

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-SC-0004-2006

UGANDA.....PROSECUTOR

VS

BYARUGABA.....ACCUSED

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

JUDGMENT

Byarugaba Tarasisio is charged with murder, contrary to sections 188 and 189 of the Penal Code Act. six witnesses were called by the prosecution. Sitereo Bangirana was PW1, Kakuru Fabius was PW2, D/C Muhumuza was PW3, Byarugaba Silvano was PW4, D/C Turyahikayo Erifazi was PW5 while Dr. Ssendi Bwongi was PW6.

In his defence accused gave a statement on oath. He denied involvement.

The case for the prosecution is that accused together with one Bakashaba visited a bar owned by the deceased for a drink at about 8.00 p.m. on the night of 21st July 2002. There they found the deceased, PW1, PW4 and several others. Thirty minutes later accused and Bakashaba left the bar carrying a bottle of Coco Cola of the size 500 ml. The deceased did not want the two to take the bottle, which belonged to him, out of the bar. It was being carried by accused. The deceased had proceeded outside following them. Soon after the two men threw the deceased onto the ground and accused hit him in the head with the bottle in issue. Report of what happened was made to the authorities. Deceased was eventually admitted to Mbarara University Teaching Hospital. He died a couple of days afterwards. Accused was subsequently apprehended and charged with the murder of the deceased.

The prosecution must prove all the ingredients of the offence beyond reasonable doubt. Where the charge is murder the following ingredients must be proved:

- i. That the deceased died,
- ii. That the killing of the deceased was unlawful,
- iii. That there was malice aforethought, and
- iv. That accused participated in the offence.

Evidence the death of Mubangizi January was given by PW1, PW2 and PW4. There was also the evidence of PW6 who carried out the post mortem examination of the deceased's body. His report is Exhibit P.2. The defence itself did not contest the fact of Mubangizi January being dead. I am satisfied that this ingredient has been proved by the prosecution beyond reasonable doubt.

The law presumes that the killing of any person is unlawful except where it results from an accident or is excusable by law. See *Gusambizi s/o Wesonga vs R* (1948) 15 EACA 63. There appears nothing on record to rebut this presumption. I find therefore that this ingredient also has been proved beyond reasonable doubt.

Malice aforethought is the intention on the part of the perpetrator to bring about the death of someone, whether that person is the one actually killed or not. In this case death resulted from neurogenic shock due to injuries to the brain from fractured temporal bones secondary to being assaulted. Malice aforethought can be gathered from surrounding circumstances such as the type of weapon used, the part of the body on which injury is inflicted, the number of injuries and the conduct of the assailant before and after the attack. See *Tubere s/o Ochen vs R* (1945) 12 EACA 63. In the instant case the post mortem report states that there was an assault to the deceased which resulted into his death. The injuries were on the head, which is a vulnerable part of the human anatomy whoever assaulted the deceased had malice aforethought. This ingredient has been proved by the prosecution beyond reasonable doubt.

PW1 and PW4 testified that they were at the scene and saw what transpired. According to PW1 when the deceased followed Bakashaba and accused outside the bar in order to retrieve the CocaCola bottle bottle Bakashaba had pulled the deceased. As Bakashaba did the kicking accused held the deceased. PW1 testified that he had seen accused hit the deceased with a bottle in the head. He further stated that the deceased fell about one metre from the doorway to the bar. He said he had seen the altercation while he sat inside the bar in a position where he could observe what went on since there was light coming from a lantern burning inside the bar. In his

Police statement made on 26th July stated PW1 did not state who in particular struck the deceased with the bottle. His statement read, 'They assaulted him with an empty bottle which hit him on the head.'

The evidence of PW4 was that he saw what went on that night outside the bar while he sat inside the bar near the doorway. It was his evidence the deceased had fallen two steps from the doorway. He stated that no sooner had Bakashaba and accused gone through the doorway to the bar followed by the deceased than Bakashaba pulled the deceased to the ground. Accused had then struck the deceased in the head with the bottle. In a statement made to Police on 15th August 2002 however PW4 had stated:

'For us we remained inside the bar drinking. When we finished our beers, we decided to go to homes. As we reached outside the bar we couldn't see Mubangizi who had gone following the three persons to collect his bottle.'

That statement was acknowledged by the witness as one he made to Police soon after the death of Mubangizi. From the statement which is more contemporaneous to the occasion than the testimony in court, it emerges there was no sense of urgency when Mubangizi went outside which one would expect if anything unusual happened. Those in the bar continued taking their drinks. Afterwards they went outside but could not see the deceased. Had events been the way PW4 and PW1 related in court, those in the bar would not have continued drinking while confusion reigned nearby and there would have been no disappearance of the deceased since he would have fallen nearby. Most probably the deceased travelled far from the bar. PW3 testified that he visited the scene and saw the vomit and faeces of the deceased about 50 metres from the bar. It was his evidence he was taken to the scene by PW2. Interestingly in his evidence PW2 said deceased was found at a distance about 4 metres from the bar.

In his defence, accused stated that he passed by the night in issue. He said he had retired early leaving Bakashaka at the bar. Further he said that he had already left the bar when the deceased was attacked.

When an accused person sets up a defence of alibi he is under no duty to prove it. The prosecution has the onus to disprove it by adducing evidence which places the accused person squarely at the scene of crime.

The two prosecution witnesses who said they were present at the scene of crime gave contradictory evidence which goes to the root of the prosecution case. They point to deliberate falsehood and cannot be ignored. Consequently I find the prosecution testimony of what transpired on the occasion worthless and reject it.

The alibi of the accused person has not been disproved by the prosecution.

This ingredient of participation has not been proved by the prosecution beyond reasonable doubt.

The gentlemen assessors advised me to find accused not guilty of the charge. For the reasons I have given in the course of this judgment I agree with that opinion. I find accused not guilty and acquit him accordingly.

P.K. Mugamba

Judge

20th June 2006