THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

***CORAM*: HON. JUSTICE G.M.OKELLO, JA**
HON. JUSTICE A.TWINOMUJUNI, JA
HON. JUSTICE C.K.BYAMUGISHA, JA

CRIMINAL APPEAL No.17 of 2001

IHUNDE JIMMY::::::::::::::::::::APPELLANT

VERSUS

UGANDA::::::::::::::::::::::::::::RESPONDENT

(Appeal against conviction and sentence of the High Court of Uganda sitting at Kampala(* Sebutinde J) *dated 2/2/2001 in Criminal Session Case No.501 of 1998)

JUDGMENT OF BYAMUGISHA(*dissenting)*

The appellant was tried and convicted of murder contrary to **section 183 of the Penal Code Act**, by the High Court sitting in Kampala. He was sentenced to suffer death. The particulars of the indictment were that on the 14th day of July 1998 at Lugonjo village in the Entebbe sub-district he murdered **JUDITH KAKONGE**.

The case for the prosecution was that the deceased and the appellant were cohabiting as husband and wife. They lived in one of the servants quarters attached to the main house where Allen Katookye (P.W.1) lived. On the day in question, the deceased returned home

at about 8.30 p.m. and found the door of the quarters where she lived locked. The appellant was not at home. The deceased who had come with her friend Margaret Hiire (P.W.2) sat on the verandah to wait for the appellant to return. He eventually returned at about 9.30. p.m.They both entered the house. At around 10 p.m. the deceased came out of the house screaming, while holding her left breast. She was calling P.W.1 to bring a torch and see what had happened to her or to see what the appellant had done to her. When she arrived with a torch she found the deceased unable to talk and she was bleeding badly. The appellant also came out of the house. He hired a vehicle to take the deceased to hospital. She was taken to a nearby clinic from where they were advised to take her to Entebbe hospital. A few minutes after the deceased was in the hands of the hospital staff, she passed away. The appellant was informed and he immediately left the Hospital and did not return. He was later arrested from the home of his brother-in-law at Mulago Village on or about the 15th or 16th July 1998. He was charged. At the trial, the prosecution called a total of five witnesses to prove the indictment. The appellant gave a sworn statement and called two witnesses. He told court that the deceased was drunk and she stumbled and accidentally fell upon a metallic object that was protruding out of the front door. The learned trial rejected his version of events and convicted him as charged-hence this appeal.

The memorandum of appeal contains the following four grounds namely that:

1. **The learned trial Judge erred in law and fact to convict the appellant of murder in view of conflicting prosecution evidence.**
2. **The learned trial Judge erred in law and fact when she made/drew wrong conclusions unsupported or conversed in evidence.**
3. **The learned trial Judge erred in law and fact when she abdicated her role, as a Judge and descended into the arena to act as a prosecutor thereby leading to biasness.**
4. **The learned trial Judge erred in law and fact when she considered and believed the prosecution case in isolation of the defence case.**

When the appeal came before us for final disposal, Mr Kabega, learned counsel for the appellant, argued the first two grounds together, then the third ground. He abandoned the fourth ground. I shall deal with the grounds in the order they were presented. In his submission, learned counsel for the appellant, referred to the record of the proceedings and in particular the appellant's extra judicial statement (exhibit P.3) in which the appellant had told the police that when the deceased came back, she started quarrelling because he had not greeted her friends. In the same statement, counsel pointed out, the appellant is alleged to have said that he pushed her and she hit a door and there was a metallic object upon which she landed. Counsel also referred to the testimony of P.W. 2 when she was cross-examined by court. She stated that the deceased was angry with her husband for having taken both keys and locked her out. Counsel contended that the trial Judge made a specific finding on this piece of evidence in her judgment when she stated that "Ihunde was upset about Kakonge having stayed out late; while Kakonge was upset about Ihunde locking her out". Counsel further pointed out that the trial Judge accepted the testimony of P.W.1 which was to the effect that when she asked the appellant what had happened, the latter simply replied that it was ***"obusungu"*** or anger which had got better of him.

Counsel criticised the trial Judge for finding that malice aforethought had been proved after her specific finding that anger had got better of the appellant. He pointed out that the specific instances, which she pointed out, would negative specific intent.

On the dying declaration, counsel submitted that the evidence of P.W.1 was full of contradictions and yet the trial Judge accepted her evidence wholeheartedly. He enumerated the contradictions. First, P.W 1 stated that when she went outside the first time, the deceased was sitting on her verandah and beseeching her to bring a torch and see what had happened to her. She stated that she went back into the house to bring a torch and when she returned, the deceased had already collapsed and she could not talk. Secondly, the witness in cross-examination stated that when she went out the first time, she saw the deceased bleeding, holding her left breast and she was beseeching her to come and see what had happened to her. She said that that is all she said to her. When she came a second time, the deceased had collapsed and could not talk anymore.

Counsel submitted that the evidence having brought out the above contradictions, the trial Judge could not hold as she did that it was unchallenged.It was also his contention that ordinarily dying declarations must come out of somebody without prompting. He claimed that the evidence we have on record show that P.W.1 kept asking the deceased to tell her what had happened to her. He therefore maintained that what the deceased is alleged to have said was not a dying declaration. He invited us to allow the first two grounds of appeal.

In responding to the above submissions, Mr Ndamuranyi-Ateenyi, learned State Attorney, stated that counsel for the appellant seem to be in agreement with the finding of the trial Judge that there was scuffle between the deceased and the appellant which led to the stabbing and eventual death of the latter. He referred to the definition of malice aforethought as set out under **section 186 of the Penal Code Act** and the case of **R vs Tebere s/o Ochen (1945) 12 EACA 63** that the learned trial Judge relied on to find that malice aforethought had been proved.. It was his contention that the nature of the weapon used and the part of the body injured established that malice aforethought was proved. He therefore supported the findings of the trial Judge on the evidence available that malice aforethought had been proved.

On the dying declaration, the learned State Attorney contended that there were no contradictions as claimed by counsel for the appellant.

This being the first appellate court, it is my duty to subject the evidence on record as a whole to fresh and exhaustive scrutiny, and draw my own conclusions of fact. I shall bear in mind that I neither saw nor heard the witnesses give evidence in the case. See **Rule 29(1)(a) of Rules of this Court; Pandya vsR [1957] EA336; Bogere &Another vs Uganda Criminal Appeal No.1/97**(S.C)(unreported). I shall bear the above in mind when considering the facts of this appeal.

The only question of real substance as I understand it, is whether malice aforethought was proved beyond reasonable doubt. The law regarding malice aforethought is contained in **section 186**(supra) which provides that:-

"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 killed or not;**

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 by a wish that it may not be caused".**

The provisions of the above section have received judicial consideration here in Uganda.In the case of **Bukenya &another [1972] EA 549** the court said: -

"It is clear that an intent to cause grievous harm no longer constitutes an element in establishing malice aforethought".

The prosecution had the burden to prove by evidence either that the appellant had the necessary intention at the time to cause death or had knowledge that the act or omission, which caused death, would probably cause the death of the deceased. The knowledge in question is a separate specie of malice aforethought and not another way of describing intention.For instance, if a man shoots a loaded gun at another the reasonable inference is that he intended to kill him or had knowledge that such an act would probably cause death. Knowledge may also be inferred from evidence that the appellant closed his eyes to the facts from which an ordinary reasonable person would realise that the act would cause death.

In determining whether or not the prosecution has discharged the legal burden of proving malice aforethought the court has to look at the circumstances surrounding the commission of the offence. These include the nature of the wounds inflicted, the type of weapon used and the conduct of the appellant both before and after the commission of the offence, if any. In the case of **Ekadelia s/o Comal vs R [1959] EA 168** the appellant caused the death of his brother by coming from behind to one side of him and, from a distance of about eight feet threw a stone at his head. The stone struck the deceased in the region of the temple killing him instantly. In deciding whether malice aforethought has been proved, the Court of Appeal took into account the dimension of the stone; the range

upon which it was thrown at the side of the head of the deceased and came to the conclusion that those were indications of intention to cause death. The court held that malice aforethought had been proved beyond reasonable doubt.

In the instant appeal, the learned trial was alive to the ingredients required to prove malice aforethought. She directed herself correctly when she said: -

"In addition, courts have established that malice aforethought or intention to cause death can either be proved by direct evidence or can be inferred from the weapon used, the manner in which it was used and the part of the body upon which the injury was inflicted. In this regard Iam bound by the decision in the case of Republic vs Tubere s/o Ochen (1945) 12 EACA 63 where the court held that-
"It has a duty to perform in considering the weapon used, the manner in which it is used and the part of the body injured in arriving at the conclusion as to whether malice aforethought has been established."

In order to prove malice aforethought, the prosecution relied on the following pieces of evidence. The words that were used by the deceased when she ran out of the house screaming calling P.W.1 and 2.The medical report (exhibit P.2), the statement made by the appellant (exhibit P.3) and his conduct before and after the commission of the offence.

The manner and circumstances under which the deceased received the injuries that resulted into her death are known by two people one of whom is alive –the appellant .The version given by him to the effect that the deceased was drunk and that she fell on a metallic object was rejected by the trial Judge.In doing so she relied on medical evidence, the injuries inflicted, the part of the body and the conduct of the appellant before and after the commission of the offence, the statement he made and the dying declaration.

I agree with the learned trial Judge that there was no direct evidence as to how the deceased received the injuries. There is evidence that was accepted by the trial Judge that there was a quarrel and the couple were angry with each other. The quarrel seem to have

been followed by a scuffle. However, there was no evidence of the weapon that was used to inflict the fatal wound that resulted in death. When the deceased ran out of the house calling P.W.1 to come and see what had happened to her or what the appellant had done to her, she did not mention that the appellant had used any weapon on her. I shall first deal with the question of the dying declaration. **Section 30(a)** of the **Evidence Act (**Cap.43 Laws of Uganda) provides for admission of a dying declaration by a person who is dead as to the cause of his /her death. The section says: -

"***Statements written or verbal of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be produced without an amount of delay or expense which in the circumstances of the case appear to the court unreasonable, are themselves relevant facts in the following cases-***

(a) When the statement is made by a person as to cause of his death, or as to the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question and such statements are relevant whether the person who made them was or was not at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

The provisions of this section have received judicial interpretation in many authorities. In the case of **Tuwamoi v Uganda [1967] EA 84** the court held that a dying declaration should be approached with caution as evidence of the weakest kind. In another case of **Terikabi v Uganda [1975] EA 60** it was held that the provision of the above section makes a dying declaration admissible if it is a statement as to the cause of death or to the circumstances leading to death.

I have no doubt in our minds that when the deceased uttered the words attributed to her by P.W.1 and 2 she was in extreme pain. I say so because she died shortly after arriving in Hospital. There was a short period of time when she ran out of the house screaming and her passing away. Her words that it was the appellant who caused her injuries ought to be accepted. Iam unable to accept the appellant's version that the deceased staggered and

fell on her own as she went out of the house to bathe. Therefore the last words of the deceased in our view rule out accidental fall.

The question to determine is whether the rest of the evidence proves malice aforethought since the dying declaration did not state the weapon that was apparently used to inflict the fatal injuries. The learned trial Judge relied on medical evidence to infer malice aforethought. The medical report (exhibit P.2) was compiled by Dr. Bubikire (P.W.5). When he examined the body he found a stab wound approximately 4 inches deep and 2 centimeters wide. The wound was on the left side of the chest extending into the apex of the heart. It extensively damaged the cardiac-coronary vessel resulting in excessive bleeding. The cause of death was stated to be haemorrhagic shock due to excessive bleeding. It was the Doctor's opinion that the wound on the body was probably inflicted at close range by a sharp instrument. It is this evidence that the trial Judge used to find that the appellant stabbed the deceased probably with a knife and that he targeted her heart which is a vulnerable part of the body. Was she was wrong to do so?

It was submitted before us by counsel for the appellant, that the learned trial Judge made specific findings that the appellant and the deceased quarreled that night. She also found that there was a scuffle and anger got better of the appellant. She then went on to find that the appellant stabbed the deceased probably with a knife. The evidence as a whole indicates that no weapon was recovered. The appellant and his daughter (D.W.3) testified that there was a metallic object at the door measuring about 3 meters long. But they differed as to the size and the angle it was positioned on. The appellant, while he was being cross-examined by court, he stated that the "metallic object was not firmly fixed in the door but would often oscillate like a pendulum when the door was being shut or opened". This means, in my view, that the metallic object was not so sharp and stationed in one place. Therefore it could not possibly inflict such injuries on a person leading to instant death. The findings of the doctor to the effect that the wound inflict on the deceased damaged the heart and the blood vessels rules out the possibility of the appellant having pushed the deceased. In my view the wound could not have been so deep.

Although there was no direct evidence as to how the deceased received the injuries, the findings of the doctor alone cannot support the conclusions reached by the trial Judge that the deceased was stabbed possibly with a knife. The doctor was merely giving his opinion. His findings could only be used to corroborate other evidence as to how the injuries were inflicted. The testimony of P.W.2 to the effect that the deceased and the appellant were angry with each other and the finding of the trial Judge to the effect that the appellant was angry and the said anger got better of him would in my view negative malice aforethought. The burden was on the prosecution to prove beyond reasonable doubt that the manner and circumstances under which the deceased received the injuries leave no doubt that malice aforethought was present in the mind of the appellant. The prosecution failed to prove the circumstances and therefore the appellant is entitled to the benefit of any doubt that exists in this case.

The conduct of the appellant both before and after the commission of the offence was relied upon by the learned trial Judge to establish that malice aforethought had been proved. The first piece of evidence was given by P.W.1. She stated that on the day in question, the deceased visited her home to deliver a message. While she was still there, the appellant came and peeped through the window and went away without saying anything. The deceased is reported to have said that that the appellant did not like her staying out late. The learned trial used this evidence to show that the appellant was jealous. The second piece of evidence was that when the deceased went out of the house screaming for help, the appellant is reported to have told her not to shout or words to that effect. The last piece of evidence that appear to have influenced the decision of the learned trial Judge was the conduct of the appellant before and after the commission of the offence. Although the appellant ran away and was arrested while in hiding in Mulago, this alone is insufficient that he caused the death of the deceased with malice aforethought. Iam not persuaded in the circumstances and facts of this case that the prosecution proved beyond any reasonable doubt that the appellant caused the death of the deceased with malice aforethought. At most, this was a case of excessive use of force or provocation or both. As for the contradictions in the testimony of P.W.1, these were not

material. They do not point to deliberate untruthfulness on the part of the witness. The first and second grounds of appeal would succeed.

The third ground of appeal complained that the trial Judge abdicated her role and descended into the arena. In submitting on this ground, Counsel for the appellant conceded that under **section 37 of the Trial On Indictment Decree** and **section 163 of the Evidence Act** a trial Judge is empowered to put certain questions to witnesses for purposes of clarification. He contended that the purpose is limited. He relied on the case of **Lambert Houareau vs R [1957] EA575** where it was held that the role of the court during a trial is to put questions in order to clear points that have been overlooked or left obscure. Counsel referred to specific instances in the record of the proceeedings where the learned trial Judge subjected the prosecution and defence witnesses to lengthy cross-examination. Counsel complained that in all the instances the Judge was not seeking clarification but she was seeking to strengthen the prosecution's case. He concluded that the Judge was biased and therefore this ground should succeed. He prayed that the appeal should be allowed, the conviction quashed and the sentence be set aside. In the alternative, in the event of our finding that the evidence point to manslaughter, he prayed that we substitute a sentence that would result in his immediate release.

In his submission, the learned State Attorney found no fault with the conduct of the trial Judge. He stated that the law cited by counsel for the appellant does not fetter the hands of the trial Judge in putting material questions to a witness in order to arrive at the truth. In the alternative but without prejudice counsel contended that the intervention by court did not lead to any injustice.

In order to resolve this ground regard must be had to the law that was cited to us. **Section 37 (**supra) provides that:

"**The High Court may, at any stage of any trial under this Decree, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine**

or re-call and re-examine, any such person if his evidence appears to it essential for the just decision of the case:

Provided that the advocate for the prosecution, or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such a time, if any, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness".

None of the advocates who appeared before us cited any authority in which the provisions of the section have been judicially considered. However, the words of the section are clear. The court is given wide discretionary powers to call or recall witnesses. Such powers must be exercised judicially and reasonably and not in a way likely to prejudice the accused. Once the court decides that certain evidence was essential for the just determination of the case, then it is under a duty to call a witness or witnesses to give that evidence whatever its effect was likely to be.

In the instant case, the trial Judge did not call or re-call any witnesses. Therefore the provisions of the section were quoted out of context. **Section 163**(supra) on its part gives power to the judge, in order to obtain proper proof of relevant facts, to ask any questions he/she pleases of any witness about any fact relevant or irrelevant.

In the case of **Lambert,** the complaint was that the trial Judge took an undue part in the conduct of the case by interrupting counsel for the appellant during cross-examination, and, as result, the appellant's case was not properly put before the court.

In the matter before us, it is true that the record shows that the trial Judge put many questions to all the witnesses including the appellant. This was done after both counsel had closed examination-in-chief or cross-examination. The provisions of **section 163(**supra) do not lay down the format or the scope under which the trial Judge can put questions to witnesses during the trial. However, **Article 28** of **The Constitution** guarantees a person charged with a criminal offence the right to a fair hearing before an

independent and impartial court. This is one of the many rights to be found in the article. Counsel for the appellant complained that the trial Judge went beyond what was permissible under the circumstances. In other words, it was counsel's contention that the trial Judge descended into the arena and in the process brostered an otherwise weak prosecution's case.

I agree that it is a cardinal principle of our criminal justice system that an accused person should have a fair trial before an impartial court. He should not be left with a feeling that his case has not been fairly handled because the presiding judicial officer did not allow his/her advocate to present his/her case, because of interruptions by such an officer. The role of the Judge is to listen to the evidence and the arguments being put forward by each side and to ensure that the trial is conducted in accordance with the laid down rules. As I have stated earlier the two sections give power to the trial court, in one, to summon witnesses whose evidence appear to be necessary for the just decision of the case, and, in the other, to ask any questions she/he pleases in order to obtain proper proof of the facts.

The record of the proceedings in this case indicate as Mr Kabega pointed out, that the trial Judge put questions to all the witnesses including the appellant. It was not pointed out to us how the appellant was prejudiced by the questions that the trial Judge asked. It is the duty of the Judge to decide the case one way or the other. In the instant appeal, the trial Judge probably knew where her doubts lay. To that extent it was her duty to ask questions in order to determine where the truth lies. Since the law cited by counsel for the appellant permits a Judge to ask questions, I have not been persuaded that the trial Judge went beyond the normal standards. But I would like to caution the learned trial Judge that she should exercise restraint when putting questions to witnesses during a trial. This ground of appeal would fail.

In conclusion, the conviction of the appellant would be set aside and substituted with one of manslaughter. As for the sentence, counsel for the appellant submitted that that he has been in custody since 1998, and he proposed a sentence that would result in his immediate release from custody. The state said nothing about the sentence.

I agree the appellant has been in custody for the period stated. But the taking of human life is a serious offence. There were no compelling reasons as to why the appellant caused the death of a woman he was cohabiting with. The use of force should be a last resort in real compelling circumstances. I would impose a sentence of eight years imprisonment and hope that the sentence will serve the ends of justice. The appeal is allowed in the terms I have set out above.

Dated at Kampala this 7th day of May 2003.

C.K.Byamugisha

JUSTICE OF APPEAL