

UGANDA / JUDGMENT

Turyamuhebwa Vs Uganda (Criminal Appeal No.172 of 2014) [2016] UGCA 79 (6 December 2016) [2016] UGCA 79

COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Criminal Appeal No.172 of 2014

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA CRIMINAL APPEAL NO. 172 OF 2014

TURYAHEBWA DEUS APPELLANT

VERSUS

UGANDA RESPONDENT

CORAM:

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE SIMON BYABAKAMA MUGENYI, JA HON. MR. JUSTICE ALFONSE C. OWINY-DOLLO, JA

JUDGMENT OF THE COURT

The appellant was convicted of murder by the High Court presided over by Hon. Justice Lawrence Gidudu J, in criminal Case No. 023 of 2008 at Kabale on 18th January 2010, and sentenced to imprisonment of life.

He now appeals against conviction and sentence on the following grounds;-

1. The learned trial judge erred in Law and in fact when he convicted the Appellant on alleged circumstantial evidence which was inconsistent and contradictory.
1. The learned trial judge erred in Law and in fact when he held that it was the Appellant who had murdered

the Late Ndyamukunda Ernest when the evidence on

record did not prove so beyond reasonable doubt.

1. The learned trial judge erred when he relied on extraneous matters and conjecture to convict instead

of relying on evidence on record.

1. The learned trial judge erred when he imposed a harsh and excessive sentence of imprisonment for life when there were mitigating circumstances that

called for a lesser sentence.

At the hearing of this appeal learned counsel Mr. Boniface Ngaruye Ruhindi appeared for the appellant on state brief. The appellant was in Court. Ms. Jacqueline Okui, Senior State Attorney appeared for the respondent.

Appellant's case

The only issue raised for the appellant in this appeal relates to his participation in the offence of murder. In the alternative, and without prejudice to the appeal against conviction, the appellant appeals against the severity of sentence.

Mr. Ngaruye submitted that the evidence adduced by the prosecution was insufficient to sustain a conviction against him. He argued that, the prosecution evidence was weak, contradictory and inconsistent, and that the learned trial Judge erred when he convicted the appellant on that evidence.

Counsel pointed to the fact that the appellant and the deceased were on good terms with each other. The deceased was the father of the appellant. They had been together at a bar where they drunk together and had spent the night together at the house of the deceased the night before the deceased was found 15 critically injured, having been struggled. Counsel contended that the appellant had left his father alive at the house where both had spent the night, as he was traveling back to his own home early that morning and could not therefore have been the person who killed him.

Counsel submitted that the appellant was only suspected to have killed his father because, by coincidence, his father had been attacked the morning the appellant had left him alive and alone in the house. He contended that the prosecution witnesses falsely testified against him because they had a grudge against him as the deceased was about to give him land, which act the witnesses opposed.

Counsel also argued that the deceased could have been killed by other unknown persons for different reasons.

He asked court to set aside the conviction.

On the alternative ground of sentence, counsel submitted that the sentence of imprisonment for life was harsh and manifestly excessive in the circumstances of this case.

He submitted that in similar cases this court and the Supreme Court have imposed lesser sentences. He asked the court to reduce the sentence to 15 years imprisonment.

Ms. Okui, learned Senior State Attorney, opposed the appeal and supported both the conviction and sentence. She submitted that the evidence relied upon by the learned trial Judge was strong though circumstantial. She contended that the death of the deceased could not be explained upon any other reasonable hypothesis other than the guilt of the appellant.

Counsel submitted that the evidence adduced at the trial proved the following:-

- 1) That the appellant was the last person seen with the deceased shortly before his death.
- 2) The appellant's conduct of hurriedly and inappropriately leaving the deceased's home and his previous residence about the time the deceased died.
- 3) The appellants going into hiding about the time the deceased died.
- 4) The appellant's conduct of being scared as he was being arrested.

Counsel contended that the above evidence was adduced by PW3, PW4, PW5, PW6, PW7, PW8, PW9 and the appellant himself.

Counsel submitted further that the learned trial Judge properly evaluated the evidence and arrived at the correct conclusion, having applied the facts to the law.

She submitted further that any conjectures, inconsistencies and contradictions did not go to the root of the case and that the trial Judge correctly disregarded this.

On the alternative ground of sentence, counsel conceded that the sentence of imprisonment for life was harsh and excessive in the circumstances of the case and proposed a lesser sentence of 36 years imprisonment.

Resolution

This is a first appeal and as such this court is required to re-appraise the evidence and to make its own inferences on all issues of law and fact. See:-

Rule 30(1*)* of the Rules of this Court, Kifamunte Henry Vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997, Bogere Moses Vs Uganda Supreme Court Criminal Appeal No. 1 of 1997 and Fr. Narcensio Begumisa & Others vs Eric Tibebaga (Supreme Court Civil Appeal No. 17 of 2002).

