

UGANDA / JUDGMENT

Ssebulime Farook v Uganda (Criminal Appeal 255 of 2016) [2025] UGCA 167 (30 May 2025) [2025] UGCA 167

COURT

Court of Appeal of Uganda

BEFORE

Obura, JA, Gashirabake, JA, Luswata, JA

CASE / FILE NUMBER

Criminal Appeal 255 of 2016

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 255 OF 2016

(Coram: H. Obura, C. Gashirabake & E. Luswata, JJA)

SSEBULIME FAROOK.....

VERSUS

UGANDA.....

(Arising from the High Court decision at Masaka (Eudes Keitirima, J) Criminal Case No.0172/2014, delivered on the 09th September, 2016)

JUDGMENT OF THE COURT

- [1] The appellant, Ssebulime Farook, was indicted for Murder contrary to sections 188 and 189 of Cap. 120, now sections 171 and 172 of the Penal Code Act, Cap 128. The particulars of the case were that Ssebulime Farook, on the 16th day of June 2014, at Kasamba fishing village in Kalangala District, murdered Nakato Hadija. The court found him guilty. It convicted and sentenced him to 40 years of imprisonment. He appealed on the grounds that;

- 1) That the learned trial Judge erred in law and fact when he *convicted the appellant based on circumstantial evidence that did* not irresistibly point to his guilt, thereby occasioning a *miscarriage of justice.*
- *2) That the learned trial Judge erred in law and fact in holding that* the appellant's silence at trial could be used as an inference of guilt, contrary to the well-established principle that an accused person is not obliged to prove their innocence.

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- 3) That the trial Judge erred in law and fact when he failed to properly evaluate the contradictions in the prosecution's evidence, thereby arriving at an erroneous conclusion.
- 4) :: :::: :,:;,' ::i :,' ::, : :': ; ; ::::; :'' ;'' legal principles governing the admissibility of such evidence.
- 5) That the sentence of 40 years' imprisonment was manifestly '::::;;r':,:;,'#::;,:;,:;,'::;:::"':,:;::; of malice dorethought.
- [2] The Respondent opposed the appeal.

Representation

- [3] At the hearing, the appellant was represented by Mr. Kigundu John. Mr. Kunya Noah represented the respondent.

Submissions by counsel for the appellant

Ground one

- [4] Counsel submitted that the conviction was founded on purely circumstantial evidence and, in his view, the evidence fell short of the standard of proof required to prove the guilt of the appellant beyond reasonable doubt. Counsel cited *Bogere Charles vs. Uganda* [1998] UGSC 28, where it was found that for the court to rely on circumstantial evidence, the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. Counsel further submitted that the Court further established that the circumstances must be so strong as to produce moral certainty to the exclusion of every reasonable doubt. He stated that the court found that all incriminating facts must be incompatible with the accused's innocence and incapable of 2lPage w

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explanation by any other reasonable hypothesis than guilt, the evidence must point irresistibly to the accused as the perpetrator.

- [5] It was further submitted that the prosecution case relied entirely on circumstantial evidence, insufficient to warrant a conviction. Counsel cited *Teper vs. R* [1952] AC 480, where the court stated that circumstantial evidence must be so compelling as to exclude any other reasonable hypotheses. He argued that, in this case, multiple plausible explanations for the deceased's death were not sufficiently ruled out.
- [6] It was argued for the appellant that the post-mortem report, tendered in evidence as Exhibit P2, confirmed that the deceased died due to drowning, with no external signs of violence. Counsel argued that it raised the possibility that her death was accidental rather than a result of foul play. He cited *Simon Musoke vs. R* [1958] EA 715, where the Court held that a conviction based purely on circumstantial evidence must be carefully evaluated to ensure no other reasonable hypothesis exists.
- [7] It was submitted that PW1 testified that the appellant was with the deceased at the landing site of Kasamba at 1:00 a.m. The witness stated further that the deceased was seated in a boat while the appellant was standing. Additionally, counsel submitted that PW1 testified that he never saw them argue and never talked to them and he left. Counsel argued that PW1 could not confirm that the appellant murdered the deceased.
- [8] Counsel argued that the evidence by PW2 does not exclude the possibility of accidental drowning or another intervening factor leading to the deceased's death. Counsel submitted that PW2 testified that she saw the deceased leave with the appellant at around 1:00 p.m., but there was no evidence of violence or threats.

