HON. JUSTICE TSEKOKO

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO.173 OF 1993

UGANDA :: PROSECUTION

V E R S U S

NO.2418 P.C. MUGENYI :::::::::::::::::::::::::: ACCUSED

BEFORE: THE HON. MR. JUSTICE C.M. KATO

J U D G M E N T

The accused person No.2418 Police constable Alex Mugenyi, whom I shall hereinafter refer to as the accused, is indicted for the murder of one Mujumbi John contrary to the provisions of section 183 of the Penal Code Act. The particulars of the indictment allege that on 3/12/92 the accused murdered John Mujumbi at Kidera police post in the District of Kamuli.

The accused pleaded not guilty to the indictment.

It is the law that once an accused person pleads not guilty to the charge it becomes the duty of the prosecution to prove beyond reasonable doubt each and every ingredient of the offence with which the accused stands charged. In a murder case like the one now under consideration the duty is placed upon prosecution to prove beyond reasonable doubt, inter alia, that a human being was unlawfully killed, that the killing was with malice aforethought and that the accused person participated in that killing (See section 183 of the Penal Code Act).

It is not in dispute that a man by the name of John Mujumbi is dead. All the witnesses called by prosecution and the accused himself are in full agreement that Mujumbi died on the morning of 3/12/92. What this court must decided is whether or not Mujumbi's death was caused by an unlawful act or omission. It was pointed out in the case of: R v Gusambizi Wesonga/1948/15 EACA 65 that death in all cases of homicide is regarded as having been unlawfully caused unless it is accidental or excusable in law.

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According to the evidence on record the deceased was arrested at his home on 29/11/92 by some two policemen who beat him up. The deceased was alleged to have stolen some money belonging to a "MUZUNGU"(European) called Christine Gamba. According to the evidence of PW1 (Florence Timugibwa Nakiirya) the beating of her husband whom she followed at Kidera police post the following day continued up to 2/12/92. The evidence of P.C. Baala(PW3) and that of Babalanda (PW4) shows that they both saw the deceased being beaten. Ziraba (PW11) also told the court that the deceased had complained to him that he had been assaulted. The accused in his unsworn statement says he also saw two police constables Mutebi and Baala beating the deceased when the deceased failed to show them where he had hidden the stolen money. In his post morterm report EXPI Dr. David Tigawalana (PW[illegible]) stated that the deceased had died of "asphyxia from increased pressure arising out of intracerebral haemorrhage due to beatings". Alll this evidence points to only one thing and that one thing is that Mujumbi John did not die of natural causes but he died as a result of beatings which were inflicted upon him by fellow human beings, he was therefore unlawfully killed.

Prosecution has proved beyond reasonable doubt that a human being by the name of John Mujumbi was unlawfully killed and so I hold.

Having found out that a human being was unlawfully killed the next question that must be resolved is who killed the unfortunate man Mujumbi, It is the case for prosecution that it was the present accused Alex Mugenyi who caused the death of the deceased but Alex Mugenyi is quite adamant that he had no hand in the death of the deceased.

Prosecution called 3 witnesses who claimed to have seen the accused torturing the deceased before he met his death. The 3 eye witnesses are Nakiirya (PW1), Baala (PW111) and Babalanda (PWIV).

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The first witness to testify on behalf of prosecution on this point was the deceased's wife by the name of Florence Timugibwa Nakiirya. In her evidence, which was of a considerable length, Nakiirya told the court that on 29/11/92 her husband was arrested by two policemen who took him away while beating him, they did not include the accused person. The following day (30/11/92) she cooked food which she took to her husband who was at Kidera police post. On arrival she found the deceased having been taken out to collect some grass, the deceased eventually returned under the escort of the accused; when she tried to give food to the deceased the accused chased her away saying;" go away with your food the prisoner cannot eat now". She was not told why her husband could not eat. On that day it was an old policeman (Ziraba) who beat her husband but she did not see the accused beat him up to the time she saw the deceased being put on a Muzungu's vehicle and being taken to Kamuli.

The next day (1/12/92) on learning that her late husband had been brought from Kamuli to Kidera police post she went to check on him, on her arrival she too was arrested on the allegation that her late husband had given her the stolen money. Later on that day she was badly assaulted together with her husband, they were assaulted by Ziraba (the witness did not mention Ziraba (PWII) by name but she kept on referring to him as an old policeman while pointing at him as he was sitting at the verandah of the court.)

