

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

CASE NO: HCT-00-CR-SC-0103 OF 2004

UGANDA :: PROSECUTOR

VERSUS

MUNYIRWA LALIYO & 6 OTHERS:: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused Munyirwa Laliyo and six others were indicted jointly for Murder contrary to section 188 and 189 of the Penal Code Act, Revised Laws of Uganda.

The particulars of the offence alleged that the accused Munyirwa Laliyo (A1), Bafabalya Martin alias Basoga (A2), Wako Gopi (A3), Kasulugaine Godfrey (A4), Koire Stephen alias Zadde (A5) Kulire Max alias Ndifa (A6) and Muyaka Patrick (A7) on the 27th day of September, 2001, at Buhalira village in Iganga District, murdered Mubera Haruna.

The background facts of the case are that on 27th September 2001, between 1.00p.m. to 3.00p.m. the home of Haruna Mubera (deceased) was attacked by an angry mob whose ringleader was Munyirwa (A1). On reaching the home of the deceased A1, who was armed with a machete (panga), lit a matchbox and set the deceased's hut, kitchen and granaries on fire. He was joined by the rest of the accused persons and others still at large. They demolished the burning houses, got hold of the deceased and threw him into the fire. When the deceased ran out of the fire, they took him under a mongo tree where they started assaulting him using sticks, stones and machete until they killed him. A1 then started drumming signaling that there was danger.

The attack on the deceased took place in the presence of members of his family. Before the attack the deceased was summoned to a village meeting where he was accused of being responsible for the death of some people, including his brother, the Late Asuman, through witchcraft.

The villagers wanted to attack him from there but the deceased was saved by the Local Council Officials who took him to the police station. The police organized a meeting and sensitized the villagers on the dangers of taking the law into their hands. The villagers then gave the deceased one-month to leave their village and when he failed to leave, he was attacked and killed by the accused persons and others still at large.

When A1 and his group were attacking the deceased one of his sons ran to the police to report the attack but unfortunately the police arrived after the deceased had been killed. Having been properly identified the accused persons were arrested and charged accordingly. All of them were subjected to medical examination and found to be mentally sound. Post mortem examination was carried on the deceased. A sketch map of the scene of crime was also drawn.

Upon arraignment all the accused persons denied the offence. By pleading not guilty the accused set in issue the essential ingredients of the offence of murder, which were to be proved against all the accused persons individually.

The essential ingredients of offence of murder are:-

1. That there was death of human being;
2. That such death was caused unlawfully;
3. That the death was caused by malice aforethought
4. That the accused participated directly or indirectly in causing the said death.

The duty to prove the above ingredients lies on the prosecution throughout the trial. An accused does not bear the burden to prove his innocence. The Constitution provides that he is innocent until proved guilty. He only be convicted on the strength of the prosecution and not weakness of his defence even when he appears to be telling lies:

See **Kooky Sharma & Another Vs Uganda; Supreme Court Criminal Appeal No. 44 of 2000** (unreported).

To prove the above ingredients, the prosecution relied on the following evidence:

Edrisa Wakabiri (PW1) whose evidence was that he was the son of the deceased who witnessed the incident and reported to the police;

Ndhaye Richard (PW2) who was the medical clinical officer who performed post mortem on the body of the deceased Haruna Mubera;

AIP Anyanga James (PW3) testified that he went to the scene with PW2 to do post mortem on the deceased. He also stated that he drew sketch map of the scene of crime and saw the dead body with suspected weapons of murder. He participated in the arrest of suspects;

Hadijah Tibaga (PW4) testified that she was wife of PW1 and that she witnessed the whole incident as one of the eyewitnesses;

Sauda Numugere (PW5) testified that she was wife of the deceased and an eyewitness who managed to identify the accused persons.

At the close of the prosecution case, A2 and A4 were summarily acquitted on a submission of no case to answer. After perusing the evidence on record it was my finding that none of the eyewitnesses mentioned the two accused as part of the gang who attacked the home of the deceased. Therefore they were not implicated. In terms of the decision in **R Vs Bhatt** it was of no legal consequence to put them on their defence.

The remaining accused persons were put on their defences in which they denied the offence. Koire Stephen (A5) called his wife Katarin Wotati as his witness in support of his alibi while Mayaka Patrick (A7) called his father Sosipateri Muyaka (DW2) as his witness in support of his alibi.

As far as the first ingredient whether Haruna Mubera is dead, there was overwhelming evidence from both the prosecution and the defence that Haruna Mubera died and was buried. Some of the accused persons conceded that they also participated in the burial of the deceased. That ingredient was therefore not disputed and I hold it was proved beyond all reasonable doubt.

Whether the death of Haruna Mubera was lawful, all homicides are presumed unlawful unless they are caused accidentally or otherwise justified due to self-defence or defence of property. That position was taken since the decision in the case of **R Vs Gusambizi s/o Wesonga [1948] EACA 65**. The above presumption is rebuttable and 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 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 the evidence adduced by prosecution witnesses tend to show that the deceased died a violent death.

In the first place, the Medical Clinical Officer Ndhaye (PW2) who examined the deceased found that he had multiple cut wounds on the head and superficial burns around the body. The trunk and the ribs had multiple superficial burns. His conclusion was that the deceased had died of severe bleeding, which was coupled with deep cut wounds. The deceased was anemic because he had lost a lot of blood due to the cut wounds and severe burns of approximately the whole body. PW2 was a very experienced Medical Clinical Officer whose testimony bore a lot of professionalism.

Even without the medical examination report, there was evidence from PW1, PW3, PW4 and PW5. All those witnesses had opportunity of looking at the body of the deceased. They testified that the deceased had wounds on the head and burns on his body. According to the sketch plan the deceased was found lying near a pool of blood and surrounded by sticks and stones, which were presumed to be weapons of attack. The nature of the injuries which the deceased sustained

could not draw any other inference than that the deceased died from an unlawful cause: See **Lutwama & 5 others Vs Uganda Supreme Court Criminal Appeal No. 38/89.**

In light of the above circumstances, I find that there was overwhelming evidence that the death of the deceased was unlawful.

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 one actually killed or not, or
- (b) Knowledge that the act or omission causing death will probably cause death of a person whether that person is the one killed or not though such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may be caused.

Malice aforethought is therefore a mental element of the offence of murder. As such it is difficult to prove by any direct evidence.

But is now established malice aforethought can be inferred from the surrounding circumstances of the offence. This include:

- (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);
- (d) The conduct of the accused before and after the incident (whether with impunity):

See **R Vs Tubere s/o Ochen [1945] 12 EACA 63.**

In that case, the appellant was convicted of murder. It was proved that he had seriously assaulted the deceased with a heavy walking stick, causing severe injuries from which the deceased died shortly afterwards. The appellant himself did not deny the use of the stick.

On appeal, Sir Sheridan CJ (as he then was) said;

“With regard to the use of a stick in cases of homicide, this court has not attempted to lay down any hard and fast rule. It has a duty to perform in considering the weapon used, the manner in which it is used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the use of say, a spear or a knife than from the use of as stick; that is not to say that the court takes a lenient view where a stick is used. Every case has of course to be judged on its own facts”.

In the instant case, the evidence of all the five prosecution witnesses showed that the deceased was inflicted with wounds on the head, which is a very vulnerable part of the body. No weapons were exhibited but the evidence from the prosecution witnesses was that A1 Laliyo had a panga which he used for inflicting injuries on the deceased. The assailants also had occasion to throw the deceased in a burning fire where a large part of his body got burnt. He struggled and got out of that inferno. To seal his fate they descended on him with sticks and stones after which the deceased died. As if that was not enough, they wanted to take the body to the lake but found that

it was useless because may be they knew he would not resurrect. The sticks and stones were found left lying by the side of the dead body. After accomplishing their mission the assailants started drumming and stopping people from mourning the deceased. That was conduct showing lack of remorse on the part of the assailants which would go to reinforce an inference that the assailants really had the necessary malice aforethought. Like both assessors I do find that this ingredient has also been proved beyond all reasonable doubt.

As far as participation of the accused is concerned, the prosecution evidence was that the incident took place during broad daylight. That the prosecution witnesses knew the accused persons very well. The defence of the accused were complete denial and alibi. But this was a very unfortunate day for the deceased. According to PW1, PW3, PW4 and PW5 the accused person stormed the home of the deceased armed with a panga, sticks and stones during broad daylight. All the accused persons were known to the witnesses, as they were village mates.

The incident took from between 1.00p.m. to 3.00p.m. that was ample time for identification. They were drumming and moving freely. The killing must have taken place against the background that the deceased was a notorious wizard.

But that could not constitute any lawful defence under our law. All the accused were acting in concert although their champion was Laliyo who was their ringleader and commander. All therefore had common intention. The defence raised by the accused were all lies. This was a clear case of people taking the law in their own hands. There was therefore overwhelming evidence that all the accused persons and others still at large participated in the killing of the

deceased. The prosecution has therefore proved all the ingredients of this offence beyond all reasonable doubt. I agree with both assessors and find all the accused guilty of murder as charged. They are therefore convicted accordingly.

RUBBY AWERI OPIO

J U D G E

17/3/2005.

Judgment read in open court.

Sentence:-

There is only one mandatory sentence for the offence of murder. I therefore sentence all the five accused to death in the manner and procedure established by our laws.

RUBBY AWERI OPIO

J U D G E

17/3/2005.