THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

HCT-00-CR-CN—0050-2014

(Arising from Buganda Road Court Crim. Case No. 23 of 2014)

ROSEMARY NAMUBIRU.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

This is an appeal arising from the decision of the Chief Magistrate at Buganda Road Court in which the appellant herein Rosemary Namubiru was charged with and convicted of the offence of doing a negligent act likely to spread infection of disease contrary to Section 171 of the Penal Code Act. She was sentenced to imprisonment for three years.

The particulars of the offence which the appellant was charged with were set out in the charge sheet as follows:

> 'Namubiru Rosemary, On the 7th day of January 2014 at Victoria Medical Centre Lumumba Avenue in Kampala District, Unlawfully and Negligently Injected Mushabe Mathew With a Cannula Contaminated With Her blood when she knew or had reasons to believe that this could likely spread the infection of HIV, a disease dangerous to life.'

The background from which the appeal arises as accepted by the trial court is thus: The appellant was a nurse at Victoria Clinic in Kampala. On 7th January 2013 one Ruth Ankunda Mushabe brought her 2 years and 10 months old child Mathew Mushabe, the victim herein to the said Victoria Clinic for further treatment. The doctor prescribed a course of treatment which included giving the patient antibiotics intravenously.

The appellant undertook to do this as was in her line of duty. She made the requisite preparations and when the mother brought in the young man Mushabe Mathew, he was agitated at the sight of

injections and started crying. The mother held the arm where a cannular was to be inserted. In the process of inserting the cannular into the hand of Mathew, the appellant pricked herself with the said cannular and blood started flowing from her injured index finger. She put the cannular back on the tray and administered treatment on her injured finger. She thereafter removed the cannular from the tray and inserted it into the vein of Mathew.

When the appellant was asked why she was re using a contaminated cannular, she responded that she had just secured the vein at the first attempt and should not therefore be disturbed. As the young man Mathew continued struggling, the cannular was coming out and his hand was starting to swell. At this point another nurse came in and the appellant told her to continue treating Mathew as she was going out for her lunch.

The mother got concerned that the same cannular was used on her son when it had been contaminated with the blood of the nurse, the appellant. The second nurse removed the contaminated cannular and using another one, she fixed it on another arm of Mathew and the treatment proceeded to the end. The mother immediately thereafter reported the incident to the management of the clinic, and upon confrontation, the appellant stated that the pricking of her finger was accidental. Matters might have ended there, but upon asking the appellant to take a blood test for HIV, it was discovered that she was HIV positive. Matters were reported to the police hence these charges.

The appellant appealed to this court on the following grounds;

1. The Learned Trial Chief Magistrate erred in law and fact when she held that the appellant was guilty of the offence charged.
2. The Learned Trial Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thus occasioning a miscarriage of justice.
3. The Learned Trial Chief Magistrate erred in law and fact in convicting the appellant on a duplex charge thus occasioning a miscarriage of justice.
4. The Learned Trial Chief Magistrate erred in law when she shifted the burden of proof to the appellant.

5. The Learned Trial Chief Magistrate erred in law and fact when she failed to consider the grave inconsistencies in the prosecution's case thus occasioning a miscarriage of justice.
6. The learned Trial Chief Magistrate erred in law and fact when she imposed a sentence that was disproportionate to the facts and circumstances of the case.

At the hearing of the appeal the appellant was represented by Ladislas Rwakafuzi assisted by Albert Kyeyune and Paul Mukiibi. The State was represented by Biira Peace Abwoli, State Attorney, together with Ainebyona Happiness, State Attorney and Barbara Masinde, State Attorney.

In dealing with this appeal, I will start with the 3rd ground of appeal and follow that up with the evaluation of evidence in the 2nd, 4th and 5th grounds. I will end with the complaint about the sentence in the 6th ground of appeal. The complaint in the 1st ground of appeal is the reason for the appeal. It is not a ground of appeal.

It is the duty of a 1st appellate court to re-evaluate all the evidence on record and make its own findings of fact on the issues while giving allowance to the fact that it did not see the witnesses as they testified, before it can decide whether the decision of the trial court can be supported. See *Kifamunte Henry v. Uganda* SC. Cr. App. No. 10 of 1997.

Duplex charge

The complaint in the 3rd ground of appeal was that the appellant was tried and convicted upon a defective charge sheet. The provision in section 171 of the Penal Code Act reads '..unlawfully **or** negligently..', while the charge sheet read '..unlawfully **and** negligently..', (emphasis added). It was argued that the law sets out two different offences under section 171, one of them involving an unlawful act, and the second one involving a negligent act. To add the two offences together made the charge duplex and therefore defective.

I noted that this complaint was brought out in final submissions from the bar at the trial stage. That was not proper. An objection to a charge sheet for duplicity or indeed for any other defect ought to be brought out at the earliest opportunity, as soon as the trial commences. The appellant was at all times represented by Counsel, who should not have waited till the very end of the trial

in final submissions to point out that he charge was defective for duplicity. To do as they did only brings out the inference that the accused was not prejudiced by the defect. I would, for that reason alone dismiss that ground of appeal.

Be that as it may, the law against duplicity is grounded on the proposition that an accused person ought to know the offence he or she is alleged to have committed to enable him or her prepare an appropriate defence to the charge. Where the charge sheet contains more than one offence in the same count, such will be declared to be duplex and therefore defective. A defective charge sheet which cannot be cured by amendment or otherwise will result in quashing the proceedings and discharging the accused person.

The DPP submitted that there was no prejudice to the accused. The accused was charged with committing an unlawful and negligent act, all in one transaction. The case of *Uganda v. Guster Nsubuga &3 others* HC Session case No. 84 of 2012 was relied on. In that case, Paul Mugamba J., held that a charge sheet which was drafted with '..unauthorised use **and** interception..' when the provision read '..unauthorised use **or** interception..' in section 15 of the Computer Misuse Act was not duplex. I respectfully agree with that decision.

In the present case, the appellant was charged with using a contaminated cannular. The act if true was not only unlawful, but subject to the evidence which would be adduced, could well be negligent. This was, according to the prosecution one act committed in one transaction. I was satisfied that there was no prejudice to the accused. The offence which she was charged with was clear and unambiguous. She could prepare her defence appropriately. I agree with the holding in *Nyanga Manyika v. R* [1980] TLR 141, that while charges should not be duplex as much as possible, there is a limitation as to the application of the rule. When a series of acts which constitute a series of the same offence are committed in such circumstances as to amount to one transaction then, in reality, there is committed one offence which ought to be charged in one count.

The burden would be greater on the prosecution to prove that the act complained of was not only unlawful but also negligent. That burden is not on the defence, and so the prejudice would, if at all, be on the prosecution. For the above reasons I dismissed that ground of appeal.

Evaluation of evidence.

I combined the 2nd ground on evaluation of evidence with the 4th ground on burden of proof and the 5th ground on contradictions. They were so argued by Counsel on both sides.

I will deal first with some matters of fact which I believe will help in the determination of this appeal. The first is to ascertain when a cannula may be said to be contaminated making its reuse a prohibited and unlawful act, but also a danger to the victim of the reuse.

The evidence on record from the experts was to the effect that a cannula, is an instrument used to administer drugs into the body of a person intravenously. It must pierce and therefore puncture the body of the patient in order to be ready for use in administering the drug. When it pierces the skin, it necessarily gets in contact with the blood of the person it has pierced. From that time on, it cannot be said to be a fresh cannula. It from then on becomes a used cannula.

Once used a cannula is therefore contaminated or presumed to be contaminated, as it must necessarily have drawn or gotten into contact with blood of the person whose skin was punctured. This is irrespective of the quantities of blood which may flow from the punctured skin or which may be seen or get into the cannula.