On the following day (2/12/92) which she referred to as a Wednesday she saw the deceased being burnt with melting jericans, he was burnt at the back and private parts, two bricks were tied around his private parts and he was ordered to run while the two bricks were dangling between his legs but he could not manage; all these things were being done by the accused person. Later on the accused called the deceased to where he was and told him! "you will have to talk or else you will go back dead unless you bring Muzungu's money"!

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At that stage the accused ordered the witness to beat her husband, when she refused the accused removed a stick from her and beat the deceased seriously all over the body, apart from beating him with a stick he also kicked him with shoes. The following day (3/12/92) the deceased collapsed and died.

The accused denied all the allegations made against him by this particular witness. The learned defence counsel Mr. Mutyabule argued that the evidence of Nakiirya was that of an accomplice because she too had participated in the beating of her husband. With due respect to the learned defence counsel I do not think what Nakiirya did amounted to participating in commission of any crime as she was acting under compulsion; she was ordered to beat her husband but she refused until she was herself beaten up to by the accused then she agreed to beat him on the buttocks 4 times; Nakiirya is excused by provisions of section 16 of the Penal Code Act she cannot therefore be treated as an accomplice. As far as the issue of compulsion is concerned this case can easily be distinguished from that of: Ezera Kyabanaizi and other v R /1962/ EA 309 at page 316 because in that case there was nothing to prove that the accused were compelled to do what they did which is not the position in the present case.

Nakiirya impressed me as a witness of truth, she could not have mistaken the accused for somebody else. Nakiirya stayed with the accused at the police post of Kidera for about 4 days so she must have been familiar with his identity. According to her evidence which I take to be truthful the beating of the deceased by the accused took place during broad day light and it was not a matter of hit and run but a prolonged assault. All these facts favoured correct identification of the accused by Nakiirya. I do not agree with the accused when he says that he did not beat the deceased at all; Nakiirya had no reason for fabricating lies against this accused.

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The second witness called by prosecution to testify in this case on the issue of accused's participation in the murder of Mujumbi was Sgt Dan Ziraba Amulamu (PW11) whose evidence was to the effect that the deceased had complained to him that the accused had assaulted him. According to the evidence of Nakiirya which I believe to be true this witness Ziraba was an accomplice. Nakiirya told the court that she had seen Ziraba assaulting the deceased on a number of occasions. Ziraba's evidence being that of an accomplice requires corroboration as a matter of practice. His evidence has, however, been sufficiently corroborated by that of Nakiirya (whom I have already found not to be an accomplice) who testified that she had seen the accused beating the deceased. The deceased had no reason to complain to Ziraba that the accused had beaten him if the accused had not done so. The deceased's complaint to Ziraba about his having been beaten by the accused does infact support the prosecution contention that the accused was physically involved in beating the deceased.

The other witness called by prosecution was P.C. Baala (PW111) whose evidence like that of Ziraba was that of an accomplice because there is evidence of Babalanda who testified that he had seen Baala hiting the deceased with a hoe at the back and that made the deceased vomit blood, the accused in his unsworn statement also informed the court that he had seen Baala hiting the deceased with a hoe. Baala's evidence being that of an accomplice requires corroboration as a matter of practice before a conviction can be based on it;: R v Thakor Singh s/o Kaler Singh /1934/ IEACA 110, R v Asuman Logon s/o Muza /1943/10 EACA 9[illegible] and R v Gas Ibrahim /1946/ 13 EACA 104.

Baala's material evidence in support of prosecution case has been that he had seen the accused beating the deceased while near the home of the deceased he had also seen him beating the deceased while at the home of Babalanda(PWIV) at one time he had seen the accused beating the deceased with the butt of his gun.

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He also saw the accused tying to the deceased's private parts a big stone. This evidence tallies very well with that of Babalanda (PWIV) who witnessed both incidents at his home and near the deceased's home. Baala's evidence that he had seen the accused assaulting the deceased has been materially corroborated by the evidence of Babalanda who is not an accomplice in this case. Although the accused denies having assaulted the deceased he does not deny having been with the deceased at the two places mentioned by Baala and Babalanda, he only denies ever having done anything to the deceased according to him the wrong doers were Baala plus Mutebi.

Babalanda was the 3rd eye witness to give evidence on behalf of prosecution. According to his evidence when he went to where the accused was questioning the deceased he observed that the deceased had been badly assaulted. He also told the court that while at his (Babalanda's) home he saw the accused tie a stone to the private parts of the deceased he then forced the deceased to stand up, the deceased tried 7 times to stand but in vain. This sort of torture meets all the requirements of the word assaulting.

I accept the evidence of Nakiirya, that of Ziraba, that of Baala and Babalanda to be truthful to the extent that the accused at different time and places did in fact take part in beating or torturing the deceased, I do not accept accused's story that it was only Baala and Mutebi who beat up the deceased and tied stone between deceased's legs. The accused was clearly identified by Nakiirya, Baala and Babalanda while beating the deceased in order to force him show police where he (deceased) had hidden the money he was being alleged to have stolen from the "Muzungu". As I said earlier in this judgment conditions for correct identification of the accused by these witnesses existed. The accused was close to these witnesses, they knew him before, the exercise took a very long time and it was carried out during the day so there was no room for the witnesses mistaking him for somebody else. The accused in fact did participate in the beating of the deceased.

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There is however the question of common intention. According to the evidence available the accused obviously had a common intention with the other policemen who assaulted the deceased. Their common intention was to illgegally extract some evidence from the deceased regarding the alleged theft of "Muzungu's"money. The law dealing with such common intention is covered by section 22 of the Penal Code Act which reads as follows:-

"When two or more persons form a sommon intention to prosecute an unlawful purpose in conjuction with one another, and in the . . prosecution of such purpose,an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".

In view of this provision of the law it is immaterial that there was no any specific agreement among the policemen to assault the deceased; their common intention could be inferred from their conduct:- R v Tabulayenka s/o Kiirya and 3 others /1943/10EACA5. The conduct of the accused and his colleagues shows that they were bent at torturing the deceased for one common reason which was to make him lead them to where the "Muzungu's" money was or to confess to having stolen that money. It is also immaterial as to whom among the attackers aimed the fatal blow that caused the deceased's death so long as the attackers had a common intention of assaulting the . deceased which resulted in his death. R v Paulo s/o Shimanyolay and another /1938/5 EACA 135.

One other point that requires consideration at this stage is that of some contradictions in the evidence as put forward by prosecution. The law as pointed out in the case of:Tajar v Uganda (criminal Appeal No.167 of 1969) is that where there are contradictions in prosecution case which are so major that they go to the root of the case such contradictions should be resolved in favour of the accused but where such contradictions are minor and do not go to the root of the case they should be ignored.

One of the contradictions which appeared in this case was with regard to PW1's first statement to the police made on 5/12/92,

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according to the learned defence counsel's argument the witness did not mention accused's name as one of those who had assaulted her husband in that statement, Nakiirya however insisted that she had mentioned accused's name and she did not know why it was not recorded. That particular statement was never tendered by defence as an exhibit although it was put in for identification. In his evidence D/ASP Otwili (PWV) explained in court that virtually all the policemen at Kidera police station were at first suspects so it is only natural that they at first tried to cover one another and in that process it was not expected that Onegiu who recorded Nakiirya's statement could have incriminated his fellow policemen who was a suspect like himself, Mr. Otwili said that fresh statements had to be recorded by some other policemen from Kamuli police station and special branch men. Judging from Nakiirya's evidence and that of Otwili (PWV) Mugenyi's name must have been deliberately left out of Nakiirya's original statement.

The other alleged contradiction is that with regard to the doctor's evidence who said that there was a deep cut wound on deceased's head and yet no witness had spoken of the deceased having been cut on the head. I do not think it is a contradiction for one witness to point out what another witness has omitted to mention, at any rate Nakiirya stated that her husband was being hit all over the body including the head, the mere fact that she did not mention of any wound on deceased's head in her evidence does not mean that it (wound) was not there.

I have failed to discover any contradiction which has not been satisfactorily explained away by prosecution in this case.

