THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 130 OF 2009

(ARISING OUT OF CRIMINAL SESSION CASE NO. HCT-05-CR-SC-140 OF 2006)

KIBIRIGE HABIBU ::

APPELLANT

VERSUS

UGANDA ::

RESPONDENT

(Appeal From a conviction and sentence of the High Court of Uganda holden at Mbarara [Yorokamu Bamwine J] on June 5, 2009)

CORAM:
HONOURABLE JUSTICE REMMY K KASULE, JA
HONOURABLE JUSTICE SOLOMY BALUNGI BOSSA, JA
HONOURABLE JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT OF THE COURT

The appellant was convicted of murder of a girl of about 9 months ***c/s 188 and 189 of the Penal Code Act*** and sentenced to life imprisonment. He appealed on two grounds:

1. The learned trial Judge erred in law and fact when he failed to evaluate the evidence on record thereby reaching a wrong conclusion.
2. Without prejudice to the foregoing the trial Judge erred in law when he sentenced the appellant to life imprisonment when it was excessive in the circumstances.

Learned Counsel William Byansi Principal State Attorney represented the State, while Nakamate Esther represented the Appellant.

Submissions of Counsel for the appellant

Counsel for the appellant argued that it was not disputed that the appellant murdered the deceased. He admitted to this in his own evidence at page 24 of the record of proceedings. According to her, the issue is whether at the time of committing the crime he was mentally fit. Counsel relied on the evidence of various prosecution witnesses that showed that the appellant had a mental problem in the past. PW2 described him as quiet while PW3 stated that he had developed anti-social behavior. The Local Council 1 Secretary stated that he appeared not to be of sound mind. Even the appellant stated that he had mental problems. The Doctor's evidence (PW1) also brought out an element of unsoundness of mind.

Counsel referred to ***sections 10 and 11 of the Penal Code Act*** and concluded that from the evidence, when the appellant committed the crime, he was not of sound mind. She also referred to page 9 of the record where the learned trial judge cited the lack of evidence on record supporting the alleged defense of insanity. She submitted that there was no evidence on record of any examination of the convict by a psychiatric doctor. She prayed that the appellant should be acquitted for having been of unsound mind at the time he committed the offence. Having had diminished responsibility, the learned trial Judge should have ordered for him to be detained in safe custody under ***sections 194 of the Penal Code Act*** and ***105 of the Trial on Indictments Act***. The onus was on the learned trial Judge to seek an order from

the Minister for the convict to be kept in a safe place where his mental status could be catered for

Submissions of Counsel for the respondent

Counsel Byansi for the state opposed the appeal, arguing that the learned trial Judge exhaustively considered the issue of the appellant's mental status and formed the opinion that he was of sound mind based on the evidence of the doctor PW1. The evidence of PW3 and PW4 was opinion of laypersons and as such there was no error on the part of the trial judge not to act on their evidence. On the sentence, he argued that it was legal and not excessive. No mitigating factors were brought forward to warrant a lower sentence.

Resolution of the appeal

We recall that the duty of a first appellate court which we are, is to re-evaluate the evidence, weighing conflicting evidence against each other, and reach its own conclusion on the evidence, bearing in mind that it did not see or hear the witnesses. (See ***Kifamunte Henry v Uganda Supreme Court Criminal Appeal No. 10 of 1997).*** The cases of ***Pandya v. R [1957] EA 336, Bogere Moses v. Uganda SCCA No. 1 of 1997 and Rule 30(1) of the Court of Appeal Rules*** are also to the same effect.

The appellant conceded at trial that he indeed killed the baby. The only question for us to determine is whether the learned trial judge erred on relying on the report of a pathologist regarding the mental condition of the appellant, at the time he committed the offence. The learned trial judge relied on the statement made by the appellant that;

I thought that by killing the child I would come out of the problems I had and be rejuvenated in strength and mind.

He then noted that there was no history of unsoundness of mind of the appellant. With respect, we consider that the evidence of witnesses like PW2, PW3 and PW4 about the queer behavior of the appellant, although lay persons in the medical field, should have raised a red flag, and led to some investigation about the mental status of the appellant. The reports from prison, where the appellant had already spent 4 years on remand, about his mental status would have been very helpful in establishing this status. None were asked for and none were provided.

The learned trial Judge also based his conviction on the report of a specialist pathologist, who examined the accused. The only criteria he applied were the notes doctors follow when they examine a person accused of a serious crime. He stated that appellant knew who he was, where he was and the time. Therefore based on this, he concluded that appellant was of sound mind.

We have carefully examined the submissions of Counsel as well as the record. With respect, we consider that the learned trial Judge erred and that the medical examination on the appellant was woefully inadequate.

We consider that there was sufficient evidence on record to bring into question the mental condition of the appellant. PW2, who had stayed with him in the same homestead, described him as a quiet man who was difficult to understand.

PW3, a sister to the appellant's father had lived with him for 5 years. She testified that when he started Senior One, he started developing some anti-social behavior. He would be seen talking alone and dancing while walking.

PW4, the Local Council 1 Secretary for Defence, Kakoba Division, Mbarara Municipality, and paternal uncle to the appellant, testified that he had known him for about 5 years. He appeared to him not to be of sound mind. Two years before the incident, if one asked him a question, he would just keep quiet.

We observe that the appellant took a 9-month-old baby and cut her up for no reason. It was incumbent on the learned trial Judge, given that a red flag had been raised about his mental state albeit by laypersons, to cause an investigation to establish his mental status as it may have had a bearing on his responsibility for the crime.

This court therefore ordered the examination of the appellant by a qualified psychiatrist after hearing from both parties. Understandably, the consultant psychiatrist who made the report could not ascertain whether the appellant had mental illness in April and May of 2005. He however established that since his entry into Luzira prison in 2009, the appellant had exhibited symptoms of a severe and chronic form of mental illness called schizophrenia. His symptoms include; uncoordinated speech, unproved aggressive outbursts, hearing of voices of unseen people (auditory hallucinations), uncoordinated and purposeless actions that he reports to be beyond his control (passivity phenomena) and neglected self care. Since September 2009, the appellant has been on medications to treat Schizophrenia and he has shown only little improvement. He has largely continued to have abnormal behavior including aimless wandering, disturbance at night, neglected self care, slow and low volume speech, cold emotions (blunt affect), impaired cognition (poor information processing). The doctor

concluded that it was likely that his illness started before 2009.

The medical report of the consultant psychiatrist, although made after the trial, and at appeal stage indicates that the appellant's medical condition was unstable before 2009. In the premises, we consider that this raised a doubt regarding his mental condition, which should have been resolved in favor of the appellant.

In the circumstances, we are of the considered view that instead of having appellant examined by a pathologist doctor, the learned trial Judge should have requested for him to be examined by a psychiatrist.

We have found assistance in the provisions of ***section 194*** of the Penal Code Act that provides as follows:

194. Diminished responsibility

1. Where a person is found guilty of the murder or of being party to the murder of another, and the court is satisfied that he or she was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury, as substantially impaired his or her mental responsibility for his or her acts and omissions in doing or being a party to the murder, the court shall make a special finding to the effect that the accused was guilty of murder but with diminished responsibility.

2. on a charge of murder, it shall be for the defence to prove that the person charged was suffering from such abnormality of mind as is mentioned in subsection (1).

3. Where a special finding is made under subsection (1), the court shall not sentence the person convicted to death but shall order him or her to be detained in safe custody; and section 105 of the Trial on Indictments Act shall apply as if the order had been under that section.

4. …

Section 105 of the Trial on Indictments Act reads;

105. Sentence of death on person under eighteen years

1. sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he or she was under the age of eighteen years, but in lieu of the sentence of death the court shall order that person to be detained in safe custody pending an order made by the Minister under subsection (2) in such place and manner as it thinks fit; and the court shall transmit the court record, or certified copy of it, together with a report under the hand of the presiding judge containing any recommendation or observations on the case he or she may think fit to make, to the Minister.

2. Upon consideration of the record and of the report transmitted to him or her under subsection (1), the Minister may by order under his or her hand direct that the person convicted shall be detained in such prison or other place of custody as may be specified in the order.

3. Any order made under subsection (2) may at any time be varied or discharged by the Minister and_

(i) the order so made shall be sufficient authority for the removal of the person to whom it relates to the place of detention specified in the order so made or varied and for his or her detention in that place;

(ii) Any person removed or detained under the authority of that order shall be deemed to be in lawful custody.

In light of the above provisions, we make a special finding that the appellant is guilty of murder but that at the time he committed the offence, he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts. He is therefore guilty of murder with diminished responsibility.

We quash the sentence of life imprisonment and substitute it with an order for the appellant to be detained in safe custody

at Butabika Mental Hospital, where he will continue to receive specialist treatment for severe and chronic schizophrenia pending an order made by the Minister under sections 194 of the Penal Code Act and 105 of the Trial on Indictments Act.

In conclusion, we uphold the conviction of the appellant for murder, but with diminished responsibility and set aside the sentence of life imprisonment. We substitute it with the orders set out above.

Dated this 8th of December 2014

Signed:

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HONORABLE JUSTICE REMMY K KASULE, JA

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HONORABLE JUSTICE SOLOMY BALUNGI BOSSA, JA

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HONORABLE JUSTICE GEOFFREY KIRYABWIRE, JA