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- [9] Additionally, it was argued for the appellant that the evidence of PW3 could not be relied upon because there were mere suspicions and did not provide any direct evidence that it was the appellant who killed the deceased.
- [10] Counsel submitted that the evidence on record leaves many questions unanswered as to how the deceased passed on.

Ground Two

[11] It was contended that the burden to prove all the ingredients of the offence entirely lies on the prosecution, as established in *Woolmington vs. DPP* [1935] AC 462. Counsel faulted the Judge for improperly inferring guilt from the appellant's silence. He contended that this contravenes the fundamental principles that an accused person has no duty to prove his/her innocence. He additionally argued that the trial record clearly shows that the appellant opted to remain silent, which is his constitutional right under Article 28(3) (a) of the Constitution of Uganda, which provides that an accused shall be presumed innocent until proven guilty.

Ground Three

Uzl It was submitted that the accused person should not be convicted if material contradictions exist in the prosecution's case, and this was the position in *Bhatt vs. R* [1957] EA. Counsel argued that the prosecution's evidence was full of inconsistencies, particularly regarding the timelines and sequence of events at 1 :00 a.m. It was argued that PW2 last saw the appellant at 1 1 :00 p.m. Additionally, it was submitted that the post-mortem report stated that the cause of death was drowning, but there was no forensic evidence proving that the appellant was responsible for this drowning. Counsel argued

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that had the Judge put this into consideration, he would not have convicted the appellant.

Ground Four.

tl3] It was submitted that evidence of prior bad character is generally inadmissible unless it directly relates to the offence in question, as was held in *R vs. Sims*, 11946l I KB 531. Counsel argued that the trial Judge misapplied the previous aggression of the appellant as testified by the witness.

Ground five

- t14] Counsel submitted that the law on sentencing is to the effect that the appellate court is not to interfere with the sentence imposed by the trial court which has exercised its discretion on a sentence unless the exercise of the 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 the trial court ignores to consider an important matter or circumstances which ought to be considered while passing sentence or where the sentence imposed is wrong in principle as held in *Kiwalabye Bernard Vs. Uganda*, Supreme Court Criminal Appeal No. 143 of 2001.
- tl5] It was argued that the trial Judge did not properly take into account all mitigating factors and equally departed from the conventional rule of uniformity in sentencing. Counsel cited *Aharikundira Yustina Vs. Uganda*, [UGSC] 2013 49, where it was held that consistency is a vital principle in ^a sentencing regime. Counsel submitted that this principle is deeply rooted in the rule of law and requires that laws be applied with equality and without unj ustifi ed di fferenti ation qF

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- ^t16l Counsel contended that the appellant stated all the mitigating factors, namely that he was 22 years of d1e, without any previous criminal record and also prayed for lenience. Counsel prayed that the period spent on remand should be considered and that the appellant had learnt a lot. Counsel argued that the Judge, however, ignored the mitigating factors. It was further argued that the trial court ought to have considered the age

of the appellant before sentencing him, that a sentence of 40 years was inappropriate in that by the time he is discharged, he shall be 66 years old. Counsel cited *Kabatera Steven Vs. Uganda*, CA No. 123 of 2001, where the court held that the age of the convict is a relevant factor.

- U7l It was further argued that the sentence of 40 years is manifestly excessive, especially given that the case was purely circumstantial. In *Pius Olima and Another Vs. Uganda*, SCCA No. 6 of 1995, it was held that sentencing must take into account the strength of the evidence and mitigating factors.
- tl8] Counsel prayed that, without prejudice to the other grounds of appeal, this Honourable Court allows this ground of appeal, sets aside the sentence of 32 years' imprisonment, and substitutes it with a more lenient sentence of about 14 years.

