THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CRIMINAL APPEAL No.628 of 2014
{Coram: Egonda-Ntende, Bamugemereire & Mulyagonja JJA}

SPC NONO GODFREY :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(An Appeal from the decision of Wilson Musalu Musene, J, in High Court Criminal Session Case No.88 of 2009 dated 13.05.2012 at Gulu)

Criminal Law – Murder c/s 188 and 189 of The Penal Code Act – Sentence- Life imprisonment- Circumstantial evidence – Last seen Doctrine -Conduct of appellant after commission of offence – illegal sentence.

JUDGMENT OF THE COURT

Introduction

The appellant, No. 1556 **SPC Godfrey Nono** was indicted on the Murder charges contrary to sections 188 and 189 of the Penal Code Act, Cap 120 Laws of Uganda. He was convicted and sentenced to life imprisonment.

Background

The brief background to this case as gleaned from the lower court record is that on 8th January 2009, the body of No. 0049 SPC Pius Reuben Oringa (the deceased) was found lifeless in a hut at the Mucwini Internally Displaced Persons (IDP) Camp, Paryeko-Tel Village in Kitgum District. The hut in which his remains were found was said to belong to the appellant. The appellant and the deceased were both special police constables, attached to the Anti-Stock Safety Unit stationed at Madi-Opei. It was an undisputed fact that Oringa, the deceased and the

appellant were known to be on good terms and lived together amicably. The deceased was said to be an uncle to the appellant. On 7th January 2009 the appellant and the deceased whiled away the evening together. Earlier in the day they had travelled to Lira to pick up their salaries and then they returned to their village in Paryeko-Tel but later proceeded to Mucwini Trading Centre where they had a social evening together watching movies. The deceased slept in the hut of the appellant, like he always did. He was found dead the following day. The appellant was quiet when asked about what happened to the deceased. In his defence he stated that he did not sleep in the same hut as the appellant for reason that the appellant had a female guest. According to the post-mortem report examination, the cause of death was severe asphyxia (lack of oxygen) as a result of obstruction of the upper airway by tight ligation by use of a human fist. The deceased was strangled with human hands. The appellant was indicted and convicted for the offence of Murder and sentenced to life imprisonment. Dissatisfied with the sentence, the appellant appealed to this court against conviction and sentence on two grounds, specifically that;

1. The Learned Trial Judge erred in law when he convicted the appellant on unsatisfactory and uncorroborated circumstantial evidence and without cautioning himself thereby occasioning a miscarriage of justice.
2. The Learned Trial Judge erred in law and fact when he sentenced the appellant to life imprisonment, which is illegal, harsh, and excessive thereby occasioning a miscarriage of justice.

At the hearing of the appeal, the appellant was represented by Mr. Stephen Lobo Akera while the respondent was represented by Ms. Caroline Marion Acio the Chief State Attorney. After the covid-19 restrictions were lifted, the appellant was able to physically be present in court. Both counsel relied on written submissions which have been relied on by this court in order to arrive at this Judgment. We have relied on the authorities provided by both counsel and also on other material beyond what both counsel availed to us.

Submissions for the Appellant

Counsel approached both grounds separately, on the first ground, counsel faulted the Learned Trial Judge for relying on circumstantial evidence without any caution. Counsel contended that the Learned Trial Judge ignored the fact that the conduct of the appellant was not in any way incriminating as he did not flee the village after the death of the deceased. Counsel further criticised the Learned Trial Judge for ignoring essential facts that weakened the evidence. It was submitted that the Learned Trial Judge ignored and did not pay attention to the facts including that PW3 and PW4 were informed by an unknown person about the death of the deceased. Secondly, that the post-mortem report was not satisfactory on the other issues that could have caused the death of the deceased. It was counsel's submission that poor investigative mechanisms, failure to collect and sample fingerprint evidence, proved fatal to the case. Counsel was critical of the Learned Trial Judge for

ignoring the fact that the appellant and the deceased did not have any grudge and therefore there was no motive proved. Lastly, counsel argued that the sketch map included illustrations of several residences around the scene with people who could have possibly seen or heard noise or seen violence.

Regarding the second ground of appeal, counsel contended that a custodial sentence of life imprisonment was harsh, extremely excessive, and illegal. Counsel also faulted the Learned Trial Judge for not taking into consideration the period spent on remand. Counsel for the appellant prayed to the court to allow the appeal or in the alternative to reduce the sentence to 13 years.

Submissions for the Respondent

Counsel for the respondent handled each of the two grounds separately. On the first ground, counsel contended that the Learned Trial Judge cautioned himself about the dangers of relying on circumstantial evidence although he did not expressly pronounce the caution. Counsel further contended that when the deceased was last seen alive he was with the appellant and this was corroborated with the appellant's conduct after crime. Counsel relied on the evidence that the appellant avoided his hut until the deceased was found dead in the hut. Counsel argued that the evidence highlighted was incompatible with the innocence of the appellant and was incapable of any other explanations upon any other hypothesis

than that of guilt of the appellant. Counsel argued that the evidence on the file proved beyond reasonable doubt that the deceased's cause of death was strangling.

Regarding the question of fingerprints and the blood stains as evidence, the respondent contended that no evidence from the Government chemist was produced in court and that the court cannot depend on evidence which was not placed before it to make a decision and that there was no logic to begin assuming that it would have been in favour of the appellant.

On the second ground of appeal, counsel contended that the Learned Trial Judge properly evaluated the mitigating and aggravating factors and rightly found that the life sentence was well deserved. Counsel argued that the life sentence was neither illegal nor excessive. It was counsel's prayer that the sentence from the lower court be confirmed and the appeal be dismissed.

Consideration of the Appeal

This court is alive to its duty of as a 1st appellate court. We are tasked to subject the evidence and other material adduced at trial to a fresh and exhaustive scrutiny and where necessary to draw our own conclusions and inferences, bearing in mind, however, that we did not have opportunity to see the witnesses testify, first-hand. **See: Fr. Narcensio Begumisa & Ors v Eric Tibebaaga SCCA No.17 of 2002, Kifamunte Henry v Uganda SCCA No. 10 of 1997, The Executive Director of National Environmental Management Authority (NEMA) v Solid State**

Limited SCCA No.15 of 2015 (unreported) and Pandya Vs R [1957] EA 336.

We shall dispose of each of the grounds of appeal separately, starting with the ground on unsatisfactory, uncorroborated circumstantial evidence.

We observe that to convict the appellant the trial Judge depended entirely based on circumstantial evidence. The Learned Trial Judge on the 'last seen' doctrine which he asserted had been corroborated by the conduct of the appellant. He arrived at the conclusion that there was no other hypothesis other than that of guilt . Counsel for the appellant was critical of this approach. He invited this court to find that the evidence on record was unsatisfactory, uncorroborated and unreliable. Counsel submitted that that the learned judge did not caution himself on the dangers of relying on such evidence.

The law on circumstantial evidence is well settled. In **Amisi Dhatemwa alias Waibi v Uganda SCCA No.023 of 1977** Ssekandi J (as he then was) stated that:

> "It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving facts in issue quite accurately; it is no derogation of evidence to say that it is circumstantial. See **R v Tailor, Wever and Donovan. 21 Cr. App. R. 20.**

However, it is trite law that circumstantial evidence must always be narrowly examined, only because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore, necessary before drawing the inference that the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See: **Teper v P. (1952) A.C. 480 at p 489** See also: **Simon Musoke v R (1958) E.A. 715**, cited with approval in **Yowana Serwadda v Uganda Cr. Appl. No. 11 of 1977 (U.C.A)**."

We acknowledge and appreciate that **circumstantial evidence**, in law, is evidence not drawn from direct observation of a fact in issue. Also known as indirect evidence it does not directly prove a fact in dispute, but a reasonable inference about the existence or non-existence of a fact can be drawn, based on the evidence. It is different from direct evidence, which establishes the existence or non-existence of a fact on its own. The law does not differentiate the weight to be attached to circumstantial or direct evidence; in law they are to be treated equally. However, just like there are weaknesses with use of eyewitness accounts, circumstantial evidence ought to be treated with the utmost care and should only be relied on if it leads to the inference of guilt, with mathematical accuracy.

In deciding the matter now before us the Learned Trial Judge relied on the 'last seen' doctrine coupled with the conduct of the

appellant after the deceased's body was discovered to find the appellant guilty. In his judgment he held that,

> "...As long as all prosecution witnesses confirmed that he was the last person seen with the deceased when he was alive, and accused did not deny, and the following day deceased is found dead, strangled in his house, then accused has been properly pinned at the scene of crime. There is no other hypothesis in the circumstances other than that accused knew how his uncle was killed or actually killed him. Why should accused chose to be adamant as if he was a deaf mute who could not speak, and even could not tell any neighbour or anybody that there was a problem in his house. He pretended till the body was discovered at 1:00 pm the following day and yet he was all along with the deceased up to the last minute. The accused killed the deceased and this court therefore finds and holds that the fourth ingredient of the offence of murder has been proved by the prosecution beyond reasonable doubt."

In the above extract from the Judgment, the trial Judge came to the conclusion that the appellant was responsible for the murder of the deceased because he kept quiet like a person who was hard of hearing. We would not bring ourselves to use the language employed by the learned trial Judge since it may be considered insensitive to a section of the society (The language was otherwise acceptable as old usage, in times past). More

importantly though, the conclusion drawn by this court from the inferences drawn by the learned trial Judge in the silence and distance of the appellant suggests that he was found guilty on the weakness of his defence and on the basis of the 'last seen' doctrine.

Counsel for the appellant submitted that the conduct of the appellant was not in any way incriminating since the appellant did not escape from the village but stayed around with people until the deceased was discovered. While addressing the issue regarding the conduct of the appellant, the learned trial Judge questioned why the appellant did not disclose to any of the neighbours the problem which had occurred in his hut let alone the fact that the appellant appeared to distance himself from it during the entire period.

In his defence the appellant testified to the effect that on the fateful day he was in the company of 41 other people, including the appellant when they travelled to pick up their salaries from a bank in Lira. The group travelled from Mucwini Trading Centre in Kitgum to Lira. They left Mucwini at 1.00pm and returned to Lira in the evening.

He further testified that on returning to Mucwini Trading Centre, the appellant and Oringa whiled the evening away, watching movies at the trading centre.

The appellant narrated that around 9.30 pm Oringa informed him that he needed to leave in order to meet an undisclosed female friend. According to the appellant, he spent the night at

the home of one Otto, having left the hut they shared to the deceased and the unknown girlfriend.

His testimony was that on the following morning he spent time repairing his bicycle and only managed to return home around 1:00pm, by which time, the appellant had been found dead.

He stated that on reaching the scene he found people crying and decided to call the Officer-in-charge of Kotokoro Military Detach. He was advised to report the matter to the Kitgum Central Police. Indeed, when he reported the death of Oringa to the Police in Kitgum he was detained for his own safety and later charged.

His defence coupled with the evidence of PW1, the scene-of-crime-officer, seemed to lead to several lines of investigation which were, apparently, not followed. These included the allegation that the hut, measuring 1.5metres, in which the deceased was found, did not belong to the appellant but to his brother. The evidence of PW4 was that the two had been seen together earlier in the evening and later walked away together. He did not know if the two returned and spent the night in the same hut or not.

The above evidence opens up other leads which ought to have been explored. The investigators ought to have ruled out the possibility that the deceased received a female visitor. Did anyone see the appellant leave the hut in which the body was found that morning? Expert evidence was that the deceased was strangled by use of human hand. If this was indeed the case,

why did the investigators not lift the finger prints found all over the neck?

In **Jagenda Joshua v Uganda CACA No.001 of 2011** this court found that a person who was last seen with the deceased had the duty to explain how the deceased met his death in accordance with the 'last seen doctrine'. **Jagenda** cited with approval the Nigerian case of **TaJudeen Iliyasu v The State (2015) LCN/4388 (SC)** where it was held that applying the 'last seen doctrine' which applies to homicides, our view is that this doctrine creates a **rebuttable presumption** to the effect that the person last seen with a deceased person bears full responsibility for his or her death."

In law, the last seen presumption seems to shifts the burden of proof or persuasion to the opposing party, who can then attempt to rebut the presumption **Nalongo Naziwa Josephine v Uganda SCCA No.35 of 2014**.

In the present appeal, it is the appellant with whom the deceased was last seen alive. His defence as noted above, included an alibi which ought to have been rebutted by the respondent/state since the appellant bore no duty to prove it. Whereas the general rule in law, is that presumptions take the place of facts if unrebutted, see **Nalongo Naziwa Josephine v Uganda SCCA No.35 of 2014, it** is equally trite that the prosecution in this case, like in all matters criminal, bears the burden of proving the case against the accused beyond reasonable doubt. This burden does not shift but remains with

the prosecution throughout. To this end, an accused can only be convicted on the strength of the prosecution case and not on the weakness in his defence. See: **Sekitoleko v Uganda [1967] EA 531) 5.** It is also true that any doubts in the case must be resolved in favour of an accused person; see **Mancini v DPP(1942)AC 1 and Abdu Ngobi v Uganda; Uganda Supreme Court Criminal Appeal No. 10 of 1991).**

We find that in questioning the behaviour of the appellant, the learned trial Judge appeared to decide this matter on the weakness of the defence put up by the appellant, rather than the strength of the respondent/prosecution case, a position which is untenable in criminal law.

As we noted earlier, this matter rested solely on circumstantial evidence since there was no eyewitness account to the murder of Oringa. However, the respondent did not explore the other lines of investigations leading to wide speculation as to whether there could have been a third hand in the murder. Failure by the respondent to close the loopholes in their evidence leads to a reasonable doubt as to whether it is the appellant who committed the murder. It cannot be over-emphasised that in criminal trials the standard is that a matter must be proved beyond reasonable doubt which by implication means any reasonable doubt, once raised, must be resolved in favour of the accused.

Upon carrying out a cautious analysis of the evidence above, we have not discovered any strand of evidence that would connect

the appellant to the death of the deceased except mere suspicion. The position of the law is that suspicion however strong, is not sufficient reason to convict a person of an offence which is not proved against him beyond reasonable doubt. See **R v Israel Epuku s/o Achietu (1934) 1 EACA 166.**

We find that it was unsafe to convict the appellant on circumstantial evidence that was weak and speculative. We set aside the conviction and sentence of life imprisonment and acquit the appellant.

He is immediately set at liberty unless held on other lawful charges.

Dated at **Gulu** this ..... **day** of **2023**

FREDRICK EGONDA-NTENDE,
JUSTICE OF APPEAL

CATHERINE BAMUGEMEREIRE,
JUSTICE OF APPEAL

IRENE MULYAGONJA,
JUSTICE OF APPEAL