IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.SC.

CRIMINAL APPEAL NO. 24 OF 2002

BETWEEN

1. NANYONJO HARRIET
2. **SENYONJO KATO PETER:::::::::::::::::::::: APPELLANTS**

AND

UGANDA :: RESPONDENT

(Appeal from the judgment of the Court of Appeal (Mpagi-Bahigeine, Engwau and Twinomujuni JJ.A) at Kampala, in Criminal Appeal No. 51, dated 8th May 2002)

JUDGMENT OF THE COURT.

Nanyonjo Harriet, the 1st appellant named above, is the wife of Senyonjo Kato Peter the 2nd appellant. On 2nd May 2001, they were jointly convicted by the High Court (Mwondha J.) sitting at Mubende, for the murder of Nsereko Patrick, a two and half years old baby who was the biological son of the 2nd appellant with another woman. They appealed, but on 8th May 2002, the Court of Appeal dismissed their appeals; hence their appeals to this Court.

Prior to his death, the deceased lived with the appellants. Apparently he had the unfortunate habit of soiling his beddings during sleep and his step-mother, the 1st appellant, frequently chastised him for it. On 23rd November 1998, the deceased

defecated where he had been prohibited. To chastise him, the 1st appellant beat him and forced him to eat his faeces. Later, the deceased died. The post-mortem examination revealed that he sustained haematoma on the left side and back side of the head. The cause of death was certified as severe brain damage. At the trial of the appellants, the prosecution contended that the deceased's death resulted from the assault on him by the 1st appellant and that the 2nd appellant participated in the assault and/or was present and had common intention with the 1st appellant.

In this Court, the appellants were separately represented and filed separate memoranda of appeal. The 1st appellant's only ground of appeal is -

> ***"I. The Honorable Justice of Appeal erred in law when they failed to correctly re-evaluate the 1st Appellant's evidence, especially her defence that the deceased died of acute epilepsy which was so recurrent, and the grudge, bias and malice of PW3 (Nsereko Mukasa Swaibu).***

On the other hand, the 2nd appellant appeals on two grounds, namely -

> ***"1. The learned Justices of Appeal misdirected themselves on what constitutes malice aforethought and thereby came to the wrong conclusion that the case had been proved beyond reasonable doubt against the Second Appellant.***
>
> ***2. The learned Justices of Appeal erred when they upheld the trial court's finding that the doctrine of common intention applied to the facts of this case."***

Clearly, the first two grounds of appeal offend Rule 82 of the rules of this Court for being drafted in narrative and argumentative forms. However, in substance the appeal raises three criticisms against the judgment of the Court of Appeal, namely:

(a) failure to re-evaluate all the evidence on the cause of death, (b) misdirection on *mens rea* for the offence of murder, and (c) erring in application of the doctrine of common intention to the facts of this case. It is pertinent to point out at this juncture, that much as the first criticism is raised by the 1st appellant alone and the second criticism is raised by the 2nd appellant alone, our finding on each of the two criticisms is bound to affect both appellants. We shall consider the criticisms in the order they are listed.

(a) Cause of death

The 1st appellant's only ground of appeal criticizes the Court of Appeal for failure to correctly re-evaluate the defence evidence on the cause of death and on the grudge of PW3 against the appellants. However, in his written submissions, counsel for the 1st appellant does not point to any error or omission by the Court of Appeal in that regard, but only asserts that the court ought to have reached a different conclusion. Learned counsel contends that the case is based on circumstantial evidence and argues that the prosecution had to show that the inculpatory facts were incompatible with the innocence of the appellants and incapable of explanation other than their guilt. In his view, the evidence that the deceased suffered attacks of epilepsy at least twice a month and that there was a grudge between PW3 and the 2nd appellant shows that there are co-existing exculpatory facts, which are compatible with the 1st appellant's innocence. He

submits that if the Court of Appeal had re-evaluated the evidence as a whole it would have realized the possibility that the severe injuries found on the deceased were caused accidentally in a fall resulting from an epileptic attack; and that PW3's testimony implicating the appellants was motivated by the grudge.

We agree with the learned counsel for the respondent that there is no merit in this ground of appeal. The same issue was specifically raised by the 1st appellant in the Court of Appeal where she complained thus in the first ground of appeal. –

> ***"1. The learned trial Judge erred in fact and law when she held that the injuries found on the deceased's dead body were inflicted by the appellant whereas it was highly probable that they could have resulted from a sudden fall by the deceased due to an attack of epilepsy which was not challenged at all."***

In considering that ground, the learned Justices of Appeal reviewed the evidence of PW3 and PW6 who testified that they severally witnessed the assault on the deceased, and concluded that those witnesses were truthful because they were consistent and were not shaken in cross-examination. They also reviewed the evidence of PW2, the doctor who performed the post-mortem examination on the deceased, and considered the 1st appellant's defence that the deceased died following a fall in an epileptic feat. In conclusion, the learned Justices of Appeal said -

> ***"We observe that the deceased was only 2½ years at the time of his death. The fall of such a child due to epilepsy could not have caused the injuries described by the doctor, as there would be no***

height to cause such impact. The doctor ruled out any possibility of the injuries being from natural causes or having been caused by a fall ….”

In agreement with the trial judge, the learned Justices of Appeal went on to hold, that the deceased died *“from physical assault”*. We are satisfied that the learned Justices of Appeal properly re-evaluated all the evidence pertaining to the issue and came to their own conclusion as they are required to do. We are unable to fault them in that regard.

(b) *Mens rea*

The second criticism is that the Justices of Appeal misdirected themselves as to what constitutes malice aforethought when in their judgment they held -

“Malice aforethought is defined inter alia, as an intention to do an unlawful act to any person, foreseeing that death or grievous bodily harm is the natural and probable result. DPP vs. Smith (1961) AC 290.

By subjecting a 2½ year old child to such a horrendous and savage treatment of stepping on and pushing its very vulnerable and fragile little head into its excreta, the appellants must have intended to inflict grievous harm to the deceased - See R vs. Tubere s/o Ochen (1945) EACA 63 where it was held, inter alia, that in arriving at a conclusion as to whether malice aforethought has been established, the court must consider the weapon used, the manner in which it is used and the part of the body injured.

In this case the first appellant was just using her fist to box and foot to kick the small child's head into the excreta.
There was therefore overwhelming evidence of malice aforethought as the Judge found…." (Emphasis is added)

In his written submissions, learned counsel for the 2nd appellant points out that what the Court of Appeal refers to as overwhelming evidence of malice aforethought is evidence of intention to inflict grievous harm, which under the Penal Code does not constitute malice aforethought.

There is substance in this criticism. It is apparent from the passage of their judgment, which we have just reproduced, that in dealing with the issue, the learned Justices of Appeal did not advert to the amendment introduced in the definition of malice aforethought by the **Penal Code (Amendment) Act 29 of 1970**. Prior to the amendment, section 186 of the Penal Code Act provided that malice aforethought was deemed to be established by evidence proving any one or more of four circumstances, namely (a) an intention to cause the death of or to do grievous harm to any person; (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person; (c) using violent measures in commission of a felony; (d) an intention to facilitate a person who has committed or attempted to commit a felony to escape from custody. In Act 29 of 1970, the Penal Code Act was amended *inter alia* by substituting for section 186 thereof, a new provision that omitted not only circumstances under paragraphs (c) and (d) but also excluded *"intention to cause grievous harm"* and *"knowledge that grievous harm will probably be caused"*. The new provision, which in the revised edition of the Laws of Uganda 2000, Cap. 120, is re-numbered as section 191, reads -

"191. Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances:

(a). an intention to cause the death of any person, whether such person is the person actually killed or not; or

(b). knowledge that the act or omission causing death will probably cause death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused."

It is obvious from this provision that the learned Justices of Appeal misdirected themselves in law in construing the definition of malice aforethought to include *"an intention to do an unlawful act foreseeing that grievous bodily harm is the natural and probable result"*. The judicial precedents of **DPP vs. Smith** (supra) and **R vs. Tubere s/o Ochen** (supra), which they apparently relied on, were concerned with the English law and Kenya law respectively, whose definition of malice aforethought was similar to that under Uganda Penal Code prior to the amendment. The precedents are therefore irrelevant to the instant case.

In his written submissions, learned counsel for the respondent stops short of conceding the misdirection when he argues that the Justices of Appeal *"did not base their finding of malice aforethought on the fact that the appellants must have intended to inflict grievous harm to the deceased."* His argument, however, cannot be sustained in view of the court's express finding that we reproduced earlier in this judgment. What we have to consider now is if, notwithstanding the misdirection, there was sufficient evidence that proved beyond reasonable doubt

that the deceased was killed with malice aforethought within the meaning of the Penal Code.

In cases of homicide, the intention and/or knowledge of the accused person at the time of committing the offence is rarely proved by direct evidence. More often than not the court finds it necessary to deduce the intention or knowledge from the circumstances surrounding the killing, including the mode of killing, the weapon used, and the part of the body assailed and injured. We note that the learned trial judge was alive to this necessity as well as to the correct definition of malice aforethought; but we are not satisfied with her evaluation and application of the evidence in that regard. Her conclusion that the appellants had the intention to kill the deceased was premised on her finding that -

> ***"In the instant case there was overwhelming evidence which established motive".***

Needless to say, while motive may be taken into account in determining the existence of intention, it is not per se proof of intention. What is more in the instant case, however, what the learned trial judge summarized as the evidence of motive is at best speculative suspicion some of which is derived from irrelevant allegations. With all due respect, we think it was farfetched on the part of the learned trial judge to deduce the motive to kill the deceased from the facts that the 2nd appellant had separated from the deceased's mother in order to marry the 1st appellant; that the appellants habitually beat the deceased for defecating in and wetting his bed; and/or that the appellants did not raise alarm when the deceased died.

Much of the evidence on the assault that resulted into the death of the deceased is unsatisfactory in the manner it was adduced and/or recorded. PW3, the only witness to the assault, described the assault as follows -

> ***"I heard A1 beating the deceased (Patrick Nsereko). Nsereko was crying. For A1 was talking... "You child today you have to eat this faeces [and] finish it today. A1 is my sister in law we stay very close together and she used to talk like that whenever she used to tell that boy to take his bedding outside. She used to talk so much about making deceased eat the faeces.… She was mentioning the name [while] talking and beating. When I heard that it was too much thinking that A2 was not there, I went and found when the kid's head had been in the defecation and she had stepped on the back of the child and one hand was beating on the head while making sure that the head was in the defecation. The husband A2 was seated there in a towel just watching. A2 looked at me with very angry eye then [A1] left the child and she started washing the plates while the men was seated. Then I kept quite …. Then I left …… I went and bought a cigarette. Then after a short while I came back I found A2 also torturing the child telling him to eat the faeces. Again when A2 saw me he stopped torturing him and [I] went home. While at home my son [PW6] came …. I narrated [to] him what had happened. When I was still narrating the story A1 started beating the child again …. A2 again beat the child the 4 time. A1 was still talking and I am conversant with her noise and A2's voice. My son went [there] because the way the deceased was crying was not normal."***

PW6 confirmed that on the fateful day he visited his parents' home and his father, PW3, told him that the appellants had both been beating the deceased but that whenever he went to see who was beating the kid *"he/she would stop"*. PW6 testified that he did not witness any beating but that as he was going to check on his crops in the garden at about 5 p.m. he passed by the appellants' home where he saw

A1 going about her business, and the deceased who *"had sat on the cut banana plantations"*. He heard A1 order the deceased to move to the verandah *"where his father will find him when she has killed him."* She moved away and he went to the garden where he did not say long. He returned to his father's home and shortly after heard a woman called Nambejja telling someone to go to Kayunga and inform people there that A2 had lost a child.

Dr. Mukunzi William, PW5, testified that on 24th November 1998, he examined the body of the deceased which was swollen and had blood and mucus coming from the nose. He noted two marks of violence on it, namely a haematoma (a swelling of collection of blood) on the left side of the head and another at the back of the head. He concluded that the cause of death was severe brain damage. He opined that the injuries could have resulted from beating with a blunt object such as a stick or a [fist].

For a court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act that caused the death and if the accused foresaw death as a natural consequence of the act. In the instant case, we agree with the Court of Appeal that the treatment, to which the deceased was subjected, as described by PW3, was horrendous and savage. To beat a baby of $2^1/_2$

years while forcing it to eat its faeces is a cruel, inhumane and unlawful assault that goes beyond permissible parental chastisement of an errant child. However, we do not think that it would be possible to infer malice aforethought from it. The beating was only by hand. The resultant injuries were not suggestive of prolonged assault. PW3, the only eye witness to the assault, did not describe how forceful the assault was; nor did the doctor who examined the injuries give opinion on whether excessive force was used to inflict the injuries. Taking all that into consideration, we are unable to say that death was a natural consequence of the assault or that the assailant foresaw that death was a natural consequence of the assault inflicted. In the result we find that the killing of the deceased was unlawful but without malice aforethought.

(c) *Common intention*

Both courts below rejected the 2nd appellant's defence that he was absent when the deceased was assaulted and found that he was present throughout the episode. We are unable to fault them on that finding. In his written submissions, counsel for the 2nd appellant presents two alternative arguments. First, learned counsel contends that the assault was a lawful correctional measure administered in exercise of parental authority over an errant child. In view of what we held earlier in this judgment, we find no merit in this contention.

Secondly, learned counsel argues that there was not sufficient evidence to prove that the 2nd appellant participated in the assault, as no witness described precisely what he did. We also find no merit in this submission. While it is correct that PW3's testimony that he found the 2nd appellant torturing the deceased lacks particularity, we find that there is other ample evidence that he had common

intention with the 1st appellant in the perpetration of the ill-fated chastisement. He witnessed the 1st appellant assaulting the deceased but did not disassociate himself from the assault by stopping her or by otherwise protecting the deceased child. He was undoubtedly in a position to prevent the assault and indeed under duty to do so. In choosing to do nothing about the assault he associated himself with it.

In the result this appeal succeeds in part. We find that the courts below erred in holding that the killing of the deceased was with malice aforethought. We, however, find both appellants guilty of manslaughter of Patrick Nsereko. Accordingly, we quash the convictions for murder and substitute convictions of both appellants for the offence of manslaughter. We set aside the death sentence imposed on both appellants. After taking into consideration that the 1st appellant has been in prison, since her arrest in November 1998 and the 2nd appellant has similarly been in prison since June 1999, we sentence each to 7 years imprisonment.

Dated at Mengo this 5th day of July 2007.

J. W. N. Tsekooko
Justice of Supreme Court

A. N. Karokora
Justice of Supreme Court

J. N. Mulenga
Justice of Supreme Court

G. W. Kanyeihamba

Justice of Supreme Court

B. Katureebe

Justice of Supreme Court