THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE S.G. ENGWAU, JA

HON. JUSTICE A. TWINOMUJUNI, JA

HON. JUSTICE S.B.K. KAVUMA, JA.

CRIMINAL APPEAL NO.42 OF 2004

KOLI JENTY …… APPELLANT

VERSUS

UGANDA ……. RESPONDENT

[Appeal from a conviction and sentence of the High Court at Lira (Maitum, J. as she then was) dated 15th March, 2004 in Criminal Session Case No.56 of 2003]

JUDGMENT OF THE COURT.

The appellant, Koli Jently, was indicted for and convicted of murder, contrary to sections 188 and 189 of the Penal Code Act, and she was sentenced to death.

The brief facts of the case as presented and accepted by the learned trial judge were that on the 27th July, 2000 at Abululyec village, Minakulu Sub-county in the Apac District, the appellant unlawfully killed Agwel Molly, a child of about 4 years old.

On that fateful day, the appellant met Jasper Otia, PW3, a child of tender years, on the way taking his little sister to the garden where their mother, Akullo Betty (PW4) was. The deceased was following PW3 while crying. She was about 20 metres behind him. The appellant then came face to face with PW3 and threatened him: ***"I will kill you all".***

On reaching the garden, PW3 inquired from his mother, PW4, whether there was a quarrel between her and the appellant. PW4 answered him in the negative. Both PW3 and PW4 soon heard an alarm from the direction of a swamp. Immediately one Bosco Otuk, PW6 came and informed them that the child had drowned in the water. PW4 concluded that it was the appellant who killed her child because she threatened to kill them all.

The post-mortem report was received in evidence by virtue of the provisions of section 66 of the Trial on Indictments Act. The cause of death was brain asphyxia probably due to strangulation and thereafter the body was dumped in water. PW6, who got the body from water, testified that the stomach was bloated. Both PW7 and PW8 also confirmed that there was no water in the stomach indicating she died before the body was dumped in water.

In her defence, the appellant denied any involvement in killing the deceased. She admitted that on the fateful day, she was in the garden for communal digging with about 14 people including her husband, Odur Justine, PW5. She denied meeting PW3 on the way. She had no witness to call.

This appeal is premised on the following grounds:-

1. ***THAT the learned trial judge erred in law and fact when she convicted the appellant on the basis of uncorroborated and unsatisfactory circumstantial evidence.***
2. ***THAT the learned trial judge erred in law and fact when she accepted and relied on the evidence of PW3 to convict the appellant.***
3. ***THAT the learned trial judge erred in law and fact when she failed to adequately evaluate all the material evidence adduced at trial and hence reached an erroneous decision which resulted into a serious miscarriage of justice.***

Counsel Henry Kunya who was representing the appellant on state brief, argued ground 2 first and grounds 1 and 3 together. Mr. Kakooza Fred representing the state followed suit. We shall also follow the same partten.

Ground 2: According to counsel Kunya, this ground centres on the evidence of PW3 who was a child of tender years, who uttered the threatening words by the appellant. Mr. Kunya pointed out that before PW3 testified, a voire dire was conducted. It was the contention of counsel that the learned trial judge did not follow proper procedure when she conducted the voire

dire. According to counsel, the proper procedure is set down in the case of ***Dhamuzungu Nathan vs Uganda, Court of Appeal Criminal Appeal No.70 of 2000 (unreported).***

In that case, the court stated:

"The procedure is that the judge should himself question the child to ascertain whether he or she understands the nature of an oath and, if the judge does not allow the child to be sworn he should record whether or not in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence because the child understands the duty of talking the truth".

In the instant case the child (PW3) who was aged 11 years was allowed to give evidence on oath after carrying out a voire dire. The learned trial judge conducted the voire dire as follows:

> ***"A voire dire held.***
>
> ***It is a sin not to tell the truth.***
>
> ***I am a catholic.***
>
> ***The witness sworn. He understands the***
>
> ***importance of telling the truth".***

Counsel Kunya contended that the above procedure followed by the learned trial judge did not comply with the legal requirement laid down in ***Dhamuzungu case (supra).*** According to the counsel, the evidence of PW3 should not have been admitted. In his view, the conviction should be quashed as there is no other evidence before the court sufficient on its own to sustain a conviction.

Mr. Kakooza for the State did not agree. According to him, holding a voire dire is to determine whether a child of tender years understands the nature of an oath and that the child is possessed with sufficient intelligence to tell the truth.

In the instant case, a voire dire was held, and according to Mr. Kakooza, the procedure followed by the learned trial judge was o.k. He referred us to the evidence in-chief adduced by PW3 and also in cross-examination. In the opinion of Mr. Kakooza, the evidence of PW3 without a voire dire could still stand.

As to who is a child of tender years, the courts have held that there is no hard and first rule and said:

"But, as a general rule, whenever a child appears to be around the age 14 or below, the court should alert itself to the possibility that the child might not be of sufficient intelligence to be able to understand the nature of an oath, and should accordingly carry out a voire dire examination". See: Patrick Akol vs Uganda, Criminal Appeal No.23 of 1992 (sc) (unreported).

The East African Court of Appeal emphasized in ***Nyasani s/o Bichana V.R [1958] E.A.190*** that non-compliance with the above requirements will result in quashing of a conviction unless there is other evidence before the court sufficient on its own to sustain a conviction.

In the instant case, PW3 who was aged 11 years was allowed to give evidence on oath after carrying out a voire dire not in accordance with the accepted procedure outlined above. In our judgment, his evidence was wrongly admitted in evidence and no conviction based on it can be sustained unless there is some other evidence on record, sufficient on its own, to sustain the conviction. We find none, and ground 2 of this appeal, therefore, succeeds.

Regarding grounds 1 and 3, Mr. Kunya submitted that there was no direct evidence to show how the deceased child met her death. Counsel pointed out that in the present case, the prosecution case wholly depended on circumstantial evidence, and in order for this court to act on such evidence, the inculpatory facts against the appellant must be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt. ***See: Kazibwe Kassim vs Uganda, S.C. Criminal Appeal No.1 of 2003 (unreported).***

Mr. Kunya submitted that the body of the child was found in swampy water. There is no evidence to show that it was the appellant who drowned the child. The medical report is to the effect that the child was strangled to death. According to counsel, the medical report is not conclusive as to who strangled the child. It gives the cause of death and reasons to be brain asphyxia, probably due to strangling and before the body was dumped in water.

In counsel's opinion, the evidence of the appellant was strengthened by the evidence of her husband, PW5 who stated that the appellant did not follow the same path as that followed by PW3. In addition, counsel pointed out that the conduct of the appellant shows she was innocent. She went to the scene in response to an alarm, and PW5 says the appellant used to care for the children of PW4.

In her judgment at pages 10-11 thereof, the learned judge branded the appellant as a liar. She stated: ***"I believe the accused lied when she denied knowing the name of the deceased who had lived with her for over three years. She also lied when she states that she did not know why the authories wanted to question PW3 on the path near the swamp…….. The blatant lies told in court by the accused also corroborated the prosecution case that she killed the deceased".***

Mr. Kunya submitted that the so-called lies were not proved, and there is no evidence on record to that effect. In his view, the grudges between the mother of the deceased, PW4 and the appellant fabricated the fact that it was the appellant who killed the child. In conclusion, counsel Kunya prayed court for this appeal to be allowed, quash conviction and set aside the sentence.

Mr. Kakooza submitted that the learned trial judge was alive in her judgment at page 9 regarding circumstantial evidence. According to Mr. Kakooza, the theory that the child drowned did not arise. The medical evidence shows that the cause of death was asphyxia due to strangulation. The neck of the child was broken and would twist. The child was bleeding from the mouth. All this PW4 stated in her evidence.

Mr. Kakooza also referred us to the evidence of PW6 who stated that he retrieved the body of the child from water. He saw that the stomach was not bloated, indicating that the child did not swallow water. PW8 also confirmed that piece of evidence.

In fact, it is the contention of Mr. Kakooza that all the ingredients of the offence of murder were proved by the prosecution beyond reasonable doubt. For example, participation of the appellant in the commission of the offence is in the evidence of PW3 whose report was corroborated by the

evidence of his mother, PW4. In conclusion, Mr. Kakooza prayed for the dismissal of this appeal and that we should uphold the conviction and sentence.

Having found that there is merit on ground 2 of this appeal, we do not wish to labour on the issue of circumstantial evidence and evaluation of evidence raised on grounds 1 and 3. However, before we take leave of this case, the appellant should count herself lucky on the ground that the voire dire examination was not done in accordance with the accepted principles and procedure.

In the result, we do allow this appeal, quash conviction and set aside the sentence. We order that the appellant be set free from custody forthwith unless she is detained for any other lawful purpose.

Dated at Kampala this 27th day of August 2009.

S.G. Engwau

JUSTICE OF APPEAL

A. Twinomujuni

JUSTICE OF APPEAL

S.B.K. Kavuma

JUSTICE OF APPEAL