THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

[*Coram: Egonda-Ntende, Bamugemereire & Mulyagonja, JJA*]

CRIMINAL APPEAL NO. 214 OF 2019

(*Arising from High Court of Uganda Criminal Session Case No. 181 of 2019 at Lira*)

BETWEEN

ONYOLO FRANCIS==========Appellant

AND

Uganda==========Respondent

(*Appeal from a Judgment of the High Court of Uganda (Ajiji, J.) delivered on the 3rd July 2019.*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted with 4 other persons of 2 counts of murder contrary to sections 188 and 189 of the Penal Code Act and 1 count of aggravated robbery contrary to section 286 (1) (b) of the Penal Code Act before the High Court at Lira. The particulars of count 1 were that the appellant and 4 others on 21st January 2016, at Oyuto-Abena village, Alebtong District, unlawfully and with malice aforethought killed Opio Vincent. The particulars of count 2 were that the appellant and 4 others on 21st January, 2016 at Oyuto-Abena village, Alebtong District, unlawfully and with malice aforethought killed Otim Martin. The particulars of count 3 were that the appellant and 4 others on 21st January, 2016 at on Oyuto-Abena village, Alebtong District, robbed from Opio Vincent 3,000,000/= and at or immediately before or immediately after the said robbery used actual violence to wit a gun on the said Opio Vincent.

[2] Prior to the commencement of the trial, A4, Ogwal Jasper was convicted under the plea bargain procedure and sentenced to 20 years' imprisonment on the 3 counts. A3, Ogwang Benson, changed his plea before the conclusion of the trial, and pleaded guilty. He was convicted on his own plea of the 3 offences and was sentenced to 13 years' imprisonment on each of the said 3 counts. A5, No. 60785 PC Opio Moses, was discharged of all counts, prior to commencement of the trial.

[3] The appellant and one other person, Okol Emmanuel, were tried on the said 3 counts and were convicted on all of them on 3rd July 2019. The appellant was sentenced to 40 years' imprisonment on each count. Accused no. 2, Okol Emmanuel, was sentenced to 18 years' imprisonment on each count. No direction was made whether the said sentences were to run concurrently or consecutively.

[4] Dissatisfied with the decision of the trial court, the appellant appealed against both conviction and sentence, apparently only on the 2 counts of murder, on the following grounds:

> '1. That the learned trial Judge erred in law and fact when he found that the offence of murder was proved beyond reasonable doubt whereas not hence occasioning a miscarriage of justice.
>
> 2. The leaned trial judge erred in law and fact when he imposed a manifestly harsh and excessive sentence against the appellant.'

[5] The respondent opposed the appeal.

[6] At the hearing the appellant was represented by Mr. Douglas Odyek Okot and the respondent was represented Mr. Ssemalemba Simon Peter, Assistant Director of Public Prosecutions, in the office of Director of Public Prosecutions. The parties filed written submissions.

Submissions of Counsel for the Appellant

[7] Counsel for the appellant submitted that the duty of a first appellate court was set out in Kifamunte Henry Vs Uganda [1998] UGSC 20.

[8] Counsel for the appellant submitted that the appellant denied participating in the unlawful killing of the two deceased persons with malice aforethought. He submitted that DW1 stated in his testimony, that on the fateful day he was burning bricks together with Okelo Bilal,

Okello Bonny, Ojok Dennis, Okello Jimmy, Ogwal Emmanuel, Etechu Lawrence and Ogei Sam at Ikulluwii which is about one and half kilometres from the scene of the crime. That they heard gun shots and moved towards the scene, and they met Oleko Franco, Obote and Ocen on the way who informed them that thieves killed Opio Vincent. They found many people at the scene including Obua, stayed there for about 20 minutes and went back to the place where he was burning bricks from.

[9] Counsel for the appellant submitted that the appellant's testimony was corroborated by the evidence of DW2 and DW3 who confirmed that the appellant was burning bricks at the time the incident happened. He argued that the appellant set up the defence of alibi and the burden was on the prosecution to destroy the same. Counsel for the appellant referred to Ainomugisha v Uganda [2017] UGSC 12 where the Supreme Court explained the ways in which a defence of alibi can be disproved.

[10] Counsel for the appellant further submitted that the learned trial Judge relied on the charge and caution statement made by Ogwag Benson (A3) without any other evidence to prove participation of the appellant in commission of the said offences. This was fatal to the conviction of the appellant. He relied on Mushikomu Watete alias Peter Wakhoka & 3 Others v Uganda [2000] UGSC 11; and Baluku Samuel & another v Uganda [2018] UGSC 26.