Submissions of counsel for the respondent

Ground One

^t^I9] It was argued for the respondent that it was true that the case of the prosecution relied on circumstantial evidence, specifically relying on the evidence of PW I , who testified that on the 1 6th Jun e 2014 at around I :00 o.ffi., he saw the appellant and the deceased at the lake. The deceased was sitting, while the appellant was standing. Counsel submitted that PWl left at the

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lake. He stated that the prosecution further relied on PW2, who stated that on the 15th June 2014 at around 11:00 pm., he sawthe appellant andthe deceased at night. That she testified that they came and knocked at her door that night, and she opened for them. The appellant picked something up and they both left.

t20] Counsel argued that they applied the last seen doctrine. In this case, the deceased was last seen with the appellant. Counsel cited *Jagenda John Vs. Uganda*, [201U UGHC 59, where the court observed that the last seen doctrine has global application to homicides and this doctrine creates ^a rebuttable presumption to the effect that the person last seen with the deceased bears full responsibility for his or her death. This principle was re-echoed in

Matovu Frank and Sebire Ronald Vs. Uganda, 120221UGCA 268.

l2ll Counsel submitted that on the premises, there was evidence that the deceased was last seen in the company of the appellant at 1:00 a.m. when she was alive, and later in the morning, she was found dead in the same spot, but the appellant was not around, bringing into play the last seen doctrine.

Ground two

122l Counsel submitted that the discussions in ground one on the "last seen doctrine" are in support of the decision of the learned trial Judge. Counsel argued that the appellant was expected to explain what caused the death of the deceased, but offered none, which calls for an inference of guilt on his part.

Ground three

123) It was submitted that there were no contradictions in the prosecution's evidence. Counsel contended that PW2 stated she saw the deceased and appellant leaving her place at 1 1:00 pm. and they went away. He argued that PW1 found them at 1:00 d.n., at the lake, and this is where the body of the

deceased was found. Counsel submitted that this evidence was consistent with each other.

Ground four.

124l Counsel submitted that the evidence of the prosecution concerning the prior character of the appellant was never challenged in cross-examination, and as such, it passed the test to be relied on by the trial court.

Ground five

- 125) It was argued that the trial court considered both the mitigating and aggravating factors while sentencing before arriving at the 40-years' imprisonment. The trial court considered the betrayal by someone close and the previous behavior of the appellant.
- 126l Counsel cited Bakubye Muzamiru and another Vs. Uganda, UGSC [2013] 5, where the court held that 40 and 30 years' imprisonment terms were neither premised on wrong principles of the law nor excessive since the offence of murder attracts a death sentence as a maximum penalty.
- 127l Counsel cited Kizito Senkula Vs. Uganda, SCCA' No. 24 of 2001, where the court held that to "take into account" at the time did not require a trial Court to apply a mathematical formula by deducting the exact number of years spent by the accused person on remand from the sentence to be imposed by the trial Court.

ANALYSIS

Role of the First Appellate Court

[28] Under Rule 30(1) of the Judicature (Court of Appeal Rules) Directions, SI-10-13, 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

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"We agree that on a first appeal, following 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 demeanor, the appellate Court must be guided by the impressions made of the judge who saw the witness. 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."

[29] We shall resolve all the above grounds jointly.

[30] In this case, there was no direct evidence of a person who saw the appellant murder the deceased. The trial court relied entirely on circumstantial evidence. In *Bulila Christiano & Anor Vs. Uganda*, [2021] UGSC 6, it was held that in a case depending exclusively or partially upon circumstantial evidence, the court must, before deciding the conviction, find that the inculpatory facts are incompatible with the innocence of the accused and Mr

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incapable of explanation upon any reasonable hypothesis other than that of guilt.

[31] In Amisi Dhatemwa alias Waibi Vs. Uganda, (1978) UGSC 13, Sekandi J stated,

"It is true to say that circumstantial evidence is very often the best. It is of surrounding circumstances which, by an undersigned coincidence, is capable of proving facts in issue quite accurately. There is no derogation of evidence to say that it is circumstantial; see: *Rv Tailor, Wever and Donovan* 21 CRAPP R 20. However, it is a trite *lmu* that circumstantial evidence must always be narrowly examined only because evidence of this kind may be fabricated to cast suspicion on another. It is therefore necessary, before drawing the inferences 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 inferences. (See: *Teper v P.* (1952) A. C 480 at p 489)."

