

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
CRIMINAL APPEAL NO. 189 OF 2013**

**NSABIMANA RICHARD.....APPELLANT
VERSUS
UGANDA.....RESPONDENT**

**CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE BYABAKAMA MUGENYI SIMON, JA
HON. MR. JUSTICE ALFONSE C. OWINY- DOLLO, JA**

(Appeal from the decision of the High Court OF Uganda Holden at Kabale before his Lordship Hon. Justice Lawrence Gidudu dated 11th August 2008)

JUDGEMENT OF THE COURT

This is an appeal from the judgment of Hon. Mr Justice Lawrence Gidudu in High Court Criminal Case No. 0112 of 2007 at Kabale, dated 11th/08/2008, in which the appellant was convicted of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to suffer death.

Brief Background.

The appellant, on the night of 14th February 2005, went to the house of his mother (**PW2**) and demanded for his deceased son who lived with his grandmother (PW2). The following day, PW2 inquired about the whereabouts of the deceased and the appellant responded he had taken him for treatment. The appellant disappeared for a few days. On the 17th of February 2005, he was found sleeping in the kitchen and was again asked about the deceased. At first he declined to answer but later he revealed the child was in the pit latrine. He led people to the pit latrine, removed the slab and pointed down the pit. He was arrested and escorted to the

police. The police visited the scene and directed the appellant to remove the body of the child from the pit latrine. The appellant was subsequently charged with murder, tried, convicted and sentenced to death. Being dissatisfied with the decision of the trial judge, he appealed to this Court against both conviction and sentence on the following grounds;

- 1. The learned trial Judge erred in law and in fact when he on the 7th/7/2016 allowed the hearing to proceed without the interpreter who had taken the interpreters oath to interpret Rufumbira which was the language the appellant could understand which occasioned serious miscarriage of justice.**
- 2. The learned trial Judge erred in law and in fact when he convicted the appellant when there was evidence on record that the appellant was of unsound mind at the time when the offence was committed and therefore lacked the requisite mensrea to commit the offence.**
- 3. The learned trial Judge erred in law and in fact when he did not conduct a trial within a trial before the charge and caution statement, exhibits Pexh iii (a) and (b) were admitted in evidence which occasioned serious miscarriage of justice.**
- 4. The learned trial Judge erred in law and in fact when he relied on prosecution exhibit Pexh iii (a) and its English translation Pexh iii (b) when on the face of it Exhibit Pexh iii (a) had not been read over and explained to the appellant before he was made to put his signature/ mark on it.**
- 5. The learned trial Judge erred when he allowed proceedings to continue as against the appellant on a charge of a capital nature when from the record it was manifest that the appellant was in effect not legally represented as counsel refused to cross examine the first prosecution witness whose evidence was very vital in the appeal and when he did not guide the Court to conduct a trial within a trial before the charge and caution was admitted when it was already evident that the appellant had been assaulted and that the statement had not been voluntarily made.**
- 6. The learned trial Judge trial erred in law and in fact when he convicted the appellant for the offence of murder when all the essential ingredients had not been proved to the required standard.**
- 7. The learned trial Judge erred in law and in fact when he imposed a harsh and manifestly excessive sentence.**

Legal Representation.

At the hearing of this appeal, learned Counsel Boniface Ngaruye Ruhundi appeared for the appellant on state brief, while Mr Brian Kalinaki, Principal State Attorney, appeared for the respondent.

Appellant's Case.

Learned Counsel abandoned ground 1 and 4. With leave of Court he rephrased ground 5 and split it into two, to read as follows;

- 5. The learned trial Judge erred in law when he allowed the trial of the appellant charged with capital offence to continue when the appellant was not effectively represented.**
- 6. The learned trial Judge erred in law and in fact in admitting the charge and caution statement without taking into account it had not been voluntarily obtained.**

The grounds were adjusted sequentially with ground 2 becoming Ground 1.

On ground 1, Counsel for the appellant submitted that the learned trial Judge erred in law and in fact when he convicted the appellant yet there was evidence that the appellant was of unsound mind at the time the offence was committed and therefore lacked the requisite mensrea to commit the offence.

Counsel referred to the evidence of PW2 Nyirandekelazi Nameese who stated that by the time of arrest the appellant was of unsound mind. The same also stated the appellant appeared drunk when he demanded for the deceased. He also referred to the evidence of PW5 who testified that the appellant had taken crude waragi with a friend. Counsel contended that this evidence showed that the appellant was not in his right state of mind and could not therefore have formed the intent to commit the offence.

As for the medical evidence that showed the appellant was of a normal mental status, Counsel contended that the examination was irrelevant since it was made days after the commission of the offence. He concluded by urging Court to find that there was ample evidence to show that the appellant was incapable of forming the requisite intent.

Counsel argued grounds 2 and 3 together. He submitted that the law is very clear in that, where there is no objection from Counsel, the accused person should be consulted before the confession statement is admitted in evidence. At the trial the appellant in this matter was

not consulted. Instead the statement was admitted following a no objection by the appellant's Counsel. Learned Counsel in the instant matter contended that the trial Judge erred when he admitted the confession statement without ascertaining from the appellant whether he had made the statement voluntarily.

On ground 4, Counsel submitted that legal representation is a constitutional right enshrined in **Article 28(3) (e) of the Constitution**, which provides that a person charged with an offence that carries a death penalty or life imprisonment, shall be entitled to legal representation at the expense of the state. In the instant, case Counsel argued that the appellant was not effectively represented. This was premised, in Counsel's view, on the fact that Counsel at the trial did not object to the admissibility of the confession statement and did even not cross-examine the doctor (PW1) who had performed post mortem on the deceased's body and also examined the appellant on PF24.

Counsel argued in the alternative that the death sentence was harsh and manifestly excessive considering the circumstances of the case. Counsel submitted that in the event this Court upholds the conviction, the sentence be reduced to 8 years imprisonment. He suggested that the appellant needs treatment from a mental hospital other than being in prison. He prayed that this Court allows the appeal, quashes the decision of the lower Court and sets aside the sentence.

Respondent's Reply.

Counsel for the respondent opposed the appeal and supported both conviction and sentence.

Arguing ground 1, Counsel contended that the trial Judge properly directed himself on the law relating to the available defences for the appellant. He submitted that the medical report PF24 indicated that the appellant was of normal mental status at the time he was examined. The trial Judge also considered the defence of intoxication and rejected the same. Further that, the trial judge properly directed himself on the law as to the defence of insanity which the appellant never raised throughout the trial. He concluded this ground by stating that the trial Judge properly directed himself on the law and evidence when he discounted the defence of intoxication and insanity.

As for the confession statement that was admitted without holding a trial-within-a trial, learned Counsel contended that the trial Judge did not solely rely on the confession to convict the appellant. There

was other ample evidence that formed the basis for conviction of the appellant. This included the fact that the deceased was alive when the appellant took him from PW2's

house and he led to the discovery of the body in the pit latrine.

On legal representation, Counsel submitted that this ground was devoid of any merit since the appellant was represented by Counsel at the expense of the state.

On sentence, Counsel conceded that the death penalty was harsh and manifestly excessive. He pointed to the need for consistency in sentencing in line with other decisions of this Court and proposed the sentence be reduced to 35 years imprisonment.

Resolution of the Court

The duty of this Court as a first appellate Court is to re-evaluate all the evidence on record and come to its own conclusions. See: rule 30(1) of the Rules of this Court, KIFAMUNTE HENRY VS UGANDA, Supreme Court Criminal Appeal No. 10 of 1997, BOGERE MOSES VS UGANDA, Supreme Court Criminal Appeal No. 1 of 1997 and ORYEM RICHARD Vs UGANDA, Supreme Court Criminal Appeal No. 22 of 2014.

In KIFAMUNTE HENRY VS UGANDA (*supra*) it was held

‘The first appellate Court has a duty to rehear the case and reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on the manner and demeanour, the appellate Court must be guided by the impressions made on the Judge who saw the witness, but there may be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a Court in differing from the Judge even on a question of fact turning on credibility of a witness which the appellate Court has not seen.’

We have carefully studied the court record and considered the submissions of both Counsel. We are also alive to the standard of proof in criminal cases and the principle that an accused person should be convicted on the strength of the prosecution case and not on the weakness of the defence. See: **AKOL PATRICK & OTHERS VS UGANDA, Court of Appeal Criminal Appeal No. 60 of 2012.**

The first ground of this appeal faults the learned trial Judge for convicting the appellant who was said to be of unsound mind at the time when he committed the offence. The record reveals the aspect of the appellant being of unsound mind was raised by PW2 when she stated in examination-in-chief that;

“I used to stay with him before he was arrested. By the time of arrest he was of unsound mind.”

Shortly thereafter, the same witness stated

“When the accused came to pick the kid from me, he was in normal mood.”

Other witnesses also gave evidence that threw some light on the mental state of the appellant. PW3 stated;

“I have known accused since birth. He is a village mate. Accused was a humble young man. Accused was a Radio mechanic who was honest. His ears were functional.”

The testimony of PW4 was as follows;

“I have known accused from birth. He was not very well behaved. He used to disrespect his mother (PW2), He was normal mentally. The accused had mild hearing problem”

Upon our evaluation of the evidence, we find that the claim that the appellant was of unsound mind is not supported by evidence. PW2 who alluded to it gave different versions regarding his actual state of mind that night. Other witnesses who knew him well (PW3 and PW4) testified that he was mentally normal. The medical report by PW1 also revealed the appellant's mental status was normal.

We note that the trial Judge addressed himself to the import of section 194(2) of the Penal Code Act with regard to diminished responsibility. He stated in the judgment that;

“.....there is no evidence adduced even by the accused himself that he was stressed to the level that he acted abnormally. In fact, the accused does not admit to killing the deceased. Diminished responsibility is a defence pursued if the accused admits killing the deceased. In the instant case, apart from failing to discharge the burden of proof as required by section 194 (2), the submission in diminished responsibility is with due respect to counsel quite misplaced.”

Diminished responsibility is provided for in section 194 (1) of the Penal Code Act, which reads as follows;

“194(1) Where a person is found guilty of the murder or of being a party to the murder of another, and the court is satisfied that he or she was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury, as substantially impaired his or her mental responsibility for his or her acts and omissions in doing or being a party to the murder, the court shall make a special finding to the effect that the accused was guilty of murder but with diminished responsibility.

(2) On a charge of murder, it shall be for the defence to prove that the person charged was suffering from such abnormality of mind as is mentioned in subsection (1).”

We note that the appellant did not allude to suffering from any abnormality of mind in his defence at the trial, yet section 194(2) (supra) imposes such burden upon him.

Diminished responsibility is a state of mind bordering on, but falling short of the state of insanity. It is an issue of fact that must be tried along with all other issues of fact arising out of the charge. See:

RUKAREKOHA FELEX Vs UGANDA, Supreme Court Criminal Appeal No. 12 of 1998.

From the evidence on record, not only did the appellant deny killing the deceased but, most significantly, there is nothing in the evidence as a whole to suggest, and less still to prove, that he was suffering from abnormality of mind arising from any cause or that his mental responsibility for his acts was impaired substantially or at all. We find that the learned trial Judge rightly came to the finding that the appellant knew what he was doing and was capable of forming the requisite intent. We accordingly find no merit in ground one and it fails.

The appellant's contention in grounds 2 and 3 is that the trial Judge erred when he admitted the confession statement without conducting a trial- within- a trial.

The question whether such confession can be used to convict an accused person has been considered by the Supreme Court in Several cases. **In OMARIA CHANDIA Vs UGANDA, Criminal Appeal NO. 23 of 2001 (SCU)**, a confession statement allegedly made by the appellant was admitted in evidence without objection from Counsel for the appellant. The Supreme Court had this to say:

“.....an unchallenged admission of such a statement is bound to be prejudicial to the accused and put the plea of not guilty in question. It is not safe or proper to admit a confession statement in evidence on the ground that Counsel for the accused person has not challenged or has conceded to its admissibility. Unless the trial Court ascertains from the accused person that he or she admits having made the confession statement voluntarily, the Court ought to hold a trial-within-a trial to determine its admissibility. See: KAWOYA JOSEPH Vs UGANDA, Criminal Appeal No. 50 of 1999 (SCU) (unreported), EDWARD KAWOYA Vs UGANDA, Criminal Appeal No. 4 of 1999 (SCU) (unreported) and KWOBA Vs UGANDA, Criminal Appeal No. 2 of 2000 (SCU) (unreported). Therefore, and with respect, we think that it was not proper for the learned trial Judge to admit in evidence the confession statement (exh. P3) of the accused on the basis that his Counsel did not object.”

In view of the above decision, we find that it was improper for the learned trial Judge to admit in evidence the confession statement of the appellant on the basis of no objection by his Counsel without first holding a trial-within-a trial.

From the judgment, it is apparent the trial Judge took into account the contents of the confession statement in convicting the appellant. He came to the following finding:

“.....the accused when he disappeared taken together with the admission in the charge and caution statement identifies the accused as the person who committed the crime.”

Having found that the confession statement was improperly admitted, it follows that no reliance could be placed on the same as evidence to convict the appellant.

However, having carefully re-appraised the evidence on record, we find that, even without considering the charge and caution statement, there was overwhelming evidence that proved beyond reasonable doubt that the appellant, despite his denials, was responsible for the death of his son. First of all, he was the one who took away the child from PW2 in the middle of the night. Secondly, in the morning the child was nowhere to be seen and when PW2 inquired about his whereabouts, the appellant responded that he had taken him for treatment. Thirdly, when asked again later on, he gave no response but disappeared instead. Fourthly, upon subsequently being quizzed by village mates, he revealed he had dumped the child in the pit latrine. Indeed the body was recovered from the said place.

The above highlighted evidence was clearly detached from and independent of the charge and caution statement. All these instances, when taken together, irresistibly lead to the inference that the appellant was responsible for throwing the deceased into the pit latrine and did so intentionally. He was fully aware of what he had done and that explained why he lied to his mother (PW2) that he had taken the deceased for treatment.

It is trite, in a case depending exclusively upon circumstantial evidence, the Court must before deciding upon a conviction be satisfied that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. Before drawing the inference of the accused's guilt from circumstantial evidence, Court had to be sure that there are no co-existing circumstances that would weaken the inference. See: **TEPER Vs R [1952] A.C 489; SIMON MUSOKE Vs R [1958] E.A 715.**

In the instant case, we are satisfied that there are no co-existing circumstances that would weaken the inference that the appellant was responsible for the death of the deceased and was clearly in command of his mental faculties.

On the issue of legal representation of the appellant at trial, it is not in dispute that the appellant was assigned Counsel to represent him as stipulated in Article 28 (3) (e) of the Constitution. The mere fact that Counsel did not cross-examine the doctor (PW1) or object to admissibility of confession statement did not necessarily imply that the appellant was not legally represented. We accordingly find no merit in this ground.

On whether the sentence of death was harsh and manifestly excessive; as an appellate Court, the circumstances and principles upon which we can interfere with sentence of the trial Court are limited. These principles are now well settled and were set out by Supreme Court in **KIWALABYE BERNARD Vs UGANDA, Supreme Court Criminal Appeal No. 143 of 2001**, as follows:

“The appellate Court is not to interfere with the sentence imposed by the trial Court where the 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 circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle.”

In other words, interfering with the sentence is not a matter of emotions but rather one of law. It has to be proved that the trial judge flouted any of the principles of sentencing. In the instant case, the trial judge heard the case and watched the appellant and all the witnesses testify. In his wisdom he found that the most appropriate sentence was death, he also put in consideration the mitigating and aggravating factors. In so doing he stated as follows;

“The accused is a first offender, however the manner in which he tormented the life of his own son was very brutal. Even if the deceased was sickly, there was no right upon the convict to quicken his death, as the evidence particularly of PW3 shows, the deceased was returned to the same shallow latrine and buried there in the fences as they demolished the pit. This was the most indigenous point send off an innocent young 3 year old boy. After considering all factors and the discretion in Kigula’s case I still find that this is a proper case which the maximum sentence should be imposed.”

The other factor that ought to have been considered is the need to maintain consistency in sentencing.

In LIVINGSTONE KAKOOZA VS UGANDA, Supreme Court Criminal appeal No. 17 of 1993. It was held that;

“An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.

»

Also in MBUNYA GODFREY Vs UGANDA, Supreme Court Criminal Appeal No. 04 of 2011, the Court observed that:

“We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing.”

In order to maintain consistency we have to look at sentences imposed by this Court and the Supreme Court in cases of a similar nature.

In UWIHAYIMANA MOLLY VS UGANDA, Court of Appeal Criminal Appeal No. 103 of

2009, this Court reduced a death sentence to 30 years imprisonment. The appellant had killed her husband.

In **KISITU MAJAIDIN ALIAS MPATA VS UGANDA, Court of Appeal Criminal Appeal No. 28 of 2007** this Court upheld a sentence of 30 years imprisonment. The appellant had killed his mother.

In **HON. GODI AKBAR VS UGANDA, Court of Appeal Criminal Appeal No 3 of 2013**, the Supreme Court confirmed a 25 year imprisonment. The appellant had killed his wife.

In BYARUHANGA MOSES VS UGANDA, Court of Appeal Criminal Appeal No. 144 of 2010, the appellant drowned his son own

in swamp, this Court reduced a sentence of 22 years to 20 years.

In **MBUNYA GODFREY Vs UGANDA** (supra), the appellant had been sentenced to death for the murder of his wife. The Supreme Court set aside the sentence and substituted it that of 25 years imprisonment.

In this case the appellant is a first offender, there was loss of life and he had spent a period of 3 years and 6 months on remand. However there are aggravating factors. The murder appears to have been premeditated, there was no provocation, the victim was the appellant's own child of tender years, who expected protection from him.

Given the circumstances of this case, and, guided by the above authorities, we find that the sentence of death was harsh and manifestly excessive. We accordingly set it aside and substitute it with a sentence of 30 years imprisonment. The sentence is to run from 11th August 2008, the day he was convicted by the High Court.

We so order.

Dated at Mbarara this..7th day of.. December .2016.

HON. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL

HON. JUSTICE BYABAKAMA MUGENYI SIMON

JUSTICE OF APPEAL

HON. JUSTICE ALFONSE C. OWINY-DOLLO

JUSTICE OF APPEAL