[11] Regarding ground 2 of the appeal, Counsel for the appellant submitted that, the sentence of 40 years' imprisonment is too harsh and excessive in the circumstances. He asked this court to re-evaluate the mitigating factors and impose on the appellant an appropriate sentence. He relied on Kyalimpa Edward v Uganda Supreme Court Criminal Appeal No. 10 of 1995 and Kiwalabye v Uganda Supreme Court Criminal Appeal No. 143 of 2001 which lay down the principles under which an appellate court may interfere with the sentence imposed by the trial Court. Counsel for the appellant also referred us to Guloba Rogers v Uganda [2021] UGCA 16 where the appellant was convicted of murder and aggravated robbery and sentenced to 47 years of imprisonment, but the Court ofAppeal found the sentence to be manifestly excessive

[12] Counsel for the appellant further submitted that the learned trial judge did not deduct the period spent on remand while sentencing the Appellant. He argued that it was not enough for the learned trial Judge to state that he had considered the period spent on remand. He referred to the decision of the Supreme Court in Rwabugande Moses V Uganda [2017] UGSC 8 where it was held that a sentence arrived at without taking into account

the period spent on remand is illegal. He prayed that this court sets aside the trial court's excessive sentence and imposes an appropriate sentence for the appellant.

[13] Counsel for the appellant relied on Batuli Moses & 7 Ors v Uganda Court of Appeal Criminal Appeal No. 225 of 2014 where on appeal the appellants were sentenced to 13 years and 9 months' imprisonment for murder. In Rwabugande v Uganda (supra) the appellant who was convicted of the offence of murder was sentenced to 35 years' imprisonment but on appeal the Supreme Court, reduced it to 21 years. Finally, Counsel for the appellant prayed that this court imposes a term of 15 years' imprisonment on the appellant.

Submissions of Counsel for the Respondent

[14] In reply, counsel for the respondent submitted that the evidence to prove the participation of the appellant was circumstantial. He relied on Simon Musoke v R (1958) EA 715 at 718. Counsel for the respondent argued that the learned trial judge considered the circumstantial evidence adduced by the prosecution to be sufficient to prove the appellant's participation in commission of murder and aggravated robbery. Counsel for the respondent submitted that the charge and caution statement of A3, Ogwang Benson, admitted in evidence as PE8 and PE9 wasn't objected to by the appellant and that A3 implicated himself and other accused persons who included the appellant. Counsel further submitted that this piece of evidence was corroborated by the evidence of PW5 who recorded the caution statement.

[15] Counsel for the respondent submitted that PW2, testified that A4 revealed to PW2 how they hatched a plan with the appellant, A2 and A3 to kill a prominent businessman and how they stole a gun from PW4. That A4 led PW2 and other officers to the anthill where the gun was hidden and recovered it with 18 rounds of ammunition. PW4 identified the gun (PE6) as the one stolen from him on 16th January, 2016. Counsel for the respondent submitted that the evidence of PW2, PW5, PE8 and PE9 pointed to the fact that the appellant formed a common intention with the 3 convicts to kill and rob the deceased Opio Vincent, the appellant being the master mind who assigned his colleagues tasks.

[16] Counsel for the respondent argued that the learned trial Judge considered the defence of alibi set up by the appellant and he analysed the evidence of DW1, DW2 and DW3. Counsel for the respondent stated that the appellant alleged that he was burning bricks with DW2 and others on the

fateful night at 9:00 p.m. and only went to the scene after hearing gun shots. He submitted that the alibi raised by the appellant was an aforethought and DW2 who sought to corroborate his evidence, gave evidence contrary to what he stated in his police statement (PE10) on 24th January,2016, three days after the incident.

[17] He stated that DW2 did not tell police that he was with the appellant on the fateful day and the fact he was burning bricks at the time the incident happened. It was the argument of Counsel for the respondent that if DW2 was with the appellant at that material time, he would have stated the same in his police statement since he was well aware that the appellant was in police custody at the time he was recording his statement. Counsel for the respondent further submitted that DW3 could not account for the whereabouts of the appellant at 9:00 p.m. or prior. That much as DW3 alleged that he went to the site of burning bricks at 9:00 p.m., he did not mention of hearing gunshots which were fired at 9:00 p.m.

[18] Regarding ground 2, counsel for the respondent conceded to the extent that the learned trial judge did not take into account the period spent on remand by the appellant by deducting it from the sentence. He referred Rwabugande Moses v Uganda [2017] UGSC 8 where it was held that taking into account the period spent on remand is necessarily an arithmetical exercise and should mean reducing or subtracting the period from the final sentence. He invited this court to invoke its powers under Section 11 of the Judicature Act and impose on the appellant an appropriate sentence.

Analysis

[19] It is our duty to review and re-evaluate the evidence adduced at the trial and reach our own conclusions on the law and facts, bearing in mind that this court did not have the same opportunity as the trial court had to hear and see witness testify and observe their demeanour. See Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions; Kifamunte Henry v Uganda, [1998] UGSC 20; and Bogere Moses v Uganda, [1998] UGSC 22.

[20] We shall proceed to do so.

[21] The facts according to the prosecution are that on the night of 21st January 2016 at 9:00 p.m., Opio Vincent left Amonononeno trading centre on a motor cycle ridden by one Otim Martin. He was heading to his home. Shortly after they started their journey, gun shots were heard

in the direction they took. When people converged they found Opio Vincent and his rider Otim Martin dead and the motorcycle abandoned 50 metres away from the dead bodies. The deceased persons were examined, the body of Opio Vincent was found with external marks of violence to wit; gunshot wounds with entry at the ramus mandible and exit at parietal region, internally, severed brain and skull at parietal. The cause of death was severed brain injuries.

[22] The body of Otim Martin was found with external marks of violence to wit; gunshot injury with entry point at the back between the rib and exit in front between the rib, internally, severed lung tissues and plenra. The cause of death was severed lung tissues resulting into heavy bleeding.

Ground 1

[23] Counsel for the appellant contended that the learned trial Judge relied on the charge and caution statement made by Ogwang Benson (A3) without any other form of evidence connecting the appellant to the said crime.

[24] It must be pointed out that the confession statement of Ogwang Benson which was recorded by PW5 could only be proved against the maker of the statement, Ogwang Benson and not any other person. It is permitted pursuant to section 23 of the Evidence Act but is otherwise not admissible as it is in the species of hearsay evidence.

[25] What was required in this case was for Ogwang Benson to be called as a witness against the appellant and his co accused. His testimony is what would amount to accomplice evidence, permitted to be considered by a court under section 132 of the Evidence Act, rather than his charge and caution statement. Ogwang Benson was not called as a witness in this case. It was therefore not open to the learned trial judge to admit the charge and caution statement made to PW5 by Ogwang Benson against the appellant and his co accused. Neither could the contents of the said statement form the crux of the case against the appellant and his co accused.

[26] The learned trial judge formed the view that there was no direct evidence against the appellant and his co accused. To this extent he could not be faulted. However, when he proceeded to state that the only evidence against the appellant and his co accused was circumstantial evidence which he stated to be the evidence of PW5, the charge and caution statement of Ogwang Benson, the testimonies of PW2, the investigating

officer, and PW4, the police officer, whose gun was stolen, he was in error.

[27] This was not circumstantial evidence whatsoever. It was hearsay evidence by PW5, PW2 and PW4. PW2, PW4 and PW5 stated only what they were told by other persons about the involvement of the appellant and his co accused in the commission of the offences with which they were charged. It was inadmissible as it was not directly perceived by the witnesses that testified. This point was discussed by the Court of Appeal of Kenya in Maina wa Kinyatti v Republic (Cr. Appeal No. 60 of 1983) [1984] eKLR where it stated,

> 'Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence; Cases and Materials on Evidence by J. D. Heydon, 1975 p 5. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated: Archbold Criminal Pleading Evidence & Practice 40th Edition p 809 para 1282.'

[28] There are exceptions to the hearsay rule, but which do not apply here. The learned trial judge just accepted the hearsay evidence on record and then relied upon it, christening it, circumstantial evidence. Circumstantial evidence is largely direct evidence of the facts properly perceived by witnesses who testify in relation to those facts from which an inference can be drawn to lead to the conclusion that an offence was committed and by whom.

[29] The appellant set up an alibi that he was at some other place burning bricks at the time the offences were committed. His co accused chose to remain silent.

[30] The appellant bore no responsibility to prove his alibi. The person setting up the defence of alibi accounts for the time of the transaction in question to render it impossible to have committed the imputed act. The prosecution was obliged to demolish the same. See Sekitoleko v Uganda [1970] EA 531.

[31] The prosecution never produced any evidence to show that the appellant and his co accused participated in the commission of the offences of

which they were indicted. Neither did the prosecution produce any evidence to destroy the alibi set up by the appellant.

[32] This was a case where the appellant and his co accused ought not to have been put to their defence. There was simply no evidence adduced to point to their participation. Although of course there was much suspicion from the information that the investigating officers may have gathered. On the face of it there was accomplice evidence which could have been adduced but it was not. No explanation was provided why Ogwang Benson was not called to testify. It may well be that this could raise an adverse inference against the case for the prosecution. We are satisfied that the prosecution did not adduce sufficient evidence in this case to support the conviction of the appellant and his co accused for the 3 offences for which they were charged.

[33] We would allow ground 1. Much as ground 1 of the appeal was directed against the conviction for the offences of murder, the said offences were so intertwined with the offence of aggravated robbery, that for the same reasons, the conviction for the offence of robbery cannot be sustained. We would allow ground 1 of the appeal.

[34] It is unnecessary to consider ground 2 of the appeal.

Decision

[35] We quash the conviction of the appellant and his co accused, Okol Emmanuel, on all the 3 counts. We set aside the sentences imposed on the appellant and his co accused. We order their immediate release unless held on some other lawful charge.

Signed, dated, and delivered this 3rd day of July 2023

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Irene Mulyagonja
Justice of Appeal