- [32] The circumstantial evidence in this case regards the principle of the "last seen doctrine." PW1, Sengo Steven, testified that on 16th June 2014, while leaving Lake Victoria waters at 1:00 a.m., he saw the appellant with the deceased Nakato Hadija at the landing site of Kasamba. He went on to testify that he saw the deceased sitting in the boat while the appellant was standing. There was moonlight and he drew closer to them after tying the boat and then left. He further testified that the next morning, Nakato Hadija was found dead in the same spot. This evidence was not challenged by the appellant's counsel during cross-examination.
- [33] The other piece of evidence was that of PW2 Nakirija Olivia, who testified that on 15th June 2014, at around 1:00 p.m., she was asleep at home, she heard a knock at her door, when she moved out, it was the appellant and

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the deceased, she flashed a torch at them and was able to identify them. She testified further that the deceased requested to pick something from the bar since she was a worker. She picked up, and the appellant held her hand, and they both left. The next day, the deceased was found dead. In *Jagenda Vs. Uganda* [2000] UGCA 25, this court held that;

> "Applying "the last seen doctrine, which has global application to homicides, our view is that this doctrine creates a rebuttable presumption to the effect that the person last seen with a deceased person bears full responsibility for his or her death."

- [34] In this case, the appellant was last seen with the deceased by PW1 and PW2. This evidence was not challenged during cross-examination. The evidence of the post-mortem shows that the deceased died by drowning. As such, it can only lead to one conclusion that the last person seen with the deceased was answerable for her death.
- [35] On the argument that it was wrong for the trial Judge to infer guilt on the appellant because he chose to exercise his right to be silent, this court in *Jagendu, Onn Vs. Uganda* (supra) addressed a similar matter and held that,

In the present appeal, the deceased was last seen alive at the appellant's bor and the appellant was present in the premises. He therefore had a duty to give an explanation relating to how the latter met her death.

Further, at the trial, the Appellant elected to remain quiet and he offered no explanation as to the cause of death and/or his alleged conduct. In the absence of such an explanation, we find that the trial court was justified in drawing the inference that the Appellant killed the deceased person. "

[36] The "last seen doctrine" creates a rebuttable presumption to the effect that the person last seen with a deceased person bears full responsibility for

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his or her death. The appellant ought to have explained the cause of death of the deceased since he was the last person seen with her. Applying that doctrine to these facts, we accordingly find no reason to fault the learned trial Judge's findings and conclusion that the appellant murdered the deceased.

[37] The appellant further alleged that there were contradictions in the timing between PW1 and PW2. The law on contradictions is settled. In *Twinomugisha Alex and two others Vs. Uganda*, [2003] UGSC 20, it was held thus:

> "It is settled law that grave inconsistencies and contradictions, unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones, unless they point to deliberate untruthfulness, will be ignored. The gravity of the contradiction will depend on the centrality of the matter to which it relates in the determination of the key issues in the case. What constitutes a major contradiction varies from case to case.

> The question is whether or not the contradictory elements are material, i.e., "essential" to the determination of the case. Material aspects of evidence vary from crime to crime, but generally in a criminal trial, motive is determined on the basis of the relative importance of the point being offered by the contradictory evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor there, it relates only to a factual issue that is not central, or that is only collateral to the outcome of the case." See also *Alfred Talar Vs. Uganda*, EACA Cr. Appeal No.167 of 1969 and *Saraplo Tinkamalirwe Vs. Uganda*, S. C. Criminal Appeal No.27 of 1989. "

[38] When we perused the evidence, we did not find any contradiction between the evidence of PW1 and PW2. PW1 clearly stated that he saw the deceased and the appellant at 1:00 a.m. at the landing site on the 16th

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2014. On the other hand, PW2 had earlier seen them on 15th June 2014 at 11:00 pm. This was hours before PW1 saw them at the landing site. We, therefore, find no contradiction in the evidence of the prosecution.

§[39] Regarding the Judge considering the previous bad conduct of the accused person, it is not relevant in criminal proceedings. Unless such evidence falls within the brackets provided for under section 52 of the Evidence Act.

