THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, KAROKORA, MULENGA, KANYEIHAMBA, KATO J.J.S.C.)

CRIMINAL APPEAL NO.1 OF 2003

BETWEEN

KAZIBWE KASSIM } :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(An appeal from the Decision of the Court of Appeal at Kampala by (Okello, Berko, and Byamugisha J.J.A) dated 18th February, 2003 in "Criminal Appeal No. 11 of 2001)

JUDGMENT OF THE COURT

This is a second appeal. It is from a judgment of the Court of Appeal dated 18th February 2003 in which the Court of Appeal quashed the conviction and set a side a death sentence for murder and substituted a conviction of manslaughter and a sentence of 10 years imprisonment. The facts of the case as accepted by the lower courts were as follows:

Early in the morning of the 21st February 1999, one Fred Senyange, (PW1) a brother of the appellant, went to the home where the appellant was cohabiting with the deceased and picked his axe and panga which he used to keep in the appellants' home and went to his place of work. Shortly afterwards the appellant called PW1 and informed him that he (appellant) might be imprisoned because his wife, the deceased, had drunk poison. PW1 entered the appellants' house, found the deceased groaning and breathing heavily. PW1 fetched milk and tried to administer it to her, but she could not drink it. Shortly after that, she died. The matter was reported to LC officials and eventually to police. The appellant reported himself to the police and was arrested.

The medical evidence comprised of a postmortem report made by a doctor who examined the deceased's body on 23/2/99. It was produced in evidence by Dr. Okware who knew the hand writing and signature of the author Dr. Kamoga. According to the report, the injuries found on the body were a bruise on the frontal part of the head, a deep cut wound over left eye lid and cerebral spinal fluid oozing from nostrils. There was also a fracture of the left clavicle. Cause of death was described as head injury. In Dr. Okware's opinion, the injuries inflicted on the deceased suggested that a lot of force was used. Cut wounds suggest use of something sharp. A fall against a sharp object could also cause some of the injuries found especially those that made a spinal fluid to come out of the deceased's nostrils.

In cross examination, Dr. Okware classified a fall into two categories, namely; "gravity fall" and "accelerated fall". In his opinion a gravity fall would not cause the kind of injury found on the head, but an accelerated fall would. At the trial, the appellant denied the offence. He stated that when he was going to his place of work in the evening of the day before the incident, the deceased told him that she needed salt. He gave her money for the salt and went to his place where he was burning charcoal. When he returned at night from his place of work, he did not find the deceased at home. He went to look for her at Kabanda's drinking place and found her fighting with her brother, Eriya Serugo (PW4). He took the

deceased home but soon afterwards left for the forest to attend to his charcoal burning, where he spent the whole night. He returned the following morning and went straight to bed. Whilst he was in bed, PW1 came and picked his axe and panga from the appellant's home where he (PW1) used to keep them and went away. The appellant then looked at the deceased and found that she had vomited. He then found a bottle of poison lying near her. The appellant stated that afterwards, PW1 returned to the house and went and brought milk but the deceased was too weak to drink it. Shortly after, the deceased died. PW1 was sent to call PW4 and LC officials. Later, police officials came and took the body away together with the bottle of poison. However, the prosecution did not, adduce evidence from the police concerning the bottle of poison. The learned trial judge accepted the prosecution evidence and rejected the appellant's defence. The appellant was convicted for murder, but the Court of Appeal allowed his appeal and substituted that conviction with a conviction for manslaughter as already stated. In allowing the appeal, the Justices of Appeal had this to say:

> ***"In the instant case, apart from the lie about suicide by poisoning and the alleged fight between the deceased and PW4, the appellant said nothing about how the deceased died and the part he played. All what we have are injuries. There is no lota of evidence as to how those injuries were inflicted what weapon was used and why the appellant did what he is alleged to have done. Various hypotheses and theories have been put forward. None of which is inclusive. In the result, we have come to the conclusion that it would be unsafe and unsatisfactory to allow the conviction for murder to stand. Consequently the appeal is allowed and conviction for murder is quashed and sentence of death is set aside. We substitute thereof a verdict of manslaughter."***

The appellant has appealed to this court on two grounds. At the hearing of the appeal, ground two was abandoned. Ground one which was argued reads as follows:

"The learned Justices of Appeal erred in law when they convicted the appellant for the offence of manslaughter in absence of evidence proving that he was responsible for the death of the deceased." Mr. Mubiru, counsel for the appellant submitted that there was insufficient evidence to prove that the appellant

was responsible for the injuries which caused the death of the deceased. He contended that the evidence on record connecting the appellant with the offense was purely circumstantial and was very weak and submitted that the onus was on the Court of Appeal to find out if there was enough circumstantial evidence to connect the appellant with the death of the deceased. He further submitted that there was no concrete evidence that the appellant inflicted those external injuries which were found on the body of the deceased. He invited us to allow the appeal, quash conviction for manslaughter and set aside the sentence of 10 years imprisonment.

Mr. Tumwesigye, Principal state Attorney for respondent submitted that the circumstantial evidence was strong enough to prove that the appellant was responsible for the injuries which caused the death of the deceased. He cited pieces of circumstantial evidence upon which the trial judge had relied to hold that the appellant had committed the offence. These included the fact that Senyange, PW1 had found the appellant and the deceased together in their home at the material time. Secondly, the fact that at that point, the deceased had a wound on her forehead and was on the brink of death. Thirdly, the fact that the appellant told PW1 a lie that the deceased had drunk poison when according to the postmortem report, Exh PI she had not. Fourthly, Senyange's disclosure of a lie told by the appellant which was intended to implicate Serugo (PW4) to the effect that Serugo had fought with the deceased in the evening before her death and probably inflicted the fatal wounds.

We agree with the submission of both counsel that the prosecution case wholly depended on circumstantial evidence. However, we find the conclusion of the Justices of Appeal not wholly correct when they stated that:

> ***"In the instant case, a part from the lie about suicide by poisoning and the alleged fight between the deceased and PW4, the appellant said nothing about how the deceased died and the part he played. All what we have are injuries. There is no iota of evidence as to how those injuries were inflicted, what weapon was used and why the appellant did what he***

is alleged to have done. Various hypothesis have been put forward none of which is inclusive."

With due respect we think that it was not incumbent upon the appellant to state how the deceased died and the part he played when he had denied having killed the deceased. The onus was on the prosecution to prove its case against the appellant. If there was no iota of evidence as to how those injuries were inflicted and what weapon was used, we think that it was a misdirection on the part of the Justices of Appeal to state "and why the appellant did what he is alleged to have done."

We think that the Justices of Appeal were in error for coming to the above conclusion, because the appellant all along denied having killed the deceased. We think that failure by prosecution to call police to testify about what they observed at the scene of crime, (if anything) indicating whether or not another person could have come to the scene during the appellant's absence, inflicted fatal injuries upon the deceased and left the bottle of poison remained unresolved. In our view, although the prosecution case wholly depended on circumstantial evidence, we think that in order for the Court of Appeal to act on such evidence, the inculpatory facts against the appellant must be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt. See **Simon Musoke V R (1958) EA 715. In Teper V R 2 (1952) AC 480** at pages 489 the Privy Council held that:

> ***"It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt."***

In the instant case, like the case of **R v Israili - Epuku s/o Achietu (1934) IEACA 166,** we are of the opinion that the evidence did not reach the standard of proof requisite for cases based entirely on circumstantial evidence. We are unable to hold that the evidence contains any facts which, taken alone amount to proof of guilt. The cumulative effect of the circumstances said to tell against the appellant

is not such as to satisfy us that he must have been connected with the death of the deceased. Although there was suspicion, there was no prosecution evidence on record from which the Court could draw an inference that the appellant caused the death of the deceased to justify the verdict for manslaughter. We therefore think that the Court of Appeal was in error to hold that the appellant was guilty of manslaughter.

In the result we allow this appeal, quash the verdict of manslaughter and set aside the sentence of 10 years imprisonment. We order that the appellant be set free from custody forthwith unless he is detained for any other lawful purpose.

Dated at Mengo this 22nd day of July 2004.

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT

J.N. MULENGA
JUSTICE OF THE SUPREME COURT

G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

C. M. KATO
JUSTICE OF THE SUPREME COURT