THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO.0307 OF 2019

(Arising from the decision of Henry I Kaweesa, J in High Court Criminal Session Case No. 136 of 2012 dated 13th September 2016, at Pallisa)

(Coram: Cheborion, Gashirabake & Kihika, JJA)

1. OKITUI FRANCIS
2. OMODING JAMES :::APPELLANTS

VERSUS

UGANDA ::: RESPONDENT

JUDGEMENT OF THE COURT

Introduction

[1] The appellants were indicted for the offense of murder contrary to sections 188 and 189 of the Penal Code Act, Cap 120. It was alleged that the appellants, on the 13th day of May 2012 at Paisa village in Pallisa district, murdered Okolimong Ismael. The appellants were convicted and sentenced to 11 years' imprisonment.

Background

[2] The facts, as ascertained from the lower court record, are that on the 13th day of May 2012, the deceased went to the swamp to check on his animals. Adeke Margaret also moved through the swamp via a shortcut and met the appellants. A2-Omoding James and A1-Okutui Francis were armed with pangas. Adeke passed the duo, but on returning hurriedly to meet her children at home, she found people gathered close to the place where she had met and seen the appellants, and there was the body of the deceased with a cut on his neck. The appellants were arrested, tried, and convicted of the offense of murder and sentenced to 11 years imprisonment.

[3] Dissatisfied with the decision of the trial Judge, the appellants filed this appeal on the following grounds: -

(i) The learned trial judge erred in law and fact when he convicted the appellants on purely unreliable circumstantial evidence.

(ii) The learned trial judge erred in law and fact when he failed to evaluate the evidence on the court record properly.

(iii) The learned trial judge erred in law and fact when he ignored the appellant's alibi defense, which was plausible.

Representation

[4] Mr. Eddie Nangulu represented the appellants on state brief while Ms. Caroline Marion Acio, Chief State Attorney, and Ms. Caroline Mpumwire, State Attorney, held brief for Mr. Joseph Kyomuhendo, for the respondent.

[5] Counsel for the appellants sought leave of the court to validate the memorandum of appeal, which was filed out of time. The court granted leave and extended the time for filing the memorandum of appeal. Both counsels submitted that they had filed written submissions and prayed that the court would consider them in determining this appeal.

Submissions

Submissions for the appellant.

[6] Counsel submitted that the trial Judge convicted the appellants purely upon circumstantial evidence. Counsel cited **Byaruhanga Fodori v Uganda, SCCA No. 18 of 2002,** where it was held that; *"It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must before deciding upon a conviction find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."*

[7] Counsel further contended that none of the prosecution witnesses directly witnessed the occurrence of the offense. Further, the alleged murder weapon was never retrieved or traced back to the appellants; thus, no evidence on record implicated the appellants in the commission of the offense. Counsel submitted that PW1, Kateu Alber, was an untruthful and biased witness. He stated that on page 11 of the record, PW1 was described as the biological child of the deceased who was aggrieved by his father's death. Counsel

added that PW1's evidence was based purely on suspicion steaming from a presumed grudge over a land dispute.

[8] Counsel submitted that PW2 Alur Veronica was also a biased witness as he was a son of the deceased and could have been aggrieved by his father's death. Counsel averred that PW2 testified that on the day before, he had seen the appellants cultivating on the adjacent land within the swamp and that they neither attacked nor interfered with his farming activities. Further, PW3, who stated that he saw the appellants pass him, did not explain the distance between where he saw the appellants and the crime scene, and he did not state that he saw the appellants engaging in the offense.

[9] Counsel submitted that PW4 Okoboi Dan stated that on the day of the alleged incident, he was at Omule's Hotel in Angule Sub-county at around 7:00 am. The 2nd appellant approached him and asked to take him to Pallisa Main Hospital. He stated that after traveling a distance of 500 meters, they met the 1st appellant, with whom they traveled

to the said hospital. Counsel argued that PW3 could not state that he saw the appellants at 7:00 am, yet they were with PW4 at that time.

