THE REPUBLIC OF UGANDA

IN THE SUPREME OF UGANDA

AT MENGO

CRIMINAL APPEAL NO. 18 OF 2002

CORAM: ODOKI C.J, ODER, KAROKORA, KANYEIHAMBA, KATO, JJSC

BYARUHANGA FODORI..... APPELLANT.

VERSUS

UGANDA..... RESPONDENT.

(Appeal from the judgment of the Court of Appeal at Kampala (Kikonyogo D.C.J, Engwu, Twinomujuni JJ.A.) in Criminal appeal* No.24 of 1999 *dated 8th. May 2002).

REASONS FOR THE JUDGMENT OF THE COURT

The appellant was indicted before the High Court on two counts of murder contrary to sections 183 and 184 of the Penal Code Act. He was convicted and sentenced to death on both counts. His appeal to the Court of Appeal was dismissed, hence this appeal. We heard the appeal on 18/2/2004 and dismissed it reserving our reasons, which we now give.

The facts of the case as established before the trial court and accepted by the Court of Appeal are as follows:

The appellant was married to the first deceased Margaret Nakate with whom he had a son, the second deceased, Moses Nsimireki. The appellant had domestic misunderstandings with his wife which resulted in her going to stay with one of her brothers, Koronolio

Kibira (PW5). On 9/4/95 a meeting was held to reconcile the first deceased and the appellant. It was resolved that the first deceased should go back to her husband on condition that the husband does not continue mistreating her. On the afternoon of 13/4/95 at about 3.00 p.m. the deceased and her son aged 3 years, left the home of Koronolio for the home of the appellant. She did not reach her intended destination. On that same night her husband came to the home of the deceased's mother, Yonia Nalugwa (PW.4) at about 10.00 p.m. He was in a confused and panicky state. When he inquired about his wife and was told that she had left for his home that afternoon, his reply was: "let me go since I am the one having the keys. May be mosquitoes have killed her." In the same night of 13/4/95 at about 1.00 a.m. the appellant went to the home of his brother-in-law, Koronolio where he again appeared in a complete state of confusion as he could not explain his reason for being there at such an odd time.

On the following day, the bodies of the deceased and her son were first seen floating in river Nguse with their clothes in the same stream near the bodies. The bodies were at first sighted by one Augustino Byabulera who informed Henry Kagwa (PW1). Both men went away to alert the public. When they returned to the scene with one of the brothers of the deceased, both the bodies and the clothes were missing from where they had been seen. A search was conducted and the two bodies were found in a different part of the stream with cut wounds and the clothes were missing. When the appellant was found at his home one of the brothers of the deceased Serwanga, asked him if his wife had arrived. He did not answer the question. Instead he got hold of a panga and said that it was Yuda and Anderea who had killed his wife. Eventually the appellant was arrested and when his house was searched, the clothes with which his wife had left her brother's home and which had also been seen where the bodies were first sighted, were found hidden under the deceased's bed in a bundle.

At the trial, the appellant denied having killed his son and wife. As for the presence of deceased's clothes in the house, he explained that he had collected them from her on 9/4/95 after they had been reconciled. Both courts below did not accept the explanation as being truthful. They believed the prosecution case on the point. He was convicted and sentenced as indicated above.

The appellant listed two grounds for his appeal, namely.

1. **The learned trial Judges of Appeal erred in fact and in law, as did the learned trial Judge when they upheld a conviction on a charge of murder basing on doubtful and insufficient circumstantial evidence (sic).**
2. **The learned Judges of Appeal erred in law and fact when they failed to evaluate all the evidence and therefore came to a wrong decision.**

Mr. Ntuyo Kafuko, who appeared for the appellant, argued the two grounds together. We shall deal with them in the same manner. The gist of his submissions was that the circumstantial evidence upon which the appellant's conviction was based left a doubt as to what caused the death of the appellant's wife and son. In his view, the evidence of Dr. Dongo who examined the bodies and concluded that the cause of death was shock due to bleeding from the wounds was wrong since the bodies had no wounds when they were first sighted. According to the learned counsel, the deceased could have drowned or their bodies could have been thrown into water after death. He contended that the learned Justices of Appeal did not make a finding as to what caused the death although they concluded that the appellant must have killed his wife and son in view of his conduct.

