THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: ODOKI, CJ; TSEKOOKO; KATUREEBE; TUMWESIGYE; KISAAKYE; JJSC.)

CRIMINAL APPEAL NO: 15 OF 2009

BETWEEN

NAKISIGE KYAZIKE:: APPELLANT

AND

UGANDA:: RESPONDENT

(An appeal from the judgment of the Court of Appeal at Kampala (Before Engwau, Twinomujuni and Nshimye, JJA) in Criminal Appeal No. 320 of 2003 dated 7th August 2009)

Second Appeal-murder-sentenced to death-re-evaluation of evidence adduced at trial-consideration of mitigating factors-malice aforethought

JUDGMENT OF THE COURT

This is a second appeal by the appellant, Nakisige Kyazike, who was convicted of murder by the High Court (Wangutusi, J) sitting at Jinja and sentenced to death. Her appeal against both conviction and sentence was dismissed by the Court of Appeal, hence this appeal.

The facts of this case are not in dispute. The appellant was the mother of Dennis Baraza, the deceased. At the time of his death he was about 10 years old. Their family was of poor peasants who lived in a rural village called Bugudo in Kamuli District.

On 26th March 2001 the appellant, her husband Bagaya Wilber (PW2) , her co-wife and their children went early in the morning to dig in their garden. At about 7:30 a.m. PW2 told the children who included the deceased to go back home and prepare to go to school. The appellant followed them. The deceased did not want to go to school that day and pretended he was ill but soon forgot and started playing. This angered the appellant, who had previously received a report that the deceased had stolen shs. 300/= from the neighbourhood.

The appellant gathered some dry banana leaves from the banana plantation and called the deceased to bring her some water. When the deceased came, she grabbed him and tied him to a jack fruit tree with banana fibre. She then tied dry banana leaves on his legs, arms and hands and on the jack fruit tree, and set them ablaze.

An uncle to the deceased is said to have tried to rescue the deceased from the fire but the appellant threatened to throw him in the fire too. It is, however, not clear what type of man this uncle was who feared to rescue his nephew from the fire because of the threats of the appellant.

One of the children, Lydia Kasana Tamale PW4, ran to the field to tell her father, PW2, that the appellant had burnt the deceased. The deceased, having been freed by the appellant also ran to PW2, followed by the appellant. On arrival the appellant suggested to PW2 that they should immediately take the deceased to hospital for treatment.

The appellant followed by her husband, PW2, took the deceased on a bicycle to Budini Hospital, some five miles from their village. The hospital referred the deceased to Kamuli Hospital where they arrived at about 9:00 p.m. PW2 left the deceased with the appellant and returned home. Early the following morning, at around 4:00 a.m., the deceased died. The appellant was immediately arrested and charged with the murder of the deceased.

The post mortem report on the body of the deceased indicated that external injuries were superficial burns which approximated 50% over parts of the deceased's body and the cause of death was burns. The appellant was medically examined by a psychiatrist who stated that her mental status was normal. In her unsworn statement in the trial court and in her charge and caution statement which was admitted in evidence the appellant confessed to have burnt the

deceased. She stated that she had got annoyed because the deceased did not want to go to school and had stolen shs. 300/=. “My intention was not to kill him but to discipline him, but unfortunately he died,” she said in her statement.

The trial judge did not believe her and did not agree with the two assessors who had advised the judge to find the appellant guilty of manslaughter. The trial judge convicted her of murder and sentenced her to death. The appellant appealed to the Court of Appeal which dismissed her appeal. The appellant has appealed to this court on two grounds.

1. **That the learned Justices of Appeal erred in law and fact when they failed to adequately re-evaluate the evidence adduced at the trial as regards malice aforethought and hence reached an erroneous decision.**

2. **That the learned Justices of Appeal erred in law and fact when they failed to consider the mitigating factors which were readily available to the appellant.**

The appellant prayed the court to allow her appeal, quash the conviction and set aside the sentence or in the alternative substitute a conviction of manslaughter for that of murder and reduce the sentence to an appropriate term of imprisonment.

Mr. Henry Kunya represented the appellant while Mr. Fred Kakooza, Principal State Attorney, represented the respondent. Both counsel made oral submissions.

Learned counsel for the appellant argued that the learned Justices of Appeal did not re-evaluate the evidence properly, that if they had done so they would have found that whereas it is true that the appellant burnt the deceased, she did so with no intention of killing him. He submitted that there was, for example, evidence on record that she cooled off the fire and even allowed the deceased to get away. He argued further that there were conflicting accounts of what happened and the extent of injuries the deceased sustained; that PW2, for

example, said that the deceased was not extensively burnt whereas the post mortem report stated that approximately 50% of the body was burnt.

Learned counsel for the respondent on the other hand, argued that the learned Justices of Appeal re-evaluated the evidence on record properly to come to the conclusion that the appellant caused the death of the deceased with malice aforethought. Malice aforethought is not established by what the accused says but is inferred from the circumstances in which the killing takes place, he argued. He submitted that the appellant was medically examined and was found to be of normal mental status and that a person of normal mental status who ties a ten-year–old boy to a tree, collects dry banana leaves, ties them on his hands and legs and sets them on fire, fights those who try to rescue him, such a person ought to have known that the end result would be death. He invited the court to find that the appellant killed the deceased with malice aforethought.

In concluding that the appellant caused the death of the deceased with malice aforethought, the learned Justices of Appeal concurred with the finding of the learned trial judge and quoted with approval extensively what he stated on this point in his judgment. We reproduce here, too, what the learned trial judge stated:

"**In this instant case PW3 and PW4 who were eye witnesses told court that the accused first collected a bundle of dry banana leaves. She then tied some on the jack fruit tree such that some were hanging. She then grabbed the deceased who she lured to the spot by asking him to take her some drinking water. Some of the banana leaves were hanging and resting on the deceased's hand. She then tied more dry banana leaves on his hands which he also held. She then set them aflame. The boy got burnt on the legs, feet, the whole stomach, hands and head....**

Her conduct of staying near the burning boy and pushing him back deep into the fire whenever he struggled to break free, her fury at the boy's uncle and threat to also throw him in the fire when he attempted to save the deceased, confirms that the accused wanted the deceased exterminated."

Then the learned Justices of Appeal concluded; “We cannot fault the learned judge for those findings. The appellant murdered (sic) her son with malice aforethought.”

The central issue in this case is whether the appellant killed the deceased with malice aforethought. Section 191 of the Penal Code Act defines “malice aforethought” as follows:

“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...”

It is clear from the definition of malice aforethought stated above that for a person to be convicted of murder the prosecution must prove beyond reasonable doubt that the accused had intention to kill or had knowledge that his or her act would probably cause the death of some person.

Learned counsel for the respondent was right to argue that malice aforethought is not established by what the accused says but is inferred from the circumstances in which the killing takes place. This has been stated in several decisions of this court. In ***Nanyonjo Harriet and Another Vs Uganda SCCA No. 24 of 2002,*** for example, this court stated:

“In cases 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.” See also... *R.V Tubere S/O Ochen (1945)* 12 EACA 63.

Learned counsel for the state was, however, wrong to state in his submission that the appellant by her actions “ought to have known that in the end, the result would be death.” The test in cases of murder is not objective. It is not whether the accused as a reasonable person should or should not have done what he or she did or should have known the consequences of her actions. The prosecution has a duty to prove that the accused had

intention to kill or knowledge that his or her action would probably result in death. The intention or knowledge will not always be obtained from direct evidence. Most often it will be inferred from the circumstances in which the killing takes place. The court must be satisfied that the intention or knowledge in respect of the accused in his individual right has been proved to the required standard of proof.

We think that in this case the prosecution did not prove the intention or knowledge of the accused beyond reasonable doubt. On 27th March 2001, the same day the deceased died, the appellant made a police charge and caution statement which was admitted in evidence. There are a few inconsistencies of this statement with the appellant's unsworn statement in court, but they are not material. The police statement is here fully reproduced for ease of reference.

"On 26/3/2001 I left my home very early in the morning together with my husband Bagaga and we went to dig in our garden. We went with our two children to the garden leaving the deceased Denis Barasa at home because he claimed to be sick. At around 9:00 hours I came back home leaving my husband and the other children at the garden still digging. When I reached home I got the deceased who had pretended to be sick playing and he didn't want to go to school. This was the same deceased who had stolen shillings 300/=. I got annoyed of the deceased. The two sisters of the deceased who are also my daughters namely Kasana Lydia and Merabu Kyaligamba came back from the garden where I left them. They prepared themselves to go to school while the deceased was playing. This annoyed me and I decided to get hold of the deceased. I tied his hands and tied him on a jack fruit tree. I got some dry banana leaves and dry grass and tied them on him after which I lit fire on them which burnt him badly. His sisters Lydia and Merabu cried but by the time I put out the fire the deceased had completely burnt. My husband came and we took the deceased for treatment to Budini Dispensary from where we were referred to Kamuli Mission Hospital where the deceased died at around 04:00 hours on 27/3/2001. My intention to burn the deceased was not to kill him but to discipline him but unfortunately he died. That is all I can state."

Apart from minor inconsistencies the appellant's statement is consistent with the prosecution evidence. She admits to have burnt the deceased in the manner described by PW2 and PW3.

She, however, states that she did what she did to discipline the deceased for his bad behaviour.

We think that if the learned trial judge and the learned Justices of Appeal had evaluated properly the evidence on record they would have concluded that while admittedly the actions of the appellant of trying to discipline the deceased were completely outrageous and extremely cruel, the appellant's subsequent conduct after the deceased got burnt was inconsistent with that of a person who intended to kill or who had knowledge that her action would probably kill.

The appellant stated that she cooled off the fire. It would appear that after the appellant realised that the deceased had sustained severe burns she put out the fire to save him from further burning but by then, in her own words, "the deceased had completely burnt". Of course the deceased had not "completely burnt" because we know that he was able to run to his father who was still in the garden. The prosecution did not produce any evidence to contradict this version of her account of what happened.

The appellant stated that she took the deceased for treatment to Budini Dispensary with her husband, then to Kamuli Mission Hospital where the deceased died at about 4:00 a.m. PW2 stated in court that the appellant came with the deceased to the garden and told PW4 to take him to hospital. PW3 stated that the appellant picked the bicycle and took him to hospital. PW4 stated that the appellant arrived in the garden and said that the deceased should be taken to hospital. All this testimony, in our view, indicates that the appellant wanted the deceased to be urgently treated so that his life could be saved.

Strangely it is only the appellant who describes the seriousness of the burns on the deceased. She states that by the time she put out the fire the deceased "had completely burnt." On the other hand her husband PW2 seems not to have thought that the burns on the deceased were serious. In his statement to court he said: "His arms were burnt, slight burn on the stomach and a slight burn on the legs."

The doctor's post mortem report is even more confusing. It states that the deceased's external injuries were "superficial burns of most parts of the body approximately 50% and that the

cause of death was “burns”. Yet it is medically known that superficial burns are the least serious of all burns and they do not ordinarily result in death.

“A superficial burn is also called a first-degree burn. It is a skin injury commonly caused by dry heat (fire) or wet heat (steam or hot liquids) ... Burns may be grouped based on how deep the affected tissue is. They may be grouped into superficial, partial thickness, or full thickness burns ... A superficial burn is the least serious type of burn. It usually heals within 3 to 5 days...”
See www.drugs.com/cg/superficial-burn.html

“A superficial burn .... is the least serious of all burns....The burned area usually turns pinkish or red and dry and tender. This type of injury usually heals itself in three to five days. However, you can treat the symptoms of a superficial burn.” See www.ehow.com/how_5610642_treat-superf

Therefore, if the description of the burns on the deceased by PW2 and the doctor who performed the post-mortem examination is to be believed, the burns were not so serious as to be the cause of the death of the deceased.

Prior to 1970 when the Penal Code (amendment) Act was passed the Penal Code Act provided that malice aforethought was deemed to be established by evidence providing any one or more of four circumstances, namely:

(a) An intention to cause the death of or to do grievous harm to any person
(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to someone.
(c) .....
(d) .....

In 1970 the Penal Code was amended and “grievous harm” was taken out of the definition of malice aforethought. We think that if the appellant had been charged before that law was amended, she would have safely been convicted of murder because there is enough evidence to show that she deliberately burnt the deceased and therefore intended to do grievous harm

to him or had knowledge that her action would probably cause grievous harm. However, on the basis of the evidence presented a reasonable doubt remains that her conduct, strange, cruel and outrageous as it was, was actuated by an intention to "exterminate" the deceased, to use the word of the learned trial judge. The evidence that was accepted by court that she herself cooled off the fire, allowed the deceased to get away from the scene, carried the deceased on a bicycle to the hospital and stayed with him until he died must be considered in her favour and consequently create doubt about her intention to cause the death of the deceased.

In the result her appeal succeeds. We quash the conviction for murder and set aside the sentence of death. Instead we convict her of manslaughter contrary to section 187 and 190 of the Penal Code Act. We shall hear submissions in mitigation before passing sentence.

Delivered at Kampala this **25th** day of **January** 2010.

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B.J. ODOKI

CHIEF JUSTICE

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J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

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B.M. KATUREEBE

JUSTICE OF THE SUPREME COURT

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J. TUMWESIGYE

JUSTICE OF THE SUPREME COURT

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E.M. KISAAKYE

JUSTICE OF THE SUPREME COURT