

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL SESSION CASE NO. 421 OF 2006**

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

**VERSUS**

**BAGAMPAGIRE GODFREY:.....: ACCUSED**

**BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA**

**JUDGMENT**

The accused is indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The prosecution called three witnesses to prove its case and the accused gave evidence on behalf his behalf in answer to the indictment.

The brief facts are that the accused and the deceased were business associates and/or in a relationship of employee and employer. According to the accused, the deceased brought him from Sembabule, Mawogola Distirct to Kayango village, Kapyanga in Bugiri Distirct to cultivate the deceased's rice gardens. Accused lived in the same compound with the deceased and the deceased's mother. On the fateful night the accused and the deceased had a fight in the deceased's mother's hut that resulted in serious injuries to the deceased. He died as a result of the injuries. Evidence was led to show that there had been a struggle in the hut where the deceased died. Further that the accused hit the deceased with a pounding stick on the legs and a hoe on the head. The Post Mortem Report (Exh. P1) showed that the deceased died of excessive bleeding following deep cut wounds.

The LC Vice Chairman Kayango (PW2) testified that the mother of the deceased, Ajambo summoned him to the scene of the crime. He found the deceased still alive but lying in a pool of blood. He had very serious injuries and was in a critical condition. PW2 arrested the accused just outside the hut in which the fight took place and took him to Kayango Local Administration Police. Accused was later re-arrested by PW1 Detective Corporal Masete and transferred to Bugiri Police Station.

At the Police Station, the accused was alleged to have confessed that he committed the offence to two police officers and two statements were made, one of them a charge and caution statement. In the charge and caution statement recorded by PW3, Detective Inspector of Police (Rtd) Mulobole, the accused admitted that he injured the deceased in a fight and that it was in a bid to defend himself from an assault by the deceased. The statement describes in detail how the accused inflicted the wounds on the deceased and the instruments that he used to do so.

When the statement was tendered in evidence the accused informed court through his lawyer that though the contents of the statement were true, but he was beaten up by the police officers before he made the statement. As a result a trial-within-a-trial was held in which the accused denied that he made the statement. The accused insisted that he was beaten up and that he made the statement because of the pain inflicted upon him by the policemen. Court disbelieved the accused and the statement was admitted in evidence as Exhibit P4. This charge and caution statement now appears to be the main piece of evidence adduced by the prosecution because unfortunately, the deceased's mother Awino who found the accused at the scene of the crime and called in PW2 the LC1 Vice Chairperson died before this trial could be held. PW2 did not see the fight. Apart from the Vice Chairperson the prosecution summoned no other witnesses except the two police officers who recorded statements from the accused and who were of course did not witness the fight between accused and the deceased.

After the prosecution had called one witness, the accused through his advocate proposed to plead to the lesser charge of manslaughter. The prosecution withheld its consent because counsel was convinced that there was enough evidence to sustain a charge of murder against the accused. In spite of his earlier prayer to plead guilty to a lesser charge, the accused gave evidence that on the fateful night he was not at Ajambo's house. He also denied that he lived in the same compound with the deceased and asserted that he lived on the deceased's other kibanja in Kisenge. The accused informed court that he did not know about the death of Batwawula until he was arrested from his house where he was found sleeping at 4.00 a.m. on 6/04/04. He denied knowledge of any fight with the deceased against whom he claimed to have no grudge. The accused further testified that residents suspected him of committing the offence and he was charged with it because he was a new resident in Kayango. That Batwawula (now deceased) was the only person in the village who knew him, which made him a soft target for a frame-up by other residents in respect of the offence.

In all criminal cases an accused person is presumed innocent until proved or pleads guilty. This is provided for by Article 28 (3) (a) of the Constitution of the Republic of Uganda. The burden of proof rests upon the prosecution, throughout the trial, to prove the charge and all its ingredients. The burden does not shift to the accused. This is the long established position of the law since the decision in **Woolmington v. DPP (1935) AC 462** which has been affirmed by courts in Uganda in several cases including **Oketcho Richard v. Uganda, Supreme Court Criminal Appeal No. 26 of 1995** (Supreme Court of Uganda Certified Criminal Judgments 1996 – 2000 at 148). The accused is also to be convicted on the strength of the prosecution case and not on the weakness of his defence (**Israel Epuku s/o Achietu v. R [1934] 1 E.A.C.A. 166**).

In order to sustain an indictment for murder, the prosecution has the burden to prove all the ingredients that constitute the offence against the accused as follows:

- i. That Batwawula (the deceased) died,

- ii. That the cause of his death was unlawful,
- iii. That the accused caused the death of the deceased, or participated in causing it,  
and
- iv. That he caused it with malice aforethought.

