THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.01 OF 2015.

[CORAM: TUMWESIGYE, KISAAKYE, OPIO-AWERI, MWONDHA, TIBATEMWA-EKIRIKUBINZA, JJSC.]

BETWEEN

JAMADA NZABAIKUKIZE ..... **APPELLANT**

AND

UGANDA ..... **RESPONDENT**

[Appeal from the decision of the Court of Appeal at Kampala (Kasule, Mwangusya and Egonda Ntende, JJA)) Criminal Appeal No. 0400 *of 2014 dated 18th December) 2014.]*

JUDGMENT OF THE COURT

This is a second appeal from the decision of the High Court delivered by Owiny-Dollo J on 25th November 2009 Vide ***Criminal Session Case*** *No. 0077* ***of 2007, Fort Portal Circuit held at Kasese.***

The background facts

The case of the prosecution was that on 21 st January 2007 at about 7.30 p.m., the deceased (Alivera Nkwano Nalongo) was at home with her step daughter (PW 2) in Ruhita village, Kasese District. On the said date, the appellant, brother in law to the deceased's co-wife

and uncle to PW2 - together with four others, who were acquitted, went to the home of the deceased. The deceased and PW2 were seated in the compound of their home when the appellant and another man called at the deceased's house. The appellant was offered a chair to sit while PW2 went into the house to pick another chair for the other guest. As PW 2 was coming out of the house with the chair, she saw the appellant grabbing the deceased and stabbing her. She ran back inside the house and sounded an alarm. Some people responded to the alarm but found the deceased dead and the assailants had fled. The medical Doctor's report showed that the deceased had died due to excessive bleeding from wounds sustained from a sharp object like a panga or knife.

The appellant however denied having been at scene of crime on the fateful day. He said that on the day the crime was committed, he was at his home in Mubende and that in fact he had never been to Kasese in his life.

Despite the alibi raised, the trial Judge found the appellant guilty of murder contrary to Sections 188 and 189 of the Penal Code Act and sentenced him to life imprisonment.

The appellant appealed against his conviction and sentence to the Court of Appeal on two grounds, one, that the learned trial Judge erred in law and fact when he relied on the evidence of a single identifying witness in absence of corroborating evidence; and two that the sentence given by the learned trial Judge was illegal, manifestly excessive, harsh and unfair in the circumstances.

The Court of Appeal held that the conditions prevailing at the time of the attack favoured correct identification. That there was light which enabled the witness (PW 2) to recognize the appellant who was not a stranger to her. The Court therefore dismissed the appeal against the conviction.

On ground 2, the Court of Appeal found that in sentencing the accused, the High Court had not considered the period the appellant spent on remand. Furthermore that the trial court had not complied with Section 98 of the Trial on Indictment Act which obliges the court to give an opportunity to an accused to say something before the trial judge passed sentence. It was also the finding of the court that the accused was a first offender. The learned Justices of Appeal held that on the basis of the above factors, the court would interfere with the discretion of the trial judge. The appellant was sentenced to 20 years imprisonment commencing from the date of his conviction.

Dissatisfied with the decision of the Court of Appeal, the appellant appealed to this Court on the following grounds:

1. **The learned Justices of Appeal erred in law when they failed to properly re-evaluate the evidence adduced at trial to come to their own conclusion hence occasioning a miscarriage of justice.**

2. **The learned Justices of Appeal erred in law when they wrongly exercised their discretion and imposed a harsh and excessive sentence of 20 years imprisonment.**

Representation

At the hearing of the appeal, the appellant was represented by Mr. Emmanuel Muwonge, on State Brief whereas the respondent was represented by Mr. Okello Richard, Principal State Attorney in the chambers of the Director of Public Prosecutions.

Appellant's submissions

Ground 1

The appellant submitted that although the Justices of Appeal rightly stated the law on the duty of a first appellate court to

reevaluate the evidence and come to its own conclusion, it did not actually go ahead to carry out that duty. He specifically faulted the learned Justices for failure to scrutinize the evidence of PW 2, a single identifying witness. According to counsel, the conditions favourable for correct identification were not present and therefore PW 2 did not correctly identify the appellant at the scene of crime. Further that, PW 2 was engulfed with fear which adversely affected her ability to identify the appellant.

That although the learned Justices of the Court of Appeal rightly stated the law on handling the evidence of a single identifying witness as expounded in **Moses Bogere vs. Uganda SCCA No. 1 of 1997** and **Abdullah Nabulele & 2 Others vs. Uganda Criminal Appeal No.9 of 1978,** they misapplied the principles and thereby came to a wrong conclusion that there was correct identification.

Ground 2

On this ground, counsel for the appellant submitted that although the learned Justices of Appeal considered the period the appellant had spent on remand as well as the mitigating factors, a sentence of 20 years imprisonment was harsh. He thus prayed that the sentence be substituted with a lesser sentence.

Respondent's submissions

Ground 1

In regard to ground 1, the respondent submitted that the learned Justices of Appeal rightly stated the law and applied it to the facts of the present case.

Ground 2

The respondent submitted that ground 2 of the appellant's memorandum and the arguments there under were not sustainable in law. Counsel for the respondent relied on Section 5 (3) of the Judicature Act which prohibits appeals to the Supreme Court on

the severity of a sentence. Counsel thus argued that ground 2 ought to be dismissed.

Analysis of Court

Ground 1

The appellant specifically faulted the learned Justices of Appeal for upholding his conviction which was primarily based on the evidence of a single identifying witness.

Counsel for the appellant contended that the crime having taken place at 7.30 p.m. when it was dark, the conditions that warranted correct identification were absent. That as such, the appellant was not placed at the scene of crime. Further, that the identifying witness was engulfed with fear which adversely vitiated her ability to correctly identify the assailant at the scene of crime.

The law on identification by a single witness has been laid out in several cases. The leading authority is that of **Abdullah Bin Wendo and another vs. R (1953) 20 EACA 583.** The law was further developed in the authorities of **Abdulla Nabulere vs. Uganda Criminal Appeal No.9 of 1978** and **Bogere Moses vs. Uganda (supra).** The principles deduced from these authorities are that-

i) Court must consider the evidence as a whole.

ii) The court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were favourable or difficult.

iii) The court must caution itself before convicting the accused on the evidence of a single identifying witness.

iv) In considering the favourable and unfavourable conditions, the court should particularly examine the length of time the witness observed the assailant, the distance between the witness and the assailant, familiarity of the witness with the assailants, the quality of light, and material discrepancies in the description of the accused by the witness.

".

In re-evaluating the evidence of the single identifying witness, the Court of Appeal stated as follows:

"In. the case before us, according to PW 2) the time of the attack was 7.30 p. m. *and it was getting dark. She together with the deceased were still outside. That is where they received both the appellant and Damaseni. This is an indication that it was not yet dark. The appellant was offered a chair as a visitor whom PW 2 knew as her uncle. This could not have been done in darkness. The relationship between the witness and the appellant is another consideration in determining the reliability of the identifying witness and in the case of* ***Nabulere vs. Uganda,*** *the court makes a distinction between a witness who recognizes an assailant and one who merely identifies him or her ... In this case, PW 2 recognized the appellant whom she offered chair* so *when she saw him stabbing the deceased, she already knew him. She was bringing a chair to a second visitor whom she also knew. When she saw the appellant stabbing the deceased, she was only a meter away.* »

After re-evaluating the evidence, the Court of Appeal concluded as follows:

((We have carefully re-evaluated the factors that could have made it difficult for the identifying witness to identify the appellant together with the factors that favoured identification free from error. In our view, the conditions prevailing at the time of the attack favoured correct identification. In summary, there was still light which enabled the witness to recognize the appellant who was not a stranger to her. She recognized him when she offered him a chair and again when she saw him stabbing the deceased. It was not a fleeting glance. n

We have analyzed in detail, the findings of the Court of Appeal. We are satisfied that in re-evaluating the evidence of PW2, the Court of Appeal was guided by the principles established by case law already

outlined in this judgment, in regard to identification by a single witness. The learned Justices weighed both the factors favouring correct identification and those that made the identification difficult before reaching the conclusion that the appellant had been positively identified.

In dealing with the defence of alibi raised by the appellant, the Court of Appeal was guided by the Supreme Court case of **Moses Bogere vs. Uganda (supra)** where the learned Supreme Court Justices directed as follows:

> **What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the Court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the valuation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime and the defence not only denies it but also adduces evidence showing that he was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and hold that because of that acceptance per** se, **the other version is unsustainable.** (Our emphasis)

After restating the above principle, the Court of Appeal stated as follows:

"In the instant case we have examined the circumstances under which the appellant was allegedly identified at the scene as well as bearing in mind his own version that he was away in Mubende and

not Kasese on the evening the deceased was killed. The appellant also denied knowledge of the witness who testified that she knew him and saw him at Kasese. The conditions favouring correct identification and those against have been carefully considered as required by law and we recognize the danger of acting on the evidence of a single identifying witness as directed in the authorities cited in this judgment. We are satisfied that the appellant's identification at the scene was positive and free from error. Proof to the required standard that the appellant was at the scene at the material time has been achieved and his conviction is upheld. "

An alibi can be discredited either by prosecution evidence which squarely places an accused at the scene of the crime or by prosecution evidence which directly negates or counteracts the accused's testimony that he was in a particular place other than at the scene of the crime.

It is on record that the appellant denied ever having been to Kasese, at the scene of crime and that on the material day, he was in Mubende. However the evidence of PW2 who identified the appellant at the scene of crime was cogent.

Having re-evaluated the evidence of PW2 alongside the evidence relating to the alibi put forward by the appellant, the Court of Appeal came to the conclusion that the appellant's alibi had been discredited. We find no reason to depart from that finding. We therefore come to the conclusion that the appellant was at the scene of the crime on the day the assault occurred.

Ground 1 therefore fails.

Ground 2

Counsel for the appellant argued that a prison term of 20 years imprisonment was severe. He prayed that it be reduced.

3. "

First and foremost we have to point out that the ground of appeal on severity of sentence is barred by law.

Section 5 (3) of the **Judicature Act** prohibits grounds of appeal based on severity of a sentence given by a trial court. The Section provides:

> **In the case of an appeal against a sentence ..., the accused person may appeal to the Supreme Court against the sentence ... on a matter of law, not including the severity of the sentence.**

Basing on the above provision of law, this Court has on proper occasions dismissed grounds of appeal based on the harshness or severity of a sentence. [See **Sewanyana Livingstone vs. Uganda SCCA No. 19 of 2006, Bonyo Abdul vs. Uganda, SCCA No. 07 of 2011].**

In the premise, ground 2 of the memorandum of appeal is incompetent and the submissions made there under unsustainable in law.

Having found that all the grounds of this appeal lack merit, it is hereby dismissed.

The appellant is to continue serving his sentence as meted out by the Court of Appeal.

Dated at Kampala this 20th .. day of .. September ..... 2017.

JOTHAM TUMWESIGYE JUSTICE OF THE SUPREME COURT.

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DR. ESTHER KISAA YE

JUSTICE OF THE PREME COURT.

RUBBY OPIO-AWERI
JUSTICE OF THE SUPREME COURT .

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FAITH MWONDHA

JUSTICE OF THE SUPREME COURT.

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PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: TUMWESIGYE; KISAAKYE; OPIO-AWERI; MWONDHA; & TIBATEMWA-EKIRIKUBINZA, JJ.S.C.]

CRIMINAL APPEAL NO 01 OF 2015

BETWEEN

JAMADA NZABAIKUKIZE ::::::::::::::::::::::::::] APPELLANT

AND

UGANDA•.•..••..••..•.••.....••..•.••.•..•....•.] RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Kasule, Mwangusya & Engonda Ntende, JJA) dated 18th December, 2014 in Criminal Appeal No. 0400 of 2014]

JUDGMENT OF DR. KISAAKYE, JSC

This is a second appeal from the Judgment of the Court of Appeal rendered in Criminal Appeal No. 0400 of 2014.

The background to this appeal and the parties submissions have been well set out in the majority Judgment of the Court, I will therefore not repeat them here in detail. Suffice to say that Jamada Nzabaikukize, (hereinafter referred to as the appellant) was convicted of murder of one Alivera Nkwano Nalongo, who was a co-wife to the appellant's sister. On 25th November 2009, Owinyi-Dollo, J. (as he then was) sentenced him to life imprisonment.

Being dissatisfied with his conviction and sentence, he appealed to the

Court of Appeal which upheld his conviction. The court however

reduced his sentence from life imprisonment to 20 years imprisonment commencing from the date of his conviction.

Dissatisfied with the decision of the Court of Appeal, the appellant lodged a second appeal in this Court on the following two grounds of appeal:

1. *The learned Justices of the Court of Appeal erred in law when they failed to properly re-evaluate the evidence adduced at trial to come to their own conclusion hence occasioning a miscarriage of justice.*

2. *The learned Justices of the Court of Appeal erred in law when they wrongly exercised their discretion and imposed a harsh and excessive sentence of 20 years.*

I have had the benefit of reading in draft the majority Judgment of the Court confirming both the conviction and sentence of the appellant. I agree with the majority that this appeal against conviction and sentence should be dismissed. However, I do not agree with the reasons given for the majority's dismissal of ground 2 of appeal, which was about sentence. For that reason, I am unable to sign the majority Judgment and I have also found it necessary to write this separate Judgment on that issue alone.

The majority has relied on section 5(3) of the Judicature Act to hold that this Court is precluded from hearing appeals against the severity of sentence.

Section 5(3) of the Judicature Act provides as follows:

"In the case of an appeal against sentence and an order other than one fixed by law, the accused person may appeal to the

Supreme Court against the sentence* or *order, on* a *matter of law, not including the severity of sentence."

I note that this section bars any intending appellant and by implication this Court from hearing an appeal against severity of sentence.

