REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CASE NO HCT 03 CR SC 0325 2010

UGANDA…….PROSECUTION

IBANDA CHARLES ALIAS LUKALU SAM……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 Act. The particulars as alleged by the prosecution were that on the 15th June 2008 in Bukana zone, Buwambe village, Kamuli District murdered one Natima Martin Saleh.

The prosecution had the burden to prove beyond reasonable doubt the following ingredients;

1. That the deceased is dead
2. That the cause of death was unlawful
3. That there was malice afore thought or intention to kill
4. That the accused participated

Its trite law that the accused is only convicted on the strength of the prosecution evidence against the accused had no duty to prove his innocence see **Justine Nankya v. Uganda SC CR App. No 24/95 unreported also see Okoth Okale v. R [1955] EA 555**. To discharge its burden, the

prosecution led evidence of 6 witnesses in addition to the admitted evidence as under S.56 of the TID contained in PF24 where the accused was examined.

On the first ingredient, the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 testified to the effect that the deceased was actually dead. I was satisfied that this ingredient was proved.

On the second ingredient, its trite law that every homicide is presumed unlawful unless if its justified, accidental or excusable see ***Gusambizi S/O Wesoga v. R [1948] 15 EACA 65***. The post mortem report established that the body had multiple bruises and swelling face, chest limbs and ribs were also bruised. The cause of death was bleeding and anemia because of internal bleeding. PW1 told court that he had someone crying saying he had been killed. That as he went he saw the accused beat the deceased. That the bruises and wounds were caused by blunt weapons. I was satisfied that this ingredient was proved.

On the third ingredient, malice aforethought is deemed to be established in the circumstances as provided in S.191 of the Penal Code. From superior courts decided cases, malice aforethought can be inferred from the surrounding circumstances of the case that it can be inferred from the nature of the weapon used, the part of the body attacked, the manner in which the weapon whether repeatedly or not, the conduct of the accused before or during and after the incident *see* ***case of Uganda v. Kato and three others [1976] HCB 204 and R v. Tubere [1945] 12 EACA 63.*** The evidence produced by the prosecution was that of beating by one person with a stick several times at night at 11:00am. The evidence does not reveal which part was particularly w targeted. PW5 who was the doctor testified that, the post mortem report established that there were multiple bruises and swelling of the face. The cause of death was bleeding and anemia. From the above it points to the fact that there was malice aforethought taking into account that it was done in the night.

On the fourth ingredient of participation, there was only one eye witness PW1 who identified the accused when conditions were not favorable for proper identification. He said it was at 11pm when he heard a voice of Saleh saying that he is being killed. He said he did not say who was killing him. That he answered the cry and he went there. That he saw the accused beating the deceased several times. That the accused had a stick of about 2 inches in width and was an acacia

tree. That the accused just run away. He said that his home was 80 meters from the road. That when he went on the road and had moved for about five feet along the road he saw the accused in a distance of three meters. He said there was moonlight. PW6 was the chairman who told court that PW2 went and reported that her husband had been beaten the previous night. That she told him that her husband told her that it was the accused who beat him. That when PW1 came he also told him that he saw the accused beat the deceased. That when the chairman brought the accused to the scene the deceased pointed at him saying that it's him who beat him. PW6 had testified that it's the accused who beat him.

The accused in his defense denied having beaten the deceased; he said that on the material day he went to Dimintelia's place, that the deceased found him there. He said he didn't know that the deceased was Natima. That the deceased and one Jimmy called him to go and sit where they were. That the two pulled him forcefully. That they continued drinking. That one Mandwa left them when one blue pulled him away. That the deceased went and joined one Mandwa. That after drinking the accused went home and it was about 8pm. That the following day i.e. 16/06/08 his Muzei sent him to buy something's and after that he went to Demintilias bar where he started drinking. That as he was there the chairman came and took him to Natimas place and the accused never talked to Natima (deceased) and yet he saw him. That he was not told whom he fought with. The defense of the accused was not offering an innocent explanation so it was difficult to believe. It shows that the deceased and the accused were in company of one another together with other people. He stated that when he was taken to Natima (deceased place) he never said anything to him and yet he saw him in the condition he was in. at first in his statement he told court that when the deceased came he didn't know that it was Natima. This indifference is not innocent.

PW1 testified that he recognized the accused as the one who beat the deceased. According to PW5 there were several wounds and beatings which targeted the face and lips and the ribs. Though the conditions for proper and correct identification were difficult the circumstances which ought to be taken into i.e. the presence and nature of light, whether the accused was known to the witness before the incident or not, the length of time and the opportunity the

witness had to see the accused and the distance between them were all positive, see *Abdulla Nabulere and others v. Uganda [1978] HCB 79.*

When the deceased reached home since he was still talking and walking he told his wife PW2 that it was the accused who beat him. When PW6 came still the deceased told him that it was the accused who beat him. This was other evidence which corroborated PW's testimony by a single identifying witness. He told PW2 and PW6 long before he died and this is first and hard evidence which a dying declaration which requires corroboration and there was corroboration. There are witnesses who testified in court and they were subjected to cross examination. It was equivalent to a dying declaration. Even when the LC chairman went to hospital he still told him who was responsible. This left no doubt in my mind that the accused was properly identified both by PW1 and the deceased himself long before he died. The movements as revealed by the accused I his statement as they were at Dimintela's place drinking showed a hostile background which the accused was trying to cover up. I found it difficult to believe that the accused went home at 8:00pm and yet he was drinking. These were just lies. I found some inconsistencies in the prosecution case between PW1's testimony and PW2. PW1 stated that the accused ran away when he asked him why he was beating his friend and yet PW2 stated that her husband arrived home when he was just crawling. Then there was also an inconsistency between PW2 and PW6 in respect of where the deceased was lying. PW2 stated that the deceased was in the sitting room while PW6 stated that he was in the bedroom where he even helped them to remove when he went to the deceased's place the next day. These inconsistencies in my opinion did not go to the root of the prosecution case. I considered them minor so I ignored them. It has been held and its settled law currently that "inconsistencies and contradictions in the prosecution case may be ignored if they are minor and do not point to deliberate lies/untruthfulness on part of the prosecution witness." So I ignored these minor inconsistencies see *Bumbakali Lutwama and four others v. Uganda SC CR App No 38 of 1989 (Unreported)* cited with approval of *Alfred Tajar v. U Cr Sc App 167/1969 EACA.*

The conduct of the accused before and after the omission of the offence clearly shows that he had an intention to kill as deemed to be established in S. 191 of the Penal Code Act. It was very clear to me that it's the accused who participated in the commission of the murder. He caused the

death of the deceased with malice aforethought. For these reasons I disagreed with the submissions of the learned counsel for the accused, that the fourth ingredient was not proved beyond reasonable doubt as I had to caution myself and the assessors of the danger of convicting the accused on uncorroborated evidence of the deceased. Though in the instant case there was corroboration. PW2 was an independent witness who saw the accused beat the deceased. He didn't talk to him as the accused run away and the deceased went to his home. By the time PW3 went to the deceased's home already PW2 the wife of the deceased had told him that the deceased had told him that it was the accused who beat him. PW1 found when already PW2 had reported to the LC so there was no sharing information between PW1 and PW2 and besides PW1 never talked to the deceased that night. This was sufficient corroboration in my opinion. In the case of ***Jasinga Akum v. R [2] [1954] 21 EACA at page 334,*** it emphasized the use for corroboration and I quote "The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting and the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed, the deceased may have stated this inference from facts which he may have omitted important particulars from not having his attention called to him."

In the instant case the circumstances in which the evidence was led were clear free of any confusion. PW1 saw the accused beat the deceased. When the deceased reached home he told his wife PW2 that it was the accused who beat him. When PW3, the LC3 chairman came, the deceased told him that it was the deceased who beat him even on the day PW3 went to hospital the deceased was inconsistent. As I have already said in this judgment, the deceased stated in his defense that on the material day he was in company of the deceased but he then told a lie when he said that he left at 8:00pm. That the following day he again went in the same drinking place where he was arrested from. His defense was not real it was merely a fabrication which could not be believed.

The Evidence Act S.30 provides, "When the statement is made by a person as to the cause of his death or as to the circumstances of the transaction which resulted into his death in cases in which the cause of that person death comes into question and such stamen are relevant whether

the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question.

Its trite law that its unsafe to convict solely on the basis of a dying declaration which is not corroborated see ***Okwel v. Uganda Cr. App No 12/90 SCU, Tindiguihwa Mbahe v. Uganda Cr App 9/87 (CA)***

As I have already stated above there was ample corroboration from independent witnesses at different stages.

The assessor in his opinion advised me to find the accused guilty. I agreed with him because of the reasons already given this judgment. Accordingly I find that the prosecution has proved its case beyond reasonable doubt and I find the accused person guilty. He's convicted as charged.

Faith Mwondha

Judge

23/09/2010.