

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL SESSION CASE 236 OF 2009**

UGANDA :::::::::::::::::::::::::::::::::::::::PROSECUTOR

VERSUS

TWEHEYO KENNETH ::::::::::::::::::::::::::::::: ACCUSED

**BEFORE HON. JUSTICE J.W KWESIGA**

**J U D G M E N T**

The Accused person is indicted for the murder under Sections 188 and 189 of the Penal Code Act. The particulars of the offence state that on 28<sup>th</sup> October, 2008, at Kiziba, Maziba, Kabale District the Accused and others not before this court murdered Turyakira Ben. The Accused is represented by M/S Nowangye Jacenta on State brief while the Prosecution is conducted by Mr. Brian Kalinaki Resident State Attorney.

The Accused person pleaded not guilty and therefore the state remained with the duty to prove the case against the Accused. The offence of murder has the following essential elements of the offence that must be proved. The death of Ben Turyakira must be proved, that his death was caused unlawfully and with malice aforethought and finally that the Accused person participated in the unlawful killing of the said deceased.

Under our criminal system the Accused person is presumed not guilty until he pleads or

he is proved guilty. This is settled under Article 28 (3) (a) of the Constitution of The Republic of Uganda. In R vs SIMS (1946) 1 KBS it was held that a moment an Accused person pleads not guilty to a criminal charge the burden of proof entirely falls on the prosecution to adduce evidence to prove beyond reasonable doubts that the offence was committed and was committed by the Accused person. The same principles of Law were restated by the Supreme Court of Uganda in Bogere Moses & Another vs Uganda Criminal Appeal No 1 of 1997 (1996) HCB5).

Apart from certain limited exceptions, the burden of proof is throughout the trial upon the prosecution. In the instant case, as far as can be gathered from the evidence of PW 3 Patience Turyakira, widow of the deceased in this case, on 28<sup>th</sup> October, 2008 at about 8:50 p.m, while she was in the family house heard a stampede outside the house and the deceased's

voice calling her in these words ***“Mayumba, Mayumba KARIBOBO is killing me”***. She got outside with her son MARKO MUKUNDANE. There was a group of people who ran away, with assistance of a lamp, she observed that the deceased had several cuts and particularly the neck had been cut. He was dead. Following her alarm people gathered at the scene and near the dead body a head cap belonging to KARIBOBO, the Accused was found and recovered.

PW 1, DR. KASYABA RONALD, whose evidence was admitted at the commencement of the trial carried out the post-mortem examination of the deceased's body. He observed multiple cut wounds that led to Irreversible Haemorrhagic Shock. The report was admitted as prosecution exhibit P.1.

PW 4 OWOYESIGIRE TOM, stated that at about 9:00 pm, on 28<sup>th</sup> October, 2008, he heard the deceased's voice saying ***“KARIBOBO WANYITA”*** which translates to ***“Karibobo you have killed me”*** he ran to the scene and found Ben Turyakira already dead about 50 metres from his house. He observed next to the body a head-cap he had always seen

KARIBOBO putting on. PW 5 BYAMUGISHA VANANSIO who

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is well known to the Accused testified that on 28<sup>th</sup> October 2008, at about 8:00 p.m he met KARIBOBO and other people, and he greeted them. KARIBOBO had a panga in his hands. About one hour later he learnt the deceased had been killed. He rushed to scene

and observed fresh cut wounds. PW 7 D/CPL Mushabe went to the scene and found the dead body of Turyakira in a pool of blood with a head-cap near the body and following information the information that the cap belonged to the Accused he proceeded with others and arrested the Accused from his father's bed where the Accused tried to hide.

The Accused person put up a defence of ALIBI. That he spent the whole day working as a porter at the building under construction at Nyanja Trading Centre. He returned home at 5:00 p.m, he never moved out until he was arrested from his father's bed. He confirmed he was scared when he heard them asking for him, he ran to his father's bed leaving his mother to open for the people that eventually arrested him. They first checked his bedroom, they traced him from his father's

bedroom. He confirmed that the deceased knew him so well that he could not mistake him for another person.

DW 2 Muleju Nasanairi, the Accused's father was called to support the ALIBI that the Accused was with him from 5:00 p.m, they had dinner together at about 8:00 p.m and separated, each went to his bedroom to sleep. At about midnight he had people knocking at his door ordering that it be opened and the Accused took refuge in his bed while putting on only underwears. He slept in his bed, behind him. Under cross-examination MULEJU told court that he was surprised by the Accused persons conduct. The above constituted the full facts of the case and I will proceed to examine the evidence in light of the Law applicable to this case.

For the state to secure a conviction the following elements of the offence must be proved;

- a) That Benon Turyakira is dead.
- b) That his death was unlawfully caused.
- c) That it was caused with malice aforethought.
- d) That the Accused person caused the death or participated in causing the death.

There is overwhelming evidence given by PW3 Patience Turyakira, PW 4 Tom Owoyesigire and PW 5 Byamugisha that they saw the dead body of Ben Turyakira at the scene of crime shortly after he had been killed. The Medical report or Postmortem report made by PW 1 Dr. Kasyaba Ronald supports the evidence of these witnesses and proved

beyond reasonable doubt the death of the deceased in question.

There is no doubt that both the unlawfulness and malice aforethought existed in causing the death. The deceased was cut with what appeared to be a panga, a deadly weapon. Prosecution exhibit P.1 shows that the deceased suffered multiple cuts on most vulnerable parts such as the head and neck that led to irreversible bleeding from the multiple cut wounds that caused his death. This cutting was unlawful and done with malice aforethought of the Accused, I have examined the Accused persons defence of ALIBI together with the prosecution evidence. First and foremost the Accused person had no duty to prove his ALIBI but in this case he

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opted to call a witness to support his ALIBI. Once an Accused person adduces evidence in support of an ALIBI that evidence shall be subject to strict evaluation like any other evidence given in proof of a point.

The evidence of DW 2 MULEJU in my view creates gaps in the ALIBI. Throughout this case the time stated by the prosecution and Defence witness was approximatation. There is no evidence that any of them had a watch or had a reason to look for a watch to accurately note the time when the events occurred. I have kept this in mind and consideration. Be that as it may, MULEJU testified that the Accused was at home and they separated at about 8:00 pm. PW 5 Byamugisha stated that he met the Accused at about 8:00 pm. The offence was committed between 8:00 p.m and 9:00 p.m. The distance between the scene, the trading centre and the Accused person is not far apart. Muleju

could not rule out the possibility that the Accused moved out of the house after they separated. The prosecution case is based on circumstantial evidence to prove participation. Nobody saw the Accused kill or take part in the killing of Turyakira Ben.

Circumstances surrounding the death include the following:-

The deceased's dying declaration which was heard by PW 2 Patience Turyakira and PW 3 Owoyesigire Tom was in identical words, to wit, "**KARIBOBO WANYITA**" or "**KARIBOBO YANYITA**" which is a declaration that Karibobo is killing me. A dying declaration must be strictly examined to rule out a possibility of error of identification by the deceased. It must be corroborated by independent evidence in view of the fact that the deceased's statement cannot be tested by the usual process of cross-examination. It is not challenged that the scene of crime was half way from where PW 2 and PW 3 were and therefore they had equal opportunity of hearing the deceased's words. It is not surprising that they both heard the same words. The Accused person's evidence is that he was well known to the deceased. It is also settled that in the stampede of killing the deceased there was talking I am satisfied that despite being dark, the deceased had opportunity to hear and identify the Accused.

The head-cap which was found next to the dead body at the scene was well described by the prosecution witnesses as belonging to KARIBOBO the Accused. This cap and the dying declaration led to the Arrest of the Accused. The conduct of

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the Accused person when the arresting team reached his father's home adds a string in

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the net of circumstantial evidence that surrounded the Accused. Why did he get scared when people knocked and called for opening of the door? While his mother went to open he ran to the bed of his father almost naked. This was an act of hiding. This could only show that he had a guilty mind. The dying declaration was overwhelmingly corroborated, it puts the Accused person at the scene of crime. His head-cap which was found at the scene immediately after the crime, puts him at the scene. PW 5 Byamugisha saw the Accused armed with a panga shortly before the crime moving with others towards the place that became the scene of murder. The failed ALIBI amounts to a false defence. The Accuse told lies. DW 2 was honest but mistaken that the Accused retired to his bed room to read books which was not the case. This false ALIBI operates as another piece of circumstantial evidence against the Accused. In view of the above the circumstantial evidence has weaved a tight rope around the neck of the Accused person in proof of his participation in the crime and no lie can un tie this rope. I agree with the joint opinion of the two Assessors that the

Accused person is guilty of murder. I accordingly convict the Accused person of murder of Ben Turyakira under Sections 188 and 189 of the Penal Code Act.

Dated at Kabale this 21<sup>st</sup> day of April, 2011.

Signed:.....

J.W.KWESIGA

JUDGE



21/4/2011

Read in the presence of :-

The Accused person.

Ms. Nowangye Jacinta for the Accused.

Mr. Kalinaki Brian Resident State Attorney for State Mr. Turyamubona

Milton - Court Clerk.

SENTENCING

STATE:

He is a first offender. He has been on remand for I year and 5 months. The offence attracts death sentence. The deceased left a widow and dependants. The State lost a useful person.

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He was killed in a brutal manner. There is a need of a deterrent sentence. We pray for death sentence.

DEFENCE:

The convict is a remorseful, he regrets what he did, he was a school going student. The Accused/convict has old parents. We pray for lenience.

ACCUSED:

I pray for lenience. I pray for a sentence that I can serve and go back to school.

S\_E\_N\_T\_E\_N\_C\_E

COURT:

The convict has been found guilty of murder whose maximum sentence is death. The Accused person has been on remand for 1 year and 5 months only. He has asked for lenience. He has asked me to consider the fact that he has old parents to look after. I have considered this together with the fact that

Turyakira, the deceased, also left behind needy dependants. The loss of Life caused can not be replaced or compensated. The offence was committed with great violence and brutality, for these reasons I will give the convict a sentence that will send a warning to criminals of his kind, and keep him a live but away from the society to which he is a

danger. I do hereby sentence him to LIFE IMPRISONMENT.

J.W.KWESIGA

JUDGE

21/4/2011