[10] Counsel further contended that PW5 was a close relative of the deceased who testified that he saw the appellants along the main road at Pacia between 6-7:00 am but did not mention that they had any weapon, as mentioned by PW7. Counsel argued that PW5 testified that his suspicion of the appellants was because they had threatened the deceased previously. Still, there is no evidence regarding the circumstances under which the statement was made when it was made, to whom it was made, and in whose presence it was made to determine if it was made.

[11] Counsel submitted that PW7's evidence was contradictory as she stated that she left her home in Ikomo village at 6:00 am, but in her police statement marked DID1, she stated that she left her home at 0700hrs. Further, PW7 stated that the distance between where she

was standing and the appellants was about 20 meters while in her police statement, she stated that the distance was about 60 meters. While identifying the appellants, pw7 stated that the 1st appellant wore a shirt whose color she could not recall; it was long-sleeved and bluish, while in her police statement, she stated that she identified the 1st appellant as being bare-chested.

[12] Counsel submitted that PW8 was also a biased witness whose testimony could not be relied upon. He contended that the evidence that was led by the prosecution was insufficient to prove the appellants' participation in the offense at hand, and it does not irresistibly point to the appellants' guilt.

[13] Counsel abandoned Ground No. 2 for the appellants during the appeal hearing. On ground No. 3, Counsel submitted that on that fateful day, the 2nd appellant pleaded that he was sick, and with the aid of the 1st appellant, he was taken to hospital. It was at the said hospital that they were arrested. Counsel contended that

the prosecution failed to place the appellants at the crime scene sufficiently. Thus, the trial judge made a fundamental error in convicting the appellants without sufficient evidence. He invited this court to allow the appeal and set aside the conviction and sentence of the trial court in the interest of justice.

Respondent's submissions.

[14] Counsel for the respondent opted to argue grounds 1 and 3 concurrently. He submitted that the trial Judge correctly evaluated the evidence on record and arrived at a proper conclusion that the appellants participated in the murder of the late Okolimong Ismael. Counsel submitted that the trial Judge relied on circumstantial evidence to convict the appellants. He cited **Godi Hussein Akbar v Uganda, SCCA No. 003 of 2013,** which cited **Simon Musoke v R, (1958) EA 715,** where it was held that in a case depending exclusively upon circumstantial, the court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the

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

[15] Counsel contended that there was sufficient circumstantial evidence to place the appellants at the crime scene. He submitted that the prosecution relied on the evidence of a grudge between the deceased and the appellants that originated from a land dispute, the appellants' preparation in a swamp, the appellants' confession to PW8 in prison, and a belated defense of alibi by the appellants.

[16] Counsel referred to **section 7 (1) of the Evidence Act** to submit that any fact is relevant that shows or constitutes a motive or preparation for any point in issue or relevant fact. Counsel argued that although the motive to commit murder is irrelevant, it becomes relevant where it is established. Counsel added that the appellants had a land dispute with the deceased, whom they accused of grabbing their family's land. Counsel contended that the motive of the murder was to resolve the land dispute.

[17] Counsel submitted that PW1 and PW5 highlighted the grudge orchestrated by the land dispute between the deceased and the appellants. Counsel further submitted that PW7 Adeke Margaret testified that he met the appellants at the swamp close to the scene of the crime and that they were armed with pangas. It was the counsel's submission that the deceased was found lying lifeless just within the area where PW7 saw the appellants. Further, PW2 Alur Veronica told the court that on that fateful day, she saw the deceased at around 6:00 am and also saw Omoding in the same area. Further, PW5 Opio Simon told the court that on that fateful day at around 7:00 am, he saw the appellants coming from the swamp towards Pacia Trading Centre.

[18] He also stated that he saw the appellants, and when they passed after a short time, he had an alarm coming from the swamp. When he went to the swamp, he found the deceased, who had been cut on the neck. PW4 stated that on that fateful day around 7:00 am, he rode Okurut on his

motorcycle from Omule's Hotel to Pallisa Main Hospital, and along the way, they were joined by Okutui.

[19] Counsel further submitted that the above pieces of evidence are corroborated by the statement made by Okurut (Private Omoding James) to PW8, Achara Kassim. It was counsel's averment that while in prison, Omoding James confessed to PW8 about killing Okolimong. Counsel submitted that PE8 told the court that when the appellants were taken to the jail, he asked Private Omoding why he was there, and he confessed to him having killed his father.

[20] **Regarding the second ground** of an alibi set up by the appellants, counsel for the respondent contended that the appellant's alibi was destroyed by prosecution adducing evidence, placing the appellants at the crime scene. Further, the appellants raised the defense of alibi belatedly at the trial. Counsel cited **Festo Adroa Asenua v Uganda, SCCA No. 1 of 1998,** for the proposition that the defense of alibi should be raised at the earliest opportunity to enable the state to investigate it and make a proper decision. It was

further held that a belated alibi is an afterthought and can only corroborate the prosecution case.

[21] Counsel submitted that the circumstantial evidence adduced points to the appellants' guilt; thus, she prayed that the appeal be dismissed.

Court's consideration.

[22] The first appellate court must re-appraise the evidence at the trial court and come to its conclusion. See **Rule 30(1)(a) of the Judicature(Court of Appeal) Rules.** However, we must remember that we did not have the opportunity to see and hear the witnesses as they testified. See **Bogere Moses Vs Uganda[1998]UGSC 22**; **Selle & Another Vs Associated Motor Boat Co[1968] E.A 123, Pandya Vs R[1957]E.A336 and Kifamutwe Henry Vs Uganda [1998]UGSC 20**

Ground 1

[23] In this case, there was no direct evidence of a person who saw the appellants murder the deceased. The trial

court relied entirely on circumstantial evidence. In ***Bulila Christiano & Anor v Uganda, SCCA No. 61 of 2015***, 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 incapable of explanation upon any reasonable hypothesis than that of guilt.

[24] In **Amisi Dhatemwa alias Waibi v Uganda, SCCA No. 023 of 1977** held that: *"It is true to say that circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving facts in issue quite accurately; it is no derogation of evidence to say that it is circumstantial; see* ***R u Tailor, Wever, and Donovan. 21 Cr.App. R 20****. However, it is trite law 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 inference of the accused guilt from circumstantial evidence to be sure that no other co-*

*existing circumstances would weaken or destroy the inference. (**See: Teper v P. (1952) A.C. 480 at p 489).**"*

[25] In the instant case, three pieces of circumstantial evidence were used against the appellants: the proof of the previous land dispute, the evidence of prior threats, and the evidence of the appellants seen near the crime scene.

[26] **PW1 Kateu Alber** testified that the deceased and Okurut's father, Omoding James, had a land battle, and Omoding was a witness in the case. He stated that they were on bad terms with the deceased and that, at one point, A2-Omoding James threatened to kill the deceased.

[27] **PW2 Alur Veronica** also testified that there was a pending land dispute between the deceased and the appellant. **PW3 Opio Simon** also testified to the land dispute between the deceased and the appellant, which was still ongoing in court.

[28] **PW7 Adeke Margaret** testified that she left her home at 6:00 am to go to Agure, but she met the appellants at the swamp with pangas on the way. She stated that when she came back, she found the deceased had been cut on the neck from close to the place where she had met the appellants before, and the distance was about 20 meters. **PW5 Eriat Robert** stated that on that fateful day, while he was going to church, he saw the appellants close to where the deceased's body was recovered at the swamp at around 6-7:00 am. He stated that he found the appellants moving towards the main road on his way back.

[29] Having established the above evidence, it is now incumbent upon this court to consider whether the circumstantial evidence that is now available compellingly leads to the conclusion that the appellant caused the death of the deceased.