Having held that John Mujumbi was unlawfully killed and that the present accused Alex Mugenyi took part in that killing, the next issue to be considered now is whether or not the killing of Mujumbi was with malice aforethought. In the case of: Tubere s/o Chien v R /1945/ 13 EACA 63 it was pointed out that in deciding whether or not malice aforethought has been established matters like nature of weapon used in inflicting the injury,

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number of injuries inflicted, the part of the body injured and the conduct of the accused before or after the incident should be considered.

In the instant case Nakiirya stated that the deceased was being assaulted with a stick whose size it was not possible to determine, she also said that the deceased was being kicked with shoes. According to the evidence P.C. Baala the accused was beating the deceased with the butt of his gun at the back of his body. Babalanda (PWIV) said that while the accused was at his(Babalanda's) /him home he saw/ (the accused) hit the deceased at his shoulders with the gun. In his evidence Dr. Tigawalana (PWVI) stated that he found a cut wound at the back of deceased's head; the deceased's body also had multiple bruises on the head, at the back and on the buttocks and he concluded that the deceased must have died of asphyxia due to bleeding in the brain caused by the multiple injuries on the head. In the absence of any clear explanation as to what weapon was used in inflicting the wounds on the head which caused the bleeding into the brain resulting in deceased's death it would be unsafe to say with any degree of certainity that the person who inflicted those injuries had malice aforethought.

In her evidence Nakiirya said that when the decesed was returned from his home to the police post the accused said! Has he refused to talk? You give him to me I will make him talk", later she heard the accused telling the deceased! "You will have to talk or else you will go back dead unless you bring"Muzungu's" money".In my opinion these words were just threats to compel the deceased to produce the money he was alleged to have stolen but they were not expressions of accused's intention to kill the deceased. As I stated earlier in this judgment the accused and his henchmen were interested in extracting some information from the deceased which would lead the police to the recovery of muzungu's money but nobody seem to have been interested in having the deceased dead, in other words there was no malice aforethought on the part of the accused and others who assaulted the deceased.

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It is most unfortunate that the police in their zeal to recover the muzungu's money over reacted and used force which was out of proportion to the situation and that resulted in the death of the deceased which in turn has landed the present accused into his present trouble with the law!

Considering all the evidence generally I find that prosecution has proved beyond reasonable doubt that the accused unlawfully killed the deceased John Mujumbi, but the accused had no malice aforethought when he caused Mujumbi's death. In the circumstances I find the accused not guilty of murder and I do acquit him of that offence but I find him guilty of manslaughter and I do convict him of manslaughter under section 182 of the Penal Code Act.

Both gentlemen assessors who assisted me in this case advised me to acquit the accused person all together, I have followed their advice only to the extent of acquiting the accused for the offence of murder. The gentlemen assessors did not seem to have addressed their minds to the alternative verdicts which I mentioned to them in my summing up, had they done so possibly they would have come to a different decision as regards to the alternative verdict judging from their views which were contained in their opinions.

C.M. KATO
J U D G E
8/2/94

8/2/94 Accused present.
Wamasebu for state.
Mutyabule for defence.
Assessors present.
Baligeya court clerk.

Court: This judgment was due to be delivered yesterday but due pressure of work it was not ready it is now delivered, dated and signed.

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Wanasebu: The accused is a first offender. He has been on remand for 2 years. I leave the matter to the court to assess an appropriate sentence.

Mutyabule: Accused is a youngman aged about 30 years. He is a first offender. He has 3 children. He has been looking after 5 children of his dead brother. He has been on remand for nearly 2 years. He was acting in obedience to the orders of his superior Mr. Ziraba. It is a pity that excessive force was used which resulted in the death of the deceased. A linient sentence should be passed. Accused is sickly he suffers from his kidney.

Court: It is true that the accused is a first offender and has been on remand for nearly 1 year, the court however takes a serious view of this kind of offence. Manslaughter carries life imprisonment as the maximum sentence. The amount of torture meted upon the deceased before his death was of such serious nature that this court would be failing in its duty as a custodian of human rights if it did not pass such a sentence as will teach other policemen to respect the law when carrying out their lawful duties. A deterrent sentence is necessary.

Considering all the circumstances of this case I feel a sentence of (8) eight years imprisonment will meet the ends of justice. Accused is accordingly sentenced to 8 years imprisonment.

C.M. KATO
JUDGE
8/2/94