

THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT

KAMPALA HCT-00-CR-SC-0164 -

2003 UGANDA:.....

PROSECUTOR VERSUS BBALE

GODFREY :..... ACCUSED

BEFORE: HON MR JUSTICE RUBBY AWERI OPIO

J U D G M E N T:-

The accused GODFREY BBALE was indicted on two counts of Murder and Robbery with aggravation contrary to section 288 and 289 and 188 and 189 of the Penal Code Act respectively. On the first count it was alleged that the accused and others still at large, on the 10th day of May 2002 at Lule Zone in Kampala District, murdered Mrs Ssempe Anociat. On the second count it was alleged that the accused and others still at large, on the 10th day of May 2002 at Lule Zone in Kampala District, robbed Ssempe Leonard of a mobile phone No.077-413083, keys for the shop and shs.300,000/= and at or immediately before or after the said robbery used a deadly weapon to wit a gun upon the said Ssempe Leonard.

The facts giving rise to the indictment were that on the 10th day of May 2002, accused Bbale Godfrey and other thugs still at large attacked the home of Ssempe Leonard at Lule Zone in Kampala District with guns and murdered his wife, the

late Mrs Anociata Ssempe. The thugs also robbed Ssempe of a mobile phone No.077-413083, keys for his shop and shs.300,000/=. On that fateful day, the complainant Leonard Ssempe left his shop in Kikuubo at around 7.00p.m. The deceased went ahead of him to attend meeting of the married couples which was to be held at their home. The complainant arrived home at about 7.30p.m. after passing through Mengo Township where he did his family shopping. While at the gate hooting, he noticed three men in dark jackets on a big motorcycle following him very fast. They caught up with him at the gate. He sped inside the gate and the three thugs started firing at him. He got out of the vehicle and ran behind the house where he got his gun and also started firing to ward of the thugs. The thugs fired many shots some of which caught the deceased from the veranda where she was conducting a meeting with her colleagues. She fell down in a pool of blood while her colleagues got scattered in fear. The thugs grabbed the phone, keys and money from the car and took off on the same motorcycle. The deceased was rushed to Rubaga Hospital where she died immediately on admission. The cause of her death was hypovolaemia following massive haemorrhage due to penetrating wound following gunshots. Prior to the incident, the accused had been seen by the complainant's neighbour who operated a barbershop and in fact gave him a haircut. After the murder, the accused kept passing along that road and the barber tipped off the complainant that led to the arrest of the accused. Another eyewitness was also

able to identify the colour and number plate of the motorcycle, which the assailants used as UYD 986. The accused was subsequently arrested and an identification parade was conducted where the accused was positively identified as Bbale Godfrey. Hence the indictment.

On arraignment the accused pleaded not guilty to all the counts. Wherefore the prosecution called eleven witnesses and four exhibits in an attempt to prove its case. The accused on his part made unsworn defence and did not call any witness.

On the first count, the prosecution was enjoined to prove the following ingredients of murder:-

- 1) That Mrs Ssempe Anociata was dead;
- 2) That the death of Mrs Ssempe Anociata was caused unlawfully,
- 3) That the cause of her death was with malice aforethought; and
- 4) That the accused participated in causing the death of the deceased: See

On the second count, the prosecution was to prove the following ingredients:

- 1) Theft of property belonging to Mr Ssempe;
- 2) Use of violence in the theft;
- 3) Use of a deadly weapon before, at or immediately after the said theft; and

4) Participation of the accused in the above ingredients.

See: **Wasajja Vs Uganda [1975] EA 181.**

On the first count of murder, there is overwhelming evidence to show that the deceased Mr Ssempe Anociata is dead and that her death was unlawfully caused. The evidence of Paul Semanda (PW2) shows that the deceased was his mother. He testified that after her death he participated in the burial. Leonard Ssempe, (PW4) who was the husband of the deceased also testified that after the incident, he took the victim to Rubaga Hospital where she died soon after admission. He stated that he participated in the burial of the deceased. Corporal Olepus (PW9) testified that he visited the scene and saw the body of the deceased. He stated that he was the one who invited police surgeon to do post mortem examinations on the deceased. Lastly the post mortem examination which was performed by Dr Kidaga who was attached to Police mortuary, which was admitted under section 64 of the Trial on Indictments Act did prove that the deceased was dead and the cause of death was hypovolaemia following massive heamorrhage due to penetrating wound following gunshots.

All the above witnesses stated that the deceased died after an assault using guns. The law presumes that in homicide cases, death is always unlawfully caused unless it is shown that that it was accidental or that it was caused in circumstances which make the killing excusable. The killing is excusable when it is committed in self-defence, defence of property or person. The above presumption is rebuttable. The duty is on the accused to rebut the above presumption and the standard of proof required of the accused is very low. It is on the balance of probability: See **Festo Shirabu s/o Musungu Vs R [1955] 22 EACA 454.**

In this case there was no evidence of rebuttal at all. Instead counsel for the accused conceded in her final address to me that the deceased was dead and that her death was unlawfully caused.

From the above evidence and concession, I find like the assessor that Mrs Ssempe Anociata is dead and that her death was unlawfully caused.

This now leads to the issue whether the said death was caused with malice aforethought. Malice aforethought is defined in section 191 of the Penal Code Act to mean intention to cause the death of any person, whether such a person is the one actually killed or not or knowledge that the act or omission causing death may 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 the death is caused or not or by a wish that it may not be caused.

Malice aforethought is therefore a state of mind of the killer. As such it is difficult to prove by direct evidence. But it is now trite law that malice aforethought can be inferred from the surrounding circumstances of the offence. This includes the weapon used, the part of the body on which such weapon was applied and the nature of the injuries inflicted. Use of a lethal weapon like a gun, panga, spear or knife on a vulnerable part of the body of the victim readily attracts inference that the assailant had the necessary malice aforethought: See **Okello-Okidi Vs Uganda, Supreme Court Cr. Appeal No.**

In the instant case the evidence of Paul Semanda (PW2) and Leonard Ssempe (PW4) show that the weapon used was a gun which was fired several times at close range. The evidence of D/Corporal Olepus (PW9) and the post mortem examination Report of Dr Kidaga show that the body of the deceased was riddled with bullets on the lower part and that the cause of death was hypovolaemia following massive haemorrhage due to penetrating wounds following gunshot wounds.

Considering the weapon used, the manner in which it was used and the part of the body of the victim on which the weapon was applied, I agree with the gentlemen assessors that the killer had the necessary malice aforethought. A gun is a very deadly weapon that man has invented. Whoever uses it at close range targeting at the lower body of the victim must but intend to kill her.

The lower parts of the body is a very vulnerable part of the body as it contains delicate organs like the bladder which can cause death if ruptured. In light of the above circumstances; I find that this ingredient has also been proved beyond any reasonable doubt.

The last but most crucial ingredient is whether the accused participated in the killing of the deceased. However, the heinous crime since the charge of aggravated robbery in the second count was also said to be linked to the first count of murder it would be convenient to discuss the elements of the offence and then make the necessary conclusion on participation of the accused person.

It was alleged that it was the same assailants in the first count who committed the robbery as well.

The evidence of Ssempe Leonard (PW4); D/C Namara (PW6); and D/C Moini (PW7) proved beyond reasonable doubt the first ingredient of aggravated robbery. It showed that there was theft of a mobile phone No.077-413083, keys for the shop and cash shs.300,000/=, all belonging to Ssempe Leonard. The mobile phone serial No.4905207084771796 on phone No. 077-413082 which was the subject matter was recovered by Namara Robinson (PW6) and put in as prosecution exhibit No.P2. The evidence further proved the use of violence and a deadly weapon in the course of the theft. Paul Semanda (PW2) and Leonard Ssempe (PW4) testified that the assailants fired several gunshots which killed one person.

PW4 testified that some of the shot narrowly missed him. He had to take cover by bending down. He stated that the assailants pursued him until he reached his gun and started firing at them that they started retreating . after they had retreated he found that they had taken off with his nokia phone, shs.300,000/= and the keys which he had abandoned in the car as he was fleeing for his life.

D/Corporal Olepus (PW9) who visited the scene the following morning testified that there were proofs of gunshots in that there was a dead person and the walls had bullet holes. The motor vehicle which the complainant was driving also had a

bullet hole on its body. At the scene, he also recovered two bullet heads and a cartridge (exhibit P1).

It is trite law that where a gun is fired in the course of theft it is proof that it is a deadly weapon under section 286 (3) of the Penal Code Act: See **Wasajja Vs Uganda [1975] EA 181.**

From the above evidence I have no difficulty in finding like the assessors that there was theft and the use of a deadly weapon in the course of the theft.

This now leads me to the next and last ingredient whether the accused participated in the murder and robbery of the victims.

The prosecution relied on the evidence of Joachim Balaba (PW1); Semanda Paul (PW2) John Lubega (PW3) Ssempe Leonard (PW4); Charles Ogwal (PW5); Namara Robinson (PW6); Benedicto Mujabi and John Baimuka (PW11). Joachim Balaba (PW1), Paul Semanda (PW3) and Leonard Ssempe (PW4) testified that they identified the accused person among the assailants. Joachim Balaba (PW1) testified that the accused appeared at his saloon for a haircut a day before the incident. He stated that he saw the accused on the material date and identified him among the assailants. He revealed the same to Benedicto Mujabi (PW8) who in

turn informed Leonard Ssempe (PW4) who in turn informed Charles Ogwal (PW5), who arrested the accused.

Joachim Balaba still testified that he identified the accused from Old Kampala Police Station in an identification parade conducted by John Baimuka (PW11).

The accused on his part made unsworn defence where he made a total denial of the offence. He stated that on 20/5/2002 he left his home at about 9.00a.m. and went to a carpentry workshop at Natete to make a wooden box for his business as a fish seller. As he was there with the carpenters, they heard sound of bullets. He went outside to find out what was going on. On reaching the doorway a bullet shot him and he fell down. He was picked from the ground by people in civilian clothes and put in a pick-up, which was parked nearby. After about five minutes, three other people were brought and loaded on the same motor vehicle and taken to Natete Police Post. From there the police officers took him to his house where a search was carried out but nothing was recovered. From there he was tortured by CMI operatives from Kitante on allegation of killing the deceased which he denied. He concluded that he was taken for an identification parade in which the person who was to identify him had already seen him before the parade.

From the above set of facts, it is very clear that the evidence implicating the accused was based on visual identification parade, identification parade and that the accused fled during the arrest.

I shall consider those different types of evidence in the above order to satisfy whether or not the prosecution has proved beyond reasonable doubt that the accused took part in the murder of Mrs Ssempe and the robbery of Mr Ssempe.

On the evidence of identification, the law appears to be very clear. It is to the effect that it is always unsafe to base a conviction on the evidence of identification unless the conditions favouring correct identification were present. Where such conditions were not present or difficult, corroboration of such evidence should be looked for to avoid acting on mistaken identification. There are very many authorities for the above proposition: They include:

Abdalla Bin Wendo & Another Vs R [1953] 20 EACA 166.

Abdalla Nabulere Vs Uganda [1979] HCB.

In regard to identification parade, the case of **Patrick Isimbwa & Another Vs Uganda Supreme Court Criminal Appeal No.13 of 1991** is very instructive. In that case the Supreme Court had this to say:

“An identification parade is usually intended to test the consistency of a witness regarding her or his identification of a suspect whom he or she claims has participated in a crime of which she or he was an eyewitness. At such a parade, the witness would be expected to identify a stranger who she may have seen for the first time at the scene of crime. But if the witness is shown the suspect or sees the suspect in the hands of the police before the identification parade, then the evidential value of such parade is rendered useless”

In the instant case Paul Semanda (PW2) and Ssempe Leonard (PW4) testified that they saw the accused as one of the three assailants. They told court that they identified the accused by his height and long face. They were aided by electric lights. Joachim Balaba (PW1) on his part stated that he also saw the accused jumping from a motorcycle in pursuit of Mr Ssempe (PW4). He stated that he identified the accused because the previous day the accused had been at his saloon and he gave him a haircut, which took about 30 minutes. He told court that there

were lights which enabled him identify the accused as the person who had been to his saloon the previous day.

From the evidence of (PW2) and (PW4) I am faced with difficulties whether they able to identify the assailants who were strangers to them within the spell of time and the prevailing circumstances. However, from the evidence of Balaba (PW1), the prosecution was able to establish the identity of the accused as one of the assailants. This witness was familiar with the accused who he had seen a day before for a period of 30 minutes. He interacted with the accused during broad daylight as he was giving him a haircut. On the material date he again saw the accused lighting off a strange motorcycle from a short distance. This was followed by seeing the accused pointing a gun at Mr Ssempe. There were therefore landmark events which created favourable conditions for identification.

The evidence of visual identification was fortified by the identification parade, which was conducted by John Baimuka (PW11) who testified to the procedure he took in conduction of the same. From that evidence I was satisfied that the identification parade was conducted in satisfaction of the principle stated by the Supreme Court in **Patrick Isimbwa & Another Vs Uganda** (supra). It is not true that the witness had prior knowledge of the suspect before the parade. I am

convinced that the officer did his best to follow the procedure required of him in conducting the parade.

For the above reasons, I find it very difficult to believe the defence staged by the accused in denying the offence. It is clear from the prosecution evidence that the accused was part of the gang who killed and robbed Mrs Ssempe and Mr Ssempe respectively. He was properly identified at the scene by Mr Balaba (PW1).

At the time of his arrest his conduct of running away was incompatible with his innocence. To show that he did not know what to say the accused even lied on the date on which he was arrested when he stated that he was arrested on 20/5/2002.

Considering all the circumstances of this case I agree with the assessors that the prosecution has proved this case beyond any reasonable doubt and accordingly find the accused guilty as charged. The accused is therefore convicted on both counts.

SENTENCE:-

The two counts attract mandatory death sentences i.e. Murder and robbery. The accused is accordingly sentenced to suffer death after all due processes of the law.

However sentence on second count shall stand suspended as one cannot suffer death twice..

RUBBY AWERI OPIO

JUDGE

31/5/2004.