

an alarm which attracted neighbours. The neighbours responded to the alarm. They found the appellant and deceased fighting and managed to stop the fight. The next morning they returned to check on the couple and found the deceased lying weak on the floor with injuries all over her body. The Police took Isut Grace to hospital where she died later in the day. The appellant was arrested and charged with murder. In his defence he denied the accusation and stated that the deceased had been drunk on that night and had hit her head on the wall and door of the house because she was annoyed. The learned trial judge did not believe the defence of the appellant. He convicted him as charged.

Being dissatisfied with the decision of the learned trial Judge, he appealed to this Court against both conviction and sentence and wrote down his grounds as follows:

1. *That the Honourable Learned Trial Judge erred in law and fact when she failed to judiciously evaluate the evidence on record whereby she reached a wrong decision by convicting the appellant of Murder.*
2. *That the Honourable Trial Judge erred in law and fact when she shifted the burden of proof as required by criminal law for prosecution to the Accused.*
3. *That the Learned Trial Judge erred in Law and fact when she imposed a harsh sentence on the appellant thereby occasioning a miscarriage of Justice.*

Amel
[Signature]

Representation

At the hearing of this appeal, Mr. Obedo Deogratiuous appeared for the appellant and Mr. Khaukha James, Senior State Attorney, appeared for the respondent.

Submissions.

Counsel for the appellant in arguing grounds one and two referred court to the evidence of the prosecution witnesses to wit PW1 Okalany James Ateber, PW2 Akeba Robert and PW3 Enyakoit Juliana. One of them testified that noise was issuing from the house of the appellant and that on arrival the appellant and the deceased were fighting. The other stated that someone had been beaten and on reaching the scene the deceased was found in bad shape. He argued that based on that evidence the learned trial Judge believed that the appellant beat up the deceased to death. He submitted that there was no evidence to that effect and that the only evidence presented showed that there was a fight between the appellant and the deceased and not that the appellant killed the deceased. He added that no medical evidence had been presented to prove the actual cause of death. He relied on the High Court authority of **Uganda vs Stephen Onyabo and others, Criminal Appeal No. 4 of 1978, [1979] HCB 39** which is to the effect that in criminal prosecution a conviction should only be based on the actual evidence adduced and not on any attractive or fanciful theories of reasoning since by doing so, there is grave danger of being led astray by the type of mental gymnastics when drawing any inferences or

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reaching conclusion. Counsel added that the circumstantial evidence relied on by the learned trial Judge did not point to the guilt of the accused.

For ground three on sentence, counsel for the appellant submitted that the sentence handed down by the trial Judge was because court did not take into account the period the appellant spent on remand. Counsel stated that before passing the sentence of 30 years the Judge should have taken that period into account as is required by Article 23(8) of the Constitution.

For the respondent it was argued that the trial Judge properly evaluated the evidence on record and correctly applied the principles of circumstantial evidence to find the appellant guilty. Counsel referred court to the evidence of the witnesses PW1 and PW2 who found the deceased badly injured with bruises on her body. At the time the deceased could neither move nor speak. He also pointed to the evidence of PW3 who together with Achebet heard noises of someone knocking and banging against the walls at the house of the deceased. On going there, the two witnesses found the appellant kicking and beating up the deceased. In his view the trial Judge correctly related the pieces of circumstantial evidence that the accused had been seen fighting his wife and the other that the deceased suffered injuries all over her body which caused her death. He also submitted that the fact that the appellant fled the scene of crime points to his guilt.

On sentence, he submitted that the learned trial judge considered the manner in which the offence was committed and found that the offence was committed with impunity. He submitted further that a sentence of 30

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years imprisonment is appropriate. Counsel however conceded to the fact that the period the appellant spent on remand was not taken into account and asked court to use its powers to consider such period.

Analysis

This being the first appeal in this matter it behoves this court under Rule 30 of the Rules of the Court of Appeal to re-evaluate the evidence before it and come up with its own conclusion bearing in mind that it did not see or in anyway perceive the witnesses as they testified in the court of first instance. See **Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of 1997** and **Selle and Another v Associated Motor Boat Company Ltd and others [1968] EA 123**.

The first ground of this appeal faults the learned trial Judge for not judiciously evaluating the evidence on record and for wrongly convicting the appellant. The trial Judge considered the evidence of Okalany James, PW1, and Akepa Robert, PW 2, whose evidence was to the effect that they saw the deceased at her house with injuries all over her body and that she could not talk. The Judge also considered the evidence of Inyakoit Juliana, PW 3, who testified that she heard the deceased and the appellant quarrelling and that the quarrel escalated into a fight and when the deceased made an alarm she responded to it and found the deceased and the appellant fighting. The following day she found the deceased lying on the floor injured. Afterwards the deceased was rushed to hospital where she died. She testified that the appellant was not at the house that day.