[30] Regarding the evidence of prior threats, **in Waihi and another v Uganda, (1968) EA 278 at p.280**, it was held that Evidence of a previous threat or an announced intention to kill is always admissible evidence against the

person accused of murder, but its probative value varies greatly. Regard must be had to how the threat is uttered, whether it is spoken bitterly or impulsively in sudden anger or jokingly, and the reason for the threat if given, and the length of time between the threat and the killing are material matters for consideration.

[31] In **Henry Francis Rubingo v Uganda, CACA No. 18 of 1977**, the Court, while commenting on prior threats, held that: "**We do not know the circumstances in which the threat was made**, ***but it was serious enough for the deceased to report his son to the chief. The chief also did not take it lightly and warned the appellant. It was made two months prior due to the deceased's refusal to give the appellant land. Those who have had to deal with land matters will realize that such a desire to acquire land or disputes concerning land are seldom, if ever, at all, forgotten. The interval of time between the utterance and the killing of about two months in the circumstances is not long enough in our opinion to***

***make the utterance irrelevant.*" (Underlined for emphasis)**

[32] In the present case, PW1 and PW5, who testified about prior threats, did not tell the exact day the threats were made, so the court cannot draw a proper conclusion regarding when such threats were made or under what circumstances. However, when the pieces of evidence are considered together, they lead to an irresistible conclusion that it was the appellants and nobody else who were responsible for the death of the deceased. In ***S v Reddy and Others, 1996 (2) SACR 1(A) at 8C-D,*** the South African Supreme Court explained the assessment of circumstantial evidence. It found thus: ***"In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality."***

[33] In this case, PW7's evidence that he saw the appellants with pangas at the scene where the deceased was found lying dead, combined with the evidence of PW5, who also saw the appellants towards the swamp where the deceased was found lying dead, and the evidence of PW1, PW2, and PW3 of the land dispute between the deceased and the appellants is sufficient circumstantial evidence.

[34] We would take the evidence of PW8 with caution. He stated that A2-Omoding confessed to him in prison that they were arrested for killing the deceased and that they killed him. There was no other piece of evidence to corroborate PW8's evidence.

Ground 3

[35] We have also analyzed the appellants' defense of alibi and the applicable law. An accused person who sets up an alibi assumes no burden to prove the truth of his alibi. In **Bogere and Anor v Uganda [2018] UGSC9,** the Court held: ***"The burden to disprove an alibi lies with the prosecution. The prosecution has to disprove the alibi***

by adducing credible evidence placing the accused at the scene of the crime at that particular time when the accused claims he was elsewhere."

[36] It was further held in ***Bogere Moses v Uganda, SCCA No. 1 of 1997,*** that; "***Where prosecution has adduced evidence showing that the accused was at the scene of the crime and the defense not only denies it but adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judiciously and give reasons why one and not the other version is accepted."***

[37] Further, in **Kisitu v Uganda, SCCA No. 66 of 2015,** the Supreme Court also noted that; ***"The other way of disposing of an alibi is for the prosecution to adduce cogent evidence which puts the accused at the scene of crime..."*** In the instant case, the appellants stated that they were at home with their wives and children and that A2-Omoding needed to go to the hospital, so they asked A1-

Okutui to escort him. They stated that they went to the hospital, and that is where they were arrested.

[38] We have studied both pieces of evidence, the prosecution's and defense's, and weighed them against each other. We find that the prosecution's evidence, as outlined above, placed the appellants at the crime scene. Our analysis shows that the prosecution discharged its burden by destroying the alibi set up by the appellants, as the trial court had already analyzed.

[39] We, therefore, find that the trial Judge correctly evaluated the circumstantial evidence on record and rightfully convicted the appellants of murder. We also hold that the trial Judge's finding that the prosecution sufficiently broke the appellant's alibi is justified and cannot be faulted by this Court.

[40] On that basis, we dismiss the appeal and uphold the trial court's finding.

Dated at Kampala this.....26th day of ..January..... 2024

Cheborion Barishaki
Justice of Appeal

Christopher Gashirabake
Justice of Appeal

Oscar J. Kihika
Justice of Appeal