Reuse of a cannula which has pierced a person thereby getting in contact with that person's blood on another person is prohibited and is unlawful.

It also came out from the evidence the cannula must be prepared before it is inserted into the body of the patient. Whatever that process may be, and the trial court was not advised what form or time frame this preparation takes, this means that a process must be undertaken to get the cannula ready for insertion.

The learned trial Chief Magistrate set out two ingredients which the prosecution had to prove beyond reasonable doubt in proof of the charge. These were;

1. That the accused unlawfully and negligently injected Mathew Tushabe with a cannula contaminated with her blood.
2. That in so doing, she knew or had reason to believe that this could likely cause the spread of the infection HIV, a disease dangerous to life.

In respect of the 1st ingredient, the evidence on record was thus.

Ruth Alinda Tushabe PW1 told court that on the 7th January 2014 she took her baby Mathew Tushabe to Victoria Medical Center where the doctor PW3 prescribed treatment. She was then called to the treatment room by the appellant who then tied a rubber glove on the arm and prepared to fix a cannula on the child's arm. During that process, the nurse who is the appellant herein pricked herself. Blood started flowing from her index finger. PW1 told court that she checked to see if her child was bleeding and was satisfied that the bleeding and flow of blood was at this point only from the nurse. The nurse plastered her injured finger, picked the same cannula and pricked the child Mathew Tushabe.

Her evidence was that she was in disbelief at the time, being aware of the danger of persons sharing piercing instruments. She questioned the nurse why she was doing this, but the nurse insisted and proceeded with the operation saying she had got the vein at the first attempt, and so she should not be disturbed. She stated that a different nurse then came in and using a different cannula completed the treatment that had been started by the appellant.

The appellant in her defence told court on oath that she indeed prepared a cannula for administering the prescribed drugs into Mathew. The appellant told court that before she called PW1 and her child in the treatment room, she first prepared a cannula, granules, a vessel for plastering the antiseptic, a syringe to flash if the cannula is in the vein and upon preparing these items; she called the mother and the child to the treatment room. The young patient was crying and uneasy when he sensed that he was about to be injected. She told the mother to hold him firmly as she introduced the cannula.

During this process, the cannula pierced her index finger and she placed the cannula back on the tray. She secured the injury with plaster and picked a cannula from the tray and proceeded to inject Mathew with the same. Her evidence was that she did not recall whether this was the same cannula previously used, the one which pierced her, or another cannula.

The argument by learned Counsel for the appellant was that there was doubt that a contaminated cannula was used on Mathew, and therefore such doubt ought to be resolved in favour of the

appellant. His reasons for the doubt were from the evidence of PW1, the sole eye witness to the events. He argued that her testimony was inconsistent. The reasons for the alleged inconsistency was her testimony in court that when the appellant fixed the cannula on her son which she believed to be contaminated, she alarmed and her alarm attracted a second nurse to enter. This was not the version of events in her first statement to the police.

This aspect of the testimony of PW1 whether or not she shouted for help was a recurring argument by Counsel for the appellant in impugning the evidence of PW1. It was further argued for the appellant that this second nurse ought to have been called as a witness as she would inform court of what exactly transpired. By not calling her, court was asked to draw the inference that her testimony would have been contradictory of that of PW1, thereby creating doubt about the veracity of PW1 as a witness.

It is not in dispute that PW1 the mother of Mathew was the sole witness to the events of that day respecting use of a cannula used or otherwise. Her testimony was that she was seated in the chair right next to the nurse. She was holding her baby in her laps and so clearly able to see whatever the nurse was doing. It was during the day. There was no dispute about the identity of the nurse. It was the appellant on duty. There was no argument of the possibility that she might have missed out on what the nurse was doing in preparation of the cannula for injecting her son.

