

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA ATA KAMPALA

CRIMINAL APPEAL NO. 65 OF 2008

TURYAMWIJUKA STEPHEN:..... APPELLANT

VE R S U S

UGANDA:..... :RESPONDENT

**(An Appeal arising from the judgment of His
Lordship V.F. Musoke- Kibuuka delivered at the High Court of Uganda in
Masaka in Criminal Session Case No. 157 of 2005 on the 4th day of June 2008)**

**CORAM: HON.MR. JUSTICE REMMY KASULE, JA ,HON. LADY JUSTICE
FAITH E. K. MWONDHA, JA,HON. MR. JUSTICE RICHARD BUTEERA, JA
JUDGMENT**

Background

On the 26th May 2005 at 8.00 pm, the appellant came back home from Lwentulege Trading Center. He asked his wife, Kekigombe Dinnah (deceased), to give him his machete, as he wanted to go to Mpame Trading Centre. The deceased gave the appellant a torch and walking stick and he went away.

At around 9.00pm, the appellant returned and found the deceased and their children having supper. He joined them and had supper .The appellant and the deceased went to their bedroom thereafter, while the children also went to theirs.

At around 1.00 am, the children heard the deceased shouting for help saying the appellant was killing her. The children opened the door, went outside while raising an alarm.

Bashabe Maria (deceased) who was their stepmother (a second wife of the appellant) responded to the alarm. When she reached the doorway, the appellant came out with a stick and hit her. The deceased run away towards their

banana plantation limping. The appellant re-entered the house, came out with a machete and followed Bashabe Maria (deceased).

The children got scared and run away and hid themselves in Bashabe's house until morning.

The following morning, Kekigombe's children found that the behind door of their house was opened. They feared to enter and stood by the doorway calling their mother (deceased) but there was no response. Later they went to the LC1 Chairman's home and narrated to him what had happened.

The neighbours came. They found the body of Kekigombe Dinnah, the first deceased, and also first wife to the appellant in her bedroom. The body had many cuts. The neighbours became suspicious that Bashabe Maria, the second wife also could have been murdered since she was nowhere to be seen. They started looking around for her. They found her body in a pool of blood in the banana plantation, with several cut wounds.

The matter was reported to Lwentulege Police Post. Police visited the scene and recovered the dead bodies as well as some exhibits.

Postmortem examinations of the deceased persons were carried out and revealed that each of the deceased sustained several cut wounds on their bodies, and that the cause of death was severe hemorrhage from the said cut wounds.

After the appellant had killed the two deceased persons, he run to Lyantonde Police where he handed himself to the police with the machete. He had cleaned the machete with a green piece of cloth, which he was covering himself with, and he was stained with blood. There were bloodstains on his hairy chest and trousers.

He was detained and later transferred to Kalisizo Police Station, where he was medically examined and found to be of sound mind. He recorded a charge and caution statement where he admitted having killed his two wives. He was accordingly charged with murder c/s 188 and 189 of the Penal Code Act, tried, convicted and sentenced to suffer death.

The appellant being dissatisfied with the decision of the High Court, appealed to this Court against both Conviction and sentence on the following grounds according to the Memorandum of Appeal:

1. That the learned trial judge erred in law and fact to convict the Appellant for the offence of murder on two counts in absence of evidence proving the essential ingredients of the offences and that he is responsible for the death of the deceased persons.

- 2. That the learned judge erred in law and fact when he acted and relied on evidence of a single identifying witness without sufficient corroboration to convict the appellant.**
- 3. That the learned judge erred in law and fact by relying on evidence of a single witness that was improbable and insufficient to convict and sentence the appellant.**
- 4. That the learned judge erred in law and fact by relying on evidence of a minor PW3 without corroboration of such evidence sufficient enough to convict the appellant.**
- 5. That the learned judge erred in law and fact by relying on evidence of a single identifying witness without sufficient corroboration to convict the appellant.**
- 6. That the learned judge erred in law and fact by relying on evidence of admission by the accused person without sufficient corroboration to convict the appellant.**
- 7. That the learned trial judge erred in law and fact by relying on prosecution hearsay evidence without sufficient corroboration to convict the appellant.**
- 8. That the learned trial judge erred in law and fact by relying on the plain statement evidence of the prosecution without sufficient corroboration to convict the appellant.**
- 9. That the learned trial judge erred in law and fact by relying on the circumstantial evidence that was improbable and insufficient to convict and sentence the appellant.**
- 10. That the learned trial judge erred in law and fact when he failed to evaluate the evidence as a whole and as a result came to a wrong decision.**
- 11. That the learned trial judge erred in law and fact for upholding that the appellant participated in the murder of the deceased persons.**
- 12. That the learned trial judge erred in law and fact when he relied on the prosecution evidence in disregard of the defense evidence and as a result came to a wrong conclusion.**

13. That the learned trial judge erred in law and fact when he failed to judiciously evaluate evidence of both the prosecution and the defense hence reached a wrong conclusion.

14. That the learned trial judge having wrongly convicted with the appellant of the offence of murder on two counts, erred in law and fact when he sentenced him to death, a sentence which was improper, unduly harsh and excessive in the circumstances.

The Appellant prayed to this Honourable Court for orders that:

- (a) The appeal be allowed
- (b) The judgment of the trial court be set aside
- (c) The conviction and sentence of trial court be quashed.
- (d) The Appellant be acquitted.

Legal representation

At the hearing of this appeal, learned counsel Ms. Tusimire Anitah, appeared for the appellant on state brief and Ms Amumpaire Jennifer, a Senior State Attorney, appeared for respondent.

Submissions of Counsel for the appellant.

Counsel for the appellant argued together grounds 1, 10, 11, 12, and 13. Counsel submitted that the learned trial judge erred in law and fact when he convicted the appellant of the offence of murder on two counts in the absence of adequate evidence to prove the essential ingredient of malice aforethought.

According to counsel, lack of proof of this essential ingredient together with other discrepancies by the lower court are fundamental and therefore the appeal should succeed.

Counsel for the appellant further submitted that this offence took place at night. The sole identifying witness was PW3 who is a child aged 15 years. According to counsel the witness woke up from his sleep, was panicking and run into hiding when he noticed that his father was cutting his mother and then he cut the step-mother with a panga.

Counsel contended that the court ought have considered the facts that it was at night, the witness was a minor and was panicking and therefore it was very difficult for him to properly identify what was taking place.

Counsel further contended that the evidence of PW3 who was a minor was not adequately subjected to test as to whether PW3 knew the difference between telling the truth and telling lies.

It was the contention of counsel that the evidence of PW3 was too weak to be relied upon as it had contradictions and was unreliable.

According to counsel, PW3 never saw the murder of the second deceased person, he stopped witnessing the events at a point where the deceased was running to the banana plantation, at that point PW3 went into hiding so that is where he stopped witnessing what happened.

Counsel submitted that the death of the two deceased wives is not disputed, but given the fact that there was no problem between the appellant and his two wives there were no reason why **malice aforethought** was found on the part of the appellant yet some of the witnesses starting with PW3 brought out the fact that there was no problem between the accused and the deceased persons.

Submissions of counsel for the respondent

Counsel for the respondent opposed the appeal. She supported both the conviction and sentence. She argued all the grounds together except for grounds 4 and 14 which she submitted upon separately. She submitted that what was being contested is the ingredient of malice aforethought and the participation of the appellant in the alleged offence.

He pointed out that malice aforethought can be established by either direct or circumstantial evidence and it is provided for under **Section 191 of the Penal Code Act**. He cited the case of **Nanvonio Harriet and Anor vs Uganda. Criminal Appeal No. 24 of 2002 (SC)**. He also referred the Court to the case of **R vs Tubere s/o Ochen (1945) EACA 63**.

According to counsel the court could infer malice from the weapon used, the manner in which it was used and the part of the body injured.

In the instant case, counsel argued a panga was used by the appellant. PW3, a son of the appellant, stated in his testimony that he saw his father, the appellant, cut the step-mother when she responded to an alarm that had been made by the mother of the witness. He said the father was armed with a stick and a panga.

According to PW5, Katusiime Docus, there was a grudge between her mother Kekigombe Dinnah, now deceased and father, the appellant, the mother having communicated to her that she, the mother, felt threatened by the appellant who had warned her that he would kill her.

“It is a well- settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.”

We shall therefore re-evaluate the evidence on record and consider the judgment of the learned trial judge, submissions of both counsel and the authorities they have availed to court in resolving all the grounds raised in the appeal.

In the instant case, it is not contested that the appellant is the one who killed the two deceased persons who were his wives. What is contested is whether or not he killed them with malice aforethought. It was the contention of counsel for the appellant that the ingredient of malice aforethought was not proved and the trial judge therefore should not have convicted the appellant for murder but should have convicted him for manslaughter.

Malice aforethought is defined by S. 191 of the Penal Code Act which states as follows

“191. Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances:

- (a) an intention to cause the death of any person, whether such person is the person actually killed or not; or**
- (b) knowledge that the act or omission causing death will probably cause death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.”**

The Supreme Court has had occasion to state the law on evidence for proof of malice aforethought in the case of Nanyonjo Harriet and Another versus Uganda Criminal Appeal No.24 of 2002 when the Court held:-

“In case of homicide, the intention and/or knowledge of the accused person at the time of committing the offence is rarely proved by direct evidence. More often than not the court

finds it necessary to deduce the intention or knowledge from the circumstances surrounding the killing, including the mode of killing, the weapon used, and the part of the body assailed and injured.”

In the instant case, the weapon used was a panga. The trial judge stated that it was a highly lethal weapon indeed. We agree. The injuries inflicted on both deceased were deep cut wounds on very vulnerable parts of each of the deceased’s bodies.

The trial judge analysed the evidence on record and concluded that there was malice aforethought in view of the principles stated by the Supreme Court in the case of Nanyonjo Harriet (supra). We find that the learned trial judge was correct to have found that the appellant cut the two deceased persons to death with malice aforethought.

The identification and participation of the appellant in committing the offence was correctly in our view, not contested. The appellant walked to Lyantonde Police Station after the murder when his body was blood stained. He narrated how he had killed his two wives in a charge and caution statement. The charge and caution statement was subjected to a trial within a trial and after due process it was admitted into evidence as the same had been voluntarily made by the appellant. The same was considered together with the other available evidence by the trial judge.

Learned Counsel for the appellant contended that the evidence of PW3 who was the main witness was evidence of a minor who was also a single identifying witness. The witness identified the appellant by voice. Counsel argued that those were not favourable conditions and therefore there was need for corroboration of the evidence of PW3. He contended that there was no corroboration and therefore the trial judge ought not to have convicted the appellant basing on the uncorroborated evidence of PW3.

The position of identification of a person by his or her voice is stated in Sarkar On Evidence Fourteenth Edition 1993, at page 170 as follows:

“If the court is satisfied about the identification of persons by evidence of identification of voice alone no rule of law prevents its acceptance as the sole basis for conviction possibilities of mistakes in identifying persons by voice especially by those who are closely familiar with voice could arise only when the voices heard are different from the normal voices on account of the situation or when identical voices are possible from other persons also...”

The same authority highlights some factors which will assist court to determine whether the conditions under which the identification is claimed to have been made were or were not difficult. This, according to the case Moses Bogere vs Uganda (SC) Criminal Appeal No. 1/1997 is the starting point and the other factors are the

length of time the accused was under observation, the distance, the light and the familiarity of the witness with the accused.

In the instant case the identification was not by voice alone. The judge also considered other factors for identification. We shall therefore consider the issue of identification generally in the case.

The case of **Abdulah Nabulele & Two Others vs Uganda: Court of Appeal of Uganda Criminal Appeal No 9 of 1978** is authority one of the leading cases on identification by a single witness and the following rules are stated therein:

- a) The testimony of a single witness regarding identification must be tested with the greatest care.
- b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.
- c) Where the conditions were difficult, what is needed before convicting is other evidence pointing to the guilt.
- d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone.

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convict on the identification of a single witness so long as the judge

advertises to the danger of basing a conviction on such evidence alone.

In the case before us, it is true that the offence took place at night and the sole identifying person was PW3, whom counsel for the appellant described as a child of tender years. We note that PW3 was found by the trial Court to be 15 years. As to who is a child of tender years, the Courts have held that there are no hard and fast rules. The Supreme Court has held in **Criminal Appeal No.23 of 1992 Patrick Akol v Uganda (unreported)** as follows.

“But as a general rule, whenever a child appears to be around the age of 14 years or below, the Court should alert itself to the possibility that the child might not be of sufficient intelligence or be able to understand the nature of the oath, and should accordingly carry out a voir dire examination.”

In the instant case the witness was 15 years old. He was not a child of tender years. The witness was a son of the appellant. He knew both the father and the mother very well. He could recognize the voice of the mother who had made an alarm. The same issue of voice identification arose in the case of **Moses Bogere vs Uganda (supra)** and the Supreme Court made an observation in relation to alleged frightened victims who give evidence, as follows

“We would not wish to give the impression that frightened victims of attack identify their attackers, nor that if one, in the panic of the moment, failed to identify his attackers initially, he cannot recognize

him in the safety of hiding. What we wish to highlight, however, is that such are factors that must be taken into consideration in evaluating the evidence in order to determine if conditions were easy or difficult for identification.”

In the instant case, we have re-evaluated the factors and circumstances of the case. PW3 was familiar with the person involved in the attack. We are convinced there was no mistaken identity. We find that the evidence of PW3 was corroborated.

We also find that there was cogent evidence the learned trial judge properly analysed and came to the conclusion that the appellant committed the offences of murder when he killed his two wives and that he did so with malice aforethought.

The grounds of appeal 1 to 13 therefore fail.

It was contended for the appellant that the sentence of death imposed on the appellant was too harsh and too excessive and should be reduced by this Court. It is true that this Court has the power to reduce a sentence imposed by the lower court when that is found to be the appropriate thing to do. This Court, however, does not interfere with the sentence imposed by the lower court on established principles.

The principles upon which an appellate court may interfere with a sentence of the trial Judge were stated by the Supreme Court in the case of **Kiwalabye Bernard vs Uganda 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 exercise 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 sentence or where the sentence imposed is wrong in principle”.

Applying the above stated principles to the instant case, we have perused the record and studied the sentencing process the trial court went through. The prosecution and the defence spent time each pleading its case before the appellant was sentenced. The learned trial judge elaborately considered their submissions. He gave his reasons for the sentence of death on a murder charge which carries a maximum sentence of death as provided by law. Considering the circumstances of the case, as the learned trial judge did, we do not find the sentence imposed to have been manifestly excessive or so low as to amount to a miscarriage of justice. We do not find either, that the trial judge did not consider any facts or that the sentence was based on a wrong principle. It was the maximum sentence provided by law but it was justified in the circumstances of this case. The trial judge imposed the sentence in exercise of his well considered discretion in accordance with the law.

We do not find merit in the appeal and we accordingly dismiss it. We confirm both the conviction and sentence imposed by the High Court.

Dated this day



of 

2015.

HON.Mr.REMMY KASULE

JUSTICE OF APPEAL.

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Hon. Lady Justice Faith E. K. Mwendha

JUSTICE OF APPEAL.

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Hon. Mr. Justice Richard Buteera

JUSTICE OF APPEAL.