

UGANDA / JUDGMENT

Nyendwoha Fenekansi and Another v Uganda (Criminal Appeal 143 of 2022) [2025] UGCA 182 (30 May 2025) [2025] UGCA 182

COURT

Court of Appeal of Uganda

BEFORE

Dr. F. Zeija, DCJ, Gashirabake, JA, K.K. Katunguka,
JJA/JCC

CASE / FILE NUMBER

Criminal Appeal 143 of 2022

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASINDI

[Coram: F. Zeija, DCJ, C. Gashirabake and K. K. Katunguka, JJA] CRIMINAL APPEAL NO. OI43 OF 2022

1. NYENDWOHA FENEKANSI**2. OZELLEALOYSIOUS. .. APPELLANTS****VERSUS**

UGANDA . RESPONDENT

(Arising from the decision of the High Court of Uganda at Masindi (J. R. Byaruhanga J.) in Criminal Case No. 0099/2015 delivered on the 3'd day of March 2022)

JUDGMENT OF THE COURT**Introduction**

1] The appellants were indicted and convicted of murder contrary to sections 188 and 189 of the Penal Code Act, Cap 120 (now Cap 128). [It was alleged that on the 2d day of December 2014, at Kitale Village in Hoima District, unlawfully caused the death of Kiiza Robert. The appellants were sentenced to 30 years' imprisonment after a full trial. The appellants were aggrieved with the decision of the trial Court, hence this appeal on one ground that;

> "The learned trial Judge erued in low and fact when he failed to properly evaluate the evidence on record, thereby orriving at a wrong conclusion lhat the oppellants killed the deceased Robert Kiiza."

Representation

2l The Appellant was represented by Mr. Daniel Omara on State brief. The Respondent was represented by Ms. Sharifa Nalwang4Chief State Attorney. Both Counsel filed written submissions.

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Submissions by counsel for the Appellant

- 3] Counsel was alive to the duty of this court as the first appellate Court, stating that this Court has to review and re-evaluate the evidence before the Court and reach its own conclusions, taking into account the fact that the appellate court did not have the opportunity to hear and see the witnesses testiff. Counsel cited Bogere Moses vs Uganda, Supreme Court, Criminal Appeal Number I of 1997, Okethi Okale vs Republic [19651 EA 555 and Pandya vs R (1957) EA 335.
- 4] Counsel argued that there was no evidence directly pointing to the appellants' participation in the murder of Kiiza Robert, or to show that it was the appellant who killed the deceased. He faulted the trial Judge for relying on the evidence of a single identiffing witness. Counsel cited the position of the law relating to a single identifuing witness. He relied on the decision of the Supreme Court in Bogere Moses vs Uganda (supra), where the court held that;

"This Court has, in very many decided coses, given guidelines on the approach to be taken in dealing with evidence of identification by eyewitnesses in criminal cases. The starting point is that a court ought to satisfu itself.from the evidence whether the conditions under which the identi.fication is claimed to have been made were or were not dfficult, and to warn itself of the possibility of mistaken identity. The Court should proceed to evoluote the evidence coutiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing, the court must consider the evidence as o whole, namely the evidence, if any, offactorsfavouring coruect identification together with those rendering it dfficult."

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- 5] Counsel argued that there was no evidence to favour the correct identification of the appellants as the ones who killed the deceased. Secondly, there was no direct evidence showing that it was the appellants who murdered Kiiza Robert. It was argued for the appellants that the evidence of PW1 does not state that the appellants killed KizzaRobert, he argued that it only highlighted that there was a fight between A1 and Ndyanabo.
- 6] Counsel submitted further that PW1 stated that he and the LC Chairman rushed to the crime scene to stop the fight between A1 and Ndyanabo. When the two arrived, they found A2 at the scene of the crime. That A2 joined PW1 and the LC chairperson in stopping the fight. Counsel argued that it was PW1's testimony that he did not see the appellants kill the deceased.
- 7] Counsel contended that none of the witnesses, as presented by the prosecution, was certain to when the murder took place and who committed it. There was no direct evidence linking the appellants to the murder of Kiiza. Counsel contended further that the only evidence relied on by the trial Judge was that PW2 had seen the appellants chase the deceased. Counsel argued that the chase was under the cover of the night and it was dark with insufficient light to identify the appellants as the assailants.
- 8] It was contended for the appellant that the trial court ought to have treated this kind of evidence as circumstantial evidence since there was no direct witness to the murder. Counsel cited Hussein Godi vs Uganda, Supreme Court Criminal Appeal No. 3 of 2013, where the court held that;

"In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon conviction, find that the inculpatory

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facts are incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis."

9] In Janet Mureeba and 2 Others vs Uganda, Supreme Court Criminal Appeal No. 13 of 2003, it was held,

"That generally, in criminal cases, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused."

- 10] Counsel argued that evidence of PW2, which was heavily relied on by the trial Judge, did not meet the test of circumstantial evidence. He stated that the mere fact that PW2 saw the appellants chase the deceased does not mean they killed the deceased. Counsel contended that the basis of the conviction of the appellant was mere suspicion.
- 11] Counsel submitted that had the trial Judge properly evaluated evidence on record and subjected the evidence as a whole to scrutiny, he would have concluded that the evidence on record fell short and was insufficient to warrant a conviction of the appellants.

Submissions by counsel for the respondent Preliminary point of law

12] Counsel for the respondent raised a preliminary objection that the ground of appeal as raised by the appellants offends Rule 66(2) of the Judicature (Court of Appeal Rules) Directions, SI 13-10. Counsel argued that the ground did not concisely state and specifo the matter of law or fact of evidence appealed against. Counsel cited Ntirenganya Joseph vs Uganda Court of Appeal No. 109 of 2017 and Sseremba Denis vs Uganda, Court of Appeal Criminal Appeal No. 480 of 2017, where the court struck out grounds of appeal for failure to specifically state the points of law or mixed law that are being appealed against.

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13] Counsel prayed that this court find that the ground of appeal as set out by the appellant was offensive.

Merits of the appeal

- 14) Counsel was alive to the role of this court as the first appellate court, as was stated in Kifamunte vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997.
- 15] It was acknowledged by counsel for the respondent that this case was premised on circumstantial evidence. Counsel noted that the trial Judge acknowledged the fact that there was no direct evidence. Counsel submitted that other than PW2 with the help of solar saw A 1 and A2 chase the deceased between 8:00 pm to 8:30 p.ffi., there was no direct evidence. He argued that the interval between the chasing of the deceased by the appellants and the deceased being found lying unconscious at 8:30 pm. left no other reasonable explanation other than that of guilt of the appellants.
- 16] Counsel invited this court to consider the evidence of PW1, who stated that he saw A1 fighting with the deceased in front of Nyakaisiki bar. It was argued that this was corroborated by the evidence of PW2, who testified that using the aid of solar on his veranda, he saw the deceased fleeing and being chased by A1 and A2 at around 8:00 to 8:30 pm. It was additionally submitted that PW2 testified that he saw A2 with a stick. Counsel argued that all these circumstances led to only one conclusion that the appellants were responsible for the death of the deceased.

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- 17] Counsel cited Bogere Charles vs Uganda(supra), where the court found that it was necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy

the inference. Counsel also cited *Simon Musoke vs R* (1956) EA 715, where it was held that in a case depending exclusively on circumstantial evidence, the court must find, before deciding upon condition, that inculpatory facts were incompatible with the Innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that the guilt.

- 18] Counsel prayed that this court finds no merit in the appeal.

Consideration of the Court

Role of the First Appellate Court

191 Under Rule 30(1) of the Judicature (Court of Appeals) Directions, 2005, the duty of this court, as the first Appellate Court, is to re-evaluate the evidence on record and come to its own conclusions. This was re-echoed in *Henry Kifamunte vs Uganda* (1998) UGSC 20. The court held that:

> "We agree that on a first appeal, from a conviction by a judge, the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it.

> When a question arises as to which witness should be believed rather than another and that question turns on manner and

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demeanor, the appellate Court must be guided by the impressions made of the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanor, which may show whether a statement is credible or not, which may warrant a court in differing from the judge even on a question of fact turning on the credibility of a witness which the appellate court had not seen. The Court of Appeal is precluded from questioning the findings of the trial Court, provided that there is evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support findings of fact."

20] Counsel for the respondent raised a preliminary objection that the only ground of appeal offended rule 66(2) of the rules of this Court.

> "The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided and in a third appeal the matters of substantial importance, on

21] We have carefully perused the ground of this appeal and considered the arguments of counsel and the authorities cited to us, the appellant faults the learned trial Judge for failing to properly evaluate the evidence on record, thereby arriving at a wrong conclusion that the appellants killed the deceased Robert Kiiza. Clearly this ground of appeal which is framed in an omnibus manner offends the provisions of rule 66 (2) of this court as it does not set

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forth concisely grounds of objection to the decision appealed against specifying the points of law or facts or mixed law and facts which are alleged to have been wrongly decided.

- 22] Having so found, we uphold the preliminary objection and accordingly strike out the ground of appeal.
- 23] There being no other ground, this appeal is dismissed.

Decision.

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- 1. The ground of appeal is struck out.
- 2. The appeal is dismissed.

| We so Order | |-----| | $\frac{30}{2025}$ day of
delivered this | | | FLAVIAN ZEJJA (Phd) | | DEPUTY CHIEF JUSTICE | | | CHRISTOPHER
GASHIRABAKE | | JUSTICE OF APPEAL | | | KETRAH KITARIISIBWA KATUNGUKA | |
JUSTICE OF APPEAL | | a g e | | |

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