Regarding the death of the deceased, the prosecution relied on the evidence of PW2 who testified that one Ajambo, the mother of the deceased summoned him to her home in the night of 6/04/04. When he got there he found the deceased who had been assaulted lying in a pool of blood, and in a critical condition. He was informed that the accused was assaulted by the accused so he arrested him and took him to local administration police at Kayango. When he returned to Ajambo's home he found the deceased dead. Detective Patrick Masete (PW1) testified that he was summoned to rescue the accused who was likely to be beaten up by a mob and who was being held at the local administration police. After seeing that accused was already safe in custody he proceeded to the scene of the crime where he found the body of the deceased lying in a pool of blood inside a hut. This evidence was supported by the post mortem report, which showed that the deceased died of excessive bleeding following deep cut wounds. Accused also agreed that the deceased died. There is thus no doubt that the deceased died and I find that the prosecution proved this first ingredient beyond reasonable doubt.

Regarding the second ingredient, it is the presumption that all homicides are unlawful except where they occur in the due process of law or where they are caused by accident. Article 22 of the Constitution of Uganda guarantees the right to life and it provides that one should be deprived of life except in execution of a sentence passed by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the highest appellate court has confirmed the conviction and sentence. According to the post mortem report (Exh. P1) the death of the deceased resulted from excessive bleeding due to deep cut injuries that were not self-inflicted. The inference from this finding is that the deceased was assaulted. The weapons likely to have been used were named in the post mortem report to be a hoe and a pounding stick. Assault is an offence under the laws of

Uganda and therefore unlawful. Since the defence also conceded that the death of the deceased was caused unlawfully, find that the prosecution has proved the second ingredient beyond reasonable doubt.

As to whether the accused caused or participated in causing the death of the deceased, there was no direct evidence linking the assault of the deceased to the accused. The prosecution relied on circumstantial evidence to prove this. The main piece of evidence was the confession that was first made to PW1, the arresting officer and later to PW3, Detective Inspector of Police Messhach Mulobole in the processes of administering a charge and caution. The statement was admitted following a trial-within-a-trial as Exh. P4. In the charge and caution statement the accused stated:

*“I did not murder him but the deceased fought me, (sic) he found me preparing my super, (sic) he poured the white ants then held me by the neck and beat me seriously, (sic) during the struggle to gain freedom, I got hold of a pounding stick (sic) which I hit him on his legs,(sic) he fell down but still holding me and beating me,(sic) I struggled until I got hold of a hoe (sic) which I hit him on his head and he released me.”*

In his defence, the accused denied that he made this confession. He testified that the detectives had coerced the confession out of him by use of force and intimidation. Mr. Niyonzima Vincent, Resident State Attorney invited court to treat this confession as a retracted confession. Relying on the decision in the case of **Kasule v. Uganda [1992-92] H.C.B. at 39**, he submitted that a retracted confession would not normally be used to support a conviction unless it is corroborated by other evidence. However, court might rely on it if it is fully satisfied in the circumstances of the case that the confession must be true. Mr. Niyonzima added that in the circumstances the confession detailed how the circumstances unfolded, including offering a defence on the part of the accused. He submitted that such a confession had to be true and it required no corroboration. But in

the event that it did require corroboration, he invited court to treat the prior confession recorded in the statement of the accused to PW1 as corroboration to the confession.

Counsel for the accused, Ms. Birungi Monica, also invited court to treat the confession as retracted. She submitted that the evidence of PW1 should be treated as hearsay evidence and could not corroborate the confession. She contended that for the confession to be considered as evidence, it had to be corroborated by independent evidence other than that of PW1.

The law on retracted and repudiated confessions was reviewed by the Supreme Court in **Matovu Musa Kassim v. Uganda, SC Criminal Appeal No, 27 of 2002** where the accused had retracted a confession that he made immediately after arrest because he alleged it was not made voluntarily. It was held, affirming the decision in **Tuwamoi v. Uganda [1967] EA 84** that:

*"A trial court should accept any confession which has been retracted or repudiated with caution and must, before founding a conviction on such a confession, be fully satisfied in all circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."*

The case of **Matovu Musa Kassim** (supra) is almost on all fours with the instant case regarding the statement that was in contention. In that case, the learned Justices of the Supreme Court observed that the appellant made a detailed statement disclosing facts and events which only a person who was an active participant and eye witness to much of what occurred on the night of the murder could have been familiar with. Though the

accused gave sworn evidence at his trial in which he repudiated the statement, a number of factors existed to discredit any claim that in any way affected the facts and events he disclosed. Court therefore concluded that any claims that the appellant was framed had no truth in them and up held the confession and the conviction that had been based on it.

I am fortified by the decision of the Supreme Court cited above and I do agree with Mr. Niyonzima that the statement of the accused disclosed details that could not have been given by a person who was not a participant or eye witness of the events that took place in Ajambo's hut on the night that the deceased was assaulted. Because the accused was telling it all as it had happened, he was so convincing that he even offered the defence that he only hit the deceased because he was defending himself from an attack. There is no other conclusion that can be drawn from the surrounding circumstances, that the confession cannot be but true. There is therefore no doubt that it can be used as a basis for conviction of the accused.

In the event that there is any doubt as to the truth of the confession the doubt would still be resolved against the accused in this case because there is other evidence on record which corroborates the circumstances in the confession other than the testimony of PW1. During the trial-within-the-trial, the accused testified that the beatings that were inflicted upon him by the detectives in order to extract the confession resulted in injuries to his left eye and loss of sight in that eye. On the other hand, PW3, DIP Mulobole testified in the same trial that on administering the charge and caution, he observed that the accused had injuries. He testified that accused had bruises on his face and another injury on his finger. According to PW3, the accused informed him that he got the injuries during the fight with the deceased.

The accused was examined and PF 24 filled after his arrest. The findings on PF 24 that was filled at Bugiri hospital on 8/04/04, barely two days after the incident, show that at the time of his examination the accused had "*healing wounds right orbital, neck region and a swollen right hand.*" These injuries are consistent with the struggle between the

accused and the deceased that was described in the charge and caution statement. In the statement the accused disclosed that the deceased got a hold of him by the neck. This explains the finding in the report that the accused had “*scratch wounds behind the neck.*” The swollen right hand is explained by accused’s report to PW1 that during the struggle, the deceased got a hold of his hand and twisted it or turned it down causing his pain. The accused then retaliated by getting a pounding stick with which he hit the deceased. These circumstances disclosed to PW1 and the doctor’s findings on examining the accused corroborate the contents of the confession in the charge and caution statement.

The accused’s testimony that he was beaten up by the investigating officer as he extracted the confession from him is therefore an after thought and a pack of lies. It contradicts the instructions that accused gave to counsel who disclosed to court that the accused had informed her that the contents of the statement where true and that accused had narrated them to the police officer. It also contradicts his prayer during the course of the trial to plead to the lesser charge of manslaughter. The accused would have had court believe that he was tortured brutally by PW1, Masete. He testified that Masete hit him with a baton on the head several times and he bled from the nose and the eye. He described the baton as a hard stick the size of his arm that had a lump at the end. It is inconceivable that the accused could have been hit several times on the head with such a weapon and not sustained injuries (most likely concussion) and/or collapsed from such beating.

Regarding his participation in the offence, the accused raised an alibi. In his testimony the accused claimed not to have been at the scene of the crime. That defence was negated by the fact that the confession put him squarely at the scene of the crime. The wounds he sustained during the fight with the deceased corroborated his confession. By the foregoing, the defence of alibi is negated.

*I am therefore fully satisfied in all circumstances of the case that the confession as adduced in the charge and caution statement was true. By virtue of his own confession, the accused was placed at the scene of the crime and he did have a fight with the deceased, which led to the serious*



*injuries that resulted in his death. On the basis of the confession, I find that the prosecution has proved the third ingredient beyond reasonable doubt.*

*The final ingredient that the prosecution had to prove to sustain the indictment is malice aforethought. Malice aforethought has been broadly defined in s.191 of the Penal Code Act. It is there provided that malice aforethought shall be deemed to be established by evidence proving an intention to cause the death of any person whether such person is the person actually killed or not; or knowledge that the act or omission causing death will probably cause the death of some person whether such person is the person actually killed. It does not matter that such knowledge is accompanied by indifference whether death is caused or by a wish that it may not be caused. From this definition, malice aforethought is a state of mind, which cannot be established from direct evidence, but which can be inferred from the circumstances of the case at hand.*

The formula above became law after the decision in **R v. Tubere [1945] 12 EACA 63**. In that case and subsequent case, courts have consistently held that malice aforethought can be inferred from the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used, and the conduct of the accused before, during and after the incident.

In the instant case, the prosecution relied on the weapons used to inflict the injuries and the part of the body that was targeted to infer that there was malice aforethought. According to the post mortem report, the accused had gush wounds on the *occiput* (part of the head) and on the legs. In his confession the accused stated that he hit the deceased with a hoe on the head. On the basis of these criteria, the prosecution invited court to find that malice aforethought had been proved beyond reasonable doubt.

Counsel for the accused submitted that there was no evidence to show that the actions of the accused were premeditated; no evidence was brought by the prosecution to show that there was a prior arrangement or threats made by the accused to kill the deceased. It

was also submitted that the accused had not run away from the scene of the crime so that guilt could be inferred from such action. Counsel for the accused thus submitted that malice aforethought had not been proved beyond reasonable doubt by the prosecution and the accused could not therefore be convicted of murder.

