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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 104 OF 2009

(ARISING FROM HIGH COURT CRIMINAL CASE NO. 0033 OF 2008 AT KABALE)

AHARIKUNDIRA YUSTINA::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA::: RESPONDENT

CORAM: HON. JUSTICE REMMY KASULE, JA

HON. JUSTICE ELDAD MWANGUSYA, JA

HON. JUSTICE RICHARD BUTEERA, JA

JUDGMENT OF THE COURT

Introduction

This is an appeal against the conviction and sentence of the appellant by the High Court of Uganda at Kabale (*Lawrence Gidudu, J*) delivered on 20th April 2009 in ***HCT-05-CR-SC-0033 OF 2008***.

The deceased, **KAJURA VICENSIO** was a sixty five year old resident of Rutundwe Cell, Kyasano, Kamuganguzi sub county Kabale District. He used to work in the Tea Estates in Toro District but had returned home after retirement. He lived with his wife **AHARUKUNDA YUSTINA** (Appellant) and their daughter **SCOLA ORIKIRIZA** (PW.7) a student at a nearby school.

On 6th June 2006 PW.7 left the deceased at home and went to attend school. She returned home at 6.00 p.m. and found when he was not at home. She asked the appellant where the deceased was and she told her that he had gone to clear bushes from a shamba. The deceased did not return home that night. The appellant explained that he had other women where he could have slept.

The deceased did not appear for two days. A search for him was mounted and his body was subsequently found some distance away from his home. His throat, arms and legs had been cut. The arms had been severed from the shoulders and the legs were missing. There were no signs of struggle at the scene indicating that the body had been brought to the scene from somewhere else.

After the recovery of the body the home of the deceased was searched by **D/SGT TUMWEBAZE** (P.W.5). During the search a mattress and a piece of cloth soaked in blood were recovered from the deceased's bedroom. According to PW.7 the appellant had locked the room from the time the deceased disappeared up to the time it was searched. PW.7 was forced by the Police to open it. The appellant was no longer sleeping in the bedroom but in the kitchen.

Following the recovery of the body a post mortem examination was performed by Dr. Tom Mugisha (PW.1), a Medical Officer whose evidence was admitted at the commencement of the trial. His findings were that the arms and legs had been cut off and the body appeared as if it had been washed. There were no blood stains and the trouser had been cut into two. Both arms had been cut from the shoulders and the legs severed from mid thigh. There was a cut wound on the left parietal measuring 4cm long and 1 cm deep and a cut wound on the epigastium. The cause of death was hemorrhagic shock due to the excessive bleeding.

The piece of cloth and mattress recovered from the bedroom of the deceased were sent to the Government Analytical Laboratory together with a sample of blood from the deceased. The tests were carried out by Mr. Ali Lugudo (PW.6) an acting Commissioner, Government Analytical Laboratory, who found that all the exhibits were of human blood of the same group as that of the deceased.

The prosecution also adduced evidence that when the deceased retired from work in the Tea Estate he found that the appellant had sold some land without his knowledge and taken his Shs300,000/= which caused a strain in their relationship leading to a fight about two weeks before the deceased was killed.

The appellant had been arrested together with PW.7 and **MBAREEBA FRANCIS** (A.2), **BAYONA SILAS** (A.3) and **MUHOOZI ALIFUNSI** (A.4) with whom she was tried. In her defence which she gave on oath the appellant

denied that there was any misunderstanding between her and the deceased. He used to drink daily and sometimes quarrel. The deceased had gone missing on 6.6.2006 and she had reported to the home of the chairperson of the area on 7.06.2006 and when the body was found she recognized it by the clothes he had worn. The body had been cut into pieces. She stated that the mattress recovered from their house was not wet with blood but had blood stains from the head injury the deceased had sustained two weeks before he died.

The trial Court found the appellant guilty of murder C/ss 188 and 189 of the Penal Code Act and duly sentence her to suffer death in a manner prescribed by law.

Grounds of Appeal

1: The learned Trial judge erred both in law and fact when he failed to properly evaluate, ascertain and assess the evidence on record to the prejudice of the appellant.

2: The learned Trial judge erred in law and fact when he unleashed the death sentence upon the Appellant to the detriment of the Appellant. (underlining provided)

Representation

At the hearing of the appeal, the appellant was represented by Mr. Kasirivu Yunus while the respondent was represented by Mr. Semalemba Simon Peter, Principal State Attorney.

Case for the appellant

At the commencement of the hearing, counsel for the appellant, with court's guidance, amended ground 2 to state that:

> **"The learned trial Judge erred in law and in fact when he imposed the death sentence on the appellant, to the detriment of the appellant"**

This was after Court had taken issue with the use of the word 'unleash' in reference to the sentence. The word unleash was found to have been

inappropriate. Counsel should be careful in their choice of words for use in pleading to avoid unnecessary exaggeration.

Ground 1

Counsel submitted that the conviction of the appellant was based on circumstantial evidence which hinges on the testimony of PW7, whom he described as a fabulous liar on account of the fact that she had retracted her Police statement, abandoned the story of what she saw and went into speculation. He explained that in her police statement, she had implicated herself and her co-accused and yet denied all that in court.

He referred court to the case of ***Dr. Kiiza Besigye Vs. Uganda High Court Criminal Session Case No. 149 of 2005*** for the proposition that, where a witness is shown to have made a previous statement inconsistent with his evidence at the trial, the court should not merely direct itself that the evidence given at the trial should be regarded as unreliable, but should also direct itself that the previous statement whether sworn or unsworn, does not constitute evidence upon which it can act.

This proposition was cited from the case of ***R Vs. Golden (1960) 1 WLR*** **1169,** and it was counsel's view that when witnesses give evidence different from their previous statement, court should look at their evidence in court suspiciously. He observed that while circumstantial evidence may be the best evidence according to the authority of ***Musoke Vs. Republic 1958 EA pg. 715*** it is required that before relying on it Court should have scrutinized it very carefully to rule out the possibility that the deceased was killed by other persons in absence of the corroboration linking the appellant with the killing.

It was his argument that where evidence needs corroboration, that evidence cannot corroborate another piece of evidence which needs corroboration. He argued that the evidence of witnesses Tinfayo Prudence (PW4), Sgt Tumwebaze

Richard (PW5), Lugudo Ali (PW6), needed corroboration. He asked court to look at the failure of PW6 to determine the age of the blood on the mattress when he stated frankly that they did not have machines to determine the age of the blood which they examined in their laboratory. It was his contention that with the appellant's evidence that there had been a fight between her and the deceased two weeks earlier, it would be difficult to determine whether the blood found in the bedroom was or was not recent.

According to him, the circumstantial evidence led by PW7 was too weak to sustain a conviction as it lacked corroboration. The mattress was lifted by PW7 from the bedroom to take it to the scene of crime and there was need for more scientific evidence to show that when she brought this mattress and placed it where the body was there was no blood flowing from it.

In attempting to explain the appellant's unusual behavior of locking their bedroom after the deceased's disappearance, counsel argued that people behave differently in given situations and as such, the appellant's behavior was not strange in her way of reacting to what had happened.

He noted that to rely on PW7's evidence, there was need for corroboration that actually the appellant was guarding the door since she (PW7) is the only witness.

Ground 2

Counsel submitted that the death sentence is very harsh. He argued that there was no proper mitigation at the trial and asked Court to allow him use this opportunity to mitigate the sentence. He contended that the death sentence was harsh, in an era when death sentences are rarely passed. He prayed for an alternative of life sentence. He cited a number of instances where this court has given life imprisonment, including the cases of ***Kato Kajubi Godfrey Vs Uganda: Court of appeal Criminal Appeal No. 173 of 2012*** and ***Hon.***

Akbar Hussein Godi Vs Uganda: Court of Appeal Criminal Appeal No. 62 of 2011 cases, all of which were considered grisly murders.

He further argued that although this court does not interfere with the discretion in sentencing by the lower court but when a matter touches on a death sentence, it is obligated to look at the discretion and see whether it was properly exercised.

He therefore prayed that court would accept the appeal and either set free the convict or if it finds that the appellant was properly convicted, then reduce the sentence to something lighter than a death sentence.

Case for the respondent

Counsel for the respondent supported the conviction and sentence. He submitted that the learned trial Judge found circumstantial evidence implicating the appellant. The deceased and appellant lived together and that when the home of the appellant was searched, fresh blood was found.

He stated that the learned trial Judge found that it was the appellant who murdered the deceased and the deceased's body was found dumped away from his home. It was counsel's submission that circumstantial evidence clearly showed that the appellant killed the deceased and dumped his body in a bush.

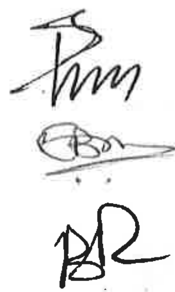
Counsel submitted that considering the manner in which the appellant committed the murder, it was his prayer that the appeal be dismissed, the conviction and sentence be upheld.

Court's Consideration of the Appeal

As a first appellate Court this Court is required to re evaluate the evidence of the entire case and come to its own conclusions and findings. The two grounds of appeal raised and argued by both Counsel enable court to achieve this task.

On the first ground of appeal the main thrust of Mr. Kasirivu's argument was that there was no corroboration of the circumstantial evidence that was relied on to convict the appellant. On the other hand while counsel for the Respondent was in agreement with Counsel for the Appellant that the evidence against the appellant was largely circumstantial it was sufficient to secure a conviction without corroboration. Our appreciation of the principle of the Law as regards corroboration in general and circumstantial evidence in particular is that circumstantial evidence can stand on its own so long as the Court subjects it to close scrutiny to determine that the inculpatory facts against the appellant are incompatible with her innocence. This is the principle stated in the case of ***Kazibwe Kassim Vs Uganda SCCA No. 1 of 2003*** following many other decisions. The Supreme Court stated as follows:-

> ***"In our view, although the prosecution case wholly depended on circumstantial evidence, we think that in order for the Court of Appeal to act on such evidence, the inculpatory facts against the appellant must be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt."***



In a recent decision of this Court in the case of ***Kitosi Abu and Another Vs Uganda Criminal Appeal No. 154 of 2010*** this Court had this to say:-

> "In respect of circumstantial evidence this Court knows of no principle that invariably before basing a conviction on circumstantial evidence there must be corroboration. In fact this Court of Appeal has in the recent case of ***Hon. Akbar Hussein Godi Vs Uganda (Criminal Appeal No. 62 of 2011*** (unreported) made a reinstatement of the principle that when properly handled, circumstantial evidence may be the best evidence to prove a proposition. This Court stated as follows in Godi's case:-

"Thus the Appellant was convicted on circumstantial evidence. We appreciate this evidence to be in the nature of a series of circumstances leading to the inference or conclusion of guilt when direct evidence is not available. It is evidence which although not directly establishing the existence of the facts required to be proved, is admissible as making the facts in issue probable by reason of its connection with or in relation to them. It is evidence, at times regarded to be of a higher probative value than direct evidence, which may be perjured or mistaken. A Kenyan Court has noted that:-

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of providing a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. See *High Court of Kenya at Nairobi Criminal Case No. 55 of 2006: Republic Vs Thomas Gilbert Chocmo Ndeley.*

Though a decision of the High Court of Kenya, we find the enunciation of the principle as regards the application of circumstantial evidence in the words of the above quotation very appropriate and as representing the position of the Law on circumstantial evidence even in Uganda."

The daughter of the appellant explained to court the unusual behavior exhibited by the appellant following the disappearance of the deceased from home. It was stated that she slept very late, kept the bedroom door locked and would not allow any one in. When the police went to carry out a search, they found the bedroom door closed and according to PW7 it had been inaccessible from the time the deceased disappeared. She had been ordered by the

appellant not to enter it. She was forced to open it and on its being opened blood was found on the bed frame and mattress. The blood on the mattress was still dripping rendering the explanation that, that was as a result of a fight two weeks before, unsustainable.