When the nurse in the attempt to inject her son with the cannula the first time pricked herself, she noticed this and even checked to be sure that it was not her soon who had been pricked. The source of the blood was clear. It was from the nurse.

The evidence thus far is fully corroborated by the accused person/the appellant in her sworn testimony to court. The evidence of PW1 was that the nurse plastered the injured finger, and she had no gloves on her hands. She had tied a glove on the hand of Mathew in preparation of injecting him. This was all noted by the mother PW1. She then observed the nurse pick the same cannula from the tray and prick her son with it.

The evidence of the appellant was that she did all this save that she was not sure whether she picked the same cannula or another cannula. The trial court had the opportunity of seeing the witnesses as they testified. It chose as it was entitled to, and believed the version of the mother PW1. I did not find that finding unjustified from the evidence.

The law relating to a conviction based on a single witness is well set out in the cases. In *Okwang Peter v. Uganda* C. A. No. 104 of 1999, it was reiterated that subject to well known exceptions, it is trite that law that a fact may be proved by the testimony of a single witness. The court cited with approval the well known cases including *Roria v. Republic* [1967] EA 583, *Abdalla Bin Wendo & Another v. R* (1953) 20 EACA 166, *John Katuramu v. Uganda* S.C. No. 2 of 1998.

The time of day meaning the conditions of light, the distance between the witness to the accused, the opportunity to observe, and prior knowledge of the accused by the witness are all factors for consideration before such evidence is accepted as the truth. While the witness did not know the nurse prior to the incident, the other factors which go for evidence being accepted as truthful were present in the circumstances.

In any event this was not about the identity of the nurse, but rather in observing exactly what she did. While it is the law that a case is not decided on the weakness of the defence, but rather on the strength of the prosecution evidence, PW1 was in position to see exactly what was going on. She had interest to do so. Her son was ill and very weak. This was the second day she was coming to the clinic, and the doctor had had to change the medication. She was anxious and so every detail mattered to her. Unlike the nurse who had doubts as to what exactly she did, the mother of the child PW1 was not in any doubt whatever as to exactly what happened.

PW1 saw the appellant place the cannula which she had been holding in the attempt to inject her son prick her instead. Whether this was accidental or otherwise to my mind was not material. PW1 saw the nurse plaster the finger of her ungloved hand. PW1 saw the nurse pick the same cannula from the tray and inject her son with the same. Upon being confronted with the objection not to use that particular cannula, she retorted that since she had at her first attempt managed to get the usually difficult to find vein of the child, she should not be disturbed. PW1 observed the nurse bringing medicine and pushing it into her son through that same cannula. There was no evidence that the appellant prepared a new cannula when she was pricked by the one she was using. The mother would have noticed that if it was done. She did not notice it because it was not done. No new cannula was used on Mathew by the appellant. No wonder the appellant insisted that she did not remember whether the cannula she used was or was not the one which pricked her.

The argument of the absence of or not calling the second nurse to testify did not reduce the veracity PW1 as a truthful witness. The second nurse came in after the cannula had already been injected in the body of Mathew. This evidence was corroborated by the accused in her evidence. Whether the second nurse came into the treatment room in answer to the alarm or shouts of PW1, or just simply because she was done with her lunch and so was relieving her colleague would not, to my mind, retract from the evidence of PW1 about what transpired inside that room before she entered.

I found the evidence of PW1 amply corroborated in material particulars by the evidence of the appellant herself. The learned trial Chief Magistrate was justified to find and hold as she did that this evidence of PW1 was truthful. I was satisfied that the young man Mathew was injected with a cannula which was contaminated with the blood of the nurse the appellant herein. The evidence of the sole witness in this case would suffice to found a conviction even in absence of evidence of corroboration. But there was, as I have shown ample corroborating evidence from the accused.

It was argued that the cannula was not brought as an exhibit. The argument therefore being that there was no proof that the cannula, even if it was the same one which pricked the appellant was contaminated. I dealt with what constitutes a contaminated cannula earlier. Once the cannula pricked the appellant and blood started flowing as it did, it necessarily got in contact with the blood of the appellant. To that extent therefore, use of the same cannula to inject any other person constituted use of a contaminated cannula. This is prohibited and is therefore unlawful.

From my analysis above, there was clear evidence that there was use of a contaminated cannula on Mathew. Non production of the same in court as an exhibit was not fatal to the prosecution case.

The next matter for consideration was whether the act was negligent as to constitute an ingredient of the offence. The appellant attacked the learned trial Chief Magistrate in respect of this aspect. It was argued that for purposes of a criminal prosecution, where negligence is an ingredient of the offence, there ought to be proof of negligence which is far greater than that required in civil matters. Several cases both local and from elsewhere were cited in support and court is grateful to Counsel for their industry.

The learned trial Chief Magistrate considered criminal negligence. In the case of *R. v. Bateman* [1925] ALL E.R. 45, in a case where a medical practitioner was charged with manslaughter, the Court of Appeal of England in overturning the conviction held that, for a person to be found guilty on the basis of criminal negligence, there must be gross negligence. The court noted that a number of phrases have been used to describe the negligence in criminal cases, but went on to advise that,

> *' whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, ... the negligence of the accused went beyond a mere matter of compensation between the subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.'*

In the Indian case of *Jacob Mathew v. The State of Punjab & Another* Supreme Court of India Case No. 144-145 of 2004, the court reviewed the cases on this subject and decided that criminal negligence goes beyond negligence in civil cases. It must be gross negligence and this has been equated to recklessness.

R.C. Lahoti Chief Justice of India reading the judgment of the court held,

> *'... but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.'*

The Chief Justice cited Lord Diplock in *R. v. Lawrence* [1981] 1 ALL E.R. 974 (HL) in a unanimous House of Lords decision where he quoted his earlier decision in *R. v. Caldwell* [1981] 1 ALL E.R. 961 (HL), on the concept of recklessness as constituting mens rea in criminal law. In that case, Lord Diplock warned against adopting asimplistic approach of treating all problems of criminal liability as being "subjective" or "objective". He said,

> *'recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual*

*to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, **and** that the risk of those harmful consequences occurring was not so light that an ordinary prudent individual would feel justified in treating them as negligible.*

It is only when this is so that the doer of the act is acting recklessly, if before doing the act, he either fails to give any thought to the possibility of there being any such risk, or having recognized that there was such risk, he nevertheless goes on doing it.' (Emphasis mine).

The above crystalises the meaning of criminal negligence. Therefore as Chief Justice Lahoti commented in the *Jacob Mathew case* (supra) in order to hold the existence of rashness or criminal negligence it shall have to be found that the rashness was of such a degree as to amount to taking a hazard knowing that hazard was of such a degree that injury was most likely to imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. See also *Andrews v. DPP* [1937] AC 576.

Upon the above exposition I will examine the evidence to determine whether the decision of the learned trial Chief Magistrate is supportable. The evidence of PW1 was that she was a regular client at Victoria Clinic in Kampala. The clinic had qualified physicians and other professional staff. She had been to that clinic with her sick child the day before and Dr. Mubiru PW3 attended to her. The day in question she returned as the child had not improved. The same doctor prescribed a regimen of treatment which would alleviate the problems of Mathew. This included administering to Mathew drugs intravenously. One of the nurses on duty Namubiru Rosemary undertook to do this. She was, according to the evidence of her boss PW3 and her own evidence in court, a fully and properly qualified nurse. She was, in other words, a qualified health care professional in her field of nursing. She had under her belt not less than 30 years experience. To cap it all, she was a mother and a grandmother, meaning that she was not unused to kids.

