THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO.396 OF 2015.

[An Appeal from the Judgment of the High Court, Kabale sitting at Rukungiri (Hon. Justice Michael Elubu) delivered on 8th January 2015]

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

BETWEEN

RUKUNDO DARIUS:::APPELLANT

VERSUS

UGANDA:: RESPONDENT

JUDGMENT OF THE COURT

This appeal arises from the judgment of the High Court Kabale, sitting at Rukungiri whereby the appellant was tried and convicted of the offence of Murder contrary to Section 188 and 189 of the Penal Code Act and was sentenced to 32 years imprisonment.

Dissatisfied with the trial court judgment, the appellant lodged an appeal to this court against both conviction and sentence.

The appellant was not able to be brought to the Court of Appeal that heard the appeal due to the Government Health Regulations in force at the material time to prevent the spread of covid 19 virus. He remained at Mbarara Government Prison on the day of the hearing of the appeal. The appellant thus attended through video conferencing and communication technology of the Court that enabled the appellant to be in touch with his counsel and the Court and participated fully in the Court proceedings.

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

The appellant in his memorandum of appeal raised two grounds of Appeal, namely:-

1. That the learned trial Judge erred to have convicted the appellant of the offence of murder without sufficient evidence.
2. That the learned trial Judge erred to have sentenced the appellant to 32 years imprisonment which was a harsh sentence in the circumstances.

Background:

The particulars of the offence, as accepted by the learned trial Judge are that, on 5th, February 2012 in Omurutezo Village, Murama parish, Nyakishenyi Sub-county, Rukungiri District, a number of people were drinking beers in the bar belonging to Tumukunde Felix (PW2). One Turyasiima Gideon was amongst those who were drinking. At some point this Turyasiima Gideon got up to go out of

the bar. On his way out he knocked a table where several people had their drinks which spilled over the table, some onto the floor.

A bitter quarrel ensued between Turyasiima Gideon and others including the deceased Agensi Alex over the spilled drinks. This resulted in a fight between the appellant and Turyasiima Gideon on one side and the others whose drinks had been wasted.

In the course of the fight, the deceased was beaten. One group attempted to take him out of the bar while another group resisted his being taken out. They wanted him to remain in the bar.

In the ensuing scuffle, the deceased was again hit, this time with a bottled of soda on the head. The deceased collapsed losing consciousness. He was taken to a health center nearby from where he was transferred to Kisiizi hospital where he was medically examined. He was found to have a fractured skull with the brain bruised. He was referred to Mulago Hospital. Unfortunately he died on the way to Mulago hospital on 12th February 2012.

The appellant and Turyasiima Gideon DW2 were arrested and charged in Court for the murder of the deceased. Turyasingura Gideon pleaded guilty to the lesser offence of manslaughter and was sentenced on his own plea of guilt to 10 years imprisonment.

The appellant having taken a plea of not guilty for murder, was tried, convicted and sentenced to 32 years of imprisonment for the murder of the deceased.

Being dissatisfied with both his conviction and sentence, the appellant lodged this appeal.

Appellant Counsel's submissions:

On ground One, learned counsel for the appellant, submitted that the prosecution had to prove beyond reasonable doubt the four elements of murder, namely; death of the deceased, the unlawful cause of the death, Malice aforethought and the participation of the accused in causing the death.

Counsel contended that the prosecution did not prove beyond reasonable doubt the element of malice aforethought and the participation of the appellant in causing the death of the deceased.

Learned counsel submitted that in the bar, almost everyone was drunk by the time the quarrel and the fight started and it was intoxication that instigated the fights which resulted into the death of the deceased. Therefore the killing of the deceased was without malice aforethought. Counsel referred court to the case of **Kiiza v Uganda; Court of Appeal Criminal Appeal.No.92 of 2013,** and submitted that the circumstances were similar to those in the instant case and the offence of murder was reduced to manslaughter by the High Court and the accused later appellant in that case was sentenced to 15 years imprisonment.

On the participation of the appellant in the death of the deceased, appellant's counsel submitted that Turyasiima Gideon DW2, in his own evidence at trial, admitted that he was the one who had hit the deceased on the head with the bottle which caused the deceased's death. The evidence of Turyasiima Gideon made it very clear as to who was responsible for hitting the deceased with the bottle. Counsel therefore invited this court to find that the appellant never

participated in the death of the deceased Agensi Alex and that this court ought to quash the conviction of the appellant, set aside the sentence of 32 years imprisonment and set free the appellant.

Counsel further submitted that, in the alternative, if this court finds the appellant guilty of killing the deceased, then this Court ought to reduce the charge of murder to manslaughter, convict the appellant of the reduced charge of manslaughter and sentence the appellant to a reduced sentence taking into account the circumstances under which the death of the deceased occurred.

On the second ground of the appeal, that the learned trial Judge erred to have sentenced the appellant to 32 years imprisonment which was a harsh sentence in the circumstances. Learned Counsel for the appellant submitted that the deceased received the fatal injuries when everyone in the bar was almost intoxicated. Counsel referred to the case of **Kiiza v Uganda; Court of Appeal Criminal Appeal. No 92 of 2013,** where the appellant was drinking with the deceased, who was then attacked on his way home. The deceased was kicked several times in the lower abdomen and died after 3 weeks of the injuries that were inflicted upon him. The trial Court sentenced him to 15 years imprisonment. This court reduced the sentence of 15 years imprisonment to 10 years imprisonment. Learned counsel thus invited this court to consider the similarities of the two cases and having done so, reduce the sentence that the trial Court imposed upon the appellant in this appeal.

Counsel prayed that this ground of appeal be also allowed.

Submissions for the Respondent:

As to ground 1, counsel for the respondent supported the learned trial Judge's finding that the appellant participated in the offence with malice aforethought. Counsel maintained that according to the testimony of an eye witness Tumukunde Felix PW5, who knew the appellant, as well as the appellant's brother and the deceased, testified at the trial that he saw the appellant hitting the deceased on the head with the bottle. This evidence was collaborated by the evidence of Bekunda Aloysius, PW4, who also testified that he saw the appellant hitting the deceased with a bottle on the head. Therefore the appellant was properly identified as a participant in the commission of the offence by these two witnesses whose evidence was credible.

Respondent's counsel further submitted that the participation of the appellant was with malice aforethought because of the nature of the weapon used to hit the deceased and the part of the deceased's body, which is a vulnerable part of the body that was hit. Counsel thus prayed this honorable court to uphold the conviction of the appellant with murder by the learned trial Judge.

On the second ground of appeal, Counsel for the Respondent submitted that the sentence imposed upon the appellant of 32 years imprisonment by the trial Court was appropriate. The trial Judge considered both the aggravating, the mitigating factors and the 2 years the appellant spent on remand while determining the sentence of imprisonment to be served by the appellant. The 2 year period

spent on remand was deducted from the imprisonment term of 35 years, so that the appellant remained to serve 33years imprisonment.

Counsel for the respondent distinguished **Kiiza v Uganda Court of Appeal Criminal Appeal No.2013;** from the instant case. In the Kiiza case (Supra), case the appellant was drinking with the deceased and the deceased was attacked on his way home and died after 3 weeks. However in the instant case, the deceased was hit on the head and he died almost instantly. He was also not drinking beer with the appellant.

Counsel therefore prayed to this honorable court not to interfere with the sentence of 35 years imprisonment imposed on the appellant by the trial court. Counsel prayed for the appeal to be dismissed.

Decision of the Court:

We have carefully listened to the submissions of counsel for both appellant and respondent. We have also perused the trial Court proceedings and the judgment of the learned trial Judge.

The duty of the Court of Appeal, as a first appellate Court, is provided for under **Rule 30 (1)** of the **Court of Appeal Rules SI 13-10**. This Court is duty bound to re-appraise the evidence and draw its own independent conclusions of fact from that evidence. The Supreme Court in the case of **Kifamunte Henry Vs Uganda; Supreme Court Criminal Appeal No. 10 of 1997**, held that it is the duty of the first appellate Court to rehear the case on appeal by reconsidering all the materials which were before the trial Court.

This Court shall carry out the above stated duty while resolving the grounds of this appeal.

GROUND 1:

This ground faults the learned trial Judge for having erred in convicting the appellant of the offence of murder when there was insufficient evidence to prove beyond reasonable doubt the said offence.

From the trial Court proceedings, the evidence of the two eye witnesses Tumukunde Felix (PW2) and Bekunda Aloysius (PW4) is that both these witnesses saw the appellant hitting the deceased with the bottle of soda on the head. The evidence of these two eye witnesses was not rebutted by the defence.

We have also considered the fact that the lighting in the bar on the night in question favored proper identification. The appellant was clearly identified by the two witnesses, who knew him very well even before the incident.

On the issue of malice aforethought we have considered the nature of the weapon used and the fact that it was the head of the deceased which was hit by the bottle. This was a vulnerable part of the body of the deceased.

The learned trial Judge considered the prosecution and the defence evidence as a whole and came to the conclusion that the evidence of PW2 and PW4 was credible and had not been discredited by any other evidence adduced before the Court. The learned trial Judge thus concluded on reviewing the whole evidence adduced that it was the

appellant who hit the deceased with a bottle of soda, that there was sufficient light to identify the appellant, and that given the fact that the bottle of soda was aimed at and hit the head of the deceased, there was a malice a forethought proved beyond reasonable doubt on the part of the appellant.

We on our part find that the trial Judge properly evaluated the evidence on record and we have no reason to interfere with his conclusion that the offence of murder was proved beyond reasonable doubt against the appellant.

In the circumstances, ground 1 of the appeal fails.

GROUND 2:

On ground 2, which is to the effect that the learned trial Judge erred to have sentenced the appellant to 32 years imprisonment and that this was a harsh sentence in the circumstances, we have considered the **Constitution Sentencing Guidelines for the Courts of Judicature (Practice) Directions, 2013,** which provide that the offence of murder attracts a maximum sentence of death. The starting point is 35 years imprisonment and the sentencing range for murder is between 30 years imprisonment to death. We are of course conscious of the legal position that these are Guidelines to Courts of Law with no binding effect on the Courts.

We have also considered the principle of uniformity and consistency in sentencing as espoused in the case of **Mbunya Godfrey v Uganda; Supreme Court Criminal Appeal No. 4 OF 2011,** where the Supreme Court held that although it is now a settled position of law

that no two crimes are identical, Courts of law should try as much as possible to have uniformity and consistency in sentencing.

We shall thus examine a number of Court decisions for guidance in applying this principle of consistency and uniformity.

In the case of **Godi Akbar Vs Uganda; Supreme Court Criminal Appeal No. 03 of 2013,** the appellant, a prominent politician and member of parliament, murdered his wife and was sentenced to 25 years imprisonment. This sentence was upheld by both this court and the Supreme Court.

In the case of **Oyita Sam Vs Uganda; Court of Appeal Criminal Appeal No. 307 of 2010,** the appellant pleaded guilty to having murdered his own brother over land wrangles and was convicted on his own plea of guilt and sentenced to death by the trial Judge. This honorable court, on appeal substituted the death penalty with a sentence of 25 years imprisonment.

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 where the appellant had killed his mother.

In **Bwefugye Patrick and Namumpa Patrick v Uganda; Court of Appeal Criminal Appeal No. 268 OF 2010,** this Court set aside a sentence of life imprisonment for murder and imposed one of 30 years imprisonment.

In **Kyaterekera George William v Uganda; Court of Appeal Criminal Appeal No. 113 of 2010,** a sentence of 30 years in

imprisonment, imposed by the trial court, was confirmed. The appellant had fatally stabbed his victim in the chest.

This Court would only interfere with a sentence passed by the trial Court if it is either illegal or manifestly excessive or is so low as to amount to a miscarriage of justice. See; **Section 139 (1) of the Trial On Indictments Act** and the case of **Boona Peter Vs Uganda; Court of Appeal Criminal Appeal No. 16 of 1997.**

We note that the learned trial Judge properly considered the relevant law and the circumstances of the case before passing the sentence of 32 years imprisonment including the fact that the appellant had spent 3 years on remand. We observe that the sentence is neither illegal nor excessive. There is, therefore, no good reason for the Court to interfere with the sentence so passed.

Ground 2 of the appeal also fails.

The two grounds of the appeal having failed, we find no merit in the whole appeal. It is accordingly dismissed.

It is so ordered.

Dated at Mbarara this.....13th..... 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.