

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

**AT ARUA**

**CRIMINAL APPEAL NO. 520 OF 2014**

*10 (Appeal against the Judgment of the High Court of Uganda at Arua (Kania, J.) given on 22.11.2013 in Criminal case No. 39 of 2003)*

**NO. 3222 PRIVATE OKWERA SIMON ::::::::::::::: APPELLANT**

**VERSUS**

**UGANDA ::::::::::::::: RESPONDENT**

**Coram: Hon. Mr. Justice Remmy Kasule, JA Hon. Lady Justice  
Hellen Obura, JA Hon. Mr. Justice Byabakama  
Mugenyi Simon, JA**

**JUDGMENT OF THE COURT**

**Introduction:**

The appellant appeals against the conviction for murder contrary to the then Sections 183 and 184 (now Sections 188 and 189) of the Penal Code Act, given in a Judgment dated 22.11.2013 by the High Court at Arua (Kania, J.) in Criminal Case 39 of 2003. The appellant was sentenced to the mandatory sentence of death.

Following the Supreme Court Susan Kigula decision whereby the mandatory death sentence was

held to be unconstitutional, the appellant's death sentence was vacated and was substituted with the sentence of 18 (eighteen) years imprisonment. This was by the High Court (Murangira, J.) at Kampala in **Criminal Mitigation Session No. 0193 of 2013** on 22.11.2013.

### **Background:**

The appellant, with two others, not parties to this appeal, were charged of murdering one Akong aged 6 years daughter of Latigo Oyat Komakech Patrick (Pw2) at Labongogali, then Amuru Division, Gulu District on 18.03.2001.

On that day at 7.30 p.m., Pw2, Pw3 Otto Dominic and Pw4 Lowum Robert were seated and chatting in front of a house of the father of Pw2 at Labongogali Camp. Suddenly, the appellant and two others all dressed as soldiers in military uniform and armed with guns, appeared at the scene. The three began assaulting Pw2, Pw3 and Pw4. Both Pw3 and Pw4 fled to the bush. Pw2 ran to his house followed by the attackers. As he attempted to enter his house, he was pulled back by one of the attackers, where upon one of those attackers ordered the appellant to shoot Pw2 with the gun. The appellant fired the gun, but the bullet missed Pw2, and instead fatally hit the deceased who was sleeping at the door way of the house. She died as she was being taken to the nearby Medical Clinic.

Pw2, Pw3 and Pw4 identified the three attackers as being UPDF soldiers guarding the Displaced Peoples' Camp at Labongogali. They were well known to them as being the appellant and the other two being Sergeant Lukecha Justine and Private Opira Tula.

The three attackers were subsequently arrested and charged with murder.

At the trial Private Opira Tula was removed from the Indictment as he was a minor aged below 18 years. His case was remitted to the Children's Court to handle. The trial thus proceeded against the appellant and Sergeant Lukecha Justine.

At the conclusion of the trial the Court found both of them guilty of murder and sentenced both to the then only mandatory sentence of death. They appealed to this Court against both conviction and sentence. However, on 26.04.2007 Sergeant Lukecha Justine died before his appeal could be heard and determined. The same abated by reason thereof. It is thus only the appellant's appeal which is the subject of this Judgment.

### **Grounds of Appeal:**

The appeal has two grounds as by the amended Memorandum of Appeal lodged in Court on 14.04.2016.



- 1. The learned trial Judge erred in law and fact when he convicted the appellant for the offence of murder when the essential ingredient of malice aforethought on the part of the appellant was not proved beyond reasonable doubt.***
- 2. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on the Court record and wrongly convicted the appellant.***

The appellant thus prays that his conviction be quashed, the sentence be set aside and he be set free forthwith.

### **Legal representation:**

Learned Counsel Paul Manzi represented the appellant on State brief, while Senior Principal State Attorney, Sam Oola, was for the respondent.

### **The appellant's Case:**

Appellant's Counsel argued both grounds together. He contended that prosecution had not proved beyond reasonable doubt that the appellant had had malice aforethought in killing the deceased by shooting. The appellant shot the gun in obedience to superior orders of his master with the intention of disabling Pw2 who was going to injure those that were chasing him. It was by misadventure that the bullet caught the deceased. There was no meditated intention by the appellant to kill the deceased.

Counsel further contended that the evidence of Pw2 and Pw4 was so contradictory that the trial Judge ought not to have put any reliance upon the same. Pw4 testified that he was already in hiding when the shooting took place, yet he claimed at the same time to have seen the shooting. Pw4 also claimed that Pw2 fell down when being chased by the attackers, but Pw2 never stated so in his evidence. The trial Judge had thus failed to properly evaluate this evidence and had wrongly convicted the appellant by reason thereof.

Therefore, Counsel contended, since malice aforethought was not proved on the part of the appellant and since the evidence of Pw2 and Pw4 upon which the trial Court acted to convict was grossly no contradictory in material particulars, the two grounds of appeal ought to be allowed.

### **The Respondent's Case:**

Respondent's Counsel contended that malice forethought had been proved in terms of Section 191 (a) and (b) of the Penal Code Act. It was immaterial whether the appellant shot the gun aiming at Pw2, but instead the bullet landed on another person, now the deceased.

According to Counsel, there were no material contradictions in the evidence of Pw2 and Pw4 so as to render that evidence to be not worthy of belief. Pw4 could see the shooting even when in

hiding.

Pw2 was not asked by the defence whether he ever fell down or not. At any rate, even if true, the contradictions were very minor. Counsel maintained that the prosecution had proved its case beyond reasonable doubt against the appellant. The appeal ought therefore to be dismissed.

### **Duty of Court:**

Being a first appellate Court, it is the duty of this Court to subject the evidence on record to a fresh review and scrutiny and make our own inferences, bearing in mind, however, that we did not see the witnesses testify: See: **Rule 30 of the Judicature (Court of Appeal Rules) Directions: SI 13-10.**

See also: **Supreme Court, Uganda, Criminal Appeal No. 37 of 1995: Uganda vs G.W. Simbwa.** unreported.

### **Resolution of the Grounds of Appeal:**

#### **Ground 1:**

The essence of the appellant's contention in this ground is that the trial Judge erred to convict the appellant of murder when the prosecution had not proved beyond reasonable doubt that in killing the deceased, the appellant did so with malice aforethought.

The learned trial Judge directed himself and the assessors both in the summing up to the assessors and also in his Judgment as to the ingredients of the offence of murder each of which the prosecution had to prove beyond reasonable doubt if a conviction of the appellant was to be secured. These were: the fact of death of the deceased that the death was caused by unlawful means, that it was caused with malice aforethought and that the accused (now appellant) participated in causing the deceased's death.

Specifically, with regard to the ingredient that the death of the deceased was caused with malice aforethought, the trial Judge addressed himself in his Judgment to Section 191 (then Section 186 at the time the offence was committed) of the Penal Code Act as to the meaning of malice aforethought.

He noted that it is the intention to cause the death of any person, whether such a person is the one killed or not, or it is knowledge that the act or omission causing death will probably cause the death of some person, whether such a 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 be caused.

The trial Judge then considered the factors a Court may consider to infer malice aforethought as being: the weapon used, the injuries inflicted and the part of the body on which the same are inflicted. The trial Judge on reviewing the whole evidence that was before him then concluded:

*“In the instant case Akongo was shot with a gun which is a deadly weapon in the terms of Section 273 (2) of the Penal Code Act inflicting a fatal wound to her buttocks with an exit wound in her genitalia which are vulnerable parts of the body. From the above circumstances whoever shot the deceased did so with malice aforethought. That the person targeted to be shot was somebody else does not exclude the existence of malice aforethought in light of Section 186 of the Penal Code Act (Supra). In the result the prosecution has proved beyond reasonable doubt that whoever shot the deceased had malice aforethought. ”*

The submission for the appellant that he never intended to kill the deceased because he had aimed at Pw2, Latigo Oyat Komakech Patrick, but the bullet landed on the deceased, cannot, in our view amount to the appellant having caused the killing of the deceased without malice aforethought. Pw4 Luwum Robert, an eye witness to the shooting described what he saw as follows:

*Latigo Oyat fell down and Okwera Simon aimed at Latigo Oyat but the bullet hit the child of Latigo Oyat instead”.*

**Pw2: Latigo Oyat testified:**

*Okwera then fired his gun intending to shoot me. He fired just one round but missed me and hit my child who was sleeping at the door way-this was my daughter Akongo aged 6 years”.*

In his defence, the appellant admitted being at the scene of crime at the material time. He stated he was armed and was very sober. It was the deceased accused, No. 2324 Sergeant Lukecha Justine, his commander, who ordered him to shoot Pw2 because Pw2 had got hold of his (appellant)

gun. He said:

*“The old man got hold of my gun and Lukecha ordered me to shoot Oyat Latigo since he was holding my gun. The bullet did not get him. ”*

Later in cross-examination by Counsel Oloya the appellant testified:

*“A1 was my boss. On the fateful day I went with him and Opira Tula. The three of us had guns. I pulled the trigger because I was under orders I understood I was to shoot Latigo Oyat, but I did not shoot the second time because I did not want to shoot I shot at Oyat Latigo because I was ordered by*

*Lukecha to shoot because I was his subordinate.”*

From the above evidence we find that the appellant, whether on orders of the first accused or otherwise, aimed to shoot with a gun at Pw2, regardless of whether the bullet would kill Pw2 or not . The bullet did not get Pw2, but instead it got the deceased, aged 6 who was sleeping in the door way of Pw2's house.

We are unable to find in the evidence of Pw2, Pw4 and that of the appellant himself anything to suggest that the appellant acted without malice aforethought.

We accordingly agree with the trial Judge that on a proper evaluation of all the evidence adduced by the prosecution and the defence, the prosecution proved beyond reasonable doubt that in causing the death of the deceased the appellant acted with malice aforethought. It was immaterial that the appellant was executing the orders of his boss, Justine Lukecha, now deceased, to shoot Pw2. This Justine Lukecha, incidentally, in his evidence on oath denied ever giving such orders to the appellant. It was also immaterial that the shooting was aimed at PW 2 but not the deceased.

It is our finding that the learned trial Judge properly directed himself and the assessors as to the issue of malice aforethought and thus arrived at the right conclusion.

There is no merit in ground 1 of the appeal. The same stands dismissed.

## **Ground 2:**

Ground 2 of the appeal faults the trial Judge for having failed to properly evaluate the evidence that was before him, and by reason thereof, for arriving at the wrong conclusion of convicting the appellant of murder.

Ground 2 in our considered view is too vague and too general and offends Rule 66(2) of The Judicature (Court of Appeal Rules) Directions.

The ground faults the trial Judge for having failed to evaluate all the evidence on record that was before him. A ground of appeal ought to indicate the specific wrong that is complained of in a specific aspect of the trial proceedings. In this particular case, the ground implies that whatever the trial Judge evaluated in the evidence that was before him was erroneous. The ground is too general and too vague. It is wrong in law. See: **Court of Appeal (Uganda) Civil Application No. 2 of 1988: Adonia Nakudi Vs Chrisant k. Mukasa: un reported**

Be that as it may, since the ground relates to an appeal against a conviction for murder, a very serious charge, Court will proceed to deal with the ground by ascertaining what exactly it aimed at.

The learned trial Judge evaluated the evidence of Pw2, Pw3, Pw4 and that of Dw 1 and Dw2 and concluded that the death of the deceased, as well as the fact that the same had been caused unlawfully had been proved beyond reasonable doubt. He properly directed himself and the assessors to the fact that these two ingredients of the offence had been proved beyond reasonable doubt by the prosecution. Indeed defence Counsel had so conceded.

The evidence that the trial Judge considered as having proved beyond reasonable doubt that the killing was



with malice aforethought has been considered while considering ground 1.

As to participation of the appellant in the crime, the trial Judge considered the evidence of Pw2, Pw3 Pw4 and that of the appellant himself who admitted to being at the scene of crime and also having carried out the shooting.

We have ourselves re-subjected the evidence to a fresh scrutiny. We find no major contradictions in the evidence of Pw2 and Pw4 as to render that evidence not credible, as Counsel for the appellant invited us to hold. Both Pw2 and Pw4 clearly explained the circumstances in which they were in and how they were able to see appellant shoot the deceased.

On the whole, we find that the trial Judge carefully and rightly considered the whole evidence both of the prosecution and the defence and came to the right conclusion as to the guilt of the appellant. We see no merit in ground 2 of the appeal.

Both grounds of the appeal having failed this appeal stands dismissed.

It is ordered that the appellant continues to serve the sentence of 18 (eighteen) years imprisonment as from the date of mitigation of sentence decision, that is 22<sup>nd</sup> November, 2013.

Dated at Arua this 6<sup>th</sup> day of June 2016.

Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon. Justice Simon Byabakama Mugenyi

JUSTICE OF APPEAL