

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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**CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE .A TWINOMUJUNI, JA
HON. JUSTICE C.K. BYAMUGISHA, JA**

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CRIMINAL APPEAL NO.26 OF 2008

TUMUHAIRWE JONAH.....APPELLANT

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V E R S U S

UGANDA.....RESPONDENT

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**(Appeal from the judgment and orders of
the High Court of Uganda at Mbarara (P.K. Mugamba, J)
dated 7th May 2008 in HCT-05-CR-SCS No.81 of 2006)**

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JUDGMENT OF THE COURT:

This is an appeal from the judgment of the High Court of Uganda sitting at Mbarara in which the appellant was convicted and sentenced on an indictment of murder. The appellant was originally indicted of the offence with three others. The three were later acquitted.

The brief background to this case is as follows: The deceased Edgar Mwijukye lived in Kakoni village, Buremba sub-county, in Mbarara District with his wife Tumuhairwe Joan (A1), Justus Kameroho (A2) Muhumuza Richard (A3) and Mutungi Robert (A4). On the night of the 30th September 2004 at about 7.00 p.m. the deceased left Kanyarugiri Trading Centre accompanied by Justus Kameraho (A2) while going home. The two later parted company going to their respective homes and the deceased went to the home of his first wife, the appellant. The following day on the 1st October 2004, the deceased went missing where upon A2 went to look for him at his home. On 2nd October 2004, A2 together with some residents of the village gathered at the home of the appellant to search for the deceased. On the 3rd October

2004, the body of the deceased was discovered 3 kilometres away in a bush with a cut wound on the throat. The appellant rushed to Kazo Police Post and reported herself for having murdered the deceased where she also revealed the participants in the murder as A2, A3 and A4. They were indicted with the offence of murder. The
5 appellant was convicted and sentenced to death while A2, A3 and A4 were acquitted and set free. It is upon this conviction and sentence that the appellant appeals to this court.

The memorandum of appeal contains eleven grounds of appeal as follows.

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1. **The learned trial judge erred in law and fact when he found that the appellant did not disclose the identity of the person responsible for killing her husband one Mr. Edgar Mwijukye, deceased.**
2. **The learned trial judge erred in law and fact when he believed and relied
15 on the contents of the police report allegedly made by the appellant at Kazoo Police Post to find that she murdered the husband.**
3. **The learned trial judge erred in law and fact when he admitted exhibits to wit; the mattress, exhibit p.11, dress p.12, and blood sample exhibit p.13 without establishing the chain of evidence.**
- 20 4. **The learned trial judge erred in law and fact when he admitted contradictory evidence of the sketch plans of the scene of crime.**
5. **The learned trial judge erred in law and fact when he allowed Mr. Ruhindi Nguruye (Advocate) to conduct and or continue the defence case of the appellant and that of the co-accused who put forward conflicting
25 evidence/defence case adverse to that of the appellant.**
6. **The learned trial judge erred in law and fact when he found that the appellant did not report to the authorities the death of her deceased husband, Edgar Mwijukye.**
7. **The trial judge erred in law and fact when he failed to afford the
30 appellant the opportunity of proper representation and her right to cross-examine her co-accused.**
8. **The learned trial judge erred in law and fact when he came to a finding and held that the deceased was killed by none other than the appellant herself.**

9. The learned trial judge erred in law and fact when he did not correctly study and evaluate the evidence on record before making conclusions which failure led to a miscarriage of justice.

5 10. The learned trial judge erred in law to hold that the only punishment allowed for murder by law is death.

11. The learned trial judge erred in law and fact when he handed a very harsh sentence on the appellant.

The appellant prays that the appeal be allowed, the conviction and sentence be set
10 aside and be substituted with an acquittal.

The duty of a first appellate court, as ours, is spelt out in Rule 30 of the Judicature Act (Court of Appeal Rules) Directions, S.1 13-10 as follows:

15 “(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may –

- a) re-appraise the evidence and draw inferences of; and fact
- b)

The Supreme Court of Uganda in the case of Kifamunte Henry vs Uganda Criminal
20 Appeal No.10 of 1997 articulated the duty of a first appellate court as follows:

25 “We agree that on first appeal, from a conviction by the judge the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to rehear the case and to consider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed other than another and that question turns on demeanour, the
30 appellate court must be guided by the impressions made on the judge who saw the witness, but there may be other circumstances quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court in differing from the judge even on a

question of fact turning on credibility of witness which the appellate court has not seen.

