THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 192 OF 2009

(Appeal against Conviction and Sentence of the High Court of Uganda at Masaka before Hon. Justice Kiggundu Jane F.B dated 18th August 2009 Masaka Criminal Case No. 0028 0f 2005)

BAGUMA ABASI ========== APPELLANT

VERSUS

UGANDA ========== RESPONDENT

CORAM: HON MR. JUSTICE Remmy Kasule, JA

HON MR. JUSTICE RUBBY OPIO AWERI, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGEMENT OF THE COURT

The appellant was convicted of murder contrary to Section 188 and 189 of the Penal Code Act and sentenced to Life Imprisonment on 7th October, 2009.

The prosecution case was that the deceased Godfrey Mutungirehi and PW4 John Mwesigye had been drinking alcohol at a local bar in their village, when a brawl ensued between them and a one Mulindwa. The two decided to leave the bar and go home. On their way they were followed by the said Mulindwa who assaulted the deceased. PW4 Mwesigye was then also hit with a brick by Mulindwa on the head and the two then started fighting. The appellant who apparently is a brother to Mulindwa suddenly appeared on the scene holding a big stick which he hit the deceased on the head. The deceased died after two days as a result of the wounds he had sustained in the fight. The prosecution called six witnesses but the

conviction was based mainly on the testimony of PW4 who was a single identification witness.

The defence relied on the unsworn statement of the appellant and called no other witnesses. In his unsworn statement the appellant raised the defence of *alibi*.

The defence while conceding that the victim is dead and that his death was unlawful, denied that it was caused by the deceased. The learned trial judge disagreed with the assessors whose opinion was that the death had not been caused with malice aforethought and as such had advised the judge to acquit him of murder and find him guilty of a lesser charge of manslaughter. The learned judge as already stated convicted the appellant of murder and sentenced him to life imprisonment hence this appeal.

The appellant's appeal was based on following grounds set out in the memorandum of appeal.

1. **The learned trial judge erred in law and fact when she convicted the appellant of murder based on insufficient and unsatisfactory prosecution evidence, attractive reasoning, fanciful theories and speculation.**
2. **The learned trial judge erred in law and fact when she held that death of the deceased was caused with malice aforethought thereby wrongly convicting on the offence of murder.**
3. **The learned trial judge grossly erred in law and fact when she disagreed with the opinion of the assessors and never gave reasons for her such disagreement.**

4. **The learned trial judge having wrongly convicted the appellant of murder, erred in law and fact when she sentenced him to life imprisonment, a sentence which was unduly harsh and excessive.**

Clearly the first ground offends the provisions of **Rule 66(2) of the Rules of this Court** which require that the memorandum of appeal must be set out without argument or narrative the grounds of objection to the decision.

See **Edward Katumba Byaruhanga versus Daniel Kyewalabye Musoke, Court of Appeal Election Appeal No. 2 of 1998**.

In substance however learned counsel for the appellant submitted that the learned trial judge erred when she convicted the appellant on uncorroborated evidence of a single identification witness. The appellant had in his defence set up an alibi. In his unsworn statement he states;

> *"On 11.6.03 I spent the day in Sembabule Court. I left around 7:00p.m and went to my home. I then slept. I never went anywhere else"*

PW3 had testified that a bar owner testified he did not see the appellant at his bar on the night the deceased assaulted; he only saw one Mulindwa, one Kalisa and PW4. However he also testified that appellant's house is only 30 meters away from his bar where the brawl apparently started.

PW4 put the accused at the scene of crime. He knew the accused very well and his evidence was not contradicted in cross examination. The Judge who heard the witnesses testify and observed their demeanor believed PW4 and rejected the testimony of the appellant. At page 4 of her judgment the learned Judge notes as follows;

"The evidence of Pw4 appears credible. PW4 was firm and consistent both during examination. No consistences were noted. PW4 evidence is strengthened by the fact that he knew the accused person as a resident of the village and the two were familiar with each other with the full moon in the open village mates would recognize each other".

We have no reason to fault the findings of the learned trial judge in this regard. This testimony effectively destroys the appellants alibi which in any case the learned trial Judge had found difficult to believe when in her judgment at page 13 she observed as follows:-

"The evidence of the accused person was riddled with deliberate misstatements. If he had been at home as he claimed he would not have heard the fight outside his house"

The assessors were of the same opinion when in respect of the appellant's testimony they stated thus:-

"Accussed's evidence is characterized by lies to mislead court and enable him avoid network of justice"

This ground must fail. We find that the learned trial judge properly evaluated the evidence and came to the correct conclusion that the appellant was sufficiently identified as the assailant.