I further note that this Court has previously held that in spite of the provisions of section 5(3), it may consider an appeal against a sentence. In ***Kiwalabye Bernard vs. Uganda, Criminal Appeal No. 143 of 2001,*** this Court held thus:

"The appellate court* is *not* to *interfere with the sentence imposed by* a *trial Court which has exercised* its *discretion on 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* a *trial court ignores* to *consider an important matter* or *circumstances which ought* to *be considered when passing the sentence* or *where the sentence imposed* is *wrong in principle. "

In my dissenting Judgment in ***Busiku Thomas v. Uganda, Criminal Appeal No. 33 of 2011 (SC),*** I expressed my reservations on the constitutionality of section 5(3) of the Judicature Act. Recently, in ***Mpagi Godfrey v. Uganda, Criminal Appeal No. 63 of 201 S(SC),*** I re-echoed the need for Parliament to amend section 5(3) of the Judicature Act to remove the restriction imposed on this Court not to hear appeals against severity or excessiveness of sentence.

In my view, section 5(3) of the Judicature Act prohibits the Supreme Court from doing what the Constitution has already permitted it to do under Article 132(2) of the Constitution. This Article provides for appeals to this Court as follows:

"(2) An appeal shall lie* to *the Supreme Court from such decisions* of the *Court of Appeal* as *may be prescribed by

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The provision is clear that an appeal shall lie to the Supreme Court from *{such decisions'* of the Court of Appeal. The constitutional provision does not say from *'such part of the decision'* of the Court of Appeal. In my view, the Constitution left the choice whether to appeal against the whole of the decision or part of it with the intending appellant.

Furthermore, Article 126 of the Constitution places the exercise of judicial power in Courts which exercise it on behalf of the people of Uganda. However, the same Constitution was cognisant of the fact that judicial officers in the course of exercising this judicial power, may err in law or fact. To address this eventuality, the Constitution set up an appeal process which ends at the Supreme Court. It also suffices to note that at each appellate level, the number of justices rehearing the matter Increases.

The Constitution further requires all organs of the State and persons to apply it. Courts of law are not exempt.

The framers of the Constitution, having provided for such an elaborate appellate process, it was therefore wrong for Parliament through section 5(3) to restrict the role of the Supreme Court in criminal appeals to only looking into conviction and illegal sentences only. In my view, it is inconceivable that in respect of criminal appeals, the Constitution only envisaged that errors of law or fact could only occur in conviction and imposition of an illegal sentence and not on the severity of sentence. Such an interpretation causes an injustice to those appellants who wish to appeal against sentences which they deem harsh or excessive.

Having noted the error of Parliament in enacting section 5(3) of the Judicature Act in terms as stated above, it is inexcusable for this Court to continue endorsing a parliamentary error by continuing to dismiss appeals against severity of sentence.

Article 2 on the other hand provides for the supremacy of the Constitution as follows:

"(1) This Constitution **is** ***the supreme law of Uganda and shall have binding force*** **on all** ***authorities and persons throughout Uganda.***

(2) If any other law or any custom **is** ***inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall,*** **to** ***the extent of the inconsistency, be void."***

Thus from the above reasons and analysis, it is my view that notwithstanding the provisions of section 5(3) of the Judicature Act, a convict who contends that a sentence imposed on him or her is harsh and excessive should have recourse in this Court to appeal against such a sentence.

Turning to the facts of this case, I note that the Court of Appeal carefully considered both the aggravating and mitigating factors presented by the parties. I also note that the appellant killed the deceased in a brutal manner. I therefore find that the sentence of 20 years imprisonment imposed on the appellant by the Court of Appeal was neither harsh nor manifestly excessive in the circumstances. In fact, when one takes into account the circumstances under which the appellant killed the deceased, it can even be argued that the sentence of 20 years was on the lenient side. For this reason, I have found no merit in ground 2 of the appeal. It therefore fails.

Before I take leave of this matter, I wish to retaliate my concerns about the need for consistency in our sentencing in criminal matters.

In our recent decision of ***Mpagi Godfrey*** (supra), this Court confirmed a sentence of 34 years for murder through beating of a victim. In this

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sentence of 20 years for the appellant who travelled miles to his victim's home and stabbed her several times in cold blood. The disparity of 14 years can neither be explained to the appellant, the victim's family, other Court users or even the general public.

Apart from the reasons already given why section 5(3) of the Judicature Act should not be followed, it is obvious that the disparities cited above emanate from the application of this section, which is clearly inconsistent with several provisions of our Constitution. Such disparities run contrary to the dictates of our Constitution which requires equal treatment of all persons before and under the law. This includes persons accused and convicted of criminal offences.

This Court is a custodian of justice, and should not endorse such provisions which result in not only glaring unconstitutionality but also injustice. As I recently stated in my Judgment in ***Mpagi Godfrey*** (supra), Parliament should immediately take action to amend section 5(3) of the Judicature Act to bring it in consonance with the Constitution, which is the supreme law of the land.

Dated at Kampala this 20th day of September .. 2017

JUSTICE DR. ESTHER **KISAAKYE**
JUSTICE OF THE SUPREME COURT