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"THE REPUBLIC OF UGANDA"

IN THE HIGH COURT OF UGANDA AT KABALE

HCT-05-CR-SC-0053-2004

UGANDA :: PROSECUTOR

VERSUS

JOVIA BAKANYOMERA :::::::::::::::::::::::::::::::: ACCUSED

JUDGEMENT:-

BEFORE HON. JUSTICE J.B.A. KATUTSI

The accused at the bar is indicted for Murder Contrary to Section 183 and punishable under section 184 of the Penal Code Act.

It is alleged that she on 25-5-2002 at Hamurambi, Kabale District murdered Rwabambarama Geofrey.

Prosecution examined 4 witnesses. PW1 Kemitare Mary is the sister of the deceased she testified that deceased was the busband of the accused. Their marriage was characterised by querrals, fights which at time involved deadly weapons. Her brother died on 25-5-2002, she said.

PW2 Nyiramakubu Phoebe is the mother of the deceased. She testified that the marriage of deceased and accused was characterised by fights accused always beating deceased. On 25-5-2002 she was at home. Deceased and accused had a house in the same homestead. On that day accused arrived home at about 9 p.m. She then heard accused talking to the deceased after which she had deceased crying out that accused was beating him. She went to their house and there accused told her not to interfere in their family affairs. Deceased told her that accused had hit him with an iron bar in the chest.

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Accused kept quiet. People answered the alarm but by this time deceased was no longer able to talk. He died the following day.

PW3 Kakara is the cousin of deceased. His home is nearby that of the deceased. On 25-5-2002 he was at home. After 9 p.m. he heard an alarm coming from the home of the deceased. It was being raised by deceased's mother. He went to the house of the deceased and found him lying down by the bed. He was still alive. Deceased only managed to tell him that he had been hit with an iron bar on the chest by the accused. He died the following morning.

PW4 No.26413 D. Sgt. Twino was on 26-5-2002 instructed to go to Hamurambi village to the scene of an alleged murder. Reaching there he found a dead body lying on the bed. He was with a Doctor who carried out post mortam on the body. The body had bruises and scratches around the neck. Accused had already been arrested.

The medical report was admitted under section 64 of T.I.D. According to the admitted medical report the body was identified by the brother of the deceased as that of Rwabambarama. He found it lying in supine position on the bed covered with a blanket. There were no blood stains on the clothes. Externally he found that the pina had been cut off. It was an an old wound. The body had two bruises on posterior aspect of the neek. There was a swelling at the left pariotal and temporal regions. There were abraisons measuring 3 x 4 cm. There were blisters - a sign of beating on the left loin. Death was caused by head injury blunt chest tauma and bleeding. Deceased had a history of T.B.

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In her testimony not on oath accused said deceased was a sick man. He was a T.B. case, on 25-05-2002 when she got him her husband now deceased was complaining of chest pain and dizziness. Later he died. On the above evidence the defence say that prosecution have not proved the charge against accused to the required degree of proof. Prosecution say, that the charge hasbbeen proved beyond any reasonable doubt.

In a joint, opinion both assessors advised me to find accused guilty as charged and convicte her accordingly.
There is no doubt that Rwabambarama is dead and buried.
There is no doubt that he died of an unlawful act. I accept the evidence of deceased's mother that he ~~had~~ heard him crying out that accused was beating him. She went to his house and accused with impunity told her not to interfere in their family affairs.

I accept the evidence of Kakara PW2 that he answeredthe alarm raised by deceased's mother and found deceased lying by the bed. I unhestantingly accept his evidence that deceased told him that accused had hit him with an iron bar on the chest. This is dying declaration admissible in evidence. The medical report corroborates the evidence of beating. Accused's defence is a shan and is rejected outright. There is evidence that the marriage between deceased and accused was characterised by querrals and fights. It appears to me that this was one of those nasity occasions when accused would discend on deceased and administer beatings on him. For this reason I am of the humble view that she did not mean to kill deceased. She was beating him as she used to do before. Malice aforethough therefore has not been proved.

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Killing people in cold blood must stop. This can be seen by the type of sentences mated out to the offender. I deem a se sentence of 18 years not to be a day longer she is sentenced accordingly.

J.B.A KATUTSI

JUDGE

17-9-2004.

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With respect I don't accept the opinion of both assessors that this was a case of Murder. I found accused guilty of Manslaughter Contrary to Section 187 of the Penal Code Act Revised Edition 2000 and convict her accordingly.

J.B.A. KATUTSI

JUDGE

17-9-2004.

Mwesigwa: No previous record of the convict.
Regarded as first offender. However the offence of which she has been convicted is a very serious one. It led to loss of life. This offence is on the increase in society. It is the duty of Court to see that these offences are curbed down. I call for a deterrent sentence.

Accused: I am a sick person. I pray for leniency.
I have young children who have no help now.
I pray leniency.

J.B.A. KATUTSI

JUDGE

17-9-2004.

SENTENCE:

This is a hardline case. A human being lost his life innocently. Accused does not show any signs of repeatance. She only cares about herself. She killed her husband who was sickly instead of caring for her. She deserves to be shown that what she did is unacceptable.

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA

CORAM: HON . JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. JUSTICE C.N.B. KITUMBA, JA.
HON. JUSTICE S.B.K. KAVUMA, JA.

CRIMINAL APPEAL NO. 61 of 2005

KABANYOMERA JOVIA.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

JUDGMENT OF THE COURT:

This is an appeal against the judgment of the High Court (Katutsi J.) given at Kabale on the 17th September 2004 in which he convicted the appellant of manslaughter, contrary to s. 187 (1) of the Penal Code Act and sentenced ~~him~~ her to 18 years imprisonment under s. 190.

The brief facts of the case, as found by the trial judge are that on 25.05.2002 at about 9p.m., the appellant who was a wife to the deceased, fought him at their house. During the fight, the appellant beat the deceased with an iron bar. The deceased died the following day at their home. The appellant was arrested by the police and charged with murder but convicted of manslaughter.

She was sentenced to 18 years imprisonment. She now appeals against both the conviction and sentence.

There are two grounds of appeal namely: -

1. **The Trial Court erred in law and fact by holding that the prosecution proved beyond reasonable doubt that it is the Appellant who caused the death of the deceased when actually the evidence adduced was insufficient and contradictory to prove the same.**

2. **In the alternative but without prejudice to ground 1 above, the Trial Court erred in law and fact by passing a harsh sentence of 18 years of imprisonment on the Appellant.**

In her defence, the appellant denied killing the deceased. She asserted that the deceased had died of T.B following neglecting his treatment.

During the hearing of the appeal, Mr. Lawrence Tumwesigye appeared for the appellant on state brief. Mr. Andrew Odiiti, Senior State Attorney appeared for the respondent.

Counsel for the appellant argued the grounds of appeal consecutively and so did counsel for the respondent. We shall consider the two grounds of appeal likewise.

On Ground 1, counsel for the appellant submitted that the learned trial judge erred in law and fact when he held that the prosecution had proved the case against the appellant beyond reasonable doubt that it was herself who caused the death of the deceased. In counsel's view, the evidence on record was insufficient and contradictory and left some doubt which should have been resolved in the appellant's favour. According to him, the judge relied on a postmortem report which had been irregularly admitted in evidence without a witness tendering it and this denied the appellant the opportunity to cross-examine the author of the report on its inconsistencies to the prejudice of the appellant. It was counsel's further submission that the judge erroneously reduced the charge of murder to manslaughter and had relied on an uncorroborated dying declaration. Counsel prayed court to allow ground 1.

Counsel for the respondent supported the conviction and sentence. He disagreed with counsel for the appellant's submissions that there were contradictions and inconsistencies in the evidence relied

upon by the learned trial judge to convict the appellant. Regarding the reduction of the charge from murder to manslaughter by the learned trial judge, counsel contended that this was because of lack of proof of intention to kill on the part of the appellant. It was his view that the medical report was properly admitted in evidence and it confirmed the deceased had indeed been assaulted just as the witnesses had stated. It was counsel's contention that the deceased's dying declaration was sufficiently corroborated to justify its use in the conviction of the appellant.

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The learned trial judge had this to say in his judgment: -

> ***"There is no doubt that Rwabambarama is dead and buried. There is no doubt that he died of an unlawful act. I accept the evidence of deceased's mother that he heard him crying out that accused was beating him. She went to his house and accused with impunity told her not to interfere in their family affairs.***
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> ***I accept the evidence of Kakara PW2 that he answered the***
> 20 ***alarm raised by deceased's mother and found deceased lying by the bed. I unhesitatingly accept his evidence that deceased told him that accused had hit him with an iron bar on the chest. This is dying declaration admissible in***

evidence. The medical report corroborates the evidence of beating. Accused's defence is a shan and is rejected outright. There is evidence that the marriage between the deceased and accused was characterized by quarrels and fights. It appears this was one of those nasty occasions when accused would descend on deceased and administer beatings on him. For this reason am of the humble view that she did not mean to kill deceased. She was beating him as he used to do before. Malice aforethought therefore has not been proved. I found accused guilty of manslaughter contrary to section 187 of the Penal Code Act Revised Edition 2000 and convict her of manslaughter." (sic)

This being a first appellate court, we have a duty to subject all the evidence on record to a thorough review and scrutiny and make our own conclusions bearing in mind that we did not see the witnesses testify. See **R. 30 (1)(a)** of the **Judicature (Court of Appeal Rules) Directions s. 1. 13 – 10,** See also **Kifamunte Henry Vs. Uganda SCCA No. 10 of 1997, Pandya V R. 1957 EA 336** and **Okeno V Rep [1972] EA 32.** We now proceed to review and scrutinize that evidence.

There is no doubt the deceased's dying declaration is admissible in evidence under **s. 30 (a)** of the **Evidence Act Cap 6.** We are, however, alive to the rule of practice that although there is no rule of law that to support a conviction basing on a dying declaration there should be corroboration of the same and it is generally recognized that it is very unsafe to base a conviction solely on it. **Migezo Mibinga Vs Uganda [1955] EA 71.** We find, however, that in the instant case the deceased's dying declaration was sufficiently corroborated.

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First, both PW2 and PW3 testified that each heard the deceased tell each of them that the appellant had hit him at the chest using an iron bar. According to the evidence on record, the declaration was made in the presence of the appellant who just kept mum. This conduct of the appellant in face of the serious confrontation of herself by the deceased, in the presence of the witnesses, was not consistent with her innocence. An innocent person, in our view, would have reacted differently. She would have protested vigorously. **Migezo Mibinga Vs Uganda** (supra).

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Secondly, there was no possibility of the deceased being mistaken about the identity of his assailant. Although the statement was made at night about 9p.m., the deceased very well knew the

appellant who beat him. She was his wife. The appellant administered the beating on the deceased which forced him to cry out loudly that she was beating him. He also raised an alarm which, with his loud yell, attracted PW1 and PW2 to the scene of the crime where the witnesses found the appellant. The appellant became furious when PW1 talked to her about the fight. She further warned the witness not to interfere since the deceased was the appellant's husband. All this points to the appellant as the person who assaulted the deceased.

Thirdly, the testimonies of PW1 and PW2 show that when the deceased made the statement about his wife's beating him, he talked easily and without difficulty. He was still in good and fit condition to make the statement.

Fourthly, we find nothing in the evidence on record that the appellant sought to challenge the evidence of the above witnesses by way of cross-examination. This failure to cross examine the witnesses on this material evidence in the whole trial of the appellant leads to the inference that the same is accepted by the appellant. See **James Sawoabiri and Fred Musisi Vs. Uganda, SCCA No. 5 of 1990** (unreported) and **Didas Kibengi Vs. Uganda C.A. Cr. App. No. 19 of 1997.** See also **Akol Patric and Others Vs. Uganda C.A. Cr. App. No. 60 of 2002** (unreported).

Lastly on this point, there is ample evidence on record to show that the appellant, in her defence, told lies about the death of the deceased when she testified that it was herself who had called PW3 to the scene of crime and that the deceased had died of TB. According to the uncontroverted evidence on record, PW3 ran to the deceased's house in answer to an alarm raised by the deceased's mother PW2. It is the appellant who registered the fatal blow on the deceased. Where lies are proved on the part of the accused person, such lies render the inference of the accused's guilt stronger and can amount to corroboration. **Moses Kasana Vs. Uganda SCCA No. 12 of 1991.** The learned trial judge found the appellant's defence a lie and sham and we do not fault him on this.

Regarding the learned trial judge's reduction of the charge against the appellant from murder to manslaughter, it was not because of some doubt he had in his mind as submitted by counsel for the appellant. It was for lack of proof of the intention to kill on the part of the appellant and the learned trial judge stated this very clearly in his judgment.

In view of the foregoing, we find, without any hesitation, that there was ample corroboration of the dying declaration of the deceased

which was, therefore, properly relied on by the learned trial judge. There was also, sufficient evidence for the learned trial judge to find proof, beyond any doubt, that the appellant had caused the death of the deceased. Ground of appeal No. 1 must fail and we so hold.

On ground 2 in the alternative, counsel for the appellant submitted that even if the appellant was to be found guilty of manslaughter, a sentence of 18 years imprisonment is too harsh. The appellant at 60 years is of advanced age. In counsel's opinion, five years would, in the circumstances, have been appropriate. He prayed Court to allow the appeal and quash the conviction and set aside the sentence or, in the alternative, reduces it to 5 years imprisonment.

Counsel for the respondent supported the sentence as being appropriate bearing in mind the circumstances of the case. The deceased, a TB patient depended on the appellant for care and treatment. She, however, decided to terminate his life. It is on record, the appellant was in the habit of beating the deceased for a long time. She was not repentant. He prayed Court to uphold the sentence and dismiss the appeal.