THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NUMBER 011 OF 2009

TWINOMUGISHA GODFREY ……

APPELLANT

VERSUS

UGANDA……

……RESPONDENT

This is an appeal from the decision of the High Court Masaka (Mukibi Moses J) dated 6th March 2009 in criminal session No. 0126 of 2004.)

CORAM: HON. MR. JUSTICE A.S. NSHIMYE, JA

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF HON. JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the majority Judgment in this appeal.

I regret I was unable to sign it, and I have been permitted by presiding Justice to state the reasons why under **Rule 33 (4)** of the Rules of this Court.

From the evidence of the appellant and his son who was PW4, the deceased was alive but sickly and gave her children sugar cane at around 5:00 pm on 8th April 2004.

The prosecution proved beyond reasonable doubt that the deceased was killed and did not commit suicide. The postmortem report was admitted and the medical officer who prepared it testified in court as PW1.

That witness testified that he found the deceased in a small pit latrine with a rope around her neck. The rope was loose and the deceased's legs were touching the ground. He found blood stains on both legs and a cut wound on her ankle. The neck of the deceased was twisted to the left side. The body also had bruises on the left side of the neck.

He determined that the cause of the death was strangulation after a struggle. He also stated that in his opinion the rope had simply been placed around the deceased's neck to make it appear as if she had committed suicide. The height of the toilet was too low for one to commit suicide by hanging. The neck had been twisted before the loose rope was put around the neck.

I agree with the finding of the learned trial Judge that the prosecution proved beyond reasonable doubt that the deceased was killed with malice aforethought. The twisted neck and the sign of struggle before death are proof of malice aforethought.

The issue then to be resolved is whether or not the appellant participated in the killing of the deceased. This question was

resolved by the learned trial Judge at pages 21-23 of his Judgment as follows;-

“The circumstances surrounding the death of the deceased are as follows:-

(1) She was the wife of and living with the accused.

(2) The deceased's body was discovered in the accused ‘s pit latrine

(3) The accused person was at home the whole day and night;

(4) The deceased's neck had been twisted to one side;

(5) A rope had been dressed around the deceased's neck to make the death appear like suicide.

(6) The deceased had a cut wound on the left outer ankle.

(7) The cut wound had bled on to the pit latrine floor underneath the left foot. An inference can reasonably be drawn that the deceased was brought to the pit latrine while still dripping blood.

(8) There was ash sprinkled on the ground in the banana plantation ending on the latrine floor. It was found that ash had been used to conceal bloodstains on the pit latrine floor.

(9) On the right leg the body had bruises.

(10) A bench was found in the pit latrine beside the body, in an upright position.

(11) There was no froth on the lips of the body.

(12) There were bruises on the left side of the neck.

(13) The doctor concluded that the cause of the death was physical strangulation after a struggle.

(14) It is reasonably inferrable from the presence of a cut wound that the struggle with the deceased involved violence and the use of a lethal weapon on her.

(15) From the bleeding from the wound inside the pit latrine, it is reasonably inferrable that the deceased met her death soon after sustaining the cut wound and that she was carried to the pit latrine when blood could still flow from her body. It is equally reasonably inferrable that the person who inflicted the cut wound also killed the deceased soon after.

(16) The accused had not reported to the local authorities that his wife had gone missing, nor did he report her death to them.

(17) A child of the accused, who was aged about 3 years, was wearing a blue dress, which had bloodstains over the area of her stomach.

(18) Inside the accused's house, through the rear door, on the wall there was a blood print of all fingers of one hand. The accused refused to place his fingers over the blood print for comparison.

It is in my view that, the presence of a three year old child, wearing a blue dress, which was blood stained, and the presence of a blood print of all fingers of one hand on a wall inside the accused's house , brought the violence on the deceased into the accused's house. There is no doubt at all that the accused was in the house at the material time. I do not believe the accused's claim that he was sick that day and evening. Nor do I believe the evidence of Nicholas Karwemera (PW4) that the accused was sick. I am in agreement with one gentleman assessor, Mr. Muwulya Haruna that, the effort made to carry the deceased to the pit latrine, and to dress up the death to make it appear like suicide by hanging, and the effort to cover blood stains on the latrine floor with ash, is evidence which irresistibly points to the accused person as the one who killed his wife.

He concluded as follows at P.23-24

Evidence of a blood stained blue dress of a three-year-old child of the accused who was inside the accused's house is inconsistent with the innocence of the accused person. Evidence of the existence of a bleeding cut wound on the left ankle of the deceased, and total silence about the reaction of the deceased upon sustaining that injury, would show that the attack on the deceased happened quickly and she had no time to cry out or call for help.

With all due respect to the learned trial Judge, I am unable to find that the evidence set out above directly links the appellant to the death of the deceased. What is on record may amount to very strong suspicion but in my view it does not amount to proof beyond reasonable doubt.

The learned Judge correctly set out the law on circumstantial evidence, which is now well settled. It has been set out in a number of authorities.

In **C. Chenga Reddy & ors -vs- State of A.P [1996] Indlaw SC 3059,** *it was held thus:*

> **"*In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved, and such circumstances must be conclusive in nature. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence* ." *(our emphasis)***

And in ***Teper -vs-R*** **[1952] AC 480 at 489,** *it was held:*

> ***"It is also necessary, before drawing inference of the accused's guilt from circumstantial evidence <u>to be sure there are no other co existing circumstances which could weaken or destroy the inference</u>" (our emphasis)***

In ***<u>Simon Musoke -vs- R</u>*** **[1958] EA 775** *the East African Court of Appeal held:-*

> ***"In a case depending .exclusively on circumstantial evidence, the Judge must find, before deciding upon a conviction, that <u>the inculpatory facts</u> were <u>inconsistent with the innocence</u> of the accused and <u>incapable of explanation upon any other reasonable hypothesis other than that of guilt</u>".***

In ***<u>Twinomugisha Alex Alia Twine & ors –vs- Ug. SSCA No. 38 of 2002,</u>*** *the Supreme Court held that:-*

> ***"there must be an irresistible inference of guilt from the sounding circumstances"***

I do not accept that the only reasonable inference from the bleeding wound on the deceased's leg is that it was inflicted by her killer. It could have been sustained before her death under other circumstances which the witnesses did not allude to.

Failure by the appellant to report to the authorities of the death of his wife is not in itself sufficient to infer guilt on him. Court has to consider the peculiar facts of each case. In this case the appellant stated that he was sick and had asked his neighbour to report the matter to the police. We are not told how far the

nearest police station is from the decease's home we have no basis upon which to reject his defence.

That a child of the appellant aged 3 years at the time was found putting on a blood stained dress and that there were blood stains on the wall of the appellant's house, and he refused "to place his fingers on blood print for comparison" cannot be proof that he killed his wife. No tests were carried on samples of these blood stains to ascertain whether or not it was the decease's blood that stained the girl's dress and the wall.

The blood stains on the child's dress could be explained away. The girl was not examined and no evidence was adduced to prove that she had not been injured under different circumstances. She was never called to testify. The stains were not described as fresh and therefore could have been there before the death of the deceased or indeed she could have been stained by the blood on the dead body when she went to see what had happened to her mother. Similarly the blood stains on the wall could have been put but any member of the family including the appellant after returning to the house from the pit-latrine where the blood stained body of the deceased was. He could have touched the blood stained dead body of the deceased and later stained the wall.

In otherwise the evidence on record falls short if what the law requires. It cannot be said *that there are no other co-existing circumstances which could weaken or destroy the inference of*

guilt neither can it be said in my view that *the inculpatory facts are inconsistent with the innocence of the accused and incapable of any other explanation upon any other reasonable hypothesis other than that of guilt.*

The learned trial Judge appears to have been swayed by the conduct of the appellant before and after the death of the deceased. That he did not make an alarm, he just went to bed and slept after he had discovered his wife's body in a pit latrine. That he did not report to the police and appeared uninterested in the death of his wife. But evidence of the appellant in Court which was not challenged explained that both him and his deceased wife were sickly. And that they both thought that "the spirits" of their parents were responsible for their sickness. They had done all they could to appease them but in no avail. This was a very troubled couple. Their comprehension of the world clearly appears to have been different from that of ordinary educated persons who investigated the case, prosecuted and tried the appellant.

For a venurable couple such as that described in the defence, who owned land and had very young children, a possibility, however remote that unscrupulous persons could have killed the deceased, framed the appellant cannot not be ruled out. Court was not told of what happened to the appellants' land and his children. The question that ought to have been asked by the prosecution and Court is "who was to benefit from the death of the deceased and the imprisonment of the appellant? That question was never

asked, needless to say it was never answered. The total absence of motive on part of the appellant should have in a way weighted in his favour, in the circumstances of this case.

Lastly, when this appeal came up for hearing at this Court, it was observed that the appellant was not acting normally. He appeared as if he was dazed and in a trause. Upon perusal of the court record, it was ascertained that although the summary of the case indicated that the appellant had been examined and found to be of sound mind, no examination report was exhibited and none was on court record.

This prompted this Court to order the Prisons Authorities to subject him to a medical examination. This was done and a medical examination report was submitted to this court.

That report reads in a part as follows;-

"Psychiatry History;

Mr. Twinomugisha reported no history of mental disturbance before the offence. Unfortunately, we had no collateral information and it was not possible to reliably ascertain whether Twinomugisha had mental illness before, and/or in the year 2004.

However, since his entry into Luzira prison, Twinomugisha has exhibited symptoms of a

severe and chronic form of mental illness called <u>schizophrenia.</u> His symptoms include; uncoordinated speech, having multiple false believes including; he is very clever like American. That has earned him the name "American" in the prison. Twinomugisha is obsessed with cleaning and he requests to wash all sorts of items for other inmates. His emotions are cold (blunt affect) and his information processing is slow leading to occasional irrelevant responses to questions. He lacks the understanding that he has mental problems and that he needs treatment (he lacks insight).

Forensic History

Mr. Twinomugisha understands' that he was arrested in the year 2004 for the offence of murder. His wife committed 'suicide by hanging but he was suspected to have killed her. He was also able to understand that the Local Council Chairman and Vice Chairman are the only witnesses who came to court during his trial. Twinomugisha lacked appropriate emotions while talking about the consequences of the incident.

Conclusion;

Mr. Twinomugisha has a chronic and severe form of mental illness called schizophrenia. We could not reliably ascertain the onset of Twinomugisha's mental illness but since his entry into Luzira prison, he has exhibited abnormal mental status. Twinomugisha requires treatment in a Mental Hospital. Without treatment, he will deteriorate and he can become a danger to the public.

This report is not helpful in the determination of the mental status of the appellant at the time of the commission of the offence. What is important is that the appellant was tried and convicted of a serious crime of murder without his mental status having been ascertained. It is possible if not probable that had he been examined he could been found to be unsound mind. His mental status could only have been helpful in explaining his very strange conduct after the death of his wife, specifically his complete lack of emotion. His strange conduct after the death of his wife weighted against him in the court's evaluation of evidence.

I would hold that there was insufficient evidence to sustain the change of murder against the appellant. I would hold that the prosecution did not prove its case beyond reasonable doubt. I would allow the appeal, quash the conviction and set aside the sentence.

Dated at **Kampala** this **5th** day of **November** 2015.

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL