THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: ODOKI C.J., TSEKOOKO, KATUREEBE, TUMWESIGYE AND KISAAKYE, JJSC)

CRIMINAL APPEAL NO. 04 OF 2009

BETWEEN

1. NANDUDU GRACE::APPELLANTS

2. NAKIWOLO FLORENCE

VERSUS

UGANDA :: **RESPONDENT**

(An appeal from the decision of the Court of Appeal at Kampala (Engwau, Twinomujuni and Byamugisha, JJA) dated 2 April, 2009 in Criminal Appeal No. 04 of 2004)

JUDGMENT OF COURT

This is a second appeal arising from the judgment of the Court of Appeal which confirmed the conviction by the High Court of the two appellants for the murder of Mafabi David [the deceased].

Most of the facts of this case are not disputed. Nandudu Grace, the 1st Appellant [Al] and the deceased [Mafabi David] were uterine sister and brother, the latter being the younger of the two. Nakiwolo Florence, the second Appellant [A2J is apparently their step sister. The three together with Kizito Sam [PW2], a step brother of Al and uterine brother of A2, lived at Nakatyaba village, in Mukono. From the unsworn statement of Al in Court, it would seem, she, the deceased

and PW2 lived in the same house. According to her, although the deceased and PW2, were primary school boys, “the two were dodging classes” and were rouges who were in the habit of stealing other peoples’ coffee. So, Al proceeded to report this behaviour to an aunt in Kampala. On 13/4/2000, Al returned home and had in her possession *Shs.l0,000/=* which she kept in her handbag. The following day, (14/4/2000), she discovered that out of that money, Shs.5000/= was missing. She suspected the deceased to have stolen it. It appears that PW2 returned from school about midday on 14/04/2000. He heard Al complaining that the deceased had stolen her money. He went away and reported this to the deceased who expressed displeasure to Al upon his return home latter.

What happened next is given partly by PW2, a key prosecution witness, and partly by the appellants themselves in their respective unsworn statements made during their trial. At about 5:00pm that day, PW2 returned home from school and found Al quarrelling with deceased because of the stolen money. The quarreling does not seem to have impressed PW2 who went to town to sell his coffee. When he returned home again at 07:00 pm, he found Al assaulting the deceased with a stick. This time PW2 assumed that Al was just chastising the deceased because of her lost money. He does not appear to have made any attempts to dissuade Al from chastising the deceased. He once more went away. There is no evidence about what happened between 07:OOp.m. and 10:00p.m. when PW2 returned for a third time to the scene. But it would seem that the quarrel between Al and the deceased did not stop altogether. This is so because, according to PW2, when he returned to the scene at 10:00 pm; he found Al and A2 assaulting the deceased who by then lay on the floor of the family house. At that time, it is not clear as to what was the condition of the deceased implying that the deceased could have been still alive because PW2 warned the two appellants that if they don’t stop beating the deceased, they would kill him. Once again he went away and reported the beating to one Mukasa. He could not trace the mother of the deceased. He returned to the scene finally later and this time he found the deceased dead and the body was covered in a blanket.

During the trial, in her unsworn statement, Al claimed that the deceased stole her money and that when she blamed him, there was some quarrel after which the deceased ***“boxed me and***

dislodged a tooth and we started struggling. He made to bite my* teat *but missed it and planted his teeth in the breast. Then Kizito PW2 got a stick and beat me. I raised alarm and this accused [A2) here came and separated us. I got a stick and hit him but I did not know where I hit him. I hit him only twice. Then Florence pushed me and Mafabi. Mafabi fell down and died."

Similarly, 2nd appellant made an unsworn statement and claimed that she went to the scene to answer an alarm. She found Al fighting with PW2. She asserted that she found the deceased dead. She further asserted, like Al, that *'The boys,"* [deceased and PW2J *"were known thieves" on the village.*

Dr. Zziwa Joachim Mbabali [PW4}, carried out the postmortem examination on the body of the deceased, on 16/4/2000, two days after the death. He noted multiple bruises on the chest, abdomen, back, legs and arms. The deceased's body was bleeding from the nose and the mouth. The neck was broken. In his oral testimony in Court, he stated that he could not tell what weapon was used.

After the summing up by the trial judge one of the assessors advised the trial judge, to convict appellants of manslaughter. The second assessor advised the conviction for murder. The trial Judge disbelieved the appellants. He believed the prosecution evidence. He convicted both appellants of murder and sentenced each of them to death on the basis that malice aforethought had been established. The Court of Appeal confirmed that decision. Hence this appeal in which each of the two appellants based her appeal on only one ground.

Mr. Tiishekwa represented the first appellant. He filed one ground of appeal and lodged a written statement of arguments. Mr. S. Mubiru from Messrs Kawanga & Kasule, Advocates, represented the second appellant. He also filed one ground of Appeal and lodged a written statement of arguments in support of that ground of appeal. Ms. Jane Akua Kajuka, Principal State Attorney [PSA] represented the respondent and made oral submissions during the hearing of the appeal.

In the two separate but similar grounds of appeal counsel for each of the appellants contends that

the Court of Appeal erred when it upheld the decision of the trial judge on the basis that malice aforethought had been proved beyond reasonable doubt.

In view of the fact that the two grounds of appeal are similar though filed separately and as the arguments thereon are equally similar, we shall consider the grounds together. In their arguments, both Mr. Tiishekwa and Mr. Stephen Mubiru contend that there was no evidence proving malice aforethought. They both criticized the two courts below for their decision that there was malice aforethought because appellants allegedly beat deceased continuously for three hours. The two learned counsel contend, correctly in our opinion, that there is no evidence proving that the appellants beat the deceased continuously from 7:00pm to 10:00pm till he died. Mr. Tiishekwa cited a number of authorities including **Halsburry's Laws of England, *3d* Ed, Vol.** 10 para. 135 and ***Attorney General for N Irelland v GalIagher (1961) 3ALLER 299*** Mr Mubiru relied on, inter alia, ***Ryan vs Fildes [19381 3 ALLER 517*** and ***R v* Maloney (**1985) in support of his submissions. Mr. Tiishekwa's authorities refer to the law on malice aforethought before our S. 186 was modified in 1970 by Act No. 29 of 1970.

The learned Principal State Attorney supported the opinions of both the learned trial Judge and the learned Justices of the Court of Appeal. She relied on S. 191 of the Penal Code Act and submitted that in this case malice aforethought was proved because the first appellant beat the deceased continuously from 7:00pm to 10:00pm, the time when PW2, claimed to have found the two appellants assaulting the deceased. The learned Principal State Attorney also cited **Tubere *SIO* Ochen** Fl 9451 **12 EACA 63 and B. Lutwama & 4 Others Vs Uganda — Sup. Ct Cr. Appeal 38 of** 1989. First we think that these two cases are distinguishable on the facts. With the greatest respect to the learned Principal State Attorney, the learned trial Judge and the learned Justices of the Court of Appeal, in our opinion there is no evidence to support the view that the appellants, leave alone the **2nd** appellant, assaulted the deceased continuously for three hours from 07:OOpm to 10:00pm on the basis of which the two courts concluded that malice aforethought had been established beyond reasonable doubt. It is well established that in criminal cases, the burden of proof is on the prosecution: This is particularly so in murder cases. See inter alia, *Mahyara S/O MalakonivReg.* ***(1955) 22 E A CA 502*** and **Obar *S/o* Nyarongo *v Reg [1955)* 22 EACA 422.** In homicide cases, where death is caused by the use of a nonlethal weapon, the inference of malice is much less readily drawn than where a lethal weapon is used: **See *Yoweri***

Damu1ira vs* (1956) *23 E.A.C.A. 501,. In the present case the following passage shows how the learned trial judge concluded that malice aforethought had been probed beyond reasonable doubt.

PW2 told court that A I hit him several times at 0 7:00pm and on his return at 10:00pm, he found Al and A2 beating the deceased and the two continued even when the boy was no longer responding to the pain. Al told a lie when she said the deceased was hit only twice. PW4 the doctor who examined the body of Mafabi told court that the body had sustained multiple bruises and ***cuts*** *on the chest, abdomen, back, legs and arms. It was bleeding in the mouth and had a broken neck. Two lashes could not have caused all these injuries, they were all over the body. They were in front and behind. The poor boy must have been beaten randomly as he turned around. He sustained injuries not only twice but several times and in all places indicating that the accused were not only disciplining him.* ***The fact they continued* to *beat him even when he was motionless is proof that it was not mere domestic chastisement. It was beating intended to cause grievous harm and death.*** *Indeed beating in the abdomen and neck which are valuable parts of the body only spelt malice aforethought. The many time he was beaten exhumed malice aforethought. The long hours of assault* ***all emitted nothing but malice aforethought.*** *The joint beating of* ***a 14 year old boy by*** *two* ***grown up women spelt malice aforethought.***

I therefore find that the prosecution has proved beyond reasonable doubt that Mafabi died unlawfully at the hands of the two accused persons with malice aforethought. *As malice aforethought, this is the mental element of the accused at the time they caused the death of the deceased. In absence of direct evidence, it can be deducted from circumstantial evidence, like the* ***weapon*** *used, the area beaten, how many times and* ***how long*** *and with what impact.*

We note with respect that the learned trial judge misdirected himself on the evidence. First he incorrectly states that PW2 testified that at 07:00pm Al hit the deceased several times whereas PW2 is recorded as saying he “found Al beating the deceased”. As regards medical evidence, the learned judge states there were cuts on the body. The doctor did not at all mention cuts anywhere on the body of the deceased. The doctor’s opinion is that he did not know what caused the injuries. In our opinions the learned trial judge concluded that malice aforethought had been

proved beyond reasonable doubt because he assumed erroneously that the deceased sustained cuts and that there was continuous beating by Al from 07:OOp.m. to 10:00p.m. Further more in view of the provisions of section 186 (now 191) of Penal Code Act, the learned trial judge erred when he held that beating was intended to cause grievous harm and death.

In confirming the conviction, the Court of Appeal stated [at page 8 of its typed judgment] that *in our view, the appellant [Al] admits she could have caused the injuries PW4, the doctor, found on the body of the deceased. We accept evidence of PW2 as the learned trial judge did. The 1st appellant assaulted her young brother for* **over *three*** *hours and continued doing so even after he had collapsed. He eventually died of beating. Given the time the assault took and the vulnerable parts of the body that were targeted, we have no doubt that she intended to do grievous harm or to kill the deceased.That is exactly what is required to prove malice aforethought in this case. In our judgment, the learned trail judge was right in convicting the 1st appellant of murder.*

With the greatest respect, like the learned trial Judge, the learned Justices of the Court of Appeal erred when they held that the 1st appellant "intended to do grievous harm or to kill" in the light of the provisions of section 191 of the Penal Code Act. The section reads as follows:
S.191. Malice aforethought shall be deemed to be established by evidence proving either of the following circumstances;
a) "an intention to cause the death of any person, whether such person is 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 court ignored Al's statement that she inflicted only two strokes by stating that she admitted to have caused the injuries which PW4 saw. Further, like the learned trial judge, the Court of Appeal erroneously assumed that Al assaulted the deceased continuously for three hours.

With regard to A2 the Court of Appeal stated,
Lastly, we consider whether the prosecution proved beyond reasonable doubt that the 2"

appellant caused the death of the deceased with malice aforethought. We have already said that we accept the evidence of PW2, a real brother of the 2' appellant that she participated in the beating of the deceased in his final moments of his life. Both appellants were holding sticks. According to the witness:

"The sticks were bigger than my thumb. They were a meter long. They were both holding each a stick and beating the boy."

In our judgment the 2nd appellant does not appear to have assaulted the deceased for as long as 1st appellant did, yet this evidence shows that she assaulted the deceased with one meter long stick and continued to do so even when it was apparent that the deceased was dying.

The court does not show in what way the 2nd appellant alleged assaults contributed to the death of the deceased.

The learned Justices of Appeal erred in assuming that at 10:00pm the beating by A2 was continuous for a long time. Indeed the question when exactly did the ***2d*** appellant join the beating, if at all, was not considered **See, *Dracaku Afia and AnotherUganda*** [1963] EA363 where a conviction for murder was reduced to assault occasioning actual bodily harm because of absence of evidence of common intension. The question of common intension was not settled in as much as the doctor's opinion that death was caused by broken neck of the deceased. The question then is; whose blow caused the death and at what stage was it administered?

PW2 claimed the size of the sticks was that of his thumb. Since we have no evidence regarding the size of his thumb, its size is any body's guess. Secondly, and if we may repeat, there is no evidence whatsoever proving Al assaulted the deceased continuously from 07:00pm until 10:00pm as assumed by both the trial judge and the Court of Appeal. With great respect to the PSA, the learned trial judge and the Justice of the Court of Appeal, we have not seen any piece of evidence suggesting that Al alone beat deceased continuously from 07:00pm till 10:00pm. Nor is there evidence to show that A2 joined Al earlier in the beating of the deceased continuously with Al till he died. As we have already mentioned the only direct evidence is that of PW2.

According to the evidence of PW2, at 07:00pm he found Al chastising the deceased on ground that the deceased had stolen her money. PW2 does not indicate how many blows were inflicted at that time. PW2 did not consider the assault serious enough because he thought it was taken as a disciplinary measure. That is why he decided to go to town to sell his coffee. If the beating was serious, or, if PW2 considered the beating to be serious at that time, we would expect him, a step brother of the two, to have gone immediately to the deceased's mother or some authority to report the beating as he did later at 10:00pm.

Most importantly, after 07:00pm, when PW2 left the scene, there is no evidence indicating that Al either alone or jointly with A2 beat the deceased until PW2 returned to the scene at 10:00pm. Medical evidence shows that there were multiple bruises on the body. Post mortem describes the cause of death as cord compression from broken neck. In court, PW4, the doctor, stated that the injuries he saw "were **from assault. I cannot recall what** sort of weapon **could have been used".** The doctor's evidence on the cause of the death is not as conclusive as it should be. It appears to be somewhat speculation. Thus during cross examination, the doctor stated —

"The head compression was apparent because even after 24 hours, the head could be turned freely. The bones in the neck were broken. I did not establish how the neck was broken".
11 of 16

In her defence, Al admits that she assaulted the deceased and that she did that after the deceased, who was a much younger brother, had insulted her by stating that Al had no husband and that the pregnancy she had was in effect a result of her loose morals. She stated that the deceased charged at her and bit her breast. We would also point out that usually in Uganda; suspects are examined by medical personnel soon after arrest. There is no evidence proving that Al was examined by a medical person as is the practice. There is no evidence to challenge her claim that the deceased charged at her and bit her breast. Thus the 1st appellant appeared to have been provoked.

Furthermore even if the medical evidence that the deceased sustained a broken neck is accepted,

it does not clearly prove that the two together broke the neck. The neck could have been broken due to a fall during the struggle. There is no evidence proving that A2 arrived at the scene before the deceased's neck broke. In the light of the ambiguous nature of the evidence of PW2 we cannot say the deceased sustained broken neck out of the assault by either or both of the appellants. The nearest evidence suggesting how the deceased's neck could have got broken is the statement by Al that as A2 separated the two, the deceased fell down.

In these circumstances our opinion is that the prosecution failed to establish beyond reasonable doubt the important element of malice aforethought. This court and its predecessors have considered what amounts to malice aforethought and how it can be proved. **See:** ***Bukenya & Others Vs Uganda(1972)J EA.549, Francis Coke. Vs Uganda (1992-93) HCB 43 and Joseph Rujumbura .V Uganda (1992— 93)HCB 36***.

In the Case of ***Francis Coke Vs Uganda (Supra);*** the facts were as follows:

On 13th January, 1981, the deceased was travelling on a tractor which was pulling a trailer in which two of his wives were sitting. The deceased was sitting on the left side mudguard of the tractor. At Nile U on Lira / Soroti road, an army Tata Lorry being driven by the appellant who was a soldier, came at a terrific speed and knocked the trailer disconnecting it from the tractor. The lorry then hit the right side of the tractor and disconnecting it from the tractor. The appellant stopped the lorry and reversed it between the tractor and the trailer and run over the deceased ribs thus crushing him to death. The appellant panicked and run away with one of his passengers [DW2] leaving the body of the deceased lying under the lorry. The appellant went away with the deceased's cap and handbag and passed at a house of [PW1] where he asked his passenger whether it was really the deceased who had died and the reply was in the affirmative. The appellant's defence was that the deceased was killed by accident. He denied knowing the deceased or intending to kill him. The learned trial judge believed the prosecution case and held that the appellant killed the deceased with malice aforethought. He rejected the appellant defence of accident and convicted him of murder.

On appeal it was held by the predecessor to this Court, inter alia, that:

A postmortem report con tains findings as to the state of the body the injuries found on it, and an opinion as to the cause of death. It is not capable by itself of proving malice aforethought, the existence of which is not a question of opinion but of fact to be determined from all the available ***evidence. We hold therefore that the trial judge was not justified in finding that malice aforethought had been established beyond*** *reasonable doubt from the evidence of the medical Dr. Odongo.*

Malice aforethought could not be inferred merely because the deceased was crashed in the ribs by the motor vehicle. The test that malice aforethought can be inferred from part of the body inflicted by the appellant's act is restricted to cases where a weapon particularly a stick has been used to commit a homicide.

The court quashed the conviction for murder but convicted him of manslaughter.

In the case of Joseph **Rujumba Vs Uganda[Supra] the facts were** these —
The appellant was convicted of murder and sentenced to death. The appellant, a youth of between 18 and 20 years of age, used a stick in jabbing or poking his mother on the upper part of the abdomen. The trial judge found that the stick used to cause death was blunt object or smooth surface and that such was the object that led to the blow which caused injuries that led to the deceased's death. It was not known how heavy the stick used actually was and the trial judge came to one finding, that **the intent was to cause grievous harm**. The predecessor to this court held:

1. ***An intent to cause harm no longer constitutes an element in establishing malice aforethought. The evidence recorded in the instant case, was not such as to warrant the inference of the intention to murder or of knowledge that the blow could probably cause death. It was unusual result from such a blow and that being the case there was not the requisite mens rea for murder within the wording of S.186 of the Penal Code.***

2. ***There should always be evidence that weapon that was used to cause death was described to the Doctor or was actually observed by the Doctor who performed the postmortem examination, and in* whose *opinion, the weapon was consistent with the nature and the time of the assault and its effect on the deceased, if that is truth. It was***

not simply that the injuries were caused by a blunt object, but that the blunt object in the case could have been used to cause the injuries, in the way it was alleged to have been* used. *This was important in estimating the mens rea of an accused.

In the present case both the two courts misdirected themselves on ingredients of malice aforethought. We are satisfied that had the learned trial judge and the learned justices considered the provisions of S.191 (former S.186)of the Penal Code Act, they would probably not have convicted the appellants of the murder.

Consequently, we quash the conviction for murder and acquit the two appellants of the offence of murder. We convict each of them of manslaughter C/S 187 and 190 of the Penal Code Act. We shall hear submissions in mitigation before passing sentences.

Delivered at Kampala this 26th Day Of October 2010

B.J ODOKI
Chief Justice

JWN_Tsekooko
Justice of the Supreme Court

B.M. Katureebe
Justice of the Supreme Court

EM. Kisaakye
Justice of the Supreme Court