THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL No.0328 OF 2016
(ARISING FROM LUWERO Criminal Case No. 047/2010)

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1. **MUSISI KAMOGA**
2. **KIWUMULO STEVEN :::::::::::::::::::::::::::::::::::: APPELLANT**
3. **SEGUYA RONALD**

VERSUS

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UGANDA :: RESPONDENT

JUDGMENT OF THE COURT

The appellants Kamoga Musisi (A1), Stephen Kiwumulo (A4) 15 and Ronald Sseguya (A5) together with Saulo Bukenya (A2) and Muyomba Godfrey (A3) were jointly indicted for the offence of Murder contrary to section 188 and 189 of the Penal Code Act and sentenced each to 20 years' imprisonment.

20 The facts of the case were that on the 2nd day of March 2013 at Kapeeka trading centre the appellants attacked **Lugumira Fred** with machetes inflicting grievous bodily harm that resulted into his death. The appellants were arrested, charged, and tried after the trial Judge found the appellants guilty. The appellants were 25 convicted and sentenced to 20 years' imprisonment. Dissatisfied with this the appellants appealed against both the conviction and sentence on two grounds.

1. THAT the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence and convicted the appellants relying on contradictory and uncorroborated evidence of a dying declaration thereby occasioning a miscarriage of justice.
2. THAT without prejudice to the foregoing, the learned trial Judge erred in law and fact when he passed a sentence of 20 years' imprisonment upon the appellants which is illegal, harsh, and excessive thereby occasioning a miscarriage of justice.

At the hearing of the appeal the Appellant was represented by Learned Defence Counsel Richard Kumbuga on State Brief while the Respondent was represented by Learned Chief State Attorney Hajjati Faridah Nakafeero. The three appellants appeared via an audio-visual link from Nakasongola Prison due to Covid-19 restrictions. Both Counsel filed written submissions that were adopted by this court.

The Appellant's Case

Counsel for the appellants formulated issues out of the grounds and made his submissions basing on them.

1. Whether the trial Judge did not properly evaluate the evidence thereby convicting the appellants based on a contradictory and uncorroborated dying declaration thereby occasioning a miscarriage of justice.

2.**Whether the sentence passed against the appellant was harsh and excessive in the circumstances.**

On the issue of a contradictory uncorroborated dying declaration, Counsel submitted that the burden of proof lies throughout on the prosecution to prove the allegations beyond reasonable doubt. Counsel critically assessed the evidence of the key witnesses for the prosecution who included, the son to the deceased, Samuel Kikomeko (PW5), the scene of crime officer (PW6) and Stuart Mbatudde the only identifying witness as (PW 11). Counsel took particular interest in the evidence of Samuel Kikomeko (PW5) whose evidence was that at around 3:30 pm PW5 got a call from one Nviri who informed him that his father had been killed and left lying on the road. He immediately proceeded to the scene, found his father and rushed him to hospital where he was pronounced dead upon arrival. PW5's evidence was that in his dying moments his father said, "Kiwumulo my son has killed me". It was also PW5's evidence that moment he was with Musisi and Ronald when his father uttered revealed who had killed him. Counsel further relied on the evidence of PW6 was among the first police responders immediately when he received the information that someone had been attacked. It was the evidence of PW6 that together with PW5 and others, they tried to save the deceased but that he died upon arrival to the hospital. He too testified that while in the car to the hospital the deceased utter the words that, "My son Ronald has killed me, Sseguya has killed me". PW 11 was 40 metres away from the crime scene when he saw men on a motorcycle. He saw 3 men runaway with a motorcycle. In court he managed to identify only 2, that is the 2nd and 3rd

appellants. Counsel submitted that the trial Judge reproduced the dying declarations but was left wondering, firstly whether both PW5 and PW6 were in the same car while the deceased was talking and if so, why did they both report different dying declarations. Secondly, why would the deceased wait for his son and the police officer to arrive at the scene before revealing who had killed him? Counsel also submitted that PW5 contradicted when he told court that the deceased had been killed for no reason yet PW6 stated that he had been killed because of land. Counsel found that the contradictions in PW5 and PW6's statements were not merely minor but rather grave and that they distorted the dying declaration. Counsel submitted that it does not add up that PW5 heard Ronald and PW6 heard Sseguya. Counsel invited the court to question how PW6 who was not as close to deceased heard the reason as to why the deceased was attacked but PW5 who was in close proximity did not hear the motive of the murder. Counsel submitted that the trial Judge did not address his mind to the grave contradictions in the dying declaration. He was critical of the trial Judge for relying on uncorroborated evidence that PW11 had seen the accused persons before and after the attack. PW11 stated in cross-examination that he had never met the appellants before, and on the day of the incident he was 40 metres away and there was a likelihood that he did not identify them. It was his evidence that the appellants runaway in a different directions and that PW11 did not get a chance to see their faces but only testified about the clothes they wore on the

fateful day which were the same as what they wore in court. Counsel found that the appellants were arrested several days after the incident and also no identification parade was held to confirm the identity of the appellants. Counsel submitted that PW11 was capable of mistaken identification and therefore his evidence was unreliable and not able to supplement an already contradictory dying declaration. The learned trial Judge relied on the existing evidence of threats which had earlier been issued by the 2nd appellant against the accused. Counsel submitted that from the evidence of PW5 there was no evidence to support these claims. Counsel further submitted that the dying declaration was contradicted by the two witnesses who were alleged to have heard it, and the evidence meant to corroborate it was unreliable. Counsel argued that circumstantial evidence of threats to the deceased had no proof and that the disappearance of the accused from the village was not substantial.

On the second issue regarding the harsh and excessive sentence, counsel submitted that the learned trial Judge did not consider the mitigating factors and the period spent on remand by the appellants thereby arriving at a harsh and excessive sentence. Counsel submitted that the Judge compounded the ages of the appellants to be between 27-30 to 40 yet in actual sense he ought to have individually assessed the age of each convict. The trial Judge hinted to the period spent on remand but it not seen anywhere how the periods are incorporated in the sentences. Counsel prayed that the conviction and subsequent orders be

quashed, and or in the alternative the sentence be substituted by a fairer and more lenient sentence.

The Respondent's Case

Counsel for the respondent handled both grounds separately. In response to Ground no.1 the counsel premised his arguments on the key witness evidence of PW5, PW6 and PW11 and submitted that the testimonies of these witnesses were corroborated and had no major contradictions as to the identification of the appellants as the suspects. Counsel submitted that PW11 had a face-to-face encounter with the appellants and identified the appellants since it was daytime and he was in close proximity. Counsel noted that PW11 identified the appellants particularly A1, A4 and A5 and that he saw A4 and A5 ran way with their machetes. Counsel submitted that the factors favouring proper identification were present and the witness could not have mistaken other people for the appellants. Counsel submitted that PW5 and PW6 testified on oath that the deceased in his dying declaration said that the appellants had killed him. PW6 added that it could have been for a plot of land. Counsel submitted that the learned trial Judge was right relying on the declaration since the victim knew his attackers, they were family and the deceased made the dying declaration in anticipation of death. On the contradictions in the dying declaration, counsel submitted that PW5 and PW6 were in the same car with the deceased heading towards the hospital. He however invited the court to consider that PW6

was at the scene earlier than PW5 and had an independent interaction with the deceased before PW5 come to the scene. This therefore qualifies the possibility of different versions of his final statements by the two witnesses. Counsel also submitted that the contradictions were minor and do not touch on the root of the case. Counsel prayed that this court finds that the contradictions were minor and disregards them.

On Ground No.2 counsel submitted that the trial Judge properly arrived at the sentence of 20 years' imprisonment after considering both mitigating and aggravating factors. In his sentence the Judge considered the reasons for the sentence. The Judge further considered the time that the appellant had spent on remand. Counsel submitted that the penalty for the offence of murder is death, and that 20 years imprisonment was not harsh since the offence was committed in a gruesome manner. Counsel prayed that this court upholds sentence.

Consideration by Court

This is a first appeal and as such this Court is required under **Rule 30(1) of the Judicature (Court of Appeal Rules) Directions, S.113-10** to re-appraise the evidence and make its inferences on issues of law and fact. In **Uganda v George Wilson Simbwa SCCA No. 37 of 2005**, the Supreme Court while discussing the duty of the first appellate court held that.

> **"This being the first appellate court in this case, it is our duty to give the evidence on record as a whole that fresh and exhaustive scrutiny which the appellant is entitled**

to expect and draw our own conclusions of fact. However, as we never saw or heard the witnesses give evidence, we must make do allowance in that respect."

We shall handle the grounds in the same order that both parties handled them.

Ground No.1

THAT the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence and convicted the appellants relying on contradictory and uncorroborated evidence of a dying declaration thereby occasioning a miscarriage of justice.

In order to prove the case against the appellants beyond reasonable doubt, the prosecution relied on an eye witness, PW11 and a dying declaration purportedly heard by PW5 and PW6. Counsel for the respondent contended that the two versions of the dying declaration as related by PW5 and PW6 were contradictory and should not be relied upon.

The law on dying declarations is provided for under **Section 30 (a) of The Evidence Act**. It defines a dying declaration as a statement made by a person who believes he is about to die in reference to the manner in which he or she sustained the injuries from which he or she is dying; or other immediate cause of his or her death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them.

