

**REPUBLIC OF UGANDA**

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

**HCT 03 CR SC O324 2010**

**UGANDA .....PROSECUTION**

**VERSUS**

**MAWANDA PATRICK.....ACCUSED**

**BEFORE HON LADY JUSTICE FAITH MWONDHA**

**JUDGMENT**

The accused was indicted on a charge of murder C/S 188 and 189 of the Penal Code. The particulars as alleged by the prosecution were that the accused Mawanda Patrick on the 21/Nov/2008 at Bulyabita village in Kamuli district murdered Kyelanga Peter.

The prosecution as usual in criminal cases except in the cases of insanity has the burden throughout the trial to prove the case beyond reasonable doubt in order to bring the guilt of the accused person home. The accused has no obligation to prove his innocence and the accused is convicted on the strength of the prosecution case and not on the weaknesses of the defense case. It is settled law, see *Woolington v. DPP [1935] AC 362; Sekitoleko v. Uganda [1967] EA532; Justin Nankya v. Uganda Sc CR App No 24/1995 (Unreported citing with approval Okoth Okale v. R [1955] EA 555)*

The prosecution laid evidence of five witnesses in addition to the medical evidence admitted as under S.56 of the TID.

In a murder charge there are four ingredients to be proved beyond reasonable doubt as follows;

1. That the deceased is actually dead
2. That the cause of death was unlawful
3. That there was malice aforethought or intention to kill
4. That the accused participated in the unlawful act/omission

As far as the first ingredient is concerned, there was the admitted evidence contained in the postmortem report PF48. The deceased Kyelanga Peter was identified by one Wilson Nadiope to the Dr Isabirye of Kamuli Hospital who was carrying out the postmortem examination on the 22/11/08. The deceased was found with deep laceration on his head ospitory region. The cause of death was established to be major head injury due to trauma following hitting with a club.

PW1 testified that the deceased died at the hospital. PW2 also testified about the death of the deceased. PW3, PW4 and PW5 said that the deceased died. I was satisfied that this ingredient was proved.

On the second ingredient its trite law that every homicide is presumed unlawful unless if it's excusable, accidental or justified see ***Gusambizi S/o Wesonga v. Republic [1948] EACA 65***. In the instant case the evidence adduced was to the effect that there could not have been any excuse or justification for hitting the deceased on the head to cause the deep wound. PW2 told court that the accused hit the deceased on the head once and the accused ran away with the stick.

That the stick had something like a club. That the deceased fell and was taken to the house which he was taken to hospital. I was satisfied that this ingredient was proved.

On the third ingredient, S.191 of the Penal Code provides how malice aforethought can be deemed to be established;

- a. An intention to cause the death of any person whether such a person is the person actually killed or not

- b. Knowledge that the act or omission death will probably cause death or 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.

The evidence brought out by PW2, PW3 is to the effect that the accused hit the deceased on the head with the stick he came with at the drinking place. It was two and a half inch stick with sort of a club. The deceased fell and he was bleeding from that wound. That the accused was reprimanding the deceased that he should not familiarize home. That the deceased bled and he was helped by being tied on the head and he was taken to the LC's place and thereafter was taken to Nawendwa Hospital where he died from on that very evening. It has been stated in various cases including *Uganda v. Kato and three others [1976] HCB 204*, *Republic v. Tubeire [1945] 12 EACA 53* that it's the duty of the court as far as possible to examine all the surrounding circumstances of the case including the actions of the accused, the conduct which precedes and the conduct which follows the killing, the way the killing was carried out, the nature and quality of injuries, the nature and kind of weapon that was used.

In this instant case the accused targeted the head which he hit once while reprimanding the deceased that he should not familiarize him. After that he ran away with the stick he used. His conduct which culminated in him reprimanding the deceased just points to nothing but the intention to kill. I was satisfied that the third ingredient was proved too.

On the last ingredient of participation, PW2 testified vehemently about what happened. He knew the accused very well and the incident took place before dark at 5pm and they were at close range. After hitting the deceased, the accused ran away with a stick.

PW3 who was seated four meters away from where PW2, the deceased, James, Dibba, Stephane and Mutiibwa. That they were drinking when the accused came there also. That it was around 6pm. That the accused came when he was annoyed. That he came with a stick. That they started quarreling with the deceased where by a fight ensued. That none of the others three separated or did anything. That the accused got the stick he came with and hit with a lot of force on the head of the deceased. The deceased fell down and the accused

walked away. That PW1 and PW2 carried the deceased to LC1 Chairman. That the deceased was bleeding from the head and at that time he was alive. That the stick had another piece which looked like a club. That the deceased did not hit the accused and he fell down the moment the accused hit the deceased. That the waragi he accused was drinking poured after that he hit the deceased.

The accused in his defense he never denied having hit the deceased he only differed in respect of the object used. He said that he hit him with the sandal which the deceased used to him with. PW3 the only eye witness who mentioned the fight between the two stated that the deceased never hit the accused at all. But PW2 and PW3 stated that the accused reprimanded the accused from not familiarizing him. The accused in his defense also affirms that he was at the scene of crime at about 5pm and he affirms that he went there the deceased and PW2 and PW1. What came out of this is that, he went there later, so he could not have been drunk. He stated that it's the accused who wanted to take the stick he had come with away. So it was not in dispute that he came with the stick. He alleged that when he fell down the deceased removed his own shoe and hit him on the face and that he retaliated by also removing the shoe from him and hit him with it on the head. This evidence especially about taking the deceased shoe and hitting him with it on the head was too farfetched. It was merely concoction of evidence to make it appear as if the accused hit him in self defense and provocation. According to the evidence the prosecution and from the defense, it was clear that the accused just started off a quarrel with the deceased and that's why he reprimanded him (deceased) not to familiarize him (Accused). It was the accused evidence in his defense that the deceased asked him why he was always walking with that stick. That the deceased commanded him to hand over the stick. This could not be believed since PW2 and PW3 stated that it's not the deceased who moved to where the accused was but the vice versa was correct. That was a lie which could not shake the prosecution case.

The State Attorney Jacqueline Okui in her submission argued that the prosecution had proved its case beyond reasonable doubt. That all the four ingredients had been proved to that standard which is required in criminal cases. She referred to the cases of ***Woolington v. DPP [1935] AC 362***. She also referred to the case of ***Miller v. Min of Pensions [1947] 2ALLER at page 372*** and S. 188 of the Penal Code which provided the ingredients of murder as

already stated in this judgment. She also referred to the case of ***Gusambizi S/o Wesonga [1948] 15 EACA 65*** where she submitted that the cause of death was unlawful as from the facts there was no excuse and it was not accidental to justifiable. She said all the ingredients had been proved beyond reasonable doubt and the accused she prayed to be found guilty and convicted accordingly.

While the defense counsel Evelyn Kabonesa on the other hand submitted that she conceded on the prosecution having proved its case on the first, second and fourth ingredients but failed to prove the third ingredient of malice aforethought. She cited the case of ***Uganda v. John Ocheng [1992-1993] HCB page 81***, which virtually reproduced what is provided in S.191 of the Penal Code for malice aforethought to be deemed to be established. And what the court should establish by evidence in order to conclude that the intention to kill was there at the time of the murder. She submitted that the evidence of the prosecution established on one injury on the head and that the accused struck only once. That the stick was small two inches in circumference. That it was not the intention of the accused to kill since it was a small stick. She submitted on the conduct of the accused before and after the commission of the offence. That there was a quarrel in the bar and a fight ensued. She submitted that the court should take it that the accused did not target the head but should consider the fight when the accused told the deceased that he should stop familiarizing him. She cited the case of ***Uganda v. Tereza Onzira and Another [1995] KLR*** and did not cite the page whose emphasis was on the use of a deadly weapon which I found of no relevance to the charge of murder and therefore not applicable.

There was very strong irrefutable and irresistible evidence of malice aforethought. The accused arrived at the scene of crime at around 5pm. He bought himself a drink (waragi) of 100/=. He walked towards the deceased where the deceased asked him why he always moves with a stick. The accused responded by telling him that he should not familiarize him after which he hit the deceased on the head once but with a lot of force. This resulted into a deep laceration on the head occipital region. The cause of death was a major head injury due to trauma following hitting with a club. The fight was allegedly only between the deceased and the accused when the accused attacked the deceased from where he was sitting. The deceased much as he was taken to hospital he bled and he died before the next day according to PW2.

The omicron took place in broad day light and the witnesses knew the accused person very well there was no chance of mistaken identity. That evidence proved beyond reasonable doubt that the accused had the intention to kill and I was satisfied that the prosecution had discharged its burden.

The assessors in their opinion advised court to acquit the accused of murder and convict him for manslaughter because of the fight that ensued.

As I have already stated above, the defense of the accused could not shake the prosecution case as far as proving the third ingredient. There was an outright malice aforethought considering the force used, that self defense and provocation could not stand as justifiable. The defense counsel contradicted herself in her submissions when she stated that she was not contesting ingredient 1, 2 and 4. If that was the case, then she would have contested the second ingredient since the defense of provocation and self defense would be available. The prosecution evidence was strong and clear that it cast no doubt in my mind that the cause of death was not justified (the deep injury on the head) and since the head is a vulnerable part of the body, the accused had the intention to kill.

The assessors in their opinion advised me to find the accused person guilty. I agreed with them because of the reasons given in this judgment.

I therefore find that the prosecution had proved its case beyond reasonable doubt. I find the accused guilty of murder C/S 188 and 189 of the Penal Code Act and he is convicted accordingly.

Faith Mwendha

**Judge**

13/09/10