THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0113 OF 2004; HELD AT KYENJOJO

UGANDA ……

PROSECUTOR

VERSUS

1. KIIZA AUSI }

2. ISINGOMA FRANK }::

ACCUSED

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

JUDGMENT

Kiiza Ausi - A1, and Isingoma Frank – A2, otherwise herein referred to collectively as the accused were indicted for the offence of murder in contravention of sections 188 and 189 of the Penal Code Act. In the particulars of the offence, it was stated that on the 20th day of July 2003, at Bubona – Kibingo village, Butiiti sub – County, in Kyenjojo District, the accused and others still at large, murdered one Musana Paul.

To the indictment whose particulars were read and explained to them, each of the accused denied the allegations contained therein after assuring Court that they had understood the same. Court then entered the plea of "Not Guilty" for each; and this trial resulted. Murder is an offence which is constituted by four ingredients; namely:-

(i) Death of a human being.

(ii) Unlawful causation of that death.

(iii) The said death having been caused with malice aforethought.

(iv) The participation of the accused in causing the said death.

It was incumbent on the prosecution to strictly prove, beyond reasonable doubt, each of the aforesaid ingredients, in order to cause Court to enter a conviction of the accused. owing to the

fact that this is a capital offence, the standard of proof required, according to ***Andrea Obonyo & Others vs. R. [1962] E.A. 542;*** at p. 550, which cited a passage from the judgment of DENNING, L.J. (as he then was), in ***Bater v. Bater [1950] 2 All E.R. 458***, and followed in ***Hornal v. Neuberger Products Ltd. [1956] 3 All E.R. 970,*** and, as well, by our own Court, in ***Henry H. Ilanga v. M. Manyoka [1961] E.A. 705 (C.A.)*** – must be of clarity that accords with the gravity of the offence charged.

At the commencement of the trial, I carried out a preliminary inquiry in accordance with the provisions of section 66 of the Trial on Indictments Act; and the following agreed facts were admitted in evidence. These were that:

(i) Musana Paul died on the 20th of July 2003 at Rubona, Kakindo, village, Kyenjojo District; and Dr. Waiswa Musa Kasadha carried out a post mortem examination on the body, on the 22nd July 2003. His findings were that: the body had deep cut wounds on the skull, right shoulder and amputee right hand – meaning that the right hand was severed off the body; and death resulted from haemoragic shiock from massive intro- external bleeding; and the weapon used was most likely a panga. The post mortem report was exhibited as CE1.

(ii) Medical examination carried out on the A1 on the 24th July 2003 by the same doctor as above, revealed that he was 26 years of age, and of normal mental condition, with no injuries, bruises, swellings, or scratches on him. The report was exhibited as CE2.

(iii) A2 was examined by the same doctor aforesaid, and found to be of the age of 21 years. He had no injuries, and was of normal mental state. The report was exhibited as CE3.

Two witnesses gave evidence in support of the prosecution's bid to discharge the above stated burden of proof that lay on it. The witnesses were:

(i) Theresa Kabaganyizi – PW1; daughter to the deceased Musana.

(ii) Komugisha Irene – PW2; daughter to the deceased Musana.

Proof of the death of Musana Paul was provided by the direct evidence of PW1, PW2, and the accused, who all saw the body of the deceased and witnessed his burial. In addition to this, the post mortem report aforesaid proved death of the said Musana. Therefore, in accordance with the

requirements set in ***Kimweri vs. Republic [1968] E.A. 452***; proof of death has been established by the evidence of eye witnesses to the corpse. The defence conceded proof of this ingredient.

It is a well established principle of law that any incident of homicide is presumed to have been unlawful. This presumption is however be rebuttable by the accused who may provide evidence that the homicide was committed under any of the following excusable circumstances; namely: either the homicide was accidental, or took place in defence of person or property, or there had been provocation, or was committed in compliance with some lawful order.

This principle of law is supported by a list of authorities such as ***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***. Further to this, establishment of a rebuttal does not require a very high premium. The standard of proof is, as laid down in ***Festo Shirabu s/o Musungu vs. R (22) E.A.C.A. 454,*** only on a balance of probabilities.

As contained in the post mortem report admitted in evidence as part of agreed facts, the deceased had extensive deep cut wounds all over his scalp and through the skull, deep cut wounds over right shoulder and upper limb, and his right hand was dismembered and lying apart from rest of the body. The gravity of the injuries inflicted on the deceased was huge. The other prosecution witnesses all spoke of severe injuries and wounds on the deceased when they saw the body.

The severity of the injuries which followed the earlier cries by the deceased who was evidently in some pain made it clear that his death was not natural, but unlawfully caused. The accused herein did not, and I shall advert to it later, set up any evidence pointing to an excusable circumstance; hence there is no need to dwell on that line of defence. The ingredient of unlawful causation has been established even to the satisfaction of the defence.

As to whether or not the unlawful causation of the death in issue was so done with malice aforethought, malice aforethought is clearly defined in the Penal Code Act 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."*

It is only when an accused had expressly communicated his or her intention to commit homicide or to do something which would lead to it, that there would be direct evidence of the existence of malice aforethought.

Otherwise in the majority of cases of homicide the existence of malice aforethought at the time of the infliction of the injuries must be derived solely by inference from the conduct of the accused. Accordingly, before conclusively making a finding as to whether there exists any of the excusable factors named above; or whether instead, the perpetrator was aware that his or her action could probably result in death, it is incumbent on the trial Court to first examine the entire circumstance surrounding the infliction of the injuries.

In the combined appeal in ***R. v. Sharmal Singh s/o Pritam Singh; & Sharmal Singh s/o Pritam Singh v. R. [1962] E.A. 13,*** the Privy Council, applying the principle laid down in ***D.P.P. v. Smith [1961] A.C. 290,*** held that the knowledge referred to prove existence of malice aforethought is knowledge which a reasonable man would have, of what consequences may result from his or her acts or omissions. The Court held at p. 16 - and this is what has been imported in the definition of malice aforethought in our Penal Code Act - that the existence of malice aforethought would have been proved where, amongst other things, there is:

'knowledge that the act or omission causing the death will probably cause the death of or grievous harm to another person."

The case of ***R. vs. Tubere s/o Ochen (1945) 12 E.A.C.A. 63***, pointed out that it is not possible to lay down a hard and fast rule for determining the existence of malice aforethought; but that however, there are certain factors which can guide the Court to reach the necessary inference; and

these factors include: the weapon used to inflict injury, the manner or force with which the weapon was used, and the part of the body targeted in inflicting injury. The Court remarked that:

> *"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."*

Other cases have followed this decision; such cases are ***Uganda vs. Fabian Senzah [1975] H.C.B. 136; Lutwama & Others vs.Uganda, S.C. Crim. Appeal No. 38 of 1989; Uganda vs. John Ochieng [1992 - 1993] H.C.B. 80, Uganda vs Turwomwe [1978] H.C.B.16,*** and have recast and or widened the areas for consideration to include whether the weapon used is ordinarily deadly or lethal, or vulnerable parts of the victim were targeted, and if injuries were intended to cause grave damage; and as well of relevance is the conduct of the accused before, during, and after the attack; whether it points to guilt or not.

In ***Siduwa Were v. Uganda [1964] E.A. 596,*** the medical evidence had presented the possibility of a reasonable alternative or co-existing circumstance to explain the death; and this was as consistent with accident or manslaughter, as it was with murder. The Court emphasised in accordance with the decision in the ***Sharmpal Singh*** *(supra)* that the onus of proof of malice aforethought was high. It is believed that the injury that resulted in the death herein was occasioned by some sharp object; probably a panga.

The skull which the assailant repeatedly targeted is without doubt a most vulnerable part of the body. The force with which the attack was perpetrated – severing the limb from the torso – was uncontroverted evidence that the attacker intended the ultimate result from the attack; or was aware that such vicious attack would most probably result in death. Malice aforethought herein has certainly been proved; and the defence has graciously conceded so.

Pertaining to the participation of the accused in causing the injuries that led to the aforesaid death, the evidence available was all circumstantial. Both PW1 and PW2 only heard the deceased run and cry out in pain from outside the house where they were lying in bed. No one saw the assailant who inflicted the injuries that resulted in the death of the victim. Certainly the victim himself did not mention or was not heard to mention any name.

The prosecution case hinges almost entirely on the alleged identification of the accused as the persons who, some four hours after the attack on the deceased, came to the home of the deceased asking PW1 and PW2 where their father the deceased. The two witnesses claim to have identified the two as the ones who came to their home that night. They claim to have identified them by their facial appearances and structures, and their familiar voices.

Two issues arise here: first is whether the said identification was correct; and even if it was so, whether the persons who came to the home of the deceased after the attack on him were the very ones had assaulted him; and which culminated in his death. On evidence of identification, such as this one, it is the inculpatory facts of identification presented in Court by the victim of the act complained of, which offers the best evidence on the matter - see ***Badru Mwindu vs Uganda; C.A. Crim. Appeal No. 1 of 1997.*** In the matter herein the inculpatory facts of identification were from PW1 and PW2, who claim to have identified the accused in the later visit to their house.

A trial Court such as this one is enjoined to exercise caution in approaching evidence of identification; before reaching any finding that the accused was correctly identified and placed at the scene of the crime. I therefore warned the assessors of this need. This principle is reiterated consistently in such authorities as: ***Abdulla bin Wendo & Another v. R (1953) 20 E.AC.A. 166, Roria vs. Republic [1967] E.A. 583, Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978, [1979] H.C.B. 77***; and ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997.***

In the ***Nabulere*** case (supra) the Court stressed, in a passage which due to its importance and relevance, I quote fully, namely 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."

Other cases such as ***Yowana Sserunkuma vs Uganda, S.C. Crim. Appeal No. 8 of 1989***, ***George William Kalyesubula vs. Uganda – S.C. Crim. Appeal No. 16 of 1997***, ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981 - [1992-93] H.C.B. 47***; all consistently stressed the need to exercise caution, and to test with the greatest care evidence of identification; and particularly so when conditions obtaining for correct identification are unfavourable. In such situation, the Court is advised to look for other evidence, whether direct or circumstantial, that points to the guilt of the accused, hence supporting the correctness of identification; and from which it can concluded that the identification was free from error, or mistake of identity.

In the cases of ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** and ***Remigious Kiwanuka vs. Uganda Crim Appeal No. 41 of 1995,*** a clarification was made that if the identification was made during broad day light, and by a witness who knew the accused fully, then conditions for proper identification would have been favourable. The nocturnal visit allegedly by the accused took place after the gruelling attack on the head of the family. There was no light in the house and the witnesses claim they benefitted from the light provided by the torches flashed by the intruders whom they claim to have identified on account of the familiarity they had with them.

It's got to be taken into account that the witnesses were much younger then, than they are now when they testified in Court six years after the event. They were in a state of fear from the earlier attack. Therefore, the conditions could not have favoured correct identification; hence, there was serious need to ascertain if there was other evidence in support of that adduced by the two witnesses, which would point to the guilt of the accused, in accordance with the warning in the ***Moses Kasana***, and ***Bogere*** cases (supra). The prosecution witnesses testified that the accused

who were their village mates were noticeably absent in both the vigil and burial of the deceased whereas the turn up by the other villagers was massive.

A1 who denied killing the deceased, and set up an alibi, stated that he had in fact joined mourners at the home of the deceased on learning of his death; and had seen many other people there whom he named. He admitted not attending the burial for the reason that this coincided with the day the police had asked him to report for his money he had lent someone. He was arrested from the police four days after the event when he had gone back in pursuit of his money. For his part A2, who also set up an alibi, claimed that he too had joined mourners at the home of the deceased immediately he learnt of his death.

He stated that he witnessed the police coming from the scene. He stated further that he even made a contribution for the money the doctor was alleged to be demanding. His arrest, he stated, was initially for the reason that he had escaped from Katojo prison where he had been detained for some other matter. It is clear that the accused were in the village during the death of Musana. Nothing that they did, or failed to do could point or be attributed to guilty behaviour. Whatever they failed to do, such as failing to bury the deceased, was satisfactorily explained. It is possible that the witnesses only failed to notice their presence at their home due to the many people who are reported to have assembled at the home of the deceased.

Finally, the witnesses for reasons which were not clear did not take the first opportunity to name the accused as the persons who intruded into their house following the departure of their father from home. The reasons advanced by them for their failure to name the accused immediately range from not being asked for the identity of the intruders, to fear that the accused would harm them. However one would have expected them to name the accused to the police at the very first instance. Instead, even to police, PW1's statement indicated that there had been one intruder; and he had not been identified. It was in the second statement, four days after the event, that PW2 named the accused as the intruders of the tragic night.

Authorities abound deciding that where a witness' earlier statement to the police differs from the one stated in Court, then although the police statement is not evidence it serves to show that what was adduced in Court may be an afterthought and would diminish the evidential value of the court testimony. It is the case here; and looked at the absence of any other evidence pointing to

the involvement of the accused it is not safe to find that the accused were the persons who intruded into the witnesses' residence that night.

The other point is that even if it were established that the accused were the ones who intruded into the residence of the deceased after he had already inexplicably left his house that night, I totally fail to see any nexus between the earlier attack and the intrusion later in the night. It would stretch the principle of circumstantial evidence beyond permissible limit to suggest that because the two incidents occurred the same night they must be linked. Yes, the second incident coming, as it did, not far in the wake of the first, gives good reason for suspicion; but that is far from qualifying as evidence that could pin the accused down in culpability.

Even when I apply the relaxed rule pointed out in the ***Bogere*** and ***George William Kalyesubula*** cases (supra), which is that the 'other evidence' required for support of that of identification need not be the type of independent corroboration such as is necessary in cases of accomplice evidence, or in sexual offences; and that any admissible evidence tending to establish that the eye witness identification is credible, can suffice even if it is from that eye witness himself or herself, I still find that the absence of evidence in support of evidence of identification has left undisturbed, the danger of error of identification or mistaken identity; and this has rendered it unsafe to found a conviction basing thereon.

In this regard therefore, I find myself unable to agree with the opinion expressed by the lady and gentleman assessors, that participation of the accused in the offence charged has been proved. To me it has not. The evidence adduced in this case fell short of what was required of the prosecution to prove the last ingredient of the offence charged. Accordingly then since this last ingredient has not been proved, I find that the prosecution has failed to prove beyond reasonable doubt, that the accused murdered Musana Paul; as alleged in the indictment. I therefore acquit him of the charge of murder for which he has been indicted.

Chigamoy Owiny – Dollo

JUDGE

05 - 06 - 2009