THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 023 OF 2012
(APPEAL FROM THE JUDGMENT OF KIGGUNDU J IN MUKONO CRIMINAL SESSION CASE NO 0171 OF 2010)

SIMBWA PAUL……APPELLANT
VERSUS
UGANDA ……RESPONDENT

Coram:
HONORABLE MR. JUSTICE S B K KAVUMA, AG. DCJ.
HONORABLE LADY JUSTICE SOLOMY BALUNGI BOSSA, JA
HONORABLE JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA

JUDGMENT OF THE COURT

The brief facts of this case are that the appellants arrested one Mukisa John on allegations that he stole a bicycle. They tied him with ropes. A mob joined them and the deceased was assaulted. The appellants tried to take him to hospital but he died on the way. The appellants were arrested, charged of murder, convicted and sentenced to 14 years' imprisonment each. Both have appealed against conviction and sentence.

The appellants' grounds of appeal were that;

1. The learned trial Judge erred in law and fact when she held that the appellants formed a common intention with one another to assault the victim and convicted them on murder.
2. The learned trial Judge erred in law and fact when she held that the death of the deceased was caused with malice aforethought.
3. The learned trial Judge grossly erred in law and fact when she did not sum up the case to the assessors for their opinion.

4. The learned trial Judge erred in law and fact when she failed to consider the conduct of the accused (sic) persons before and after the death of the deceased as well as their defense.
5. The learned trial Judge erred in law and fact when she sentenced the appellants to fourteen years' imprisonment, a sentence that was unduly harsh and excessive.

They prayed that we allow the appeal, set aside the sentence, and in the alternative but without prejudice to the above, convict the appellants to manslaughter and reduce the sentence accordingly.

Mr. Sebugwawo Andrew appeared for the appellants on State brief while Mr. Kamuli Charles Richard Principal State Attorney appeared for the Respondent.

Before we resolve the grounds of appeal, we recall that ***Rule 30 of the Judicature (Court of Appeal Rules) Directions SI 13-10*** provides that, on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, we have to: reappraise the evidence and draw inferences of fact; and in our discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner. This same principle is reflected in the jurisprudence of the former East African Court of Appeal and the Supreme Court. As a first appellate court, this Court has to reconsider the entire evidence on record and subject it to a fresh and exhaustive scrutiny and make its own conclusion, bearing in mind that it did not have the opportunity to see and hear the witnesses and should, where available on record, be guided by the impression of the trial judge on the manner and demeanor of witnesses (see ***Bogere Moses and Another v. Uganda, Supreme Court Criminal Appeal No. 1 of 1997, Okwonga Anthony V. Uganda Supreme Court Criminal Appeal No. 20 of 2000, Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997 and Pandya v. R [1957] EA 336).***

We have opted to resolve the grounds of appeal in the order the parties argued them. Counsel for the appellants argued Grounds 1 and 4 together. They raise the issue of whether the Prosecution established common intention between the parties to murder the deceased, and whether the learned trial Judge considered the conduct of the appellants as well as their respective defenses.

Counsel for the appellant argued grounds 1 and 4 together, abandoned ground 3, and argued the rest separately. He argued that; the learned trial Judge based her conviction of the appellants on the fact that they had a common intention with others to execute an unlawful act, which led to the death of the deceased. While she correctly set out the law on common intention, she did not consider factors that disassociated the appellants from the execution of the alleged unlawful act and the participation of the accused persons in the unlawful act was not properly addressed. All that was captured by the learned trial Judge was the point of arrest of the deceased by the appellant.

Counsel for the appellants also argued that the learned trial Judge having held that the appellant formed a common intention with one another to assault the victim erred in law and fact when she held that the death of the deceased was caused with malice aforethought. Common intention to assault and murder did not go together. He cited the case of ***Nannyonjo Hurriet and Another v. Uganda Supreme Court Criminal Appeal No. 24 of 2002*** for this proposition.

Counsel also submitted that there was no cogent evaluation of evidence placing the appellants at the scene of crime and how they participated in the unlawful act. It was not true that the first appellant; Kisule Lumala Yonasani participated in any way in beating the deceased because he was at home milking a cow. The

participation of Kisule at the scene was only at the point of arrest. After arrest, he left the place. All he did was come and take away the deceased after PW2 had stopped those who were beating him. The people who beat the deceased were listed by PW2 and PW5.

Regarding the second appellant, Simbwa Paul, even the learned trial Judge accepted that no witness saw him beating the deceased. He was standing aside from the beating. He only came to where the beating took place when he was prompted by the deceased to intervene and stop those who were beating him. The two appellants were Local Council (LC) officials so it was part of their duty to arrest suspected criminals in their area.

Counsel for the Respondent argued that the learned trial Judge correctly and ably analyzed the law on common intention as stipulated in ***S. 20 of the Penal Code Act (cap 120)*** and correctly concluded that the appellants had a common intention to kill the deceased. On malice aforethought, Counsel referred us to ***s. 181 of the Penal Code Act*** (supra), arguing that it relates to the mental condition of the accused. Whether or not an assailant intended to kill the deceased can be established through the nature of the weapon used, the nature and number of injuries inflicted on the victim, the part of the body hit and the conduct of the killer before, during and after the incident.

It is common ground that the deceased died from wounds inflicted on him following a physical assault on him.

Applicable law

Section 20 of ***the Penal Code Act*** provides:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a

probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

The case of ***Kisegerwa and Another v. Uganda Criminal Appeal No. 6 of 1978 (Court of Appeal)*** elaborates on the above provision thus*:*

In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence…an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault.

We do not understand the case of ***Nanyonjo Harriet and Senyonjo Kato Peter v. Ugandan Supreme Court Criminal Appeal No. 24 of 2002***, as laying down the principle that the finding of common intention to commit a crime is incompatible with a finding of malice aforethought. That case specifically dealt with the definition of malice aforethought as it was before the amendment to the Penal Code Act and what it is now. The learned Justices of Appeal in that case had held that malice aforethought had been established based on an intention to do an unlawful act foreseeing that grievous bodily harm is the natural and probable result. The learned Justices of the Supreme Court found that the learned Justices of Appeal had misdirected themselves by basing their conviction on an intention to do an unlawful act foreseeing that grievous bodily harm is the nature and probable result. They noted that judicial precedents of DPP v Smith and ***R. v. Tubere s/o Ochen*** had been overtaken by the amendment to the ***Penal Code Act***, which limited malice aforethought to only two instances. The Supreme Court stated:

“It is apparent from the passage of their judgment, which we have just reproduced, that in dealing with this issue (of malice aforethought), the learned Justices of Appeal did not advert to the amendment introduced in the definition of malice aforethought by the Penal Code (Amendment) Act 29 of 1970.

Prior to the amendment, section 186 of the Penal Code Act provided that malice aforethought was deemed to be established by evidence proving any one or more of four circumstances, namely (a) an intention to cause the death of or to do grievous harm to any person; (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person; (c) using violent measures in commission of a felony; (d) an intention to facilitate a person who has committed or attempted to commit a felony to escape from custody. In Act 29 of 1970, the Penal Code Act was amended *inter alia* by substituting for section 186 thereof, a new provision that omitted not only circumstances under paragraphs (c) and (d) but also excluded *“intention to cause grievous harm”* and *“knowledge that grievous harm will probably be caused”.* The new provision, which in the revised edition of the Laws of Uganda 2000 cap 120, is renumbered as section 191, reads-

They relied on ***S. 191 of the Penal Code Act*** that now provides as follows:

Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances:

(a) an intention to cause the death of any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause death of some person, whether such

person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.

It is obvious from this provision that the learned Justices of Appeal misdirected themselves in law in construing the definition of malice aforethought to include 'an intention to do an unlawful act foreseeing that grievous harm is the natural and probable consequence'."

The question in this case is therefore whether the learned trial Judge based her finding of malice aforethought on the fact that the appellants must have intended to inflict grievous harm to the deceased. And if she did, whether notwithstanding the misdirection, there was sufficient evidence that proved beyond reasonable doubt that the deceased was killed with malice aforethought within the meaning of the Penal Code Act.

We have chosen to resolve grounds 1, 2 and 4 together as we consider them related. The question in this case is therefore whether the learned trial Judge based her finding of malice aforethought on the fact that the appellants formed an intention to do an unlawful act foreseeing that grievous harm is the natural and probable consequence.

