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**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT GULU
CRIMINAL APPEAL NO. 0577 OF 2015**

BONGOMIN ALEX alais ACELAM.....APPELLANTS

VERSUS

10 **UGANDA.....RESPONDENT**

*(Appeal against conviction and sentence of the High Court of
Uganda Wilson (Masalu Musene, J) at Gulu on the 15th August,
2014 in HCT-02-CR-SC-077 of 2011)*

15 **CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE F.M.S EGONDA -NTENDE, JA
HON. LADY JUSTICE HELLEN OBURA, JA**

JUDGMENT OF THE COURT

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The appellant was on 15th of August 2014 convicted of the offence of murder contrary to *Sections 188 and 189* of the Penal Code Act and sentenced to 30 years imprisonment, by His Lordship Wilson Musalu-Musene, J in High Court Criminal Case No. 0077 of 2011 Gulu. Being dissatisfied with the decision of the High Court he

25 appealed to this Court on the following grounds;-

1. *That the learned trial Judge erred in law and fact when he convicted the appellant on a charge of murder basing on doubtful and insufficient circumstantial evidence.*
- 30 2. *The learned trial Judge erred in law and fact when he passed an excessive and harsh sentence against the appellant in the circumstances of the case.*

5 **Brief Background.**

The appellant was in May, 2011 a resident of Juba village in Amuru District, where he was co-habiting with one Arach Janet (PW1) a mother of a 3 year old boy named Okwera Rogers, now deceased. The two had lived as husband and wife for about 6 months together with the deceased. The deceased was not the appellant's child.

10 On 5th April 2011, when PW1 the mother of the victim had gone to fetch water from a well, the appellant also left home together with the deceased boy and went to a nearby river. When PW1 came back home she looked for the two, but they were both nowhere to be seen.

15 The appellant later returned home that evening without the boy. The boy 's dead body was the next day discovered about one mile away from their home, with bruises , a broken neck and broken ribs.

20 The appellant was charged and convicted of murder of the deceased, hence this appeal.

Representation

25 The appellant was at the hearing of this appeal represented by learned counsel Mr. Moses Oyet while the respondent was represented by. *Ms. Caroline Hope Nabasa*, Assistant Director of Public Prosecutions.

The Appellant's submissions

30 It was submitted for the appellant that:-

The evidence adduced at the trial was insufficient to sustain a conviction of murder. The appellant's participation was not proved and his defence was unjustifiably rejected by the trial Judge.

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5 Counsel went on to attack the postmortem report contending that, it was insufficient to prove the cause of death as the doctor did not perform an autopsy on the deceased's body and as such his observations were inconclusive, as to the cause of death. The deceased's body was never opened up, but rather the doctor based his findings only on external observation.

10 This, Counsel argued weakened the prosecution case as the appellant's defence that, the deceased had died from accidental drowning had not been ruled out.

Further, that the appellant's conduct immediately after the deceased's body had been recovered was consistent with his innocence as he had gone to the Police Station that morning on his own accord to report the accidental death of the deceased.

He faulted the trial Judge for having found that, the medical report and the evidence of the Doctor who carried out the postmortem on the body of the deceased corroborated the evidence of the other witnesses.

He argued that, the learned trial Judge ought to have rejected the medical evidence as to the cause of death and had he done so he would have found that, other evidence was insufficient to prove the case against the appellant beyond reasonable doubt. Counsel also attacked the evidence of PW2 the Police Officer who first visited the scene for not having indicated on the sketch plan the distance between the river where the appellant stated the deceased had drowned and then where the body had been found. He argued that, had he done so, the trial Judge would have believed the appellant's defence.

He asked this Court to allow the appeal.

5 In the alternative and without prejudice to the above, Counsel submitted on ground two as follows:-

That, the sentence of 27 years imprisonment imposed on the appellant was harsh and manifestly excessive in the circumstances. The trial Judge failed to take into
10 account all the mitigating factors in favor of the appellant. Had he done so, he would have sentenced him to at least 20 years imprisonment.

The Respondent's reply

15 Ms. Nabassa opposed the appeal and supported both the conviction and sentence. She submitted that:-

The prosecution had adduced sufficient evidence *albeit* circumstantial to sustain the conviction against the appellant. The medical evidence was provided by Dr. Dominic
20 Mabusio a qualified medical practitioner, who carried out a postmortem on the deceased's body and made a report that conclusively established the cause of death.

The Doctor, Olwedo Onen who presented the report in Court under *Section 30* of the Evidence Act confirmed that, the cause of death was asphyxia and not by drowning.
25 Further that, the evidence of PW1 the Mother of the deceased sufficiently linked the appellant to the commission of the crime.

Counsel submitted that, the learned trial Judge was justified when he rejected the appellant's defence as it was riddled with falsehoods, contradictions and
30 inconsistencies.

She pointed out some of the contradictions and falsehoods as follows:-

Whereas the appellant stated that, the deceased was his own son, the truth is that he
35 was not. The appellant claimed to have returned from the river with the child, which

5 was not true. He stated that, the deceased having drowned in his presence he
retrieved the body and brought it home, which was also not true. It was also not true
that he had returned home with the deceased and had left him with his uncle one
Oringa. This Counsel pointed out contradicted his earlier testimony that, the
deceased had drowned and he had brought his body home. Whereas the appellat
10 stated that the deceased had accidentally drowned in the river, the medical
evidence and that of other witnesses who saw the body established that, he had not
drowned but had been strangled, had a broken neck, bruises and broken ribs.

Counsel asked Court to dismiss the first ground of appeal and uphold the conviction.

15 In respect of the alternative ground of sentence Counsel submitted that, considering
that the appellat killed a 3 year old child, in a gruesome manner, and that the
maximum sentence for the offence of murder is death, the sentence of 30 years
imprisonment was justified. He asked Court to uphold it.

20 **Decision of the Court**

This being a first appeal this Court is required to re-appraise all the evidence
adduced at the trial and make its own inferences on all issues of law and fact. See
Rule 30(1) of the Rules of this Court, *Kifamunte Henry vs Uganda, Supreme Court*
25 *Criminal Appeal No. 10 of 1997* and *Bogere Moses vs Uganda, Supreme Court*
Criminal Appeal No. 1 of 1997.

We shall proceed to do so.

30 There was no eye witness to this crime. The appellat was convicted entirely on
circumstantial evidence. The law relating to circumstantial evidence is now well
settled. It was set out in *Simon Musoke Vs R [1957] EA 715* and has consistently
been followed. In that case the Court of Appeal of East Africa held as follows:-

5 *"In a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. Teper v. R., [1952] 2 All ER 447, followed."*

10 In *Tumuhairwe vs Uganda [1967] EA 328*, it was observed that:-

15 *"Circumstantial evidence is very often the best evidence. It is evidence surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."*

See; also Akbar Hussein Godi vs Uganda, Court of Appeal Criminal Appeal No. 62 of 2011, and Mulidwa James vs Uganda, Supreme Court Criminal Appeal No. 23 of 2014.

20 While evaluating the evidence adduced at the trial we shall keep in mind that, circumstantial evidence is capable of being fabricated or manipulated to the detriment of an accused person. We shall also bear in mind that, the duty to prove the guilt beyond reasonable doubt of the appellant lay on the prosecution through
25 the trial and the appellant has no burden to prove his innocence.

 Counsel for the appellant put the cause of death in issue. From the evidence of PW3 Dr. Olwedo, the appellant died of asphyxia resulting from a broken neck and a bitten tongue. He died while he was struggling for air. He ruled out drowning as the cause
30 of death. The medical report indicated that, there was blood clot in the nostrils, ears and eyes. The intestines were protruding from the anus and the tongue was bitten.

 He also testified that the cause of death in circumstances such as these, required no autopsy and can be established only by postmortem. He explained that an autopsy is
35 when the body is opened up and postmortem is only by external observation.

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PW2 the Police Officer who first arrived at the scene where the body lay, testified that, there was nothing on the deceased's body to indicate that, he had died of drowning. The stomach was not swollen, and the body was over one mile away from the river where the appellant said he had drowned.

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PW1 the mother of the victim also testified that, when the body was found, she held the deceased and observed that, his neck was broken and it was rotating. His ribs were broken and his testicles were swollen.

We are satisfied that, the prosecution proved beyond reasonable doubt that, the
15 deceased died of asphyxia as evidenced by broken neck and other injuries inflicted upon him and not by drowning as contended by the appellant.

The next issue is whether sufficient evidence had been adduced at the trial to prove the participation of the appellant in the commission of the offence.

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From the evidence of PW1 the mother of the deceased, it was established that, the deceased was on the 5th of April, 2011 last seen with the appellant. She had left both of them at home that day when she went to fetch water. Upon her return both were not at home. She slept that evening before they had returned and when she woke up
25 at night they had not returned so she went looking for the deceased. She checked at two of the appellant's Uncles' homes. They were not there.

The appellant returned late that morning between 5 and 6 am alone. When asked about the child he is said to have replied that, he had left him at his Uncle's home
30 one Oringa. But from the evidence of PW1, she had gone to Oringa's home looking for the boy earlier the previous evening but had not found him there.

PW1 testified further that, that very early morning the appellant picked the deceased's clothes and left the home leaving PW1 behind. That morning PW1 was in

5 the search party that found the deceased's body laying lifeless under a tree not far
away from their home. In her words she states as follows in examination in chief.

*"In the morning I together with others we started looking for the child.
Eventually we came across the body of the deceased child lying under a tree
10 some distance from the road. The clothes which the accused had picked from the
house were placed on the body. The eyes were gorged out by the redacts. The
body was dressed in clothes that the accused had picked from the house.*

*On seeing the body the men ran away. I picked the body and noticed the neck
15 was just rotating. I was advised to put back the body. The accused was not
present then.*

*After I had put back the body. I observed scratches around the cheeks, the ribs
20 were broken, and the testicles were swollen. The child was three years old" (sic).*

In his defence the appellant made a sworn statement. He stated that the appellant
was his biological son. That on 5th April he had sent PW1 to go and sell honey 3
miles away for the home. He went to the river with the child but the child had
drowned while he was checking on his trap of fish. Then he had made an alarm but
25 no one responded. Then he carried the body to his home and informed his father
what had happened. He was advised to report to the Police which he did early
morning of the 6th of April 2011.

We have carefully evaluated the evidence adduced at the trial. Both for the
30 prosecution and the defence. We find that, the prosecution adduced credible
evidence as to the cause of death of the appellant. In this regard we find that the
appellant's defence was a fabrication.

5 In respect of the appellant's participation, PW1 testified that, the appellant had on
the morning following the disappearance of the deceased left home with the
deceased's clothes. The same clothes that were found on the deceased's body. The
appellant had lied to PW1 that, he had left the deceased at Oringa's home, but
unknown to him, PW1 had already been to Oringa's home earlier that evening and
10 the deceased was not there.

We find that, the learned trial Judge was justified when he rejected appellant's
defence, as it was full of falsehoods, contradictions and inconsistencies.

15 We agree with the learned trial Judge that, the prosecution proved the case against
the appellant beyond reasonable doubt. Accordingly ground one of appeal fails and
is hereby dismissed.

The appellant's conviction is hereby upheld.

20 The appellant has appealed against the severity of sentence. He was sentenced to 30
years imprisonment.

The appellant was a first offender. He was a young man of 21 years when he
25 committed the offence. Justice requires that we exercise some leniency.

In Omusenu Sande Vs Uganda, Court of Appeal Criminal Appeal No. 0029 of 2011, the
appellant was convicted of the offence of murder and sentenced to 30 years
imprisonment. On appeal, this Court reduced the sentence to 20 years
imprisonment.


30 *In Wodaba Moses Vs Uganda, Court of Appeal Criminal Appeal No. 0758 of 2014*, the
appellant was convicted of the offence of murder and sentenced to 39 years
imprisonment. On appeal, this Court reduced the sentence to 23 years
imprisonment.

5 Taking into account the gravity of the offence, and the sentencing range established
by this Court and the Supreme Court, we consider a sentence of 20 years
imprisonment to be appropriate. From the sentence we deduct 3 years the appellant
had spent on pre-trial detention, and order that he serves a period of 17 years in
prison commencing from 15th August 2015, the date of conviction.

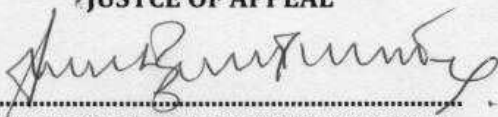
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Dated at Gulu, this ^{7th} day of ^{November} 2017.


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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE F.M.S EGONDA NTENDE
JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL