

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-SC-0399 OF 2010

UGANDA
PROSECUTOR

VERSUS

BAKUBYE MUZAMIR & ANOTHER
ACCUSED

BEFORE: HON. LADY JUSTICE MONICA K. MUGENYI

JUDGMENT

The accused persons, Bakubye Muzamir alias Joogo (A1) and Jjumba Tamale Musa alias Twaha Sentongo (A2), were indicted on 2 counts each - murder contrary to sections 188 and 189 of the Penal Code Act and aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. The prosecution case on count I is that between 11th and 14th April 2008 between Tunduma, Tanzania and Mutukula, Uganda the accused persons murdered a one Semakula Moses, the deceased. Under count II it is the prosecution case that at the same time and place the accused persons robbed the deceased of 3 motor vehicles, 2 passports, personal effects and documents; and in the course of the said robbery murdered him. Both accused persons denied the charges. While A1 gave sworn evidence denying knowledge of the deceased, denied travelling with him and denied robbing him of any property; A2 gave unsworn evidence denying knowledge of the accused, ever travelling to South Africa or robbing any property.

10 witnesses were called for the prosecution - the deceased's brother-in-law (PW1); the deceased's sister (PW2); the deceased's brother (PW3); a police officer who recorded A1's inquiry statement (PW4); police officer who recorded A2's inquiry statement (PW5); the police officer that recorded A1's retracted statement (PW6); the police officer that recorded A2's repudiated statement (PW7); the doctor that adduced the medical evidence (PW8); a

URA officer (PW9), and the police officer that received the deceased's exhumed body and witnessed the post mortem done in Uganda (PW10). The defence did not call any evidence save for the testimonies of both accused persons.

It is well settled law that the burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution and generally, the defences available to an accused person notwithstanding, that burden does not shift to the accused at any stage of the proceedings. The prosecution is required to prove all the ingredients of the alleged offence, as well as the accused's participation therein beyond reasonable doubt. See **Woolmington vs. DPP (1993) AC 462** and **Okale vs. Republic (1965) EA 55.**

The standard of proof in a criminal trial does not entail proof to absolute certainty. The standard that must be met by the prosecution's evidence is that no other logical explanation can be derived from the facts except that the accused committed the crime, thereby rebutting such accused person's presumption of innocence. If a trial judge has no doubt as to the accused's guilt, or if his/ her only doubts are *unreasonable* doubts, then the prosecution has discharged its burden of proof. It does not mean that no doubt exists as to the accused's guilt; it only means that no *reasonable* doubt is possible from the evidence presented.

It is trite law that in the event of reasonable doubt, such doubt shall be decided in favour of the accused and a verdict of acquittal returned. Further, inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be ignored if they do not affect the main substance of the prosecution's case; save where there is a perception that they were deliberate untruths, in which case they may lead to the rejection of the offending evidence. See **Alfred Tajar vs Uganda EACA Criminal Appeal No. 167 of 1969** and **Sarapio Tinkamalirwe vs. Uganda Supr. Court Criminal Appeal No. 27 of 1989.**

In this judgment I propose to address the offence of murder prior to a determination of the offence of aggravated robbery. The prosecution is required to prove the following ingredients of murder, as well as the participation of the accused persons beyond reasonable doubt: first, the

incidence of death; secondly, that the death was unlawful, and finally, that the death was caused with malice aforethought.

The fact of death was attested to by the direct evidence of PW1, PW2 and PW3; as well as medical evidence adduced by PW8. PW1, PW2 and PW3 attested to the death, identification and burial of their relative, Moses Semakula - the deceased. PW3 also attested to a DNA test having been done on the deceased to confirm his identity. PW8, on the other hand, attested to the performance of a post mortem report on the deceased by his colleague, a one Dr. Gemagaine, whose handwriting and signature he was very conversant with, and which colleague was out of the country during the trial and therefore unavailable to testify in court. The post mortem report was admitted in evidence as Exh. P10. I am therefore satisfied that the Prosecution has proved the fact of death in this case beyond reasonable doubt.

On the second ingredient of murder - whether or not the deceased's death was unlawful, the medical evidence on record did attest to the cause of the deceased's death. The deceased's death was attributed to the multiple injuries observed on the body including a crushed skull. The foregoing medical evidence was corroborated by PW2 and PW3 in so far as they attested to having identified the deceased by his torso and toe nail, his head having been smashed beyond recognition. The said injuries, described in detail in the post mortem report, were not commensurate with natural death.

The legal position on the legality of death (or lack thereof) is that every homicide is presumed to be unlawful unless circumstances make it excusable. This position was laid down in the case of **R. Vs. Gusambiza s/o Wesonga 1948 15 EACA 65**. The same position was restated in **Akol Patrick & Others vs Uganda (2006) HCB (vol. 1) 6**, (Court of Appeal) where it was held:

“In homicide cases death is always presumed unlawfully caused unless it was accidentally caused in circumstances which make it excusable.”

In **Uganda vs Aggrey Kiyingi & Others Crim. Sessn. Case No. 30 of 2006**, excusable circumstances were expounded upon to include justifiable circumstances like self defence or when authorised by law.

The term 'homicide' has been invariably defined as the killing of a human being by another human being. See **'Dictionary of Law', Oxford University press, 7th Edition, 2009, p.264.** Therefore in the present case, having found that the deceased's death was not a result of natural causes, the deceased's death would *prima facie* fall within the category of deaths defined as homicides. It therefore follows that the deceased's death would be presumed unlawful unless the circumstances surrounding the said death are such as would make it excusable or justifiable. The question then is whether or not any such excusable or justifiable circumstances existed in the present homicide so as to give a semblance of legality to the resultant death.

Excusable homicide has been defined as **'the killing of a human being that results in no criminal liability because it took place by misadventure or an accident not involving gross negligence.'** On the other hand, *lawful or justifiable homicide* is deemed to occur **'when somebody uses reasonable force in preventing a crime or arresting an offender, in self defence or defence of others, or in defence of his property, and causes death as a result.'** See **'Dictionary of Law', Oxford University press, 7th Edition, 2009, pp.216, 264.**

In the instant case there were no circumstances presented to this court that would make the deceased's death either excusable or justifiable. A1 denied knowledge of the deceased or ever travelling anywhere with him, while A2 simply stated that he had never been to South Africa and did not murder the deceased. These defences do not denote circumstances that would render the present homicide either excusable or justifiable. I am therefore satisfied that the deceased's death was unlawful and do so hold.

Having established that the deceased's death was unlawful, this court must establish for a fact whether the said death was caused with malice aforethought, and whether the accused participated in the present offence as alleged or at all. However, I propose to address the question of the accused persons' confessions prior to a determination of the foregoing issues.

A1's retracted confession entailed a fairly detailed background of his education and the schools he attended; a brief explanation on how he met the deceased, and a detailed exposition on his journey from South Africa in April 2010, the circumstances under which the deceased met his death and what transpired thereafter with regard to the deceased's property.

Similarly A2's repudiated confession entailed a brief description of how he met the deceased, and was more detailed on the circumstances under which the deceased met his death and what happened to the property he had come with.

For present purposes, the areas of convergence in the accused persons' confessions are that the deceased travelled with A1 from South Africa via Botswana albeit in different cars - the former in a Toyota Premio and the latter in a BMW. Further, that A2 joined A1 and the deceased in Zambia having travelled from South Africa to Zambia via Zimbabwe. It is also common ground in both confessions that a plan was hatched between the 2 accused persons to kill the deceased and take his property, and the said plan was executed in Tanzania. The only point of divergence in the 2 confessions is who of the accused persons initiated the homicide plan and whether or not A2 participated in fatally hitting the accused unto his death. While A1 stated that the plan to kill the deceased was hatched by A2 and he (A2) did participate in the fatal beating, A2 stated that the said plan was hatched by A1 and he (A2) did not participate in the fatal beating. Although both confessions were admitted on the court record pursuant to trials within the trial, both accused persons continued to deny their validity throughout the trial, as they are well entitled to.

The legal position on confessions was aptly expounded in the case of **Tuwamoi vs Uganda (1967) EA 84**. In that case the distinction between a retracted and repudiated confession was clarified, and the law on confessions summed up as follows:

"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." (*emphasis mine*)

In **Tuwamoi vs Uganda** (supra) it was further held:

"If the court is satisfied that the statement is properly admissible and so admits it, then when the court is arriving at

its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted. In assessing the confession the main consideration at this stage will be, is it true?" (emphasis mine)

In the case of **Matovu Musa Kassim v Uganda Supreme Court Criminal Appeal No.27 of 2002** the learned Justices of the Supreme Court observed:

"Before his trial, 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. It is true that at his trial, he gave sworn evidence in which he repudiated the confession. However, a number of factors exist to discredit any claim that his repudiation, in any way, affected the facts and events he disclosed. We have already observed that the story he told could only have been known by a person who had actively participated in the incidents of the crimes. The appellant's contention that he was framed has no grain of truth in it."

As enjoined in **Tuwamoi vs Uganda** (supra) I am mindful of the need for extreme caution before I rely on either of the confessions on the court record for a conviction, and do evaluate the said confessions on that basis. Be that as it may, in the present case each of the confessions entailed detailed disclosures on facts that only a person who was an active participant in or an eye witness to the events leading up to the alleged murder could have been familiar with. This would underscore the authenticity of the confessions. Further, although made in exclusion of each other, that is, on different dates, at different venues and before different persons; both confessions are almost identical on the areas of convergence highlighted earlier herein. This consistency on the events leading up to the present offence would reasonably denote such knowledge as could only have been informed by the accused persons' participation in the fatal journey under consideration presently, as well as their being privy to the plan to kill the deceased. This too goes to underscore the authenticity of the said confessions.

Nonetheless, as a matter of good practice and prudence, it is pertinent that the contents of the confessions be scrutinised against the totality of the

evidence on record to ascertain the truth thereof. In the present case both confessions were corroborated by the evidence on record in several material aspects, of which I shall highlight but a few. To begin with, the fact that A1 and the deceased travelled together from South Africa to Tanzania is borne out by the entries in each of their passports. Page 9 of the deceased's passport bore immigration stamps that illustrated that he departed the South Africa North Western border point on 3rd April 2008; entered Botswana on the same day and departed that country on 7th April 2008; was at the Zambia Kafungula border post on 7th April 2008 and departed Zambia at the Nakonde border post on 10th April 2008, and entered Tanzania on 10th April 2008 via the Tunduma border post. Identical stamps were observed at pages 7 and 9 of A1's passport. However, in addition to the foregoing stamps, A1's passport bore 2 additional entries - an exit from Tanzania via Kyaka border post on 14th April 2008 and an entry at Mutukula border post in Uganda on the same day. Therefore, while the deceased's journey terminated between Tunduuma and Kyaka border posts in Tanzania, A1's journey proceeded with an entry into Uganda. This evidence thus corroborates the confessions of both accused persons that the deceased travelled with A1 from South Africa to Tanzania where he met his death.

The confessions are further borne out by the evidence of PW1 who testified that the deceased rung her while in Botswana and Tunduma, Tanzania and informed her that he was travelling with 2 men - Twaha (A2) and Joogo (A1). PW2's evidence further corroborated the contents of the confessions in her averment that when the deceased rung her while in Tunduma he told her that the BMW car they had travelled with was bothering them. This piece of evidence goes to support the confessions by both accused persons that 100 - 200 km into Tanzania the BMW was involved in accidents and was placed on the Canter lorry for the rest of the journey. Furthermore, the assertion in A1's confession that the deceased was beaten repeatedly on the head is corroborated by the evidence of PW1, PW2 and PW3 who testified that the deceased was recognised by his torso and toe nail as his face had been smashed beyond recognition. Short of mere speculation, it would be far-fetched to posit any other explanation for his smashed face.

On the other hand, both accused persons sought to repudiate and retract their confessions. While A1 gave sworn evidence, A2 opted for unsworn evidence. It is trite law that in assessing the evidence in order to arrive at a verdict, a judge can take into account the fact that an accused person did

not give evidence on oath but this right must be exercised with caution and must not be used to bolster up a weak prosecution case or be taken as an admission of guilt on the part of the accused. See **Lubogo v Uganda (1967) EA 440**. I do take this into account as I evaluate A2's evidence.

Be that as it may, the accused persons' oral evidence in the main trial was fraught with lies and contradictions in some material aspects. I shall cite but a few. In his evidence in the trial within a trial A1 testified that he had known the deceased from South Africa but did not confess to killing him, while at the main trial he testified that he only got to know the deceased by name on the day he was arrested but had never met him physically. With regard to A2, he denied ever making the confession attributed to him contending that the signature thereon did not belong to him. The signature on the confession did appear different from a specimen signature he provided to court in the course of the trial within a trial. However, the signature on the confession does not appear fundamentally different from that appended in A2's passport. A2 further contended that he had never been to South Africa and that this fact was borne out by the no such entry in his passport. I do however, note that A1's confession did clarify that A2 travelled to Uganda with a temporary travel document and not his passport.

The question then is how should trial courts treat such obvious inconsistencies in defence evidence? While I am duly mindful that the burden of proof in criminal matters rests with the prosecution, in my view, inconsistencies in the defence case cannot and should not be ignored. Such inconsistencies are, at best, oversights attributable to the passage of time but, more often than not, are deliberate untruths that are intended to mislead court and avert the course of justice. To that extent they would point to the culpability of an accused person. Be that as it may, faced with confessions that have been materially corroborated by cogent evidence, I find no reason to disbelieve the accused persons' confessions in respect of their areas of convergence. I am satisfied that the said confessions do hold true in that regard. I therefore find that the prosecution has proved beyond reasonable doubt that the accused persons travelled with the deceased up to Tanzania where he met his death; that a plan was hatched between the 2 accused persons to kill the deceased and take his property, and that the said plan was executed in Tanzania.

The question then is whether or not both accused persons participated in the present homicide, and if so, whether or not they did so with malice aforethought. I propose to determine both issues concurrently.

In the present case, while A1 confessed to participating in the killing of the deceased together with A2, the latter stated in his confession that it was only A1 that participated in the fatal beating. Both accused persons confessed that the deceased was beaten on the head repeatedly until he died. The deceased's head injuries were also attested to by PW1, PW2 and PW3.

Section 191 of the Penal Code Act provides as follows on malice aforethought:

“Malice aforethought may be established by evidence providing either of the following circumstances:

(a) an intention to cause the death of any person ...

(b) knowledge that the act or omission causing death will probably cause the death of some person, although such act is accompanied by indifference whether death is caused or not ...”

The courts are cognisant of the difficulty of proving an accused person's mental disposition and thus agreeable to an inference of such disposition from the circumstances surrounding a homicide. In the case of **R. vs Tubere (1945) 12 EACA 63** as cited in **Uganda vs. Aggrey Kiyingi & Others** (supra), the court gave the following guide of circumstances from which an inference of malicious intent can be deduced:

- a. The 'weapon' used i.e. whether it was a lethal weapon or not;
- b. The part of the body that was targeted i.e. whether it is a vulnerable part or not;
- c. The manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted, and
- d. The conduct of the accused before, during and after the incident i.e. whether there was impunity.

This position was restated in the case of **Akol Patrick & Others vs. Uganda** (supra) where the Court of Appeal held:

“In arriving at a conclusion as to whether malice aforethought has been established the court must consider the weapon used, the manner in which it is used and the part of the body injured.” (*emphasis mine*)

The courts have consistently held the head to be a vulnerable part of the body which, if targeted by an accused, imputes malicious intent on his part.

See Okello Okidi vs Uganda Supreme Court Crim. Appeal No. 3 of 1995. Further, the definition of a deadly weapon would be instructive on the definition of a lethal weapon for present purposes. In Wasaja vs. Uganda 1975 EA 181 at 182 the court observed:

“The vital consideration is that the weapon must be shown to be deadly in the sense of 'capable of causing death'.”

In the case of Nanyonjo Harriet & Another vs. Uganda Criminal Appeal No. 24 of 2002 (Supreme Court) it was held:

“For a court to infer that an accused killed with malice aforethought it must consider if death was a natural consequence of the act that caused the death, and if the accused foresaw death as a natural consequence of the act.”
(emphasis mine)

On the question of malice aforethought, it is common ground that the deceased was beaten repeatedly on the head until he died. The weapon used in the fatal beating was never produced in court. However, it was referred to in the accused persons' confessions. While A1 described it as an iron bar, A2 referred to it as the joining bar that holds a car jack together. This court finds that the metallic bar described in the said confessions was capable of causing death depending on the way it was used and the part of the body targeted. To that extent, therefore, it was a lethal weapon.

No evidence was adduced on the accuseds' conduct prior to or after the incident in issue presently as would support an inference of malice aforethought. PW2's evidence that the accused persons declined to take her calls inquiring into the whereabouts of her brother, though creating suspicion, did not sufficiently prove that it was in fact the accused persons that answered those phone calls. However, the nature of the repeated attack on the deceased's head and the injuries observed on the body as stipulated in the post mortem report would clearly denote an intention to kill on the part of the deceased's attackers. It would be reasonable to conclude that the beating inflicted upon the deceased was done in the full knowledge that it would result in death; that death was a natural consequence of the said beating and, to that extent, the deceased's attackers can be reasonably deemed to have foreseen death as a natural consequence of the beating in question. I do therefore find that the deceased was killed with malice aforethought.

On the question of the accused persons' participation, it is common ground that a plan was hatched to kill the deceased. Each of the accused persons in their confessions attributed the hatching of the plan to the other, but

both confessions were consistent on such a plan having been discussed between the 2 accused persons.

Section 20 of the Penal Code Act clearly outlines the legal position with regard to joint offenders in prosecution of a common unlawful purpose - each such offender is deemed to have committed the offence arising from such unlawful purpose. Further, in the case of **Ismael Kisegerwa & Another vs. Uganda Criminal Appeal No. 6 of 1978** (Court of Appeal) the doctrine of common intention was enunciated upon as follows:

“In order to make the doctrine of common intention applicable it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter. It is now settled that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault.” (*emphasis mine*)

In the present case A1 confessed to participating in the killing of the deceased by repeatedly hitting him on the head. This confession is corroborated by the head injuries (crushed skull) reported in the post mortem report, as well as the evidence of PW1 and PW3 that the deceased's body had a smashed head. I therefore find no reason to disbelieve this confession, his purported retraction thereof notwithstanding, and do accept it as such. On the other hand, A2's confession was that while he was present as A1 hit the deceased, he did not participate in the beating. However, he did not state in his confession or in evidence that he sought to prevent A1 from hitting the deceased, or otherwise disassociated himself from the said beating. To that extent, A2's omission to disassociate himself from the deceased's beating would infer a common intention between him and A1 to kill the deceased. In accordance with section 20 of the Penal Code Act each such offender is deemed to have committed the offence arising from such unlawful purpose. I therefore find that the prosecution has proved both accused persons' participation in the present offence

beyond reasonable doubt. In the result, I find that the prosecution has proved the offence of murder against Muzamir Bakubye (A1) and Musa Tamale (A2) beyond reasonable doubt.

I now revert to the offence of aggravated robbery. The prosecution is required to prove the following ingredients of aggravated robbery, as well as the participation of the accused persons beyond reasonable doubt: first, the incidence of theft; secondly, the use or threat of violence in the course of the theft, and finally for present purposes, causing death at, immediately before or immediately after the said theft.

The Prosecution relied on the accuseds' confessions, as well as the direct evidence of PW1 and PW9 to prove the incidence of theft. PW1 testified that in April 2008 the deceased telephoned his wife (PW2) and himself and informed them that he would be travelling to Uganda by road and that he was coming with 2 vehicles - a Mitsubishi Canter and a Toyota Premio. PW1 further testified that the deceased told them that he would be travelling with a one Joogo (A1) and a one Tamale (A2). The witness further testified that although they had lost contact with the deceased after he crossed into Tanzania, records at the Mutukula border post indicated that the deceased's cars had been cleared and allowed entry into Uganda. Furthermore, PW1 testified that upon his arrest A1 led his captors to a garage where the deceased's Toyota Premio Reg. No. B368AM was recovered. PW1's evidence was corroborated by PW2, PW3, PW4, PW5 and PW6.

On the other hand, PW9 testified that on 14th April 2008 a query was raised at Mutukula Customs Station with regard to household electrical appliances (2 TV sets, 1 used home theatre and 1 used DVD player) and personal effects (clothes) that A1 sought to bring into Uganda but had been identified by the Customs officials as belonging to the deceased. The witness further testified that the response received from alleged owner of the goods in respect of the the query read as follows:

"Bakubye Muzamir (A1) is the owner of the used items in the car (Toyota Premio) while Moses Semakula (deceased) is the owner of the car and I am the brother driving the car."

In their oral evidence on this ingredient, the accused persons both denied having stolen anything from the deceased. However, their confessions bespoke to the contrary. In his confession A1 stated that after the deceased's death he and A2 drove the Toyota Premio and Mitsubishi Canter

to Mutukula, cleared the vehicles and drove them to Kampala. He later proceeded with the Toyota Premio to Jinja, while the Mitsubishi Canter was returned to a bonded warehouse in Kampala. A1 also confessed to having been a co-owner (with the deceased) of the Mitsubishi Canter. A2's confession was to the effect that after the deceased's death A1 drove the Toyota Premio to Mutukula border and cleared it through to Uganda, while the Mitsubishi Canter was sold and the proceeds there from shared between himself, A1 and a one Umaru.

The legal definition of theft is set out in section 254(1) of the Penal Code Act. It entails the fraudulent dispossession of another of something that is capable of being stolen, and which item the dispossessor has no claim of right over.

In the case of **Sula Kasiira v Uganda Criminal Appeal No.20 Of 1993** (Supreme Court) the following legal position from **Halsbury's Laws of England, Vol. 10, 3rd Edition, paragraph 1484** was cited with approval with regard to the act of taking or carrying away as an element of theft:

"There must be what amounts in law to an asportation (that is carrying away) of the goods of the prosecutor without his consent; but for this purpose, provided there is some severance, the least removal of the goods from the place where they were is sufficient, although they are not entirely carried off. The removal, however short the distance may be, from one position to another upon the owner's premises is sufficient asportation, and so is a removal or partial removal from one part of the owner's person to another. ... The offence of larceny is complete when the goods have been taken with a felonious intention, although the prisoner may have returned them and his possession continued for an instant only." (*emphasis mine*)

In the case of **Bogere Moses & Anor vs Uganda Cr. Appeal No. 1 of 1997 (SC) (unreported)** it was held as follows:

"It ought to be realised that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing so that if there is no innocent explanation of possession, the evidence is even stronger and more dependable than the eye witnesses evidence of identification in a nocturnal event. This is especially so because invariably the former is

independently verifiable while the later solely depends on the credibility of the eye witness.”

As observed earlier herein, it is trite law that **‘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.’** See **Tuwamoi vs Uganda** (supra).

In the present case corroboration of A1’s confession was found in the evidence of PW1 in so far as the latter attested to recovering the Toyota Premio from a garage in Jinja to which he was led by A1. On the other hand, A2’s confession was corroborated by PW5 who testified that A2 directed him to the bonded warehouse where the Mitsubishi Canter had been sold, and upon going to the said bonded warehouse he did confirm the sale of the said car. I am therefore satisfied as to the authenticity of the accused persons’ confessions with regard to the present offence.

Further, quite clearly the deceased was dispossessed of items that were in his possession and were capable of being stolen. The said items were taken without his consent and, to that extent, would reasonably be deemed to have been taken with a felonious intent under circumstances where the dispossessor(s) thereof had no right of claim thereto. Even if there was shared ownership of the Mitsubishi Canter as confessed by A1, such shared ownership did not entitle A1 to dispossess his co-owner of the said car. I am therefore satisfied that the prosecution has proved the ingredient of theft beyond reasonable doubt.

With regard to the use or threat of violence, the term ‘violence’ is defined in the Oxford dictionary as ‘behaviour involving physical force intended to hurt, damage, or kill someone or something’. The present theft entailed physical force that resulted in death. It therefore follows that there was use of violence. Accordingly, I find that this ingredient has been proved beyond reasonable doubt.

Finally, for present purposes the definition of aggravated robbery stipulated in section 286(2) of the Penal Code Act entails causing death at, immediately before or immediately after the said theft as the third ingredient of the offence of aggravated robbery. In the present case there

was proven incidence of death. I therefore find that the prosecution has proved this ingredient of aggravated robbery beyond reasonable doubt. In the result, I find that the prosecution has proved the offence of aggravated robbery beyond reasonable doubt.

Having established that all the ingredients of aggravated robbery have been proved, the question then is whether or not the accused persons participated in the said robbery.

As stated earlier herein, both accused persons denied any involvement in the present robbery. On the other hand, the prosecution case was that they both participated in the proven robbery. It was the evidence of PW1 and PW9 that although the Toyota Premio was acknowledged at Mutukula Customs Station as belonging to the deceased; it was later recovered in the possession of A1 albeit in a garage to which he had taken it. Similarly, although A2 was not found in possession of the Mitsubishi Canter as it had been sold, PW5 testified that A2 directed him to the bonded warehouse where he had taken the said car and from where it was subsequently sold. This evidence does infer that A2 had been in recent possession of the stolen car, in respect of which he had no right of possession. In the absence of an explanation on how they acquired possession thereof, the recent possession of the stolen cars by the accused persons would raise a very strong presumption of their participation in the cars' theft. In the present case, no such explanation of innocence was forthcoming. On the basis of the legal position advanced in **Bogere Moses & Anor vs Uganda** (supra), I find that the prosecution has proved to the required standard that both accused persons did participate in the proven robbery.

In the final result, in complete agreement with the gentlemen assessors (to whom I am grateful) I find the accused persons - Muzamir Bakubye and Musa Tamale guilty of the offences of murder contrary to sections 188 and 189 of the Penal Code Act and aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act, and do convict them of the said offences as charged.

Monica K. Mugenyi

JUDGE

19th April, 2012

SENTENCE

I carefully listened to both counsel in allocutus. I also did listen to both convicts on the same subject. I quite agree that the convicts being first offenders deserve a degree of leniency to distinguish their penalty from that in respect of repeated offenders. I do also agree with defence counsel that the convicts now appear remorseful. The convicts are 34 years and 45 years old respectively. At this age the convicts could indeed be quite useful to their families and the community. I do therefore recognise the convict's age as a mitigating factor. I am also aware that the convicts have spent 4 years on remand to date. I do bear all the foregoing mitigating factors in mind as I determine the appropriate sentence.

Conversely however, the convicts do stand convicted of terminating the life of a 36 year old man who was also at the prime of his life; had a 4 year old child called Shina Semakula, and was on his way to visit his family in Uganda. Further, the convicts were found to have been motivated by monetary gain to commit such a heinous crime. Furthermore, the proven murder was committed in a very wicked manner. Hitting another human being to a point of smashing his head beyond recognition and crashing his skull; not to mention abandoning his body in a bush in a foreign country is despicable and inhuman conduct. If committing 2 capital offences under such circumstances was the convicts' introduction to the world of crime, then one wonders what else they could be capable of doing.

This court does have a duty to play its role in upholding the tenets of justice, and giving appropriate sentence for a proven crime is part of that duty. In **Odoki, B. J, 'A guide to Criminal Procedure in Uganda', LDC Publishers, 2006 (3rd Edition) at p.164**, retribution was advanced as one of the objectives of sentencing. According to the retributive theory as stated therein '**punishment is also said to be an expression of society's disapproval of the accused's conduct.**' In the same literature (at p.165) reformation is also advanced as another objective of sentencing. In that sense '**punishment is believed to bring remorse, repentance and reform.**' Furthermore, deterrence is posited as another objective of sentencing. I do take these objectives into account.

I am aware that it is a principle of sentencing that the more wicked the circumstances under which an offence is committed the stiffer the penalty. I am also mindful that aggravated robbery is on the increase in this society. There is, therefore, need to express in the strongest terms societal and indeed this court's disapproval of the convict's actions.

It has been argued that the death penalty should be reserved for the most horrendous of offences executed in the most wicked of circumstances; and preferably not to a first offender. I do respectfully subscribe to that view as a general rule. I also note that while the present convicts plotted and planned their offence, and executed their plan with impunity and complete disregard for the sanctity of human life; upon being apprehended they owned up to their heinous crime. I do consider this a mitigating factor. However, having so owned up, the convicts at trial sought to avoid responsibility for their actions by denying their confessions. I find this conduct dishonest and deplorable, and do consider it an aggravating factor presently.

With due regard to the totality of the foregoing circumstances, I do hereby make the following orders:

1. I sentence Bakubye Muzamir to 40 years imprisonment for the offence of murder and 30 years imprisonment for the offence of aggravated robbery, the sentences to run consecutively for 70 years from the date hereof.
2. I sentence Tamale Musa to 40 years imprisonment for the offence of murder and 30 years imprisonment for the offence of aggravated robbery, the sentences to run consecutively for 70 years from the date hereof.
3. I order the immediate release of Bakubye Muzamir's BMW motor vehicle to his family as this vehicle was never in issue in this case.
4. Under section 126(1) of the Trial on Indictment Act I order Bakubye Muzamir to compensate the deceased's estate in the sum of Ushs. 10,000,000/= being compensation for the deprivation of the Toyota Premio and Mitsubishi Canter that were the subject matter herein.

The convicts have a right of appeal against conviction and sentencing within 14 days hereof.

Monica K. Mugenyi

JUDGE

19th April, 2012