THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.089 OF 2009

KYOMUGISHA SYLVIA :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Appeal from the decision of the High Court holden at Nakawa (The Honourable Justice Joseph Murangira) dated the 27th day of March 2009 in Criminal Session Case No. 0026 of 2003).

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF THE COURT

This appeal is from the decision of the High Court of Uganda sitting at Nakawa in High Court Criminal Session Case No. 0026 of 2003, in which Joseph Murangira, J convicted the Appellant of the offence of murder contrary to *Section 188 and 189* of the Penal Code Act Cap 120 and sentenced her to life imprisonment.

The facts as established by the prosecution before the trial court were that between 17th and 18th November 2001, at Kavule-Kibuye, Makindye Division in Kampala District, the appellant unlawfully caused the death of Byamukama Charles through poisoning. Medical evidence revealed that the deceased had died from ingestion of organochlorine poison (ambush).

With leave of court granted under *Section 132(1) (b)* of Trial on Indictments Act, the Appellant now appeals to the Court of Appeal of Uganda on grounds couched in the Memorandum of Appeal dated 2nd September 2021 as follows:

1. *THAT the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby convicting the Appellant basing o weak circumstantial evidence.*
2. *THAT the learned trial Judge erred in law and fact when he sentenced the Appellant to life imprisonment which was manifestly harsh and excessive.*

Representation

At the hearing of this appeal the Appellant was represented by *Mr. Richard Kumbuga,* learned Counsel on state brief while *Ms. Vicky Nabisenke* learned Assistant Director of Public Prosecutions represented the Respondent. The Appellant was in attendance via video link to Nakasongola Prison by reason of the restrictions put in place due to COVID 19 pandemic. Both parties sought, and were granted, leave to proceed, by way of written statements.

Appellant's case

In his submissions Counsel for the Appellant submitted that the ingredient of participation of the Appellant in the commission of the alleged offence was not made out against the Appellant and it was erroneous for the learned trial Judge to decide otherwise hence occasioning a miscarriage of justice. According to Counsel, there was no direct evidence linking the Appellant to the commission of murder and the trial Judge relied on circumstantial evidence from various witnesses and the conduct of the Appellant, and yet there were co-existing circumstances which would weaken or destroy the inference of guilt.

Counsel referred court to the decision of the Supreme Court in **Bogere Charles v Uganda, SCCA No. 010 of 1996** for the proposition that before drawing an inference of the accused's guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt.

Counsel submitted that the evidence at trial was lacking in materially and referred this court to the evidence of PW1 who testified that it was only the Appellant who used to serve the deceased with food and that when he discovered the deceased in his kiosk, there were remains of food that is, matooke, fish mixed in ground nuts and vomit. Further by way of contradiction that upon searching the Appellant's kiosk, the food found was matooke and offals.

Counsel also submitted that according to the testimony of the Appellant, which was supported by the evidence of PW4, who testified that the deceased took tea that evening from a one Nalongo who later took away her two cups and as such, it is possible that the poison was in the tea and that the cups which were submitted for toxicological examination were different from the ones from which the deceased was served with tea.

It was also submitted that the scene of crime was contaminated by a number of people who broke into the deceased's container and there was a possibility that someone could have planted the poisoned food there to conceal something vital. Counsel contended that according to PW1, by the time police arrived, people had already had access to the deceased and the door was already open.

Counsel for the Appellant criticized the trial Judge for relying on exhibit evidence and yet the chain of exhibits was broken. He referred court to evidence adduced by the government analyst who testified the items for examination were received unsealed and yet he clarified during cross examination that all exhibits submitted to the Government Analytical Laboratory have to be sealed. According to Counsel, the exhibits were contaminated and/or fabricated by police on purpose.

Counsel contended that the toxicology expert had intimated to court that poison such as ambush once ingested could cause death within less than three hours and that the symptoms included stomach pain, vomiting and diarrhea.

According to counsel, none of the witnesses made reference to diarrhea and the post mortem report did not indicate for how long the deceased had been dead to attach a timeline for administration of the poison. As such, this uncertainty should have been resolved in favour of the Appellant.

Counsel further contended that the Appellant's home was never searched to recover any useful exhibits to support the assertion that the Appellant must have been the one who administered the poison. Further that the Appellant testified that she left the deceased's container around 11:00pm and no evidence was led to show that no other person accessed the deceased's container and also whether the deceased never took food from any other person on that night.

According to counsel for the Appellant, had the learned trial Judge addressed his mind to all these facts, he would have come to a conclusion that the circumstantial evidence against the Appellant was destroyed and the inference of guilt weakened.

On ground 2, it was submitted for the Appellant that the learned trial Judge did not properly take into account the mitigating factors advanced on behalf of the Appellant and thereby arrived at a harsh and excessive sentence in the circumstances as to amount to an injustice.

Counsel for the Appellant faulted the learned trial Judge for having failed to consider the principle of uniformity and proportionality in sentencing. Had he done so, Counsel submitted he would have ascertained from the authorities of

this Court and the Supreme Court that, the sentencing ranges for the offence of murder. Counsel referred court to the decision of the Supreme Court in **Aharikundira Yustina v Uganda SCCA No. 027 of 2005** for the dicta that consistency is a vital principle of the sentencing regime.

Counsel also referred us to **Epuat Richard v Uganda, Criminal Appeal No. 199 of 2011,** a case similar to the present one in which the Appellant in that case had been convicted of 30 years and on appeal this court set aside the sentence and substituted it with 15 years.

Counsel prayed that this appeal be allowed and court be pleased to set aside the sentence and substitute it with 15 years considering the time that the Appellant has spent in lawful custody.

Respondent's reply

Ms. Nabisenke for the Respondent opposed the appeal. Counsel submitted that the learned trial Judge was cognizant of the fact that this case was hinged on circumstantial evidence and he highlighted different pieces of circumstantial evidence in proof that it was the Appellant who murdered the deceased to wit, the Appellant's conduct and disinterest after finding out that the deceased was dead; the fact that the deceased had caused the arrest of the Appellant and her lover Bogere to impute motive; PW1's testimony that the Appellant had informed him that she served the deceased with matooke and ground nuts with fish at around 10:00pm and the appellants confirmation of the same in her defence; the

fact that remnants of the said food were found in the room where the deceased's body was and the dead rats which also ate this food; medical evidence (PEX 1, PEX2, and PEX3), and the testimonies of PW5 and PW6 who confirmed that the deceased's stomach contents and the food remnants had traces of ambush and the fact that tea and cups examined were found to be free from poison.

Counsel referred court to **Lulu Festo v Uganda, Court of Appeal Criminal Appeal o. 214 of 2009**, for the dicta that circumstantial evidence is the best evidence where there are no other co-existing circumstances which would weaken or destroy the inference of the accused's guilt.

According to Counsel for the Respondent, Counsel for the Appellant's attempt to weaken or destroy the inference of guilt on the Appellant was woefully fruitless since the Appellant herself informed PW1 that she had cooked matooke and groundnuts and served the same on the deceased which shows that the Appellant had the motive, will and intention of poisoning the deceased and she ensured this by preparing a separate dish for him.

Counsel contended that it was impossible that the tea served contained poison since the same was examined by the Government Chemist (PW5) who testified that he examined both the cup and red plastic container containing coffee and they had negative results.

It was also submitted for the Respondent that the allegation that there was contamination of the scene and a break in the chain custody for exhibits was

mere conjecture and suppositions submitted from the bar by Counsel and the same were not part of the record. She prayed that the same be disregarded.

Counsel prayed that this court finds that there was sufficient circumstantial evidence implicating the Appellant in the murder and she prayed that the conviction be upheld.

Regarding the sentence, it was Counsel's contention that the learned trial Judge did not consider all factors raised in allocutus against the Appellant. She referred court to **Aharikundira Yustina v Uganda, Supreme Court Criminal Appeal No. 037 of 2015** for the proposition that failure to consider mitigating factors raised on behalf of the Appellant renders the sentence erroneous. Counsel submitted that failure to consider the aggravating factors rendered the sentence erroneous.

Counsel referred court to the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 and submitted that a conviction of murder carries a starting sentence of 35 years with a maximum sentence of death. She also referred to paragraph 20 of the said guidelines on aggravating factors and contended that for this case, the deceased and appellant were relatives, the deceased had employed the Appellant to work in his kiosk, her actions abused his trust, care and hospitality, the act of poisoning the deceased for having the Appellant's lover arrested was vengeful and malicious, and the act of using poison to kill the deceased was pre-meditated, deliberate and insidious.

According to Counsel, these aggravating factors call for a deterred and punitive sentence.

Counsel referred Court to **Bukenya Stephen v Uganda, Court of Appeal Criminal Appeal No. 051 of 2007**, where the Appellant stabbed to death his brother with a knife and spear and was sentenced to life imprisonment by the trial court. On appeal, this court found that there was nothing excessive, harsh or wrong with the sentence to call for court's interference and the court maintained it.

Counsel also referred to **Sebuliba Siraji v Uganda, Court of Appeal Criminal Appeal No. 319 of 2009** where the Appellant attacked the deceased with a panga and cut him on the head, neck and hands leading to death. On appeal, this court maintained the life imprisonment sentence.

Counsel concluded that the sentence of life imprisonment in this case was appropriate given the circumstances and thus prayed that the same be upheld by this court.

Resolution

This is a first appeal and as such this Court is required under Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions to re-appraise the evidence and make its inferences on issues of law and fact while making allowance for the fact that we either saw nor heard the witnesses. See: **Pandya v R [1957] E.A 336, Bogere Moses and another v Uganda, Supreme Court Criminal Appeal**

No. 1 of 1997 and Kifamunte v Uganda, Supreme Court Criminal Appeal No. 10 of 1997.

It is trite law that an accused person is convicted on the strength of the prosecution case and not on the weakness of the defence. **See: Israel Epuku s/o Achouseu v R [1934] EACA 166 and Akol Patrick & Others v Uganda, Court of Appeal Criminal Appeal No. 060 of 2002.**

Bearing in mind the above principles of law, we shall proceed to consider the first ground of appeal on the alleged failure by the learned trial Judge to properly evaluate the evidence on record and convicting the Appellant basing on weak circumstantial evidence.

From evidence on record, there is no eye witness to the incident that led to this fatal consequence. The evidence adduced by the prosecution witnesses in this regard was all circumstantial. Where, as is the case here, the accused denies having killed the deceased, it is not incumbent on her to explain how the deceased died; the onus remains on the prosecution to prove its case against the accused. **See Kazibwe Kassim vs. Uganda, S.C. Crim. Appeal No. 1 of 2003 – [2005] 1 ULSR 1.**

The law on circumstantial evidence is well settled as stated by Ssekandi J (as he then was) in Amisi Dhatemwa Alias Waibi v Uganda, Court of Appeal Criminal Appeal No. 023 of 1977 that:

"It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving facts in issue quite accurately; it is no derogation of evidence to say that it is circumstantial, See: R v Tailor, Wever and Donovan. 21 Cr, App. R. 20. However, it is trite law that circumstantial evidence must always be narrowly examined, only because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See: Teper v P. (1952) A.C. 480 at p 489 See also: Simon Musoke v R (1958) E.A. 715, cited with approval in Yowana Serwadda v Uganda Cr. Appl. No. 11 of 1977 (U.C.A).

The burden of proof in criminal cases is always upon the prosecution and a case based on a chain of circumstantial evidence is only as strong as its weakest link.

In **Bogere Charles v Uganda, Supreme Court Criminal Appeal NO. 010 of 1998**, the Supreme Court referred to a passage in **Taylor on Evidence 11th Edition, Page 74** which states:

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

Having set out the law on how to deal with circumstantial evidence, we shall now proceed to evaluate the evidence on record.

The incriminating circumstances in this case arise from the Appellant's conduct and disinterest after finding out that the deceased was dead; the fact that the deceased had caused the arrest of the Appellant and her lover (Bogere) which incident the learned trial Judge relied upon to impute motive; PW1's testimony that the Appellant had informed him that she served the deceased with matooke and ground nuts with fish at around 10:00pm and the Appellant's confirmation of the same in her defence; the fact that remnants of the said food were found in the room where the deceased's body was and the dead rats which also ate this food; medical evidence (PEX 1, PEX2, and PEX3), and the testimonies of PW5 and PW6 who confirmed that the deceased's stomach contents and the food remnants had traces of ambush and the fact that tea and cups examined were found to be free from any poison.

PW1 Kakuru Enoch testified that on 18th November 2001, when he came to check on his best friend as he usually did, he found him already dead. Accordingly, he went and told the Appellant who was seated outside her kiosk but she was not bothered by the death of her employer and also relative. PW1 also testified that before his death, the deceased had found the Appellant and a one Bogere having

sexual intercourse in his kiosk and he arrested them and handed them over to police. The young man remained in detention while the Appellant was released. In her defence, the Appellant admitted having been caught with the said man. The learned trial Judge relied on the above piece of evidence to show that the Appellant had a grudge against the deceased which she later acted upon and murdered the deceased with malice aforethought.

We now turn to the ingredient of participation of the Appellant. The evidence upon which she was convicted was circumstantial. PW1 testified that on the night of 17th and 18th November, 2001, the deceased died of food poisoning. PW5 Ali Lugodo the Ag. Commissioner of the Government Chemist and Analytical Laboratory, together with PW6 Dr. Nalwoga Hawa confirmed scientifically that the deceased ate matooke, fish mixed with ground nuts which contained ambush. In her defence, the Defendant testified that she prepared matooke and offals at around 11:00pm and took it to the deceased. She did not adduce any evidence to show that she removed the plates and other utensils after eating. Further, she stated that no visitor came around from 7:00pm to 11:00pm.

While evaluating this evidence the learned trial Judge at page 16 of his Judgment stated thus:

> *"... It is also evident from the prosecution witness who went to the scene of crime that the vomits from the deceased which even were eaten by two rats which also died contained matooke and fish mixed*

with ground nuts. The vomit did not include among others offals. It should be noted and observed that offals as meat are not easily digested when eaten and they take some time to digest. Since the accused stated that she served offals for diner that evening, the same should have been found in the deceased's vomit. The only conclusion therefore is that the accused served the accused that night with matooke, ground nuts mixed with fish."

We have also reviewed the evidence of PW7 Naginda Betty Nalongo who testified that the accused was staying with the deceased and she was the one cooking for the deceased. The Appellant in her evidence testified that,"*It was about 11:00pm, I closed my kiosk, and I took to where Charles was working from. I served the food and we ate.*" Upon careful evaluation of the above, we are inclined to agree with the learned trial Judge that had the deceased eaten offals that evening as testified by the Appellant, traces of the same would have indeed been found in his vomit or stomach contents by PW5 and PW6.

Counsel for the Appellant submitted that according to the testimony of the Appellant, which was supported by the evidence of PW4, the deceased took tea that evening from PW7 Nalongo who later took away her two cups and as such, it is possible that the poison was in the tea and that the cups which were submitted for toxicological examination were different from the ones from which the deceased was served with tea. We are inclined to disagree with this inference and as rightly submitted by Counsel for the Respondent that the utensils used

for the tea/coffee were tested for traces of ambush and none was found. PW5 testified he received a yellow cup containing coffee and a red plastic container containing coffee which both tested negative.

Counsel for the Appellant also criticized the trial Judge for relying on exhibit evidence and yet the chain of exhibits was broken. According to Counsel, the exhibits were contaminated and/or fabricated by police on purpose. We find that the Appellant had a grudge against the deceased for imprisoning her lover and that evidence was not fabricated to hold the Appellant liable. Moreover, the issue of fabrication of evidence was indeed a mere submission from the bar and it was not raised at the trial.

Accordingly, we find no reason to fault the learned trial Judge's findings and conclusion that the Appellant caused the death of the deceased with malice aforethought. In the result we hold that there was sufficient evidence to sustain a conviction and the learned trial Judge evaluated the evidence on record and came to the right conclusion.

In respect of the alternative ground of sentence, it is now settled that for the Court of Appeal, as a first appellate court, to interfere with the sentence imposed by the trial court which exercised its discretion, it must be shown that the sentence is illegal, or founded upon a wrong principle of the law; or where the trial court failed to take into account an important matter or circumstance, or made an error in principle; or imposed a sentence which is harsh and manifestly

excessive in the circumstances. **See: Kamya Johnson Wavamuno v Uganda, Supreme Court Criminal Appeal No. 016 of 2000 (unreported); Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported) and Kalyango Achileo and Another v Uganda, Court of Appeal Criminal Appeal No. 637 of 2015.**

While sentencing the appellant, the trial court stated thus:

> *(1) ...*
>
> *(2) The defence counsel raised the issue that the convict is a juvenile that by the time she committed the offence she was aged 16 years. According to the charge sheet on 26/11/2001, the accused was a female adult aged 18 years old. In defence the convict put her age at 24 years old meaning that the age of the convict might have been over 17 years but still a juvenile. The father of the convict was in court and when asked on the proof of age, he said that the documents as to her birth were lost in the war.*
>
> *The summary of the case proceedings in paragraph 8(c) states that the accused/convict was examined on police form 24 and was found to be 18 years old and of normal demeanor. I have looked at the police form 24 which on physical examination by the police surgeon put the age of the accused at 18 years.*

It is therefore clear that under section 108(2) of the Children's Act Cap 59, Laws of Uganda, the apparent age of the convict was 18 years. Considering the above, I do put the age of the convict at the time the offence was committed to have been 18 years pursuant to section 108(1) of the Children's Act Cap 59 Laws of Uganda 2000.

(3) The convict is presumed pregnant. And that no sentence of death can be passed on a pregnant woman.

(4) The convict caused the death of the deceased. Therefore, taking the above into consideration, the convict is sentenced to life imprisonment in prison.

From the above and as rightly submitted by Counsel for the Respondent, it is clear that the trial court did not take into account all the mitigating and aggravating factors before sentencing the Appellant to life imprisonment. It was submitted for the Appellant at allocutus that she was a first-time offender, remorseful, she had an infant child and was pregnant, and for the Respondent that the deceased and appellant were relatives, the deceased had employed the Appellant to work in his kiosk, her actions abused his trust, care and hospitality, the act of poisoning the deceased for having the Appellant's lover arrested was vengeful and malicious, and the act of using poison to kill the deceased was pre-meditated, deliberate and insidious.

We have considered both the mitigating and aggravating factors in this case. In addition, this court is bound to follow the principle of "parity" and "consistency"

while sentencing, while bearing in mind that the circumstances under which the offences are committed are not necessarily identical. **See Sentencing Principle No. 6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013- Legal Notice No. 8 of 2013** and **Aharikundira Yustina v Uganda, Supreme Court Criminal Appeal No. 027 of 2015.**

In **Muhwezi Bayon v Uganda, Court of Appeal Criminal Appeal No. 198 of 2013**, this court after reviewing numerous decisions of the Supreme Court and the Court of Appeal stated thus:

> *"Although the circumstances of each case may certainly differ, this court has now established a range within which these sentences fall. The term of imprisonment for murder of a single person ranges between 20 to 35 years imprisonment. In exceptional circumstances the sentence may be higher or lower."*

In ***Mbunya Godfrey (supra)***, where the appellant had murdered his wife and he was convicted and sentenced to death, the Supreme Court set aside the death sentence and imposed a sentence of 25 years imprisonment.

In ***Kakubi Paul and Muramuzi David V Uganda, Court of Appeal Criminal Appeal No.126 of 2008***, this Court set aside the death sentence and substituted it with a custodial sentence of 20 years.

In ***Atuku Margret Opii V Uganda Court of Appeal Criminal Appeal No.123 of 2008,*** this Court reduced the sentence from death to 20 years imprisonment.

The appellant was a single mother of 8 children and the victim who was a 12 year old girl had been killed by drowning.

We take the above into account and accordingly set aside the sentence of life imprisonment passed by the High Court. We now invoke section 11 of the Judicature Act Cap 13 which gives this court power to impose a sentence of its own.

Having considered both the aggravating and mitigating factors, we find that the sentence of life imprisonment was excessive because the mitigating factors were not considered. For that reason, we set it aside and substitute it with a sentence of 30 years imprisonment from which we deduct the period of 7 years and 4 months spent on remand. The appellant shall therefore serve a sentence of 22 years and 8 months in prison to run from 27th March, 2009, the date of conviction.

We so order.

Dated at **Kampala** this 11th day of February 2022.

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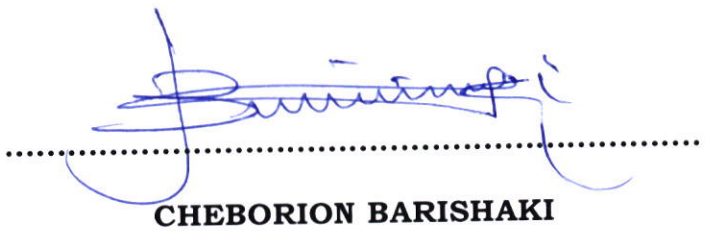
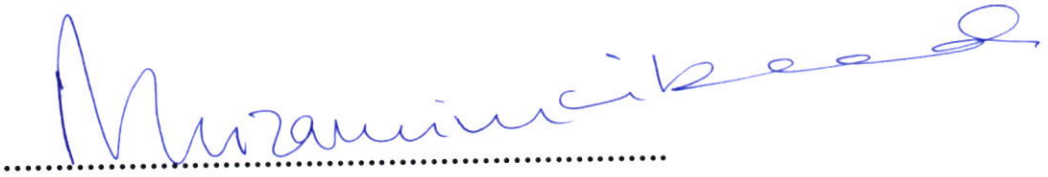
RICHARD BUTEERA

DEPUTY CHIEF JUSTICE



CHEBORION BARISHAKI

JUSTICE OF APPEAL



MUZAMIRU MUTANGULA KIBEEDI

JUSTICE OF APPEAL