THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 228 OF 2014

(CORAM: F.M.S Egonda-Ntende, JA, Hellen Obura, JA, and Stephen Musota, JA)

KIZITO ENOCK::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Nakawa before his Lordship Hon. Justice Wilson Masalu Musene dated 8/05/2014)

JUDGMENT OF THE COURT

Introduction

The appellant, Kizito Enock was indicted, tried and convicted by the High Court of the offence of manslaughter contrary to sections 187 (1) and 190 of the Penal Code Act. He was sentenced to 23 years imprisonment and he now appeals to this Court against both conviction and sentence.

Background to the Appeal

The facts of this case as found by the trial court is that on 06/07/2012 while the deceased (Nansubuga Mary) was away at Nansana where she worked, the appellant who is her husband and his accomplice went to her home (their matrimonial home) at Kasangombe village in Wakiso Town Council carrying two bottles and a red plastic mug containing corrosive content. After a change of clothes, the two men stood at a nearby path leading to the deceased's house. At around 9:00pm when the deceased was walking to her home, the appellant attacked her and poured the corrosive content on the deceased's face, chest and in her mouth. The appellant and his accomplice then rode away on a

motorcycle. The deceased screamed in pain whereupon people came to her rescue and took her to Namungona Hospital for medical treatment where she later died from her wounds and the matter was reported to Wakiso Police Station. The appellant was arrested and charged with the offence of murder. He denied the offence and in his unsworn statement during his trial, he claimed that he was attacked together with his deceased wife while on their way back home by people riding a boda boda who poured acid on them. At the trial the prosecution adduced evidence to prove the offence of murder but upon closure of the prosecution case, the trial Judge ruled that the prosecution evidence did not disclose the offence of murder but rather manslaughter as the ingredient of malice aforethought had not been proved. The appellant was therefore called upon to defend himself on manslaughter and the court found him guilty of the offence, convicted him accordingly and sentenced him to a period of 23 years imprisonment, hence this appeal.

Grounds of Appeal

1. *The learned trial Judge erred in law and fact in convicting the appellant on unreliable circumstantial evidence.*
2. *The learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence on the appellant.*

Legal Representations

At the hearing of this appeal, Mr. Henry Kunya appeared for the appellant on private brief assisted by Mrs. Susan Nabirye Lumu while Senior State Attorney, Ms. Barbara Masinde appeared for the respondent.

Appellant's case

On ground 1, counsel submitted that the learned trial Judge relied on pieces of circumstantial evidence to make the finding that he did and one of them was on the exhibits which were found. He argued that the exhibit recovered from the crime scene which

included a red plastic cup, an empty bottle of Nile special, a dress of the deceased and the appellant's trouser and shirt were not subjected to any scientific analysis so as to connect them to the appellant. Counsel also submitted that there was mention of a black jacket which the appellant's daughter saw him wearing but it was never exhibited. He argued that if the appellant had this jacket on, it would have also been burnt by the acid just like his trouser and shirt. He added that it was erroneous for the trial Judge to find that the appellant disappeared and was arrested after 3 months following the death of the deceased when actually PW3, No. 40859 Detective Woman Constable Achola Esther the Investigating Officer in the matter testified that the appellant was arrested on 8/7/2012.

Regarding the aspect of the appellant's phone being off, counsel contended that by the time the appellant's phone was called he was already under arrest. Counsel urged this Court to re-evaluate the evidence on record and make a finding that the circumstantial evidence which the learned trial Judge relied on to convict the appellant had those lapses and so the offence was not proved beyond reasonable doubt.

Regarding ground 2 on sentence, counsel submitted that the sentence of 23 years imprisonment is manifestly harsh and excessive. He added that in arriving at the sentence, the learned trial Judge did not take into consideration the mitigating factors pleaded by the appellant. He referred to the Supreme Court decision in ***Kamya Abdullah and 4 ors vs Uganda, SCCA No. 24 of 2015*** where courts are implored to observe uniformity when passing sentences. He prayed that court allows the appeal, quashes the conviction and sets aside the sentence. In the alternative, if conviction is upheld, counsel prayed for a lesser sentence.

The Respondent's reply

Counsel for the respondent opposed the appeal and submitted that the trial Judge reached the right conclusion in convicting the appellant. Regarding ground 1, counsel submitted that the circumstantial evidence relied on by the trial Judge was very reliable specifically

that the appellant had burns which were consistent with acid having been poured on him. She argued that this was taken into account by the trial Judge at page 50 of the court record where he referred to the evidence of PW5, Sserugo Francis who testified that the cup bounced off the deceased onto the attacker who had thrown the acid at the deceased. She contended that the appellant's version of his defence that he was walking with his wife when acid was thrown at them is not true because PW5 who came to the deceased's rescue said that she was walking alone.