The Medical Director of Victoria Clinic Dr. Mubiru PW3 told court the procedure of handling situations where in the course of their duties, one is pricked and there is a flow of blood. He put it in these words,

'It is not safe to use a needle contaminated with one's blood to be used on another person. You could contact Hepatitis B, or HIV. The standard procedure after contaminating is to stop immediately. Put everything down. Go clean yourself. Apply plaster where the instrument pricked you. The instrument which is contaminated is condemned. It should be thrown away. That is why we have several cannulas.'

This was repeated by Dr. Richard Sekitoleko of Mulago Hospital Infectious Diseases Institute who testified as PW7. He told court that;

' If the nurses blood got into contact with the baby's blood inside the baby, that could have led to baby risk of getting HIV. The precautionary measures the nurse should have taken on realizing she had pricked her finger with a cannula, she should have discarded the cannula. She should then have cleaned and tied and gloved her fingers. She would then get a new cannula and use that to get blood from the baby.

In other words the nurse should have ensured that her blood does not get into contact with the baby's body/blood. On realizing that she had pricked the baby with a contaminated cannula she should have washed the baby's site of the prick with copious amounts of water and soap and she would have advised the parents as well as the management of the need to access post exposure prophylaxis for the baby.'

The evidence of these two professionals was that this standard procedure was well known to all the health care professionals. This was clear from PW2 a colleague nurse of the appellant the same clinic. There was no intimation that the appellant was unaware of the same. She was, from her evidence a 30 years experienced Nurse.

The evidence of Dr. Mubiru PW3 was that they always had many cannulas so that in event of an emergency arising as it did in this case, there would be other cannulas to apply. There was a prick during the process of inserting a cannula in the body of Mathew. Blood started flowing from the injured finger of the nurse who was handling Mathew. This was noticed by the nurse and the mother of the child. The mother expected nothing short of professional care and competence from the nurse in handling this emergency, if one can call it that.

There was a standard procedure of handling the situation. Put down everything, clean the affected part, plaster the same, glove the hand, *throw away the contaminated cannula,* get a new cannula, and proceed with the treatment. The reasons for all this elaborate precaution was to avoid the risk of infection of Hepatitis B or HIV, both very dangerous and in respect of HIV, an incurable disease.

What does the evidence show in the present case, the nurse the appellant herein put the cannula in the same tray where the other cannulas were, cleaned her injured finger, put plaster on the same, and resumed the treatment. Was she aware of the standard procedure in satiations as she found herself of being pricked by a needle in the course of administering treatment, sure indeed she was aware of the same. She had been in practice for at least three decades. Did she comply with it ? , not at all. Her evidence was that she does not recall whether she resumed the treatment with the same cannula or not.

That was an act of negligence. She was fully aware of the danger of the child being infected with hepatitis B or HIV. The mother asked her why she was continuing to push the injection in the body of Mathew using the same cannula. Her response was that since she had secured the vein at the first attempt, she would not be disturbed.

The evidence of PW4 the colleague nurse was that it is often difficult to find the vein of a child in order to commence intravenous treatment. for that reason, the appellant chose to disregard the standard procedure and proceed with the risky act of using the cannula when she was not sure whether or not it was contaminated. In her evidence she did not say that she was sure the cannula was not contaminated. She told court on oath that she was not sure whether she resumed with the same cannula. She stated this many times during her evidence, showing that if was sure of one thing, it was that she was not sure whether the cannula she used on Mathew was the one which pricked her.

In all the above the court is not thereby shifting the burden of proof to the accused person. However the court is duty bound to consider all the evidence adduced before it. Prosecution evidence is not to be considered in isolation of defence evidence. For the court to comment, even adversely, on the defence evidence does not amount to shifting the burden of proof to the accused person. I did not see anywhere evidence of the trial court having shifted the burden of

proof to the accused person. There was an argument that the learned Chief Magistrate relied on the statements of PW1. I did not see this anywhere in the judgment. The evidence relied on was that adduced by both sides. I noted that the statements now impugned by the defence were all introduced in court by the same defence.

The evidence of the witness PW7 was that in event of discovering that a contaminated cannula was used on the baby, there was a procedure to follow. I have set it out above in full. The appellant was a professional and so is presumed and expected to know the same. She did not follow that procedure when it was brought to her attention by the mother PW1 that the cannula she had used on Mathew was the one which pricked her, meaning it was a contaminated cannula. She told court that she had more than one cannula. The safe thing even from a non professional person would be to immediately throw away the maligned cannula and get a fresh one. That was what a prudent and reasonable person ought to have done.

The evidence of PW1 was amply corroborated by the appellant in her own evidence that soon as a new nurse walked in and while the treatment was still ongoing, she the appellant instead walked out as she could not tolerate a cold lunch. She merely advised the new nurse to change the cannula as the one she inserted had started swelling, not that there was a danger of having used a contaminated cannula.

These were acts of a person who was unconcerned about the safety of her patient, or had complete disregard for the same. This was culpable negligence, failure to exercise that reasonable and proper care and precaution to guard against injury to the child, which negligence having regard to all the circumstances especially aware of the prevalence of hepatitis B and HIV in this country, it was the imperative duty of the appellant to have adopted. This amounted to gross negligence according to the cases I cited above for which criminal liability accrued.

The next issue for determination is whether the accused person knew or had reason to believe that this could likely cause the spread of the infection HIV, a disease dangerous to life.

The evidence of PW1was that when she realized that her child had been injected with a contaminated cannula, she immediately reported to the management of the clinic. PW2 summoned the appellant and explained the complaint. PW1 was assured that the pricking was an

accident, and that this was not uncommon, especially when treating children, she nonetheless asked for the HIV status of the appellant.

There was hesitation, but when she insisted, the HIV test was done for both the appellant and Mathew. The results showed that the appellant was HIV positive. This brought out a new dimension. Further investigations revealed that the appellant was living with HIV and was attending Nsambya hospital for that purpose. There was evidence to this effect from an official from Nsambya hospital PW5 where the appellant was registered as an HIV patient. By the time of this incident the appellant was all too well aware of her HIV status. She was a health care professional for three decades. She was aware of the modes of transmission of HIV.

Dr. Sekitoleko from the Infectious Diseases Institute told court that one of the modes of transmission of HIV is getting in contact with the blood of an infected person. However not all such contact leads to infection. From the evidence on record, it was clear that the appellant who was HIV positive acted ~~so~~ recklessly when she was informed that she had reused a contaminated cannula. Her evidence was that she was not aware that she reused a contaminated cannula. Prudence and practical sense dictated that she takes extra care considering her HIV status, which only she knew. As was pointed out by the learned Chief Magistrate, no one at the clinic knew of her status, and none needed to know anyway. She was performing her duties satisfactorily according to her supervisor PW2.

She did not follow the standard procedure when she was pricked and her blood got or was likely to have got on the cannula she was trying to insert in the body of Mathew. She did not follow standard procedure when she was informed of the possibility that the baby's blood might have got in contact with her own through the contaminated cannula. Even when a colleague entered the room, she did not warn her of the danger the baby might have got exposed to, through the prick on her finger which prick she stated was accidental.

Dr. Sekitoleko told court that the possibility of infection was higher where the blood contact with that of an infected person was through intravenous administration. The appellant was aware that she was carrying out an operation for exactly that purpose, meaning that the possibility of her blood infecting Mathew was all the greater.

The inconsistencies alleged have been explained. Other minor inconsistencies would be ignored in accordance with the law regarding inconsistencies and contradictions. Where there are minor inconsistencies, unless they point to deliberate untruthfulness on part of the prosecution witnesses, they will be ignored. Major ones which go to the root of the case should be resolved in favour of the accused. See *No. 0875 Private Wepukhulu Nyuguli v. Uganda* SC. Crim. App. 21/ 2001 AND *Alfred Tajar v. Uganda* EACA. Crim. App. No. 167 of 1969.

In the end, I was satisfied that the prosecution evidence proved beyond reasonable doubt the ingredients of the offence charged. The findings of the trial court were supported by the evidence. The 2nd, 4th and 5th grounds of appeal are therefore dismissed.

The Sentence

The 6th and last ground of appeal was on sentence. It was argued that the sentence meted out to the appellant was excessive in the circumstances. The initial argument that the trial court sentenced the appellant to a severe punishment because there were two offences was so unreasonable it merits no consideration. There was only one count charged and the appellant was convicted on only that count. The sentence of the trial court was only in respect of that single count.

It was argued that the appellant was an elderly person aged 64 years. She was sickly and as was noted by the court, HIV positive. She was a mother and grandmother. She spent 5 months on remand. While she was found guilty of exposing the 2 years old child to infection with HIV, happily the child remained negative. As noted by the court, there was no intention to harm the baby. All these mitigating matters negatived a custodial let alone a long custodial sentence of three years.

The prosecution asked for the sentence of the trial court to be maintained. There was nothing in appellants submissions which was not considered by the trial court.

I agree that the trial court gave due considerations to the matters raised by the appellant on sentence. In the case of *Ogallo s/o Owoura v. Regina* Cr. App.No.175 of 1954 the Court of Appeal for Eastern Africa held that;

'The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v. R (1950) 18 EACA 14 it is evidence that the judge acted upon some wrong principle, or overlooked some material factor. To this we would add also a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case.'

The Supreme Court in *Jackson Ziwa v. Uganda* SC. Crim. App. No. 19 of 1995 put it simply stated that for an appeal against sentence to succeed, the sentence must be illegal, or manifestly excessive or inadequate.

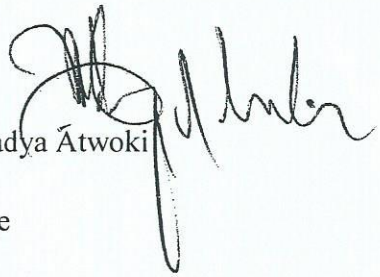
There was no illegality alleged, nor any principle which was overlooked. Was the sentence therefore excessive in the circumstances? What are the circumstances which court ought to consider in a case like the present. The appellant was a health care provider. She acted so recklessly that she exposed a baby to the risk of infection of a disease which is dangerous to life. There is need to protect society from such reckless behavior. This country continues to grapple with various life threatening diseases. Court cannot shut its eyes from the reality of the situation in which we live. The confidence and trust put in health care professionals by the people should not be abused, or misplaced. It should not also be taken for granted either.

On the other hand medical practitioners need some degree of protection. It was pointed out in the *Jacob Mathew case* (supra) in rather dramatic fashion that,

'If the hands be trembling with the dangling fear of criminal prosecution in event of failure for whatever reason, whether attributable to him or not, neither a surgeon can successfully wield his life saving scalper to perform an essential surgery, nor can a physician successfully administer a life saving dose of medicine.'

I must point out that this case was about reckless, negligent behavior on the part of health care providers, which expose patients to life threatening diseases. This could for example have been the dreaded Ebola, or Marburg, or even measles. It was not, contrary to what sections of society wanted us to believe, a case against those living with HIV.

Having considered all the aggravating circumstances of this case, and having weighed them against the mitigating circumstances which I pointed out above, and which the learned trial Chief Magistrate considered, and having anxiously considered the need not to interfere with the discretion of the sentencing court, I was satisfied nonetheless that the circumstances of this case requires a sentence which is lighter than that meted out by the trial court. The ground of appeal on sentence therefore succeeds to this extent. The appellant is hereby sentenced to such period of imprisonment as shall enable her to go home immediately. I so order.



Rugadya Atwoki

Judge

28/11/2014.