

UGANDA / JUDGMENT

Rwabushagara v Uganda

(Criminal Appeal 164 of 2018)

[2025] UGCA 100 (10 April 2025)

[2025] UGCA 100

COURT

Court of Appeal of Uganda

BEFORE

Kiryabwire, JA, Muzamiru, JA, Kihika, JA

CASE / FILE NUMBER

Criminal Appeal 164 of 2018

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

[Coram: Geoffrey Kiryabwire, JA; Muzamiru M. Kibeedi, JA; Oscar Kihika, JA]

CRIMINAL APPEAL NO. OI64 OF 2018

(Arising from High Court Criminal Session Case No. 091 of 2017 at Mubende)

BETWEEN

RWABUSIIAGARA THIOMAS APPELLANT

VS

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UGANDA RESPONDENT

(An Appeal from the Judgment of the High Court of Uganda Hon. Justice Dr Joseph Murangira J
Delivered on the 9th July 2018) t

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

On the 12th day of May 2016 at Kyakatebe Trading Centre, Nalutuntu Sub-County in Mubende District, the Appellant Rwabushagara Thomas and others still at large, with malice aforethought unlawfully caused the death of Ntanzi Clovis who was alleged to have stolen the goats of one Doreen. The deceased lost his life as a result of mob justice. It was the Appellant who was alleged to have arrested the deceased.

Decision of the Trial Court

Hon. Justice Dr. Joseph Murangira sentenced the Appellant to 27 years' imprisonment. Dissatisfied with the Decision, the Appellant appealed against conviction and sentenced him on the following grounds in his Amended Memorandum of Appeal dated 5th June 2023: -

- 1. The learned Trial Judge erred in law and in fact when he conducted the trial without properly appointing the assessors which occasioned a miscarriage of justice.
- 2. The learned Trial Judge erred in law and fact when he relied his conviction on the prosecution evidence that was uncorroborated thus arriving at a wrong conclusion that led to a miscarriage of justice.
- 3. That the Judge erred in law and fact when he failed to take into account the period the Appellant had spent on remand while sentencing the accused thereby arriving at a manifestly harsh and excessive sentence.

The Respondent opposed the Appeal.

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Representations

At the hearing, the Appellant was represented by Ms. Sheila Kihumuro Musinguzi and the Respondent by Mr. Sam Oola Senior Assistant DPP.

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 case of *Bogere Moses and Another Vs Uganda Criminal Appeal No.1 of 1997*, the court stated:

"What causes concern to us about the judgment, however, is that it is not apparent that the Court of Appeal subjected the evidence as a whole to scrutiny that it ought to have done. And in particular it is not indicated anywhere in the judgment that the material issues raised in the appeal received the courts due consideration. While we would not attempt to prescribe any format in which a judgment of the court should be written, we think that where a material issue of objection is raised on appeal, the Appellant is entitled to receive adjudication on such issue from the appellate court even if the adjudication be handed out in summary form... In our recent decision in *Kifamunte Henry* we reiterated that it was the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court and make up its own mind.... Needless to say that failure by a first appellate court to evaluate the material evidence as a whole constitutes an error in law."

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The basis of setting aside a sentence imposed by a trial court are generally set out in *Ogalo s/o Owoura v R* (1954) 21 EACA 270. In the appeal, the Appellant appealed against a sentence of 10 years' imprisonment with hard labour which had been imposed for the offence of manslaughter. On the relevant principles to interfere with sentence, the East African Court of Appeal in that appeal held that: -

"... The principles upon which the 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 also 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 offence attracting less severe penalties. Courts also have added another principle of consistency in terms of equality before the law so that the offences committed under similar circumstances with similar degree of gravity should attract the same range of sentences therefore precedents of the appellate courts are a relevant guiding factor..."

Ground No. I: The learned Trial Judge erred in law and in fact when he conducted the trial without properly appointing the assessors which occasioned a miscarriage of justice.

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Submissions of Appellant

Counsel for the Appellant submitted that from the Record of Proceedings at page 4, the Court recorded that assessors were appointed. It did not show the procedure for appointment of the assessors, whether they were sworn in, whether they were of age, their names, or whether they were within prohibited persons that are not eligible to be assessors under the assessor's rules. He further argued that this

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denied the accused and his Counsel the opportunity to challenge the assessors as required under section 3 and 68 of the Trial on Indictments Act.

Submissions of Respondent

Counsel for the Respondent in reply submitted that at page 384, the Record indicates the two assessors were present. Furthermore, pages 386 to 388 shows that the trial Judge Summed up to the Assessors. Further at page 391, Nsamba Cissy an Assessor gave her opinion and stated that: -

"This is a joint opinion of Nsamba Cissy and Twayiro Seru,anja Kizito. "

The Judgment was delivered on the 9th July 2018 and recorded that the assessors were Mrs. Nsamba Cissy and Mr. Sserwanja Twayiro Kizito. He submitted that the failure of the Trial Judge to indicate the particulars of the assessors did not occasion a miscarriage of justice and that it was a technicality that did not go to the root of the trial.

Findings and Decisions of Court

We have considered the submissions of both Counsel for which we are grateful.

Under this ground, the issue revolves around the conducting of a trial without properly appointing the assessors during the trial. Section 68 of the Trial on Indictments Act Cap 23 provides as follows:

"Section 68. Challenge for cause

- (1) The accused person or his or her advocate, and the prosecutor may, before an assessor is sworn, challenge the assessor for cause on any of the following grounds-
- (a) Presumed or actual partiality;
- (b) Personal cause such as infancy, old age, deafness, blindness or infirmity;

- a. tscsJor,' (c) His or her character, in that he or she has been convicted of an offence which, in the opinion of the judge, renders him or her unfit to serve as an

(d) His or her inability adequately to understand the language of comr. b/

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(2) When a challenge is disputed, the issue shall be tried by the judge and the person may be examined on oath..."

Relying on the above Section, Counsel for the Appellant submits that the none of the above-mentioned legal requirements were followed, making the procedure used irregular. Counsel argued therefore that the Appellant was denied a chance to challenge the assessors.

Counsel for the Respondent on the other hand is of the view that this ground is an afterthought following the conviction of the Appellant and a technicality.

We have addressed our minds to Section 139(l) of the Trial on Indictment Act, which provides that: -

"no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error or omission, irregularity or misdirection during trial, unless in fact it occasions a failure of justice. "

We agree with the submissions of Counsel for the Respondent that failure to indicate the particulars of the assessors was a mere technicality and did not tantamount to a miscarriage of justice. The Appellants were present in Court and represented by an advocate and could have challenged the appointment of the Assessors but did not. Nowhere on the record did they attempt to challenge the assessors, nor were they prevented from doing so. Whereas it is expected that what transpired in Court is fully recorded, it is our finding that this omission can be regarded as a mere technicality, and accordingly we dismiss this ground. In this finding we are fortified by the provision of the 1995 Constitution and in particular Article 126 (2) which provides: -

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(a) ... ; (b). iustice shall not be deluyed, (c) .;

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(d) ...; and

(e) substantive justice shall be administered without undue regard to technicalities ... "

It is our view that the Appellant had ample time to raise this objection during trial but did not do so but now wants to use the omission as a technicality to delay justice.

Given our above findings, we dismiss this ground of Appeal.

Ground No.2: The learned Trial Judge erred in law and fact when he relied his conviction on the prosecution evidence that was uncorroborated thus arriving at a wrong conclusion that led to a miscarriage of justice.

Submissions of Appellant

Counsel for the Appellant submitted that the crime he was accused of the ingredient of participation was not proved creating a nexus between the Appellant and the crime committed. He argued that the trial Judge erred when he relied on the uncorroborated circumstantial evidence of Nsimire Mukwaya Erick PW 3 who was the only witness that claimed to have directly seen the accused being involved in the act that led to the death of the deceased. He prayed that Court find that there were grave inconsistencies in the evidence adduced and the trial Judge did not state in the timelines drawn, whether the accused was involved in the homicide of the deceased. Counsel relied on the case of Bogere Charlese V. Uganda (Supra), where court found that before drawing an inference of the accused's guilt from circumstantial evidence, the court must be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt.

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Submissions of the Respondent

Counsel for the Respondent in reply argued that Nsimire Mukwaya Erick's (PW 3) evidence against the Appellant was based on identification. He cited the case of Bogere Moses and Another Vs. Uganda (Supra), which decided that: -

"... the court must consider the evidence as a whole, namely the evidence if any of factors favouring the correct identification together with those rendering it difficult. The factors to consider are length of time, the distance, the light and familiarity of the witness with the accused. "

Counsel submitting that the conditions favouring the identification of the accused were present. Furthermore, taking as a whole the oral evidence of Lubega Steven (PW1), Mzee Sevuma (PW2), Nsimire Mukwaya Erick (PW3) together with exhibit P1 (post-mortem report) all pointed to the participation of the Appellant in the killing of the deceased. Counsel therefore submitted that the Appellant was properly convicted.

Findings and Decision of Court

We have considered the submissions of both Counsel for which we are grateful.

Under this ground the issue revolves around the evaluation of evidence that the Appellant participated in the death of the deceased and the evidence relied upon to convict the Appellant was uncorroborated leading to a miscarriage of justice.

