

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-148-2002

UGANDA.....PROSECUTOR

VS

BAKEIHAHWENKI YUSUF alias MUSILAAM.....ACCUSED

BEFORE: THE HON MR. JUSTICE P. K. MUGAMBA

JUDGMENT

Bakeihahwenki Yusuf alias Musilaam is indicted for murder, contrary to sections 188 and 189 of the Penal Code Act. Four witnesses were called by the prosecution to prove its case. Mujuni Vincent was PW1, Emmanuel Kamuntu was PW2, D/ASP Billy Baryabasha was PW3 while Dr. Mugisha Trifon testified as PW4. Accused in his defence made a sworn statement. He called no witnesses.

In brief the prosecution case is that at about 9 p.m. on the night of 10th June 2001 accused, who was a security officer attached to the local defence unit at Wachango trading centre in Ntungamo District, went to a scene next to a bar where people were fighting. While he was there his gun went off fatally murdering the deceased. Gabriel Baterine. Accused was detained in consequence and charged with this offence.

The prosecution has a duty to prove the case against the accused beyond reasonable doubt. See Sekitoleko vs Uganda [1967] EA 531. Where the charge is murder the following ingredients must be proved to that required standard:

- a) That the deceased died,
- b) That the killing was unlawful
- c) That there was malice aforethought, and
- d) That accused participated.

Concerning that death of the deceased, both PW1 and PW2 testified that the deceased, Gabriel Baterine, died. This was also the testimony of accused himself. It was further the evidence of PW4 that he examined the body of the deceased and medical evidence was contained in exhibit P.3. This ingredient has been successfully proved by the prosecution.

The next issue the prosecution must prove is that the killing of the deceased was unlawful. The law presumes every homicide to be unlawful except where it is accidental or where such excusable by law. See *Gusambizi s/o Wesonga v R* (1948) 15 EACA 63.

The duty is on the defence to rebut the presumption. The prosecution does not show that the fatal shot was deliberately discharged by the accused from his gun. While accused admits the shot was discharged from his gun, he states that when he realized he was about to be overpowered and disarmed by the crowd he acted as if he was shooting and a bullet which had been in the chamber of his gun went off. The gun had been in the custody of accused all along. He, no doubt, knew that there was ammunition in the gun. I do not find it accidental that a bullet went off. He ought to have known the probability. Nor was the shooting excusable by law. I find therefore that the prosecution has proved this ingredient also beyond reasonable doubt.

The prosecution must also prove that the killing of the deceased was with malice aforethought. Malice aforethought is the intention to bring about the death of another person. Whether that person is the one actually killed or not. I have mentioned earlier that a bullet went off from the gun held by accused. No one saw accused aim the gun at anyone. Accused in his defence stated that he did not aim at anyone but that the gun accidentally went off. Accused and deceased were not known to one another nor did the prosecution present evidence of malice aforethought. I find accused's version of events has not been negative by prosecution evidence. This ingredient has not been proved beyond reasonable doubt by the prosecution.

The final ingredient concerns accused's participation. The prosecution has proved beyond reasonable doubt that the bullet which killed the deceased came from accused's gun and defence does not contest this.

The gentleman assessor in his opinion advised me to acquit accused of the charge of murder and convict him of a lesser offence. For the reasons I have given in the course of this judgment I

agree with that opinion. I acquit accused of the charge of murder but instead convict him of manslaughter, contrary to sections 187 and 190 of the Penal Code Act.

P.K. Mugamba

Judge

22nd April 2005

22nd April 2005

Accused in court

Ms. Lydia Ahimbisibwe for accused person

Mr. Ngabirano State Attorney

Ms. Tushemereirwe court clerk/interpreter

Court:

Judgment delivered in open court

P.K. Mugamba

Judge

22nd April 2005

ALLOCUTUS

State Attorney:

The convict is a first offender. He has been on remand for 3 years and 10 months. He has been convicted of a serious offence. A person died yet convict was responsible for security of people. Give deterrent sentence.

Ms. Ahimbisibwe:

The convict is remorseful. He did not intend the act. he has a big family which needs his assistance as a bread winner. I pray for lenient sentence.

Convict:

The death occurred accidentally. I have been on remand for long. I pray for lenience as I have many dependants I take care of. My wife has also died since.

SENTENCE:

I have heard the submissions of both counsels just like I have listened to what the convict had to say regarding sentence. There is no doubt the incident which brought about this case occurred in very unfortunate circumstances. That is not to say that the accused does not take responsibility. I note he is a first offender and that he is remorseful. He has also been on remand for 3 years and 10 months. Taking everything into account I hand out sentence which is equal to the period he has been on remand. He is to be released at the rise of court.

P.K. Mugamba

Judge.