5 **See: Pandya vs R (1957) E.A. 336 at page 338 and Okeno vs Republic (1972) E.A. 32 Charles B. Bitwire vs Uganda S.C.C.A No.23 of 1985 at p.5.”**

10 We will now consider and re-evaluate all the evidence which was adduced before the trial court and, bearing in mind that we did not have the opportunity, like the trial court, to see the witnesses as they gave their evidence in court, we must make a finding of our own whether the decision of the trial court can be supported.

15 Grounds No.8 and 9 of the memorandum of appeal invite us directly to re-appraise and re-evaluate all the evidence which was before the learned trial judge. In doing so, we propose to consider all the evidence adduced by both sides, the submissions of counsel and the conclusions of the learned trial judge. We propose to begin our appraisal on grounds 8 and 9 of the memorandum of appeal.

GROUND NO.8 AND 9

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For ease of reference, we reproduce the two grounds here below:-

25 **8. The learned trial judge erred in law and fact when he came to a finding and held that the deceased was killed by none other than the appellant herself.**

9. The learned trial judge erred in law and fact when he did not correctly study and evaluate the evidence on record before making conclusions which failure led to a miscarriage of justice.

30 Mr. Kandebe, learned counsel for the appellant criticised the trial judge for the following:

- (a) Failure to evaluate evidence.
- (b) Admission of exhibits contrary to the rules of evidence.

- (c) Reliance on inadmissible evidence.
- (d) Failure to accord the appellant proper legal representation.

Before convicting the appellant, the learned trial judge made the following finding:-

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“Regarding A1 the appellant there is evidence that she went to Kazo Police Post and reported herself to have killed her husband. When A.2 and others went to her house looking for the deceased A.1 did not come out clearly and state that her husband was dead. Instead she ran away. If her husband had been killed by someone else one would have expected her to report that person to the authorities. She never did. I am satisfied the deceased was killed by no other than A.1 herself. A.1 did participate in the alleged offence and the prosecution has succeeded in proving this ingredient beyond reasonable doubt.”

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It is evident from these findings that the appellant was convicted because:-

- (a) She reported herself to have killed her husband.
- (b) She did not report the death of her husband.
- (c) When the body was discovered she ran away.
- (d) She did not name the person who killed her husband.

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It is clear to us that the main reason why the appellant was convicted was because she, after the discovery of her husband’s body, went to the Police Post and reported that she killed her husband. The learned trial judge treated this as a confession and placed a lot of reliance on it to convict the appellant. However, at the trial, the appellant denied that she told the police that she had killed her husband. It is now necessary to examine whether the appellant confessed to the crime or not.

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PW8 D/Sgt Musunguzi James testified that on 2nd October 2004 the appellant reported at Kazo Police Post and told her in a first information that she had killed her husband on the night of 30th September 4004. He simply recorded that information as “first information”. He never took her to a senior police officer to record a charge and caution statement in accordance with the law. The first information was admitted in evidence as Exhibit P.9. Section 23(1) of the Evidence Act provides:-

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“No confession made by any person while he or she is in custody of a police officer shall be proved against such a person unless it is made in the immediate presence of

(a) a police officer of the rank of Assistant Inspector, or

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(b) a magistrate.”

Even assuming that the appellant actually confessed to PW8 that she had killed her husband, such a confession could not be proved against her because PW8 was not of or above the rank of Assistant Inspector nor was he a Magistrate. It would also need to be corroborated in material particulars since it was retracted by the appellant. We have not been able to find any evidence that could provide such corroboration to the alleged confession.

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In her own unsworn statement at the trial she made the following explanation of what happened:-

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“I did not commit the offence. The deceased was my husband. On the evening of his death 20th September 2004 he was not at home. There was a brother of his called Asiimwe Innocent who used to sleep at our home when my husband was absent. I was sleeping with him at about 10.00 p.m. when we heard someone knock on the door. I wondered what to do. I thought the person who knocked was my husband. He said I should go and open for the person knocking (Asiimwe said). When I went to open Asiimwe went behind the door of the bedroom. I opened for my husband and then I went to ease myself outside. On my return I found they were fighting in the room. My husband was drunk at the time. As my husband was drunk Asiimwe dropped him on the floor. Asiimwe used to move with a knife. He said it was for his security as he moved at night. He was on top of my husband and he cut him. I did not know what to do then. Asiimwe said he wanted to go outside for a while. He went out and left me in the house. He shut the door.

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A few minutes later I heard people talking outside. They opened and found me in the house. These people he came with I did not know. When I asked him he said he got them from his elder brother’s home to come

and assist him. He said I should not say anything if I was not to suffer. They lifted the body and took it away to a place I did not know. He later returned alone and again reminded me against mentioning the incident. I kept quiet wondering what to do. I know I would be killed if I revealed what happened.

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Next day I was at home when the relatives of deceased came and asked me the whereabouts of the deceased. I did not know what to do. I told them later that the deceased was dead. They asked me how he had met his death. I told them how he had come home drunk the previous night and fought with his brother whom he found in the house. The brother had killed him. They told me to keep quiet and that having lost one person they did not want to lose another in the same family. I did not know what to do. They started harassing me that I was the one who killed their relative. When I saw things had turned that way I went to Police at Kazoo told them my husband had died. Police detained me and later took me to Ibanda.”

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In this statement, the appellant admits that she was sleeping with one Innocent Asiimwe, the cousin of the deceased, when the deceased came home. That there was a quarrel between the two which led Asiimwe to kill her husband with a knife. That she, Asiimwe and other participated in the disposal of the body and that when she sensed that relatives of the deceased would kill her, she ran away to Kazo Police Post to report. The prosecution did not make any attempt to disprove this plausible story. It solely relied on the alleged confession which is not admissible in law. It is amazing that a person making such a confession would simply be put in jail without recording a proper statement from him or her. The alleged statement was recorded without caution and it is not signed by the appellant.

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The appellant also explained why she had to run away from home. It was not a sign of guilt, as the trial judge seems to have found but to escape being harmed or killed.

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Both herself and A2, who is known to have been a great friend of the deceased, seem to suggest that there was a sexual affair with one Innocent Asiimwe during which the deceased found them in action. That could as well be true given the way the appellant

seems to have taken pains not to implicate him and in fact to protect him. She could, even if she had implicated herself, have done so to protect her lover. However, she had no duty to disclose the killer of her husband and it is the responsibility of the prosecution to prove that she was actually the killer of her husband. Looking at the evidence the trial judge relied on, it did not prove beyond reasonable doubt that the appellant had killed the deceased. It did not disprove the possibility that it was Innocent Asimwe who did it. This finding also takes care of arguments of both counsel on grounds No.1 and 6.

10 OTHER GROUNDS OF APPEAL

There is merit in Mr. Kandebe's arguments on grounds No.3, 4, 5, and 7. However, many matters raised therein were not relied upon by the trial judge to convict the appellant. It is also true that counsel who defended the accused persons in the High Court had a problem of representing accused persons with conflicting interests. As a result, the appellant was not ably represented and in some cases badly represented. This too could have justified this court to quash the conviction.

In the result, in light of our findings that the trial judge relied on inadmissible evidence to convict the appellant, we find that in absence of that evidence, he would not have convicted the appellant. The trial judge also failed to consider the defence of the appellant thus failing to properly evaluate the evidence which resulted into a wrong conviction. The conviction is hereby quashed and the sentence of death is set aside. The appellant will be set free immediately unless held on other lawful charges.

25 Dated at Kampala this 15th day of February 2010.

Hon. Justice A.E.N. Mpagi-Bahigeine
JUSTICE OF APPEAL.

30 Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL.

Hon. Justice C.K. Byamugisha
JUSTICE OF APPEAL.