

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KASESE

HIGH COURT CRIMINAL SESSION NO. 0107/2003

UGANDA.....PROSECUTOR

VERSUS

AKANDWANAHO NATHAN

Alias CAMEROON.....ACCUSED

BEFORE: HON. MR. JUSTICE V.T. ZEHURIKIZE

JUDGEMENT

AKANDWANAHO NATHAN alias CAMEROON, hereinafter called the accused was indicted for Murder Contrary to Sections 188 and 189 of the Penal Code Act. It is alleged in the particulars of offence that the accused and others still at large on the 29th day of November 2001 at Kanyatete village in Kasese District murdered Mugabe Robert. The accused denied the charge and the case went into full hearing.

In a bid to prove its case the Prosecution adduced from nine witnesses in addition to admitted post mortem report, Police Form 24 and photograph of the deceased's body which are marked exhibits P.I, PII and PIII respectively. In his defence the accused made unsworn statement and called no witnesses.

The case for prosecution briefly is as follows. According to Nshekanabo Richard (PW2), on 29/11/2001 at around 8.00 a.m. the deceased told him that he had been hired by the accused to take him to a place called Karusandara. This witness did not see the accused. The deceased told him that the accused was waiting for him at Nyakasanga from where he was going to pick him. Nyakasanga is a village within Kasese Town. Later in the evening the witness received information that the deceased's Motorcycle was at Hima Police Post. Together with his fellow bodaboda cyclist the witness went to Hima Police Post.

The following day 30/11/2001 the witness and other motor cyclists went on looking for the body of the deceased. The body was found in Kanyatete village in a bush. It had stab wounds and there was a rope around its neck.

The Prosecution further examined Aziz Tirikwendera (PW3) who stated that on 29/11/2001 at around 9.00 a.m. he was going to his office in Kasese Town when he found two strange people standing on

Kasese-Fort Portal road at around Asaba School in Kasese Town. Since these strangers were standing away from any stage or path he decided to seek their identification and he even checked in their bag in which he found a locally made knife. The witness was the secretary for security Nyakasanga L.C.1 Kasese Town.

While he was still interrogating the two strangers the late Robert Mugabe came carrying the accused on the Motor Cycle. The accused told the deceased that this was the job he was calling him for. The job was to take the two men. After the deceased had agreed to take them for the sum of shs. 6,000/= and put their bag on the motor cycle, the witness left for Town.

The following day he learnt that the deceased had disappeared. He then reported to Police how had last seen the accused with the deceased. They started looking for the accused to tell them of the whereabouts of the deceased but in vain. Later he learnt from the bodaboda cyclist that the body of Robert had been found at Kanyatete in Karusandara.

A man Bwambale Kamurali (PW4) on 29/11/2001 between 9.00 to 9.30 a.m. while near the junction to the air-field in Kasese Town he saw the deceased carrying two people on his motor cycle. One of the passengers was the accused who was sitting between the deceased and another man he did not know. This spot is about one Kilometre from where PW3 left the accused, the deceased and two men. He did not see Robert – the deceased – again. The following day he saw his body towards Kanyatete Railway Station. It had stab wounds on the stomach, neck and head. The intestines were out.

Hama d Dolla (PW5) who said knew Mugabe Robert testified that on 29/11/2001 at around 10.00 a.m. the deceased passed by him at Karusandara Primary School. He was on his Motorcycle carrying two passengers heading for Kanamba village which is on the way to Kanyatete. He did not know the two passengers before, but said that he would recognize one of them who is the accused in Court.

He went further to say that around 11.00a.m. of the same day he again met the two men passengers- pushing Robert's Motorcycle, at Nkoko Trading Centre. They were coming from Kanyatete side. This time Robert was not with them.

The following day he discovered the body of Robert near the railway bridge, it had stab wounds on the stomach and throat. According to the evidence of PW2, PW3 and PW4, after the discovery of the deceased's body there was an attempt to trace the accused in Kasese Town but he was no where to be seen . He appeared in Town on 2/12/2001 lynched him but was saved by police who rescued him and took him to Kasese Police Station where he was detained as a suspect in the Murder of the late Mugabe Robert. On 5/12/2001 was produced in Court and put on remand.

In his defence the accused denied any involvement in the Murder of Mugabe Robert. He stated that on 27/11/2001 he went to see his parents in Rushere Mbarara District. He stayed there as he had no money. But on 30/11/2001 his father gave him money for transport and on 1/12/2001 he set off for Kasese where he arrived at around 7.00p.m., the same day. On 2/12/2001, on Sunday, when he was going to report to Police because he was on Police bond in the Murder case of the late Nyakahuma, he was stopped by a Police man. He thought this was because he had missed to answer his bond as required. He had defaulted in reporting as he had failed to get money for transport from home in time.

After being stopped, many people started throwing stones at him. He was rescued by Police who took him to the Police Station where he was detained. On 3/12/2001 he was taken to Court, but he did not hear the charge in this case. He came to hear of it when he was in Toro Court. Upon this evidence the defence closed its case.

In Criminal cases the duty of proving the guilt of the accused person lies on the prosecution and it never shifts to the accused. That duty/burden is discharged by the prosecution on proving the accused's guilt beyond reasonable doubt. In case of doubt the same must be resolved in favour of the accused. See **Ssekitoleko v Uganda 1967 EA 53, Uganda V Dick Ojok 1992 – 93 HCB 54**. A conviction of an accused person cannot be based on the weakness of the defence case but rather on the strength of the Prosecution evidence See Etuk S/O Achetu V. R. (1934) 1 RACA 166.

In a charge of Murder the Prosecution has to prove the following ingredients of the offence if it is to secure a conviction.

- a- That a human being is dead, in this case that Robert Mugabe is dead.
- b- That the death was caused by unlawful act or omission.
- c- That there was malice aforethought
- d- Participation of the accused person.

As to whether Robert Mugabe is dead the Prosecution presented the evidence of PW2, PW4 and PW5 all who knew the deceased. They went to the scene and saw the body of the deceased. It had stab wounds and there was a rope around its neck. There is also the evidence of PW1 the Police officer who visited the scene with Doctor Mainuka who carried out the Post mortem examination as evidence by exhibit P.1. The body was buried in Ibanda according to PW2. In view of the overwhelming evidence on record I find that the Prosecution proved this element of the offence beyond reasonable doubt.

The next issue is whether the death was unlawfully caused. The law is that every homicide is unlawful unless it is excusable or is authorized by law. The evidence of the prosecution witnesses and the admitted evidence as disclosed in the post mortem report exhibit P.1 and the photograph exhibit P.3 all show that the deceased was strangled and stabbed in several places. His body was left in bush. The motive appears to have been to steal his motor cycle Reg. No. UAC 639V. Red in color. It is clear to me that his death was neither accidental nor authorized by law. In the premise I find that this ingredient has also been proved beyond reasonable doubt.

As to whether there was malice aforethought, Court would consider the surrounding circumstances to determine whether the evidence on record established this essential ingredient. In this regard Court will take into account the nature and number of injuries, the weapon used, the part of the body on which it is used and sometime the conduct of the accused person before or after the commission of the offence – see **Tubere S/O Ochan V.R (1945) 12 EACA 63.**

In the instant case there is the evidence of PW1, PW2, PW4, and PW5 which shows the deceased sustained several stab wounds, and was also strangled. The Post mortem report and the clear photograph of the deceased's body further fortify the evidence as to the brutality meted out to the deceased leading to his death. The stab wounds on the abdomen where the small intestines were extruding out, stab wounds on the throat and cheek were all inflicted on the vulnerable parts of the body. I am satisfied that whoever inflicted these wounds intended to cause death or had knowledge that these acts would probably cause death. In the premise I find that this ingredient of the offence of murder was proved beyond reasonable doubt.

The only issue which was contested by the defence is the participation of the accused person. On the evidence adduced by the prosecution there is no body who saw the deceased being killed and who killed him.

The Prosecution case is hinged on circumstantial evidence to implicate the accused in the participation of the Murder of the deceased. I direct the assessors as I do to myself that in a case depending exclusively upon circumstantial evidence, Court must find before deciding upon conviction that the inculpatory facts are incompatible with the innocence of the accused person and incapable of explanation upon any other reason hypothesis than that guilt – See Simon Musoke V. R. 1958 EA 715. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which weaken or destroy the inference. See also Waibi V. Uganda 1978 HCB 218.

The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. It must be treated with caution and narrowly examined because evidence of this type can easily be fabricated – see Tindigwire Mbone V. Uganda Cr. Appeal 9/87 (S.C.) Unreported.

The circumstantial evidence in this case is as follows.

There is the evidence of PW2 who testified that he knew both the accused and the deceased. He was a bodaboda cyclist like the deceased. The late Mugabe Robert had left his motor cycle to him. On 29/11/2001 at around 8.00 a.m. he came and took it away saying that he had been hired by the accused to take him to Karusandara. He told him that he had left the accused at Nyakasanga where he was going to pick him. This is followed by the evidence of PW3 Aziz Tirikwendera.

PW3 stated that at around 9.00 a.m. of the same day he found two strangers at a suspicious location on Kasese Fort Portal road near Asaba School. It was suspicious because they were not near a path or stage. He was secretary for security and he asked for their identities. He even checked in their bag where he saw a locally made knife. These are the people who hired the deceased to take them to Kanyatete. The deceased came into contact with them through the accused who came with the deceased on his motorcycle. The accused told the deceased that the job he had invited him for was to take these two men. The witness left the accused, the deceased and the two men preparing to go.

The chain of events is continued by PW4 who met the deceased carrying the accused and another man on his motor cycle at a distance of about one kilometre from the place where PW3 had left the group. He was able to recognize the accused since the deceased slowed down as he approached him because he wanted to know what had happened to the witnesses' motorcycle. He averred that he knew the accused very well and even if they had passed by him on a high speed he would still have recognized the accused as one of the two passengers the deceased had.

Both PW3 and PW4 narrated in detail how they knew the accused before. They both knew him as a Disco man at Club Mountains. According to PW4, the accused used to come and hire their motorcycles and mostly that of the deceased. This piece of evidence is similar to that of PW2 who said that he knew the accused very well and that he used to hire their motorcycles on self drive basis.

Both PW3 and PW4 saw the accused in the company of the deceased as already detailed during day time. It was around 9.00a.m. Their evidence is topped up by that of PW5 who stated that on the same morning of 29/11/2001 at around 10.00a.m., he saw the deceased carrying two passengers. He identified one of them as the accused in the dock. PW5 further stated that around 11.00a.m., he met the two men pushing the deceased's motorcycle towards Nkoko Trading Centre and were coming

from the direction of Kanyatete. The deceased was not with them. The following day he found the body of the deceased in a bush near the railway bridge in Kanyatete.

The story is completed by Robert Semuwemba (PW8) a mechanic of Hoima Town who was approached by the accused, as he claims, to go and repair his motor vehicle but later changed to say that it was a motor cycle. He noted its registration No. UAC 639 V red in colour. This motorcycle belonged to the deceased.

It is quite impossible that PW5 could not have recognized one of the two passengers he saw on the motorcycle of the deceased, as the accused whom he purported to identify in the dock. Further I do not believe that PW8 was correct to assert that it is the accused who approached him to repair the motorcycle. According to the evidence of No. 26.26156 D/C Omuge Julius (PW7) that person turned to be Bale as per his identifications. I believe this is the same Bale that PW3 talked about.

Admittedly both PW5 and PW8 did not know the accused before. They could thus not state with certainty that the person they saw on 29/11/2001 is the same person that they purported to identify in Court. I would therefore not rely on their evidence as to the identification of the accused.

However when I consider the evidence of PW2, PW3 and PW4 I find that one of the two passengers PW5 saw, being carried by the deceased, was indeed the accused person. The evidence of PW2, PW3 and PW4 is so connected and coherent that it keeps the accused in the company of the deceased such that the two passengers PW5 saw were the accused and another person as testified to by PW4. PW2 learnt from the deceased that the accused had a job for him. PW3 witnessed the striking of the deal where accused connected the deceased with the two strangers. He left the four preparing to go. PW4 saw the deceased carrying two men namely the accused and another man. Soon after, PW5 met the deceased carrying two men. Logically, the second man was the accused. He could not have dropped the accused and picked another man.

It is the same two men that again PW5 met pushing the deceased's motorcycle at around 11.00a.m. this time they were not with the deceased. It was the same motor cycle that PW8 was employed to repair. It was motor cycle Reg. No. UAC 639V red in color.

From the evidence it is clear to me that when PW5 met the two men pushing the deceased's motorcycle, they had just killed him and that is why he was no longer with them. PW5 said that the two men were pushing the motorcycle near the railway line. The following day he found the deceased's body near what is called the railway bridge in Kanyatete village. PW5 said that the two men he met pushing the motorcycle of the deceased were the same men he had seen the deceased

carrying on his motorcycle. From what I have already discussed above, one of the two men was the accused.

I would probably emphasise that all the narrated events took place in the morning hours of 29/11/2001. When PW3 left the accused, the two strange men and the deceased tying the bag on the motorcycle in preparation for the journey, he said it was around 9.00a.m. PW4 saw the deceased carrying the accused and another man on his motorcycle at around 9.30a.m., while PW5 met the deceased carrying two men on his motorcycle at around 10.00a.m. He later at around 11.00a.m., met the same men pushing the deceased's motorcycle, further PW3, PW4 and PW5 all knew the deceased before while PW3 and PW4 in addition knew the accused person before. Thus there was no possibility of mistaken identity of the accused person as far as PW3 and PW4 were concerned.

Further more there appears to be no reason why PW3 and PW5 would have falsely implicated the accused as one of the persons who went with the deceased on a journey that marked the end of his life. According to the evidence of PW2 and PW4 the accused was friendly to the bodaboda cyclists. They trusted him to the extent of giving him their motorcycle on self drive. He used to hire that of the deceased. PW3 who was the Chairman of the bodaboda – i.e. bicycle transporters and had no reason to tell lies against the accused. PW5 who falls in the claim of events of that morning was just a trader in charcoal while PW8 who even became so suspicious that he had to drive the stolen motorcycle to police at Hima was also an independent mechanic who could not have been used to fabricate any story against the accused. I am satisfied that the circumstantial evidence as sequentially set out by PW2, PW3, PW4, PW5 and PW8 cannot be a fabrication. It is a chronological account of what happened.

The accused in his defence set up an alibi when said that from 27/11/2001 to 1/12/2001 he was not in Kasese Town, but he had gone to his home in Rushere Mbarara District.

When an accused person sets up an alibi in answer to a charge he assumes no duty to prove it. It remains the duty of the prosecution to prove his guilt beyond reasonable doubt by placing him at the scene of the crime and proving that he committed the offence – see Ssekitoleko V. Uganda 1967 EA 531.

What amounts to putting the accused at the scene of crime is proof to the required standard that the accused was at the scene of crime at the material time. The Court has to consider and evaluate the evidence as a whole before coming to that conclusion. The court has to give reasons why one version and not the other is accepted. It is a misdirection to accept one version and then hold that because of

that acceptance per se the other version is wrong. See Moses & Kamba Robert V. Uganda Cr. Appeal No. 1/97 (Unreported) Kasumba Fred V. Uganda Cr. Appeal No. 14/98 and Kibale Ishma v Uganda (Unreported)

It is with the above principles in mind that I see out to consider the accused's alibi. He stated that he went home on 27/11/2001. He had no money to go back to Kasese to report to police on his bail bond till 30/11/2001 when his father gave him money for transport and he set off on 1/12/2001. He was arrested on 2/12/2001 on a Sunday. I find it difficult to believe that he would have gone on 27/11/2001 when he was about to go to police for possibly extension of his bail bond within a few days. It appears by 1/12/2001 he had already defaulted in his police bond conditions. By simple calculation it appears from 27/11/2001 to 30/11/2001 he had about 3 to 4 days within which to report to police in answer to his bail. No reasonable person would have risked to go on such a long journey as to move from Kasese to Rushere and hope to report to Police in Kasese as required within such short time.

I do believe the evidence by the prosecution witness that on learning that the deceased had been killed they tried to trace the accused but was not available at his place of work until he was arrested on 2/12/2001 some four days later. I do believe during these days the accused was in hiding. I do not, for the above reasons, believe that he had gone home in Rushere. I reject his version of the story. The prosecution evidence especially that of PW3 and PW4 placed him at the scene of the crime to the effect that he was involved in the hiring of the deceased and he was one of the two people who were seen being carried by the deceased to the fateful trip.

Counsel for the accused pointed out some discrepancies or contradictions in the prosecution case. He pointed out that PW3 at first said the two men he found standing near Asaba School were the accused and another man and that later said they were stranger. According to my record there is no such contradiction or change of statement on part of PW3. He immediately corrected the misstatement as it appeared to be a slip of the tongue. The other contradiction pointed out and which is apparent on record is that while PW7 said that the man who was briefly arrested and whom the police at Hima sent to produce documents for the motorcycle was one Bale, PW8 said that he was the accused person. I have already commented on this earlier in my judgment. I would not rely on the evidence of PW8 in as far as he purported to identify the accused in Court as he accused person who approached him to repair the motorcycle.

Further Counsel argued that PW5 in his statement to police he did not mention the name of the deceased while in Court he said he knew the deceased and saw him carrying two men on his motorcycle. He did not identify the deceased to the Chairman L.C.I Kanaytete.

The law regarding contradictions and inconsistencies in a witnesses' evidence is that if they are grave and go to the root of the case they will lead to the evidence of the witness being rejected. But if they are minor and not deliberate lies intended to mislead court they can be ignored. See Uganda V. Ngirabakunzi & 2 others (1988- 1990) HCB 40

In the instant case PW5 explained that he did not tell the Chairman whose body he had found because he feared to be killed and that he forgot to tell police that he had met two men being carried by the deceased. He only minded about the face of the person the deceased was carrying. I have looked at the Police statement (exhibit D1) of 8/1/2002. It appears the interrogating Police Officer was interested in finding out whether PW5 had identified one of the two men that he met. He went into extracting from the witness evidence of whether the two people had hats or glasses. The issue was not the identity of the deceased. It appears that was being taken for granted. This was so because all the four prosecution witnesses namely PW2, PW3, PW4, and PW5 were residents of Nyakasanga village, Kasese Town just like the deceased. Exhibit P.I shows that deceased's address was Nayakasanga. By 8/1/2002 when the statement was taken from PW5, the death of the deceased was common knowledge. Even by 2/12/2001 it was so and that is why the bodaboda cyclist wanted to lynch the accused. It is therefore not surprising that the policeman who took the statement was more interested in the identity of the accused rather than whether the witness knew the deceased.

I have no doubt that PW5 knew the deceased before as a fellow resident of Nyakasanga. In cross-examination he stated that he knew the deceased because he used to sell charcoal to him. I am sure that even if he had not met the accused and the deceased on the fateful day still he would by 8/1/2002 have known of his death and how it occurred. I believe it was because PW5 was not asked about the identity of the deceased that there is no mention of it in his police statement. I am satisfied that he told Court the truth of what he knew and witnessed on 29/11/2001.

In view of what I have tried to discuss above I find that the circumstantial evidence on record is incapable of any other explanation except that the accused participated in the Murder of the late Mugabe Robert. All in all and in agreement with the unanimous opinion of both gentlemen assessors I find Akandwanaho Nathan alias Cameroon guilty of Murder Contrary to Sections 188 and 189 of the Penal Code Act and convict him accordingly.

(V. T. ZEHURIKIZE)

JUDGE

19/4/2004

Court: the sentence for the offence of Murder Contrary to Sections 188 and 189 of the Penal Code Act is mandatory and it is death. I therefore sentence you to death and shall suffer death in the manner authorized by law.

(V. T. ZEHURIKIZE)

JUDGE

19/4/2004

Court Right of Appeal explained.

(V. T. ZEHURIKIZE)

19/4/2004