52. Bad character in criminal proceedings is only relevant in certain circumstances

In criminal proceedings, subject to section 133(2) of the Magistrates Courts Act and section 99 of the Trial on Indictments Act, the fact that an accused person has a bad *character is irrelevant, unless*—

b) The proof that he or she has committed or been convicted of another offence is admissible evidence to show that he or she is guilty of the offence with which he or she is charged;

- §[40] We find that the evidence of an attempt to kill his former wife was admitted under section 52(b) of the Evidence Act. Hence, the trial Judge cannot be faulted for relying on such evidence. It has to be appreciated that this was just additional evidence, however, the undisputed fact of being the last person seen with the deceased was enough for the prosecution in executing their obligation of proving the guilt of the appellant beyond reasonable doubt. In the circumstances, we cannot fault the trial Judge.
- §[41] Regarding the argument that the trial Judge passed a manifestly harsh and excessive sentence, we are guided by the fact that the maximum sentence for the offence of murder is death under Section 188 and 189 of the Penal Code Act, Cap 120, (now 171 & 172 of the Penal Code Act Cap 128) and the

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sentencing guidelines. According to the third schedule of the sentencing guidelines, the starting point for the offence of murder is 35 years. The Supreme Court in Aharikundira Yustina Vs. Uganda (supra) held that;

> "There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on the grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion,' therefore, perfect uniformity is hardly possible. The keyword is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation. " (Emphasis ours)

142) The Appellant faulted the trial Judge for not considering the mitigating factors, more so the age of the appellant. While sentencing, the Judge held that;

> "I have heard both aggravating and mitigating factors. The loss of life by another person is a serious offence. The convict betrayed the person who was too close to him. The convict has a history of aggressiveness and needs to be out of society for some time. I have considered the period spent on remand, and I will sentence him to 40 (forty) years imprisonment. The convict has a right of Appeal against the convictions and sentence."

t43] It is our view, much as the trial Judge mentioned at the outset of her ruling that she had considered both the mitigating and aggravating factors, she went ahead to highlight the aggravating factors only and based her decision on them. She should have highlighted both factors and weighed them against each other before arriving at the appropriate sentence as was held in *Aharikundira Yustina vs Uganda* (supra) where court held that;

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" Before a convict can be sentenced, the trial Court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, statutes, Practice Directions, together with general principles of sentencing."

- 144l We shall reproduce both the aggravating and mitigating factors presented at trial and also consider cases of a similar nature to ascertain whether or not the sentence of 40 years' imprisonment was harsh and excessive as contended by counsel to the appellant.
- [45] In this case, the aggravating factors were that the offence carried ^a maximum sentence of death, the convict's antecedents were not good and counsel prayed for a punitive sentence to be given. The mitigating factors were that the accused was a first time offender, he had no previous record against him, he is a remorseful young man of 22 years and he prayed that the court give him a lenient sentence so he could reform.
- 146l Regarding the principle of consistency, we agree with the position of the law in *Biryomumaisho Alex Vs. Uganda*, Criminal Appeal No. 464 of 2014 (unreported), which restated with approval the position in *Katureebe Boaz and another Vs. Uganda*, [2019] UGSC 82, where the court held that the principle of consistency in sentencing is neither a mitigating factor nor an aggravating factor, the sentence imposed lies in the discretion of the court, which is in the exercise thereof. We have considered the Supreme Court position in *Opolot Justine and Another Vs. Uganda*, [UGCA]201 4, 39, where the Supreme Court confirmed a sentence of life imprisonment. In *Kaddu Kalule Lawrence Vs. Uganda*, [2019] UGSC 19, the sentence of life imprisonment was confirmed as well by the Supreme Court. W

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- 1471 Considering the above position of the law, we find that the appellant failed to demonstrate that the sentence had occasioned a miscarriage of justice to justify the intervention of this court. We therefore, find that the trial Court properly meted out the sentence of 40 years' imprisonment.
- [48] In conclusion, we uphold the conviction and confirm the sentence of 40 years' imprisonment and dismiss the appeal for lack of merit.

We so Order

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Prepared on 14 October 2026 · Esheria