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**THE REPUBLIC OF UGANDA**

**IN THE COURT APPEAL OF UGANDA**

**AT GULU**

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**Coram: Hon Justice L.E.M. Mukasa- Kikonyogo, DCJ**

**Hon Justice S. B.K Kavuma, JA**

**Hon Justice A.S. Nshimye, JA**

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**CRIMINAL APPEAL NO. 86 OF 2005**

**{ ARISING FROM THE JUDGMENT AND ORDERS OF HON JUSTICE }  
**{ AUGUSTUS KANIA IN ARUA HIGH COURT CRIMINAL SESSION NO. 44 }  
**OF 2001******

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**ABICOPONGO PATRICK :::APPELLANT**

**VS**

**UGANDA::: UGANDA**

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**JUDGMENT OF THE COURT**

A High Court session sitting in Arua on 7.12.2004 convicted the appellant of murder contrary to section 188 and 189 of the Penal Code Act and sentenced him to death. He appealed to this Court against both conviction and sentence.

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**The brief facts of the case.**

On 2<sup>nd</sup> December 2001 at Alaa village, Nebbi District, the appellant and his brother Olaya Patrick, who was acquitted and others murdered Mungungeo Wilfred a child of two years.

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Prior to the said murder, the appellant and his group laid a road ambush and started beating people. One Aromburach Evaline, the mother of the deceased child and her in-law, one Dona entered the ambush.

The mother was carrying the deceased on her back. The appellant and his group armed with sharp instruments immediately closed on them. Dona was hit on the head and took off for his life. The mother attempted to run away, but was chased for a distance of about 50 meters and fell down with the deceased on her back.

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The appellant hit the child on the head and it died instantly. The mother was also in the process, hit on the head as she tried to escape with the dead child. The appellant and his brother Oloya went to Warr police station claiming that Oloya Patrick had been assaulted by unknown people. As the police were taking their statements, the mother of the deceased, carried on a bicycle, arrived at the police to report her ordeal. She recognised the appellant as her assailant. The appellant jumped from the police room and ran away. Despite efforts by police to arrest him including scare by gun fire, he escaped. His brother Oloya was arrested and detained. The appellant was subsequently arrested and joined his brother Oloya at police. Both were charged with the murder of the child.

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In his defence, the appellant made a general denial that he knew nothing about the case. The trial judge accepted the prosecution evidence and rejected the defence resulting in his conviction and sentence, hence this appeal. His brother Oloya was acquitted.

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20 Counsel for the appellant presented 2 grounds of appeal.

(1) ***That the trial judge did not properly evaluate the evidence on record on the issue of identification and corroboration to support the conviction.***

(2) ***That the sentence imposed was excessive in the circumstances of the case.***

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During the hearing of the appeal, Mr. Henry Komakech Kilama appeared for the appellant on state brief, while M/s Joan Kagezi a Senior Principal State Attorney appeared for the state.

The opening remarks of counsel for the appellant, were that the appeal is challenging the findings of the trial judge on identification of the appellant and on corroboration. He referred us to the evidence of P.W.2 on page 14 line 5 and submitted that, the prevailing condition could not have favoured positive identification of the appellant.

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On evaluation of the evidence, he asked us to look at the medical report which indicated that there was along cut not a deep wound. In the absence of an exhibit by way of the instrument

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which caused the injury, one can not tell whether the appellant had the intention to kill or not. He contended that it is the back of the mother of the victim that was aimed at and hit. It is not therefore a venerable part of the body.

5 In his view, had the trial judge properly evaluated the evidence, he would have returned a conviction of manslaughter and not murder. Counsel also asked us to consider that, the fact that the appellant and his brother had gone to report an assault on the appellant's brother, there must have been a situation of a fight. Counsel down played the conduct of the appellant in fleeing from the  
10 police station. He explained, that he could have been escaping responsibility. Counsel asked us to allow the first ground of appeal.

In the unlikely event that the conviction is upheld, he prayed that the death sentence be reduced to a custodial sentence within the principles laid down by the Supreme Court in **Attorney  
15 General Vs Suzan Kigula 417 & others. Supreme Court Constitutional Appeal N0. 3 of 2006.**

In mitigation, he submitted that the appellant:-

1. Was a first offender
- 20 2. Had been in custody for a total of 7 years from the time he was arrested.
3. Has a wife and twins of 13 years of age to guide and look after.

He suggested that 6 years imprisonment would be appropriate in the circumstances.

M/s Joan Kagezi did not agree. She supported the learned trial judge in the way he evaluated  
25 the evidence. She submitted that judging from the type of injury that was inflicted, malice aforethought was inferred. The blow inflicted caused external and internal injuries. In her view, it involved a lot of violence which shows malice aforethought. For the contention by counsel for the appellant that the back is not a venerable part, she disagreed. The back protects very delicate organs like the lungs and the heart. It is venerable and a blow to it, infers malice  
30 aforethought.

Secondly, counsel contended that the conduct of the fleeing from a police station is evidence of guilt. She finally asked us to find that murder was proved and disallow ground one.

On mitigation of sentence, she submitted that the appellant and others were on an erratic mission to kill people.

5 They first attacked P.W.I who ran away. Killing a child is an aggravating factor. It does not make the offence lighter. She asked us to uphold and maintain the death sentence.

After hearing both counsel, in our view, the appeal rotates around two issues, whether it is the appellant who killed the deceased child and whether he did so with malice aforethought.

10 Rule 30 of the judicature (Court of appeal rules) enjoins us to reopen and re-evaluate the evidence and come our own conclusion. See also Supreme Court decision of **Kifamunte Vs Uganda reported in East Africa V R [1999] 2 EA, Okello V Republic [1972] EA32 and Charles B. Bitwire V Uganda SCCA N0. 23 of 1995.**

15 We shall begin with **participation**. P.W.2's evidence was to the effect that while he was returning home in company of the deceased's mother, he was attacked by the appellant. He said he knew him very well because he was his in-law. He said it was a round 8:00pm and was not very dark.

20 There is also the evidence of P.W.3 Isombe Alfred who stated before 8:00pm, his sister who is the mother of the deceased made a brief visit to his home where he was with a visitor, one Donaziano. Not long after she had left, she came running and crying. She said that:-

“ Abichopongo had hit and killed her child”. The dead child had a cut injury on his head. He noticed also that she had injuries on her ears. He accompanied her to report to Warr police.

25 While there, the appellant ran way but was arrested after 2 weeks. The witness during cross examination, stated that the appellant was a clan brother. Then, there is a charge and caution statement exhibit P.2. It was tested and admitted after a trial within a trial. The appellant confessed having killed the child but accidentally.

30 After evaluating the evidence against the appellant, the learned trial judge finally stated:-

***“Taking into account the totality of the prosecution evidence together with the confession of A2 himself, I find the prosecution has proved participation of A2 in the death of Munyengeo Wilfred beyond reasonable doubt”;***

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From the evidence, we have pointed out earlier while evaluating the evidence of participation by the appellant, we entirely agree with the learned trial judge that the prosecution proved participation beyond reasonable doubt. However, on proof of malice aforethought by the prosecution beyond reasonable doubt, we are of a different view.

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Malice aforethought is a state of mind which can be determined from the circumstances under which a given offence was committed. The following considerations may help court to understand what was the intention of an accused person.

1. The weapon used.
- 10 2. Parts of the body affected.
3. Number and nature of injuries inflicted.
4. Amount of force used.

Judging from the evidence of P.W. 2 on page 10 of the record, he stated:-

15 ***“ Abicho-pongo then attacked me and hit me with the handle of a slasher”.***

A slasher normally has two distinct parts. The handle and an elongated metallic blade which is sharp at the end. If the appellant decided to hit P.W.2 with the handle and not the sharp blade, no reasonable tribunal would infer that he intended to kill P.W.2 or  
20 cause grievous harm to her. Secondly, we are of the view that when he also hit the mother of the deceased at the back, he must have hit her with a handle and not the sharp blade. We say so because it is common scientific knowledge that a head of child of two years is so fragile that a blade of a slasher would have chopped off part of the head, given the amount of force involved.

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Thirdly, if the intention of the appellant was to kill, he would have inflicted many more blows on her. Although it was alluded to that the mother had injuries to her ears, these were not proved.

According to the evidence on record, only one blow was inflicted and it hit the  
30 deceased child.

Fourthly, in the charge and caution statement, the appellant stated that it was accidental.

The assessors had unanimously advised the learned trial judge to convict the appellant  
35 of a lesser offence of manslaughter. We think they were right. The appeal therefore

succeeds. The conviction of murder is quashed and sentence of death is set aside. We substitute a conviction of manslaughter contrary to section 187 and 190 of the Penal Code Act.

5 Taking into account that the appellant was on remand for 3 years before conviction, we sentence him to 15 years imprisonment to run from 7.12.2004.

**Dated at Gulu this 23<sup>rd</sup> day of June 2010.**

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**L.E.M. MUKASA KIKONYOGO  
DEPUTY CHIEF JUSTICE**

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**S.B.K. KAVUMA  
JUSTICE OF APPEAL**

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**A.S. NSHIMYE  
JUSTICE OF APPEAL**

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