We shall resolve the rest of the grounds together. It is the appellant's case that malice aforethought was not proved in this case and as such the appellant was wrongly convicted of murder.

The prosecution is required to prove malice aforethought which is defined in **Section 191 of the Penal Code Act Cap. 120** 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.

The learned trial judge found that the prosecution had proved beyond reasonable doubt that the appellant had killed the deceased with malice aforethought, within the meaning of Section 191 of the Penal Code (supra).

In Supreme Court considering as similar appeal in **Nanyonjo Harriet and another versus Uganda Supreme Court Civil Appeal No. 24 of 2012** observed as follows;

"In cases of homicide, the intention and/or knowledge of the accused person at the time of committing the offence is rarely proved by direct evidence. More often than not the court finds it necessary to deduce the intention or knowledge from the circumstances surrounding the killing, the weapon used, the part of the body assailed and the injury".

The learned trial judge in this case was alive to the above proposition of the law when she stated at page 5 of her judgment as follows:-

"It is true that intention or knowledge is not easy to identify. Case law has developed some guidelines that may help to solve the problem. In case where a deadly weapon such as a gun, a spear, a knife, a machete, a big stick, a metal bar is applied against a venerable part of a victim's body of the head, stomach and chest. Courts have been quick to infer the requisite intention or knowledge"

The learned trial Judge went on to conclude that the injuries described by PW2 (Dr.Baguma) who examined the body of the deceased are serious injuries. That they affected very sensitive parts of the body, the head and the neck. Therefore it was reasonable to infer that whoever inflicted the injuries on the deceased's body either intended to kill him or knew that such injuries would cause his death.

Learned counsel for the appellant Mr. Andrew Sebugwawo challenged the conclusion of the learned trial judge. He submitted that the nature of the weapon was not proved as the big stick allegedly used by the appellant to hit the deceased was never found and as such was never exhibited in court. It was therefore never established as to what kind of weapon was used to inflict the injuries. That the medical report was insufficient to prove the weapons as it did not suggest any weapon that might have inflicted the injuries. It simply described the presumed cause of death as 'beaten' and provided no other necessary information. He referred us to the case of **Rujumba Joseph versus Uganda, (1992 – 1993) HCB 36.**

The learned trial judge relied on the direct of evidence of PW4 as proof of weapon used as corroborated by the evidence of PW2 the medical doctor who examined the body.

In this regard PW4 testified as follows:-

"We passed the accussed's house. Mulindwa and Baguma (appellant) followed us. Mulindwa slapped the deceased. I turned and asked what the problem was. Mulindwa got a brick and hit my head. We started fighting. Baguma got a big stick and hit Godfrey (deceased) on the head. The deceased fell down"

As already noted above, the stick was never recovered. The deceased died two days later apparently from the injuries inflicted upon him by the appellant.

The learned trial judge with due respect did not take seriously into account the fact that the murder weapon "a big stick" was never exhibited. This in our view weakened the prosecution case as to the intention of the appellant.

"A big stick' is a very subjective description of a weapon that was not produced in court and which was not described by any other witness. The doctor's report is wanting to this regard to say the least. No attempt was made by PW2 the medical doctor to describe the murder weapon in his medical report.

The above coupled with the fact that the deceased and PW4 were engaged in a fight against the deceased's brother which fact was not conversed by the trial Judge and that there was no apparent motive for the appellant to kill the deceased creates doubt in our minds as to the actual intention of the appellant.

Taking all the above into account we are unable to say that the prosecution in this case proved beyond reasonable doubt that the death of the deceased was a natural consequence of the assault. We are also unable to say that the appellant foresaw that death was the natural consequence of the assault, more especially by the fact that he was said to have hit the deceased only once.

Accordingly we find that the appellant was properly identified as the person who killed the deceased unlawfully but without malice aforethought.

In the result the appeal succeeds in part. We find that the learned trial judge erred in holding that the appellant killed the deceased with malice aforethought.

We however find the appellant guilty of unlawfully killing Godfrey Mutungirehi.

Accordingly we quash the conviction for murder and we substitute it with the conviction for the offence of manslaughter. We set aside the sentence of life imprisonment imposed on the appellant.

Taking into account the fact that the deceased has been in prison since his arrest in 2003 we sentence him to ten (10) years imprisonment to run from the date he was sentenced by the High Court.

Dated at Kampala this.....20th ..... day of December ..... **2013**.

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HON JUSTICE Remmy Kasule

JUSTICE OF APPEAL

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HON JUSTICE RUBBY OPIO AWERI

JUSTICE OF APPEAL

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HON. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL