THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CASE NO: HCT-00-CR-SC-0158 OF 2003

UGANDA :: PROSECUTOR

VERSUS

WASSWA DAUDI & OTHERS:::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The six accused persons, WASSWA DAUDI (A1), OTIM GARANG ANDREW (A2), KIWANUKA (A3), NAKIGULI HASIFA (A4), KASIGAZI JOHN (A5) and ANGUYO DAVID (A6) were indicted jointly for Murder contrary to section 188 and 189 of the Penal Code Act, Cap 120 Revised laws of Uganda.

The particulars of the indictment alleged that the accused persons on 25th September 2002 at Kyamukana village in Nakasongola District, murdered MUDUMIZI-MWESEZI.

The accused denied the offence whereupon the prosecution led evidence of seven (7) witnesses in satisfaction of its constitutional duty to proved the case beyond any reasonable doubt: Article 28 (3) of the Constitution they were:

Mustafa Semusu (PW1); No. 3277 W/P Amoditho (PW2); Gitta Sowedi (PW3); No. 23567 D/C Malevu (PW4); Dr Kasibante (PW5); Peter Runyabyoma (PW6) and D/ASP Nelson Achili (PW7).

The accused made unsworn defences and did not call any witnesses.

In very brief terms the prosecution case was as follows:-

The accused persons except Hasifa Nakiguli (A4) were domestic workers of Mustafa Semusu (PW1). Nakiguli Hasifa (A4) was a wife to Mustafa (PW1). On 25th September, 2002 at 6.00p.m. the accused persons, Mustafa Semusu (PW1) and Mudumizi Mwesezi were together drinking local brew at a bar in Kibuloka,

Kyamukana village. In the process a misunderstanding arose between the deceased and Hasifa Nakiguli (A4) which forced the deceased to leave the drinking joint. The deceased went to the home of Runyabyoma (PW6) to spend the night as a visitor. The deceased had gone to that village to look for a job, including Hasifa's home (A4) where he was unsuccessful. At about 10.00p.m. while the deceased was sleeping at Runyabyoma's home Otim Garang (A2) and Anguyo David (A6) stormed the home ordering the host to release the deceased and started beating him. They were joined by the rest of the accused persons in beating the deceased branding him of being a thief.

While beating the deceased Hasifa Nakiguli (A4) told the rest of the accused that the deceased should be burnt to death. The dragged the deceased to her home where her husband (PW1) advised them to take the deceased to the sub-county headquarters. Nakiguli Hasifa then entered the house and came out with a small jerrycan of paraffin. They let the deceased as if

taking him to the sub-county headquarters and on the way they beat him and subsequently poured paraffin onto him and burnt him to death. As they were leading the deceased towards "Calvary" Runyabyoma (PW6) was tracking them with his colleague. After realizing that the accused were determined to kill the deceased, he reported the matter to the police. He was given a team of police officers which included W/P Amoditho (PW2) and D/C Malevu (PW4) who arrested the accused persons. After the arrest Wasswa A1 and Kiwanuka admitted killing the deceased and led the arresting party where they had buried the deceased in "shallow grave". Hasifa Nakiguli pointed the direct spot where the deceased was buried.

The accused persons were taken to Nakasongola Police Station where Wasswa David (A1), Kiwanuka Stephen A(3) and Kasigazi John (A5) made charge and caution statements before ASP Achili (PW7) admitting the offence.

Exhibit P6, P7 and P8. The body of the deceased was exhumed whereupon Dr Kasibante (PW4) carried out post mortem examination exhibit P7 to establish the cause of death. The same medical officer also examined the mental status of the accused persons, which he found to be sound.

All the accused persons made unsworn statements in the defence. While Wasswa Daudi (A1) stated that he was framed in this offence by Mustafa Semusu because of a grudge for failing to pay his debt, Otim Andrew Garang (A2) stated that he was arrested because his colleagues thought he had take off in fear of tax collectors. The rest of the accused made plain denials.

The essential elements requiring proof beyond reasonable doubt to secure a conviction in an offence of murder are:-

(1) that the person alleged to have been murdered is dead;

(2) that the death of the deceased was unlawfully caused;

(3) that whoever caused the death of the deceased had malice aforethought; and

(4) that it was the accused who so caused the death of the deceased: See ***Kabiswa Charles Vs Uganda, Court Of Appeal Cr. Appeal No. 73/98*** (Unreported).

On whether Mudumizi Mwesezi is dead, there was no dispute. There was overwhelming evidence from PW1, PW2, PW4, PW5 and PW6 knew the deceased who had been in this village looking for a job. They saw the dead body and witnessed it being exhumed by the police. PW6 stated that after the death of the deceased he made several radio announcements to the relatives to collect the body but in vain. There was also medical evidence from Dr Kasibante (PW5) who performed a post mortem examination and proved the death of the deceased and its cause in terms provided by the case of ***Cheya And Another Vs Republic [1973] EA 500.*** In light of the above evidence and

circumstances, I have no difficulty in holding that the death of the deceased has been proved beyond any reasonable doubt.

As to whether the death of Mudumizi Mwesezi was unlawfully caused, it is instructive to bear in mind that in homicide case, death is presumed to have been caused by unlawful act or omission unless it is shown to have been caused by accident or in circumstances, which make excusable. This principle was laid down in the case of ***R Vs Gusambizi s/o Wesonga [1948] 15 EACA 65***. Death is excusable when it is caused in self-defence, defence of property or defence of another. The burden is on the defence to rebut the above presumption by adducing evidence to show that the deceased died by accident or under excusable circumstances. The standard of proof required of the defence here is very low. It is on the balance of probabilities: See ***Festo Shirabu s/o Musungu Vs R [1955] 22 EACA 454***.

In the instant case the evidence on record does not show that the deceased died accidentally or under excusable circumstances. According to Mustafa Semusu (PW1) the deceased was brought to his home at night on allegations of being a thief. He advised those who had arrested him to take him to the appropriate authorities either to the Local Council authorities or the sub-county Chief. He stated that on that advice he saw the deceased being led towards the sub-county headquarters.

Peter Runyabyoma (PW6) testified that the deceased was arrested from his home by his assailants. They tied him with a rope and took him to the home of (PW1). From there the deceased was led to a dark place where he was killed and buried on a shallow grave. Malevu (PW4) confirmed that the deceased was buried in a shallow grave and after exhuming the body they found that the body was burnt. The deceased died with his hands tied from behind. According to Sowedi Gitta (PW3) the deceased was tied with a rope, which the assailants had got from him.

Above all, the medical evidence from Dr Kasibante (PW5) clearly confirmed that the deceased died as a result of violence, which netted on him. He stated that the body of the deceased had third grade burns, which were covering 80% of the body. The deceased also had heamatoma i.e. swelling at the back of the head of 6x6cm. The deceased died as a result of brain injury having been hit on the head by a blunt object and neuroloeis i.e. shock brought about by the burning. From the above evidence which neither challenged nor controverted, I have no doubt that the death of the deceased was caused b an unlawful act or omission.

In regard to malice aforethought it is important to refer to section 191 of the Penal Code Act which defines malice aforethought to mean:-

(1) an intention to cause death of any person, whether such person is the one actually killed or not; or

(2) knowledge that the act or omission causing death will probably cause death of some person whether such person is the person actually killed or not; although such knowledge is accompanied by indifference by a wish that it may not be caused: See ***Sebastiano Otti vs Uganda Cr. Appeal No. Supreme Court***.

it is trite law that malice aforethought being a mental element of the killer, it is always difficult to prove by direct evidence. as a state of mind, it can nevertheless be deduced from a set of facts and circumstances surrounding the events, such as the nature of the injuries sustained, part of the body targeted, weapon used and the conduct of the assailant before, during and after the attack. The use of precise weapons of killing such as concentrated acid, or guns or pangas, spears and knives on venerable parts of the body would readily attract inference of malice aforethought. The above principle was laid down since the decision in ***R Vs Tubere s/o Ochen [1945] 12 EACA 63.*** The

above principle has been followed consistently by our courts. This in ***Foro Yahaya Vs Uganda Court of Appeal Cr. Appeal No. 24/98*** (unreported), the deceased was killed in a brutal manner with what might have been a lethal weapon given the injuries she sustained on venerable parts of her body. The Court of Appeal confirmed that her assailants might have intended to kill her if not they must have anticipated her death as the probable result of the assault and therefore the killing was done with malice aforethought.

In the instant case, the deceased was tied up with a rope and assaulted during along procession. He was said to have been finally hit on the head and burnt to death with a lethal substance. Thereafter he was buried in a shallow grave. The deceased was said to have died as a result of brain damage due to the assault and shock due to the burning. It is very obvious from the above circumstances that whoever caused the death of the deceased in the above manner might had intended to kill him if not they might

have known that acts or omission would lead to the death of the deceased and therefore the killing was tainted with malice aforethought.

This now drives me to the last ingredient, which is whether the accused persons participated in causing the death of the deceased.

The evidence implicating the accused persons was that the accused was seen arresting the deceased who they tortured and led to unknown place where he was eventually found dead. Another set of evidence was the confession statements which A1, A2 and A5 made.

All the six accused persons denied the offence. The two sets of evidence implicating the accused persons can be categorized into two:-

The first one is circumstantial evidence from PW1, PW3 and PW6 who testified that they saw the deceased in the company of the accused persons. The deceased had been arrested by the accused and tied with a rope. Accused were the last people seen leading the deceased towards the sub-county headquarters but the deceased was later on discovered dead, buried in a shallow grave.

The law in regard to circumstantial evidence is that for court to base a conviction on it, it must such evidence that leave nothing but the guilt of the accused persons. Thus before court can act on such evidence must lead to the inevitable conclusion. The deceased's death was cause by the acts of the accused and nobody else. In other words the inculpatory facts must be incompatible with the innocence of the accused: See ***Kasibwa Charles Vs Uganda*** (Supra).

Another set of evidence implicating the accused was the charge and caution statements made by A1, A2 and A5, which were retracted and repudiated, the law in regard to this type of evidence is that it is dangerous to act on it to bas a conviction unless it is corroborated in material particulars or unless the court after full consideration of the circumstances is satisfied of its truth. Supreme Court Cr, appeal No. 1 of 1992.

The charge and caution statements were admitted after a trial within a trial whereupon ruled that they were made voluntarily. I reserved my reasons for saying so. I now give my reasons accordingly. The statements were recorded in English as they were being interpreted from Luganda. The practice of this court is that such statements should be records in the language spoken by the maker. However, failure to follow that order does not make them inadmissible as long as court is concerned that the same was made voluntarily.

Another overriding factor is that court should always doubt charge and caution statements where it feels they are relevant in the dispensation of justice even though the procedure are not strictly followed: **See *Namulosi Hasab Vs Uganda CAC App. No. 16/97.*** I have perused the said charge and caution statements they were all made in a flowing language.

The nature of charge and caution statements could only be attributed to people who were free and settled in mind. They made the charge and caution statements in great details which could not be said to have been framed by the administering officer.

I have perused the evidence on record very carefully. According to PW1, PW2, PW3, PW4 and PW6 there is very strong circumstantial evidence against A1, A3, A4 and A5 as the people who were last seen with the deceased.

According to PW6, A4 was the one who got a jerrycan of paraffin which they used for burning the deceased. After that the deceased was never seen alive. PW2 and PW4 stated that the accused persons were the ones who led them to the spot where the deceased was buried. I therefore find very strong circumstantial evidence against the accused persons.

Apart from the circumstantial evidence A1, A3 and A5 made charge and caution statements where they implicated themselves and other accused persons in this offence. A1 in his charge and caution statement implicated himself together with the rest except Anguyo. A2 implicated all the accused persons except Otim Garang whereas A3 implicated all except Anguyo and Garang.

All the three accused persons made their statements in details starting from where they were drinking together that evening at the home of one Monica to the stage where the deceased picked a quarrel with A4 which annoyed her so much that she ordered

the accused persons who were here casual workers to arrest the deceased. They arrested and tortured the deceased before taking him to the husband of A4 Mzee Mustapha (PW1) on allegation that he was a thief. After taking the deceased there, Mzee ordered them to take the deceased to the sub-county headquarters. On the way to the headquarters A4 ordered them to kill the deceased, which they did. After the killing they buried him and A4 ordered them not to reveal the same to anybody.

From the above charge and caution statements I find corroboration in the evidence of PW1, PW2, PW3 and PW4. From the same it can also be noted that the accused persons had different levels of participation. I find the main author of the murder as being A4. She was the source of the quarrel and she was the one who ordered the arrest of the deceased to his eventual death.

She was the one who poured paraffin on the deceased before it set on fire. On the other hand I find that Anguyo and Otim Garang only participated up to the time they arrested the deceased and him up to the home of PW1. They never continued up to the scene where the deceased was killed except that A2 stated that Anguyo participated in the burial. This might have been after the killing was done.

Although the two participated in the arresting they were not present when the rest of the accused persons killed the deceased on way the sub-county. The two therefore did not have the common intention unlike the rest who participated in the crime and never withdrew at any one point.

Looking at the defence raised by the accused persons, and the prosecution evidence, I must say that the accused merely wanted to divert to the course of justice. The defence raised were a mere sham. There was clear evidence that the accused persons were

the ones who killed the deceased over a simple dispute, which arose after a drinking spree. All the accused acted in concert and accordingly had the necessary common intention.

This leads me to another important aspect of the case as to any possible defence available from the recorded evidence. The law is that court is entitled to investigate all the circumstances of this case including any possible defence even though they were not duly raised by the defence. See_***Okello Okidi Vs Uganda Supreme Court Cr. Appeal No. 3 of 1995***.

In this case there are two possible defence which can be gathered from evidence on record of provocations and then of intoxication.]

It was stated tat the dispute between the accused and the deceased arose when the deceased abused Hasifa (A4). For an act or insult to constitute provocation in the legal sense, it most

ease a burden and temporary loss of self control rendering the accused do subject to person as to make him at the material time lose control of his mind. If the assault is noted on the deceased after a passage of time sufficient for a cooling period and enough for the accused to regain his self control such assault is deliberate reviewing. In such event this defence of provocation is not available to the accused: See ***Sowedi Osire Vs Uganda SC Cr. App. No. 28/89***.

In the instant case the nature of the abuse/provocation was not disclosed. Even if have been disclosed, the fact that the deceased had run away and taken refuge at the home of PW6 was sufficient time for a cooling period for A4 to have regained her self control: See ***Otti Sibestian Vs Uganda*** (supra) .

Another aspect of the defence available to the accused persons generally was intoxications. There was evidence that the accused persons were drinking Inguli (a potent local gin) during

that evening and that a quarrel which led to the incident. Sparked of during that time when the accused were drinking. It is trite law that where there is defence of intoxication in the evidence, it is the duty of the prosecution to show that the accused persons were nor so drunk as to be incapable of forming an intent to kill. See ***James Kolo Vs Uganda C.A. CR. App. NO. 8/96.***

In the instant case the prosecution did not discharge the above burden. It could as were be that the accused were so drunk that they did not form an intention to kill. The accused entitled to benefit of doubt. I accordingly find the accused not guilty of murder butt I find them guilty of manslaughter i.e. A1, A3, A4 and A5.

As for A2 and A6 (Otim and Anguyo) the prosecution has not proved the case against them beyond any reasonable doubt. They are accordingly acquitted.

One assessor advised me to convict all the accused as charged while the other advised me to acquit Otim Garang and Anguyo and convict the rest. I do agree with the latter assessor that Anguyo and Garang be acquitted as prosecutions had not proved their case beyond any reasonable doubt. However, considering the fact that the rest of the accused could have acted under the influence of Inguli, it would not be safe to convict. They are therefore convicted for manslaughter contrary to section 187 of Penal code Act.

RUBBY AWERI OPIO

J U D G E

7/6/2004.

Aine Mbabazi for state.

Nyakana for the Accused.

Judgment read in open court.