We have read the record of appeal and from our understanding of the two testimonies of PW5 and PW6, it is true that the dying declaration PW6 quotes is different from that of PW5. Ogwal Fredrick, CID Kapeeka PW6 in his examination in chief at the trial court testified that.

> "I returned the motorcycle and returned to the **scene. I got the victim lying on the side of the road. He had fresh cuts wounds on the back of the neck top of the mouth. ... He said my son, my son Ronald has killed me. Seguya has killed me." He talked those words in Luganda.** He said those words up to when he died. We found out that they had killed him because of a plot of land. "I have been killed because of a plot of land" he said. We took him to Nakaseke hospital, but he died along the way."

From this extract of his exact testimony, we find that, the dying declaration PW6 quotes was made at the scene of the crime and not in the car as the appellant submitted. It is also on court record, that PW6 during his evidence in chief testified, on oath that he arrived at the scene before PW5 and that the deceased was still conscious and was still talking.

On the other hand, PW5 testified on oath that he received a call informing him that his father had been attacked. He went to the scene of crime and found his father on the ground but was still alive. PW5 while in the vehicle taking the deceased to the hospital with Sebuwuufu, his brother, and the CID officer, the

father made some statements. In his testimony, PW5 he testified that,

> "He told me 'Kiwumulo, my son has killed me for no reason. He was with Musisi and Ronald,' he repeated his word more than 4 times. He kept saying that "Kiwumulo has killed me for no cause. Kiwumulo is A4 Musisi is A1 and Ronald is A5."

This court finds that the two dying declarations in dispute were made to PW5 and PW6 at different times and at two different locations. We agree with counsel for the appellants' argument that the vagueness caused by the two accounts amounts to a grave contradiction. The black's law dictionary defines contradiction to mean **to disprove, to prove a fact contrary to what has been asserted by a witness. Contradiction in terms means a phrase of which the parts are expressly inconsistent.** From this definition and the above explanation, it would be inconclusive to suggest that the two dying declarations do prove any fact. The fact that the deceased told PW6 some names; Ronald and Sseguya and told PW5 other names; Musisi, Kiwumulo and Sseguya renders part of the declaration expressly inconsistent especially since PW6 appeared to have had more time with him than PW5. While it is true that a drowning man will clutch at a straw, the prosecution had sufficient time to investigate this case fully and not clutch at any straw, as it were. Secondly, the deceased seemed to have confided less in PW5 yet he was family. We will therefore discount the dying declarations since they are contradictory.

We have cautiously considered the eye witness account of PW11 especially since the trial judge used it to corroborate the dying declaration. Each must be considered in isolation.

PW11 was a mason who was working close by when the deceased was killed. He testified that he espied, with his own eyes, the appellants attack the deceased and he ably identified them. The record shows that PW11 was at a distance of 40 feet when he witnessed the attack. He stated that, "I recall one was dressed in a T-shirt of green and white joined stripes. The second one had a cap on his head. I do not recall with certainty about the third one but (*he was dressed in sic*) a red T-shirt. I had not seen the men before in town." In court he did a dock identification of the accused persons and attempted to identify them by the clothes they were at the crime scene, saying they were the same clothes they had worn at the crime scene. This court does not find this type of dock- identification reliable and dependable. In matters of ocular identification, accuracy is critical and therefore great care must be taken to ensure that the identification is not in doubt. There was a distance of 40 feet (13 metres) between PW11 and the attackers. However, PW11 was not familiar with the attackers, so a possibility of a mistaken identity was highly likely. In cases such as this, to eliminate the possibility of a mistaken identity, it would be essential to conduct an identification parade. We find the decision of this Court in **Stephen Mugume v Uganda, Criminal Appeal No. 20**

of 1995 (SC) quite insightful on this. In Stephen Mugume (supra) this Court held as follows:

> "It is, we think, common sense that a witness would normally not be required to identify a suspect at a parade if the witness knows the suspect whom he/she saw commit an offence. Identification parades are, as a practice, held in cases where the suspect is a stranger to the witness or possibly where the witness does not know the name of the suspect. In such a case the identification parade is held … to enable the identifying witness to confirm that the person he has identified at the parade is the same person he had seen commit an offence."

In the absence of an identification parade the evidence of PW11 is perilous. There was no cogent evidence adduced to prove that it is the three appellants who murdered the deceased. We find the conviction for murder unsafe and hereby set it aside. Having set aside the conviction, the sentence of 20 years' imprisonment cannot stand. The three appellants are herewith acquitted and set at liberty unless held on other lawful charges. We so find.

HON. JUSTICE MR. JUSTICE EGONDA-NTENDE
JUSTICE OF APPEAL

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

HON. MR. JUSTICE CHRISTOPHER MADRAMA
JUSTICE OF APPEAL

2/08/2022.