

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
HCT-03-CR-SC-107/2004

UGANDA:PROSECUTOR

VERSUS

KAFUKO JAMES: ACCUSED

JUDGMENT

The accused James Kafuko was indicted for murder contrary to sections 188 and 189 of the Penal Code Act; Revised Laws of Uganda. The particulars of the offence alleged that the accused on the 20th day of December, 2002 at Budwapa Village in Iganga District murdered Kalali Samwiri.

On arraignment the accused denied the offence. The prosecution was thereby called upon to prove all the essential elements of the offence of murder to the required standard which is beyond all reasonable doubt. However, the background facts of the case were that;

The deceased and the accused had long standing land dispute. On 20-12-2002 the deceased who had migrated to Bunya in Mayuge District returned to his ancestral village to attend a funeral and also to give his relatives Christmas gifts. As he was at the home of his son Dabusoni; the accused accompanied by his children descended on him with sticks, pangas, and bricks and severely assaulted the deceased. When the deceased's son and other relatives made alarms, the accused and his children took off leaving the deceased unconscious. The deceased was rushed to Nsinze Health Centre where he was referred to Iganga hospital where he died the following day. The accused was arrested and charged. His children however went into hiding and have never been apprehended.

The ingredients which the prosecution is obliged to prove beyond reasonable doubt are:-

- (1) that the deceased is dead
- (2) that his death was caused unlawfully
- (3) that the death was caused with malice aforethought and
- (4) that the accused participated directly or indirectly in causing the death of the deceased.

To prove the above ingredients the prosecution adduced the evidence of three witnesses:

Dabusony Kalalyi (PW1) Mukobe Charles (PW2) and Luvisa Namukose (PW3).

The accused made a sworn defence and call two witnesses in support of his defence:

Ndahaye Richard (DW1) and Muwaya Stephen (DW2)

In regard to the first ingredient whether Kalali Samwiri is dead, there is overwhelming evidence to that effect. The accused himself admitted in his defence that the deceased is dead. The three prosecution witnesses did participate in the burial of the deceased. I therefore have no difficulties in concluding that the ingredient of death has been proved beyond any reasonable doubt.

As to whether the death of the deceased was occasioned unlawfully, the law is that any death of a human being should always be presumed to be unlawful unless the cause has been established to be accidental or justifiable in the circumstances of self defence or defence of property. That the prosecution which the defunct Eastern African Court of Appeal look in the case of **R v. Gusambizi s/o Wesonga (1948) 15 EACA 6`5.**

The above prosecution is however rebuttable at the instance of the accused by showing that the death was either accidental or justifiable under the available circumstances. The standard of proof in that regard is very low. It is on the balance of probabilities; **See Festo Shivabusio Musungu v. R 1955 122 EACA 454.**

In this case, the three prosecution cases testified that the deceased was attacked by a group of assailants whereby he sustained serious cut wounds on the head. He bled profusely and later died. The accused in his defence also confirmed that the deceased had been assaulted seriously by some people he did not know, the presumption of homicide was not rebutted. Even from the nature of the injuries as attested to by the eye witnesses and in the absence of any other probable case of death it is more likely than not that the deceased died a violent death: ***See Bumakali Lutwama v. Ug. Supreme Court Cr. Appeal No. 38/1989 (unreported).***

In light of the above factors. I find that the prosecution has also proved that the death of the deceased was caused unlawfully.

This brings me to issue whether those who caused the death of Kalali Samwiri had the necessary malice aforethought as defined under S 191 of the Penal Code Act.

Malice aforethought as a state of mind of the killer and can only be deduced from the surrounding circumstances leading to the death of the deceased. They 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) and
- (d) the conduct of the assailant before or after the incident (whether with impunity).

See Okello Okidi v. Uganda.

In the instant case the prosecution who were all eye witnesses testified that the deceased was cut with a hoe on the head. The deceased was also beaten using sticks and stones mostly on the head. The deceased sustained cut wounds on the head and spots of sticks on the different parts of the body. The deceased bled profusely. He could not talk as he was being rushed to hospital. He died soon later. I find the nature of the weapon (hoe) lethal and the part of the body (head and other parts) very vulnerable. The deceased was hit several times by several assailants. It is therefore my finding that whoever participated in assaulting the deceased must have known that their acts would lead to the death of the deceased. So they had the necessary malice aforethought.

The last ingredient is the participation of the accused in this offence. According to the evidence of PW1, PW2 and Pw3 this offence took place during broad day light where the accused and his children descended on the deceased with a hoe, sticks and stones. The accused raised a defence that it was the deceased who first attacked him with a panga. This was confirmed by the clinical officer who treated him (DW1). He went on to say that the deceased was later assaulted by some other people in the village. From the evidence on record, I find that there was overwhelming evidence that the accused participated in the event that led to the death of the deceased. This was confirmed by the evidence of PW1 PW2 and PW3. There could not have been any mistaken identity as the witnesses knew the accused who was a close relative. ***See Abdalla Nabudere v. Uganda (1979) HB***

But in this case the defence raised by the accused appears to be formidable and believable. He started that it was the deceased who attacked him together with his son PW1. PW1 testified that he grabbed the panga from the hands of the accused and the deceased and took it to the bush. From that evidence it could as well be true that it was the deceased who first started the fight considering that there was a long standing land dispute between the two. Either side could have provoked the fight. I am forced to conclude that the accused and the children took up the fight and descended on the deceased using excessive force. It is on that ground that I find that the circumstances of this case are not fit to convict the accused for murder. I therefore convict the accused guilty of manslaughter.

Rubby Aweri Opio

Judge

17/3/2005

17/3/2005

Judgment read in open court.

Kakooza - He is 1st offender. He was 48 at that time.

He terminated life of another prematurely.

Many cases of land dispute result from loss of life that should be conducted. I pray for stiff sentence.

Liiga: The accused gave me his age at 62 years. He has been on remand for 4 years. He is married to 3 wives with 30 children. He had 6 orphans. He is therefore a very responsible person. The circumstances of this case must be looked at either side could have started the fight. He was being hated therefore a sentence for life would be harsh. I pray for a lenient sentence. He is an old man. Living in concuration will affect his life.

Sentence: this matter arise out of land dispute. It is not known who started the fight. But all the same there was cross examination by use of force. The accused is an old person. It is not of any legal consequence to convict him to long custodial sentence. But he is not a remorseful person. He has bee in custody for long. That will be taken into consideration.

In all the circumstances the accused is sentenced to five years imprisonment (5) the period taken in custody has been considered in the above sentence. Otherwise he would have been sentenced to ten years. Right of Appeal explained.

Rubby Aweri Opio

Judge

17/3/2005