

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA (COA)
AT KAMPALA

CRIMINAL APPEAL NUMBER 0243 OF 2013

KOROBE JOSEPH.....APPELLANT

VERSUS

UGANDARESPONDENT

CORAM:

HON. MR. JUSTICE REMMY KASULE, JA

HON. LADY. JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

*(An appeal from a decision of the High Court of Uganda
Holden at Soroti before Her Lordship the Hon. Lady Justice
Margret Oguli Oumo dated the 25th day of August 2011 in
Criminal Session Case No 0020 of 2011.)*

JUDGMENT OF THE COURT

The appellant appeals against the Judgment of the High Court of Uganda, at Soroti, dated 25th August 2011.

The Grounds of the appeal are set out as follows in the amended memorandum of appeal.

- 1. That the learned trial Judge erred in law and fact when she relied on the uncorroborated evidence of PW4 as to convict the appellant.***

2. That the sentence of 25 years imprisonment as meted out is manifestly harsh and excessive given the obtaining circumstances.

3. The learned trial Judge erred in law when she made a finding that the appellant had participated in unlawful killing of the deceased.

At the hearing of this appeal, **Mr. Henry Kunya** learned counsel represented the appellant while learned counsel **Mr. Alex Baganda** represented the respondent. The appellant was present.

It was submitted for the appellant on ground one that the learned trial Judge erred when she relied on the evidence of PW4, one Langole Gideon who at the time of giving evidence was a child of tender years, and the only eye witness.

Learned counsel submitted that the evidence of PW4 was not corroborated in any material particulars, sufficient to point out the fact that it was indeed the appellant who caused the death of the deceased.

Counsel submitted further that the learned trial Judge had at the trial failed to conduct a proper *voire dire*, before receiving the evidence of PW4. That the learned Judge did not make any findings as to whether or not PW4 understood the importance of an oath and of telling the truth.

Counsel submitted that in his evidence, PW4 mentioned that the appellant had used a metallic rod to assault the deceased. However, the metallic bar was never mentioned in the witness's statement to police which was recorded the day after the incident.

It was contended by counsel for the appellant that failure by PW4 to mention the metallic rod in his statement to police, the fact that the police officer who came to the scene did not find the bar and the fact that it was not mentioned in the investigating officer's statement threw doubt on the prosecution case.

He contended that it was not proved that the said iron bar was the offensive weapon that was used to kill the deceased.

Learned counsel further submitted that there was no postmortem report tendered in court, a matter that rendered the prosecution evidence even weaker. That there was no sufficient evidence on the injuries sustained by the deceased.

Counsel urged this court to reject the finding of the learned trial Judge, that evidence of PW4 was corroborated by the fact that sugar solution was found around the mouth of the deceased.

Counsel submitted that the evidence adduced cannot be said to be linking the appellant to the death of the deceased.

Counsel submitted further that the conduct of the appellant after the death of the deceased who was his wife was consistent with that of an innocent man.

That he did not flee, he tried to give her a sugar solution to revive her when she collapsed and he was at hand to take her to the health centre when she had a problem with breathing. He went to the police and reported the death of the deceased.

He asked court to quash the conviction and set aside the sentence.

In the alternative, he asked court to reduce the sentence imposed by the trial court. He contended that in the circumstances of this case a sentence of 25 years imprisonment was manifestly harsh and excessive. He cited the case of ***Kiyingi Rajab vs Uganda (Court of Appeal Criminal Appeal No. 145 of 2009)***.

He asked court to set aside the sentence and substitute it with a lesser one.

Mr. Baganda for the respondent opposed the appeal and supported the Judgment of the trial court.

He submitted that the learned trial Judge had correctly relied upon the evidence of PW4 even if he was a child of tender age. He submitted that his evidence was corroborated by that of PW2 who had found crystals of sugar on the mouth of the deceased.

He submitted that there was no set procedure or rules for conducting a *voire dire*, and that the Judge had properly conducted it and had determined that PW4 understood the nature and importance of taking an oath.

Learned counsel submitted that the metallic pipe (exhibit P2) had been properly identified by the witnesses and had been properly tendered in court.

He submitted further that the absence of postmortem evidence did not weaken the prosecution case as the Judge properly relied on the direct evidence of PW4 which was corroborated by evidence of other witnesses.

He asked this court to confirm the sentence imposed by the learned trial Judge. He submitted that the sentence imposed was neither harsh nor manifestly excessive.

This is a first appeal and this court, as a first appellate court has a duty to reevaluate the evidence and come to its own conclusion. ***See;- Pandya versus R. (1957) E.A. 336, Henry Kifamunte Vs Uganda (Supreme Court Criminal Appeal No. 10/1997, Bogere Moses versus Uganda (Supreme Court Criminal Appeal No. 1 of 1997) and Rule 30 (1)*** of the Rules of this Court.

The appellant is entitled to receive from this court its own judgment and conclusion after re-evaluating the evidence adduced at the trial.

Ground one of the memorandum of appeal faults the learned trial Judge for relying on the uncorroborated evidence of PW4, a child of tender years in convicting the appellant.

PW4 Langole Gideon is the son of the appellant and the deceased was his mother. The deceased was the appellant's wife. They were all living in the same house on the night of 16th June 2010 when the deceased died. The appellant was charged with murder. PW4, their son, was the only eye witness to what transpired at their home that fateful night.

In his examination in chief he narrates as follows;-

"That is my father, he killed my mother. My father told Ocheng to pick the shoes. My mother was seated in the kitchen, he put on the second shoe and went where my mum was and kicked her on the chest. After kicking, my mum slapped my father and they wrestled up to my grandmother's house, from my grandmother's place they went to the compound, and my father threw my mother down and there was a stone which hit my mum at the back of her head...."

After that my mother walked up a bit confused and tried to get hold of the accused. The accused picked a metal and decided to hit the mother on the waist and she fell down and he continued kicking and also knocking her. He picked the iron bar the second time and hit my mum on the right arm and also hit part of her heart, she became unconscious and died. My mum was left in front of the compound and there was heavy rain my father left her there and she was failing to breath. It was at night

when it was raining. I helped my father to take my mum in the house. My father mixed sugar with water and tried to give my mum to take but she failed completely.

It was night, I fell asleep but in the morning my father called his second wife mama Nate to change the deceased's clothes. Mama Nate came and removed the clothes that my mum was putting on and put them on top of the bicycle. There I decided to awake my mum but there was no response the blood was coming from the mouth, ears and nose. The blood from the mouth was mixed with foam. Mama Natte was locked with her children in her house.

My father went to the neighboring home and called my aunt, she is here, and two more relatives where my aunt was staying. My aunt is called Kokoi when they came my father told those people he brought them to come and see what would have happened in this house. The house was dark, they found the deceased lying on the mattress.”

In cross examination he stated as follows;-

“I helped to carry my mother inside the house in the bedroom. Me and my father carried my mother. The police asked me some questions. I told them everything I am telling the court now. I did mention it to the police. It was an iron bar which my father used to beat my mother. It was the iron bar I saw myself. I don't like the accused. He killed my mother that is why I don't like him. He killed my mother at night, it was dark and it was raining. My mother was a habitual drunkard.

It is contended for the appellant, that the above testimony required corroboration since it was that of a child of tender age.

The witness, PW4 was 10 years old at the time he gave the testimony. He testified on oath and was cross examined. PW1 Lamokol Jimmy testified that when he arrived at the appellant's home on the 17th June 2010, the day following the incident, he found the deceased's body there. In his testimony he narrates what he observed as follows:-

“The body was in Korobe's home in the house where he used to live. I found out that the accused had already run to the police station. I looked at the body my observation was there was blood oozing from the ears, nose and mouth, the right arm was swollen and when I touched it was like as if it was fractured/broken. The leg also was swollen, above the foot. Also there was swelling above the waist but at the back just below the ribs. She was putting on a clean dress green in colour with some colours.”

This testimony corroborates that of PW4 in material facts. The swollen leg, the swollen arm, blood oozing from the ears, nose and mouth and the fact that the body was dressed in a clear dress.

The testimony of PW2 also corroborates that of PW4. In cross examination, this witness stated that she had heard the voice of the deceased earlier that night of 16th June 2010. The deceased was crying out saying “this man has killed me”. She was calling the witness saying “mother of Lang rescue me”

This is consistent with evidence of PW4 that the appellant had assaulted the deceased prior to her death.

The evidence of PW3 a nurse at Latome Health Centre II also corroborates the evidence of PW4 in respect of injuries sustained by the deceased.

She states as follows in her examination in chief.:-

“There were bruises on the left side of the face, the right upper arm was swollen, I tried to touch to observe whether it was broken but it was too swollen. There was blood oozing from the ears and nose.”

The injuries observed on the deceased’s body by this witness were consistent with the testimony of PW4.

PW5 a Police officer who saw the body described the injuries as follows in his testimony.:-

“We carried the body. We opened it. The right arm we observed bruises, left leg had bruises and swellings. We saw bruises all over the back after turning the body. At the lower back there was serious injury. We saw sugar around the mouth which were told that Korobe tried to give to the deceased”

This testimony also corroborates that of PW4 in all material facts.

The injuries as described by the witnesses are consistent with PW4's testimony that the deceased died as a result of injuries sustained after she had been assaulted by the appellant who used a metallic pipe (rod) in the assault.

We find that the evidence of PW4 was corroborated. The injuries do not tally with the appellant's version of events that the deceased died after falling down while she was drunk. The learned trial Judge rightly rejected the evidence of the appellant.

We agree with the finding of the learned trial judge that it was the appellant who unlawfully caused the death of the deceased.

We also agree with learned trial Judge that the offence of murder was not proved. The learned Judge rightly convicted the appellant of the offence of manslaughter.

Ground one and three of the memorandum of appeal therefore fail and are hereby dismissed.

The appellant's conviction is hereby upheld.

Ground two relates to sentence.

The appellant was sentenced to 25 years imprisonment.

It was contended by the appellant's counsel that the sentence is manifestly harsh and excessive. The respondent on the other

hand submitted that the sentence was neither harsh nor excessive.

Sentence is a discretion of a trial court. Instances in which this court may interfere with sentence have long been settled by the decisions of this court and the Supreme Court.

They were set out in the case of ***Ogalo Son of Owoura vs Republic [1954] 21 EACA 270*** as follows;-

"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless: , as was said in James Vs Rex [1950] J, 18 EACA 147, it is evident that the judge has acted upon some wrong principle or over looked some material factor' To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R V Shershewsky [1912] C.CA 28 T.LR 364."

See also :- ***Kiyingi Raja vs Uganda (Court of Appeal Civil Appeal No. 145 of 2009), Wailagala Mohamed Puni versus Uganda Court of Appeal Criminal Appeal No. 133 of 2005, Kiwalabye Bernard vs Uganda (Supreme Court Criminal Appeal No. 143 of 2001) among others.***

In this particular case the learned trial Judge did not set out in detail the mitigating factors in the Judgment. She only set out the aggravating factors in her reasons for the sentence.

The appellant appears to be of advanced age. There is evidence that he was remorseful and attempted to revive the deceased when she collapsed. He was a first offender. It appears from the record that he was arrested on 17th June 2010 and convicted on 25th August 2011. The period he spent on remand therefore is one year and 2 months.

The learned trial Judge did not take into account the period the appellant had spent on remand. There is no evidence that the appellant had been admitted on bail. Taking into account the remand period is a constitutional requirement under **Article 23(8)** of the Constitution. Failure to comply with said provision of the constitution renders the sentence a nullity. **See;- *Kizito Senkula vs Uganda Supreme Court (Criminal Appeal No. 24 of 2001).***

We accordingly set aside the sentence on that account.

Taking into account all the mitigating and aggravating factors set out above including the period spent on remand, we now sentence the appellant to 14 years imprisonment from the date of conviction.

We so order

Dated at Kampala this 27th day of November 2014.

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HON. MR. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

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HON. LADY. JUSTICE SOLOMY BALUNGI BOSSA
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL