

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA**  
**CRIMINAL APPEAL NO. 210 OF 2010**

**MAWANDA PATRICK.....APPELLANT**

**VERSUS UGANDA.....RESPONDENT**

*(Appeal from conviction and sentence of the **HON. LADY JUSTICE FAITH E.K MWONDHA**, at the High Court of Uganda at Jinja in Criminal Session Case No 0324 of 2010.)*

**CORAM: HON. MR. JUSTICE A.S. N SHIMYE, JA**

**HON. MR. JUSTICE KENNETH KAKURU, JA**

**HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA**

**JUDGMENT OF THE COURT**

This appeal arises from the conviction and sentence of the *Hon. Lady Justice Faith E.K Mwendha*, J (as she then was) in High Court Criminal Session Case No. 0324 of 2010 at Jinja dated 13<sup>th</sup> September 2010.

**Brief background:**

The brief background to this appeal is as follows;

At the trial it was the prosecution's case that, on the 21<sup>st</sup> November 2008 the appellant went to a bar in Kamuli District where the deceased Peter Kyelanga was drinking alcohol with friends. The appellant was carrying a walking stick. After a brief argument the appellant hit the deceased with the stick he was carrying on the head. The deceased died later from the injury.

The appellant was thereafter arrested and convicted of murder contrary to **Sections 188** and **189** of the Penal Code Act and sentenced to 35 years imprisonment. He now appeals against both

conviction and sentence.

At the hearing of this appeal **Mr. Edward Damulira Muguluma** appeared for the appellant together with **Ms. Immaculate Nshekanabo.** The respondent was represented by **Ms. Lucy Kabahuma** learned Senior State Attorney. The appellant was present in Court.

Mr. Muguluma sought and was granted leave to add additional grounds of appeal to the original memorandum of appeal which had been filed earlier on 27<sup>th</sup> March 2015 by M/S. Kafuko -Ntunyo & Co. Advocates the appellant's former advocates.

**Leave was duly granted. The appeal is now based on the following grounds:-**

***“ The learned trial Judge erred in law and fact when she convicted the appellant of the offence of murder without evidence to prove of an essential element of malice afore thought.***

***2)The learned trial Judge erred in law and fact when she convicted the appellant relying on contradictory evidence of prosecution witnesses.***

***3)The learned trial Judge erred in law and fact when she failed to adequately consider and evaluate evidence on either side of the case and as a result came to the wrong conclusion.***

***4)That the learned trial Judge erred in law and fact when she failed to properly deal with Assessors and failed to sum up to the said Assessors at end of the Prosecution/ State and defence case.***

***5)The sentence imposed on the Appellant was excessive in the circumstances and should be set aside or reduced.***

Mr. Muguluma first argued ground 4 in which he faulted the learned trial Judge for having failed to properly deal with the assessors.

He submitted that the appellant was at the trial not given an opportunity by court to state whether or not he objected to any or both of the assessors. In addition counsel submitted that at the end of the trial, the assessors were not given an opportunity by court to put any question to the appellant.

He contended further that the assessors had not been individually sworn in by the court but had been sworn in together and at the same time in contravention of the law and procedure. That the learned Judge erred when she stated in her Judgment that she had agreed with decision of the assessors but went ahead to convict the appellant of the offence of murder whereas the assessors opinion had been that only the offence of manslaughter had been proved.

Counsel further contended that the learned trial Judge having rejected the opinion of the assessors she ought to have given reasons for doing so in her judgment which she did not. He asked court to quash the conviction and to set aside the Judgment on this ground.

Counsel then argued ground one which is to the effect that the learned trial Judge erred when he convicted the appellant for the offence of murder without evidence to prove malice aforethought.

He argued that the incident took place at a bar. The appellant had come to the bar with a walking stick. That the walking stick was not a weapon. That although it possibly had a knob on it, nevertheless it was a small walking stick. That there was a fight between the appellant and the deceased at a bar and the appellant did not just hit the deceased out of the blue.

That the two had in fact fought. They had struggled with the stick. That although the appellant hit the deceased, he had no intention of killing him.

Counsel also faulted the postmortem report, in as far as it is stated that the weapon used was a club. That there is no evidence that a club was used to hit the deceased. That the Doctor who performed the

postmortem could not have known that the injury on the deceased's body had been caused by a club. That the doctor could only have determined that the injury was a result of force by a blunt instrument. He faulted the doctor for having relied on the police request form that referred to 'a club' as the cause of injury.

Counsel contended that if the learned trial Judge had properly evaluated the evidence as set out above she would not have come to the conclusion that she did.

Counsel further submitted that the learned trial Judge had relied heavily on the prosecution evidence and had not put much weight on the defence in the result that she came to a wrong conclusion.

He asked court to quash the conviction and set aside the sentence and substitute the conviction of murder with that of manslaughter. He asked court to impose a sentence that would enable the appellant to be freed forthwith as he had been on remand for 2 years before conviction and has served 5 years in prison since conviction.

Ms. Kabahuma for the respondent opposed the appeal.

She conceded that at the trial some of the procedures were not adhered to. That the appellant was not asked whether or not he objected to any or both of the assessors. That the learned trial Judge did not sum up for the assessors.

She submitted that the above errors did not prejudice the appellant as he was ably represented by a lawyer Ms. Kabonesa.

Counsel submitted that the learned Judge had correctly convicted the appellant. That the evidence of PW2 showed that the stick which the appellant used to hit the deceased was not a usual walking stick. That the appellant had come to the bar where the incident occurred when he was already annoyed. That the deceased was sitting drinking alcohol with his friends when the appellant started a quarrel that ended up with him hitting the deceased with the stick he was holding.

That the appellant intended to kill the deceased because he hit him on a vulnerable part of the body, the head, and the deceased died as a result of that injury.

That the stick the deceased used to hit the appellant was not an ordinary stick. It was in fact a club. That the stick was two and half inches thick. She relied on the case of ***Tubeire vs R[1945] EACA 63*** for the proposition that malice aforethought had been proved in this particular case as the learned trial Judge had found.

That the trial Judge had evaluated the evidence properly as she had considered both the evidence of the prosecution and that of the defence. That she had considered all defences available to the appellant and had properly rejected them.

That the contradictions in the prosecution evidence were minor and did not go to the root of the case. She relied on the authority of ***Uganda Vs George William Simbwa Criminal Appeal No. 37 of 1995 (COA)*** in which this court held that where there are contradictions and inconsistency between prosecution witnesses

which are minor and trivial court may ignore them unless they point to deliberate untruthfulness.

She submitted that in this case the inconsistencies in the prosecution witnesses were minor and trivial, and ought to be ignored. She asked court to uphold both the conviction and sentence.

In rejoinder, Mr. Muguluma faulted the learned trial Judge for having based the conviction on the description of the stick used to hit the deceased when that stick was not exhibited. He submitted that the learned Judge had no basis for determining how long, big or small the stick was or whether or not it was a club.

He submitted that the trial court should have instead, made a finding of causing grievous bodily harm. He retaliated his earlier prayers.

### **DECISION OF THE COURT**

This being a first appeal, this court is required to re-evaluate the evidence and make its own inferences on all issues of law and fact. In this regard Rule 30(1) (a) of the Rules of this court stipulates as follows

***“30. Power to reappraise evidence and to take additional evidence. (1)On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may- (a) reappraise the evidence and draw inferences of fact.***

**See also *Bogere Moses versus Uganda (Supreme Court Criminal Appeal No. 1 of 1997)*, *Henry Kifamunte Vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997)*.**

We shall therefore proceed to reevaluate the evidence and make our own inferences.

Mr. Muguluma learned counsel for the appellant faulted the learned trial Judge for having failed to give the appellant an opportunity to object to the assessors assigned to his case at the trial. He also faulted the learned trial Judge for not having summed up to the assessors at the close of the trial. He also contended that the assessors had not

been individually sworn in before the trial.

Ms. Kabahuma learned Senior State Attorney who appeared for the respondent concede to the above two contentions raised by the appellant's counsel. Whereas, Mr. Muguluma contended that the three issues were fundamental and in effect had resulted in a mistrial, Ms. Kabahuma submitted that the omission were minor and did not prejudice the appellant in anyway.

We have perused the court record and specifically the proceedings at the trial. There is no indication that the appellant was given an opportunity to object to the assessors assigned to his case. This, as already stated is conceded to by the respondent. It would therefore be a violation of the law and the Rules of natural justice if an accused person was to be tried by court assisted by an assessor who may be biased or who may have a personal interest in the outcome of the trial.

In this case however, it has not been alleged that any of the assessors had an interest in the outcome of the trial or could have been biased. There is no indication that the appellant would have objected to any of the assessors had he been given opportunity to do. We find therefore, that no substantial miscarriage of justice had been caused by this omission. We have found nothing on the record to suggest that assessors were not sworn individually. This contention has no basis. The record also indicates that the learned trial Judge did not sum up to the assessors. Summing up for the assessor is a requirement of the law. **Section 82 (1)** of the Trial Indictment Act states as follows

**82(1) "When the case on both sides is closed, the Judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The Judge shall take a note of his or her summing up to the assessors." (Emphasis added)**

The Judge therefore erred when she failed to comply with the above provision of the law which is set out in mandatory terms. We

however, find that no substantial miscarriage of justice was occasioned to the appellant as the assessor's opinion to convict him of a lesser offence of manslaughter, was rejected by the trial Judge who went on to convict him of a more serious offence of murder.

Section 34(1) of Criminal Procedure Code Act permits this court to ignore procedural errors and omission if no substantial miscarriage of justice has been caused. It states as follow:-

***“34 (1) The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal; except that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.” (Emphasis added)***

It appears clearly to us that for this court to set aside a decision of the High Court on account of any question of law or any other ground, it must first be satisfied that, substantial miscarriage of justice has occurred. As already stated above the issues raised in this ground though valid occasioned no substantial miscarriage of justice to the appellant.

We shall resolve grounds 1, 2 and 3 together.

It was submitted for the appellant that the learned trial Judge convicted him of murder without evidence to prove malice

aforethought an essential element of that offence.

The learned trial Judge at page 5 of her Judgment stated as follows in respect of malice aforethought.

***“There was very irresistible evidence of malice aforethought. The accused arrived at the scene of crime at around 5 pm. He bought himself a drink (waragi) of 100/-. He walked towards the deceased asked him why he always moves with a stick. The accused responded by telling him that he should not familiarize him after which he hit the deceased on the head once but with a lot of force. This resulted into a deep laceration on the head occipital region.***

***The cause of death was a major head injury due to trauma following hitting with a club. The fight was only***

***between the deceased and the accused when the accused attacked the deceased from where he was sitting. The deceased much as he was taken to hospital he bled and he died before the next day according to PW2. The omission took place in broad day light and the witnesses knew the accused person very well there was no chance of mistaken identity. That evidence proved beyond reasonable doubt that the accused had the intention to kill and I was satisfied that the prosecution had discharged its burden. ”***

It is not in dispute that the appellant hit the deceased with a stick on the head and that he later died of that head injury. What is in issue is whether or not death was caused with malice forethought.

Malice aforethought is defined in Section 191 of Penal Code Act as follows

***“191. Malice aforethought.***

***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; or***

***(b) knowledge that the act or omission causing death will probably cause the 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.”***

Before arriving at a conclusion as to whether malice aforethought has

been established, every case must be judged on its own facts. The court however, must consider among others the weapon used the manner and the circumstances under which it was used, the part of the body injured, and the nature and extend of the injury See also; **Tubere vs R.** (Supra).

The circumstances which led to the commission of the offence are essential in proving malice aforethought. In this case, the deceased was drinking alcohol at a bar with friends when the appellant also came to the same place while he was with a walking stick. It was the deceased who walked to the appellant and asked him why he was always walking with a stick. It appears clearly from the evidence of the prosecution that the appellant was in the habit of walking with a stick. It does not appear that he carried the walking stick as a weapon. The appellant then responded to the deceased's question by asking him not to get familiar with him. What happened after that is narrated differently by both parties. Pw2 who was present at the scene narrates what happened as follows in his examination in chief.

***"We were with PW1, the accused person and the deceased Peter Kyelanga. As we were drinking the accused in the dock had a stick he sat there. After a short time he told Peter the late that he should not familiarize him. It was at that point he stood with his stick and hit the deceased on the head once. He fell and we took the deceased to LC but the accused run away with the stick. "***

PW3 testified as follows in examination in chief; -

***"The accused came when he was annoyed and found those people including the deceased there. He quarreled and he came with a stick which he hit the deceased with. He was saying "don't familiar me" and he hit him (deceased) on the head. He fell down and the accused just walked away. The others didn't do anything. Diba and Mutiibwa lifted the deceased and took him to Chairman LC***

**1. I saw blood coming out of his head and he was alive. That's all I can say. He used a lot of force and once. The stick was about 1 inch wide. It had another piece like a club which he used to hit the head of the deceased. Kyelanga Peter never hit the accused, he just fell down the moment the accused hit him. ”**

The appellant gave sworn testimony in his own defence. He stated as follows in his examination in chief:-

**“On 21/11/08 I came from my home at around 5p.m. I went to a place called Kayembe. I bought meat from there it was pork. At that time it's me who bought the meat. I then wanted to buy 'waragi' from that place (home) of 100/=. I sat on the form with that glass. Peter Kyelanga (deceased), Diba and Steven were seated about 5 meters from me. The deceased was complaining about one of them that he had not bought a drink. I found when those people were drinking. The deceased left and came to my place and he stood nearby me where I was sitting. He forcefully commanded me to give him the stick which I normally walk with. I told him that I heard him complaining and they were quarrelling thereafter. I could not give him the stick. When I refused, he kicked the form and I fell down. He then got a sandal which he was wearing he hit me on the arm and on the face. He continued demanding for the stick and I was cut on the mouth and face. There was a nail on the shoe. I got a lot of pain and I got the shoes and I hit him on the head as I was separating myself from him so I used that very shoe and hit him on the head. He then said “I have blood and you have blood let me see what you will do”.**

The appellant did not call any witness in his defence. His testimony was not challenged in cross examination. The learned trial Judge did not find him untruthful. With all due respect to the learned trial Judge, she does not appear to have taken into account the defence version of

events. Had she done so, she would have found that the appellant had been provoked into a fight by the deceased.

Exhibit PII the medical report on the physical examination of the appellant states that he had bruises on his upper lip. This appears to corroborate his story that he had been hit by the deceased. At least no other explanation was provided by the prosecution.

The learned trial Judge made a finding of fact that the appellant had hit the deceased with a club. The evidence on record is that the deceased was hit with a stick, no mention is made of a club by any of the witnesses. PW3 only states that the stick "had another piece like a club". Our understanding of this is that stick was like a club. The stick which PW3 says was one inch wide was not exhibited.

We accept Mr. Muguluma's submission that the learned Judge could not have ascertained the exact nature of the stick since it was not exhibited. We find, with respect that the trial Judge had no evidence upon which she based her finding that the deceased was hit by a club or indeed that the stick was 2 and half inches in width.

It appears that she was influenced by postmortem report, exhibit PI which described the cause of the death as "major head injury due to trauma following hitting with **club**"

We agree with Mr. Muguluma that the doctor who carried out the postmortem had no basis for finding that the injury had been caused by "hitting with a club" as stated in the postmortem report. He could only have concluded from the examination of the body that the injury had been caused by a "*blunt instrument*".

The doctor himself appears to have been influenced by the information contained in the police request for postmortem report.

The police in its request for a postmortem report stated that;-

*“It is alleged that the deceased was hit twice on the back and head using a club hence sustained an injury resulting into over bleeding” (Emphasis added).*

We have already set out the evidence of the eye witnesses and they all said that the deceased was hit once not twice on the head with a stick and not a club. The above statement which the doctor appears to have relied upon therefore had no basis.. The doctor ought to have made his own professional and independent findings. He does not appear to have done so.

The evidence on record is that the appellant went to a bar with a walking stick. That he was in the habit of walking with a stick. There is nothing to suggest that he used the stick as a weapon or he had gone to the bar with the intention of fighting, let alone killing anyone. It appears clearly from the evidence already set out above that he was provoked into a fight by the deceased. He hit the deceased only once on the head. The stick which was not exhibited appears to have been of a normal ordinary size. PW3 stated that it was 1 inch wide. Suffice it say that the actual size of the stick was not proved and as such could not have been ascertained by the Judge. Both the appellant and the deceased appear to have been taking alcohol and such may have been drunk.

In circumstances of this case we find that malice aforethought was not proved. The charge of murder therefore was not proved beyond reasonable doubt.

Accordingly, we allow this appeal. We quash the conviction of murder and substitute it with that of manslaughter. We also set aside the sentence of 35 years imprisonment.

Having set aside the sentence, we now invoke the provisions of Section 11 of the Judicature Act (CAP 13) which grants this court powers of the court of original jurisdiction to impose a sentence of our own.

It Provides;-

***“For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction from which the appeal originally emanated”***

We take into account the fact that the appellant was 60 years old in 2010 when he testified, that he had been on remand for a period of 1 year and 9 months before conviction, that he was a first offender, that he had been provoked into a fight at a bar and that he had hit the deceased once with a stick he normally carried.

However, causing unlawful death is always a serious matter. The deceased was a young man whose life was pre-maturity terminated. The appellant could have just walked away and avoided a fight. He ought to have acted more responsibly.

We find that he deserves a lenient sentence.

Taking into account both the aggravating and mitigating factors, we now sentence the appellant to 7 years imprisonment to run from the date of sentence at the High Court.

We so order.

**Dated at Kampala this 28<sup>th</sup> day of May 2015**

**HON. A.S NSHIMYE**

**JUSTICE OF APPEAL**

**HON. KENNETH KAKURU**

**JUSTICE OF APPEAL**

**HON. GEOFFREY KIRYABWIRE**

**JUSTICE OF APPEAL**