

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL SESSION CASE NO. 0088 OF 2010**

**UGANDA ::: PROSECUTOR**

**VERSUS**

**TABAARO SULAIMAN ::: ACCUSED**

**BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGMENT**

**TABAARO Sulaiman** was indicted for murder contrary to **Section 188 and 189 of the Penal Code Act**. The particulars of the offence alleged that the accused on 30<sup>th</sup> March, 2007 at Busungura village, Kayunga District murdered Sonko Valentino.

When the indictment was read and explained to the accused he denied the offence. It was therefore upon the State to prove all the essential ingredients of the offence of murder beyond reasonable doubt. The accused person does not bear the burden of proving his innocence. The above principle was since laid down the decision of **SEKITOLEKO v R [1967] EA 531**. The above principle has since been entrenched in **Article 28 (3) (a) of the Constitution of the Republic of Uganda**.

The essential elements of the offence of murder are the following:-

- (1) That the person alleged to be murdered is dead;

(2) That the deceased died out of unlawful act or omission;

(3) That whoever killed him did so with malice aforethought;

(4) That the accused participated in causing the death of the deceased: See **NANYONJO HARRIET & Another v Uganda (2007) HCBI Vol. 1 page 1 (Supreme Court).**

In order to prove the above ingredients beyond reasonable doubt the prosecution relied on the following evidence:

(1) Short death certificate and referral notes to establish the cause of death of the victim.

(2) The prosecution relied on the following evidence of witnesses:

Pw<sub>1</sub> Moses Sesanga who testified that he was at the scene when the incident took place and identified the accused assaulting the deceased.

Pw<sub>2</sub> Bogere Kivumbi who also testified that he was at the scene and witnessed the accused assaulting the victim.

Pw<sub>3</sub> Kiduma Dorozio also witnessed the madding and also identified the accused using moonlight.

Pw<sub>4</sub> Kisolo Moses testified that he answered the alarm and found the victim had been assaulted. He organized transport to take the victim to the Health Centre. He was informed by eye witnesses that it was the accused who had assaulted the victim. He found the accused reporting an assault of himself at the Police. He

informed the Police that it was the accused who had assaulted the victim and asked the Police to arrest him. Thereafter the accused was arrested accordingly.

The accused made a sworn defence where he stated that his home was near a bar where alcohol was served. He stated that during the material night he was woken up by drunkards who were fighting. He went to the scene where he saw Moses Sesanga Pw<sub>1</sub> standing while his colleagues were beating someone. After seeing him the assaultants fled the scene leaving the victim lying near his house. Because of that he reported the incident to the Police so that they could rescue the man. He denied assaulting the victim claiming that he was merely victimized because he was not born in the area.

### **Analysis:**

As far as the death of the victim was concerned, there was overwhelming evidence to prove that the deceased was dead and buried. The evidence of Moses Sesanga Pw<sub>1</sub>, Pw<sub>2</sub>, Bogere Kivumbi Athanisis and Pw<sub>3</sub> Kidura Donazio all testified that during the material night they were in a drinking joint. As they were returning home the deceased was attacked and stabbed with a Kunge on the lower abdomen. Together with the help of Pw<sub>4</sub> Kisolo Moses they rushed the victim to Galilaya Health Centre for First Aid and later he was transferred to Kayunga Hospital before he was referred to Nkozi for further management where he died. According to referral notes from Kayunga Hospital the deceased had sustained perforation on the transverse colon. Repairs on the same were done but he developed faecal fistula. A short death certificate from Nkozi Hospital indicted that the deceased died on 13/4/2007 and the cause of death was gastric fistula septicana. From the above overwhelming evidence I have no difficulty in concluding that the prosecution has established beyond reasonable doubt that Ssonko Valentino is dead and was buried.

On whether death of the deceased was unlawful, the presumption is that all homicide is unlawful unless caused by accident or in defence of property or person or when done under excusable circumstances: Before the decision by the Court of Appeal in **Paulo Omala v Uganda, Court of Appeal Criminal Appeal No. 6 of 1999**. That the above presumption was rebuttable upon the accused showing that the killing was either accidental or inexcusable and the standard required of the accused was to discharge the burden was very low. It was on the balance of probabilities: **Festo Shirabu C/O Musungu v R {1955} 22 EACA 454**.

The above position of the law was charged in **Omale v Uganda (Supra)** when the Court of Appeal emphasized that:

**“It is for the prosecution to prove beyond reasonable doubt that the prisoner with malice aforethought killed the deceased. It is not for the prisoner to prove accident or self defence and he is entitled to be acquitted even though the Court is satisfied that his story is not true, so long as the Court is of the view that his story might reasonably be true.”**

In arriving at the above passage the Court of Appeal was clearly applying the full import of **Article 28 (3) (a) of the Constitution** which is to the effect that the duty of proving the guilt of the accused is squarely on the prosecution and that duty does not shift on the accused as the accused does not bear the duty of proving his innocence. For that reason I find the case of **Omale (Supra)** groundbreaking as far as **Article 28 (3) (a) of the Constitution** is concerned.

Be that as it may, in the instant case all the prosecution witnesses testified that the deceased was stabbed on the abdomen and a wound was made 3 inches as to let out

the intestines which they tried to hold in position using a jacket belonging to Pw<sub>1</sub> Sesanga Moses. As a result of the wound he was taken first to Galilaya Dispensary for first Aid before he was rushed to Kayunga Hospital and later referred to Nkozi Hospital. The Referral notes from Kayunga Hospital indicated that the deceased sustained perforation on the transverse colon. The accused himself admitted that he saw the victim (who later turned to be the deceased accused) being attacked by some people he did not know except Pw<sub>1</sub> Moses Sesanga whom he saw standing aside. All the pieces of evidence above overwhelmingly show that the deceased died from an unlawful act of some assailants who caused him fatal injury on the colon from which he died even after receiving adequate medical attention. Death of Mr. Ssonko was therefore not natural, nor justifiable or excusable. This leads me to the issue whoever killed the deceased did have the necessary malice aforethought.

Malice aforethought is defined under **Section 191 of the Penal Code Act** to mean:

- “(1) an intention to cause death of any person whether such person is the one actually killed or not; or**
- (2) Knowledge that the act or mission causing death will probably cause death of 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.”**

Malice aforethought is the state of a human mind which is difficult to prove by direct evidence. However, that can be inferred from the facts surrounding the killing like the mode of killing, the weapon used, and part of the body assailed

and injured. To infer malice aforethought the court must also consider if death was a natural consequence of the act that caused the death and if the accused foresaw death was a natural consequence of the act: See **Nanyonjo Harried & Another v Uganda {2007} Vol. 1 HCB 1.**

In the instant case Pw<sub>1</sub> Moses Sesanga, Pw<sub>2</sub> Bogere Kivumbi and Pw<sub>3</sub> Kiduma Donozio all testified that the deceased was stabbed on the stomach whereby the intestine got out and a jacket belonging to Sesanga was used for keeping it in place. Their evidence was supported by that of Pw<sub>4</sub> Kisolo who answered the alarm and found the deceased in pains. He rushed the deceased first to Galilaya dispensary, and later to Kayunga Hospital. The prosecution evidence above were corroborated by both the Kayunga Hospital referral notes which established that the deceased had been stabbed and sustained perforation on the transverse colon. Later the deceased developed faecal fistula which according to the short cause of death report from Nkozi Hospital, was the cause of death.

From the above evidence, it is clear that the deceased was stabbed by a sharp object in the stomach. Whoever assaulted or stabbed the deceased with a sharp object in the stomach damaging his colon must have intended to kill him. Colon is a very delicate part of the intestine and it is difficult to repair as seen in the instant case. The same developed into a faecal fistula which eventually killed the deceased. For the above reasons like the gentlemen assessors I could not resist concluding that malice aforethought had been proved beyond reasonable doubt by the prosecution.

### **Participation of the accused.**

In the instant case the prosecution relied on the evidence from Bogere Pw<sub>2</sub> whose testimony was to the effect that as they were returning home the accused

came from behind and started assaulting him with a stick. He made an alarm while running following Sesanga Moses Pw<sub>1</sub>, Kiduma Donozio and the deceased. The accused by passed him and went and stabbed the deceased. The above evidence was confirmed by Sesanga Moses Pw<sub>1</sub> and Donozio Kiduma Pw<sub>3</sub> who testified that when the incident happened they were together with the deceased and Bogere. All the above witnesses knew the accused person before as a fish monger with whom they had dealt with.

There was moonlight which aided their identification. The attack was not a sudden one because the accused first attacked Bogere Pw<sub>2</sub> who made an alarm and alerted his colleagues. So when the accused followed his victims they were ready and prepared and they did manage to identify him. There was therefore no error in identification. After the incident they mentioned the name of the accused as their assailant. This was confirmed by Moses Kisolo Pw<sub>4</sub> who stated emphatically that on the material night he was at home smoothing fish when he heard an alarm. He rushed to the scene and found that the deceased had been stabbed around the stomach and he was informed immediately that it was Sonko the accused who was responsible. That it was Sesanga Moses Pw<sub>1</sub>, Kivumbi Bogere Pw<sub>2</sub> and Kiduma Pw<sub>3</sub> who gave him that information. They looked for Sonko but failed to get him. That after taking the deceased to Galilaya Dispensary for First Aid, he rushed to Galilaya Police Post to report the matter. As he was there he got the accused at the Police Post allegedly reporting a case of assault on him. From there he told the Police that it was the accused who had stabbed the deceased. Upon that report the accused was detained by the Police.

In his sworn defence the accused made a defence of total denial and Alibi. He stated that he woke up and found some people fighting near his house. At the scene of the fight Moses Sesanga Pw<sub>1</sub> was standing nearby, apparently drunk.

He saw the victim of the fight lying down. Because of that he reported to the Police so that they could help the victim.

After looking very carefully at the evidence of the prosecution witnesses and the defence of the accused, I find that the identification of the accused was done under very favourable circumstances. The witnesses knew the accused before there was ample light and the attack was done in close proximity when the witnesses had been alerted of the pending attack because the accused followed the victim for some distance before attacking.

The evidence of the eye witnesses were ably corroborated by that of Kisolo Moses Pw<sub>4</sub> who upon being informed that it was the accused, who was the assaultant, got the accused at the Police Post. The accused had reported a case of assault on him. It was Kisolo who put the record straight and told the Police that it was the accused who had assaulted the deceased and that was how the accused was arrested. For the above reasons I find that the prosecution witnesses did place the accused squarely at the scene and his defence of total denial and alibi are therefore a sham, and if not a mere afterthought to nozzle himself from the crime he had committed. In conclusion therefore I find that all the ingredients of the offence of murder and I find the accused guilty as charged and he is convicted accordingly.

**HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGE**

**28/10/2010**



**29/10/2010**

Accused present.

Masinde for the State.

Bukenya for the accused on state brief.

**Judgment read in Court.**

**HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGE**

**29/10/2010**

**Masinde:** No previous conviction. I pray for a deterrent sentence because of the brutal act he inflicted on the deceased. He deprived the deceased of his life. I therefore pray for a deterrent sentence.

**Bukenya:** He has been on remand for 4 years. He has a family with six children. He is remorseful I pray for a lenient sentence.

**Allocatus:** I pray court to consider the time I spent in custody. I have a family. My wife left my children and remarried.

## **SENTENCE:**

Though the accused was convicted for murder death sentence is no longer mandatory. The accused killed the deceased very brutally. However this appears to be a borderline case. I will consider the fact that he has no previous record. He is still fairly young. He has spent about 4 years in custody which period I have to consider. He can still reform from living a violent life. For the above reasons he is sentenced to ten years imprisonment.

**HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGE**

**29/10/2010**