

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA**

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CRIMINAL APPEAL NO. 321/2003

**CORAM: HON. JUSTICE A.E.N.MPAGI-BAHIGEINE, JA
HON, JUSTICE A.TWINOMUJUNI, JA
HON. JUSTICE S.B.K.KAVUMA, JA**

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ABSOLOM OMOLO OWINY :::::::::::::::::::: APPELLANT

VERSUS

UGANDA:::::::::::::::::: RESPONDENT

(Arising from High Court Cr. Session Case No. 0015 of 2003(Kania J) holden at Gulu)

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JUDGEMENT OF THE COURT

This appeal is against both conviction and the death sentence passed on the appellant by the High Court (Kania J) at Gulu, on 19-08-2003.

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On 12-03-2003 the appellant, Absolom Omolo Owiny, was indicted for the murder of one Wanok Michael, contrary to **sections 183 and 184** of the **Penal Code Act**. He pleaded not guilty, was tried and convicted as aforementioned.

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The facts as accepted by the learned trial Judge were as follows. The deceased, Michael Wanok, was serving a sentence at Kakira Prison

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in Paidha when, on the 5th day of December 2001, he escaped while in the custody of the appellant. He was, however, rearrested in Paidha trading centre on the 11th December 2001 and escorted to Paidha Police Station for custody.

The following day, the appellant and another prison warder by the name of Onegagiu Kosko, No. 0912, DW1, went to Paidha Police Station, removed the deceased from Police Custody and took him to the administration prison at Kakira. While there in one of the prison wards, the appellant tortured and beat him up with a baton until he became unconscious. Later the same day the
5 deceased died from his injuries. A search of the appellant's premises revealed a blood-stained prison warder's uniform. The appellant was subsequently arrested and charged with the deceased's murder.

At his trial the appellant made an unsworn statement maintaining that it was the other prison staff
10 who had a grudge with him (the appellant), who beat up the deceased, trying to implicate him.

The Memorandum of Appeal comprises 4 grounds, namely that:

- 15 **“1. The learned trial Judge erred in law and fact when he admitted in evidence a baton or a baton-like looking stick as being the offensive weapon used in the commission of the offence, thereby arriving at a wrong decision.**

- 20 **2. The learned trial Judge erred in law and fact in believing the evidence of the prosecution and
rejecting that of the defence thereby arriving at a wrong decision.**

- 25 **3. The learned trial Judge erred in law and fact when he failed to properly evaluated the evidence on record which led to the wrong decision to the prejudice of the appellant.**

- 30 **4. In the alternative but without Prejudice to the aforestated, the appellant shall, in accordance with the principle of fair trial seek to mitigate the mandatory sentence imposed by law to custodial sentence.” (sic).**

Mr. Alli Gabbe Akidda represented the appellant while Mr. William Byansi, Principal State Attorney P/SA appeared for the respondent.

Mr. Gabbe argued grounds 1 and 4 separately; 2 and 3 together.

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Regarding ground I, learned counsel submitted that PW3 – No 0915 Gila Robert, the witness who recovered the baton used to assault the deceased from the ward where he was being assaulted and who took it to Police rejected the baton exhibited in court. He said that it did not look like the one he had delivered to Police. Learned counsel pointed out that even PW5 No 10 30456 D/C Mobinga Ezikiel who was at Paidha Police Station at the material time, testified having received from PW3 the baton which the appellant had been using to assault the deceased. He treated it as an exhibit, painted it with a blue marker and labeled it CRB 213/2001.

15 Mr. Gabbe submitted that this supported the defence case that the appellant was being framed. He however, agreed that the deceased was assaulted with a stick but not with the one exhibited in court.

Mr. William Byansi, learned Principal State Attorney (P/SA) opposed the appeal arguing that the 20 baton exhibited was the same one described by the prosecution witnesses as having been used by the appellant. He asserted that it was not factory made and therefore none of the witnesses could be exact in describing it. He submitted that the relevance of the baton was only to prove assault of the deceased, but the nature of the weapon used was not in issue and was not an essential ingredient to prove the charge of murder. In his view, what was on record regarding the baton 25 was sufficient to establish this fact that the deceased died from assault with a baton-like stick.

The learned trial Judge observed:

30 **“If in committing the murder deadly weapons are used to inflict fatal injuries on vulnerable parts of the body, malice aforethought will easily be deduced. In Uganda V Turwoniwe (1978) HCB 182 and R V Tubere (1945) 12 EACA 63 which are all cases in which pangas, which are deadly weapons, were applied to**

vulnerable parts of the victim’s body to inflict fatal injuries, malice aforethought was easily inferred..... ”

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He found thus that:

“ **In the instant case a baton was used to repeatedly assault the deceased. A deadly weapon under S 273 (2) of the Penal Code Act includes any weapon which is likely to cause death if offensively used. The baton like stick with which the assailant of the deceased assaulted the deceased fits this description in that if used offensively to indiscriminately attack somebody it can cause death.....**

According to the medical report of PW1, Dr. Anzubo Paul, the deceased sustained a fracture of the base of the skull which is an extremely vulnerable part of the human physiology The injury itself was life threatening and fatal as according to PW1 Dr. Anzubo Paul, it led to the death of the deceased.”