After examining the prior threat made by A1 to kill the deceased, the learned trial Judge found that the threat by A1 to kill the deceased was recent and proximate, and constituted circumstances of the transaction leading to the death of the deceased. She also found that although A1 denied participation in the beating of the deceased, his conduct of tying him with a rope, announcing to everyone in a populated area about the arrest of the deceased and conveniently leaving him to the mercy of the mobs despite having been a Local Council Chairperson irresistibly pointed to the guilt of the A1. She found further that from the injuries inflicted on the deceased,

whoever inflicted them intended to kill him or knew that such injuries would cause his death. Regarding A2, the learned trial Judge found that A2 held the deceased on a rope while A1 and others were following. He was present when the deceased was being beaten and the deceased pleaded with him to save his life. That A2 testified that A1 left him to guard the deceased but he was overwhelmed by the mob. She then concluded that the mob mobilized by A1 and A2 formed a common intention to assault the deceased. The appellants were aware of this and left the deceased to his mercy. At no time did the appellants disassociate themselves from the prosecution of this unlawful purpose. They were therefore guilty of murdering the deceased (see pages 93-95 of her judgment).

Malice aforethought was clearly established by the conduct of the appellants. They clearly intended to kill the deceased. They knew that their acts or omissions would cause the death of the deceased within the meaning of ***S.191(b)*** of the ***Penal Code Act.*** On participation of the appellants, PW2 testified that he served on the same LC Executive Council as the appellants. His home is approximately 60 meters from the road. On April 14, 2007, he heard loud and angry voices at about 6am. He heard people shout from below. As he stood outside, he saw the deceased tied with ropes full of soil. A2 was holding him on the rope and A1 was walking from behind the deceased. Others were following. They were moving towards the station. For the time PW1 had known the deceased, he had never seen or heard that he was a thief. After dressing up, PW1 proceeded to the station and found the deceased tied on a pipe at Muwanguzi's shop. He asked what the deceased had done. One Sunday told him that he had stolen a bicycle. The deceased was seated looking down between his legs. A1 asked the deceased where he had put his bicycle. The deceased responded that he did not have it. A1 then left to milk his cow. Fred Kamya and Lukwago Swaibu came on a motorcycle and beat up the deceased with sticks. At this point, A1 was at his home, milking a cow. The deceased was beaten thoroughly. PW2 decided to intervene and

warned those beating him of prison. A1 came, got Swaibu's motorcycle and rode away. Swaibu and Kamya pulled Mukisa to the road. A1 came and put the deceased on the motorcycle and rode away.

Another piece of evidence came from PW3. On learning that he had been badly beaten, she went to the station and saw A1 with a stick at the scene but she did not see him beating the deceased.

PW3's evidence is also relevant to the participation of the appellants. On learning that the deceased had been badly beaten, she went to the station and saw A1 with a stick at the scene but she did not see him beating the deceased.

PW5, Muwanguzi Godfrey's testimony is also relevant. He was in his house on April 14, 2007, when he heard people shouting outside at around 6.30am. When he opened the door, he saw on one side the deceased with a rope tied around the waist and full of soil. A1 was asking him where he had put his bicycle. The deceased kept quiet. One Jagi, Bagala, Sembatya, and Defence Kamya sat on the same bench with the deceased next door (muzigo). A1 left to milk his cows and then went to the Police. The others started beating the deceased. The deceased pleaded with A2 to assist him as he was being killed. A2 tried to assist. The deceased stated that the bicycles were with his brother Monday and with Jaya Kimenye at Nakifuma. Police came and those who were beating him ran away. Police took him away and he later died. He did not see A1 or A2 beating the deceased.

PW6 testified that before he could intervene in the wrangle between A1 and the deceased, PW1 came to him and told him that A1 continued to threaten the deceased. He then received a call that the deceased had been taken to Nakifuma Police Post. He and PW1 followed on a bodaboda. At Nakifuma, they found A1 carrying the

deceased on a bodaboda with one Ojiambo of CID of Nakifuma Police Post. The deceased was in a terrible condition. He looked like he had been pulled/dragged for a long distance. He had a wound on the eye and arm. His whole body was swollen and full of soil. He died near a shop after the Police Post at Nakifuma Trading Centre. A1 and the police officer escaped.

Although this evidence does not link A1 and A2 directly to the beatings of the deceased, it nevertheless establishes their effective participation in the events that led to his death at the scene of crime. PW2 testified that himself, A1 and A2 were all officials of the LC Executive Council. A1 and A2 were among the people who arrested the deceased and tied him with a rope on April 14, 2007 and took him to the station. A1 demanded to know from the deceased where his three bicycles were. They walked the deceased past PW2's house in Nakiwate Village and took him to the station, followed by others.

It is not clear whether the station is the same place where PW5 found him on a veranda of the muzigo next to that of his shop/home at 6.30 am the same morning. What is clear is that all this time, a rope was tied around his waist and he was full of soil. A1 continued to demand that the deceased tell him where he put his bicycles. He left the deceased to the mercy of those who had gathered, and they beat him to death. A2 was in the company of A1 from the time PW2 cited the group below his house, up to the station. At some point, the deceased was prompted to seek the intervention of A2 (Muko Simbwa) to help to stop the beatings.

When PW3 Alice Nabukeera went to the trading centre after receiving news that her Uncle the deceased had been badly beaten, she found A1 at the scene holding a stick.

There is therefore no doubt that the Prosecution established that the appellants arrested the deceased, confined him with a rope, depicted

him as a thief, tortured him to make him tell where he had taken the bicycles allegedly stolen from A1, instead of handing him to the Police, allowed a crowd to surround him, knowing fully well that they would lynch him, and omitted or neglected to prevent them from assaulting him to death. They were local council officials who should have set an example by following legally established procedures in arresting the deceased on suspicion of having committed a crime and taking him to the Police. They did not do so. Instead, they allowed a big crowd to gather around him, from the moment of arrest until they sat him down in the station. A1 kept on demanding for his bicycle, a clear indication that he suspected him to be a thief.

In the circumstances, the appellants were fully aware that their actions invited action from the mob that was following them. They were uncaring whether the deceased died or not. In fact, the mob beat him so much that the deceased pleaded with A2 to intervene to stop the beating. A2 did not effectively intervene, despite the authority he wielded as a local Council official. He could have called the Police or removed the deceased from the scene. After all, it is him and A1 who had brought the deceased to the station in the first place, tied with a rope. As happened, the beating did not stop and the deceased lost his life. The appellants therefore had a clear intention to cause the death of the deceased. We are satisfied that the learned trial Judge was right in finding malice aforethought in the appellants' knowledge that their act or omissions in exposing the deceased to a mob and failing to protect him or hand him over to the police would probably cause his death, although such knowledge was accompanied by indifference whether death is caused or not, or by a wish that it may not be caused. We consider that malice was established within the meaning of section 181 of the Penal Code Act.

There is also the evidence of a prior threat made by A1 only the previous evening. PW1, Nagawa Efransi, mother of the deceased testified that the deceased did not stay with her but kept a cow in the

backyard of her house. In the afternoon of April 13, 2007, at about 3 pm, she walked to Kalagi and met her son Peter. She wanted him to intervene in the misunderstanding between the deceased and A1. A1 had threatened to kill the deceased alleging that the deceased had stolen his (A1's) bicycle. When she reached home, her grandchildren PW3 and Annet Nalubega informed her that A1 had been to her home at 8pm and wanted to see her. Soon afterwards, A1 came back, around 10pm. He stated that he had come to get his cow. She informed him that the deceased who owned the cow was not around. In a rage, he insisted that he would take it. He further told her that by the following morning, the deceased would be in a box, meaning that he would be dead. She called the neighbors and A1 repeated the threat in their presence and stated that he had authority to put the deceased in a box. He then took the cow. He stayed for approximately 15 minutes.

The deceased arrived about 10 minutes later. He asked what had become of the cow, and what A1 had left behind for caretaking the cow that was brought as a calf. She answered that nothing had been left, and told him of the threats uttered by A1. Despite pleas by PW1 not to go for the cow, he left saying that he would die for his cow.

The evidence of the threat was corroborated by PW3 and PW6. PW3 testified that A1 came to their home (PW1's home) in the night of April 13, 2007 and asked for PW1. As she was not around, he left and came back at approximately 10pm and found PW1 home. He said that the deceased had stolen 3 of his bicycles but if he got him, he would carry him in a box. He then requested for his cow. PW1 asked him for a document and he said that she would get it the following day from his house. PW1 called a neighbor called Nalongo to witness the incident. He untied the animal, and took it. The deceased arrived soon after, and they told him about what had happened. He decided to go for his cow. He never came back.

PW6 Kefa Peter (Pastor Musumba) owned a shop at Kalagi Trading Centre and was an elder brother to the deceased. He testified that A1 had requested the deceased to take care of his cow when it was about 6 months. By the time of the deceased's death, it was about 2 years old. On April 13, 2014, PW1 came and told him that A1 was looking for the deceased and if he found him, the deceased would be taken in a coffin.

As the Supreme Court observed in the case of ***Nanyonjo Harriet and Another v. Uganda*** (supra), in cases of homicide, the intention and/or knowledge of the accused person at the time of committing the offence is rarely proved by direct evidence. More often than not the court finds it necessary to deduce the intention or knowledge from the circumstances surrounding the killing, including the mode of killing, the weapon used, and the part of the body assailed and injured.

On the submission that common intention to assault and murder did not go together, we do not understand the case of ***Nanyonjo Harriet and Another versus Uganda Criminal Appeal (supra)***, as laying down the principle that the finding of common intention to commit a crime is incompatible with a finding of malice aforethought. That case specifically dealt with the definition of malice aforethought as it was before the amendment to the Penal Code Act and what it is now as already indicated in the cited passage of the Supreme Court.

In the circumstances of this case, we consider that there was a clear intention by A1 to kill the deceased, as the threat made by him only the evening before signified; and by both appellants in arresting him, taking him tied to a rope and soiled at the station with a crowd in tow; allowing him to be surrounded by the crowd, and allowing the crowd to beat him to his death, without attempting to stop them or take him to the Police. The fact that PW3 found A1 holding a stick was clear evidence that he signaled to those present that it was all right to beat

up the deceased. Moreover, at some point he left the deceased to the mercy of the crowd by going home to milk his cow. It was only after he returned and realized the condition that the deceased was in that he attempted to rescue him by taking him to hospital.

We consider that the learned trial Judge did not err in her evaluation of the evidence. Malice aforethought was clearly established by the conduct of the appellants described above. They knew that their acts or omissions would cause the death of the deceased. Their knowledge was accompanied by indifference, as to whether or not the deceased died. We consider that malice was established within the meaning of ***s. 191(b)*** of the ***PCA***.

We also consider that the learned trial Judge came to the right conclusion, regarding their participation at the scene of crime. The evidence clearly established that the appellants arrested the deceased and deliberately left him to the mercy of the crowd to deal with him as they saw fit, despite being local council officials, and despite the clear common intention of the crowd to lynch him. These actions and omissions on the part of the appellants resulted into the death of the deceased through beatings. Predictably, the crowd beat the deceased until he died.

The learned trial Judge referred to the common intention of the mob to kill the deceased. We do not consider that it was an error for her to refer to its intention to kill the deceased. The appellants were aware of this intention but nevertheless left the deceased to the

In conclusion on these issues, and after a careful perusal of the record, we find both appellants guilty of murdering the deceased and uphold their respective convictions accordingly. Grounds 1, 2 and 4 are accordingly resolved in the negative.

On ground 3, learned Counsel for the appellants argued that the learned trial Judge grossly erred in law and fact when she did not sum up the case to the assessors for their opinion. There was no record of summing up notes on record. This occasioned a miscarriage of justice, as the assessors were not guided on the law.

There is clear evidence on record that the learned trial Judge summed up to the assessors on page 72. However, the substance of the summing up was not reproduced in full. All that the learned trial Judge stated was that:

“Summing up notes delivered to the assessors. When will the assessors be ready with their opinion?”

This is what appears in the original record as well. We therefore conclude that summing up was done but the content of the summing up notes is note on record. It is a good and desirable practice that the substance of the summing up notes to assessors appears in the record of proceedings. It is the only way an appeal court can tell whether the summing up was properly done. We are however satisfied that this essential step was undertaken by the trial Judge and that failure to file the notes on record was not fatal to the conviction.

We also consider it good practice that the opinion of each of the assessors should appear on record. In this case, we note that the assessor’s opinion appears in full on pages 73-75 of the record of proceedings.

On sentence, 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 the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence. A court will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge has acted upon some wrong principle or over looked some material factor or the sentence is manifestly excessive

or lenient, in view of the circumstances of the case. We consider that the appellants were lucky to get away with murder with the sentence that they did. We see no reason to interfere with the sentence, none of the principles on which we should interfere with the sentence have been established.

In conclusion, we dismiss this appeal; uphold the conviction of the appellants for murder and confirm their respective sentences.

Dated 3rd October 2014

Signed by:

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HONORABLE MR. JUSTICE S. B. K KAVUMA, AG. DCJ.

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HONORABLE LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

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HONORABLE JUSTICE PROF. L .E TIBATEMWA, JA