

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT RUKUNGIRI**  
**CASE NO: HCT-05-CR-SC-0116 OF 2003**

**UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR**

**VERSUS**

**A1. NALUSIBA TEDDY }**

**A2. BESIGYE FRANCIS } :::::::::::::::::::::::::::::: ACCUSED**

**BEFORE: THE HON. MR. JUSTICE RUBBY AWERI-OPIO**

**J U D G M E N T:-**

The accused, Nalusiba Teddy was indicted for Murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence alleged that the accused and others still at large on the 26<sup>th</sup> day of July 2002 at Murambo Cell in Rukungiri District, murdered Keimusya Amon.

The background facts of this case are that on the 26<sup>th</sup> day of July 2002, the accused person was staying with the deceased who was her porter. On the fateful day, the accused's mobile phone got lost and she suspected the deceased to have stolen it. She interrogated him to reveal where he could have hidden the same

but the deceased kept on denying. The accused was joined by other people in interrogating the deceased. In the process, they assaulted the deceased in an attempt to compel him to produce the said phone but without success. In the end the deceased sustained several injuries and died as a result of the assault. The accused was arrested and charged with the murder of the deceased.

When the charge was read and explained to the accused, she pleaded not guilty. By that plea accused set in issue all the essential elements in the offence charged. That meant that the prosecution had to prove each and every element in the offence charged in order to secure a conviction against the accused.

The essential elements requiring proof in the offence of murder are:-

- (1) that the person alleged to be murdered is dead;
- (2) that he died as a result of an unlawful act or omission;
- (3) that whoever killed him did so with malice aforethought;

(4) that the accused was the one who caused the death of the deceased.

The law places the burden of proving the above elements on the prosecution. An accused does not bear the burden of proving his innocence. He is innocent until proved guilty. It is also trite law that the accused should only be convicted on the strength of the prosecution case and not on the weakness of his defence. See **Sekitoleko V Uganda [1967] EA 531.**

In order to discharge the burden of proof the prosecution called the evidence of five (5) witnesses: Adrin Tumwebaze (PW1); Byamukama Blazio (PW2); Geresom Turyahikayo (PW3); Dr Rutahigwa Elisha (PW4); and D/AIP Bwambale Joel (PW5).

The accused on his part made a sworn defence and raised defence of total denial and alibi.

With regard to the first element of this offence, there is no dispute that the deceased is dead. All the prosecution witnesses alluded

to the fact of death of the deceased. The accused person herself also alluded to the fact of death of the deceased. There was therefore overwhelming evidence that the deceased died on 26/7/2002 and was subsequently buried. I am therefore satisfied that this ingredient has been proved beyond all reasonable doubt.

Regarding the second ingredient whether the death of the deceased was unlawful, the law as established in the case of **R Vs Gusambizi s/o Wesonga [1948] 15 EACA 65** is to the effect that all homicide is presumed unlawful unless excused by law. It is only excusable if caused by accident, in defence of property or person: See **Uganda Vs Okello [1992-93] HCB 68**. The above presumption is a rebuttable one. It is the duty of the accused to rebut it by showing that the killing was either accidental or that it was excusable. The standard of proof required of the accused to discharge that duty is very low. It is only on the balance of probabilities: See **Festo Shirabu s/o Musungu Vs R [1955] 22 EACA 454**.

In the instant case Adrin Tumwebaze (PW1) testified that the deceased was her niece. She told court that after receiving information from Geresom Turyahikayo (PW3) of the death of the deceased, she rushed to the scene at the home of the accused. The accused told her that the deceased had been killed by villagers because he had stolen her phone. She inspected the body of the deceased and found thereon several injuries on the ribs and stomach. Byamukama Blazio (PW2) testified that he saw the deceased being beaten by very many people some of whom he did not know. Among those he knew were Rubingo, Rukundo and Midiasi. He told court that the deceased died shortly after the beatings. Geresom Turyahikayo (PW3) was the area local council chairman. He testified that on the fateful day the accused reported to him that the deceased who was her porter had died after being beaten by some people in a bid to reveal where he had hidden her stolen phone. He stated that since the dead body had several injuries he reported the case to Bugangali Police Post for further management. Upon the above report D/AIP Bwambale Joel (PW5) testified that he visited the scene at Nyamurambo where he found the dead body in a coffin at the home of the

accused. The body had scratches all over the face, neck, buttocks and knees. He suspected that the deceased could have been tortured before he died. So he took the body for post mortem examination which was done on 28/8/2002 by Dr Rutahigwa (PW4). Dr Rutahigwa (PW4) testified that the deceased had multiple bruises and minor stabbed wounds. The deceased had fractured cervical vertebrae. The suspected cause of death was nemogenic shock as evidenced by the fractured cervical vertebrae.

