THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING

AT JINJA

CRIMINAL APPEAL NO. 0038 OF 2019

ZEBOSI ANDREW::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda sitting at Mbale delivered on 17th November, 2009 in Criminal Case No. 094 of 2008 by Hon. Lady Justice Elizabeth Ibanda Nahamya)

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. LADY. JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT

This is an appeal from the decision of the High Court sitting at Mbale in Criminal Case No. 094 of 2008 delivered on 17th November, 2009 by Elizabeth Ibanda Nahamya, J in which the appellant was indicted and convicted of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act Cap. 120. He was sentenced to life imprisonment. The particulars of the offence were that on 5th November 2007, the appellant and one Masa Emmanuel George alias Mbaya

Patrick at Namango Village in Sironko District murdered Wodyamboga Augustine. Dissatisfied with the decision, the appellant appealed against sentence only on the following grounds:

1. ***That the learned trial Judge erred in law and in fact when she sentenced the appellant to life imprisonment without deducting the period the appellant had spent on remand; and***
2. ***That the sentence meted onto the appellant was illegal in the circumstances.***

At the hearing of the appeal, Mr. Munyamasoko Chris appeared for the appellant while Ms. Namatovu Josephine, Assistant Director of Public Prosecutions appeared for the respondent. The appellant was present in court.

Counsel for the appellant sought and was granted leave to appeal against sentence only. He also sought leave to amend the memorandum of appeal and add the ground of harshness of the sentence but court declined to grant him the same.

On grounds 1 and 2 of the appeal, he submitted that the sentence was harsh and comprised an illegality since the appellant was convicted and sentenced to life imprisonment at the age of 20 years in 2009 and the trial Judge did not recognise the fact that the appellant was a first offender at the time of sentencing. He prayed that the sentence is set aside and substituted with a

more lenient sentence in the circumstances. Counsel for the appellant relied on the case of **Ogwal Alberto versus Uganda, CACA No. 46 of 2010**.

In response, Counsel for the respondent submitted that the sentence against the appellant was not harsh given the peculiar circumstances of the case. She submitted that the appellant killed his own father and according to the evidence of PW 8 the police surgeon, the appellant used an axe or a hoe to hit the deceased's head, buried the body and planted a coffee nursery bed onto the grave.

She submitted that in respect to ground 1, it is not true that the Judge did not consider the period the appellant spent on remand. At page 123 of the record of proceedings the 2nd paragraph on the last 4 lines, the trial Judge considered the 2 years the appellant had spent on remand and ground 1 of the appeal fails. The appellant was not given the maximum sentence of death therefore according to Counsel for the respondent the sentence was not harsh. She relied on the authority of **Tigo Stephen versus Uganda, SCCA No. 8 of 2009**.

Counsel for the respondent further submitted that in terms of Article 23 (8) of the 1995 Constitution of Uganda, court only takes into account the period on remand if the convict is to be sentenced to a custodial term. She argued that reading the entire page 123 of the record of proceedings from the 1st paragraph, the trial Judge referred to both mitigating and aggravating factors hence the justification for life imprisonment. She relied on the cases of **Imere**

Deo versus Uganda, CACA No. 0065 of 2012 and Kiwalabye Bernard versus Uganda, SCCA No. 143 of 2001 (Unreported).

She submitted that the appellant's age at the time the offence was committed and the possibility of the appellant reforming and becoming a useful member of the society were factors considered by the trial Judge in favour of the appellant, therefore there was no justification to warrant interference with the sentence against the appellant. The period spent on remand by the appellant was also considered therefore there are no grounds to warrant deduction from the sentence passed against the appellant and prayed that the sentence is sustained. She relied on **Semanda Christopher and Another versus Uganda, CACA No. 77 of 2010**.

In rejoinder, Counsel for the appellant submitted that the authority of **Ogwal Alberto versus Uganda, CACA No. 46 of 2010** quoted Article 123 (8) of the 1995 Constitution of Uganda which was for purposes of stating that life imprisonment is also a term and the period spent on remand should be deducted in case such a sentence was passed. He argued that in **Tigo Stephen versus Uganda, SCCA No. 8 of 2009**, the court held that the sentence of life imprisonment was vague because trial Judge intended to impose a sentence for 20 years even though she had passed a sentence of life imprisonment. He prayed that the sentence be substituted.

The appellant submitted that he found the lawyer representing him in court and was introduced to him by one of the prison officers. He submitted that

the assessors who were to give court their opinion were absent at the start of the hearing of the matter and did not hear the evidence of 2 witnesses. The appellant had not come to terms with his lawyer concerning these issues.

Before we delve into the merits of the appeal, we would like to deal with the appellant's submission on the issue of absence of assessors. The appellant submitted that the assessors who were to give court their opinion were absent at the start of the hearing of the matter and did not hear the evidence of 2 witnesses.

Section 69 (2) of the Trial on Indictments Act, Cap. 23 provides that;

"If more than one of the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of different assessors."

In **Bwenge Patrick versus Uganda, CACA No. 54 of 1999**; Court stated that the assessor Sunday Aluzero, having absented herself from part of the trial and did not hear the evidence even of only one witness should not have been permitted to resume participation and give opinion in the case. Allowing her to resume participation in the trial was a fundamental irregularity which is fatal to the trial. It is a question of jurisdiction. It occasioned a miscarriage of justice as that Assessor's opinion which was based not on the full evidence could have influenced the decision of the Judge. We think that this was a mistrial as the error cannot be cured under Section 137 of the Trial on Indictments Act. Court held that basing on the evidence adduced, the interest

of justice demands a retrial. We allow the appeal, quash the conviction and set aside sentence of death. We order a retrial before a different judge. Appellant therefore must be kept in custody pending the retrial.

In **Mpagi Godfrey versus Uganda, SCCA No. 63 of 2015**; Court stated that from the outset we wish to point out that absence of assessors from a trial is not a mere irregularity. Under Section 3 of the Trial on Indictments Act all trials before the High Court shall be with the aid of assessors and Section 69 of the same Act provides that in absence of an assessor the trial proceeds with the aid of other assessors. If more than one of the assessors are prevented from attending or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of different assessors. Court held that the assessors could not have relied on the evidence of the appellant and his wife if they had not been in Court and heard their testimony on the alibi. The omission by the trial judge to record their presence was due to inadvertence rather than their absence from the trial. We, therefore find no merit on this ground of appeal which is also dismissed.

At the beginning of the proceedings presided by Hon. E. K. Muhanguzi J, two assessors were proposed without objection that is Wananda Nathan and Wegukhulu James. The two assessors were present when PW 1, Gidongo Ponsiano and PW 2, Rose Nagudi testified but did not ask questions.

Hon. Elizabeth Ibanda Nahamya J was appointed to hear the case when the court session resumed and new assessors, Wanelobi Medadi and Buyera

Perpetua were proposed without objection. The new assessors were present during the examination of PW 3 Nafuna Judith; PW 4 Francis Wekesa; PW 5 Gibuzuyi Godfrey; PW 6 Ochen James; TWT – DW 1 Zebosi Andrew; PW 7 Nangai Morris; and PW 8 Doctor Rubanza Barnabas. At page 110 of the record of proceedings, the case was adjourned to 11.00am when court would receive the assessors' opinion. At page 120 of the record of proceedings the last paragraph, the trial Judge concurred with the assessors who advised Court to convict DW 1, Zebosi Andrew.

During the trial within trial, the assessors were absent when TWT – PW 1 Ochen James; TWT – PW 2 Nangai Morris; and TWT – PW 3 Mugeni John Martin testified. DW 1, Zebosi Andrew and DW 2, Masa Emmanuel George alias Mbaya Patrick relied on the unsworn statements as their evidence.

From the foregoing, part of the trial within trial proceeded in absence of the new assessors and the old assessors. PW 1, Gidongo Ponsiano and PW 2, Rose Nagudi were never recalled to testify upon the appointment of the new trial Judge.

We fault the learned trial Judge in concurring with the new assessors' opinion which was based on partial evidence. There was a mistrial and under Section 69 (2) of the Trial on Indictments Act cited above, we would have ordered a retrial.

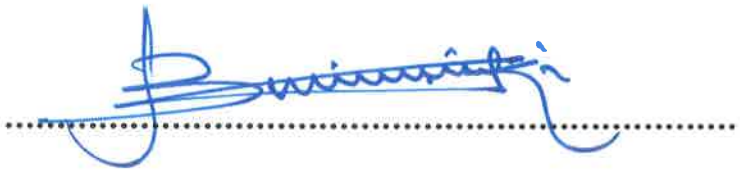
However, the appellant was convicted and sentenced to life imprisonment on 17th November, 2009 and has so far served 10 years since his sentence. We

find that he has served sufficient time and should be released. For this reason, there is no need to consider the grounds of appeal.

In conclusion, we allow the appeal, quash the conviction and set aside the sentence of life imprisonment. In the interest of justice the appellant is hereby released forthwith.

We so order

Dated at Jinja this 17th day of July 2019



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