THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CORAM: HON. JUSTICE A. TWINOMUJUNI, JA

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

HON. JUSTICE M. S. ARACH AMOKO, JA

CRIMINAL APPEAL NO. 4 OF 2003

[Appeal from the conviction and sentence by His Lordship V. T. ZEHURIKIZE at the High Court of Uganda Fort Portal dated 6th January 2003 in criminal session case No. 011 of 2002]

1. **BAHEMUKA WILLIAM**
2. **ABIGABA CLOVIS ::::::::::::::::APPELLANTS**

VERSUS

UGANDA ::RESPONDENT

Criminal law – murder – defence – self defence **– sentence –** whether death sentence excessive **– evidence – identification –** conditions favouring correct identification – conduct of the accused person immediately after commission of the offence.

The two accused persons were indicted for murder contrary to sections 123 &124 of the Penal Code. Each of them was convicted and sentenced to death. They both appealed against conviction and sentence.

Held (1) His conduct of running away from the village soon after the incident is also inconsistent with the conduct of an innocent man. Although he was aware of the death of the deceased, and he even stated that he kept vigil at the home of PW2, he never attended the burial. He stated that he was instead grazing his cows on the day of the burial.

(2) Regarding the third ground of appeal, we find that sentence is not harsh in the circumstances of this case. The grisly and barbaric manner in which they murdered the deceased deserves a deterrent sentence. There were no mitigating factors to warrant a lesser sentence.

JUDGMENT OF THE COURT

The two appellants, Bahemuka William and Abigaba Clovis (hereinafter referred to as "A1" and "A2" respectively), were convicted by the High Court at Fort Portal of Murder contrary to sections 183 and 184 of the Penal Code and were sentenced to death. They have now appealed to the Court of Appeal against both the conviction and sentence.

According to the indictment, the appellants and one other still at large, on the 9th of March 2001 at Rubona Village, Butiiti Sub-county, in Kyenjojo District, murdered Kiiza Tereza.

The prosecution's case was that on the 9th March 2001, at about 9:00 p.m. Karoli Rwabogo (PW2) was at home with his wife Tereza Kiiza (the deceased) and their children, when the Appellants together with one Kusemererwa attacked them and beat PW2 severely until he was unconscious. They then pulled PW2 out of the house and threatened to pour cold water over him. When the deceased heard that, she came out of hiding and made an alarm. That is when the attackers grabbed her and took her away and killed her. The body was discovered near the home of A1 the following day.

A1 reported himself to the Police after several days, he was arrested and charged with the murder of the deceased.

A2 was arrested after nearly two weeks and was also charged.

At the trial, A1 admitted that he killed the deceased but in self defence. His defence is that on that day, he found the deceased and her children picking mushrooms from his land. He reported them to the LC Chairman. That because of that incident, PW2, the deceased and their children had attacked him at his home on the night in question. He defended himself during which the deceased was killed.

A2 denied the charge and stated that he only went to the home of A1 that night when he heard that they were fighting and he went to intervene to stop them from fighting. When he failed, he returned to his home.

The trial judge believed the prosecution evidence and dismissed the defence as lies. He convicted the Appellants as charged and sentenced both of them to death.

According to the Memorandum of appeal, the grounds of appeal are that:

1. **The trial judge erred in law and fact when he convicted Bahemuka William (A1) of the offence of murder without taking into consideration his defence of self defence.**
2. **The learned trial judge erred in law and fact when he convicted Abigaba Clovis (A2) of the offence of murder as a joint offender with Bahemuka William (A1) who admitted the offence and never implicated Abigaba Clovis (A2) as an accomplice in the crime.**
3. **The sentence imposed on the appellants was excessive in the circumstances.**

In his submissions On the first ground of appeal, Mr. Deogratious Bango Bezire, learned Counsel for the appellants conceded that the learned trial judge did take into account the defence of self defence put up by A1. He contended, however, that the learned trial judge dismissed that defence for the wrong reasons.

According to him, what should be considered is the scene of the fracas, that is, whether the scuffle or fight took place at the home of A1 or at that of PW 2. Judging from where the body of the deceased was found, that is, near the home of A1, that is where the scuffle took place.

Secondly, A1 should have been believed when he testified that he never went to the home of PW2 that night. A1 told court that there was a background to the attack over picking mushrooms from his land. That he had complained to them and they had reacted by threatening to attack him. So in the night, that was the second attempt. That they struggled over the spear that PW2 had brought with him to attack him. He admits having also hit someone. This is how the deceased came to be hit in the darkness. Faced with this attack by several members of that family, he had no choice but to put up a defence. His story is consistent with the charge and caution statement which is even more detailed about the cause of the attack. He narrates how he was provoked over the mushrooms. He says he did not know whom he was hitting in darkness. Also the husband of the deceased could have hit her.

Thirdly, somewhere in the judgment the learned judge talked about scalds on the deceased but this remains mysterious since the evidence is not clear as to who inflicted them. It is speculative. In the circumstances, the evidence shows that the attack was at the home of A1 and he could have used the spear which is normal for an African man to protect himself at night. The evidence also shows that more people were coming and he feared they were coming to re-enforce the attackers, so he was trying to defend himself. The learned judge went far. Witnesses don't recall facts with mathematical precision, one witness may recall some facts and another may recall something else. Even in the Bible, you find some synoptic facts which are agreed and others which are not agreed.

Lastly, the accused's conduct was not that of a guilty man. He reported himself to the Police. Earlier on he had tried to report to the LC 1 Chairman, but the LC insisted on money. His conduct is, therefore, of a law abiding person. The LC 1 Chairman was a brother to PW2, so, a conspiracy cannot be ruled out.

Mr. Okwanga Vincent learned Counsel for the Respondent submitted that the defence of self defence is not available to A1 at all because:

He admitted killing the deceased and the evidence on record does not point to the fact that the deceased was killed in self defence.

Conditions were favourable for the proper identification of the appellants. They were not strangers to the family of PW2. A1 is a biological son of PW2. A2 is a maternal uncle to A1 and a brother in law to PW2. The deceased was a step mother to A1.

The injuries do not show that the killing was accidental or in self defence. According to PW2 they killed her in a most barbaric manner, they speared her through the anus. This must have been someone who was lying down helpless.

The attack was not at the home of A1. It was at the home of the deceased's husband. She had raised an alarm when she heard what the Appellants were saying. The appellants poured all the vengeance on her when she made the alarm.

PW2 said he never attacked the Appellants. Why would a 70 year old man attack his own son? He didn't have a reason to hate his son. PW2 also said there was blood on his veranda. This piece of evidence went unchallenged.

A1 did it with pre-meditated malice. There was no imminent threat to A1. It is not shown anywhere that the deceased went to A1's home or was armed.

The force used in self defence must be proportionate to the force used by the attackers. There is overwhelming evidence to support the prosecution case. The learned judge directed his mind properly.

In respect to the second ground of appeal, Mr. Bazire submitted that the story of A2 was that he was a Good Samaritan who went to solve problems happening to a neighbour. His defence should have been seen through that instead of being called a liar. He didn't run away. He continued with his business until they found him tending to his cows. He also went to the scene of the attack which was A1's home and not at the home of PW2.

In reply, Mr. Okwanga submitted that there is overwhelming evidence that A2 was well known to PW2. He was his brother in law. Therefore, there is no question of mistaken identity when PW2 said they are the people who attacked him. They had a motive. They wanted to rob PW2's money. There was evidence that he had sold some jerrycans of waragi that day. The deceased had raised an alarm which distracted them from carrying out their mission because neighbours would come.

Further, the fact that PW2 had separated with his first wife, mother to A1 and sister to A2 confirms that they had a grudge.

The defence that he was a good Samaritan does not hold if you view the evidence from both sides. He said he took long after hearing the commotion.

The house of A1 is near the one of A2. A2 all along shared the same intention with A1. He is thus fully implicated under the doctrine of common intention. He was not an innocent by-stander. Section 20 of the Penal Code Act is very clear.

On the third and last ground of appeal, Mr. Bezire submitted that in view of the defence, the conviction should be quashed and set aside. In the unlikely event that Court finds evidence, Court should consider conviction for a lesser offence and reduce the sentence accordingly.

Mr. Okwanga supported the sentence on the ground that although it could have been harsh, it was not excessive in the circumstances. Death penalty is still legal in our statutes and it is the maximum sentence on conviction of murder.

Secondly, there were no mitigating factors. The deceased was well known to the appellants. She was related to them. The manner in which the murder was committed was barbaric. Killing a human being is bad enough. But somebody who has the intention of tormenting the dead goes even beyond. Therefore, there were circumstances which made the trial judge pass this sentence. Court should not disturb the sentence.

As a first appellate Court, this Court is under a duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate it and make its own conclusion, while bearing in mind the fact that the Court never observed the witnesses under cross-examination so as to test their veracity. **See: Sanyu Lwanga Musoke Vs Galiwango SCCA No. 48 of 1995. (Un reported).**

In the present case, we find on the first ground that the learned trial Judge took into consideration the defence of self defence put forward by A1. We agree with him that the defence is not available.

In other words we support the findings of the trial judge that the incident took place at the home of PW2. The appellants attacked his home on the evening in question, beat him up unconscious and when the wife who was in hiding heard them saying that they were going to pour cold water on him, she came out her hiding place. They grabbed her, beat her up and eventually murdered her near the home of A1 where her body was found.

We do not accept the evidence of A1. There are major contradictions in the testimony of A1. For instance in his charge and caution statement, he stated that on the 9th March 2001, he found the deceased with her children on his land picking mushrooms. He wanted to arrest them but they ran away, and he arrested one child called Birungi whom he took to the

Chairperson LC 1 and reported a case of theft of mushrooms. He left the child there and went home. In his testimony in Court he never mentioned arresting Birungi or leaving her at the home of the LC 1 Chairman.

The LC 1 Chairman Fortunate Kaijabuhoire who testified as PW8 never said that A1 had reported a case to him of theft of mushrooms on that day or had arrested and taken to him a child called Birungi from the home of the deceased and PW2. Therefore, the learned trial judge was right when he found that the stealing of mushrooms was fabricated by A1.

Further, the injuries on her body were too extensive. PW 6 who was the Clinical Officer who carried out the Post Mortem on the body stated that he found the body lying proper and had scalds and bruises. The clothes were soiled. There were also fractures. Death was due to hyterracania caused by severe pain due to scalds, bruises, and fractures caused by a blunt trauma. The deceased was traumatised so much that the interfimine appearance had changed.

His evidence corroborated that of PW2 who stated that the appellants poured boiling water on the body and speared her through the anus.

It is also inconceivable that all these injuries could have been inflicted on the deceased if the fight took place at the home of A1 with all those people present and fighting at the same time. This is evidence of a deliberate and wanton torture of a helpless woman by three strong and able bodied young men, namely the appellants. It is proof of malice aforethought. Ground 1 fails for the above reasons.

As for ground two, we find that the learned trial judge was right to hold that the appellants had a common intention; which was to rob PW2 of the money from the sale of his waragi. His conduct of running away from the village soon after the incident is also inconsistent with the conduct of an innocent man. Although he was aware of the death of the deceased, and he even stated that he kept vigil at the home of PW2, he never attended the burial. He stated that he was instead grazing his cows on the day of the burial.

A2 was very close to A1. They drank waragi the following day together first at the road side then on a hill before disappearing. There is no law that requires a co-accused to implicate an

accused before he can be convicted of a crime. He can be convicted as long as there is ample evidence to connect him to the crime.

Regarding the third ground of appeal, we find that sentence is not harsh in the circumstances of this case. The grisly and barbaric manner in which they murdered the deceased deserves a deterrent sentence. There were no mitigating factors to warrant a lesser sentence.

In conclusion, we agree with Mr. Okwanga that the appellants have not made out a case to justify interference with the conviction and sentence meted out by the learned trial judge to them.

For that reason, this appeal stands dismissed.

Dated at Mbarara this...**15th** ...day of .....**November**.....2010

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HON. JUSTICE A. TWINOMUJUNI

JUSTICE OF APPEAL

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HON. JUSTICE S. B. K. KAVUMA

JUSTICE OF APPEAL

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HON. JUSTICE M. S. ARACH AMOKO

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