THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-SC-0219-2003

UGANDA……... PROSECUTOR

VS

RWOMWANI ALEX ……ACCUSED

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

Rwomwani Alex is indicted for murder, contrary to sections 188 and I 89 of the Penal Code Act. To prove its case the prosecution called three witnesses. Tibereeba Shedrach was PW1, Ntungwiguru Gordon was PW2 while Fred Niwagira was PW3. Medical evidence contained in the post mortem report was agreed under S. 66 of the Trial on Indictments Act. The report is exhibit P.1.

The prosecution case is that on the night of 18th June 1997 accused together with another still at large entered the room where their father, the deceased, slept and killed him by repeatedly striking his head with a hoe. PWI, a grandson of the deceased, who together with the deceased slept in the bedroom, was able to see what went on because there was light from a tadooba which accused carried. When PWI wanted to raise an alarm accused had menacingly held his throat and warned him against making any noise. Later that night the deceased's death was reported to other relatives and neighbours and to Ntungamo Police Station. A hoe used to strike the deceased was recovered and taken by Police. Accused was also arrested and detained by Police in connection with the incident.

In his defence contained in a statement made on oath, accused denied involvement in the killing of his father. He stated that he was framed owing to a subsisting grudge with his brothers, PW2 and PW3.

The prosecution has a duty to prove the case against the accused person beyond reasonable doubt. See *Sekitoleko vs Uganda* [1967] EA 531; *Woolmington vs DJ3P {1935J* AC 462. Accused has no duty to prove his innocence and any gap in the prosecution case is to be resolved in favour of the accused. Any conviction will be based on the strength of the prosecution case. The following ingredients must therefore be proved where the charge is of murder:

i. That the deceased died;
ii. That there was an unlawful act or omission which resulted into the death of the deceased;
iii. That there was malice aforethought; and
iv. That accused participated in the crime.

Regarding the death of the deceased, PW1, PW2 and PW3 testified that the deceased. Bateera Christopher died. Agreed evidence in the Postmortem report shows that Bateera Christopher died. It was also the evidence of the accused that Bateera Christopher died. Consequently I am satisfied that the prosecution has proved this ingredient beyond reasonable doubt.

Concerning the second ingredient, it is the presumption of the law that the killing of any person is unlawful. The presumption will however be rebutted by evidence showing that the killing was accidental or that it was excusable by law. See *Gusambizi s/o Wesonga vs R* (1948) 15 EACA 63. Since this presumption has not been rebutted my finding is that the prosecution has proved this ingredient also beyond reasonable doubt.

Malice aforethought can be inferred from surrounding circumstances where there is no direct evidence of the same as is the case here. Such circumstances are the number of injuries inflicted on the victim, the part of the body where the injuries are inflicted, the nature of the weapon used and the conduct of the killer before and after the attack. See *Uganda vs Ochieng* [1992 — 1993] HCB 80. According t6 PWI the deceased was assaulted with a hoe in the head. The post mortem report shows that a hard object was used to inflict injuries on the deceased, who was struck while he slept. According to the report the impact was on the right hand side of the head. Doubtless this is a delicate part of the human anatomy. I note also that those who attacked the deceased, apart from the weapon used, carried a light which was a tadooba. Doubtless they ensured they did

what they set out to do. I have no doubt there was malice aforethought. I should note here with regret that though a hoe was identified and collected in connection with the incident according to PW2 and PW3 nothing was done with it to further progress of the investigations in this case. Nevertheless this ingredient has been proved by the prosecution beyond reasonable doubt.

Accused's participation should be considered in view of available evidence. PW1 testified that he had seen accused and another of his uncles assault the deceased in the room where both PWI and the deceased slept. It was his evidence he had been sleeping for about 4 1/2 hours when he was rudely awakened by disturbing noise of the deceased being assaulted. PW1 testified that while the deceased slept on a bed he (PW1) slept on the floor and that their room was 3 metres by 3 metres square. He said he was able to see his two uncles' assault the deceased with a hoe owing to light from a tadooba which accused carried.

In *Abdalla Nabulere & Anor vs Uganda* [1979] HCB 77 it was stated thus:

> 'where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number or such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger
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> When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution.'

For more certainty the Supreme Court of Uganda in *George William Kalyesuhula vs Uganda* Criminal Appeal No. 16 of 1997 (unreported) stated:

> "The law with regard to identification has been stated on numerous occasions. The courts have been guided by *Abdula Bin Wendo & Anor vs R* (1953)20 EACA and *Roria vs Rep* [19671 EA 583 to the effect that although a fact can be proved by the testing of a single witness this does not lessen the need of testing with greatest care the evidence of such a witness respecting identification especially when the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error.'

See also *Moses Kasana vs Uganda* [1992—931 HCB 47, 48 in this connection.

I warned the assessors and warn myself of the danger involved in relying on identification evidence to convict. The factors involved in the *Nalubere case* I have taken into account as I have done those in the *Kalyesubula* case and that of *Kasana.* I have considered that after the assailants had left the scene, according to PW 1, he together with the wife of one of his uncles proceeded to the home of the accused which is situate 30 metres from the house where PWI slept. According to PWI the, went to the home of accused 10-15 minutes after the attackers had left the scene of crime. It is PWI's evidence that when they reached accused's house he took some time to open for them because he had been sleeping in his house. After he woke up he accompanied them back to the scene of crime. This evidence tallies with that of accused in his defence statement which was made on oath. In fact he raised an alarm to summon people to the scene. I do not believe that given the short distance between accused's house and the scene of crime and the short span of time that went by between the escape of the assailants and the visit of PWI to accused's house it could have been possible for accused, had he been in the party that attacked deceased, to have had time to settle in his house and sleep as the body of evidence suggests. It is also debatable whether he could have been available to go to the scene and raise an alarm knowing very well that he had been involved and that his nephew had seen him. When people answered the alarm accused was not arrested at the scene although he was present. It is likely accused was named by PWI as an afterthought. He was arrested later when he was near

Ntungamo Police Station. It is the prosecution case that when accused was arrested he was fleeing from arrest. On the other hand accused stated that he too had gone to Ntungamo Police Station just like others and that when he was arrested he was going to inform his mother about what had happened to the deceased.

When an accused person sets up a defence of alibi it is not his responsibility to prove it. The duty is on the prosecution to disprove the alibi by adducing evidence which places the accused person squarely at the scene of crime. Sec *Uganda vs George Kasya* [1988- 1990] HCB 48. According to the accused at the time the attack was made on the deceased he was sleeping in his house. I have already pointed out that the evidence of PW 1 was partly to the effect that accused was sleeping in his house when he went to call him. I do not find the alibi disproved by prosecution evidence. In the circumstances the prosecution has not proved beyond reasonable doubt that accused was one of the attackers who fatally assaulted the deceased.

The gentlemen assessors advised me in their joint opinion to convict accused as charged. For the reasons I have given in the course of this judgment I do not agree with that opinion. I find accused not guilty of the charge and acquit him.

P.K. Mugamba

Judge

11th April 2005