The accused in her sworn defence testified that the deceased could have died due to the beatings he had received from his colleagues who were helping her to recover her stolen phone from the deceased.

It is very clear from the above pieces of evidence that the death of the deceased was neither natural nor excusable. The deceased died after being assaulted. The nature of injuries which he sustained could not draw any other inference than that the deceased died from unlawful cause: See **Lutwama & 5 others**

**Vs Uganda; Supreme Court Criminal Appeal No. 38/89**

(unreported).

The third ingredient is whether whoever killed the deceased had the necessary malice aforethought. Malice aforethought is defined under section 191 of the Penal Code Act to mean -

- (a) an intention to cause 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.

It is clear from the above definition that malice aforethought is a mental element of the offence of murder. Being a mental element it is difficult to prove by direct evidence. However, it is now established that it can be inferred from the surrounding circumstances of the offence such as:-

- (a) the nature of the weapon used (whether lethal or not);
- (b) the part of the body targeted (whether vulnerable or not);
- (c) the manner in which the weapon is used (whether repeatedly or not; and
- (d) the conduct of the accused before, during and after the attack (whether with impunity): See **R Vs Tubere s/o Ochen [1945] 12 EACA 63.**

In the instant case Byamukama Blazio (PW2) testified that he found the deceased being assaulted by very many people. He told court that the deceased was beaten with his legs tied up on a tree. Dr Rutahigwa (PW3) testified that the deceased had multiple injuries and minor stab wounds. His neck bone was broken. It can be deduced from the above evidence that the deceased suffered several injuries. The most severe injuries resulted in the fracture of the cervical vertebrae (neck bone) which translated into nemogenic shock which caused the death of the deceased. The deceased was subjected to torture for a very long period of time according to the evidence of the Blazio Byamukama (PW2). He was tortured from mid morning to late



afternoon. This was confirmed by the accused herself who testified that she got tired and left the villagers still with the deceased as they were tracing her lost phone. Accordingly I find that the accused was assaulted repeatedly and with impunity which resulted in his death. It is therefore my finding that whoever assaulted the deceased in the above manner causing the stated injuries had the necessary malice aforethought.

This brings me to the last ingredient whether Nalusiba Teddy was responsible for the death of Amon.

The evidence implicating the accused was from Blazio Byamukama (PW2) who testified that he saw the accused standing with a stick while people were beating the deceased. It was his conclusion that by that time the accused had completed beating the deceased. The accused in her sworn defence stated that she was with the deceased and other people when the deceased was trying to locate her phone which he had stolen. She testified that the deceased took them to several places but he could not locate where he had hidden the phone. After along

search she got tired and returned back home leaving the search still going on. She told court that she left before the deceased was beaten.

From the above evidence it is probable that Blazio (PW2) did not see the accused beating the deceased. He stated categorically the deceased was being beaten by so many people among whom he recognized one Rubingo, Rukundo and a lady called Midiasi. He did not mention the accused as among the assailants. This evidence is so coloured in that it is full of contradictions and therefore unreliable. In the first place Blazio did not witness the incident full scale. At one point he left to graze the goats. He stated that when he returned he found the deceased unconscious. Thereafter he rushed to inform the accused who was in her house. To be precise his testimony was:

***“ I got the deceased and laid him on the mat in the porters house where we were staying. I then went and informed the accused that Amon had died. All***

***along the accused was in her house. After informing her she got out and went to the chairman's place."***

The above passage clearly supports the defence of the accused that she returned from the search partly because she was tired. She went back home and took a bed rest. If the accused was indeed among those who had beaten the deceased I do not think she would have gone to the local council chairman to report herself.

Geresom Turyahikayo (PW3) to whom the accused reported the incident testified that the accused reported to him that the deceased had died after being beaten by his colleagues for stealing her phone. He testified that the accused mentioned to her who had beaten the deceased as Apolo, Sunday and Bosco. He concluded that no one pointed to the accused as one of the killers.

From the above evidence I find it difficult to believe the testimony of Blazio that the accused was among those who had beaten the

deceased. I believe the defence of the accused that she left before the deceased was beaten by a mob of colleagues. For the above reasons I agree with both assessors that the prosecution has failed to prove all the ingredients of this offence beyond all reasonable doubt. The accused is therefore acquitted.

**RUBBY AWERI OPIO**

**JUDGE**

**15/9/2005.**

**15/9/2005:-**

Accused present.

Twinomuhwezi for the state.

Ndimbirwe present for the accused on state brief.

Judgment read in open court.

**Order:-**

Any money paid for bail be refunded to the accused.

**RUBBY AWERI OPIO**

**JUDGE**

**15/9/2005.**