THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.
HON. JUSTICE C.N.B. KITUMBA, JA.
HON. JUSTICE S.B.K. KAVUMA, JA.

CRIMINAL APPEAL NO. 114 OF 2002

MUSISI ERIA :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Appeal from the conviction of the High Court of Uganda sitting at Nakawa (Okello, J.) dated 16/8/2002 in Criminal Session Case No. 412 of 2000]

JUDGEMENT OF THE COURT

The appellant, Musisi Eria, was convicted of murder contrary to sections 188 and 189 of the Penal Code Act and was sentenced to death.

The brief facts of the prosecution case as found by the learned trial judge are as follows. The appellant and Jessica Nakajja alias Nabuso were husband and wife. They lived at Lulagwe village, Ntenjeru sub-county Mukono District. Allen Namulwana who was aged 6 years at the material time was their daughter and lived with them in the same house. The appellant used to accuse the deceased of infidelity and both of them, often fought. On 21st February 1999 after supper PW2 went to bed. She was woken up by a fight between her parents. During the fight he was accusing his wife of committing adultery. The appellant picked an axe that was in the sitting room behind the door and hit Pw2's mother on the head with it where upon she died instantly. Thereafter, the appellant poured hot water on the deceased's body. PW2 ran out of the house and spent the night at the home of her paternal grandmother. In the morning the appellant went around informing his village mates that his wife has passed away and that the cause of her death was a headache. He also sent a letter to Kabuso Patrick, PW3, who was the father of the deceased informing him that the deceased had died of headache. Later on, the appellant personally went to Ntenjeru to

the home of PW3 to formally report the death of his wife and to discuss the burial arrangements.

PW3 requested the appellant to take the body of the deceased to his home for burial. The appellant returned to his home at Ntenjeru but delayed to comply with PW3's request. PW3 got a vehicle collected the deceased's body and took it to his home at Ntenjeru village which was about 12 miles away from the appellant's home. When Patricia Namulondo, PW4, and Jane Nambalirwa, PW5, together with other women were washing the dead body, they observed that there were marks of hot water having been poured on it. They also noted, on the body, a wound at the back of the head and that the private parts had been cut off. They informed PW3 who in turn informed the police.

Sgt Ogwang PW6, went together with Dr. Isaac Kaija, PW7, to PW3's home where they found the body of the deceased. PW7 performed a post mortem examination on the body and made a report which was admitted in evidence as exhibit P1. According to PW7's findings the body was well nourished but had blisters due to burns. There was a fracture of the skull in the occipital region. The labia minora and the clitoris were cut off. The cause of death was open head injury. The prosecution produced in evidence the axe, Exhibit, P2 which D/C Mugabi John Peter found in the appellant's house after the death of the deceased. Exh. P2 was identified by PW3 as the axe with which the appellant hit the deceased on the head.

In his defence the appellant totally denied the offence and attributed the death of the deceased to the headache and malaria. The learned trial judge believed the prosecution case, rejected the defence and convicted the appellant as already stated.

The appellant has filed his appeal to this Court on the following grounds.

1. ***1.*** **The learned trial judge wrongly evaluated the evidence.**
2. ***2.*** **The learned judge erred in finding that the deceased was killed by the appellant.**

Mr. S.N. Serwanga, learned counsel for the appellant, argued both grounds together and Mr. Simon Peter Ssemalemba, learned Principal State Attorney for the respondent, followed the same order. We shall deal with both grounds similarly.

Appellant's counsel contended that PW2's testimony implicating the appellant by law, required corroboration before a conviction could be based on it. It was his argument that Pw2's evidence was not corroborated. Counsel submitted that PW2 testified that she witnessed the fight between her parents and saw her father hitting the deceased with an axe on the front of the head. However, according to the testimony of Dr. Kaijja, PW7, he found a wound on the occipital region, which is the back of the head.

Further, PW2 testified that the appellant hammered a nail into the deceased's head but when PW7 performed the post-mortem examination he made no such finding. Counsel argued that PW7 testified in cross examination that when a wound is inflicted before death there would be a swelling. However, PW4 who was among those who washed the body at Ntenjeru said that they found a depressed wound and not a swelling. He argued that all prosecution witnesses who saw the body of the deceased at Ntenjeru said that there were burns of it. This was contrary to the testimony of Prossy Lunkuse, PW1, who saw the same body soon after the death. Then there were no injuries on it. Counsel urged this Court to take into account the conduct of the appellant after the death of the deceased and to believe the appellant's defence that the deceased died of natural causes.

The Principal State Attorney disagreed and supported the learned trial judge's finding that it was the appellant who murdered the deceased. He argued that there was sufficient evidence to corroborate the evidence of PW2.

It is our duty as a first appellate court to review the evidence again in the light of the findings of the trial court and come to our own conclusion. See **Pandya v R. [1972] E.A. 32** and **Kifamunte Henry vs. Uganda S.C. Criminal Appeal No. 10/97.**

According to the evidence of Pw2 on the material fateful day she had supper together with her parents. She was lying down in the same room with her mother. She was woken up by the fight between her parents. The appellant was accusing the deceased

of infidelity that he had caught her with a man. However, there was no man in the house. The appellant went to the sitting room, picked an axe from there and hit the deceased with it on the head. At that time, the tadoba was lit. Later the appellant poured hot water on the body of the deceased.

We note the argument by counsel for the appellant that PW2 testified that the deceased was hit on the front part of the head whereas PW7 said that he found the wound in the occipital region of the head. The learned trial judge dealt with this apparent discrepancy in the witness's evidence. She found and rightly so in our view, that this was a minor discrepancy which did not substantially affect PW2's evidence.

Appellant's counsel by his arguments tried to infer that the injuries on the deceased, that is the wound on the head and the burns on the body, were inflicted after her death. Regarding the wound, counsel argued that PW7's evidence in cross examination was that if one is hit before death there would be a swelling in the vicinity. On the other hand PW4 testified that the wound they found on the body was a depressed one.

We are of the considered view that PW7's evidence did not exclude the existence of swelling around the open wound which according to PW4 was a depressed wound. Counsel's submission that the witnesses namely; - PW3, PW4, PW5, PW7 and PW8 who saw the body at Ntenjeru claim to have seen the burns whereas PW1 who saw the same body at the home of the deceased did not observe them is with due respect not tenable. All the prosecution witnesses above mentioned saw the body at a close range. PW7 as a doctor had to carry out the post mortem examination. PW4 and PW5 were washing the body. PW2 was called by PW4 and PW5 to see what they had discovered when they were washing the body. PW5 as an investigating policeman looked at the body closely. PW1's evidence is to the effect that the body was in the sitting room. She did not go close to it but peeped through the door. We are of the considered view that PW1 being just a neighbour and not a close friend of the deceased had no reason to observe and note the injuries on the dead body. PW2 testified that the appellant hit the deceased with an axe on the head. PW8 recovered a silver grey small metallic axe from the appellant's house soon after the death of the deceased. This axe was identified by PW2 as the one which the appellant used to hit the deceased on the head.

PW1's testimony is to the effect that on 20/2/1999 she together with the deceased went to the well to fetch water. The deceased was well and was not complaining of any illness. The witness did not see the deceased on the following day which was Sunday. On that Sunday around 8.00 p.m. the appellant informed her that the deceased had died of headache. When we consider the evidence of PW2 that on 21/2/1999 she had supper together with her parents and that of PW1 who went to the well with the deceased in the evening of 20/2/1999 the appellant's evidence that the deceased suffered from headache for two days and the illness intensified on 20/2/1999 at around 5.00 p.m. cannot b e true.

We appreciate counsel's argument that the deceased suffered from a headache and told PW2 as both of them were going to the well in the evening of the fateful day. However we rejected the appellant's story that the cause of death of the deceased was headache or malaria. PW7 found a fracture of the skull in the occipital region. According to him the cause of death was open head injury which tallied with the evidence of Pw2.

In view of the above, we are unable to fault the learned trial judge for her finding that the evidence of PW2 was corroborated by other prosecution witnesses. We also agree with her conclusion that it was the appellant who unlawfully killed the deceased.

In her judgement the judge considered the defences of self-defence and provocation. She relied on the evidence of the eyewitness PW2. On self-defence the learned judge considered the fact that there was a fight between the appellant and the deceased. However, it was the appellant who began the fight. During the fight the deceased was only using bare hands. Further, as she pointed out, instead of retreating, the appellant went to the sitting room picked a deadly weapon, namely an axe and hit her on the head, which is a vurneable part of the body. In the judge's view, this was use of excessive force. In the premise, the defence of self-defence was, therefore, not available to the appellant. We agree with this finding.

On provocation, the learned judge found that there was none because the appellant did not find the deceased in the act of adultery. Additionally, on the evidence there is

nothing she did to provoke the appellant immediately before the attack. We support the judge's findings on the two defences.

In the result we find that this appeal lacks merit. It is accordingly dismissed.

Dated at Kampala this 22nd day of May 006.

L.E.M. Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE

C.N.B. Kitumba
JUSTICE OF APPEAL

S.B.K. Kavuma
JUSTICE OF APPEAL