counsel submitted that the law on inconsistencies and discrepancies or contradictions unless satisfactorily explained will usually but not necessarily result in evidence of a witness being rejected. He further submitted that minor inconsistencies and contradictions will not normally have that effect unless they point to deliberate untruthfulness. He cited **Shokatali Abdulla Dhalla vs. Sadrudin Wenalli SCCA No. 32 of 1994 and Uganda vs. Sowedi Ndosire [1988-90] and Wasswa Stephen and Anor Versus Uganda SCCA No.31 of 1995**.

Counsel submitted that the alleged eye witnesses **PW2 (Komakech Walter) and PW3 (Kerobel Kizito)** contradicted each other as to the period the fight took place. PW2 claimed that the fight took place for one hour while PW3 stated that the fight took 3-4 minutes. PW2 told Court that when he reached the scene, he found the dead body on the ground. He made an alarm and the first people to respond to the alarm were Okello Giriano.

Counsel further submitted that according to PW2 the deceased was helpless as they beat him. PW2 stated that he raised an alarm to help the deceased and his first alarm was not heard so he run to stop the disco system where he made more alarms, and the disco system was stopped and the people who responded to the scene was Mzee Okello Girasol who called the police. PW2 did not at any time talk about the presence of PW3 at the scene.

Counsel for the Appellants submitted that PW.3 on the other hand contradictorily told court that as he pushed Appellants 1 and 3 away from further beating the deceased, he came back to find the deceased dead. That as they heard him saying

that the deceased had died, they started running away. He made an alarm and Komakech stopped the disco noise and people ran away. Mr. Okello Giriano and the wife of the deceased came to the scene.

Counsel submitted that from the above testimonies of PW2 and PW3, either one or both were not present at the scene. One of them or both told court lies on oath, in the alternative, the evidence was manufactured by the prosecution to create corroborative evidence.

Counsel prayed that this ground succeeds.

Submissions of Counsel for the Respondent.

Counsel for the Respondent submitted that the trial court did thoroughly and judiciously evaluate the evidence adduced by the prosecution during the trial. Counsel submitted that as cited and stated by counsel for the Appellants minor inconsistencies if any in the prosecution case will not necessarily result in the evidence of a witness being rejected.

Counsel submitted that trial Judge ably addressed his mind to the contradictions between PW2 and PW3 which was raised by defence counsel right from the time of trial all the way to the submissions. That further the judge took time dissecting the inconsistency and giving reasons why he believed PW3 who said the assault on the deceased by the Appellants took 3-4 minutes as opposed to the "about 1 hour" stated by PW2.

Counsel submitted that the evidence on record demonstrates that the two witnesses were present at the scene of the crime she quotes PW2 stating that:

> "I took off and ran to the place A2 was beating the deceased. I then joined Komakech, and we found A2 was top of the deceased; A1, A2 and A3 were stepping on him.....I made an alarm and cried and Komakech stopped the disco noise and people ran away..... my first alarm was not heard so I ran to stop disco system"

It is counsel for the Respondent's submission that trial Judge took the correct approach of evaluating the prosecution's evdeince as one whole and taking into consideration the defence case as well.

Ground Two

Submissions of counsel for the Appellant

Counsel for the Appellants submitted that they were not availed with Record of Appeal, Sentence, and reasons for sentence. He submitted that the sentence of 23(twenty-three) years against the 1st Appellant, 30 (thirty years) against the 2nd Appellant and 21 (twenty-one) years against the 3rd Appellant is harsh and excessive. He submitted that trial judge did not consider the important information and evidence that the accused persons/Appellants are close blood relatives and therefore, there was need to promote reconciliation and peace in the families as provided under Articles 126(2) (d) of the 1995 Constitution of Republic of Uganda as amended.

Counsel prayed that the sentence be reduced to at least 7(seven years) imprisonment for the 1st Appellant and 3rd Appellant and 10 years for the 2nd Appellants.

Submissions of counsel for the Respondent

Counsel for the Respondent submitted that the principles upon which an appellate court should interfere with a sentence were considered by the Supreme Court in **Kamya Johnson Wavamuno vs. Uganda, Criminal Appeal No.16 of 2000** in which the court held.

> "It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion; or failure to take into account a material consideration; or an error in principle was made. It is not sufficient that the members of the court would have exercised their discretion differently."

Counsel submitted that the sentencing judge took into consideration both the mitigation and aggravating factors while passing the respective sentences. Counsel further submitted that in exercising his discretion, the trial judge took into account the observation by the prosecutor during allocutus the fact that the Appellants were convicted of an offence that could have as well attract the death sentence. The trial judge gave reasons for the sentence that was given to each convict.

On reconciliation, counsel for the Respondent submitted that the relationship between the Appellants and the deceased was not raised during the trial and there is no way the trial judge could be faulted. Counsel further submitted that the trial judge took into consideration the period spent on remand by each Appellant as at the time of passing the sentence in line with **Article 23(8) of the Constitution**.

On harshness, counsel submitted that the sentence handed down to the Appellants was not harsh considering the consistency that is exhibited by the appellate courts in a conviction of the same offences. That in **Rwabugande Moses vs. Uganda Supreme Court Criminal Appeal No. 25 of 2014**, this court confirmed the 35-year imprisonment which was reduced to 22 years by the Supreme Court. Counsel therefore objected to the proposal by the Appellant that the sentence should be reduced to 7 years for the first Appellant; 11 years for the second Appellant and 10 years for the third Appellant respectively.

Consideration of court

We have carefully studied the court record, considered the submissions for either side, and the law and authorities cited therein. As well as those out of our research.

A first appeal from the decision of the High Court to this court, requires this court under **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10,** to review, re-evaluate and scrutinise the evidence on record such that it comes to its own inferences of law and fact.

In **Kifamunte Henry vs. Uganda, Criminal Appeal No.10 of 1997**, the Supreme Court held that this court has the 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"

Ground 1

This Court and the Supreme Court have laid down the principles governing the law on contractions and inconsistencies in the Prosecution evidence. In **Obwalatum Francis vs. Uganda Criminal Appeal No.30 of 2015**, the Supreme Court held that.

> "The law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained."

It is therefore settled law that grave contradictions and discrepancies unless satisfactorily explained, will usually but not necessarily result into the rejection of that witness's evidence. See **Alfred Tajar v Uganda, EACA. Cr. Appeal No. 167 of 1969.**

It must be noted that there's no hard and fast rule of measuring the degree of inconsistencies, this will vary on a case-to-case basis. These vary in nature and the level of importance. It is always the duty of the trial Court to establish whether such contradiction is material to the facts of the case before it, considering the weight of that contradiction against material aspects that help the prosecution to prove their case beyond reasonable doubt.

Counsel alleged that eyewitness PW2 and PW3 contradicted each other as to the length of period the fight took place. Counsel alleged that PW2 claimed that the

fight took one hour while PW3 stated that the fight took about 3 - 4 minutes. In his submissions counsel alleges that this showed that one of them was not present at the scene or both of them.

We have considered the record of appeal and note that the trial judge took cognizance of the contradictions in the prosecution evidence and had this to say:

> "I have watched the demeanour of these two witnesses, PW2 and PW3 in court. They both gave their evidence in a straightforward manner, firmly and clearly answered all questions put to them in cross examination without any hesitation. Their respective demeanour in the witness box were unquestionably impressive.
>
> PW2, who said in his cross examination that the three accused persons took one hour beating the deceased could have been mistaken about the timing as beating someone for almost an hour would practically be unsustainable. I am prepared to decipher and reject that part of this witness' evidence from the rest of his evidence which I believe to be truthful....
>
> In my view , the estimated 3-4 minutes by PW seems to be the most correct version and nearer to the truth than the one hour estimate of PW2; I accept that piece of evidence and hold that the contradiction in these two witnesses' evidence is minor and does not go to the roots of the prosecution's evidence to make such evidence to be rejected as worthless"

In exercising our role of evaluation and scrutinising evidence, we have considered the range and character of the contradictions and inconsistencies so highlighted. We do not find them grave because they are not material in nature. The trial Judge was able to high light this aspect and actually rejected that part of evidence of PW2. The evidence of PW2 and PW3 was consistent other than the range of time the fighting took place. The participation of the accused was not brought in doubt by the minor contradictions of PW2 and PW3.

We therefore find that the trial court made a proper finding on this matter.

Ground 1 fails.

Ground 2

It is the submission for Counsel for the Appellants that the sentence handed down by the trial court was excessively harsh. An appropriate sentence by a trial court is a discretion of the sentencing judge. It is trite law that there is no hard and fast rule of sentencing, however each case presents its own circumstances that requires the sentencing judge to judiciously exercise his/her sentencing discretion while being guided by the sentencing guidelines. It is now trite law that the appellate court will not usually interfere with the discretion of the trial judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly excessive as to amount to a miscarriage of justice. See **Ogalo s/o Owousa vs. R (1954) 21 E.A.CA 270.**

Court in **A.G vs. Kigula and 147 others, Constitutional Appeal No.3 of 2006,** held that;