Based on that evidence the learned trial Judge concluded that Isut had multiple injuries inflicted on delicate parts of the body and that in her view whoever inflicted those injuries on the deceased had the intention of depriving her of life. The learned Judge rejected the appellant's version of the occurrences to the effect that the injuries of the deceased were self inflicted. Court believed the evidence of PW3 Inyakoit Juliana, who saw the appellant fighting with the deceased and later saw Isut's injuries. The Judge found corroboration of that evidence in the testimonies of PW1 and PW2 who testified to seeing the deceased injured before she was taken to hospital. The trial Judge also considered the disappearance of the appellant after assaulting the accused, an act incompatible with the appellant's innocence. The judge concluded that the facts as presented by the prosecution pointed to the guilt of the appellant and that court was satisfied it was the appellant who fatally assaulted Isut Grace.

We note that the learned trial Judge considered that the evidence against the appellant was largely circumstantial and she cautioned herself on the care to be taken when relying on such evidence. We appreciate that this case is based solely on circumstantial evidence. The learned Judge was correct when she warned herself about the danger of relying solely on circumstantial evidence.

In our re-evaluation of the evidence on record, we note that there was no medical report on record showing the actual cause of death. No post mortem examination was made to ascertain that fact. Lack of this evidence

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created a gap in the prosecution case and leaves court in speculation as to whether the injuries sustained were the cause of death or some other factor.

The evidence of PW3 Inyakoit Juliana shows a picture of what transpired. PW3 clearly states that she responded to an alarm made by the deceased and found the appellant and the deceased fighting that night and that the appellant had already sustained injuries on her nose. The next day PW3 found the deceased on the floor badly injured. The deceased died later that day. This evidence was corroborated by the evidence of PW1 and PW 2. We do not doubt that the appellant had an encounter with the deceased. He was seen fighting with the deceased who died the following day. He was the only assailant of the appellant a day before she met her death. We are content that the learned trial Judge rightly found that the assaults by the appellant on the deceased contributed to her debility. This however cannot be the only basis for a conviction of murder. The appellant's intention when committing the crime was not established. Available evidence is of a fight that occurred between the appellant and the deceased. No weapons were involved. The circumstances of this case do not fully support the existence of malice aforethought. Malice aforethought is the intentional causing of death. There is lingering doubt on the aspect of *mens rea* which doubt should be resolved in favour of the appellant. We consider this a case where the appellant acted unjustifiably but, however, had no intention of killing the deceased.

In the authority of **WAIHI and Another vs. Uganda [1968] E.A. 278 (C.A)** at page 280, **SPRY, J.A.** said:

"...There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violent that it could not but have caused immediate death. On the other hand, where there is medical evidence and it does not exclude the possibility of death from natural causes, the task of the prosecution is very much harder and only in exceptional circumstances could a conviction of murder be sustained." In that case the court found that there was other evidence, other than medical evidence, which pointed irresistibly to an unlawful killing.

We do not consider this to be such an exceptional case related to the Waihi case to warrant a conviction of murder.

We are inclined to find the appellant guilty of the lesser charge of manslaughter, contrary to section 187 of the Penal Code Act. We so order.

The second ground was in respect to the learned trial Judge shifting the burden of proof to the Accused. Appellant's counsel argued this ground together with the first ground. He however did not direct court to the error made by the trial Judge in that respect. We are unable to see at what point the learned trial Judge shifted the burden on to the appellant. The learned trial Judge rightly pronounced himself on who bore the burden of proof. Ground two must fail.

The third ground of appeal was in respect to the sentence imposed. Counsel for the appellant contended that the sentence handed down by the trial Judge was illegal for the reason that she did not take into account the period the appellant spent on remand before passing the sentence of 30 years as is required by Article 23(8) of the Constitution. Counsel for the respondent conceded to this fact.

The trial Judge when handing down the sentence neither mentioned the period the appellant had spent on remand nor deducted it from the sentence she eventually handed down to the appellant, which was in contravention of Article 23(8) of the Constitution which provides that:

“Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

We are alive to the principle that an appellate court will only alter a sentence imposed by the trial court if it is evident the latter court acted on a wrong principle or overlooked some material facts or if the sentence is harsh and/or manifestly excessive in view of the circumstances of the case. See *Ogalo s/o Owuora - vs- R* (1954) 21 EACA 270 and *Livingstone Kakooza v Uganda*, SCCA No. 17 of 1993 (Unreported).

Consequently, having set aside the conviction of murder and substituted it with manslaughter, we have also deducted the period of one and a half years the appellant spent on remand. He is accordingly sentenced to 15 years imprisonment effective 12th September 2011, the date he was convicted. We so order.

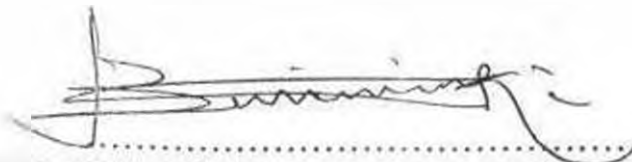
The appeal succeeds.

Dated at Mbale this^{24th} day of August..... 2017



.....
HON. JUSTICE ELIZABETH MUSOKE,

JUSTICE OF APPEAL



.....
HON. JUSTICE BARISHAKI CHEBORION,

JUSTICE OF APPEAL



.....
HON. JUSTICE PAUL.K MUGAMBA,

JUSTICE OF APPEAL