THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT GULU

Coram **Hon Justice Amos Twinomujuni, JA**
Hon Justice S.B.K Kavuma , JA
Hon Justice A.S. Nshimye, JA

CRIMINAL APPEAL N0. 51 OF 2006

ARISING FROM THE JUDGMENT OF HON JUSTICE AUGUSTUS KANIA OF 4/12/2006 IN HIGH COURT CRIMINAL SESSION CASE N0. 003/2006 SITTING AT ARUA.

FENI YASIN ::APPELLANT

VERSUS

UGANDA ::RESPONDENT

JUDGMENT OF THE COURT

The appellant, Feni Yasin, was found guilty of murder contrary to sections 188 and 189 of the Penal Code Act by the High Court sitting at Arua and sentenced to death. He appeals against the said conviction and sentence.

The following were the brief facts as accepted by the trial Court.

The appellant aged 35 years, was being accommodated in the house of his step grandmother Omaru Mariam (70) (deceased). At around 8:00pm on 9th of December 2002, at Ogayi village, Muni in Arua District the appellant returned home where he found the deceased and other members of the homestead. The deceased asked him

why he had returned late. The appellant replied that he did not wish to talk to her, because she had criticised him and Magezi for bringing maize and beans which caused her heart burn. The deceased denied having said so.

The appellant then kicked her violently on the chest and stomach three times. As if that was not enough, he picked a dry piece of wood and beat her in the chest and stomach several times. She cried for mercy but the appellant could not stop. He scared away members of the homestead who tried to come to her rescue. She slowly crawled to her house and the appellant closed the door. Members of the family reported the incident to police who immediately responded. By the time the door of the house of the deceased was opened, she was already dead. The appellant, after demonstrating violence, was arrested and charged with the murder of the deceased. He denied the charge but claimed that she had died of a natural cause. After hearing both the prosecution evidence and that of the defence the trial judge and the assessor rejected the defence and accepted the evidence of the prosecution.

The appellant appealed to this Court on two grounds namely:

1. ***That the trial judge erred in law and fact when he denied that the accused was positively identified without mistake or error.***

2. ***That the trial judge erred in law and fact when in evaluation of the evidence adduced at the trial he misdirected himself on the defences of intoxication.***

When the appeal came up for hearing before us, Mr Oyet had instructions to represent the appellant on State brief, while his senior colleague Mr. Vincent Okwang a Senior Principal State Attorney represented the State/Respondent.

Before commencement, Mr. Oyet sought leave of this Court under Rule 45(1) of the Rules of this Court, to amend the memorandum of appeal. We granted him leave to do so since Mr. Okwang did not oppose the application. The two new grounds of appeal read:

1. ***Whether the trial judge had correctly dealt with the defence of provocation.***

2. ***Whether the trial judge had correctly dealt with the defence of intoxication.***

Even then, counsel agreed that the two grounds could be reduced to only one namely:

> ***"That the learned trial judge erred in not correctly considering the defences of provocation and intoxication."***

We readily warned counsel for the appellant of the effect of the amendment that, the appellant had shifted from his original defence at his trial, that he did not cause the death of the deceased. He was now admitting that he caused the death of the deceased but was entitled to benefit from the defences of provocation and intoxication. Counsel confirmed that, that was so.

Mr. Oyet preferred to argue provocation and intoxication together. He referred us to the evidence of P.W.3, Masudi Hassan, who stated that it appeared to him that the appellant was drunk, yet that of P.W.I Aluma Ronny was that he was not drunk, although at times he drinks. Then, there was the evidence of P.W.4 N0. 26322 P/C Angurai Silvano who stated that the appellant resisted arrest but was overpowered.

Looking at all that evidence together, he criticised the learned trial judge for concluding in his judgment that the defence of intoxication was not available to him. He referred us to the **Supreme Court Cr. Appl N0. 35/2003 Kiyengo Vs Uganda [2005] 2 EA 106.**

To him, given the evidence of P.W.3 and P.W.4, the arresting officer, the Court should have availed the appellant the defence of intoxication.

Turning to provocation, counsel argued that the trial judge should have found provocation in the evidence of P.W. I who stated that the appellant ordered the deceased not to talk to him because, the deceased had defamed him over beans. That she had said the beans he and Magezi used to bring home caused her heart burn. In

counsel's view, the trial judge should have considered the above evidence in his judgment as provocation.

He again referred us to a case of the Court of Appeal of Tanzania **Philibert Vs R [1976-1985] 1EA 477.**

In that case, the accused threatened to expel the deceased's children from school for having jiggers. The deceased reminded him that he also had jiggers during his school days. That reply angered him and he stabbed the deceased to death. Counsel in that case urged the Court of appeal to find that the appellant was provoked.

Counsel also cited the case of **Yovan Vs Uganda [1970]1EA 405** a decision of this Court in which a defence of provocation was considered. In his view, if the trial judge had properly considered the two defences, he would have found the appellant guilty of manslaughter. He asked us to allow the appeal, quash the conviction of murder and set aside the death sentence and substitute a conviction of manslaughter.

In the event we upheld the conviction, counsel submitted that in view of the decision of the Supreme Court in the case of **Attorney General Vs Suzan Kigula and 417 others,** we ought to hear the appellant on mitigation of sentence.

Mr. Oyet stated that:

1. The appellant was 48 years.
2. He was a first offender.
3. He was on remand for 4 years before conviction.
4. He is a married man with 5 children.

He pleaded that we should find the above mitigating factors weighing in favour of the appellant and vary the death sentence to a custodial sentence.

In reply, Mr. Okwang Vincent did not agree. In his view, the trial judge was right. There was overwhelming evidence that it was the appellant who committed the offence. In the memorandum of appeal the appellant was not any more denying having caused the death of the deceased.

On intoxication, Mr. Okwang stated that the defence of intoxication was not available to the appellant and he did not raise it in his defence. However, the learned trial judge carefully considered the defence in his judgment and found none. Secondly, the conduct of the appellant before and after did not show a man who did not know what he was doing. He invited us to re-evaluate the evidence as a 1st appellate court and come to our own conclusion.

On provocation, counsel submitted that considering an ordinary person of the appellant's status in life, provocation is not available. He posed a question, "what did the deceased do that provoked the appellant"? The deceased did not say anything about beans that day, counsel concluded.

In his view, since there was no evidence of provocation on record, for the trial judge to consider, the court therefore cannot be faulted.

On mitigation of sentence, he invited us to consider that the deceased was like a natural mother and had accommodated him for 1½ years. This was not a case boardlining an accident. He invited us to find no favourable mitigating factors and not to interfere with the death sentence. Finally he prayed that in totality the appeal be dismissed.

In a quick reply Mr. Oyet stated once the defence of intoxication emerged from the evidence, the trial judge should have decided whether the appellant had capacity of forming the intention to kill.

We have considered the submissions of both counsel and read the record and authorities referred to us.

Notwithstanding that, the appellant narrowed his appeal to the issue of availability of defences of intoxication and provocation. In the course of executing our duty of re-valuating the whole evidence under rule 30 of the Rules of this Court as a 1st appellate court, we have found nothing to fault the learned trial judge in his findings on the proof of the essential ingredients of the offence charged.

Section 12 of the Penal Code Act defines the defence of intoxication. It provides:-

12 intoxication

(1) Except as provided in this section, intoxication shall not constitute a defence.

(2) intoxication shall be a defence to any criminal charge if by reason of the intoxication the person charged at the time of the Act or omission complained of did not know that the act or omission was wrong or did not know what he or she was doing.

(a) the state of intoxication was caused without his or her consent or by malicious or negligent act of another person; or

(b) The person charged was by reason of intoxication insane, temporarily or otherwise. (emphasis is mine)

The appellant did not raise the defence of intoxication. However the trial judge was alive and obliged to consider it when it faintly emerged from the evidence of P.W.3 who stated during cross examination that ***"It appears the accused was at that time drunk."***

We find that P.W.3 was merely expressing an opinion. There was no clear evidence that the appellant was drunk and to what extent. The trial judge considered intoxication and stated as follows at page 19-20 of his judgment

"In the instant case the evidence about drinking is that of P.W.I Ronny Alema where he testified that that night the accused was not drunk. He also stated that at times the accused drinks and at other times he does not drink.

Another piece of evidence on this point is that of P.W.3 Masudi Hassan where he testified that it appeared that the accused was drunk.

There is no evidence in the instant case that the accused was under the influence of drink or that he had been drinking like in the case Mr. Odongo cited. Whatever is there about the state of drunkenness is the opinion of the witness and not evidence. In the circumstances this defence is not available to the accused".

We agree with his finding and wish to quote from the case of **Philibert V R (Supra**) cited by counsel for the appellant in which the justices of the Court of Appeal of Tanzania approved an observation of the trial court thus:-

"Mere drinking does not count in law otherwise many killers would get off by arming themselves with alcohol before they go on their murderous missions"

We can't find better words to express our view than the above which we endorse. In the instant case, there was no evidence of drinking. Not even from the horse's mouth, the appellant. Even if he had been drinking, which could have been the basis of P.W.3's opinion, there is no evidence that he was so drunk that he did not know what he was doing within the meaning of section 12(2) of the Penal Code Act. Like the trial judge, we also find that the defence of intoxication was not available to him.

We now turn to provocation. It is defined by section 193 of the Penal Code Act.

Provocation 193(1)

Means and includes, except as stated in subsections (3) to (5) any wrongful act or insult of such a nature as to be likely:

(a) ***when done or offered to an ordinary person or***

(b) ***When done or offered in the presence of an ordinary person to another.***

(i)……

(ii)……to deprive him or her of the power of self control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered. (underling is mine)

From the above definition, the court has to apply is an objective test of an ordinary person in the locality of the appellant.

In the same manner as counsel for the state questioned, what did the deceased say to the appellant that deprived him of his power of self control?. There is no evidence on record that the deceased said any thing provocative before she was brutally murdered. If at all she said that the appellant and Magezi brought beans that caused her heart burn, would that cause an ordinary person from Ogayi village in Arua District to loose his or her temper to the extent of killing a person? To us the answer is no.

We find that the deceased did not say any thing provocative to the appellant before she was attacked. We do not fault the finding of the trial judge that the defence of legal provocation was not available to the appellant. We disallow the ground on provocation.

In light of the decision of the **Attorney General Vs Suzan Kigula & 417 others (supra)** we allowed the appellant to plead before us in mitigation of his sentence.

We have considered the mitigating and aggravating factors advanced for and against variation of the death sentence. The appellant brutally killed his 70 year old step grandmother who had been generous to accommodate him for 1½ years. He did so with out provocation of any nature other than asking him why he was late. The deceased at her age was like an egg shell. Kicking her violently so many times and beating her in the chest and stomach was a sure way of sending her unwillingly and prematurely to her creator.

Although the appellant is presented as having a family of 5 children, we are not sure. Otherwise why was he being accommodated alone in the house of the deceased?

We find no good reason to interfere with the death sentence which was lawful. The plea in mitigation is denied.

In the final analysis, the whole appeal is dismissed.

Dated at **Gulu** this **28th day of June 2010**.

A. TWINOMUJUNI
JUSTICE OF APPEAL

S.B.K. KAVUMA
JUSTICE OF APPEAL

A.S. NSHIMYE
JUSTICE OF APPEAL