IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA & KATO JJ.S.C.

CRIMINAL APPEAL NO.4 OF 2002

BETWEEN

GABULA DAVID :: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from judgment of the Court of Appeal (Mukasa-Kikonyogo DCJ, Engwau & Kitumba JJ.A) at Kampala in Criminal Appeal No. 109 of 2000, dated 20th December 2001).

REASONS FOR JUDGMENT OF THE COURT.

This appeal was against the decision of the Court of Appeal confirming the appellant's conviction and sentence of death for the murder of Christine Mbabazi, a seven-year-old girl. We heard and dismissed the appeal on 17th September 2003. We now give the reasons for our judgment.

The complaint in the single ground of appeal to this Court was that the Court of Appeal erroneously confirmed the conviction without enough proof of malice aforethought. That was also the substance of the second ground of appeal in the Court of Appeal. The thrust of Mr. Sekabojja's argument for the appellant was that the medical evidence on the cause of the deceased's death was so inconclusive that it could not lead to an inference that the killing of the deceased was with malice aforethought. The appellant's conviction was based on

circumstantial evidence, which the learned trial judge believed to be true. In addition to the medical evidence, the rest of the evidence was on the conduct of the appellant and the statements he made immediately before, and immediately after the death of the deceased. Four witnesses gave the evidence on the appellant's conduct and statements.

The key witness was one Agnes Bwerere, the widowed mother of the deceased. Before the deceased's death, Agnes and the appellant had cohabited as lovers, but because he mistreated her habitually, they separated after about five months and she left his home. Later, on 23. 2. 97, she met the appellant. He tried to force her to return to his home, but she refused. He took her to an LC 1 official's home, apparently for reconciliation, but after she explained to the official why she was unwilling to resume the cohabitation, the official said she was free not to do so. The appellant went away and she stayed at the official's home for a night. The following day the appellant came to her and said that he had removed her daughter from James Bunini's home where she had been staying, and he threatened that he would kill the child if Agnes did not return to him. She retorted that she would report him to the authorities. Later that day, he returned to inform her that he had killed the child. He said that the child's body was hanging on a tree at Ndolwa and her dress was also in a nearby tree. In his evidence, James Bunini who is Agnes' brother, confirmed that the appellant had taken the deceased from his home. He said that the appellant came to his home under the pretext that Agnes had sent him to collect the deceased, and that he had believed the appellant and allowed him to take the child away. Agnes, James, D/W Cpl.Kyazike and Stephen Bitature, LC 1 Chairman, testified that the deceased's dress and body were found at Ndolwa, the place that the appellant had mentioned to Agnes. The body was tied with a sisal rope by the neck hanging from a tree. Meanwhile the appellant disappeared from the village for about five days. Another piece of evidence that the trial court relied on, but which the Court of Appeal held to be inadmissible, was a statement the appellant made when he was in police custody.

The medical evidence comprised of a post-mortem report made by a doctor who examined the deceased's body at the place where it was found on 26.2.97. Dr. John Were who knew the handwriting and signature of the author produced the report in evidence. The substance of the report was the opinion of its author that the cause of death was asphyxia and that the

head of the deceased was battered before she was hanged. According to Dr. Were, the only indicator on the report from which asphyxia could be inferred was that the body was found hanging on a tree by the neck; and the indicator of battering was a swelling on the right praetor area of the head. He testified that there was no indication from the report that the body was opened up during the post-mortem examination. He opined that opening the body would have revealed internal indicators of the cause of death. In case of asphyxia, there would have been internal swelling of subcutaneous tissue around the neck and pulmonary oedema swelling of the lungs. He also opined that the battering could cause death if it led to internal bleeding. The internal indicator of that would be blood in the brain. Dr. Were concluded that there was not enough information in the report to show conclusively that the cause of death was asphyxia or bleeding in the brain. On that apparent criticism of the post-mortem examination, Mr. Sekabojja pegged his submission that the medical evidence on the cause of death was inconclusive, and his argument that therefore, malice aforethought was not proved beyond reasonable doubt. With due respect to learned counsel, however, we found no merit in his submission and/or argument.

The learned Justices of Appeal considered the same argument. They reviewed at length, the evidence as evaluated by the trial judge and upheld his conclusion that whoever killed the deceased did so with malice aforethought. We respectfully agreed with them and did not find any error of law or fact in their judgment. We were satisfied that the evidence, which we have summarised, proved overwhelmingly that the appellant killed the deceased intentionally. He declared his intention before the killing. After the event, he confessed to the killing and went into hiding. There can be only one inference from the acts of battering the child's head and hanging her by the neck, namely that the appellant who perpetrated those acts intended to kill her. Invariably, in homicide cases, malice aforethought is inferred from the *actus rea* (the unlawful act), rather than from the cause of death. The importance of proving the cause of death is to establish the nexus between the death and the *actus rea* in order to rule out the possibility of death having been by other innocent causes. In the instant case that nexus was established, and the malice aforethought was properly inferred from the *actus rea.* Therefore, Dr. Were's opinion, which in effect was that he could not say conclusively which of the two acts led to the death, was immaterial. It was for those reasons that we dismissed the appeal and upheld the appellant's conviction and sentence.

We are constrained, to comment for guidance, on a statement the appellant allegedly made while in police custody, because we continue to come across many cases, in which trial courts do not follow the proper procedure for admission of such statements in evidence. In the instant case, the trial court received the statement in evidence without testing its admissibility in a trial within a trial. The defence did not raise any objection to the evidence of PW 6, the Police Officer who recorded the statement, until he had narrated, and the trial judge had recorded detailed contents of the statement. In his ruling on the objection the learned trial judge said -

"The usual procedure is for Counsel in a case where the suspect is represented to raise an objection long before court gets to know that accused made a statement. It would have been different if accused was unrepresented. As it is now, court and the assessors know what is contained in it. It is therefore too late to remove its contents on record. What Counsel is raising is a retraction of the statement. I would therefore not reject it but instead advise the defence to discredit the same through cross-examination of the witness. The same shall therefore be received in evidence..." The Court of Appeal quite rightly disapproved of this ruling, and held that despite the late objection, the trial judge should have held a trial within a trial, and directed the assessors and himself to disregard it, if he found that it was not made voluntarily. We should add here that if in such trial within trial he had found that the statement was made voluntarily, it would not have been expunged on appeal. The learned Justices of Appeal went on to say -

" in a case where the prosecution has an extra judicial statement implicating the accused he should let his counsel know about it. We say so because there is a duty on all court officers to see that justice is done and that the accused gets a fair trial. We are aware that the present summary of facts is inadequate and does not offer sufficient opportunity to the accused to prepare his defence." They appropriately cited **Kawoya Joseph vs. Uganda** Criminal Appeal No.50/99, in which this Court held in similar circumstances, that the trial judge should not permit the reception of such evidence without ascertaining that the accused person is aware of the consequences of its reception. While we agree with the learned trial judge's comment in the ruling, on what he expected of defence counsel, his observation that it would have made a difference if the accused were not represented is wrong, to the extent that it implies that he overlooked the mistake because the accused was represented. True, the defence counsel has the primary duty to ensure protection of his client's interests, but the court's overall responsibility to ensure that proper procedure is followed and that justice is done, remains the same, whether the accused is represented or not. It would be anomalous and unjust to allow an accused to be disadvantaged merely by the slowness or ineptitude of his counsel.

DATED at Mengo this 18th day of June 2004.

A.H. O. ODER

Justice of the Supreme Court

J. W.N. TSEKOOKO

Justice of the Supreme Court

A.N. KAROKORA

Justice of the Supreme Court

J. N. MULENGA

Justice of the Supreme Court

C.M. KATO

Justice of the Supreme Court