THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0046 OF 2006

UGANDA ……

PROSECUTOR

VERSUS

1. BIKORIMANA CHARLES }

2. NUWAGABA PULIKARIPO } ::

ACCUSED

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

Bikorimana Charles, herein referred to as A1; and Nuwagaba Pulikaripo, herein referred to as A2; and together referred to as the accused, were jointly indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence in the indictment were that the accused, on the 9th day of October 2005, at Kibota Trading Centre, Ntonwa Parish, Bwizi Sub - County, in Kamwenge District, murdered Ndyamuhaki Gadi.

The accused each denied the offence upon the indictment having been read out to them; and after each responding that he had understood the charge. The Court therefore entered the plea of "Not Guilty"; as a consequence of which a trial took place. Murder is an offence containing four ingredients; and the prosecution is duty bound to prove each of the ingredients beyond reasonable doubt, for an accused to be found guilty. These ingredients are, namely:-

(i) Death of a human being.

(ii) The said death having been unlawfully caused.

(iii) The death was caused with malice aforethought.

(iv) The accused participated in causing the said death.

In the instant case, the prosecution called two witnesses in a bid to discharge the burden that lay on it, to prove that the accused are guilty as charged. These were; Katungi Hakim – PW1, a former local leader of the area where the alleged crime took place; and Mildred Dorothy Nakimera – PW2, a medical officer who carried out medical examinations and made reports there from.

To prove that Ndyamuhaki Gadi was dead as stated in the particulars of the indictment, the prosecution relied on the evidence of the two witnesses named above. PW1 testified to having found Ndyamuhaki Gadi in critical condition in his compound after the latter had a brawl with two others. The following day Ndyamuhaki Gadi was dead, and he attended the burial. PW2, performed the post mortem examination on a body identified to her as that of Ndyamuhaki Gadi, by a widow of the deceased.

The evidence adduced by the two witnesses above, taken together, establishes beyond reasonable doubt that Ndyamuhaki Gadi is dead; and satisfies the requirements in the case of ***Kimweri vs. Republic [1968] E.A. 452****;* where it was held that death may be proved, amongst other means, by evidence of someone who saw the dead body. This is so with regard to the death of Ndyamuhaki Gadi. The defence conceded that the prosecution had discharged its burden with regard to proof of the death of the said Ndyamuhaki Gadi. I so find too.

On the issue of causation of the death, the presumption in law is that any incident of homicide is unlawful. Where however, it is shown that the homicide was committed under circumstances that was either accidental, or was in defence of person or property, or in execution of a lawful Court order, then it is excusable; see the cases of ***R. vs. Gusambizi s/o Wesonga (1948) 15 E.A.C.A. 65****; Uganda vs. Bosco Okello alias Anyanya, H.C. Crim. Sess. Case No. 143 of 1991 - [1992 - 1993] H.C.B. 68; Uganda vs. Francis Gayira & Anor. H.C. Crim. Sess. Case No. 470 of 1995 – [1994 - 1995] H.C.B. 16.*** An accused may therefore rebut the presumption of unlawful homicide by showing that the killing is covered under any of the excusable circumstances. The standard of proof for such rebuttal is on the balance of probabilities; see the case of ***Festo Shirabu s/o Musungu vs. R (22) E.A.C.A. 454.***

With regard to the death of Ndyamuhaki Gadi, PW1 testified that the deceased had, only a few minutes earlier that night, been involved in an altercation with two others. His account of the exchanges went as follows:-

"You guy you are a mother fucker. If you come near me, I will beat you.' This was A2 Nuwagaba saying it. The deceased (Gadi) responded by calling the other one 'Mother fucker, mother fucker, you can't beat me'. Then a fight ensued. They were drunk and quarrelling. They were coming from Kabajungu's bar."

When PW1 intervened in the brawl, A1 was the first to flee, but A2 remained beating Gadi with a stick, after which he also fled. PW1 found Gadi lying helpless and had to be carried to his home. He died the following morning, when being taken to hospital. PW2 established that the cause of death was due to a fractured spinal cord. She found evidence of beatings at the back of the neck which, in her opinion, was occasioned by a stick.

The evidence of the two with regard to injury the deceased suffered, and the circumstance under which it occurred, rules out the possibility that the said fatal injury was inflicted under any of the excusable circumstances pointed out above; or any other. The defence honourably conceded - as with the ingredient of fact of death - that, in deed, there was irrefutable proof by the prosecution that the cause of the death in issue was unlawful. This ingredient too, has therefore been proved to the required standard.

As for the ingredient of malice aforethought, this is a mental element. Section 191 of the Penal Code Act defines malice aforethought as follows:

"191. Malice aforethought.

Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances-

(a) an intention to cause the death of any person, whether that person is the person killed or not, or

(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused."

Therefore, save for circumstances where the person causing the death has expressly declared the intention to cause the death of a person, the existence of malice aforethought can only be established by inference, from evidence of the circumstances surrounding the death. Such inference can be derived from such factors as were laid out in the case of ***R. vs. Tubere s/o Ochen (1945) 12 E.A.C.A. 63***; where, Justice Sir Sheridan made the following remarks:-

> *"With regard to the use of a stick in cases of homicide, this Court has not attempted to lay down a hard and fast rule. It has a duty to perform in considering the weapon used, the manner in which it is used, and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the use of say, a spear or knife than from the use of a stick; that is not to say that the Court take a lenient view where a stick is used. Every case has of course to be judged on its own facts."*

This principle has been restated in a number of other cases, such as ***Uganda vs. Fabian Senzah [1975]H.C.B. 136; Lutwama & Others vs. Uganda, S.C. Crim. Appeal No. 38 of 1989,*** where these factors are spelt out as follows:-

(i) Whether, or not, the weapon used, and which caused the death in issue was lethal.

(ii) Whether, or not, the part of the body of the victim, targeted by the assailant was vulnerable.

(ii) Whether, or not, the injury was inflicted in a manner that indicates it was intended to cause grave damage or injury; as for example where the injury was inflicted repeatedly.

(iii) Whether, or not, the conduct of the accused, before, during, and after the attack, points to guilt.

The medical evidence on record is that the cervical spine of the deceased was fractured due to trauma resulting from serious beatings on the back of the neck. The injury was thus inflicted on a very vulnerable part of the body. On the authority of ***Uganda vs Turwomwe [1978] H.C.B. 16,*** malice aforethought would be inferred in the instant case, since the weapon used, was applied in the manner brought out by the evidence. However, the Court has to look at the entire

circumstance surrounding the cause of the injury, before making a conclusive inference that malice aforethought existed at the time.

The evidence on record is that the deceased and his assailants were all drunk. The brawl took place in darkness; and PW1 had to flash a torch to be able to see the persons fighting, and from which he saw the accused beating the victim. It is reasonable to harbour serious doubt as to whether the assailants in the said circumstance intended to target the back of the neck, or any specific part of the body. The stick allegedly recovered from the scene of the crime was not exhibited or sufficiently described. This leaves open other reasonable possibilities as to the cause of the injury; amongst which is that the deceased could have had a fall during the drunken confrontation.

Proof of the ingredient on participation of the accused in the crime charged, rests solely on the evidence of PW1. Where a case depends on evidence of identification, such as this one, it is the inculpatory facts of identification adduced by the victim of the act complained of, which is the best evidence - see ***Badru Mwindu vs Uganda; C.A. Crim. Appeal No. 1 of 1997.*** In the instant case before this Court, however, the inculpatory facts are not adduced by the victim, as he is since dead; but by the direct evidence of PW1 who witnessed the event, and therefore was very much in a position near that of the victim.

It was the testimony of PW1, a single identification witness, that on that occasion, he was woken up from his sleep by the altercation between the deceased and two persons; all of whom he identified first from their voices as they were his village mates, and later confirmed by visual identification. PW1 heard the voices of those quarrelling, for about five minutes, before he rushed out to stem the fight that had ensued. The light available, and which enabled him to identify the persons involved in the brawl was from the torch he flashed. Since the determination of this instant case rests on evidence of this single identification witness, this Court must proceed with caution before arriving at the conclusion that the accused are guilty.

This is in keeping with the warning in ***Roria vs. Republic [1967] E.A. 583,*** at p. 584 - and reproduced by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997*** - where the Court of Appeal for Eastern Africa had stated as follows:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner L.C. said recently in the House of Lords in the course of a debate…..' There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of the ten – if they are as many as ten – it is on a question of identity' …..

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."

The **Bogere** case (supra), cited the case of ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77*** with approval; and reproduced the passage from the latter judgment, whereat the Court had clarified that the need for exercise of care applies to both situations of single or multiple identification witnesses. It stated that:

"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken.

The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger…..

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

The Supreme Court of Uganda restated this position of the law in ***George William Kalyesubula vs. Uganda – S.C. Crim. Appeal No. 16 of 1997,*** when it stated as follows that:-

> *"The law with regard to identification has been stated on numerous occasions. The Courts have been guided by* ***Abdulla bin Wendo & Another v. R (1953) 20 EACA 166*** *and* ***Roria v. Republic [1967] E.A. 583*** *to the effect that although a fact can be proved by the testimony of a single witness this does not lessen the need of testing with greatest care the evidence of such a witness respecting identification especially when the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error."*

Where, however, conditions favouring correct identification are found to have been difficult, the Court in the case of ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93]H.C.B. 47***; and cited with approval in the ***Bogere*** case (supra), stated at p. 48 as follows:-

> *"Where the conditions favouring correct identifications are difficult, there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm, and of fabricated alibi."*

In the ***Bogere*** case (supra), the Court stated as follows:-

> *"We have to point out that the supportive evidence required need not be that type of independent corroboration such as is required for accomplice evidence or for proving sexual offences (See* ***George William Kalyesubula vs. Uganda*** *(supra)). Subject to the circumstances of each case, any admissible evidence which tends to confirm or show that the identification by an eye witness is credible, even if it emanates from the witness himself, will suffice as supportive evidence for the purpose."*

The prosecution evidence on record is that PW1 had up to about five minutes of listening to the altercations between the antagonists outside his house; where they were using abusive, vulgar and

obscene language. These were, to use his own words, persons he was ‘staying together with’; and he was their Secretary for Defence in the village local council. When he went out of the house, although it was dark, he confirmed by visual identification what his audial identification had been. He was assisted by the light from the torch which he shone on them.

Under this circumstance then, the condition obtaining for identification was relatively poor; and therefore there was need to look for such other evidence as would support the evidence of identification, in accordance with the authorities cited above. PW1 immediately reported the incident to his fellow leaders, and from his evidence, A1 and A2 were arrested that very night; and their respective fathers proposed that the accused take responsibility for treating the victim. The following morning, the victim died in the hands of the two parents who were in fact taking him to hospital for treatment.

PW1 testified that he saw A2 beating the victim with a stick. PW2 testified that she saw a stick which the police stated they had recovered from the scene of the crime. The prosecution did not lead evidence from the police with regard to the alleged stick. There is therefore no direct evidence that the stick PW2 saw at the police was the one used in the crime. Nonetheless, this does not lessen the value of the opinion expressed by PW2 that the beatings evidence of which she found at the back of the neck of the deceased had been perpetrated with a stick.

The accused for their part denied being at the scene of the crime that night. They testified that they were each arrested from their respective homes and not immediately told of the reason for their arrest, until when they were taken to police. They denied knowledge of any killing of a human being that had taken place. I must reject this denial as worthless, in view of the prosecution evidence evaluated above. Even if they were not responsible for the killing, they as fellow villagers would have known of the death of a village mate.

Secondly, when they were arrested that night and their fathers undertook to treat the victim, they should have protested their innocence; and this would have thrown doubt on the prosecution claim. This they did not do, leaving the Court to make the reasonable inference of culpability on their part. As was held in the case of ***Moses Kasana*** above, a fabricated alibi, and I can add here, or defence generally, amounts to that other evidence. The reaction by their parents that night, and their futile attempt the following morning, to take the victim for treatment provided yet another of this required evidence.

This is so in the light of the authority that this corroborative evidence need not be at the level of evidence required to prove sexual offences, or accomplice evidence. I find support in my contention in the aptly worded advice the court sounded in the ***Abudalla Nabulere*** case cited above; as follows:-

> *"If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered."*

I do find that, in this instant case before me, there are the other evidence as pointed out above, supporting the identification evidence adduced by PW1, that it was the accused who, that night, had that tragic brawl with Gali, now deceased. Therefore, after having satisfied myself that the other evidence in support of that of identification has removed the danger that otherwise would have been there, I find it safe to found a conviction basing on the totality of the evidence on record.

In the premise then, since the ingredient of malice was not proved, I find that the prosecution has failed to prove beyond reasonable doubt, that the accused caused the death of the victim Ndyamuhaki Gadi with malice aforethought, as alleged in the indictment. I therefore, and in agreement with the lady and gentleman assessors, acquit each of them of the charge of murder for which they were indicted. However here, save for that of malice, all the other ingredients have been proved beyond reasonable doubt.

The evidence adduced by the prosecution has established the commission, by the accused, of the offence of manslaughter contrary to sections 187 (1), and 190, of the Penal Code Act. The authority in ***Funo & Ors. vs. Uganda; H.C. Crim. Appeals Nos. 62 – 69 of 1967; [1967] E.A. 632,*** is that an accused person can be found guilty and convicted of a minor cognate offence to the one he or she has been charged with; notwithstanding that the accused was not charged with that minor cognate offence. Section 87 of the Trial on Indictments Act, (Cap 23), provides as follows:

"87. Persons charged may be convicted of minor offence.

When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it."

Since the evidence in this case fits in with the provision of the law set out above, I find each of the accused guilty of the minor cognate offence of manslaughter, contrary to sections 187 (1), and 190, of the Penal Code Act; notwithstanding that they were not charged with that offence; and accordingly do hereby convict them.

Chigamoy Owiny – Dollo
JUDGE
02/10/2008

Ann Kabajungu for the State.
Cosma Kateeba for bot accused.
Both accused in Court for judgment.
Clerk – Irumba Atwoki.

Judgment delivered in open Court.

Chigamoy Owiny – Dollo
Judge.

02/10/2008

Ann Kabajungu: Both convicts are first offenders. They have spent three years on remand. First convict is 36 years old, married, and has three children. The second convict is 32 years old, married and has 4 children. Both are young and can reform. They have however been convicted of manslaughter which carries the maximum sentence of life imprisonment. They were, in their actions, reckless and irresponsible; and as a result the life of an innocent person was taken. Justice must be done and rampant cases of killings curbed. The sentence must be deterrent custodial sentence.

Cosma Kateeba: Both convicts are young men who can reform. They are bread winners. The second convict has, on top of his, two children of his late brother under his care. The convicts were assaulted on day of arrest and are in need of treatment. The circumstance under which the offence was committed was not blatant; not premeditated. PW2 attested to their having been drunk. I pray for leniency in sentencing to cater for the interest of their family.

Court: The two convicts are both relatively young, in their early 30s. True, the circumstances under which the offence for which they were convicted was committed lacked blatancy as they were all, including the deceased, drunk. Nonetheless, this will not change the fact that the two acted unnecessarily in a manner which has resulted in Gadi Ndyamuhaki never walking the face of the earth, ever again. Being drunk should never be an excuse for committing any offence and as is the instant case, as grave as manslaughter. But because this Court believes a corrective custodial sentence would be appropriate in the circumstance of this case, I sentence each of the convicts to 8 (eight) years imprisonment. Right of appeal explained to each convict.

Chigamoy Owiny – Dollo
JUDGE
02/10/2008