> "Interfering with the sentence is not a matter of emotions but rather one of law. Unless it can be proved that the trial judge flouted any of the principles in sentencing, then it does not matter whether the members of this Court would have given a different sentence if they had been the one trying the Appellant. see Ogalo S/O Owousa v R [1954] 24 EACA 270. In the instant case, he found that the most appropriate sentence was death. Without proof that this discretion was biased or unlawful, this court would have no lawful means of interfering with the same"

It is therefore very clear from the above authorities, that the appellate court is not at liberty to interfere with the discretion of the trial sentencing court as and when it deems fit, but it is guided by the sentencing principles. There must be cogent evidence that the trial court flouted any known principle of sentencing as set down by the law. In this case while considering both the mitigating and aggravating factors the trial judge at page 32 to 34 held that;

> "I have looked at the mitigating factors in favour of the 3 convicts. All of them are first offenders, all are young men in their prime of life. A1, Omodo Norbert is now aged 27 years old, married with 2 wives and 2 children. He lost a mother in 2011 and has 3 sisters to care for with a sick father who underwent an amputation on one leg. He has spent two and half years on remand. A2 Openja Samuel is now 30 years old, has a wife and 6 children and some 6 orphans to take care of from his deceased's elder brother. He has spent on remand since 23 /08/3011, 2 years and 5 months. While A3, Openja Jude is now 21 years old unmarried, was a student at the time of his arrest. it was his brother A2 who was paying for his school fees.
>
> Taking into account all the above factors, this is my sentence and the reasons for the same."

The offence in question in this matter is murder contrary to **Section 188** of the **Penal code Act**. Under the Penal Code the punishment for murder under **Section 189** is death. Since the **Suzan Kigula and other vs. A.G** (*Supra)* the mandatory death sentence was overruled. The holding of the trial court as partially laid above demonstrates that the trial court put into consideration the mitigating factors and aggravating factors. The mitigating factors were that the accused were first time offenders, all young men in their prime years of age and they had families to fend for. Having considered the mitigating factors, the trial judge could not be faulted on that principle.

This court has the duty to consider whether the sentences handed down to the three Appellants are manifestly excessive. In the third schedule of the **Constitution (Sentencing Guidelines),** the sentencing range for murder is from 30 years imprisonment to death penalty which is the maximum penalty upon consideration of the mitigating and aggravating factors.

It is a requirement under **Guideline No.6(c) of the Sentencing Guidelines** that, the sentencing court is guided by precedents of similar offences while sentencing. The guideline provides that;

> "Every court shall when sentencing an offender take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances"

We agree with the above guideline. It is the duty of this court while re-evaluating evidence regarding sentencing to ensure that there is consistency. The principle of consistency is deeply rooted in the rule of law and the principle of equality. Even when cases present different circumstances, it should not be seen that there is a wide differential range between convicts of same offences. In assessing the appropriate sentence, we shall consider sentences in similar cases by the supreme court.

In **Aharikundira vs. Uganda [2018] SC Criminal Appeal No.27 of 2015,** court held that;

> "In consideration of the aggravating factors and mitigating factors of the case, and in the interest of consistency we are of the view that the death sentencing this case should not stand. The death sentence is hereby set aside and substituted with a sentence of 30 years to run from the time of conviction in the High Court"

In the above case, the Appellant brutally murdered her husband and cut off his body parts in cold blood.

In **Ndyomugenyi vs. Uganda, Supreme Court Criminal Appeal No.57 of 2016,** the Supreme Court confirmed a sentence of 32 years imprisonment for a murder as passed by the re-sentencing judge and confirmed by the Court of Appeal.

In **Mpagi Godfrey vs. Uganda Supreme Court Criminal Appeal No 63 of 2015**, the Supreme Court confirmed a sentence of 34 years imprisonment for murder as handed down the sentencing judge and confirmed by the Court of Appeal.

In the circumstances of this case and considering the authorities cited above together with the mitigating and aggravating factors as well as the time spent on remand, we confirm the sentence handed down by trial sentencing judge. That is;

1. 1st Appellant Omodo Norbert we confirm the sentence of 23 years the trial court having considered the two and half years spent on remand.
2. 2nd Appellant Openja Samuel, we confirm the sentence of 30 years the trial court having considered the two years and five months spent on remand.
3. 3rd Appellant we confirm the sentence of 21 years the trial court having considered the two years and five months spent on remand.

We so hold.

Dated at Arua this 29th Of March 2022

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BARISHAKI CHEBORION

JUSTICE OF APPEAL

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MONICA MUGENYI

JUSTICE OF APPEAL

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL