THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL UGANDA, AT KAMPALA

CRIMINAL APPEAL NO. 146/2004

ATTO JACKLINE:::::::::::::::::::::::: APPELLANT

VERSUS

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

CORAM:

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON. JUSTICE S.G. ENGWAU, JA

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

JUDGMENT OF THE COURT.

(Appeal against the decision of the High Court of Uganda at Gulu (A. Kania) dated 9/9/2004 in Criminal Session No. 52 of 2004)

This appeal is against the conviction and death sentence passed by the High Court at Gulu.

The appellant and two others were indicted for the murder of Tracy Lakareber, contrary to **Sections 188 and 189 of the Penal Code Act.**

The following were the facts. The victim was a five year old girl, by the name of Tracy. She was kidnapped, strangled and thrown into a pit latrine by the appellant. The appellant admitted to these facts. She, the appellant, had had a sour history with the father of the victim, Richard Oballim (**PW3)**. The two are former lovers who had lived together. Prior to the victim's death they had been engaged in legal disputes regarding responsibility for the appellant's pregnancy, maintenance and defilement. Subsequently the charge was dropped when PW3 agreed to support the appellant and admitted paternity as well. Their relationship however did not improve.

On the day of the incident, the appellant swore that she would do something to PW3 which he would never forget.

On 24th October 2002, the victim went missing after leaving Holy Rosary Nursery School. Her body was found in the pit latrine at the home of the appellant. It was naked with sanitary pads stuffed into her mouth and a handkerchief tied around the neck. It had cervical fracturing and heavily swollen eyeballs. Her neck was broken and the head could rotate up to 300%. The death was due to strangulation (postmortem report EX PI). The victim's clothes were found in a bag hidden in cupboard in the appellant's home. They were recovered by the police No. 24071 D/CPL Ogwal (PW5) and Obwona Santos retired army officer, PW4 in the company of PW3. The clothes were found prior to the discovery of the body which put the appellant on suspicion.

The appellant was arrested and indicted with her two sisters who were subsequently discharged due to lack of a prima facie case against them. She confessed to the case and put up a defence of provocation which was rejected by the judge. Hence this appeal.

The memorandum of appeal filed on 11th June 2009 comprises 3 grounds, namely:

1. **That the learned trial judge erred in law and fact when he overruled the defence of provocation which was available to the appellant.**
2. **That the learned trial judge erred in law and fact when he failed to adequately evaluate all the material evidence adduced at trial and hence reached an erroneous decision.**
3. **That the learned trial judge erred in law and fact when he sentenced the appellant to suffer death yet she was a minor.**

Mr. Henry Kunya appeared for the appellant while the state was represented by Mr. James Odumbi were, Senior Principal State Attorney (S/PSA).

Mr. Kunya argued grounds 1 and 2 jointly. Ground 3 was argued separately.

Regarding grounds **1** and **2**, Mr. Kunya argued that the defence of provocation was available to the appellant. In his view the appellant laid the ground to what led her to act the way she did which was ill-treatment by PW3. She was also disliked by PW3's mother, who would often refer to her as a prostitute. At the time of committing the offence she could no longer control her anger. Learned counsel submitted that the appellant was too young to control her anger. She committed the offence in the heat of passion. He pointed out that people react differently to difficult situations. She was consistently being tormented by the cruel words used to refer to her by PW3 and his mother. She was mentally tortured. He prayed court to allow grounds **I** and **2.**

Learned Senior Principal State Attorney Mr. Odumbi referred to the appellant's charge and caution statement in which she admitted killing the victim after a litany of events between her and the victim's father, PW3, up to the time of the commission of the offence.

She narrated how PW3 was unsupportive of her and their unborn child. On the day of the killing, PW3 told her that she could throw her unborn child in latrine when she gave birth which (PW3 denied) and that his daughter (the victim) was a "queen". She added that PW3's cousin used to pinch her ears doing the same episode. The appellant admitted to killing the victim but contended she was "infuriated", given her treatment, by the victim's father, PW3. She admitted to throwing the victim in the latrine because that is what the victim's father, PW3, said the accused should do with her unborn child. She was thus purporting to negative malice aforethought.

Malice aforethought is a term of legal art defined by **section 191** of the **Penal Code Act** comprising the following elements:

(1) **Intent to kill, or**

(2) **Knowledge that an act or omission will cause a death; or**

(3) **Knowledge of likelihood accompanied by indifference to whether a death will result.**

Thus, knowledge of likelihood that death will result does not require a specific intent to kill. Malice aforethought is a mental disposition which can be inferred from the accused's actions. Factors viewed in consideration of whether malice aforethought existed include weapons used,

the nature of the injury, parts of the body on which the injuries were occasioned and the conduct of the appellant before and after the offence.

The appellant by testimony set up a provocation defence. However, for this defence to rise to a level of legal adequacy, so as to amount to a defence, the appellant must have committed the offence in the heat of passion when incapable of self control **(Section 192 of the Penal Code).** There must be no cooling off or period of "cool reflection". The defence of provocation if proved negates malice aforethought and mitigates a sentence of murder to the lesser offence of manslaughter

Section 193 of the Penal Code describes provocation as any wrongful act or insult.

In the instant case the appellant described her reasoning, considerations and the events leading up to the victim's death. On the day of the incident, she warned the victim's father, PW3, of her intention to do something he would not forget. Eleven hours passed between her exchange with PW3 and the incident which caused the victim's death.

The appellant said she collected the victim from her nursery school at 1 p.m. The victim came up to her because the victim liked her (this was shortly after the victim had been let out of the nursery school to return home). According to the school administrator Anna Lucy Adwar (PW6), an eleven year old girl had been sent by the appellant to collect the victim on the day of the incident. According to PW6, this girl later admitted to being sent by the appellant.
The appellant said she wanted to throw the victim into a pit latrine on her way home, but there wasn't one thus she took the victim to her home. She dropped her into the latrine at 9.00 pm, according to her testimony.
The appellant stated that she tied the victim's neck so she wouldn't make noise; It was not her intent to strangle the victim. The appellant stated that she was so infuriated that she did not think about the "eventuality of the death" of the victim. She explained that her anger at PW3 coupled with her pregnancy caused her to act that way.

However, we feel that her actions were quite systematic and carefully premeditated. She admitted to preying on the five year old's trust by stating that the little victim rushed to her when

she appeared at her nursery school because the little girl liked her. The threat to PW3 and the callous resolve to throw her in a latrine provide a strong case of premeditation.

It cannot be rationally disputed that by tying a person's neck with a handkerchief stuffing her mouth with sanitary pads, and throwing her into a latrine full of fecal matter would result in death by asphyxiation (this was a five year old certainly unable to physically defend herself against the 19 year old appellant). It is indisputable that there was sufficient knowledge by the appellant that her action/conduct would cause the death of the victim. Again knowledge accompanied by indifference to the death is sufficient to found malice aforethought. Granted that PW3 and his family members verbally insulted her and may be punched her ears if at all they did, nonetheless these wrongful acts would not cause a normal ordinary person to react in the way the appellant did. She did not kill PW3 or any of the other adult family members who had annoyed/angered her but an innocent five year old who did nothing to provoke the appellant.

Ground No. 3 that the appellant was a minor at the time she committed the offence, was not substantiated at all. We have no doubt that this was a mere desperate attempt to clutch at straws.

In the totality of the facts above, the appeal should have been summarily dismissed. The appellant's actions were most heinous and eerie. We cannot agree that adequate provocation can be found in the facts stated.

The maximum death penalty is most deserved.

Dated at Kampala this 6th day of October 2009

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE
JUSTICE OF APPEAL

HON. JUSTICE S.G. ENGWAU
JUSTICE OF APPEAL

HON. JUSTICE S.B.K. KAVUMA

JUSTICE OF APPEAL

5