

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
HCT-00-CR-SC-0372-2020

UGANDA **PROSECUTOR**

VERSUS

TUKUNDANE NICHOLAS **ACCUSED**

BEFORE: THE MR. JUSTICE MICHAEL ELUBU

JUDGEMENT

The accused, **TUKUNDANE NICHOLAS**, is indicted with the offence of Murder contrary to sections 188 and 189 of **the Penal Code Act**. It is alleged in the particulars of offence that on the 7th day of October 2018 at Katwe - Katenda Zone on Makindye Division, in Kampala district the accused, with malice aforethought caused the death of **AKATKUNDA VICTOR**.

At his arraignment, Tukundane Nicholas denied the charges thus bringing all the elements of this offence into issue. The prosecution called 6 witnesses to prove its case, while the accused was the sole defence witness.

The brief case for the prosecution is that at 9:00 pm on the night of the 7th of October 2018, the deceased Akatukunda Victor, his two of his friends, PW2 Muzafaru Akankunda and PW3 James Isaac and others were sitting at a toilet veranda in Base zone which is in Katenda, Makindya Division in Kampala district.

That the accused was seen peeping into a shop next to where the deceased and others were. The deceased then confronted him saying that he should not do that because if anything was stolen from the shop, they would be suspected to have stolen the items. The accused got annoyed. He confronted the deceased, shoved and him before walking away.

Shortly thereafter the accused returned with his friend Dan and called the deceased. The deceased walked over to the accused about 5 meters from where the others were.

That the accused was seen stabbing the deceased. A jet of blood shot into the air from the base of the neck. The deceased was heard shouting out that that, 'Nick has stabbed me'.

The deceased bled profusely and was rushed to Nsambya hospital where he was pronounced dead. A death certificate was made which showed that the deceased had a cut on the side of the neck. He was confirmed dead at 9.20 pm. A post mortem was later done in Mulago hospital mortuary. Both documents were exhibited.

Photographs of the dead body were taken by Nyakato Annet a police officer. They show a dead body lying supine on a bed. There is a long stitched incision on the shoulder next to the base of the neck.

The accused fled the scene and was arrested by PW 2 and others, at about 5:00 am, hiding in the garden of the LC I chairman. They took him to Katwe police station where he was charged with murder.

The accused denied committing this offence. His defence testimony was that as he returned home in the evening of the 7th of October 2018, he met a group of boys by the railway line in Katwe. They accosted him and forcibly took away his wallet. One stabbed him with a knife which was lodged in his arm. The boys fled in different directions thereafter. That the accused went home with the knife still

in his arm. Shortly thereafter the same boys, including PW 2, followed him home. that he fought them. He removed the knife from his hand and struck out although he does not know which was hit.

It was his evidence that he did not know the deceased and it was only while he was in detention that a police officer told him that he was alleged to have killed a person.

As this is a criminal case it is trite law that the burden of proof rests with the prosecution and never shifts (**Okethi Okale vs R 1965 E.A 555**). The standard of proof is beyond reasonable doubt (see **Kamesere Moses vs Uganda S.C.C.A 8/1997** (unreported)).

Ms Carol Opia was Counsel for the Prosecution while Mr Muhwezi Anthony represented the accused person on state brief.

With regard to charges of Murder contrary to sections 188 and 189 of **the Penal Code Act** the essential elements are:

- i. There was a death
- ii. The death was caused unlawfully
- iii. With Malice aforethought
- iv. The accused participated.

i. There was a death

Death, like any fact is proved by evidence. In this case PW 1 Nakamala Ada stated that she was the mother of Akatukunda Victor. That she received a call telling her that her son was dead and his body was in Mulago hospital. She went to the hospital mortuary where she found her son's body. That he was taken to the Rukunugiri where he was buried.

Both PW 2 Akankunda Muzafaru and PW 3 James Isaac saw the body of the deceased. PW 5, Nyakatto Annet, the Police officer who investigated the case took photographs of the body which were tendered collectively as PE 4.

This evidence proves beyond any doubt that Akatukunda Victor is indeed dead.

ii. The death was caused unlawfully

The position of the law is that all homicides are presumed to be unlawful unless authorized by law or proved to have been accidental or excusable (see **Gusambizi s/o Wesonga [1948] 15 EACA 63**). This finding is an inference to be drawn from the facts of a particular case.

