

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT ARUA
CRIMINAL APPEAL NO. 0007 Of 2014**

{Arising from Criminal Session Case No. 0029 of 2010 before Hon. Justice Lameck .N. Mukasa at Arua on 16.1.2012}

No. 14459 SPC ONETI DANTE:::::::::::::::::: APPELLANT

=VS=

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

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

JUDGMENT OF THE COURT

This is an appeal against both conviction and sentence arising from the decision of Hon. Justice Lameck N Mukasa, delivered on 16/01/2012, whereby he convicted the appellant of the offence of murder contrary to sections 188 and 189 of the Penal Code act and sentenced him to life imprisonment.

The facts as accepted by the trial Judge were that, on the night of 27th of august 2007, the appellant who is a Police Officer, went out with other colleagues to effect an arrest of a suspect. Along the way they arrested several people some of whom were moving at night while others were drinking. The deceased Droma Lukano was among them. The appellant

started assaulting the deceased with a stick as he and his colleagues escorted the arrested persons. Along the way the deceased revealed he could not walk further as he was drunk. The appellant remained behind with the deceased as the others proceeded to Oleba Police Post. The following morning the body of the deceased was discovered lying on the road at Azipi village. A post-mortem examination revealed there were injuries on the neck, face, chest and broken thyroid bone. The cause of death was suffocation due to airway obstruction.

The appellant denied assaulting the deceased and stated the latter collapsed on his own due to being drunk and had also been assaulted during a fight he had with people he was drinking with.

The trial Judge disbelieved the appellant's defence, convicted and sentenced him as mentioned earlier.

This appeal is premised on two grounds, to wit:

1. The learned trial Judge erred in law and fact when he held that the offence of murder had been proved beyond reasonable doubt against the appellant.
2. The learned trial Judge erred in law and fact by imposing a severe sentence of life imprisonment.

At the hearing of the appeal, Mr. Odoma Henry appeared for the appellant on state brief and Mr. Oola Sam, Senior Principal State Attorney, was for the respondent.

Counsel for the appellant, on ground one, submitted that the ingredients of malice aforethought and participation were not proved beyond reasonable.

He pointed out that since it was night time none of the eyewitnesses could tell the size of the stick that was used in assaulting the deceased.

In the instant case, he argued, court was incapable of forming an opinion whether the

weapon used was capable of causing death and the user thereof could not be said to have acted with malice aforethought.

Counsel also contended that, the cause of death was more consistent with the fighting the deceased had in a bar where he was drinking with others, as opposed to assault after his arrest by the appellant and his colleagues.

Counsel prayed that court finds the appellant was wrongly convicted and quash the conviction.

On ground 2, counsel submitted that in the alternative, the sentence of life imprisonment was harsh and manifestly excessive.

He argued that the learned trial Judge did not consider other mitigating factors, such as the appellant was 60 years of age and the remand period of 4 years and 4 months was not taken into account, as required by Article 23 (8) of the Constitution. Counsel prayed to court to reduce the sentence.

Counsel from the respondent opposed the appeal. He argued that although there was no direct evidence to the actual killing of the deceased, there was ample evidence to show the appellant assaulted the deceased, had remained behind with him and when he was subsequently asked about the whereabouts of the deceased, his response was that he had abandoned him after beating him. Counsel submitted that the available circumstantial evidence pointed to the appellant being responsible for the death of the deceased.

On sentence, counsel submitted that it was appropriate considering that the appellant is a police officer whose duty was to protect the life and property. The appellant reneged on that duty when he brutally assaulted the deceased. I prayed to court to uphold the sentence of life imprisonment.

We have carefully considered the submissions of both counsel and perused the record of the trial court.

As a first appellate court, it is our duty to review and reevaluate the evidence before the

trial court, draw inferences from the evidence and reach our own conclusions bearing in mind that this court did not have the opportunity to hear and observe the witnesses testify as the learned trial Judge did - See Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions; BEGUMISA and OTHERS -V- TIBEBAGA, SCCA No. 1 7/2002 and MBAZIRA SIRAJI and ANOTHER -V- UGANDA, Cr - Appeal No. 7 of2004 (SC).

In the matter before, there was ample evidence to show the deceased together with others including Candia Patrick (PW3) and Anguyo Robert (PW4) were placed under arrest by the appellant and his colleagues. One of them was SPC Billy Martin Chandiga (PW6).

The learned trial Judge discussed at length regarding the assault of the deceased by the appellant. None of the appellant's colleagues participated in the assault. He also considered the evidence of PW3, PW4 and PW6 which was to the effect that the deceased remained in the hands of the appellant while the others proceeded to the Police Post.

Pw3 testified the appellant followed and found the others at Oleba Police Post. As to the whereabouts of the deceased, PW3 stated:

“One of the two Police Officers asked him where Droma was. Adraa answered that he had left Droma on the way having beaten him and he did not know whether he will be alive or not”

The appellant's defence was that the deceased collapsed on his own and this was in the presence of the others. However, all the witnesses (PW3, PW4 and PW6) stated the appellant remained with the deceased. The appellant's version was not raised in cross-examination to any of the prosecution witnesses thus undermining its credibility.

Upon our re-evaluation of the evidence, we are satisfied the learned trial Judge evaluated the evidence and arrived at a correct decision that the appellant was responsible for the death of the deceased. Ground 1 therefore fails.

The complaint in ground 2 is that the sentence was harsh and excessive.

It is trite that this court can only interfere with the sentence of a lower court where, the sentence imposed is excessive or so low or where the court ignores to consider an important matter or circumstance which ought to have been considered while passing the sentence - See KWALABYE -VS- UGANDA, Cr Appeal No. 143 of 2001 (SC).

However, we do note that the trial Judge did not take into account the remand period of 4 years and 3 months that the appellant had spent on remand. This was a fundamental error in view of the mandatory provisions of Article 23 (8) of the Constitution. A sentence imposed without taking into account the remand period is illegal and we hereby set it aside.

We have re-evaluated the mitigating and aggravating factors. We are in agreement with the observation by the trial Judge that there was need to send a warning to other Police Officers against brutalizing suspects.

We also note the appellant was aged about 60 years at the time of conviction. He is married with two wives and children.

Considering all the circumstances of this case, we hereby sentence the appellant to 20 years imprisonment. The sentence is to be served from the date of conviction that is from 16/1/2012.

We order accordingly.

Dated at Arua this 7th day of June 2016.

Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon. Justice Simon Byabakaba Mugenyi

JUSTICE OF APPEAL

