

UGANDA / JUDGMENT

Balanda v Uganda (Criminal Appeal 448 of 2017) [2024] UGCA 111 (13 May 2024)

[2024] UGCA 111

COURT

Court of Appeal of Uganda

BEFORE

Kiryabwire, JA, Kibeedi Mutangula, JA, Monica K. Mugenyi, JA

CASE / FILE NUMBER

Criminal Appeal 448 of 2017

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

[Coram: Geoffrey Kiryabwire, JA; Muzamiru Kibeedi, JA; Monica Mugenyi]

CRIMINAL APPEAL NO. 0448 OF 2017

(Arising from High Court Criminal Session Case No. 255 of 2015 at Jinja)

BETWEEN

EDRISA BALANDA.....

AND

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UGANDA

RESPONDENT

(An Appeal from the Judgment of the High Court of Uganda Catherine Bamugemeriere J
Delivered on 27th November 2014.)

JUDGMENT OF THE COURT

Introduction

The Appellant was indicted and convicted of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act Cap 120.

The Facts

The Appellant on the 19th May 2011 at Rwambogo village Mutai Buwanzi Parish Buyengo Sub county in Jinja District with malice aforethought unlawfully killed his daughter Sirina Kyakuwaire. The Appellant was tired of the baby crying and heated a spoon on fire until it was red hot, put it in her mouth, slapped her head and chest until she died. He was subsequently found hiding in a Cart Cart sugarcane plantation and arrested and charged with the offence of murder.

Decision of the Trial Court

The Trial Judge sentenced the Appellant to 49 years' imprisonment. Dissatisfied, the Appellant appealed against conviction and sentence on the following grounds: -

- 1. The learned trial judge erred in law and fact in relying on the uncorroborated evidence of PW1 causing a miscarriage of justice.
- 2. The learned trial judge erred in law in giving an illegal and unconstitutional sentence of 49 years' imprisonment.

The Respondent opposed the Appeal.

At the hearing, the Appellant was represented by Mr. Martin Asingwire and the Respondent by Ms. Lillian Omara Alum.

The parties sought the leave of court to adopt their written submissions as their legal arguments in this Appeal which was granted.

Powers of the Appellate court

This is a first Appeal. We are alive to the duty of a first appellate Court which was espoused in the case of Kifamunte Henry v Uganda SCCA No.10 of 1997 to reappraise all the evidence at the trial and come up with our own inferences of law and fact.

In the matter of Kiwalabye v Uganda Criminal Appeal No. 143 of 2001(SC) it was held that: -

"The appellant court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of its discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is *wrong in principle.*"

We shall apply the above principles to this appeal.

On the ground of contesting a Sentence that has been passed, we also are alive to the **decision in** Ogalo s/o Owoura v R (1954) 21 EACA 270 where the Court held: -

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"... The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion, exercised by the trial judge unless as was said in James v R, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. An appropriate sentence should be proportionate to the offence with the gravest offences attracting the most severe penalties and lesser offences in terms of aggravation attracting less severe penalties. Courts also have added another principle of consistency in terms of equality before the law

Ground No.1: The learned trial judge erred in law and fact in relying on the uncorroborated evidence of PW1 causing a miscarriage of justice.

Submissions of Appellant

Counsel for the Appellant submitted that the learned Judge stated that she agreed with the evidence of PW1 Rehema Ndyaho and found that the accused was the only one capable of causing death of the infant. The finding on the ingredient of the accused's participation was solely dependent upon the testimony of PW1 who was not competent to testify under Section 117 of the Evidence Act. The prosecution informed Court that PW1 had mental illness.

Counsel submitted that the trial seemed to have been hurried and the post-mortem report was summarily admitted since it was going to take more time to procure the attendance of the doctor. The doctor would have given insights as to why the body was examined after 11 days, to rule out the child having suffered from measles, and whether such a disease could cause the child to refuse to breastfeed and become malnourished.

Counsel submitted that there was doubt that the accused killed his daughter from the evidence of PW1 which was uncorroborated in respect to the 4th ingredient being the accused's participation. Court did not call into mind the mental state of PW1.

Counsel further argued that Section 51 of the Evidence Act should have been employed with regard to his good character as he worked hard for his family. Further he raised and educate his girls.

He prayed that court finds that the 4th ingredient was not proved beyond reasonable doubt.

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Submissions of Respondent

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Counsel for the Respondent submitted that the law is that there is no required number of witnessed to prove any fact, and that evidence of a single witness is good evidence as long as the Court is satisfied of its truthfulness as was found in the case of Ntambala Fred V Uganda SCCA No. 34 of 2015.

Counsel submitted that PW1, Rehema Ndyaho was a competent witness and she understood the questions being put to her and gave rational answers to the questions. Furthermore, the medical report on PW1 Rehema Ndyaho dated 2nd October, 2013 on her mental assessment found that although she had poor concentration and was poor at reasoning, she had had a good attention span and fair judgment during the trial. PW1 observed the Appellant burning the deceased child with the heated spoon, hitting the child's head against the wall and swinging her around until she died. PW1's evidence was corroborated by a Post-Mortem Report, Exhibit 2. It was therefore an afterthought by the Appellant that the child died from measles. PW1's evidence was corroborated by PW2 Mary Kizza her mother, and PW3 AIP Moses Rwakasheiza Talemwa to whom she reported the incident.

Counsel consequently argued that PW2 Mary Kizza's evidence was not hearsay and not excluded by Sections 58 and 59 of the **Evidence Act Cap 6** as submitted by the Appellant.

Counsel further argued that the failure to call the investigating officer to Court was not fatal. Counsel referred court to the case of Alfred Bumbo and others V Uganda Cr. App. No. 28 of 1994 in support of his argument. Furthermore, failure to call the witnesses mentioned by the Appellant or consider the fact that the Appellant was of good character, did not affect the prosecution's evidence.

Counsel in conclusion prayed that Court finds that the Appellant's participation in commission of the offence was beyond reasonable doubt.

Findings and Decisions of Court

We have considered the submissions of both Counsel and the authorities they have given us for which we are grateful.

We have addressed our minds to the case of *Ntambala Fred V Uganda SCCA No. 34 of 2015*, where the learned Justices of the Supreme Court held that a conviction can be sustained solely on the evidence of a victim as a single witness. Section 133 of the Evidence Act further provides that:-

"Subject to the provisions of any law in force, no particular number of witnesses shall in any case be required for the proof of any fact... what matters is the quality not quantity of evidence."

The above position of law was supported by decision of *Abdala Nabulere and Another V Uganda Cr. App. No. 9 of 1978* where it was found that: -

"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications, [..]. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity, of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality the greater the danger... [...]. When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

Ndyaho Rehema's evidence (PW1) was sufficient and corroborated by PW2 Mary Kiiza, PW3 AIP Moses Rwakasheiza Talemwa and was also supported by the post-mortem report PE2 which also indicated that the 4-month old baby had lacerations on the left eyelid with offensive discharge, blood oozing from her nostrils, a fractured skull, petechial haemorrhage over the lungs and her cause of death was brain damage secondary to injuries sustained by blunt force trauma. The baby was also malnourished. PW1 had testified that whenever she would try to feed the baby, the Appellant would throw it. The Ministry of Health Report dated 13th October 2013 indicated that although she had poor concentration and slurred speech, she had fair judgment. She had no Psychotic symptoms elicited.

We consequently find that the evidence of PW1 was sufficiently corroborated, and she had a reasonable mind set at the time.

Ground No 1 therefore fails.

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Ground No. 2: The learned trial judge erred in law in giving an illegal and unconstitutional sentence of 49 years' imprisonment.

Submissions of Appellant

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Counsel for the Appellant argued that with regard to the constitutionality of the sentence, the Trial Judge was in violation of Article 28(8) and (12) of the **Constitution** and further submitted that life imprisonment translates to 20 years. Counsel referred Court to the case of Sundya Muhamudu and 568 others V Attorney General Constitutional Petition No. 24 of 2019 where it was held that the most severe penalty after that can be meted the death sentence was life imprisonment and such sentences would be of 20 years' imprisonment. Counsel submitted that the accused was sentenced to 49 years in prison, and therefore should be substituted with a lesser custodial sentence to run from the time of conviction.

Counsel submitted with regard to the illegality of the sentence, that the trial Judge erred in law by not taking into account and arithmetically deducting the pre-trial remand. Counsel referred Court to Article 23(8) of the Constitution which mandates a trial court to take into account any period spent on remand in imposing the term of imprisonment.

Counsel submitted that the Appellant was arrested on the 20th May, 2011 and convicted on 27th November, 2014, and had therefore been in custody for 3 years, 6 months and 7 days. Counsel prayed that if the Appellant is not acquitted on the first ground, Court substitutes the sentence to that of 20 years and further that the pre-trial period be deducted arithmetically.

Submissions of the Respondent

Counsel argued that with regard to the constitutionality of the sentence, that the sentence of 49 years' imprisonment was constitutional, legal and appropriate in the circumstances. Counsel submitted that the decision of Sundya Muhamudu (*supra*) that the Appellant relied on did not supersede the decision of the Supreme Court. The doctrine of precedent binds all lower Courts, and there were numerous decisions of the Supreme Court confirming imprisonment terms of more than 21 years.

Counsel argued that with regard to illegality of sentence, the Appellants case was decided on the 27th November 2014 while the case of **Rwabugande Moses** (*Supra*) was decided on 3rd March 2017, therefore for a precedent to be followed, it must have been in existence in accordance with the case of Abel Asuman V Uganda Supreme Court Criminal Appeal No. 66 of 2016. Therefore, the learned Judge did the right thing not to apply principle in that case.

Counsel submitted in the alternative that the learned Judge took into consideration the period spent on remand in compliance with Article 23(8) of the Constitution because, Page 54, Paragraph 2 of the record of appeal reads,

Counsel argued that under Rule 30 of The (Court of Appeal Rules) Directions SI 13-10, this Court has the power to appraise evidence and draw its own conclusion. Counsel prayed that the 49 years is upheld, but if Court finds otherwise, it deducts the period spent on remand, meaning he was on remand for 3 years, 5 months and 20 days, and gives an appropriate sentence. Further Counsel prayed that the appeal be dismissed.

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It was argued for the Appellant that in the case of Sundya Muhamudu and 568 others V Attorney General, (supra) the Court held that sentences between 21 years and 73 years' imprisonment have no enabling legislation prescribing such penalties and are therefore in breach of Article 28(8) and (12) of the Constitution and that such sentences will be deemed sentences of 20 years' imprisonment. In reply Counsel for the Respondent submitted that the doctrine of precedent provides that the decisions of the superior Courts are binding on all lower courts, and that there were many decisions from the Supreme Court contrary to Sundaya Muhamudu and 568 Others V Attorney General (Supra).

In *Rwalinda John v Uganda*, SCCA No 03 of 2015, the Appellant who was 67 years old and trial was sentenced to life imprisonment. The sentence was confirmed by this Court. On further appeal to the Supreme Court the sentence imposed by the trial court was upheld. The court found that the trial judge considered the aggravating and mitigating factors like having been a first offender and took into account the one year and three months he spent on remand, the age of 67 years and his prayer for leniency. Further, that the trial Judge considered the seriousness of the offence, the death of a toddler, the way the murder was carried out which culminated in the death, among others. He passed the sentence of life imprisonment. The Court did not consider the sentence to be harsh and excessive in the circumstances and so upheld it. The Court also found that the pre-trial remand period was not calculated and applied. The Appellant had been on remand for 4

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

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HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

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*HON. LADY JUSTICE MONICA K. MUGENYI, JA

**This Judgment was signed before this Judge ceased to hold that office.*

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