Counsel submitted that it is not true that the appellant abandoned his wife in hospital because he had been arrested as argued by his counsel since he was arrested 2 days after the incident at which time he did not go back to visit his wife. She contended that the exclamation of the deceased that she was dead and the fact that she immediately made an effort to reveal to PW5 that it was her husband who had burnt her amounted to a dying declaration as it was made in anticipation of death.

Counsel also added that the other pieces of circumstantial evidence are the exhibits which were recovered from the scene of crime which included the beer bottles and red mug which his child PW4, Nankya Gloria had seen him carrying prior to the attack. She also submitted that much as the black jacket, was not recovered, both PW4 and PW5 managed to describe him as wearing a black jacket on the fateful day. Taking all these circumstances into account, counsel prayed that this Court finds that the trial court properly convicted the appellant and upholds the conviction.

Counsel pointed out that the trial Judge pronounced himself prematurely when after the prosecution had closed its case he found that the prosecution evidence on record disclosed the offence of manslaughter as opposed to the offence of murder which the appellant was charged with. She prayed that this Court exercises its power to re-appraise the evidence and come to a different finding.

Regarding the ground on sentence, counsel submitted that the trial Judge rightly sentenced the appellant to 23 years imprisonment as the period the appellant had spent

on remand were taken into account and the mitigating and aggravating factors were all considered. She prayed that the sentence be maintained because the offence is grave and it was committed in a brutal manner.

In rejoinder, counsel for the appellant submitted on the issue of the dying declaration that there is nothing on record to show that the deceased made a statement to PW3 that amounts to a dying declaration. He added that even PW2, Paul Mwebaze who was the pastor to the deceased stated that he was able to talk to the deceased but she did not disclose to him who poured the acid on her. Regarding the exhibits, counsel submitted that there were no fingerprints picked from the crime scene to confirm with certainty that this was the mug and these were the bottles which PW4 saw the appellant holding on the fateful day

Decision of Court

The duty of this Court as a first appellate court was re-stated by the Supreme Court in the case of ***Oryem Richard vs Uganda, Criminal Appeal No. 22 of 2014 (SC)*** at page 5 in the following words;

> *"We should point out at this stage that rule 30 (1) of the Court of Appeal Rules places a duty on the Court of Appeal, as first appellate court, to re-appraise the evidence on record and draw its own inference and conclusion on the case as a whole but making allowance for the fact that it has neither seen nor heard the witnesses. This gives the first appellate court the duty to rehear the case."*

Mindful of that duty and taking into consideration the arguments of both counsel, we now turn to consider the grounds of appeal.

On ground1, it is submitted that the trial Judge erred when he convicted the appellant basing on unreliable circumstantial evidence. The principles which courts apply in deciding cases based on circumstantial evidence were well summarised by the

Supreme Court in the case of ***Akbar Hussein Godi vs Uganda, SCCA No. 03 of 2013***, as follows:

> *"There are many decided cases which set out the relevant principles which courts apply in deciding cases based on circumstantial evidence. In the case of Simon Musoke vs R. (1958) E.A. 715 at page 718H, the Court of Appeal for East Africa held that in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt "see also* ***Teper vs R (1952) 2 ALLER 447and Andrea Obonyo & Others vs R. (1962) E.A. 542*** *where the principles governing the application by courts of circumstantial evidence were considered."*

In ***Bogere Charles vs Uganda; Supreme Court Criminal Appeal No. 10 of 1998*** the Supreme Court referred to a passage in Taylor on Evidence 11th Edition page 74 which states thus;

> *"The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."*

The above authorities clearly set out how courts should deal with circumstantial evidence. With those principles in mind, we now proceed to appraise the evidence on record.

In his judgment, the trial Judge observed as follows;

> *"According to PW1, when the accused eventually surface, he had acid burns. That is a piece of circumstantial evidence corroborated by PW5 who saw accused throwing a cup of acid at the deceased and the cup bounced back on his arms. Another piece of circumstantial evidence is what PW1 stated that accused came/went to Mulago only once and for one hour to visit the seriously injured deceased wife. She added that accused thereafter switched off his phone and disappeared, never to return till he was arrested after 3 months following the death of the deceased. That conduct on the part of the accused was definitely not conduct of an innocent person.*

In my view, it confirms what PW1 stated that her deceased sister told her that it was the accused, father of Oliver who burnt her. The other piece of circumstantial evidence was the recovery by PW3 of the red cup and bottles of Nile beer, which corroborates the testimony of PW4. PW3 further testified that in the course of her investigations, she was told by the deceased that accused was the one who burnt her.

In the premises, I find and hold that the circumstantial evidence on record points at none other than the accused, Kizito Enock as the person who was behind the acid attack of the deceased. I therefore on the advice of the assessors and in view of what I have outlined, do hereby convict the accused of manslaughter C/S 187 (1) and 190 of the Penal Code Act."

The circumstantial evidence that the trial Judge relied on was adduced by different witnesses. PW1 Namyalo Sylvia who was the sister of the deceased testified that on 6/7/2012 she received a phone call at around 10.00 p.m that the deceased had been burnt with acid. She rushed to Namungona Orthodox Hospital and later to Mulago Hospital where the deceased was admitted and she (deceased) told PW1 that Tata Oliver (the appellant) had burnt her with acid. He had called the deceased on the night of the attack and asked her to meet him on the way. On her way at around 8:30 pm she saw two people squatting with a boda boda and she passed them whereupon one of them whom she recognised by voice as her husband poured some liquid on her and she realised that it was acid. PW1 also added that the appellant arrived at the hospital at about 3:00am in the night holding a handkerchief on which he poured water and he also had scars and burns of acid and dots on the face. He stayed at the hospital for one hour and never returned. He switched off his phone and was arrested from Wakiso where he was undergoing treatment in a clinic. The deceased died after 3 $^{1}/_{2}$ months.

PW2 testified that on 6/7/2012 at around 8:00 pm or 9:00 pm a one Kwagala rang him and informed him that the deceased had been burnt with acid and she was at Namungona Hospital. He rushed to the hospital where the deceased requested him to call PW1. They proceeded to Mulago Hospital where the deceased had been referred. PW2 also called

the appellant to inform him about the incident but he said that he was at Kalule driving towards Luwero. He arrived at the hospital between 2:00 am and 3:00 am with a handkerchief and a bottle of water which he would pour in the handkerchief and apply to his face that had spots like burns. The deceased did not tell PW2 anything.

PW3 NO. 40859 D/W/C Achola Esther the Investigating Officer testified that she visited the scene of crime after Detective Sergeant Kirabira Noah (Sgt Kirabira) had visited it on 7/7/2012 and recovered exhibits including a red plastic cup, an empty bottle of Nile special beer, dress of the deceased which was burnt with acid and a brace of the deceased which was also burnt. She added that Sgt Kirabira proceeded to St. Joseph's clinic, Wakiso where the appellant had been admitted and arrested him. He found a trouser of the accused and shirt equally burnt with acid. PW3 exhibited all the items and labelled them.

PW3 testified further that after visiting the scene of crime, she proceeded to Mulago Hospital and recorded the deceased's statement in which she revealed to her that she managed to identify one of the suspects who poured acid on her as the appellant. PW3 also interviewed the deceased's children Nankya Gloria (PW4) and Oliver both aged 8 and 6 years respectively who revealed that prior to the incident, the appellant went home with a boda boda rider dressed in a black jacket holding two bottles of beer. He entered the house, picked a red plastic cup and sat on the boda boda and proceeded to the direction of the crime scene. During cross examination, PW3 stated that the deceased had told her that the appellant called her before the incident and that during the attack, she identified her attacker as the appellant and he also got a splash.

PW4, testified that on that fateful day, her father the appellant came home at around 5:00 pm wearing a mask, dressed in a black coat, white vest and a black trouser and he was with a certain boda boda man in possession of two bottles of beer. He entered the house and picked a red cup, ordered them not to get out till he returned and he left. She added that at the time, her mother (the deceased) was at work. Later, a neighbour called and informed them that acid had been poured on her mother. PW4 testified that it was the

appellant who poured acid on the deceased because he got the red cup from home and had bottles of beer and was also putting on a mask. She also stated that her parents usually had misunderstandings and quarrelled often but reconciled afterwards.

PW5 testified that on the fateful night at around 9:00pm as he was heading home, he met two men on a motorcycle both clad in black coats and as he was about to reach them, he heard one of them saying, "let us go there is a person coming" . Then he saw a lady coming from the opposite direction. They rode towards her and the rider flashed lights at her while the passenger threw a red cup which hit the deceased on the face and bounced back to the assailant's shoulder. The deceased cried out, moving towards PW5 and fell in his chest but he pushed her away while the two assailants fled the crime scene. After about 15 minutes, the deceased's face turned maroon whereupon PW5 raised an alarm and people gathered and identified the deceased as Nansubuga Mary. A one Kato called the appellant's phone to inform him that his wife had been burnt with acid and he said he was still far but was going to come. PW5 also stated that the deceased informed them that it was the father of his children, the appellant, who had burnt her with acid. PW5 further testified that they flashed torches and saw the red cup and a bottle of Nile beer brand. He confirmed that they were the ones in court.

In his defence, the appellant stated that on 6/7/2012 he and the deceased were given a lift by a one Mutebi and on the way they disembarked. As they were walking home, an approaching motorcycle flashed lights at them and the people who were riding on it poured acid on him and the deceased. They both fell down and each one ran in different directions. He reached a petrol station where he rushed to Wakiso to get a vehicle and while he was there, he was called and told that his wife had been taken to hospital. He rushed to Namungona Hospital but the deceased was referred to Mulago Hospital where she was admitted. Afterwards, the appellant left for home but he was arrested by police while on his way.

We have reproduced the material part of both the prosecution and defence evidence so as to analyse them and determine whether indeed the circumstantial evidence was

unreliable as contended by the appellant. PW1, PW3 and PW5 all testified that the deceased revealed to them that it was the appellant who had poured acid on her. Similarly, the red cup and beer bottles that were exhibited in court were seen with the appellant by his daughter, PW4 prior to the incident. She also said that the appellant was dressed up in a black jacket and on that day he had a mask. This evidence was corroborated by PW5 who stated that the people who attacked the deceased were both wearing black coats and they poured the acid using a red cup which bounced back at the assailant.

It is not in dispute that the appellant was at the scene of crime. However, his version of the story is that he was walking with the deceased when they were both attacked and they first fell down then each of them ran in different directions. For him he ran up to the petrol station and then rushed to Wakiso to get a vehicle. We find appellant's evidence contradictory to that of PW5 who said he witnessed the incident. The evidence of PW5 was clear that the deceased was walking alone when she was attacked. The appellant's contention that they were walking together when both of them were attacked is therefore unbelievable. If indeed the appellant had been walking with his wife he could not have run away from the scene and even 'rushed to Wakiso to get a vehicle' without first establishing her condition.

In any event, it was the appellant's evidence that they each ran in different directions when they got up immediately after the attack. One therefore wonders what could have informed the appellant's decision to rush and get a vehicle since he did not see the deceased's nature of injury. It would also be illogical, given the minor burns the appellant had got, that he would just run away and abandon his wife (the deceased) who sustained serious injuries if indeed they had been walking together.

We must also observe that the appellant's story that he was walking with his wife when they were attacked appeared to have come as an afterthought because he did not disclose this to PW2, their Pastor who called and talked to him immediately after the incident. According to PW2, the appellant told him that he was at Kalule driving towards Luwero

and he only arrived at the hospital between 2.00 am -3.00 am. Even when he arrived at the hospital he never told PW2 that he had been with the deceased when the acid attack occurred.

The Supreme Court in the case of ***Janet Mureeba and 2 others vs Uganda, Supreme Court Criminal Appeal No. 13 of 2003*** stated that;

> *"Generally, in a criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused..."*

Upon our re-evaluation of the evidence as above, we find the circumstantial evidence on record consistent and it irresistibly points to the appellant's guilt, thus disproving his evidence that he was also a victim of the acid attack. We therefore agree with the conclusion of the trial Judge that the appellant, Kizito Enock is the person who was behind the acid attack of the deceased. Ground1 therefore fails.

However, before we take leave of this matter, we wish to make some observations following what we stated earlier in the background of this appeal, that at the closure of the prosecution case, the learned trial Judge in his ruling on whether a prima-facie case had been made against the appellant, went ahead to make a finding that the ingredient of malice aforethought had not been established by the prosecution. He said he was satisfied that the intention of the attacker was to disfigure the deceased hence PF3, Medical Examination of an injured person in which the deceased was initially described as a victim of attempted murder. He then found that the prosecution evidence on record disclosed the offence of manslaughter as defined under section 187 (1) of the Penal Code Act. He relied on section 87 of the Trial on Indictment Act and made a finding that a prima-facie case of manslaughter had been disclosed against the appellant and called upon him to defend himself on that offence as opposed to murder which he had initially been charged with.

In our considered view, the learned trial Judge erred in so doing because the purpose of a ruling on a prima facie case is to establish whether or not the prosecution has

adduced sufficient evidence to put the accused person to his defence on the offence charged.

First of all, we find that the trial Judge's decision that the prosecution evidence disclosed the offence of manslaughter against the appellant was prematurely done at a wrong stage of the trial. In our view, section 87 which the trial Judge relied on to reduce the offence of murder the appellant was charged with to a minor cognate offence of manslaughter is only applicable at the stage of judgment when the trial court has evaluated the prosecution evidence and the defence evidence in their totality and found that the facts proved reduce the offence charged to a minor cognate one.

Secondly, we have also failed to find any basis for the trial Judge's conclusion that the ingredient of malice aforethought had not been established by the prosecution. To our minds, that conclusion was erroneously based on the trial Judge's view that the intention of the attacker was to disfigure the deceased as she did not die immediately so she was described in the medical report as a victim of attempted murder. The trial Judge seems to suggest that one of the elements to prove malice aforethought is the immediate death of the deceased. That view is contrary to the now settled law as provided under section 191 of the Penal Code Act and case law.

Section 191 of the Penal Code Act provides thus;

> *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 the 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 in ***Nanyonjo Harriet and anor vs Uganda, SCCA No. 24 of 2002*** held that;

> *"In a 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 prosecution evidence, especially the medical examination report and the post-mortem report, clearly revealed that the deceased's face which is a very vulnerable part of the body was targeted and moreover with acid which is a very lethal substance. The extensive burns the deceased sustained eventually caused her death.

In the premises, the deceased's failure to die immediately cannot be a basis for concluding that her attacker only intended to disfigure her and as such the ingredient of malice aforethought had not been proved. Death occurred as a result of the appellant's act which he knew could cause death. It is therefore our firm view that the trial Judge erred in law and fact by finding that malice aforethought had not been proved and thereby reducing the offence from murder to manslaughter. If the respondent had cross-appealed on this ground we would have been inclined to substitute the conviction of manslaughter with murder as originally charged. However, since the respondent did not cross-appeal, as an appellate court, we can only note the trial Judge's error with concern.

On ground 2 regarding sentence, it is now settled that this Court can interfere with the sentence imposed by the lower court only where it is 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. See Supreme Court decision in ***Kiwalabye Bernard vs Uganda, Criminal Appeal No.143 of 2001 (unreported)***.

In this appeal, the learned trial Judge sentenced the appellant to 23 years imprisonment for causing the death of the deceased. It should be noted that this is a grave offence which carries a maximum penalty of life imprisonment. In mitigation of sentence, it was presented for the appellant that he has 4 children, has been on remand for 2 years and has realized his mistakes. The aggravating factors presented were that the deceased suffered for long before she succumbed to death, the treatment was cruel, the appellant's actions will have an everlasting impact on their children and they will live without their mother. The trial Judge took into consideration both the aggravating and mitigating factors and the period the appellant had spent on remand and sentenced him to 23 years imprisonment.

We have ourselves considered all the aggravating and mitigating factors as well as the range of the sentences this Court has imposed in similar offences with more or less similar circumstances in the spirit of maintaining consistency in sentencing as expressed by the Supreme Court in ***Mbunya Godfrey vs Uganda, Supreme Court Criminal Appeal No. 4 of 2011.***

In ***Simon Amodoi vs Uganda, SCCA No. 14 of 1994 [1995] UGSC 20,*** the appellant was convicted by the High Court of murder of his father and was sentenced to death. This Court upheld both conviction and sentence and he appealed to the Supreme Court which quashed the conviction of murder and set aside the sentence of death. A conviction of manslaughter was substituted and a sentence of 12 years imprisonment was imposed. In ***Okwaimungu Dominic vs Uganda, CACA No. 0036 of 2014,*** the trial court convicted the appellant of the offence of murder and sentenced him to 21 years imprisonment. On appeal to this Court, the conviction was quashed and the sentence set aside. This Court then convicted the appellant of manslaughter and sentenced him to 15 years imprisonment.

We therefore find the sentence of 23 years imprisonment imposed on the appellant harsh and excessive as it was out of range. Having so found, we set aside the sentence of 23 years imprisonment and substitute it with a sentence of 20 years imprisonment which in our view is appropriate.

However, we note that the appellant had been in pre-trial custody for a period of 2 years. Pursuant to Article 23 (8) of the Constitution, we deduct that period from the 20 years and sentence the appellant to imprisonment for 18 years imprisonment from the date of conviction, that is, 08/05/2014.

In conclusion, the appeal against conviction is dismissed and the conviction is upheld. The appeal against sentence is allowed in the above stated terms.

We so order.

Dated at **Masaka** this...30th...day of.....July.....2018

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Hon. Justice F.M.S Egonda-Ntende

JUSTIE OF APPEAL

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Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

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Hon. Justice Stephen Musota

JUSTICE OF APPEAL