,THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.0051 OF 2007

(Appeal from judgment of High Court at Masaka before Hon. Mr. Justice V.F. Musoke Kibuuka delivered on 5th December 2006 in Criminal Session Case No.09 of 2004)

BUKENYA STEPHEN.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

CORAM: **HON. MR. JUSTICE REMMY KASULE, JA**
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE F.M.S. EGONDA NTENDE, JA

JUDGMENT COURT:

This is an appeal, according to the Memorandum of Appeal on the following grounds:

1. **The learned trial judge erred in law and fact by holding that the appellant killed the deceased with malice aforethought without evaluating the evidence as a whole.**

2. **The learned trial judge misdirected his mind as to the law by outright rejecting the appellant's defence of self defence or provocation without considering the circumstances in which the deceased was killed.**

The facts of the case, are the following:-

The appellant Bukenya Stephen was 36 years old at the time the offence was committed. He was a brother of the deceased and they were both residents of Latita Kago village in Kashari Parish in Bukulura Sub-county in Masaka District. On the night of 25th May 2003 at around 2 am the appellant and the deceased fought. After the fight, the appellant attacked the deceased from his house and killed him by stabbing with a knife and spearing him with a spear. He thereafter ran to his house where he slept. The following morning the body of the deceased was recovered one hundred meters from his (deceased) house. The appellant was arrested from his own

house, where a sharpened knife and a spear used in the killing of the deceased were recovered and taken to police as exhibits.

The deceased was buried after a postmortem had been carried out by a doctor. The appellant was charged with the offence of murder for which he was tried, convicted and sentenced to life imprisonment by the High Court at Masaka.

At the hearing of the appeal the appellant was represented by learned counsel, Mr. Mark Bwengye and the State was represented by Mr. Badru Mulindwa, a Senior Principal State Attorney.

Counsel for the appellant on appeal submitted that the learned trial judge erred in law and fact when he held that the appellant killed the deceased with malice aforethought.

According to counsel, the appellant fought the deceased but without malice aforethought. He never had the intention to kill him. Counsel argued that the appellant acted with anger as he was injured with severe bruises in the fight.

Counsel contended that it's not clear who started the fight and there had been no previous grudge between the two brothers. According to counsel the appellant acted in anger with brutal force in anger and there was no time for him to cool down.

Counsel submitted that as a result of the injuries he suffered, the appellant was provoked and he acted without malice aforethought.

Mr. Mulindwa, for the State, in his reply opposed the appeal. He supported the conviction and sentence. He submitted that the learned trial judge was correct on the evidence on record to conclude that the appellant killed the deceased with malice aforethought and he was right on the facts and the circumstances of the case to sentence him to life imprisonment.

We have carefully studied the court record and considered the submissions of both counsel and the issues they raised. We shall proceed to resolve the appeal. We are alive to the fact that this Court has a duty as a first appellate court, under Rule 30 (1)(a) of the Rules of this Court, to re-appraise the evidence and come up with our own conclusion. On this, we are fortified further by the decision of the Supreme Court in the case of **Father Nasensio Begumisa & 3**

Ors vs Eric Tibebaga SCCA 17/20 (22.6.04 at Mengo) from CACA 47/2000 [2004] KALR 236 in which the court held:-

> **"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."**

We shall accordingly be reviewing the evidence on record and the submissions of both counsel to enable us come to our own conclusion in our judgment.

It is true there was a fight between the appellant and the deceased who were brothers. After the fight each went to his house. The two lived in the same locality but their homes were separated by a road.

When the appellant attacked the home of the deceased, PW3 Muyomba Bernard was awake. He opened a window and was able to hear and see what was happening. There was bright moonlight.

The witness heard the appellant tell the deceased **"Nsamba, I have got you. You have beaten me. This is your last time to stay in your house."**

He saw the appellant stab the deceased whom he heard cry:-

"Bukenya, why do you kill me so that I leave my young children without any one to care for them."

The appellant moved to the house where PW3 was and asked him to open the door, he said:

"open so that I also kill you because you are going to report that I killed your father."

The post mortem evidence established that the deceased died of bleeding from the stab wounds. The fact that the appellant killed the deceased was not in contention. The issue on appeal, according to counsel for appellant, was whether there was malice aforethought.

Malice aforethought is defined by s.191 of the Penal Code Act which states as follows:-

"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."

What we have to consider in the instant case is whether there was evidence to prove beyond reasonable doubt that the appellant killed the deceased with the intention to kill him.

On proof of intention to kill, the Supreme Court provided guidance in the case of **Criminal Appeal No.24 of 2002, Nanyonjo Harriet & Another vs. Uganda,** when the Court held:-

"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, including the mode of killing, the weapon used, and the part of the body assailed and injured."

In the instant case the appellant attacked the deceased from his own home. He told him **"I have got you. You have beaten me. This is the last time to stay in your home!** He immediately thereafter told PW3 a son of the deceased to "**open so that I also kill you because you are going to report that I killed your father."**

He used a knife and a spear, both lethal weapons, to stab the deceased to death. Telling deceased that that was the last time for him to stay in his house was clearly an expression by the appellant of the intention to kill the deceased. This is coupled with the weapons he used.

We find that the learned trial judge properly evaluated the evidence on record. He also considered the defences for the appellant which he

appropriately found not available to the appellant. We agree with the analysis and the conclusions reached by the learned trial judge.

There was no ground of appeal on sentence. The maximum sentence for murder is death. The trial judge imposed a sentence of life imprisonment. We have found nothing to show that the sentence imposed by the trial judge, in the circumstances of this case, was manifestly excessive, harsh or wrong in law to call for our interference.

On the whole we find there is no merit in this appeal and we accordingly dismiss it.

We confirm the conviction for murder and the sentence imposed by the lower court.

Dated this day.....of .....2014.

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Hon. Justice Remmy Kasule

JUSTICE OF APPEAL.

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Hon. Justice Richard Buteera

JUSTICE OF APPEAL.

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Hon. Justice F.M.S. Egonda Ntende

JUSTICE OF APPEAL.

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