20 We entirely agree with the learned Judge’s analysis regarding the baton-like weapon. It was not necessary to give a precise description of the baton. There was sufficient evidence to establish that a stick by whatever description was used in the assault. PW2 No. 19847 Sgt. Rahwengu Geoffrey who was in charge of Paidha Police Station at the time testified that when the appellant and Kasko Onegagiu DW1 collected the deceased from the Police, they had an SMG and a baton which was locally made. It was bigger than the normal baton. PW3, who was the gatekeeper at Paidha Prison saw the appellant and Kasko bring in the deceased. As soon as they entered the prison premises the appellant started beating the deceased with a piece of wood, made like a baton. He said that they had no batons in the Prison. He heard the deceased crying. He advised the appellant to stop assaulting the deceased. He later recovered the

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baton from the ward where the assault had taken place and took it to Police though later at trial he was not sure that it was the exhibit produced in court.

5 PW4 Yahaya Mohamed, then a convict serving a four-months sentence at the prison at the time, witnessed the appellant assaulting the deceased with a baton and hitting him all over the body. He happened to be standing outside the room where all this was taking place. It also extended to the corridor where PW3 and Kosko DW1 tried to restrain the appellant. The deceased was crying and bleeding through the nose and mouth.

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Furthermore PW6 No 0920 Warder Oketh wengo saw the appellant with a short stick-like baton with which he was beating the appellant all over the body before the Officer-in-Charge ordered him to take the deceased to him.

15 There is thus overwhelming evidence that the offensive weapon was a 'baton-like stick'. The deceased met his end through beating with such a stick. The injuries described as abrasions and lacerations (page 4-5 record) would be more consistent with such a weapon. This ground of appeal cannot succeed.

20 Regarding Grounds 2 and 3, Mr. Gabbe attacked the testimony of PW5, No 30456 D/C Mobinge Ezekiel, who searched the appellant's house and recovered a blood-stained prisons uniform which he marked CRB 213/2001 and yet he testified that at the time of committing crime, the appellant was putting on a washed uniform. Learned counsel stated that this was a contradiction in PW5's story. With respect we fail to see any contradiction. We consider that prison personnel
25 must each be having a pair of uniforms so that when one is washed the other one comes in use.

His other issue was that the blood stains on the uniform was never subjected to forensic examination to determine whether it matched that of the deceased. Learned counsel submitted that the appellant was framed by one warder, Beronga Alex Olichu who had a grudge against him
30 and was the one hitting the deceased with a "2 x 2" piece of wood on which there was a strap of loop iron 'nailed with nails.' We wondered why he never mentioned this in his statement to

Police. Learned counsel added that even if the appellant assaulted the deceased, he was not alone. There were others who had no connection with the appellant but who came and joined in. The appellant had no intention of killing the deceased. He submitted that the trial judge did not properly evaluate the evidence, otherwise the appellant should have been acquitted or a verdict of manslaughter returned. Learned counsel asked court to quash the conviction.

Mr. William Byansi pointed out that the learned trial judge properly evaluated the evidence of both the prosecution and defence. The evidence revealed the appellant was carrying a baton and a gun. His own witnesses confirmed this. DWI, No 0912 W/Onegagiu Kosko testified ... *'I told the police that I saw Omolo beat the deceased as we were walking. Yes I witnessed Omolo beat the deceased at the ankle I heard the deceased crying inside the ward.'*

Furthermore the appellant's other witness, Dramaza ASP O/C Paidha Prison, DW2, denied having instructed the appellant and Kosko to collect the deceased from the Police Station. He said: ***'It was not proper for the staff to collect the accused from the police station.'*** This witness pointed out the contradiction in the evidence of DWI who had reported to him that the deceased had been beaten by a mob though in his evidence-in-chief he said he saw the appellant assault the deceased.

After analyzing all the evidence the learned Judge found that:
"Though the accused denied assaulting the deceased, PW3 Giha Robert, PW4 Fahaya Mohamed and PW6 W/Oketh wangu all testified to witnessing the accused beating the deceased. PW4 Jahaya Mohamed and PW6 Oketh wangu both gave evidence that they saw the deceased being beaten by the accused because they were at the time at the window of the room where the incident was happening. When the above witnesses testified about the accused assaulting the deceased their evidence was in no way controverted or seriously challenged in cross examination. I believe the evidence of these three eye witnesses as they were consistent and corroborated one another's testimony. I disbelieve the defence of the accused that on reaching the prison with the deceased he handed him over and immediately left.

5 **There is evidence that the accused participated in the unlawful assault on the deceased outside the prison premises ostensibly to punish him for having escaped. The accused continued assaulting the deceased long after reaching the premises. Therefore even if the version of the accused were to be believe, he would still be guilty of the murder of the deceased under the doctrine of common intention.”**

The gist of the appellant’s unsworn statement was that he did not beat the deceased but that it was rather other prison warders who beat up the deceased against all his protestations.

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We entirely agree with the learned Judge’s appraisal of the evidence. It is apparent that the appellant was very angry with the deceased for having escaped from his custody. He had to punish him. That is the very reason why he and DW1 collected him from Police custody without authority of O/C.

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The other warders must have taken the cue from the appellant to assault the deceased. He thus clearly falls within the ambit of **section 22** of the **Penal Code Act**. They all had a common intention of assaulting and punishing the deceased, for having escaped.

20 There is overwhelming evidence against the appellant even without the forensic test of the blood. The prosecution evidence remains impeccable.

Grounds 2 and 3 cannot succeed.

25 Regarding ground 4 of the memorandum of appeal which concerns mitigation of sentence, we would say that we cannot enforce our decision in ***Criminal Appeal No. 06/2003, Susan Kigula and 416 Ors V Attorney General*** because it is pending confirmation of the Supreme Court, on appeal.

30 This ground of appeal also fails.
Consequently the appeal fails in toto.

Dated at Kampala this 8th day of April 2008.

HON. A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

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HON. A. TWINOMUJUNI

JUSTICE OF APPEAL

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HON. S.B.K. KAVUMA

JUSTICE OF APPEAL