THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CRIMINAL APPEAL NO. 73 OF 1998

CORAM: HON. MR. JUSTICE G.M. OKELLO, J.A.

HON. MR. JUSTICE J.P. BERKO, J.A.

HON. MR. JUSTICE A. TWINOMUJUNI, J.A.

KABISWA CHARLES…… APPELLANT

VERSUS

UGANDA…… RESPONDENT

(Appeal from a Conviction and Sentence of the High Court at Mubende (Hon. Lady Justice S.B. Bossa) dated l7 August 1998 in Criminal Session Case No. 100 of 1997)

JUDGMENT OF THE COURT.

The appellant was convicted by the High Court of the murder of a child called Luwanga. He now appeals to this court.

The brief facts are that at about 6 a.m. on the 8th January 1996 PW 2 was still in bed when he heard an alarm. The alarm was raised by the wife of the appellant from her parents' home. Following what the wife of appellant said whilst raising the alarm, PW 2 together with Kalyesubula and Nyanzi Deo went to the home of the appellant. They found the appellant alone in the house. The appellant had a substance which looked like a brain matter and blood over his body. They found a badly mutilated body of his child in the sitting room. They also found a blood stained hoe in the house. They arrested the appellant and sent him to the police station together with the hoe.

A Post mortem examination carried on the body by Dr. Mugenyi Kizito revealed that the deceased had a crashed skull, the intestines and lung had been removed from the body, the left

thigh was cut into two, the right thigh was completely cut off. The cause of death was said to be brain damage. According to the doctor, the injuries were caused by both blunt and sharp wearpons.

At the trial, the appellant denied the offence. He testified that he left home at around 8.30 a.m. on the day of the incident to go and fetch water from a valley to make bricks. When he was returning home around 11.30 a.m. he met some people who asked him if he knew what had happned in his home. He replied that he was not aware that anything had happened in his home as he was in the valley fetching water. He was arrested and tied with ropes and sent to the police station and later charged with the offence.

The learned trial judge accepted the prosecution case and disbelieved the appellant. She convicted him of the offence of murder and sentenced him to death.

There were two grounds of appeal, namely:

(1) The learned trial judge erred in fact and in law when she failed to properly evaluate the evidence on record and came to a wrong decision.

(2) The learned trial judge erred in law and fact when she convicted the appellant of the offence of murder and sentenced him to death when an essential ingredient of the offence was not proved.

On the second ground learned counsel had wanted to argue that malice aforethought had not been proved. That ground was abandoned when the attention of counsel was drawn to the nature of injuries found on the body of deceased which clearly showed that whoever inflicted those

injuries had intention to cause the death of the child or a knowledge that his act or omission would probably cause the death of the child.

On ground one, learned counsel for appellant has submitted that there was no evidence connecting the appellant with the murder of the deceased. The learned trial Judge found, correctly in our view, that there was no eye witness to what appears to be a horrendous crime. The evidence against the appellant was therefore circumstantial. The Judge correctly directed herself on circumstantial evidence. Before this court can act on such evidence, she noted, such evidence must lead to the inevitable conclusion that the deceased's death was caused by the act of the accused and nobody else. The court must find that the inculpatory facts are incompalible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The learned Judge compared the evidence of the prosecution with that of the defence and she correctly addressed her mind to the burden of proof in the case of an alibi defence. However she accepted the evidence of PW 2 that when he rushed to the appellant's home, following an alarm allegedly raised by appellant's wife, he found what appeared to be a brain matter of a person and blood all over the appellant. A blood stained hoe was also found in the house. From that evidence she deduced that it was the appellant who had killed the deceased.

With due respect to the learned trial Judge, the finding of what appeared to be a brain matter of a person and blood on the appellant is not enough to lead to the inevitable conclusion that he was the one who killed the deceased. Some stranger could have killed the child and he only got the brain matter and blood on him when he lifted the child up and brought him to the sitting room. The wife even could have killed the child. Besides, the hoe was not examined by Government chemists for finger prints of the alleged assailant. Therefore there is doubts as to the killer of the child.

There was, however, a material witness whose evidence could have, resolved the doubt one way or the other. That material witness was the wife of the appellant who raised the alarm. The prosecution, for some unexplained reason, did not call her. The failure to call the wife meant that

the case was not proved beyond reasonable doubt.

Consequently we do not agree with the learned trial judge that the prosecution proved beyond reasonable doubt that it was the appellant who killed the deceased.

We agree with learned counsel for the appellant that had the trial judge properly evaluated the evidence she would have come to the conclusion that the case against the appellant was not proved beyond reasonable doubt.

In the result the appeal is allowed. The conviction is quashed and the sentence of death set aside. The appellant to be released forthwith.

Dated at Kampala this 3rd day of May 1999.

G.M. Okello
Justice of Appeal.

J.P. Berko
Justice of Appeal.

A. Twinomujuni
Jutice of Appeal.