Mr. Vincent Okwanga Principal State Attorney, who appeared for the state, opposed the appeal. He submitted that the Court of Appeal resolved the issue of the wounds when it held that it was the appellant who was responsible for the death of the two deceased irrespective of how the wounds were inflicted He, however, conceded that Dr. Dongo might have been wrong when he stated that the deceased died of shock following bleeding. In counsel's view the circumstantial evidence irresistibly shows that it was the appellant who murdered both deceased in view of the appellant's strange conduct on the fateful day.

It is not in dispute that the case against the appellant depended essentially on circumstantial evidence in that nobody saw the appellant murdering his wife and son. The Court of Appeal and the trial court were alive to that fact.

It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must before deciding upon a conviction find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See: **S. Musoke V R [1958] EA 715 and Teper V R [1952] AC 480).**

In the instant case, the circumstantial evidence upon which the appellant was convicted is contained in his conduct before and after the death of his son and wife. The first piece of evidence is appellant's violent relationship with his late wife before her death. The appellant in his own testimony admitted that he used to fight with his wife and that is why they had separated. The mother of the deceased Yawania Nalugwa (PW4) and the deceased's brother Koronorio Kibira (PW5) testified that the appellant used to beat his late wife. Both Yawania and Koronolio told the court that on a number of occasions the appellant used to threaten his wife with death.

Another piece of evidence pointing to the appellant's guilt was his strange behaviour on the night his wife left her brother's home. The first deceased left the home of her brother Koronolio at about 3 p.m., later at about 10 p.m. the appellant appeared at the home of his mother-in-law in a confused state and when he was asked if the wife had arrived he answered that she had not and that if she had arrived then she had not entered the house as he had the key to the house and that mosquitoes might have killed her. At about 1.00 a.m. the appellant was seen at the home of Koronorio. When Koronolio asked him as to what was the matter, he kept quiet and looked confused. No explanation or reason was given for the two visits at such odd hours of the night or for the strange behaviour of the appellant.

The other piece of evidence which was considered by the courts below as incriminating the appellant is the discovery of the bundle of clothes belonging to the two deceased under the bed of his late wife. The clothes were those the deceased had taken with her when she left her brother's home. They were also seen floating near her body and that of the son by those who first saw the two bodies. In our view the trial Judge rightly rejected the appellant's explanation that he had collected those clothes from deceased's home when he went there for reconciliation on 9/4/95 in view of the evidence of Koronolio and the

first deceased's mother who saw her leaving with those clothes on the afternoon of 13/4/95. One other aspect of appellant's connection with the death of his wife and son is to be seen in his rash conduct. When he was told of the discovery of the bodies he jumped to the conclusion that it was Yuda who must have killed his wife and yet the identity of the dead woman and child had not yet been known at that stage. How did he know the wife was dead if he was not involved in her death?

With due respect to learned counsel for the appellant, we do not agree that the circumstantial evidence left a doubt as to what caused the death. It is, however, true that each of the above pieces of evidence considered in isolation could not lead to the conviction of the appellant but when considered together they lead to an irresistible conclusion that it is the appellant and nobody else who was responsible for the death of his son and wife on 13/4/95. The Court of Appeal was justified in its finding that the circumstantial evidence pointed to no one else except the appellant as the killer.

The theory put up by Mr. Ntuyo that the two deceased might have drowned or might have been thrown into the water after they had met their death at the hands of some other people different from the appellant, cannot be sustained in view of what has been outlined above. With respect, we agree with the decision of the Court of Appeal that the deceased could not have accidentally drowned in the river. We found no merit in the two grounds of appeal.

It was for those reasons that we dismissed the appeal.

Dated at Mengo 29th this day of July 2004.

B.J. Odoki
Chief Justice

A.H.O. Oder
Justice of the Supreme Court

A.N. Karokora

Justice of the Supreme Court

G.W. Kanyeihamba

Justice of the Supreme Court

C.M. Kato

Justice of the Supreme Court