From the Record of Appeal, it can be discerned that Lubega Steven (PW1) saw the deceased being ted away by the accused (now the Appellant). Mzee Sevuma (PW2) confirmed that he knew the accused because he was from the same village and the accused had come to his home to collect the allegedly stolen goats. Nsimire Mukwaya Erick (PW3) testified at page 108 of the Record of Proceedings that between 7:00 to 8:00pm he was on the road riding a motorcycle from Kisozi to Kyakatebe when he heard chaos and stopped. He saw the accused as one of the people beating the deceased.

Looking at the evidence as a whole, we agree with reasoning of the trial judge who took testimony of all the witnesses collectively to come to his decision.

Furthermore, in the case of Bogere Moses and Another Vs. Uganda (Supra) the court held that: -
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"... when dealing with evidence of identification by eve witnesses in criminal cases, a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were *not difficult and warn itself of the possibility of mistaken identity.*"

We have considered the facts of this Appeal and are satisfied the trial Judge considered all elements inclusive of the fact that the Appellant was part of a mob that arrested the deceased and also took the deceased to Doreen's farm and beat him to death on allegation he had stolen Doreen's goats.

The doctrine of common intention under Section 20 of the Penal Code Act was applicable. This doctrine is supported by the case of No. 441 PC Ismail Kisegerwa and Another Vs. Uganda, Court of Appeal Criminal Appeal No.6 of 1978, it was held: -

"In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue, a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose and in the prosecution of that unlawful purpose, an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter. It is now *settled that unlawful common intention does not imply a pre-arranged*

plan.... Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault..... It can develop in the course of events though it might not have been present from the start... It is immaterial whether the original common intention was lawful so long as an unlawful purpose developed in the course of events."

We accordingly agree with the findings of the trial Judge who took into consideration the evidence of all witness, found the said evidence to be

corroborating, thus properly convicting the Appellant. We are therefore unable to fault the trial Judge on his findings and accordingly dismiss this ground.

Ground No.3: That the Judge erred in law and fact when he failed to take into account the period the Appellant had spent on remand while sentencing the accused there by arriving at a manifestly harsh and excessive sentence.

Submissions of Appellant

Counsel for the Appellant submitted that the mitigating factors considering when sentencing the Appellant are found at page 385 of the Record of Proceeding. It is stated that the Appellant was a first time offender, of advanced age of 55, the sole breadwinner of his family, that the convict was sick and weak on account of his advanced age and he was remorseful and requested to address the court which request was denied. He prayed that this Court consider the sentence passed on him as harsh and excessive and substitute it with a fairer sentence of '1 5 years. n->

Submissions of the Respondent

Counsel for the Respondent submitted that the sentence was neither harsh or excessive. At page 397 and 398 of the Record, the trial Judge considered that the Appellant had been on remand for a period of 3 years and 2 months. He also considered other mitigating factors as submitted by Counsel for the Appellant. He specifically deducted the period spent on remand by the Appellant from a sentence of 30 years and 2 months' imprisonment that he deemed appropriate and sentenced the Appellant to 27 years' imprisonment.

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Furthermore, Counsel for the Respondent submitted that while the others beat up the deceased using sticks and the Appellant hammered two 6 inch nails on his head after accusing him of stealing goats. Counsel argued that the Appellant and mob took the law into their own hands and brutally killed the deceased without giving him the opportunity for due process.

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Findings and Decisions of Court

We have considered the submissions of both Counsel for which we are grateful.

Under this ground the issue was whether the Trial Judge failed to take into account the period the Appellant spent on remand thus arriving at a harsh and excessive sentence. The case of Kyalimpa Edward Vs. Uganda SCCA No.10 of 1995 held that: -

"an appropriate sentence is a matter of discretion for the sentencing Judge. Each case presents its own facts upon which the Judge exercises his discretion..."

In Ogalo s/o Owoura Vs. R (Supra), it was held that the Court has power to interfere with any sentence imposed provided it acted on the wrong principles or the sentence was manifestly excessive or harsh.

Counsel for the Appellant relied on the case of Epuat Richard Vs. Uganda, Criminal Appeal No. 0199 of 2022 where the Court set aside a sentence of 30 years sentence and substituted it for one of 15 years. On the other hand, in a subsequent case of **Mpagi Godfrey Vs. Uganda** Supreme Court Criminal Appeal No. 63 of 2015 a witness awoke to noise of the Appellant in that matter and others beating the then deceased. The victim was appealing to the Appellant to take him to the police if he committed a crime; but this did not happen and he died. The post-mortem report revealed bruises and deep wounds. The Appellant was charged, tried, convicted and sentenced to 34 years. His appeal on both conviction and sentence failed.

The trial Judge at page 397 and 398 of the Record, considered that the Appellant had been on remand for 3 years and 2 months. He specifically deducted the period Jovi spent on remand and sentenced the Appellant to 27 years.

We have also taken into consideration that this is a case involving mob justice. Therefore, we have also addressed ourselves to the case of Rwabukoma and 2 Others v Uganda (Criminal Appeal) [2024], which cited the authority of Kamva Abdullah and 4 others v Uganda Supreme Court Criminal Appeal No. 0024 of 2015, which addresses the issue of the use of mob justice in a crime of murder. In

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this case, the deceased was killed by a mob and the appellants were sentenced to 40 years' imprisonment. On appeal, this Court substituted the sentence of 40 years' imprisonment with 30 years' imprisonment. On a second appeal, the Supreme Court reduced the sentence to 18 years' imprisonment.

Further in Atukwasa Jonan and 6 others v Uganda, Court of Appeal Criminal Appeal No. 168 of 2018, the appellants were part of a mob that committed murder. They were tried, convicted and sentenced to 25 years' imprisonment. On appeal to this Court, their sentences were substituted with $\$14\frac{1}{2}$ years' imprisonment each.

In *Kamya Abdullah and 4 Others Vs. Uganda*, Supreme Court Criminal Appeal *No. 0024 of 2015*, (Delivered on 26th April 2018) Supreme Court stated the point thus:

"... Counsel for the appellants in his submissions stated that many of those who take part in mob justice do so without thinking. They do so because others are doing so. We agree, furthermore, a mob in its perverted sense of justice thinks it is administering justice while at the same time ignoring the importance of affording the suspects the rights to defend themselves in a *formal trial.*"

Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot ignore the *fact that, in terms of sheer criminality, such people cannot be and should not* be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood." \$-QD\$

In the *Kamya and 4 Other v Uganda* (Supra), the Appellant was convicted of murder by the High Court and sentenced to 40 years' imprisonment. On appeal to the Court of Appeal the sentence was reduced to 30 years' imprisonment. However, on further appeal, the Supreme Court reduced the sentence to 18 years on account of being a murder arising from "*mob justice*".

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In *Wakiso Patrick & Tibita Peter Vs Uganda*, Criminal Appeal No. 368 of 2017, while relying on the authorities of *Kamya Abdullah and 4 Others Vs. Uganda*, Supreme Court Criminal Appeal No. 0024 of 2015 and *Atukwasa Jonan and 6 Others Vs. Uganda*, Court of Appeal Criminal Appeal No. 168 of 2018. the Court of Appeal reiterated that it was apparent from the decided cases of the Supreme Court and Court of Appeal that convicts in cases of "mob justice" cannot be put in the same sentencing plane as other convicts of murder. The Court then found that the appropriate sentence in the circumstances of the case was 15 years for the offence of murder.

We invoke Section 11 of the Judicature Act Cap 13, now Cap 16 of the 7th Revised Edition of Principal Laws of Uganda. It provides thus: -

"...11. Court of Appeal to have powers of the court of original jurisdiction" *For the purpose of hearing and determining an appeal, the Court of Appeal* shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of *which the appeal originally emanated.* "[*Emphasis ours*]."

This section empowers this Court to exercise the power of the Trial Court and impose an appropriate sentence upon considering both aggravating and mitigating factors as well as the pre-trial period the appellants spent on remand.

Taking into consideration both the mitigating and aggravating factors highlighted above; the above sentences previously imposed by this Court and the Supreme Court in cases of a similar nature; and the principle of parity in sentencing, we find $\mathcal{Q}$ that sentences of 18 years is justifiable.

On pg. 397, paragraph 10, line 1 of the ROA, it is stated that "...the Convict has been on remand for 3 years and 2 months." Further on pg. 398, paragraph 3, the trial judge signed at Mubende on the 9th day of July 2018. The commitment warrant at pg. 429 is signed on the aforementioned date. Under Article 23(8) of the **Constitution**, we are enjoined to take into account that period on remand. The

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Appellant is re-sentenced to 18 years' imprisonment to be served from the date of conviction on the Commitment Warrant.

From the sentence, we deduct 3 years and 2 months. Therefore, he shall serve 14 years and 10 months in prison. The date shall run from 9th July 2018.

Final Decision

- 1. The appeal partially succeeds.
- 2. The Appellant shall serve 14 years and 10 months in prison from 9/07/2018\$.

We so order.

Dated at Kampala. This Day of Day of 2025. Hon. Mr. Geoffrey Kiryabwire, JA ² Hon. Mr. Muzamiru M. Kibeedi, JA Hon. Mr. Oscar Kihika, JA

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