

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT MBARARA**  
**CRIMINAL APPEAL NO.427 OF 2016**

*(Arising from the judgment of the High Court (Michael Elubu,  
J) at Rukungiri Criminal Session Case No. 084 of 2014*

**[CORAM: ELIZABETH MUSOKE, STEPHEN MUSOTA, JJA,  
& REMMY KASULE, Ag. JA]**

**BETWEEN**

**TUMUKWASIBWE JUSTUS:..... APPELLANT**

**VERSUS**

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

**JUDGMENT OF THE COURT**

This appeal arises from the judgment of His Lordship Michael Elubu, delivered on 9th, February, 2016, in High Court, at Rukungiri, Criminal session case No. 084 of 2014 whereby, after a full trial, the appellant was convicted of the offence of murder contrary to Section 188 and 189 of the Penal Code Act and was sentenced to 25 years imprisonment.

**Background:**

The facts of the case, as accepted by the trial Judge, were that on the 12th October, 2013 at around 9:00pm, the appellant, then a builder at Katojo Secondary School, Buyanja Town, Rubabo County, Rukungiri District went to the bar known as BCF Guest



House, and ordered for a Nile special beer. He had come to the bar with his fellow builders and had a yellow helmet with him. At about 09:00pm, the appellant approached the deceased one Birungi Bonny and requested to dance with her. The appellant also made advances of intimacy to the deceased. The deceased rejected the appellant's request and advances. A scuffle ensued between the appellant and the deceased. The bar owner, one Akampurira Ham intervened. This annoyed the appellant who now wanted to fight with the said bar owner.

From the scuffle with the bar owner, the appellant moved a short distance at the premises of the bar, to where the deceased was and then threw a bottle of beer aiming at the head of the deceased. The bottle hit the deceased's head. She started bleeding profusely and cried that the Mukiga man had hit her with a bottle. She was rushed to the nearby clinic.

The appellant together with some of his friends went to the said medical clinic. They tried to fight those who had rescued the deceased and taken her to the medical clinic to get treatment. The appellant and his friends did so because they wanted to prevent the deceased from getting medical treatment. The appellant was overcome and was arrested at the clinic. The victim was rushed to Nyakibale hospital where she died later that night.

The appellant was later charged and tried for murder. He was convicted and sentenced to 25 years imprisonment.

Dissatisfied, the appellant lodged this appeal against both conviction and sentence.

**The appeal is on two grounds, namely:**

- 1. That the learned trial Judge erred when he convicted the appellant without sufficient evidence to sustain the charge.***
- 2. That the learned trial Judge erred to sentence the appellant to 25 years imprisonment which was a harsh sentence in the circumstances.***

At the hearing of this appeal, the appellant was represented by learned counsel Nowangye Jacinta on state brief, while learned State Attorney Anthony Kurugyishuri was for the respondent.

Due to the Covid 19 virus pandemic and in compliance with the Uganda Government Health Regulations aimed at preventing the spread of the said virus, the appellant remained at Mbarara Government Prison during the hearing of the appeal. He participated in the Court proceedings through the video conferencing and communication technology set up by the Court. Both counsel for the respective parties filed written submissions.

**Submissions for the Appellant:**

On the first ground of appeal, Appellant's counsel submitted that for the prosecution to obtain a conviction for the offence of murder, the four elements of the offence had to be proved by the prosecution beyond reasonable doubt. These are that someone was killed, that the killing was by the act of the appellant, that the said act was unlawful and that the appellant acted with malice aforethought.

Counsel contended that the prosecution failed to prove beyond reasonable doubt the participation of the appellant in the murder of the deceased. Further, that there was also no evidence of malice aforethought on the part of the appellant.

On the participation of the appellant in the crime, counsel submitted that the circumstances surrounding the identification of the appellant as the person who hit the deceased with the bottle were never proved beyond reasonable doubt. This is because the alleged scuffle of the appellant, the deceased and the bar owner, took place at the balcony of the bar at around 9.00 p.m. in the night. The question as to whether there was proper identification of the appellant remained doubtful because Akampurira Ham (PW1), the bar owner, never stated before the trial Court that there was lighting to enable proper identification at the balcony during the scuffle. Counsel relied on the case of **Abdula Nabulere & Others Vs Uganda; Court of Appeal Criminal Appeal No.09 of 1978 in** which the Court laid down the conditions that must be present for correct identification.

Counsel further disputed the 1 hour and 30 minutes period considered by the trial Judge as having been sufficient time for the bar owner Akampurira Ham, PW1, to have properly observed the appellant, for the first time, from the time the said appellant was served a beer in the bar up to the time the deceased was injured.

Learned counsel contended that since PW1 was the one in-charge of the bar, thus overseeing other activities, he could not have sat in one place and concentrated on observing the features of the appellant in the bar.

Counsel also faulted the trial Judge for not ascertaining whether or not, given the distance that was between PW1 and the balcony from where the bottle was allegedly thrown from, it was possible for PW1 to clearly see who of those at the bar threw the bottle of beer to hit the head of the deceased. Counsel reasoned that PW 1, was seeing the appellant for the first time, and as such he could have been mistaken in his identification of the appellant as the one who hit the deceased with a bottle of beer.

Lastly, counsel faulted the learned trial Judge for not considering the fact that the said helmet, alleged to have been the property of the appellant, could not fit on the appellant's head. This indicated that it was not his and therefore he was not the person PW1 described as starting a scuffle while with the deceased putting on a helmet.

Counsel prayed this Court to find that the participation of the appellant was never proved beyond reasonable doubt and that the learned trial Judge erred in law and on the facts to hold otherwise.

As to malice aforethought, counsel submitted that the circumstances surrounding the deceased's death do not fit the narrative that whoever killed the deceased had malice aforethought. This is because everyone around, including the deceased herself, were dancing and having a good time. This made it clear that whoever killed her did it out of intoxication rather than out of malice aforethought. Counsel thus prayed this court to find that there was no malice aforethought proved. In the alternative, if this court finds that there was evidence that the appellant participated in the death of the deceased, then such a participation was without malice aforethought. The conviction of the appellant

should therefore be of manslaughter. Counsel thus prayed this Court in the alternative to set aside the conviction of the appellant for murder and substitute the same with a conviction of the appellant for manslaughter.

On the second ground, learned Counsel for the appellant, relied on the case of **Naturinda Tamson Vs Uganda; Supreme Court Criminal Appeal No. 025 of 2015**, where the Court held that an appellate court will only alter a sentence imposed by the trial court, if it is evident that the trial Court acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly too excessive or too low to amount to a miscarriage of justice, given the circumstances of the case.

Learned counsel submitted that the sentence of 25 years imprisonment was excessive and the trial judge did not fully consider the mitigating and aggravating factors before he pronounced himself on the sentence. Counsel prayed that this court considers all these factors and reduce the sentence from 25 years to 10 years imprisonment of the appellant.

**Submissions for the respondent:**

Learned Counsel for the respondent opposed this appeal and supported the finding of the learned trial Judge that all the elements of the offence of murder were proved beyond reasonable doubt against the appellant.

Counsel further submitted that PW1 was familiar with the appellant and he was able to tell the trial court the appellant's names and that even though the appellant was not his regular

customer at the bar, he was familiar with him as he was working at the nearby Katojo Primary School.

As to whether there was enough light to aid the identification of the appellant as the killer of the deceased, learned counsel for the respondent contended that there was enough light in the bar and in the entire building which allowed PW1 to identify the appellant as the very same person who hit the deceased with a beer bottle and then followed them from the bar to the medical clinic where the deceased had been taken to receive medical treatment. The appellant was arrested at that medical clinic while trying to ensure that the deceased does not receive the necessary medical treatment.

As to the time spent observing the incident and the proximity of PW1, the identifying witness, to the appellant, learned counsel for the respondent, submitted that the 1hour and 30 minutes was enough for PW1 to properly identify the appellant. It was PW1 who had separated the appellant from the deceased during the scuffle in the bar which made it easy for PW1 to see the appellant throw the bottle at the deceased. Finally, it was never disputed by the appellant that on the night in question he was at this very bar of which PW1 was in charge at the material time.

Counsel further submitted that the learned trial Judge properly inferred malice aforethought on the part of the appellant from the weapon used and the part of the body of the deceased targeted by the appellant. The appellant also tried to ensure that the deceased did not receive medical treatment at the medical clinic where the deceased had been rushed after the appellant had hit her on the head with a bottle of beer. Counsel thus prayed this court to find

that the fact that the appellant acted with malice aforethought in causing the death of the deceased was proved beyond reasonable doubt by the prosecution.

On the second ground of appeal, learned counsel for the respondent, submitted that the learned trial Judge considered all the mitigating and aggravating factors and the relevant Court precedents before rightly arriving at the sentence of 25 years imprisonment that he imposed upon the appellant. Learned Counsel argued that, given the fact that the offence of murder attracts a maximum penalty of death, a sentence of 25 years imprisonment imposed upon the appellant was neither harsh nor excessive in the circumstances.

Counsel therefore prayed this court to dismiss the appeal by upholding both the conviction and the sentence passed by the trial Court upon the appellant.

#### **RESOLUTION BY COURT:**

This Court has carefully considered the court record proceedings of the trial court and the submissions of both counsel. This being a first appellate court, the duty of this Court is to review and re-evaluate the evidence adduced before the trial Court, by subjecting the same to fresh scrutiny, drawing inferences therefrom and reaching its own conclusions as to the conviction and sentence passed upon the appellant, bearing in mind that this Court did not have the opportunity to hear, see and observe the demeanour of the witnesses testify as the learned trial Judge did. See: **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions SI 13-10**, and **Begumisa and others Vs Tibebaga, Supreme Court**





**Civil Appeal No. 17 of 2002 and Kifamunte Henry Vs Uganda,  
Supreme Court Civil Appeal No. 10 of 1997.**

The Court will carry out the above duty in resolving the two grounds of this appeal.

**Ground One:**

On ground one of the appeal, that the learned trial Judge erred when he convicted the appellant without sufficient evidence to sustain the charge, counsel for the appellant submitted that the prosecution did not prove beyond reasonable doubt that it is the appellant who actually killed the deceased, or that if he is the one who did so, then the prosecution did not prove beyond reasonable doubt that he did so with malice aforethought. Counsel for the respondent on the other hand maintained that the prosecution had proved beyond reasonable doubt all the ingredients of the offence against the appellant.

This Court has therefore closely examined and considered the evidence of the eye witness Akampurira Ham (PW1), the bar owner, who identified the appellant as the individual who threw a bottle of beer at the deceased's head thus causing the fatal injuries to her. The appellant then followed the deceased up to the medical clinic where the deceased was first taken for medical treatment. The appellant did so so as to prevent the deceased from being medically treated at that medical clinic.

We have also considered the fact that Akampurira Ham (PW1) closely interacted with the appellant before, during and after the scuffle between the appellant and the deceased. Before the scuffle this witness was able to serve the appellant with a bottle of beer

and during the scuffle, he was the one who intervened and requested the appellant to leave the deceased in peace.

PW1 then clearly saw the appellant hit the deceased with a bottle of beer that he, the appellant, aimed at, and hit the head of the deceased. After injuring the deceased, this witness PW1 was also able to see the appellant at the medical clinic trying to prevent the deceased from getting medical treatment. From his testimony it was clear that PW1 had interacted enough with the appellant to properly identify him even if he had just seen him for the first time at the bar on that day.

The evidence adduced by the prosecution that there was proper lighting in the bar on the night in question which favored proper identification of the appellant was not in any way contradicted by the defence at the trial.

This Court therefore upholds the finding of the trial Judge that PW1 (Akampurira Ham) properly identified the appellant as the one, on the material date and place, who threw the bottle of beer aimed at the head of the deceased, thus causing her to get the fatal injuries that resulted in her death.

On the issue of malice aforethought, this Court has considered the nature of the weapon used and the part of the body of the deceased, that is the head which was aimed at and hit with the bottle of beer by the appellant. It is clear from the evidence that the part which was targeted was the head, which is a vulnerable part of the body. Thus the intention of the appellant to cause a fatal injury to the deceased was rightly inferred by the trial Court. The conduct of the appellant whereby he tried to prevent the

deceased from getting medical treatment at the medical clinic to which the deceased was rushed, is further evidence of malice aforethought on the part of the appellant.

This Court therefore finds that the learned trial judge properly evaluated the evidence on record before coming to the conclusion that the appellant was properly identified as a participant in the commission of the crime and that he acted with malice aforethought in the murder of the deceased.

**Ground Two:**

Ground 2 of the appeal, faults the learned trial Judge for having erred to sentence the appellant to 25 years imprisonment for murder which was a harsh sentence in the circumstances.

This Court has carefully reviewed and considered the **Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions, 2013**, whereby the offence of murder attracts a maximum sentence of death and the sentencing range is between 30 years imprisonment to death with 35 years imprisonment as the starting point.

In **Godi Akbar Vs Uganda; Supreme Court Criminal Appeal No. 03 of 2013**, the appellant, a member of parliament murdered his wife by inflicting upon her gunshot wounds by use of a gun. He was sentenced to 25 years imprisonment which sentence was upheld by both this Court and the Supreme Court.

The appellant in **Oyita Sam Vs Uganda; Court of Appeal Criminal Appeal No. 307 of 2010**, pleaded guilty to having murdered his own brother over land wrangles. He was convicted on his own plea of guilt and sentenced to death by the trial judge.

On appeal this honorable court substituted the death sentence with one of imprisonment for 25 years.

In **Kisitu Majaidin alias Mpata v Uganda; Court of Appeal Criminal Appeal No.28 of 2007**, the Court of Appeal upheld a sentenced of 30 years imprisonment imposed by the trial court. The appellant had been convicted of the murder of his mother.

In **Kyaterekera George William v Uganda; Court of Appeal Criminal Appeal No. 113 of 2010**, a sentence of 30 years imprisonment imposed by the trial court was confirmed by this Court. The appellant had fatally stabbed his victim in the chest.

This court will only interfere with the sentence imposed by the trial Court where it finds that that sentence is either illegal or too manifestly excessive or too low, in view of the circumstances of the case, to amount to a miscarriage of justice. See; **Section 139(1) of the Trial On Indictments Act** and the case of **Ogalo S/O Owoura v R (1954) 21 EACA 270**.

Having carefully considered the evidence on record, the judgment of the trial court and the law, this Court finds that the trial Judge properly evaluated the evidence and considered all relevant factors as to the sentence of the appellant. The trial Court considered the mitigating and aggravating factors as being the fact that the appellant was a first offender, was a family person, the offence happened in a bar where beer was being taken, it arose out of sudden circumstances and the fatal injuries were caused by a single strike on the deceased's head. The appellant was aged 36 years at that time and was capable of reforming into a better person.

On the aggravating side, the appellant killed the deceased merely because she rejected his requests for love intimacy, murder was rampant in the area, the deplorable appellant's conduct to prevent the deceased from getting treatment at a nearby clinic, and the fact that the maximum sentence is death were factors that were considered.

The fact that the appellant had spent three (3) years on remand was also considered in determining the sentence that was imposed upon the appellant.

This Court therefore holds that the sentence of 25 years imprisonment by the trial Court imposed upon the appellant was neither illegal nor excessive in the circumstances. Therefore, there is no reason for this court to interfere with the same.

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

It is so ordered.

Dated at Mbarara this.....13<sup>th</sup>..... day of .....October.....2020.



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**HON. LADY JUSTICE ELIZABETH MUSOKE, JA.**



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**HON. MR. JUSTICE STEPHEN MUSOTA, JA.**



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**HON. MR. JUSTICE REMMY KASULE, Ag. JA.**