THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. MR. JUSTICE S.C. ENGWAU, J.A
HON. MR. JUSTICE A. TWINOMUJUNI, J.A

CRIMINAL APPEAL NO.24 OF 1999

BYARUHANGA FODORI……..…. APPELLANT

VERSUS

UGANDA ……RESPONDENT

(Appeal from the judgment of
the High Court of Masindi (Ogoola, J)
dated 03/10/98 in C.S.C. No.302 of 1996)

JUDGMENT OF THE COURT:

The appellant was tried and convicted on two counts of the murder of his wife and his son contrary to sections 183 and 184 of the Penal Code Act. He was sentenced to death.

The facts of the case were ably summarised in the judgment of the learned trial judge as follows:-

> **"The basic facts of this case were straight forward and, except for the identity of the killer(s), uncontentious. Deceased Nakatte and Moses were, respectively, wife and son of accused. The accused, a polygamist with two other wives, had a rather rancorous matrimonial relationship with his third wife, Nakatte. For at last 11/2 months prior to her murder, Nakatte had separated from her husband, and was living with her own brethren- specifically in the home of her brother Kibira Koronelio (PW5); situated a few villages away from her husband's village, with a large stream as the natural boundary between the two villages. Three or four days prior to the murder, accused had gone to Koronelio's home to negotiate**

reconciliation with his wife and his in-laws. Agreement was reached for Nakatte to return to her matrimonial home on the 12th or 13th of that month (i.e. within the next three or four days). On 13/4/95, at about 3.00 p.m., Nakatte, watched by her brethren and a little later on by her mother, packed a number of her own and her young son's items is of clothing, wrapped them in a green table-cloth, tied her son on her back, and set out to return to her own home — across from the large stream. That would prove to be the last journey for her and for her 3-year-old son. They were never to be seen alive again. Their naked bodies, tied together by a piece of cloth (son on mother's back), were discovered early the next day floating in the open area of the flooded stream, by the pathway. Their bundle of clothes was found strewn all over the area of the stream. Approximately 11/2 hours after this first sighting, the naked bodies were surreptitiously removed from the open stream, and were clandestinely and secretly hidden deep in the papyrus part of the stream — away from the pathway, with a large log laid over the bodies to hold them down, submerged. When rediscovered later that day by the police (PW2), the LC Chairman Henry Kagwa (PW1), and deceased's brother, Deo Serumaga (PW3), the bodies had been horribly and savagely hacked to pieces — with genitalia of both, as well as the breasts of 5 Nakatte, virtually severed. The items of clothing previously strewn by the stream were all missing. They were to be recovered the next day, bundled back again in the green tablecloth, hidden under the bed in the accused's house (which was also deceased's house). The discovery of the bundle of clothes in these mysterious circumstances would prove to be the most contentious issue in this case, and to become the pivotal fulcrum on which the entire Prosecution case against accused would rest. Accused was arrested and charged with the double murder."

At the trial, the appellant totally denied the indictments. His explanation for the deceased's bundle of clothes which were found hidden under the bed in the appellant's house was that he had come with the clothes, with the permission of his wife, the deceased, when he left her at her brother's house on 9th April 1995.

The appellant raised eight grounds of appeal as follows: -

1. That the learned trial judge erred in law in making appointment of the assessors without the approval of the appellant and he erred in holding the trial of the case with only a single assessor instead of the number prescribed by law.

2. The learned trial judge erred in allowing the evidence of the Post Mortem Reports as to the examination of the death of the deceased about one and a half months later to be admitted in evidence under S. 64 of the T.I.D.

3. That the learned trial judge erred on the facts and in law in believing the medical evidence of the Post Mortem examination to the effect that the two deceased had died from the cut wounds found on their bodies.

4.That the learned trial judge erred in holding that the prosecution had proved beyond reasonable doubt that the death of the deceased was caused unlawfully and with malice aforethought and he erred in inferring malice aforethought from the injuries found on the dead bodies of the two deceased.

5. That the leaned trial judge erred in relying on the evidence of the properties recovered from the house of the appellant to connect the appellant with the death of the 2 deceased.

6. The learned trial judge erred in relying upon the evidence of the appellant's character, previous relations with the 1st deceased and conduct to connect the appellant with the death of the 2nd deceased.

7. The learned trial judge misdirected himself and the assessors on the standard of proof what were contentious issues during the trial and whether the prosecution had proved that the death of the 2 deceased was caused unlawfully.

8. That the learned trial judge erred in relying on the circumstantial evidence adduced by the prosecution to find the appellant guilty of the murder of the two deceased.

The duty of this court, as an appellate court of the first instance, is very well established and has been expounded in numerous authorities. The most outstanding ones include: - **Pandya vs. R (1957) E.A 336, Okeno vs. R. (1972) E.A. 32., Bogere Moses vs. Uganda Cr. App. No.1 of 1997 (S.C) (unreported) and Kifamunte Henry vs. Uganda Cr. App. No.10 of 1997 (S.C) 10 (unreported).** This principle is also confided in Rule 29 of the Rules of this Court which states:-

"29 (1) on any appeal from the decision of the High Court acting in the exercise of its original jurisdiction, the court may: -

(a) re-appraise the evidence and draw inferences of fact;"

It is now our duty to re-appraise all the evidence on record and to arrive at our own conclusion as to whether or not the decision of the learned trial judge can stand or not. In so doing, we must bear in mind that we did not have the opportunity of seeing the witnesses as they gave evidence in the trial court, as the trail judge had, and therefore his findings of fact should be respected unless they are seen or shown to be clearly erroneous.

The first ground of appeal is that the learned trial judge erred in appointing assessors without the approval of the appellant and in holding the trial with assistance of one assessor instead of the number prescribed by law. Mr. George Emesu, learned counsel for the appellant submitted that section 3 of the Trial on Indictments Decree required that all trials before the High Court be conducted with the assistance of at least two assessors. In this case, only one assessor appears to have taken part in the trial. Mr. Emesu also attacked the trial judge for failing to record how the assessor was selected and for not giving the appellant opportunity to challenge the selection of the one assessor who took part in the trial. In his view, these were fatal irregularities which alone should justify this court to find that the trial was a nullity and to order a retrial.

In reply, Mr. Vincent Wagona submitted that failure to swear the assessors and to give the appellant a chance to challenge their appointment was an irregularity which was not fatal to the trial because it did not occasion any miscarriage of justice as there was no evidence that the assessor failed in his duty to properly advise the trial judge. Mr. Wagona also conceded that it was an irregularity for the trial judge to proceed with assistance of a single assessor but contented that it also did not occasion any miscarriage of justice. He relied on the Tanzanian case of **Muhamed and another vs. Republic (1973 E.A** 197 which incidentally is not very helpful to his argument.

The manner the learned trial judge handled the matter of the assessors left a lot to be desired. There is no record at all as to how the assessors were selected or their particulars. It is not clear whether there were two or one at the beginning of the trial. The learned trial judge used the word "assessor" in which case we can only presume that he started the trial with one assessor whom he did not name till the assessor was about to give his opinion. Though section three of the Trial on

Indictments Decree requires that all criminal trial in the High Court be conducted with at least two assessors, this trial appears to have proceeded with only one assessor and no explanation appears on record as to why another assessor was not obtained. It is now established law that a trial can proceed with the assistance of a single assessor if the other one fails to turn up during the trial or for any reason absents himself and misses part of the trial. It is not clear, however, what happens when a trial judge uses only one assessor and gives no explanation why at least two were not appointed at the beginning of the trial. What is amazing is that though the appellant was represented by counsel, he does not appear to have objected to all these irregularities throughout the trial. The first time the matter is being raised is on appeal.

Regarding Mr. Emesu's first submission on this matter that the appellant was not given opportunity to object or challenge the assessors, it was held in similar circumstances in **Ndirangu s/o Nyagu vs. R. (1959) E.A. 875** that though there is no express provision in the law that an accused be given opportunity to object to any assessor, to do so was sound practice which should be followed. However, in the instant case, the appellant who was represented by counsel did not request for the opportunity to make such objection. In our view, his failure to object did not occasion to him any prejudice and since it was not mandatory that the opportunity must be given, we find no reason to disturb the judgment of the learned trial judge on that account alone.

In considering the other apparent irregularities like the deficiency in the record on the assessors and the decision of the trial judge to commence and proceed with the trial with a single assessor, this court must determine whether the irregularity caused a substantial miscarriage of justice.
Section 331(1) of the Criminal Procedure Code provides: -

> **"The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on grounds that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if such decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in is favour of the appellant dismiss the appeal**

if it considers no substantial miscarriage of justice has actually occurred." emphasis Ours

In order to determine whether in fact any miscarriage of justice occurred, the role of the assessors in our criminal justice system must be taken into account. Their importance in advising a trial judge on matters of fact cannot be underestimated. However, their role is merely advisory and not binding on the trial judge. While their role might have been very important when the judges were foreigners and therefore not acquainted with our customary laws and usages, their role is diminishing with the replacement of foreigners with Ugandan judges. In our view, failure to record the particulars of the assessors or whether they were sworn in or not does not cause any miscarriage of justice. The judge could obtain their particular and even swear them in but fail to record the fact. Where the defence is represented by counsel and no objection is raised, the accused cannot be said to have been prejudiced when he only remembers to raise such a matter on appeal. Similarly, if trial with a single assessor can be permitted when the other assessor(s) absent himself, we do not see any big difference when the trial starts and ends with assistance of a single assessor. This ground of appeal must in our view fail.

We must hasten to add that we do not condone the failure of trial courts to strictly adhere to the provisions of the Trial on Indictments Decree regarding the assessors. We are of the view, however, that it is high time the impact of trials with assessors on our criminal justice system was assessed in light of the provisions of article 126(2)(e) of the Constitution which enjoins our courts to administer substantive justice without undue regard to technicalities. To what extent, for example, is any irregularity relating to the institution of assessors to be regarded as affecting substantive justice or a mere technicality? The answer to this question must await another day.

The most important grounds of this appeal, in our view, are contained in grounds 2, 3 and 4 of the Memorandum of Appeal. Those grounds raise two very important issues as to whether it was proved beyond reasonable doubt (i) that the deceased's death was caused unlawfully (ii) that there was malice aforethought. At the trial, these ingredients of murder were conceded to by the defence as proved beyond reasonable doubt and the only issue which was considered at great length was whether the appellant participated in the killing of the deceased persons which are the subject of grounds 5, 6, 7 and 8 of the appeal. However, on appeal, Mr. Emesu argued that: -

(a) The trial judge should not have allowed the Post-Mortem Report of the doctor when it was taken one and half months after the death of the deceased persons. Since such reports were bound to be inaccurate, they should not have been admitted under section 64 of the Trial on Indictments Decree.
(b)The trial judge was wrong to believe that the two deceased had died from the cut wounds inflicted on their bodies when there was the evidence of eye witnesses who saw the dead bodies floating in water and without any cut wounds at all.
(c) In view of the fact that the cause of death was not established, malice aforethought was not proved beyond reasonable doubt.

Owing to the fact that the post-mortem report of the two deceased persons was admitted under section 64 of the Trial on Indictments Decree, the learned trial is judge appears to have assumed that the cause of death was bleeding from multiple cut wounds. He never considered evidence of eyewitnesses who saw the floating dead bodies without cut wounds at all.

Mr. Vincent Wagona, realising the force of this argument, conceded that the evidence raised the possibility that the cut wounds were inflicted after the death of the deceased persons. He also conceded that the learned trial judge did not consider this possibility. He, however, requested that this court re-appraises all the evidence and finds that despite the error by the trial judge, the prosecution evidence proved that the death of the deceased was caused unlawfully and with malice aforethought. He invited this court to find that the deceased persons were drowned in the river and that all available circumstantial evidence pointed to no other culprit other than the appellant. He submitted that there was overwhelming evidence showing that the death could not have been accidental. He referred to the circumstantial evidence which was believed by the trial judge, which included the finding of the deceased clothes hidden under the appellant’s bed, the conduct of the appellant after the death of his wife and child and his violent nature. In his view, this clearly showed that the appellant had drowned his wife and son and cut them after their death in order to disguise the true cause of their death.
In reply, Mr. Emesu invited us to reject this alternative theory. of the cause of death because there was no evidence that the deceased were drowned by the appellant. In his view, circumstantial

evidence relied upon by the trial judge was not enough to convict the appellant and was capable of innocent explanation. It was not compatible only with the guilt of the appellant.

We agree with Mr. Emesu that the evidence of the Post-Mortem Report did not establish conclusively the cause of death. It left open the possibilities that:
(a) The deceased died accidentally by drowning.
(b)The deceased were killed and thrown in the river after their death.
(c) The deceased were intentionally drowned to death in the river.

The fourth possibility that they were cut to death before they were thrown in the river was negative by the evidence of Henry Kagwa (PW 1) to the effect that when he first saw the naked bodies of the deceased they did not have cut wounds that were found on them one and half hours later after an attempt was made to hide the bodies in the swamp. This evidence was believed by the learned trial judge and we see no reason to find otherwise.

On the evidence before us, there is a possibility that the deceased died accidentally by drowning. However, its probability is very remote. We are told by the appellant himself that there were two possible ways to across the river on the way from the home of the deceased's brother (PW5) to the home of the appellant. One was flooded and another was not. It was the route, not flooded, which appellant himself used a number of times between the 9th April 1995 and the 14th April 1995 when he was shuttling between the two villages in an attempt to return his wife to his home. There is no definite evidence as to which route she took but it is more probable that she would choose a safer route. Secondly, if you believe the evidence of PW4 and PW5 as to the luggage the deceased had on her fateful journey, as we believe it, it would be very strange how it found its way under appellant's bed. It must be remembered that the clothes were seen floating on the water by PW1 Kagwa on the afternoon of 14th April 1995. He left the scene for 1 1/2 hours to organise people to retrieve the bodies from the river. On his return both the bodies and the clothes were missing. They were found the next day under the appellant's bed. How did they get there? If they were collected by the appellant, why did he not report the death of his wife and son? Did he have to behave the way he did if there was an innocent explanation for the death of his wife and child?

Thirdly, the person who removed the clothes must know something about the 25 cutting up of the bodies and hiding them in the swamp. Why should anyone take such a risk on dangerous waters if the deceased had accidentally drowned? Who ever did it could not have had an innocent motive.

In our judgment, the evidence before us is not consistent with the appellant having accidentally drowned. It is consistent with the deceased having been killed and thrown in the water after death or having died by a deliberate act of drowning her by someone else. In either of these possibilities, the cause of death was an unlawful act by someone. These possibilities become a definite certainty when you take into account the circumstances leading to the recovery of the dead woman's clothes, the conduct of the appellant before and after the death of his wife and the existence of a motive and hot-tempered nature of the appellant. The learned trial judge did, carefully analyse to minute details why in his view, the possession of the deceased's clothes, the conduct before and after death of the deceased and the character of the appellant leave no doubt whatsoever that he killed his wife and son. We cannot, in this judgment, do better than him because we think he did a thorough job of it. We are equally left in no doubt that the appellant killed his wife and son. All the circumstantial evidence on record point to no one else except the appellant as the killer. The analysis of the relevant evidence by the trial judge is self explanatory and we do not repeat it in this judgment.

We would only like to add two other matters, for emphasis, that leave no doubt, taken together with all other circumstantial evidence, leave no doubt that appellant killed his wife and son.
First, not only did he tell lies to the people who were looking for the bodies of his wife and son but he also told lies to the police and the court. The learned trial judge who observed his demeanour in court found him a great liar. The fact that he sweated profusely throughout his trial without any apparent reason tells a lot about his state of mind during his trial. Many of these lies are pointed out in the learned trial judge analysis of the evidence.
Secondly, before the discovery of his wife's body, the appellant appeared certain 5 that the killer of his wife was one YUDA. He even threatened, with panga in hand, to lead the search party to the home of YUDA to have him arrested for the death of his wife. That was even before it was

known that his wife was dead. After the discovery of the bodies, and in presence of YUDA, he never repeated the claim. At his trial, it was never part of his defence that it was YUDA who killed his wife. His defence was a total denial of the offences. He never ventured to blame anyone else for the murders. The trial judge was not convinced by the appellant's explanation as to how the deceased's clothes came to be under his bed. We are not convinced either.

We also agree with the trial judge that from the night his wife and son disappeared, the appellant conducted himself in a manner totally inconsistent with innocence.

Finally, we must observe that none of the bits and pieces of circumstantial evidence enumerated by the learned trial judge and by us in this judgment is capable, in isolation, of proving a charge of murder against the appellant. However, considered together as a whole in our view, no doubt is left as to the guilt of the appellant.
We find no merit in this appeal which we dismiss accordingly.

Dated at Kampala this day 8th of May 2002.

Hon. Lady Justice Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE.

Hon. Mr. Justice S.G. Engwau
JUSTICE OF APPEAL.

Hon. Mr. Justice A. Twinomujuni
JUSTICE OF APPEAL.