As pointed out earlier in this Judgment, the only issue in contention in regard to the conviction is the participation of the appellant. At the trial the following facts were not in contention.

The deceased was the father of the appellant. On 23rd June 2008 the appellant together with his wife visited his aunt at Rwakaraba. While still there the deceased came and visited them and left on 26th June 2008. On 27th June 2008 the deceased went to Karujanga-Rubaya where he was working.

On 29th June 2008 the appellant left his aunt's home at Rwakaraba to see his father who was by then at Karujanga Health Centre where he worked and resided.

He went there to consult his father, the deceased, about the land that latter had promised to give him.

On the same day, at about 5:00 pm, the two went to visit PW4 who worked as a nurse at the Health Centre at Karujanga where the deceased also worked. Following that visit the deceased and the appellant went to drink alcohol at a neighbouring place and returned to the deceased's home later that evening.

A about 5:00 am, the appellant left the house he and the deceased had spent the night. He left the door open. He proceeded to Rwakaraba picked his wife from Rwakaraba and went to Ntungamo where he was a resident. He then picked his mother together with his family went to Ibanda, he returned to Ntungamo a few days later. He was later arrested and charged with the murder of his father.

In addition to the non-contested facts above, the prosecution adduced further evidence. PW4 Topista Nuwagaba was a sister to the deceased and an aunt to the appellant. She testified that on 23rd June 2008 the appellant, his wife and their baby came to visit her at Rwakaraba. The purpose of the visit was to meet the deceased at the invitation of the appellant. The deceased had promised to give the appellant land.

The deceased came and joined the appellant at PW4's house. The deceased and PW4 discussed the issue of giving the appellant land. Apparently PW4 questioned the deceased's decision which had been made without consultation with other family members.

Later the deceased went back to Karujanga Health Centre where he worked. The appellant, on 29th June 2008, left his aunt's home and went to see his father at Karujanga Health Centre.

According to PW4, the appellant returned early the next morning and hurriedly picked his wife and the child and they left. The same day, she came to know about the death of her brother, the deceased.

PW5 Ruth Muhirwe was at the time a Nurse at Karujanga Health Centre where she worked with the deceased. She saw the deceased together with the appellant on 29th June, 2009 at 5:00 pm and she talked to both of them. At 6 pm the same day the two passed by her house which was 200 metres away from where the deceased lived. They were on their way to the deceased's house. At about 4 am early on the morning of 29th June, 2009 she heard noise emanating from the Health Centre where the deceased lived and thought the thieves had attacked the place but was afraid to investigate so she waited until day break.

At 7 am that morning she was called to urgently attend to the deceased who had been found groaning in pain in his sitting room. When she got there she found the deceased groaning with his head resting on a brick. Next to him was a stick and piece of iron sheet. He could not speak, but gestured using his hands counting up to five. He died shortly after. This witness testified that the door to the deceased's house was open and there had been no break-in or damage at the Health Centre where she had heard noise that morning at 4 am.

PW6 the husband to PW4 testified that the appellant had come to his house early on 30th June 2008 and picked his wife and a child and they left in a hurry. When this witness asked the appellant about the deceased the appellant replied that he was fine and had no problem. This witness testified as follows;-

“At 8.30 am, accused arrived. I welcomed him back. I asked him about the deceased and he told me he was fine no problem.”

We entered the house and I sat while the accused remained standing that he wanted to go. I told him to wait for the aunt (PW4) to return but he said he was in a hurry.

I told him to wait for tea. Accused sat down and then asked me how much money his father had on the account. I said I do not know. We then started having tea. The accused then asked me if a person had an ATM machine Can he get money from any bank, and I said yes.

He wanted to leave the wife because she was taking long. I told him to wait for her. But the accused got his bag and got out and left the home. I then told my daughter to escort the wife after the accused had left. They went without dressing the kid because accused was in a hurry. My adopted daughter Maureen is the one who escorted the wife.

The accused spent about 15 minutes before going off. PW4 had not returned. 30 minutes later after they had left, Hamu a son of my daughter-in-law came to say Ndyamukunda is dead. I further received a call from my sister-in-law in Mbarara. I told my wife who also arrived from church.

We wondered how the accused would not tell us about the death when he had just been at the deceased's home.”

This witness further testified that death announcements were aired on local radio stations but the appellant, his wife and mother who were in Ntungamo did not attend the deceased's burial.

On her part PW7, the young girl who escorted the appellant and his family as they left PW6's home on the morning of 30th June 2008, testified as follows

“I was home with PW6 when accused left in the morning at about 8.00a.m. He had not slept at our home that night. He had gone to Karujanga. He said he was in a hurry yet his wife was still in bed. We told him to wait for tea. He at first refused but later he accepted and took tea while standing. I escorted them. Accused left first and the wife followed. I escorted the wife. We found a vehicle along the main road. I do not know the owner of the vehicle. We found accused talking to the driver of the parked car. Deus was calling us to go quickly. Deus sat behind and the wife sat in front. It was a small car. It is

called "my car". I did not know the owner. The car had only the driver. When we left home, we were following Deus as we saw him. He never stopped the car. The car was already parked by the road side. I did not know the driver. When Deus reached the vehicle, he started talking to the driver. The vehicle was parked about 150 metres from home. The vehicle drove off when they entered and I also returned home."

The appellant gave an unsworn testimony in which he stated that:-

"On 29/6/2008 I went to see my father at Karujanga Health Centre II. We stayed together and he introduced me to PWS that I was his son at about 5.00 pm. We went to some local bar and took muramba -local brew up to 8.00p.m. We retired via PW 5's place and bade her goodnight. We had supper and slept. He had been complaining of eye problem and had eye drops. At 5.00 a.m. I bade him farewell that I was leaving. I reached Kabale town at 7.00a.m. Later I got a boda boda to Rwakaraba. I met PW6 at home. PW4 was not there. I told PW6 that the deceased was fine.

I told him I wanted to go. PW6 asked me to wait for tea. I took tea told my wife that we go. PW7 escorted my wife.

When we reached Greenville School I stopped a saloon car (corona) doing taxi. We entered and it took us up to Skyline Hotel. We then boarded a taxi to Ntungamo. We found when my mother was going to Ibanda where she is born. I then went with her and my wife that day 30/6/2008.

From the excerpts of the testimonies prosecution witness and the appellant reproduced above, it clearly appears to us that it was only the appellant who was last seen with the deceased on 29th June 2016. The appellant himself admits having spent the night of 29th June 2016 with the deceased. He also admits having last seen the deceased alive at about 5 am the morning of 30th June 2016.

The appellant's testimony tallies with that of the prosecution witness specifically PW5. The deceased was found alone dying in his house at 7 am shortly after the appellant admitting having been with him. The door to the house was open with no indication it had been forcefully opened. There was no indication that the house had been broken into. The health centre nearby had not been broken into either. The deceased was found to have died of strangulation, with bruises at the neck and back.

The deceased ran away from scene, hurriedly picked up his family and put it into a waiting car apparently hired for them to get away. When he arrived at his home in Ntungamo that day he left again for Ibanda with his family and his mother. He appeared to have been trying to escape when he was arrested.

As already stated, he did not attend his father's burial yet radio announcements had been aired informing all about the death of his father. It is inconceivable that he could not have known of his death.

He tried to cover up when he told PW6 that the deceased was fine and had no problem. This case exclusively depended on circumstantial evidence. The trial Judge was alive to the law regarding circumstantial evidence and we find that he correctly applied it to the facts before him. We agree with him that in this case the inculpatory facts are incompatible with innocence of the accused and are incapable of explanation upon any other reasonable hypothesis other than the guilt of the appellant.

We find no merit in grounds 1, 2 and 3 of this appeal which are hereby dismissed. The appellant's conviction is accordingly upheld.

The fourth ground of appeal was argued in the alternative and is in respect of severity of sentence. The respondent conceded that the sentence of imprisonment for life was harsh and manifestly excessive in the circumstances of this case.

The Supreme Court and this court have emphasized the need for consistency in sentencing. In this regard both courts have in the recent past established a range, within which sentences for murder of a single person where the appellant is a first offender, the murder was not related to ritual sacrifice, was not pre-mediated and was not coupled with any other offence. The sentences now range between 20 years imprisonment at the lower end of the scale to 35 years imprisonment at the upper end. However, a court may impose a lesser or a more severe sentence depending on the peculiar circumstances of each case.

Taking into account the appellant was a first offender, without previous record of conviction, he was relatively young and capable of reform and he does not appear to have used any weapon, we set aside the sentence of imprisonment for life and substitute it with a sentence of 30 years imprisonment.

Ground four therefore succeeds to that extent.

We accordingly allow this appeal in part. The appeal against conviction is hereby dismissed and the appeal against sentence is allowed in the above stated terms.

Dated at Mbarara this 6th day of December 2016

HON. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL

HON. JUSTICE SIMON BYABAKAMA MUGENYI

JUSTICE OF APPEAL

HON. JUSTICE ALFONSE C OWIN7Y –DOLLO

JUSTICE OF APPEAL

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