THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT OF UGANDA AT KAMPALA

(CORAM: KISAAKYE, ARACH-AMOKO, MUGAMBA, BUTEERA AND CHIBITA; JJ.SC)

CRIMINAL APPEAL NO. 12 OF 2017

NSABIMANA RICHARD::APPELLANT

AND

UGANDA::RESPONDENT

(Appeal from the judgment of the Court of Appeal (Kakuru, Byabakama Mugenyi and Owiny-Dollo, JJA) in Criminal Appeal No. 829 of 2014 dated 7th December, 2016)

JUDGMENT OF THE COURT

The appellant, Nsabimana Richard, was convicted by the High Court of Uganda (Gidudu J) sitting at Kabale for the murder of his three year old son, Uwimana Derrick and was sentenced to death. He appealed to the Court of Appeal against both conviction and sentence. The Court of Appeal upheld the conviction but quashed the sentence and replaced it with 30 years imprisonment. He has appealed to this Court against the conviction.

Background

This was a tragic case of homicide in the family. The brief facts of the case are that on 14th February, 2005, the appellant went to the house of PW2, his mother, at midnight and demanded for his three year old son who lived with her saying that he would like to spend the night

with him. PW2 let the child go with the appellant as requested. The following morning, when PW2 inquired about the child's whereabouts, the appellant responded that he had taken him for treatment. When PW2 persisted with her inquiries, the appellant disappeared from home. PW2 reported the incident to the area Local Council authorities (LCs) who mobilized the villagers, who mounted a search for him. It was not until the 17th February, 2005 at about 2 am, that they found the appellant sleeping in PW2's kitchen. When he was again asked where the child was, he initially refused to answer but later on after he was beaten, he revealed that the child was in the pit latrine. He then led the search team to the pit latrine, removed the slab, and pointed down the pit. The search team indeed saw the lifeless body of the child wrapped in a blanket inside the pit.

They immediately arrested the appellant and handed him over to Police. The Police visited the scene and ordered the appellant to remove the body of the child from the pit. He did so. The child was later buried after a postmortem was carried out on the body. As stated earlier, the appellant was charged and tried for murder by the High Court sitting at Kabale. He denied the charge in his unsworn statement but the trial judge convicted and sentenced him to death. He appealed to the Court of Appeal against both conviction and sentence. The Court of Appeal upheld the conviction but set aside the death sentence. Instead it sentenced him to 30 years imprisonment. Hence this appeal.

Ground of Appeal

The sole ground of appeal in the Memorandum of Appeal filed in this Court on the 11th December, 2019, is:

That the learned Justices of Appeal erred in law in finding that the appellant was not suffering from a mental disorder at the time of commission of the offence.

Representation

Counsel Wakabala Susan represented the appellant on State brief while Senior Assistant DPP Badru Mulindwa appeared for the State. Both of them filed written submissions which they briefly highlighted at the time of hearing.

Submissions

The thrust of the submission by Ms. Wakabala is that the defense of insanity is available in murder cases. She stated the law to be clear that where evidence is given during the trial that the accused was insane at the time of the commission of the offence so as not to be responsible for his or her actions, the court should make a finding to the effect that the accused person is not guilty of the offence charged by reason of insanity. She submitted that the state of mind of an accused person may be discerned from the evidence on record such as the evidence from the prosecution side or a statement made by the accused person to the Police as well as his general conduct prior and after the occurrence of the incident. She added that all the pieces must be put together in order for court to reach a conclusion on the state of mind.

Counsel further quoted a passage from a book by **John H. Blume and Pamela Blume Leonard** entitled **The Champion** where the authors stated that mental faculties constantly change and that a person can be in one mental state at the time of committing the offence and be in another state subsequently. Unfortunately, she did not avail Court a certified copy of the said passage as the practice of the Court directs. We are therefore unable to verify the contents of the quoted passage.

Counsel contended that it was clear from the evidence on record that at the time of the commission of the offence, the appellant was of unsound mind. She pointed out that the testimony of PW2, like those of PW3 and PW4, was that the appellant used to sleep in his mother's kitchen. Counsel argued that living in a kitchen is not a normal occurrence for a person of sound mind. She pointed out other indicators as being that the appellant's wife had left him just two months into the relationship. Counsel went on to state that it was unfortunate that she(the appellant's wife) was not brought to testify as she would have thrown some light on the appellant's mental status considering that she had lived with him for some time. Counsel contended that in any case the appellant's defense of insanity had not been taken into account by the Courts below.

Counsel faulted the Court of Appeal for not having looked at all the conditions surrounding the appellant's conduct before coming to the conclusion about his mental status. She submitted that in re-evaluating the evidence on this point, the Court of Appeal left out

critical evidence that favoured the appellant. She added that the court had relied only on the evidence which favoured the prosecution. For instance, PW2 stated in her examination in chief that:

"I used to stay with him before he was arrested. By the time of his arrest he was of unsound mind".

Shortly after, the same witness said:

"When the accused came to pick the kid from me, he was in a normal mood."

But the Court of Appeal omitted what the witness said in cross-examination that:

"I saw the accused's face from the lamp-tadoba which I lit up. He came with force demanding for the kid. He said "I want my child to stay a night with me. He was violent."

According to counsel, the relevant evidence is that of PW2 who interacted with the appellant when he went to pick the child, corroborated by the appellant's confession and the testimony of PW5 who recorded it. Counsel submitted that the appellant had stated in his confession that he went drinking and returned at 11 pm after which he strangled the child and threw him in the pit latrine.

Counsel also denigrated the medical report relied on at the trial which indicated that the appellant was of *"apparently normal mental state"*. She argued that it was prepared four days after the incident, on the 17/2/2015. She pointed out that the offence was committed on the

night of the 13/2/2015. Secondly, counsel further argued that the meaning of the word *"apparent"* used in the report is not conclusive. Thirdly, she observed that the Doctor who examined the appellant and prepared the report was a general practitioner who had nothing to do with mental health issues. She noted that the doctor testified that he had qualified as a medical doctor in 1994 with an MBCHB degree from Makerere University, and that he held also a post graduate diploma in Community medicine from the University of Innsbruck (Austria).

Counsel therefore invited Court to re-evaluate the evidence and make a finding that the appellant is not guilty by virtue of insanity. She invited Court to quash the conviction and set aside the sentence.

Mr. Mulindwa on the other hand disagreed with the above submissions and fully supported the findings and decision of the Court of Appeal. He submitted that the Court of Appeal had fully and properly re-evaluated the evidence and applied the law. He contended that the issue of insanity was never raised nor did the appellant allude to suffering from any abnormality in his defense at the trial as stipulated by section194 of the Penal Code Act. He submitted that Court pointed this out in its judgment and that as such the appellant cannot raise it now, especially when he had denied that he had killed the deceased.

Mr. Mulindwa further contended that the Court of Appeal rightly found that the claim by the appellant was not supported by any evidence on record. He submitted that the evidence instead showed

that the way the appellant executed the murder and concealed the body undoubtedly showed that he was of sound mind at the time he committed the offence. He added that the appellant had picked the child in the middle of the night and when in the morning, PW2 asked him for the child's whereabouts, he told her that he had taken him for treatment. He submitted that the appellant had disappeared from home for a number of days until the villagers located him in the kitchen of PW2 where he was sleeping and noted that it was only after the villagers had quizzed him that the appellant revealed that he had dumped the child in the pit latrine, where the body was actually recovered.

Mr. Mulindwa further contended that the fact that the appellant was living in the kitchen of PW2 is not something that this Court can rely on to conclude that the appellant was not of sound mind at the time he committed the offence. He argued that PW2 had clearly explained the reason the appellant lived in her kitchen as being because the appellant had no house of his own. Mr. Mulindwa noted that PW2 testified that the appellant first stayed in her home with his wife before she (PW2) advised him to move into the kitchen. He added that it was not the problem of unsound mind that had compelled the appellant to live in the kitchen.

In conclusion Mr. Mulindwa invited Court to find that the appeal lacked merit and prayed for its dismissal.

Consideration of the appeal by Court

This appeal raises the issue whether the appellant was of unsound mind at the time he committed the offence and if so, whether the Court of Appeal erred in upholding his conviction for the offence of murder.

In resolving this appeal, it is instructive to state the law in this area. The starting point is section 10 of the Penal Code Act, which states that every person is presumed to be of sound mind and to have been of sound mind at the material time of the offence until the contrary is proved. Section 10 reads:

> **"10. Presumption of sanity**
>
> **Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."**

It is also a cardinal principle of criminal justice that a person is not criminally liable for an act or omission if at the time of doing the act or making the omission, he is, through any disease affecting his mind, incapable of understanding what he is doing, or knowing that he ought not to do the act or make the omission. Section 11 reads as follows:

> **"11. Insanity**
>
> **A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he or she is through any disease affecting his or her mind incapable of understanding what he or she is doing or of**

knowing that he or she ought not to do the act or make the omission ; but a person may be criminally responsible for an act or omission , although his or her mind is affected by disease, if that disease does not infact produce upon him or her mind one or the other of the effects mentioned in this section in reference to that act or omission."

Lastly, it is settled law that in a criminal trial, the burden of proof of the defence of insanity rests on the defence and the standard of that proof is on the balance of probability. **Archbold Criminal Pleading Evidence and Practice 1997 Edition at paragraph 17-74** states that:

"Every person of the age of discretion is, unless the contrary is proved, presumed by law to be sane, and to be accountable for his actions.....the onus is on the defence to establish such insanity on a balance of probabilities".

In **Godiyano Barongo s/o Rugwire v Rex (1952) 19 EACA 229**, the appellant was convicted of murder by the High Court of Uganda. The trial Judge was prepared to find as a fact that the appellant's brain must have been inflamed and poisoned by a drink. He refused to believe that the appellant's intoxication was so complete as to amount to legal insanity. His appeal to the Court of Appeal for Eastern Africa was dismissed. The learned Justices in upholding the conviction held that:

"The burden rests upon the accused when the attempt is made to rebut a natural presumption which must prevail unless the contrary is proved. This burden will never be so heavy as that which rests upon the prosecution to prove the facts which they have to establish and it will not be higher than the burden which rests on a plaintiff or defendant in civil proceedings. It must, however, at least establish the probability of what is sought to be proved."

(Underlining added for emphasis.)

This decision was followed by this Court in the case of **Silver Ongom alias Peter Atwi, Supreme Court Criminal Appeal No. 14 of 1985. (unreported).**

Section 194 provides for diminished responsibility in murder cases and onus of proof. It reads:

" 194(1) Where a person is found guilty of murder or being a party to the murder of another, and the court is satisfied that he or she was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury, as substantially impaired in his or her mental responsibility for his or her acts and omissions in doing or being a party to the murder, the court shall make a special finding to the effect that the accused was guilty of murder but with diminished responsibility.

(2) On a charge of murder, it shall be for the defence to prove that the person charged was suffering from such abnormality of mind as is mentioned in subsection (1).

(3) Where a special finding is made under subsection (1) , the court shall not sentence the person convicted to death but shall order him or her to be detained in safe custody, and section 105 of the Trial on Indictments Act shall apply as if the order had been made under that section.

(4)..."

We are also alive to the fact that this is a second appeal and this Court does not have the duty to re-evaluate the evidence unless it is of the view that the Court of Appeal failed in its duty to do so as a first appellate Court or where the findings are wrong. This Court has restated this position in numerous appeals including **Areet Sam vs Uganda SC Criminal Appeal No, 20 of 2005,** which was followed in **Buhingiro vs Uganda, SC Criminal Appeal No. 08 of 2014** using the following words:

"... it is trite law that as a second appellate Court we are not expected to re-evaluate the evidence or question the concurrent findings of facts by the High Court and the Court of Appeal. However, where it is shown that they did not evaluate or re-evaluate the evidence or where they are proved to be manifestly wrong on findings of fact, the

Court is obliged to do so and ensure that justice is properly and truly served."

Turning to the ground of appeal, the record shows that the question of the appellant's sanity was not raised by anyone at the time of his arrest or arraignment or by the appellant in his charge and caution statement. The appellant was represented by counsel during the trial and he gave an unsworn statement in his defence in Court but did not indicate anywhere that he was mentally ill at the time of committing the offence at all. The medical report that was tendered by PW1 who medically examined the appellant four days after his arrest, actually indicated that he was apparently normal. It was only mentioned by PW2 during the trial in her evidence in chief that counsel Wakabala referred to, when she stated that:

> *"I used to stay with him before he was arrested. By the time of his arrest he was of unsound mind".*

The record further indicates that during his submissions, the then counsel for the appellant had raised insanity as a second line of defence on top of the defence of intoxication. He had argued that the accused was suffering from a disease of the mind that diminished his responsibility for the murder. Counsel had submitted that the deceased was sickly with a chronic illness coupled with the domestic misunderstanding between the appellant and PW2, his mother, regarding sharing of family property and that these problems had built up stress in the mind of the appellant to make him act without responsibility. This is how the learned trial Judge dealt with it:

"S. 194 (2) of the Penal Code Act provides that on a charge of murder, it shall be for the defence to prove that the person charged was suffering from such abnormality of mind. The burden of proof shifts to the accused to prove that he was suffering from abnormality of mind. Finally, apart from counsel's submission from the bar, there is no evidence adduced even by the accused himself that he was stressed to the level that he acted abnormally. In fact the accused does not admit killing the deceased. Diminished responsibility is a defence pursued if the accused admits killing the deceased. In the instant case, apart from failing to discharge the burden of proof as required by s. 194 sub-section 2 of the Penal Code Act, the submission on diminished responsibility is with due respect to counsel quite misplaced."

The issue of insanity was ground 2 of the appeal before the Court of Appeal and was dealt with as the first ground of appeal after adjustments. It was framed as follows:

"2. The learned trial judge erred in law and in fact when he convicted the appellant when there was evidence on record that the appellant was of unsound mind at the time when the offence was committed and therefore lacked the requisite mens rea to commit the offence."

We have perused the record and considered the submissions by both counsel. We find that the Court of Appeal was alive to its duty as a

first appellate court and the principles set out in **Kifamunte Henry vs Uganda, SC Criminal Appeal No. 10 of 1997** which duty it stated before embarking on the task before it. The Court of Appeal was also aware of the burden and standard of proof in criminal cases and the principle that an accused person should be convicted on the strength of the prosecution case and not the weakness of the defence as stated in its judgment.

The Court of Appeal then proceeded to scrutinize the record of proceedings and found that the record revealed that the aspect of the appellant being of unsound mind was raised by PW2 when she stated during her examination in chief that:

> ***"I used to stay with him before he was arrested. By the time of arrest he was of unsound mind."***

The Court of Appeal found that shortly thereafter, the same witness had stated:

> ***"When the accused came to pick the kid from me, he was in a normal mood."***

The Court of Appeal further considered the evidence of other witnesses who in their view threw some light on the mental state of the appellant, namely PW3 and PW4. For instance, PW3 stated that:

> ***"I have known the accused since birth. He is a village mate. Accused was a humble young man. Accused was a radio mechanic who was honest. His ears were functional.(sic)"***

The testimony of PW4 was as follows:

> ***"I have known the accused from birth. He was not very well behaved. He used to disrespect his mother PW2. He has a problem. He was normal mentally. The accused had a mild hearing problem."***

The Court of Appeal then considered the provisions of section 194 of the Penal Code Act and held as follows:

> ***"Upon our evaluation of the evidence, we find that the claim that the appellant was of unsound mind is not supported by evidence. PW2 who alluded to it gave different versions regarding his actual state of mind that night. Other witnesses who knew him well (PW3 and PW4) testified that he was mentally normal. The medical report by PW1 also revealed that the appellant's mental status was normal.***
>
> ***We note that the trial judge addressed himself to the import of section 149(2) (sic) of the Penal Code Act with regard to diminished responsibility. He stated in his judgment that....***
>
> ***We note that the appellant did not allude to suffering from any abnormality of mind in his defence at the trial yet section 194(2) (supra) imposes such burdens on him.***
>
> ...

From the evidence on record, not only did the appellant deny killing the deceased, but most significantly, there is nothing in the evidence as a whole to suggest, and less still to prove, that he was suffering from abnormality of mind arising from any cause or that his mental responsibility for his acts was impaired substantially or at all. We come to the finding that the learned trial judge rightly came to the finding that the appellant knew what he was doing and was capable of forming the requisite intent. We accordingly find no merit in ground 1 and it fails. (sic)"

Counsel for the appellant argued that the Court of Appeal left out crucial evidence and she quoted the response by PW2 where she stated in cross-examination that:

"I saw the accused's face from the lamp-tadoba which I lit up. He came with force demanding for the kid. He said "I want my child to stay a night with me. He was violent."

With due respect to counsel, the above statement does not point to a mental illness. It is an indication of intoxication, which was one of the defenses raised by the appellant's counsel in his submission before the trial Judge and was dismissed as well. It is not therefore useful to the appellant's appeal. Further, we find that the testimony of PW5, D/ASP Munyaneza Amos the Director CID Kisoro who recorded the appellant's charge and caution statement was actually that ***"the accused's mind was stable."*** This too is not useful to the appellant's case.

As rightly pointed out by Mr. Mulindwa, counsel for the appellant in her submissions was in essence raising the defence of diminished responsibility. Under section 194 (1) and (2) of the Penal Code Act reproduced above, the defence of insanity is available if the accused is able to prove that he was suffering from a disease of the mind at the material time, and that as a result of such disease he was either incapable of understanding what he was doing or incapable of knowing that he ought not to do the act or make the omission charged against him. That is to say, that he was incapable of knowing that what he was doing was wrong. Evidently the defence did not discharge this onus.

To the contrary, the medical report (Police Form 24) dated 17/2/2005 that counsel Wakabala has criticized in her submission actually indicates that the appellant was medically examined by Dr. Christopher Rwabugiri (PW1) from Kisoro Hospital who prepared and signed it. The doctor stated clearly therein that the appellant was of *"apparently normal mental state"*. It was tendered as Exhibit P. Ent.2, without any objection from the appellant's counsel. The Doctor's qualification was also not challenged. It is too late in the day in our view for counsel to raise that objection at this stage. In any case, the appellant would have been referred for the requisite specialized medical examination if the issue of his mental health had been raised at the appropriate time particularly at the time of his arrest, arraignment or trial and he would have been handled in accordance with the laid down procedure regarding such cases.

Likewise, as Mr. Mulindwa rightly submitted, the fact that the appellant was sleeping in the kitchen or that his wife had left him after a short time, *per se,* is no conclusive evidence of unsound mind. Besides, PW2 explained the circumstances under which the appellant came to stay in her kitchen when she stated that he had no house of his own.

We also agree with Mr. Mulindwa that the defence of diminished responsibility is available to an accused who has pleaded guilty. In the instant case, the appellant in his unsworn statement before court denied killing the child. That defence is therefore not available to him.

For the foregoing reasons, we are satisfied that the Court of Appeal properly re-evaluated and reappraised all the evidence on the record in respect to the defence of insanity before upholding the decision of the trial Judge. We thus find no reason to interfere with the concurrent findings of the courts below.

In the circumstances we find that the ground of appeal has no merit and it therefore fails. In the result, we dismiss the appeal.

Before taking leave of this matter, we wish to point out however, that in the event that the appellant has developed mental illness while in prison as alluded to by his counsel, the Prisons authorities must ensure that he urgently receives the requisite medical attention.

Dated at Kampala this....6th.....day of ....October.....2020

.....

HON. JUSTICE Dr. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT

.....

HON. JUSTICE STELLA ARACH-AMOKO
JUSTICE OF THE SUPREME COURT

.....

HON. JUSTICE PAUL MUGAMBA
JUSTICE OF THE SUPREME COURT

.....

HON. JUSTICE RICHARD BUTEERA
JUSTICE OF THE SUPREME COURT

.....

HON. JUSTICE MIKE CHIBITA
JUSTICE OF THE SUPREME COURT