THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

CRIMINAL APPEAL No. 0041/2009

{ *Arising from Criminal Session Case No. 0018/2007*
Before Hon. Justice Augustus Kania at Arua }

ATIKU LINO:::APPELLANT

VS

UGANDA ::RESPONDENT

Coram : **Hon. Justice Remmy Kasule, JA**
Hon. Lady Justice Hellen Obura, JA
Hon. Justice Simon Byabakama Mugenyi, JA

JUDGMENT OF THE COURT.

This is an appeal against both conviction and sentence arising from the decision of Hon. Justice Augustus Kania, delivered on 28.4.2008, whereby he convicted the appellant of the offence of murder contrary to **Sections 188 and 189 of the Penal Code Act** and sentenced him to life imprisonment.

The facts as proved and accepted by the trial Judge were that, on the night of 9-3-2006, the deceased Alioni Antonio Felice was asleep in his house when he was attacked by the appellant who was armed with a panga, a bow and arrows. The appellant cut the deceased several times accusing him of bewitching his son

and demanded he (deceased) should get medicine to cure his son.

The appellant was identified by the deceased's daughter (P.W.3) and grandson (P.W.5) with the help of light from the fire place inside the house, as well as moonlight. P.W.3 tried to intervene but was also cut by the appellant on the head. At day break, the appellant proceeded to the sub-county headquarters where he reported that his wife killed a jackal that had invaded their home during the night. He dissected the jackal, removed its heart and liver, applied salt and pepper before burning them. He surrendered the panga to the police and was detained.

Post mortem examination was performed on the body which was found to have cut wounds on the right shoulder, right side of the neck and left anterior chest wall. The cut went through the heart and great vessels. The cause of death was severe hypovalaemic shock from severe bleeding.

In his defence at the trial, the appellant denied killing the deceased or going anywhere that night. He only heard people crying from the home of the deceased. He decided to report to the sub-county headquarters after he heard people implicating him in the death of the deceased.

The trial Judge dismissed the appellant's version as untrue, convicted him of murder and sentenced him to life imprisonment, hence this appeal.

At the hearing of this appeal, the appellant was represented by Mr. Komakech Denis Atine and Ms. Barbra Masinde, Senior State Attorney appeared for the respondent.

At the commencement of the hearing, counsel for the appellant with leave of court, amended the Memorandum of Appeal by substituting the first ground with a fresh one. The grounds of appeal as amended therefore, are that:

1. ***The learned trial Judge erred in law and fact when he disregarded the defence of intoxication available to the appellant thereby occasioning a miscarriage of justice.***

2. ***The learned trial Judge erred in law and fact in passing a harsh and excessive sentence thus occasioning a miscarriage of Justice.***

On the first ground, counsel for the appellant submitted that the learned trial Judge only addressed himself to the defence of alibi but not intoxication, yet the latter defence emerged prominently in both the prosecution and defence evidence. Counsel pointed to the evidence of Anguyo Fabiano (P.W.6) which was to the

effect that the appellant returned home with a bottle full of waragi which he shared with his wife.

The appellant's evidence was that, on the said day (9-3-2006) after supper, he together with one Edward left his home for a drink at the home of Gaspero Okuni. He bought one bottle of potent gin commonly known as "enguli" (waragi). As he was still drinking, Anguyo and Fred arrived and informed him that his wife had raised an alarm because a jackal had attacked her before she killed it with a pestle.

Learned counsel for the appellant also referred to the evidence of the conduct of the appellant, when he reported to the sub county headquarters by himself, as an indication of absence of mens rea on his part due to intoxication. Counsel argued that had the trial Judge considered the said defence, he would have found that malice aforethought was not proved and would have convicted the appellant of manslaughter other than murder. He invited Court to substitute the conviction for murder with that of manslaughter.

On ground 2, counsel briefly submitted that the sentence of life imprisonment was harsh and excessive in the circumstances. He invited Court to set aside the sentence and substitute it with that commensurate with the offence of manslaughter.

Counsel for the respondent opposed the appeal. She contended that while there was evidence that the appellant drunk alcohol that night, he was not so drunk as not to be in full control of himself according to the testimony of Anguyo (P.W.6). She also contended that the appellant's conduct at the scene revealed he knew what he was doing in that, when the deceased cried out why he was killing him, the appellant retorted he (deceased) was strangling his son with witchcraft.

Learned counsel further contended that, even the appellant's defence was laden with several incidents of witchcraft which underlined the motive of the attack on the deceased. Counsel invited Court to disregard the defence of intoxication as inapplicable to the facts of this case and find that mens rea was proved beyond reasonable doubt.

On sentence, counsel submitted that the sentence of life imprisonment was not illegal, harsh or excessive as it befitted the gravity of the offence and the manner it was committed. She prayed Court dismisses the appeal against both conviction and sentence.

We have carefully considered the submissions of both counsel and perused the record of the trial Court.

As a first appellate Court, it is our duty to review and re-evaluate the evidence before the trial Court, draw inferences from the evidence and reach our own conclusions, bearing in mind this Court did not have the opportunity to hear and observe the witnesses testify as the learned Judge did See Rule **30(1) (a) of the Judicature (Court of Appeal Rules) Directions; Begumisa and others Vs Tibebaga, SCCA N0. 17/2002** and **Mbazira Siragi and another Vs Uganda, Cr. Appeal N0. 2004 (SC).**

In the matter before us, it is correct that the learned trial Judge did not consider the aspect of intoxication in the determination of the ingredient of malice aforethought. Counsel for the respondent argued that while the appellant mentioned he went for a drink at Okuni's home that evening, he did not raise intoxication as a defence.

Looking at the appellant's defence, it is evident he did not say he was drunk at the time he killed the deceased. He simply denied being responsible for his death. Although a plea of intoxication is a matter of defence, circumstances pointing to such a condition may arise out of the evidence adduced by the prosecution. In that case, the trial Judge has to consider whether the accused was incapable of forming the requisite intent by

reason of intoxication- see **Nyamweru S/o Kinyaboya Vs R (1953) 20 E.A.C.A 192**.

In the instant case, the evidence of the eyewitness (P.W.3) was to the effect that the appellant attacked and hacked the deceased to death at about midnight. The evidence of Anguyo Fabiano (P.W.6) was that he rushed to the appellant's home in answer to an alarm by his wife. The time was after 7:00pm. When he inquired the cause of the alarm, the appellant's wife answered that she was attacked by a jackal but that she had managed to kill it. She asked him (P.W.6) to go and summon her husband. P.W.6 stated:

> ***"Lino was drinking..... I went to call Lino from the home of Gaspero which was neighbouring. He came with a bottle of crude waragi which he and his wife shared. At 8:00pm, I went home and slept until morning."***

In his cross examination, P.W.6 stated:

> ***"It was only Volente Candia who partake (sic) of the crude waragi with the accused and his wife. I don't know if Lino had started drinking before but he was not drunk."***

The appellant's evidence on the aspect of drinking was that:

"I came home with Edward after 7:00pm. After supper, we went for a drink at the home Gaspero Okuni and bought one bottle of potent gin commonly known as "enguli". While still drinking, Anguyo and Fred arrived to call me. He asked me if I did hear the alarm that was being made"

Upon our re-evaluation of the evidence of P.W.3 (eyewitness), P.W.6, and the appellant, it is our finding that the appellant drunk waragi some hours prior to the attack on the deceased. The question is whether, by reason of the said drinking, he can be said to have been incapable of forming the specific intent to kill the deceased. In the determination of this pertinent issue, we wish to highlight the following facts that emerged from the evidence:

1. The deceased was attacked from his house.

2. The appellant was armed with a panga, a bow and arrows. This, in our view, shows preparation on his part.

3. Although the appellant drunk waragi that evening, he was not drunk in that he was in full control of his faculties (PW6's evidence).

4. He cut the deceased more than once and, according to PW3, when the deceased cried out why he was killing him, the appellant responded that;

> ***"I am killing you because my son complains that you strangle him using witchcraft. You should take medicine to cure my son."***

5. When P.W.3 inquired why he was killing her father the appellant pursued P.W.3 and also cut her. Thereafter he returned to the house and resumed assaulting the deceased.

6. **The aspect of the jackal.** In his defence, the appellant stated that when Anguyo (P.W.6) and Fred found him drinking at Gaspero's home, P.W.6 informed him about the jackal that had invaded his home, but that his wife had killed it. He did not say he did anything to the said jackal himself. Yet, according to P/C Amviko Hellen (PW8), the appellant reported that after his wife had killed the jackal, he dissected it, removed the heart and liver , applied salt and pepper and burnt it. The appellant surrendered a blood stained small panga to P.W.8.

7. There is no evidence to suggest the said jackal was in the house of the deceased.

Upon our re-evaluation of the evidence, we have come to the finding that the appellant was fully in control of his faculties, he prepared and armed himself to the teeth, launched an attack on the deceased and brutally hacked him to death. His response to the deceased's cry was a clear indication he knew what he was doing. Further, he was not ready to stomach any interference in the pursuit of his objective and, that was why he chased and cut P.W.3 when she tried to intervene. Thereafter he returned to the house to continue with his grisly act.

We have come to the conclusion that the appellant's state of mind cannot be said to have been impaired by the waragi he drunk earlier, and in those circumstances, the contention that he was incapable of forming the necessary intent is clearly untenable.

Having found as above, ground No.1 fails.

The complaint in ground 2 is that the sentence of life imprisonment was harsh and excessive. However, other than the mere contention that the sentence was harsh and excessive, counsel for the appellant did not advance any reasons why he felt so.

While sentencing the appellant, the learned trial Judge stated as follows:

> *"Though the accused is a first offender and a young man who could still reform and play a role in nation building, murder is an offence of a capital nature. ....I have carefully looked at the ferocity and the brutality with which the accused attacked the deceased and taken a very serious view of his act, but I have also considered that the accused acted under a delusion that the deceased was responsible for the ailment of his child. Exercising my discretion in those circumstances, the accused is sentenced to life imprisonment."*

We are in agreement with the observations of the learned trial Judge in that regard. We, however, note that he did not take into account the period of 2 years the appellant was stated to have spent on remand. This is a mandatory requirement under **Article 23 (8) of the Constitution**.

There are a host of decisions to the effect that, a sentence imposed by the trial Court in non-conformity with the said provision is a nullity and the sentence ought to be set aside – see **Kabwiso Issa Vs Uganda, Criminal Appeal No. 7 of 2002 (SC); Kizito Semakula Vs Uganda, Cr. Appeal No. 24 of 2001 (SC); Katende Ahamad Vs Uganda Cr. Appeal No. 6 of 2004 (SC).**

We must emphasise that, for purposes of other cases pending trial before the High Court, a trial Judge ought to clearly state that the period of remand has been taken into account before passing sentence of imprisonment. In the instant case, the trial Judge did not.

For that reason, we find that the trial Judge erred when he sentenced the appellant to life imprisonment without taking into account the period he had spent on remand as required by **Article 23(8) of the Constitution.** The sentence is therefore illegal and a nullity. We hereby set it aside.

Having set aside the sentence, this Court has a duty to impose a sentence of its own as if it were the trial Court. This is pursuant to **Section 11 of the Judicature Act.**

We have taken into account not only the remand period but also the other aggravating and mitigating factors. The offence of murder carries a maximum penalty of death. The deceased was attacked at his home and killed in a ferocious manner. The appellant clearly did not want him to live. So brutal was the attack that death was instantaneous. The appellant was aged 31 years at the time of sentence and a first offender. We note that one of the objectives of sentencing is rehabilitation of the offender. The other factor we have considered is the need for

parity in sentences, in particular where the facts of the case under consideration have a resemblance to previous cases.

This Court, in **Tumwesigye Anthony Vs Uganda, Criminal Appeal N0. 46 of 2012**, substituted the sentence of 32 years imprisonment with that of 20 years. The appellant in that case was convicted of murder. The deceased had reported him for stealing his (deceased) employer's chicken. The appellant killed him by crushing his head after which he buried the body in a sand pit.

While reviewing the sentence, this Court observed that:

> ***"We note that the fact that the appellant was a first offender, and a young man, aged only 19 years with a chance to reform, was a father of two children and supported two orphans, called for a lesser sentence than what the trial Judge imposed.***

The Court thus set aside the sentence of 32 years and substituted the same with 20 years imprisonment.

Considering the circumstances of this case, we consider a sentence of 20 years imprisonment to be commensurate with the gravity of the offence. We accordingly sentence the appellant to twenty (20) years imprisonment. The sentence is to be served

from the date of conviction of the appellant, that is 28th April, 2008.

We therefore allow this appeal in part. The appeal against conviction is hereby dismissed and appeal against sentence allowed in the above stated terms.

We order accordingly.

DATED AT ARUA THIS.....6th.....DAY OF.....June.....2016.

HON. JUSTICE REMMY KASULE,
JUSTICE OF APPEAL.

HON. LADY JUSTICE HELLEN OBURA,
JUSTICE OF APPEAL.

HON. JUSTICE SIMON BYABAKAMA MUGENYI,
JUSTICE OF APPEAL