# THE REPUBLIC OF UGANDA

## IN THE COURT OF APPEAL OF UGANDA, AT JINJA

## CRIMINAL APPEAL NO. 200 OF 2015

*(ARISING FROM HIGH COURT CR. SESSION CASE NO. 216 OF 2012)*

**OKELLO JOSEPH:::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**CORAM: HON. JUSTICE HEBORION BARISHAKI, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**HON. LADY JUSTICE NIGHT PERCY TUHAISE, JA**

## JUDGMENT OF COURT

This is an appeal against the judgment of Hon. Justice Wolayo in Criminal Session Case No. 100 of 2012 in which the appellant was convicted of Murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 32 years imprisonment.

### Background

The deceased, Ayeo Hellen, was a wife to Aresa Charles a watchman in Jinja and she stayed at her husband's home in Kaberamaido District. One Akuro Florence, is a sister to Aresa Charles and therefore a sister in-law to the deceased and lived near the home of the deceased. Akuro Florence had a land dispute with her brother Aresa Charles and often attacked the deceased since her husband

was always away. The appellant, was a resident of the nearby Oyama village in the Kaberamaido District. On several instances, Akuro Florence had attacked the deceased and kept on threatening her with death. The deceased always reported the instances to the leaders and the chairman LC.1 of the arrest.

That a few days before on the 15/5/2012, the deceased was threatened with death by the said sister in law who later told the deceased that she would be dead within three days. The deceased informed the clan leader, the LC.1 Chairman and her husband about the matter. On the 19/5/12, at about 12.30am, the deceased was attacked in the night. Her door was hit so hard till it gave way and the assailants gained entry. Ejula Moses and Ambrose Egou the deceased's children who had slept in different houses with in the courtyard ran outside immediately after hearing the loud bang on. As they stood, they saw the appellant running out of their mother's house towards the direction of Akuro's home. The appellant was identified with the help of the clear sky as someone they had always known and seen for a long time as being short and disabled. Egou Ambrose and Ejula Moses entered unto their mother's house to find out what had happened. They were shocked to see her lying dead on the ground with a deep cut wound on her neck. The appellant was charged together with Akuro Florence but Akuro did not appeal.

The appellant was dissatisfied with the decision of the trial court and filed this appeal on the following grounds;

1. The learned trial Judge erred in law and fact in failing to correctly evaluate the evidence on record thus reaching a wrong conclusion.
2. The learned trial Judge erred in law and fact when she erroneously convicted the appellant for the offence of murder when he was not properly identified.

3. The learned trial Judge erred in law and fact in disregarding the appellant's defence of alibi when it was not disproved by the prosecution.
4. The learned trial Judge erred in law and fact when hse sentences the appellant to 32 years imprisonment which sentence is excessive and harsh in the circumstances of the case.

**Representation**

Mr. Esarait Robert appeared for the appellant while Ms. Asiku Nelly (Senior State Attorney) appeared for the respondent.

**Submissions of the appellant**

Mr. Esarait argued grounds 1 and 2 together and then ground 3 and 4. On grounds 1 and 2, counsel submitted that there was no proper evaluation of evidence in this case. That PW1 testified that on that night, he heard a bang at the mother's door and when he came out, he saw the appellant together with another with pangas that were blood stained at a distance of about 7 meters. PW1 testified that he had a torch and also, the sky was clear. He made an alarm and was joined by his brother. His brother testified as PW2 and stated that when he came out of the house, he rushed to his mothers' house and found her dead. That the evidence of the two witnesses was contradictory as to whether they saw the appellant and identified him.

Counsel submitted that the conditions of the night were not favorable for identification by PW1 who claims to have seen the assailants with the appellant inclusive. PW2 admitted that he did not see the faces of the assailants who were 15 meters away from him. Counsel relied on the case of **Abudala Nabulere and 2 others Vs Uganda Criminal Appeal No. 9 of 1978** on a conviction based solely on visual identification.

PW1 testified that when he saw the appellant, he had a hoe and he fled. That his homestead was burnt down by relatives of the deceased. PW3 testified that he returned to the village to control the crowd that was burning property including the house of the appellant. Counsel submitted that the evidence of PW1 and PW3 corroborated that of the appellant who testified that on that fateful day, he was in the garden when he was informed by his father of the death of the deceased and that the police needed him for questioning. While moving to the police, he saw a mob burning property and having feared for his life, he did not go back home. That the conduct of the appellant was that of an innocent person.

Regarding ground 3, counsel submitted that the appellant raised an alibi that was never disproved by the prosecution. He testified that on the night in question, he was at his home and in the morning, he went ploughing with oxen. That the prosecution failed to place the appellant at the scene of the crime.

Finally, counsel submitted that the sentence of 32 years meted on the appellant was harsh and excessive and was out of range with sentences imposed in circumstances of this nature.

**Respondent's submissions**

In reply, counsel for the respondent submitted that the trial Judge properly evaluated the evidence on record and he considered both the prosecution and defence case before reaching the decision that he took of convicting the appellant. In addition to the evidence of PW1 and PW2, the trial judge also considered the corroborative evidence of the conduct of the appellant. This evidence was in the testimony of PW3, the arresting officer, who went together with PW1 and PW2 to the home of the appellant and when the appellants saw them, he ran away.

In regard to sentence, counsel submitted that the sentence of 32 years is appropriate for the unlawful actions of the appellant. The

offense of murder carries a maximum sentence of death but in this case, the appellant was only given 32 years.

**Consideration of the appeal**

This is a first appeal and the duty of this Court as a first appellate court is to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses testify. (See **Pandya v R [1957] EA p.336 and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997 and COA Criminal Appeal No. 39 of 1996.** In the latter case, the Supreme Court held that;

*"We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

We have kept these principles in mind in resolving this appeal. We shall resolve the grounds of appeal in the order in which the parties argued them.

The ingredients of the offence of murder are:-

1. Death of human being.
2. That the death was unlawful.
3. That the death was as a result of malice aforethought.
4. That the accused is the person who caused the death of the deceased.

As far as the first ingredient of the offence is concerned, it is not in dispute that Ayeo Hellen died. The post mortem report tendered in at the trial under Section 66 of the Trial on Indictment Act confirmed the death of the deceased and cause of death. In addition, all the prosecution witnesses on record alluded to the fact of death of the deceased. The first ingredient of the offence was proved by the prosecution beyond reasonable doubt.

Regarding the second ingredient, the post-mortem report tendered in court revealed that there were deep cut wounds on the posterior aspect of the neck, right shoulder joint and left upper forelimbs. The body was lying in a pool of blood. In the circumstances, we find that the death was unlawful and the second ingredient duly proved.

The third ingredient is malice aforethought. Malice aforethought is defined under **Section 191 of the Penal Code Act** to mean:

*"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."*

Malice aforethought, being a mental element of the offence of murder maybe proved by direct evidence or can be inferred from the surrounding circumstances of the offence, such as: the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used, the conduct of the assailant before, during and after the attack.

In the present case, the prosecution adduced evidence of a number of witnesses. PW1 testified that the appellant is a relative of his father and on that night, he was in his house when he heard a bang at the door of his mother's house. On reaching outside, he saw the appellant with his co-accused emerge from his mother's house with blood stained pangas at a distance of about 7 meters. His testimony was that he had a torch and the sky was clear. He flashed the torch at the appellant and made an alarm which brought out his brother from his house which was about 12 meters from the mother's house. When calling his brother out, he said that "Musa Musa, come out Akuro and Okello have killed our mother." They chased the appellant for a short distance and proceeded to police.

PW1 testified that he went to the appellant's home the next day at 6:00am and found the appellant at home but when he saw them, he ran away. The police tried to chase him but failed to get him.

PW2 testified that on that night, he was asleep when he heard his brother make an alarm that he had seen the appellant and Akuro emerge from their mother's house while armed. PW1 advised that they chase after the assailants but PW2 declined because they did not know the number of assailants. When he came out of his house that night, he identified the assailants as they were entering the bush because the sky was clear. They entered the garden that separated the home of the deceased and that of A2. The matter was reported to the police and at about 5:00am, they went to the appellant's home. When he saw them, he ran away.

PW3, a police officer, testified that on that night, he was on duty when the matter was reported by PW2 and other old men. He signed for a rifle and proceeded with the DPC to the scene and found the deceased had been cut on the neck. He returned and mobilised other policemen and they went to the home of the appellant who had been implicated in the murder. They found the appellant washing his face and immediately he saw them, he ran away. They searched for him

for almost a week until they got a call from someone in Bata village who informed them that the appellant was in that village which led to his arrest.

In his defence, the appellant testified that on that night, he was at home with his children. In the morning, he went to the garden using oxen when he was told by his father at around 7:00 am that his brother's wife had been killed and the police needed him for questioning. Before he reached home, he saw a mob burning their property and he feared for his life and went to the home of his father-in-law where the police late found him.

The appellant was identified by both PW1 and PW2 who identified him with skylight and PW1 had a torch. This court has to consider the conditions available for proper identification. The principles for consideration were stated in the case of **Abdulla Nabulere & Anor vs Uganda Cr. Add. No.9 of 1978**, in which it was stated that;

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witness can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All those factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger*
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> *When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory*

*conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution."*

What is clear from the evidence on the record is that the appellant was well identified by both PW1 and PW2 with the sky light and his limp. In addition, both eye witnesses knew the appellant before the incident. The appellant had issued a threat to the deceased that he would kill her for hire once he received his balance of 50,000/=. The deceased mentioned this threat to PW2 and 2 days later, the incident happened. The conduct of the appellant after the incident was not that of an innocent person. PW3 testified that when he reached the appellant's home, the appellant ran away after he saw the officers.

We are of the considered opinion that the learned trial Judge's finding in this regard is fully supported by evidence. The evidence of PW1 and PW2 was corroborated by that of PW3 who testified that the appellant ran away when he saw the police. There was skylight that favored proper identification of the assailants and PW1 testified that he had a torch which he flashed on the assailants and recognised them. Grounds 1 and 2 of the appeal are therefore dismissed.

The appellant raised an alibi that he was at home with his children on the night the incident happened. Early in the morning, he went to the garden ploughing with oxen. In the case of **Bogere Moses and Another Vs Uganda (SCCA 1 of 1997)**, the Supreme Court of Uganda held that;

*"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved the court must base itself upon the evaluation of the evidence as a whole. Where the*

*prosecution adduces evidence that the accused was at the scene of crime, and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept one version and the hold that because of that acceptance per se the other version is unsustainable."*

We reiterate our earlier findings that the prosecution witnesses properly identified the appellant and placed him at the scene of the crime. PW3 testified that they found the appellant at his home and when he saw them from a distance, he ran away. It is not clear whether his garden was within the homestead. From the testimonies of PW2 and PW3, the appellant was found at his home and he ran away. We find that the evidence of PW1, PW2 and PW3 destroyed the appellant's alibi. In the result we find no reason whatsoever to depart from the decision of the trial court. The appeal against conviction is accordingly dismissed.

**Review of sentence**

With regard to sentence, the appellant argues that the sentence passed by the trial court was harsh and excessive in the circumstances of the case. It is well settled law that an appellate court should not interfere with the discretion of a trial court in the determination of a sentence imposed by that trial court unless that trial court acted on a wrong principle or overlooked a material factor or the sentence is illegal or manifestly excessive. (See **Kyalimpa Edward v. Uganda SCCA No. 10 of 1995 and Kyewalabye Bernard v. Uganda Criminal Appeal No. 143 of 2001(S.C).**

The sentencing order of the trial court stated that;

> *"The gruesome manner in which the deceased lost her life is an aggravating factor. She was hacked to death with a sharp object almost decapitating her head. This court has a duty to protect the*

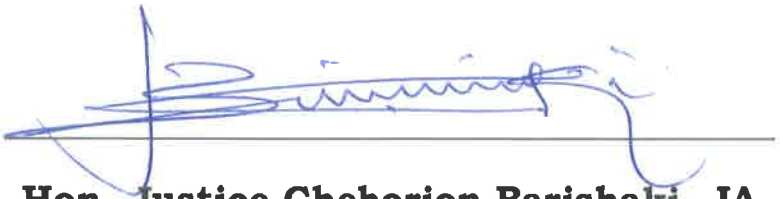
*right to life. The lawless attitude to life demonstrated by the utterances of convict Okello is a further aggravating factor. That he has a family with children is a mitigating factor. Appropriate sentence is 35 years. As he has been on remand since May 2012, he is sentenced to 32 years imprisonment...."*

The sentencing Judge noted the mitigating factor but did not put it into consideration while passing sentence. Sentencing, as a punishment for an offence is meant to be a retribution, deterrent and also to rehabilitate the offender. Both aggravating and mitigating factors have to be considered by the sentencing Judge. Since the sentencing Judge did not consider the mitigating factors, we have no option but to set aside the sentence passed by the trial court and sentence afresh. In **Attorney General Vs Susan Kigula and 417 others Constitutional Appeal No. 3 of 2005** (unreported), court observed that;

*"Not all murders are committed in the same circumstances, and all murders are not necessarily of the same character. One may be a first offender, and the murder may have been committed in circumstances that the accused person deeply regrets and is very remorseful. We see no reason why these factors should not be put before the court before it passes the ultimate sentence."*

The appellant has no previous criminal record and was very repentant. He had spent three years on remand and has four children. He had also been chased away from his land. On the aggravating side, the murder was brutally done and the deceased was slaughtered. Taking all the mitigating and aggravating circumstances into account and the period spent on remand, we sentence the appellant to 25 years of imprisonment from the date of conviction.

Dated this 17th Day of July 2019



**Hon. Justice Cheborion Barishaki, JA**

**Hon. Justice Stephen Musota, JA**

**Hon. Lady Justice Night Percy Tuhaise, JA**