

UGANDA / JUDGMENT

Kasubo v Uganda (Criminal Appeal 155 of 2010) [2024] UGCA 115 (16 May 2024)

[2024] UGCA 115

COURT

Court of Appeal of Uganda

BEFORE

Kiryabwire, JA, Muzamiru, JA, Monica K. Mugenyi, JA

CASE / FILE NUMBER

Criminal Appeal 155 of 2010

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT JINJA

CRIMINAL APPEAL NO.155 OF 2010

(An Appeal from the decision of Hon. Lady Justice Elizabeth Ibanda Nahamya dated 12th August 2010 at High Court (Jinja) in Criminal Case No. 202 of 2007)

KASUBO AIDAHO===== APPELLANT

VERSUS

THE REPUBLIC OF UGANDA=====RESPONDENT

10 CORAM

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, f. A

HON. MR. JUSTICE MUZAMIRU M. KIBEEDI, f. A

HON. LADY MONICA K. MUGENYI, f. A

¹⁵ ^fUDGEMENT OF THE COURT'

Introduction

The Appellant was indicted with the charge of Murder C/o to Section 188 and ¹⁸⁹of the Penal Code Act, and an alternatc ofence of Kidnap with intent t0 Murder C/o to section 2a3\\$)(a) and (b) olthe Pcnal Code Act cap 120'

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Background

on 12rh August,2007 in the afternoon, the deceased, Namusoke Makilina, ^a child of about two (2) years went to play with other children at the homestead of the Appellant. At around 6.00pm the deceased's mother, Tekereza Irene(PW3J went to pick her up but did not find her there. When she asked the Appellant about the deceased, the Appellant denied having seen her around her homestead. Drums were sounded and people gathered, a searchr was made in vein to find her. A few hours later, the Appellant and boyfriend (Munyagwa Laston) fled from their home and were nowhere to be seen ^A report of stealing a child was made to police whereupon the Appellant and her boyfriend were traced and arrested, hiding in a nearby village.

On 20th, August 2007,the body of the deceased was found decomposing in ^a nearby maize garden. The deceased's hair, tongue and private parts were missing. There was also a gaping wound on the right hand side of her back' When a Postmortem Report was carried out it revealed that the clitoris was miss ing.

The Appellant was examined and found to be of sound mind. The Appellant admitted to the charge in her charge and caution statement and irrpllicated Munyagwa Laston her boyfriend to the effect that she had handed the deceased to him in the banana plantation for child sacrifice.

At the trial the Appellant was found guilty of Kidnap with Intent to Murder and sentenced to thirty years'imprisonment. The Appellant being tlissatisfied with the Judgment and sentence lodged this Appeal.

Representation

The Appellant was represented by Mr. Robert Esarit while the Respondent was represented by Ms' Cladys Macrina Nyanzi Assistant DPP who was holding brief for Nakafeero Chief State Attorney.

Grounds ofAppeal

- 1) That the trial judge erred in law and in fact when she convicted the appellant on insufficient circumstantial evidence thereby occasioning a miscarriage of iustice.

- 2) That the learned Trial Judge erred in law when she sentenced the Appellant to 30 years' imprisonment without putting into consideration the period of 2 years and 11 months spent on remand thus arriving at an illegal sentence.
- 3) That the learned trial Judge erred in law and fact when she sentenced the Appellant to 30 years' imprisonment which sentence was harsh and excessive in the circumstance of the case'

Duty of the court

This being a first Appellate court it is our duty to give the evidence on the record as a whole that fresh and exhaustive scrutiny which the Appellant is entitled to expect, and then draw our own conclusions of fact. [However, as we never saw or heard the witnesses who gave evidence, we must make due allowance in that respect. See Rule 30(1) (a) of the Rules of this court,

Pandya v R (1957) EA 336, *Uganda v George Wilson Simbwa* SCCA No' 37 of 2009.

Ground 1

5 That the trial Judge erred in law and in fact when she convicted the appellant on insufficient circumstantial evidence thereby occasioning a miscarriage of justice.

Appellant's Submissions

Counsel for the Appellant submitted that the circumstantial evidence on the record was not enough to infer guilt on the Appellant because of three reasons. 10

First, that there was no evidence on the record to show that it was the Appellant who kidnapped the child. He submitted that the Appellant testified

that she did not lock her house and disappear but she was helping with the search of the missing child and while she was arrested she was looking for the missing child. Counsel for the Appellant criticized the trial Judge for relying on this evidence to convict the Appellant. 15

Secondly, that there was no evidence of anyone who saw the Appellant with the deceased on 12th August 2007.

He argued that the testimony of the Munyagwa Mike IPW J of the Appellant admitting to having handed over the child to her boyfriend did not amount to a confession or admission. He further submitted that there was no evidence to corroborate the evidence of Munyagwa Mike (PW4) with regard to the

admission since the Appellant denied ever talking to Munyagwa Mike while she was in custody.

Thirdly, counsel for the Appellant submitted that the trial Judge relied on hearsay evidence provided by Tekereza Irene to come to the conclusion that

5 the Appellant kidnapped the deceased, This was because 'fekereza Irene was told by someone else that the deceased had gone with the Appellant'

Respondent's submissions

Counsel for the Respondent submitted that the Appellant handed over the deceased to her killers.

She argued that there was circumstantial evidence in proof of the element of force or fraud in execution of the kidnap. This was that PW3 had inquired from Salima who told her that the Appellant had kidnapped the deceased falsely pretending that the deceased was just escorting her to the banana

plantation and yet she intended to do something else. She submitted that the Appellant took advantage of the vulnerability of the deceased who trusted her since she always played with her children Salima and Akisoferi and fraudulently asked her to accompany her to the 'garden' She further submitted that PW5 testified that the upon interrogation of the 15

Appellant confessed that she had taken the deceased to the plantation and handed her to her husband and added that "she must be dead by now" ' 20

Court's findings

The complaint in this ground is that there was no evidence on the record to show that the Appellant was the one who kidnapped the child and handed her over to her boyfriend with the intent of having her murdered. On the other

hand, the prosecution has submitted that there was evidence that Appellant participated in this crime. Counsel for the Appellant faulted trial Judge for relying on hearsay evidence to convict the appellant the the

5 Section 59 of the Evidence Act provides that oral evidence must be direct. Hearsay evidence is evidence which is incapable of being verified by cross examination to determine its veracity. It is not admissible to determine the guilt of the Appellant. In this case the mother of the deceased testified that Salima a child of B years told her that the Appellant had taken the deceased to a plantation and only came back with a bunch of bananas. We agree that this was hearsay evidence since Salima the child of B years never testified. We find that the trial Judge was mindful of this since she found, 10

> "PW3's statements that one of the children, Salima who was playing with the deceased told her that DWI took her child are tantamount to hearsay. Salima who would have been a vital witness was not called by Prosecution."

We find that the trial judge did not base her judgment on hearsay evidence but rather on the strength of the circumstantial evidence that was adduced by the prosecution.

Instead the trial court found that there was sufficient circumstantial evidence to support the conviction of the Appellant. The Appellant's biggest criticism of this finding was that there was no evidence on the record of anyone who saw the Appellant with the child on 12th of August 2007.²⁰

It has long been a rule of practice at common law for the Judge at the trial of a person for a criminal offence to warn the jury of the danger of convicting the prisoner on uncorroborated evidence of an accomplice or accomplices and, in the discretion, to advise them not to convict on such evidence. In the absence of such warning the court of criminal Appeal will quash the conviction, but will not do so if after a proper caution by the judge, the jury nevertheless

convict the prisoner, unless it thinks that the verdict is "unreasonable" or cannot be supported having regard to the evidence.

In the case of *R. v Baskerville* [1916] 2 KJ 650 the court held,

"Corroboration means independent evidence. The evidence does not have to be a kind which proves the offence against the accused. It is sufficient if it connects the accused to the crime. Corroboration does not mean that every detail has to be corroborated. What is required is that there must be some additional evidence rendering it probable that the story of an accomplice is true and it is reasonably safe to act upon it."

In this case the trial judge found as follows with regard to corroboration;

In the present case, corroboration can be obtained from the fact the accused disappeared from him on the fateful day. Tekereza Irene testified that on that day the villagers continued to search for Namukose Makiline but then they realised that the accused had left her home together with her household. That the Accused's home could be seen from where they were. Further that Kasubo and her husband (her friend) Munyagwa were not assisting the other villagers to search for the deceased so the search

party went to Kasubo's house. At Kasubo's house, they found that she had put a candle light in the house making it seem as if there were people inside the house. The villagers knocked at her door. There was nobody; they had all run away. Many people gathered and raised an alarm. Still they did not see Kasubo. The disappearance of the accused immediately after committing the offence can be used to infer her guilt in relation to the offence and this court considers that it is an independent factor that corroborates the admission made by the accused to PW4 that she took Makiline to the banana plantation and handed her to Laston Munyagwa her boyfriend/husband.

PW3 (Tekereza Irene)'s evidence was corroborated by the evidence of PW4 (Munyagwa Mike), the father of the deceased who testified that when he went to the police station to see the Appellant she admitted to him that she had taken the deceased to a banana plantation and handed her over to Laston Munyagwa and another unidentified person. Furthermore, the trial Judge also corroborated the evidence of PW3 (Tekereza Irene) with the evidence of PW5 the investigating

officer (D/woman Corporal Namugasa) also testified that the accused admitted to her, upon interrogation, that she had actually kidnapped the deceased pretending that she was escorting her to the banana plantation. We agree with the trial judge's findings that there was corroborative evidence. 15

Ground 2 and 3

That the learned Trial Judge erred in law when she sentenced the Appellant to 30 years' imprisonment without putting into consideration the period of 2 years and 11 months spent on remand thus arriving at an

illegal sentence. 25

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That the learned trial Judge erred in law in fact when she sentenced the Appellant to 30 years' imprisonment which sentence was harsh and excessive in the circumstance of the case'

5 Appellant's submissions

counsel for the Appellant submitted that the sentence was valid as it was not stated how the trial Judge considered the remand period'

He argued that the remand period is to be deducted from the final sentence and the same was not deducted from the thirty-year sentence. He submitted

that taking into account the period spent on remand was arithmetical. He submitted that the trial Judge did not demonstrate how she had taken into account the actual period the Appellant had spent in lawful custody prior to her conviction and sentence. 10

Furthermore, counsel for the Appellant submitted that the sentence handed

down by the trial Judge was manifestly excessive and harsh. [The court referred us to the case of *Ainobushobozi Venancio v Uganda*, Court of Appeal Criminal Appeal No. 242 of 2014 where this court reduced the sentence of 18 years to 12 years 15

Respondent's submissions 20

Counsel for the Respondent submitted that the trial Judge considered both the mitigating and aggravating factors before arriving at the sentence of 30 years. He submitted that the trial Judge considered the fact that the appellant was a first offender, the offence being rampant in Uganda, the crime being savage and also considered the mitigating factors being that the Appellant had spent

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two years and eleven months on remand, the Appellant's weak health and the fact that she had orphans to look after'

counsel for the Respondent also submitted that the learned trial judge considered the period spent on remand before passing a sentence of 30 years, imprisonment to the Appellant.