In addition, counsel for the accused submitted that in his confession the accused stated that he had been forced to hit the deceased with a hoe because deceased attacked him and held him by the neck. The accused added that after he hit him with a pounding stick on the legs, the deceased fell down but he continued holding onto the legs of the accused who was trying to run away to avoid imminent danger. She drew that attention of court to the evidence of PW1 that there was evidence of a violent struggle between the accused and the deceased in the hut where deceased's body was found. Counsel then prayed that in the circumstances court should find that the defence of self-defence is available to the accused and convict him of manslaughter instead of murder.

The law on the defence of self-defence was discussed in **U v. Dic Ojok [1992-1993] HCB at 54** where the elements of the defence were laid down. Court was of the opinion that there are four factors that could be said to constitute self-defence:

- i. There must be an attack on the accused,
- ii. The accused must as a result have believed on reasonable grounds that he was in imminent danger of death or serious bodily harm,
- iii. That accused must have believed it necessary to use force to repel the attack upon him,
- iv. The force used by the accused must be such force as the accused believed on reasonable grounds to have been necessary to prevent or to resist the attack; but in determining whether the extent of force used by the accused was reasonably necessary, regard must be had to all the circumstances of the case.

There is no doubt that the force that the accused used in this case – hitting the accused with a hoe was excessive. Although the deceased had at the onset of the fight gotten a hold of the accused's neck, when the deceased hit him with a pounding stick on the legs, the deceased fell down. Deceased was not armed and he was on the ground. The immediate danger to the accused's life had been reduced had it not been for the deceased's continued clutching onto his legs to prevent accused from making an escape. This in the view of the accused necessitated use of more force to get the deceased to release his legs so that he could escape. It will be remembered that the initial attack on the accused was vicious. The deceased grabbed him by the neck and perhaps threatened to strangle him. The scratch marks recorded in the medical exam report on the accused Exh. P2 attests to this.

In **U v. Dic Ojoc** (supra) it was held that although a person who is attacked in circumstances where he reasonably believes his life is in imminent danger is entitled to use force, even deadly force to repel the attack, the determination that the person is placed in such a situation where he must use force to protect his life is one of fact that depends on the circumstances of a particular case. Court concluded that the person would not be availed the defence of self-defence if there are no reasonable grounds upon which he based his belief that the force used was reasonably necessary to repel the attack.

In the instant case, the fact that the accused tried to disengage and run away from the deceased after he hit his legs and he fell to the ground deserve closer examination because it is his reaction after he removed the imminent danger and the accused's response to it that would determine whether the accused needed to use more force to repel the attack. In **U v. Ojoc** (supra) court found that although a person faced with imminent danger of death may use such force as he reasonably believes necessary in the circumstances, he must evince a willingness to temporise or disengage and perhaps to make some physical withdrawal. If the opportunity to avoid conflict exists and instead force is resorted to, this may be used to determine whether the force used was reasonably necessary in the circumstances.

I find that the circumstances in which the accused was placed, with the deceased who had previously threatened to strangle him clutching onto his legs to prevent his escape, could have caused the accused to lose all sense of reasonable action. His immediate response was to get the deceased to release him at all costs. He got the nearest weapon that he could find to achieve this and unfortunately, the hoe was the nearest that he could use. As was held in **U v. Dic Ojoc** (supra) the person in danger of a violent attack “is not expected to weigh to a nicety the exact measure of the defensive action since it is known that fear, pain and surprise can physiologically so change a person as to literally take him out of his normal self.”

I therefore find that the instant case can be distinguished from that of **U v. Turwomwe [1978] HCB 15** which was cited by the learned Resident State Attorney to support the submission that malice aforethought is inferred where the accused hits the deceased with a deadly weapon such as a *panga* in a vulnerable part of the body like the neck. In the instant case, though the accused hit the deceased on the head with a hoe, he had been placed in a situation where he was afraid for his life. He could not in the circumstances start considering which part of the deceased’s body to disable. He had already tried the legs and the deceased continued to fight him, in fact to prevent him from making his escape from the struggle and imminent danger to his life.

The assessors in this case gave a joint opinion. They opined that on the basis of the evidence that had been adduced before this court, the accused killed the deceased but he did not do so intentionally. I agree with them. In the end result, I find that the prosecution did not prove malice aforethought beyond reasonable doubt. The accused was clearly trying to defend himself and unfortunately ended up killing the deceased. The defence of self defence shall therefore be availed to him. The accused is therefore acquitted of murder and is instead convicted of manslaughter.

**Irene Mulyagonja Kakooza**

**JUDGE**

14/08/08