THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA

**CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.**
**HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.**
**HON. JUSTICE C.K. BYAMUGISHA, JA.**

# CRIMINAL APPEAL NO. 239 OF 2002

KIGUNDU SULAIMAN……APPELLANT

VERSUS

UGANDA……RESPONDENT

**JUDGMENT OF THE COURT**:

Sulaiman Kiggundu, the appellant was indicted for the murder of Kayondo Richard, the deceased. He was found guilty and convicted as charged. He was sentenced to death.

The brief facts of the case were that on 24/03/2001 the appellant and the deceased were playing a game of cards known as "matatu" together with some of the prosecution witnesses. A quarrel broke out between the appellant and the deceased. It was followed with a fight. The two were separated by PW1, Kyagaba and Lukyamuzi, PW2 and taken into the directions of their homes.

However, the appellant overpowered Lukyamuzi and escaped from him. He picked up a big stick and ran to the deceased and hit him with the stick on the head. The deceased collapsed and started bleeding profusely

from the nose. He was eventually taken to Mulago Hospital where he died three days after the incident. The postmortem report revealed that the cause of death was fracture of the skull due to assault.

At his trial the appellant denied the charge and set up an alibi, but which was rejected by the Court. In agreement with the assessors, the trial judge found the appellant guilty as charged and sentenced him to death. Hence this appeal.

The memorandum of appeal contains three grounds.

Mr. Bwengye Mark represented the appellant and submitted that the prosecution did not prove malice aforethought. Had the learned trial judge properly considered the evidence of PW1 and PW2 he would have come to the conclusion that the appellant had no intention to kill.

Miss Tuhaise did not agree. She prayed Court to uphold the conviction and sentence. The defence of provocation was not available to the appellant.

Upon listening to addresses by both learned counsel for the parties and on perusal of the evidence adduced before Court and the authorities cited by the counsel we find merit in the appeal.

Considering the whole evidence and the circumstances of the case we accept the submission of Ms Tuhaise that the defence of provocation is not available to the appellant.

However, as it was observed in the cases of **Palmer vs. R. (1971) 1 All ER 10 77, Uganda Vs. Charles Oligo 1974 HCB 54,**
**"if on the evidence in a case it is possible that, although all questions of self defence and provocation are rejected, it would be open to conclude that though the accused acted unjustifiably he had no intention to kill or cause serious bodily injury then manslaughter should be the verdict".**

In the instant appeal, taking into account all the surrounding circumstances of this case, the prosecution did not prove malice aforethought beyond reasonable doubt. It will be unsafe to base a conviction of murder on the evidence as it stands on record.

In the result we allow the appeal, quash the conviction of murder, and substitute it with one of manslaughter contrary to Section 187 of the Penal Code Act.

Considering the period the appellant has spent in custody we impose on him 6 years' imprisonment which would entitle him to immediate release, unless held on some other lawful charges.

Dated at Kampala this 28th day of April, 2008.

**L.E.M. Mukasa-Kikonyog**
**DEPUTY CHIEF JUSTICE.**

**A.E.N. Mpagi-Bahigeine**
**JUSTICE OF APPEAL.**

**C.K. Byamugisha**
**JUSTICE OF APPEAL.**