Here referred to the case of *Rwalinda John v Uganda SCCA No. 3 of 2015* where the supreme court upheld a sentence of life imprisonment against the Appellant for kidnap with intent to murder'

counsel for the Respondent submitted that the case of *Rwabugande* did not

have retrospective effect on sentences that were passed before it. He relied on the case of *Befeho Iddi V Uganda SCCA No 58 of 2016* 10

Court's findings

under this ground, the Appellant submitted that the trial judge erred in the exercise of her discretion when she sentenced the Appellant to 30 years' imprisonment. He argued that the sentence was harsh and excessive in the circumstances. However, counsel for the Respondent submitted that the sentence neither illegal nor manifestly harsh and excessive" 15

It has been consistently held in numerous cases by the Supreme Court and specifically in the case of *Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993* that: - 20

> "... An appellate court will only alter a sentence imposed by a trial court if it is evident that it acted on a wrong principle or overlooked some material fact, or the sentence is manifestly excessive in view of the

circumstances of the case's sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration. See *Ogalo S/O Owoura v R* (1954) 21 E. A. C.A. 270'

'the foregoing principles are equally applicable in the instant case'

5 In the case of *Muhwezi Bayon v Uganda*, Court of Appeal Criminal Appeal No 19B of 2013, This court held that: -

> „Although the circumstance of each case may certainly differ this court has now established that a range within which these sentences fall. The term of imprisonment for murder of a single person ranges between 20 to ³⁵years' imprisonment. In exceptional circumstances the sentence may be higher or lower."

15 20 Similarly, in *Ssalongo Senoga Sentumbwe v. Uganda*, C' A' Criminal Appeal No. 102 of 2009, an appeal against a sentence of sixteen years' imprisonment was dismissed following a conviction for the offence of Kidnap with intent to murder c/s 243 (a) and (b) of The Penal Code Act. He had kidnapped a two-year-old boy, motivated by an intent to murder the victim by ritual sacrifice. In

Nuulu Asumani Kibuuka v. Uganda, c. A. criminal Appeal No. 23 of 2000 the court of appeal upheld a sentence of twenty years' imprisonment meted against the appellant for the offence of Kidnap with intent to murder c/s 243 (a) (by then section 241 @) of The Penal code Act. The victim was aged about 6 months at the time he was kidnapped as a co-accused for incestuous relationship, and was never seen alive again. Lastly, in Rwalinda John v. Uganda, S' C. Criminal Appeal No, 3 of 2015 the Supreme Court upheld a sentence of life imprisonment meted against the appellant, a sixty-seven-

year-old man and first offender who had spent one year and three months on remand, for the offence of Kidnap with intent that the victim may be murdered or disposed of as to be put in danger of being murdered, C/s 243(a) (by then Section 247) of The Penal Code Act. The victim's body was found mutilated, the neck had been cut open, the lower jaw and tongue were missing and found that the killing was characteristic of ritual killing by witch doctors'

Since the body of the deceased was also found mutilated and the prosecution witnesses testified that the Appellant had handed over the child to another person that which is characteristic of ritual killings by witch doctors, 'The instant case a sentence of thirty (30) years is not out of range with

sentences for this type of offence.

We will now consider whether the trial Judge considered the Period that was spent on remand by the Appellant.

In the case of Rwabugande v Uganda (criminal Appeal No. 25 of 2014) [2017] UGSC B (3 March 2017) the Supreme Court held: - 15

"...It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused"

While the trial judge, as sentencing the Appellant she held as follows;

I have noted the two years, and eleven months spent on remand and I have taken them into consideration.

Therefore, the trial Judge arithmetically considered the period that the Appellant spent on remand.

FINAL RESULT $\mathbf{\$}$

This Appeal is dismissed and the Conviction and Sentence of the trial court are upheld.

Dated at Jinja this..... 10 Jagderje de la la la la la la la la la la la HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J. A. mincilee St HON. MR. JUSTICE MUZAMIRU M. KIBEEDI, J. A. 15 mudtugeny; *HON. LADY JUSTICE MONICA K. MUGENYI, J. A.

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

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