From the above evidence, the inference that something sinister took place in the bedroom, is irresistible. It is the only explanation as to why the appellant kept the door constantly locked and upon discovering the body there was also evidence that appellant moved very fast to conceal any kind of evidence by painting the walls and forbidding the daughter from opening the bedroom for anyone. This also explains the appellant's conduct of avoiding sleeping in the room and keeping in the kitchen at night following the disappearance of her husband.

The trial Judge disbelieved the appellant's explanation that the blood was as a result of an injury the deceased suffered when the two of them had a fight some weeks before.

The trial judge found PW7 a reliable witness and so does this Court. She is not the fabulous liar that appellant's Counsel described her to be. The reason appellant's Counsel described her as a fabulous liar was that her testimony in Court differed from her previous statements made to the Police. The case of **R. Vs Golden** (Supra) which was cited by Counsel for the appellant has resolved the issue as to the value to be attached to evidence of a witness whose evidence on oath is at variance with what he or she previously stated to the Police. The position is that while Court cannot ignore the previous statements which must be taken into account when assessing a witness' credibility, the previous statements do not constitute the evidence upon which the Court can act. It is the testimony adduced on oath that constitutes evidence of that witness. In the instant case all PW7 did was to describe the circumstances of her father's disappearance, the strange behavior of the appellant and the recovery of the

blood socked mattress when the bedroom was opened. The appellant's Counsel did not indicate where the witness lied when she described the above events, all of which were also supported by the evidence of other prosecution witnesses. She also explained that she had been forced to state what she stated in her Police statement and that should not be a basis for rejecting her testimony.

The other aspect of the case that we have considered is that evidence of a motive was adduced. Although the appellant denied that there was a problem between her and her deceased husband, Tumwine Deogratius (PW2) testified that the deceased had been complaining that the appellant was selling his property, and two weeks before the killing of the deceased, they had fought. The deceased had sustained injuries for which he was treated in Hospital. PW2 testified that the appellant was stronger than the deceased. In the case of ***Godfrey Tinkamalire & Anor Vs Uganda [1988-1990] HCB 5* the Supreme Court** held that while motive was irrelevant in a criminal prosecution, (see Section 8(3) of the Penal Code Act), it is always useful since a person in his normal faculties would not commit a crime without a reason or a motive. The existence of a motive made it more likely that an accused person did in fact commit the offence charged.

It is the view of this court that the presence of a motive coupled with the circumstantial evidence found by this court leaves no doubt that the appellant was responsible for the death of her husband and this court finds no merit in her appeal against conviction and ground I fails.

Ground 2

On the death sentence, and whether this court should lessen the death sentence that was given to the appellant, it is trite that the appellate court is guided by principles governing sentencing. This has been spelt out in a number

of authorities including ***Kiwalabye Bernard versus Uganda; Supreme Court Criminal Appeal No. 143 of 2001*** (unreported) as follows:

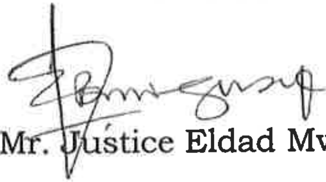
> ***"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."***

In other words, interfering with sentence is not a matter of emotions but rather one of law. Unless it can be proved that the trial Judge flouted any of the principles in sentencing, then it does not matter whether the members of this court would have given a different sentence if they had been the ones trying the appellant. See ***Ogalo s/o Owoura Vs R [1954] 24 EACA 270***. In the instant case, the trial Judge had the opportunity to hear the case and watch the appellant and all the witnesses testify. In his wisdom, he found that the most appropriate sentence was death. Without proof that this discretion was biased or unlawful, this court would have no lawful means of interfering with the same. Therefore, ground 2 fails. The death sentence is upheld.

This appeal therefore hereby fails in totality for lack of merit.

Dated at Kampala this .... day of 2014

Hon. Mr. Justice Remmy Kasule
JUSTICE OF APPEAL



Hon. Mr. Justice Eldad Mwangusya

JUSTICE OF APPEAL

Hon. Mr. Justice Richard Buteera
JUSTICE OF APPEAL