I shall consider this element jointly with the next.

iii. With Malice aforethought

In this case, the deceased was stabbed with a sharp object on the shoulder next to the base of the neck. The photographs show a long stitched wound in this area. PW 2 and PW 3 both state that they saw the deceased being stabbed with a knife. PW 2 said he saw the stabbing movement to the neck. That immediately thereafter the deceased put his hand to his neck, however when he removed it, a jet of blood shot into the air. PW 3 stated that he also saw the deceased being stabbed.

Malice aforethought is provided for in S. 191 of **the Penal Code Act** and is deemed to be proved by evidence showing a positive intention, by the accused, to cause death although such knowledge is accompanied by an indifference whether death is caused or not.

Malice aforethought is not easily proved by direct evidence, as intention resides in the mind. For that reason, the High Court and superior courts have held in a long line of decisions, that malice aforethought can be inferred from: the type of

weapon used; the nature of the injuries inflicted; the part of the body affected; and the conduct of the perpetrator before and after the attack. (See **Amis Katalikawe & 2 Ors V Ug SCCA 17/94** Unreported).

In this case the deceased was stabbed in the neck with a knife. The wound was deep. Such great force was used that the penetration run from the neck to the lungs.

Both PW 2 and PW 4 (the nurse called Olivious Nankunda) stated that the shirt of the deceased was soaked in blood indicating that he bled extensively. PW 1 said the wound that she saw on the neck of her son was frightening which I understood to mean it was gruesome.

It is the submission of the defence that they do not dispute the element of whether the death was caused with malice aforethought but state that the medical evidence was contradictory. That there was no evidence of stabbing.

However, a study of both the Post Mortem examination report and death certificate shows that the deceased was injured on his neck. The post mortem describes the injury as a penetrating wound while the death certificate stated it to be a cut wound. This is not a contradiction when the two reports are read together.

In the result, the evidence is that a knife was used with great force to stab the deceased on the shoulder next right to the base of his neck.

The second and third elements of the offence have been proved.

iv) Whether the accused person participated in the commission of the offence

The accused has denied being responsible for the death of Akatukunda. It was his evidence that he was attacked by a group of boys who included PW 2. That these boys robbed him, first at the railway line then they followed to his house and

attacked him again. That he lashed out at them with a knife and hit one, but denies stabbing any.

In their evidence, both PW 2 and PW 3 state that between 8:00 pm and 9:00 pm, they were sitting at a toilet verandah with the deceased. That the place was lit by a bright electric bulb. That both saw the accused come to a nearby house and peep inside. They suspected that he may have wanted to steal from the premises. The deceased confronted the accused and told him to leave because if he stole from those premises, the owner would think it was the deceased and his friends who had done it.

The accused is said to have left and returned with a friend called Dan. That the accused called the deceased aside. Just then, both PW 2 and PW 3 saw the accused stabbing the deceased in area on the shoulder near base neck.

This court notes that the incident happened in the night time. Certainty of identification in those conditions is therefore paramount.

It is the law that an identification, just like any other fact, may be proved by testimony. There is a need to test with the greatest care, any evidence of identification. It is also the law that where identification is made in difficult conditions, such as at night, caution must be exercised and court should warn itself to examine such evidence closely to avoid a case of mistaken identity (see **Roria V R 1967 E.A. 583**). Indeed, such mistaken witnesses may be very persuasive and sincerely believe the mistaken identification they have made to be correct. I therefore warn myself as I warned the assessors of this danger.

Indeed, the court should examine such evidence scrupulously. It is for this reason that courts have developed guidelines to test the quality of identification evidence by scrutinising the light conditions; the familiarity of the witness with the accused; the length of time spent observing the incident; and the distance from

which such observation is made (see **Abdalla Nabulere and Ors V Ug Cr App 1/1978**).

As stated before, both witnesses affirmed that the accused lived less than 100 meters from their residence adding that he worked in Nakasero market. PW 2 had known him for more than 6 years while PW 3 for about 4 years. They therefore claim to have been well acquainted with him. There was a bright electrical light illuminating the site where they were gathered. Lastly that both were all standing less than 5 meters away from the point where the incident is said to have happened.

It was submitted on behalf of the accused that PW 2 did not know the accused because at one stage he referred to him as Ivan. That in my view appears to have been a slip. The witness knew details about the accused that the accused himself admitted, including the fact that he lived with Dan and worked in Nakasero market. The accused also said he knew PW 2 who at one time was training to be a boxer. It is not therefore not true that PW 2 did not know who the accused was.

It was also argued by the defence that the death was a result of a scuffle involving the deceased, PW 2 and the accused. That in any event, the involvement of PW 2 makes him an accomplice and any evidence from him should be treated as such.

Firstly, in a criminal trial, a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial (**Nassolo V Ug [2003] EA 181**). Neither party in this trial has adduced any evidence that shows that PW 2 participated, either directly or indirectly, in the killing of Akatukunda. This court cannot therefore treat him as an accomplice.

It should also be noted that the version of events as given by the accused was never put to the any of the prosecution witnesses. The investigating officer who arrested the accused testified as PW 5. She said that she spoke to him shortly after

arrest but he told he that a group of boys had attacked him when he went to the home of one Christine who wanted to buy a memory card from him. They followed him home and he hit one with a bicycle chain. This account of what happened is inconsistent with the defence testimony or the line pursued in cross examination.

When this same witness interviewed PW 2 and PW 3 the version given to her is consistent with their testimony here in court.

PW 2 and PW 3 also stated that the deceased shouted out that, 'Nick has stabbed me with a knife'.

Under Section 30 (a) of **The Evidence Act** statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts when the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question.

That is the statutory position of the law on dying declarations. The case law was restated in **Mibulo Edward vs Uganda Criminal Appeal 17 of 1995** which cited **Tindigwihura Mbahe vs. Uganda Criminal Appeal No. 9 of 1987** with approval. It was held that,

"Briefly the law is that evidence of dying declaration must be received with caution because the test of cross examination may be wholly wanting; and particulars of violence may have occurred under circumstances of confusion and surprise, the deceased may have stated his inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Particular caution must be exercised

when an attack takes place in darkness when identifications of the assailant is usually more difficult than day light.

... It is not a rule of law that in order to support conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is generally speaking very unsafe to base conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subjected to cross examination unless there is satisfactory corroboration."

See also (**Okoth Okale and others vs Republic [1965] EA 55** and **Tomas Omukono vs Uganda [1978]**).

Applying the foregoing to the circumstances in this matter, the accused was well known to the deceased. He lived nearby and the deceased called him by name. The other witnesses saw the accused and the deceased interact briefly before the deceased exclaimed that the Nick had stabbed him. It has also been stated that the area was well lit and the two were in such close proximity of each other. One could reach out and stab the other. The possibility of a mistaken identity in those conditions is absent.

I would also dispel the argument made that PW 3 was couched. That he was not at the scene of crime and did not therefore witness what happened.

When he testified, PW 3 went into great detail describing the event. His evidence was consistent both in examination in chief and cross examination. The testimony does not differ in any material way from that of PW 2.

With regard to the corroboration of the dying declaration made by Akatukunda, the eye witnesses who had clearly identified the accused furnished that corroboration. In addition, the medical evidence which showed that the deceased

suffered a cut or incisive wound to the shoulder near the base of the neck showed that indeed the deceased was stabbed just as he had stated before he passed away.

It is trite that evaluation of evidence must always be done as a whole. I find that the version of events given by the accused is untrue. He was properly identified at the scene of crime as the person who stabbed the deceased.

In addition, the evidence shows that the stabbing was intentional and not the result of an action to defend himself from attack.

Thirdly the deceased cried out that it was the accused who had stabbed him

Lastly the accused person fled the scene and his home immediately after. He was arrested after several hours of search. This conduct is hardly the behaviour of an innocent man. It is more what a fugitive would do (**Uganda vs George Wilson Simbwa SCCA 37 of 1995**).

The conduct of the accused, by escaping from his home, furnished farther corroboration of the identification made at the scene of crime.

In view of the foregoing it is the finding of this court that the accused is the one who killed the deceased.

The assessors have advised this court to find the accused guilty as charged. In agreement with them, this court finds and holds that **Tukundane Nicholas** is *guilty* on the offence of Murder Contrary to Sections 188 and 189 of the PCA and are hereby *convicts* him.

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Dated at Kampala this Day of October 2023



Michael Elubu

Judge