THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0013 OF 2005; HELD AT KYENJOJO

UGANDA ……

PROSECUTOR

VERSUS

1. **SANYU CHARLES }**
2. **ISINGOMA PETER } ::**
   ACCUSED
3. **KAKULILEMU BEATRICE }**

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

JUDGMENT

Sanyu Charles, Isingoma Peter, and Kakuliremu Beatrice Nalongo a.k.a. Kabakenya; herein referred to respectively as A1, A2, and A3; and collectively as the accused were indicted for murder contrary to sections 188 and 189 of the Penal Code Act.

The particulars of the offence as set out in the indictment were that on the 5th day of December 2003, at Isandara village, Butiiti Sub – County, Kyenjojo District, the accused murdered Rugomoka Stephen. The indictment was read out and explained to each of the accused. Each of them stated that they had understood the indictment; but each denied committing the offence. The Court therefore entered the plea of "Not Guilty"; and as a consequence of which this trial followed.

Murder is an offence which comprises four ingredients. The prosecution is under strict duty to prove each of these ingredients, beyond reasonable doubt, before an accused can be found guilty, and convicted. These ingredients are, namely:-

(i) Death of a human being.

(ii) The said death having been unlawfully caused.

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

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

In the instant trial, the prosecution called seven witnesses in a bid to discharge the burden of proof aforesaid. These were:

(1) No. 21904 Cpl. Matete Augustine – PW1; a police officer who carried out investigations into the crime and visited the scene of the death.

(2) Kwikiriza Ali – PW2; resident of the village of the accused, and a close relative to them.

(3) Wako Seregio – PW3; village mate and relative of the accused, and brother to the deceased Rugomoka Stephen.

(4) Akugizibwe Mutabazi Edwins – PW4, a Clinical Officer.

(5) Atenyi Joseph Kachope – PW5; relative and village mate of the accused; and brother to the deceased.

(6) Basiima William – PW6; LC1 Chairman of the village where the deceased was resident.

(7) Byaruhanga Alozio – PW7; brother to the deceased.

To prove the death of Rugomoka Stephen, the prosecution relied on the testimonies of all the aforesaid witnesses; all of whom, saw the body of the deceased; and, except for PW1, all attended his burial; and therefore in keeping with the decision in ***Kimweri vs. Republic [1968] E.A. 452***; which is that proof of death may, amongst other means, be established by evidence of someone who saw the body of the dead person. The defence rightly conceded the overwhelming proof of the death of Rugomoka. This ingredient has therefore been established beyond reasonable doubt.

Regarding the cause of that death, the legal position is that any incident of homicide is presumed unlawful. This presumption is however excusable by showing that either the homicide was accidental, or was done in defence of person or property; 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]; Uganda vs. Francis Gayira & Anor. H.C. Crim. Sess. Case No. 470 of 1995 – [1994 - 1995] H.C.B. 16.***

An accused may rebut the presumption of unlawful homicide by showing that the killing falls 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.***

The manner Rugomoka died was gruesome. The prosecution witnesses who saw his body in detail testified to his penis having been severed, his tongue sliced off, the hand was broken, and the body had several beatings on it; the face with the face having bruises on it, and there were signs of strangulation. PW4 stated that the deceased had died of haemorrhagic shock. In the words of PW6 the deceased had died under strange and suspicious circumstances that pointed to his having been murdered.

These multiple and bizarre injuries could not have been inflicted on the deceased either in self defence or defence of property, or upon provocation, or accidentally, or in execution of any lawful process at all. The injuries on the deceased pointed to an unlawful killing. The defence, correctly, conceded this ingredient too.

As for 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, except where an assailant expressly declares the intention to cause the death of a person, the prosecution can only derive the existence of malice aforethought from the circumstances surrounding the death. This can be from such factors as were laid out in the case of

R vs Tubere s/o Ochen (1945) 12 E.A.C.A. 63*;* and which have 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.*** These factors are:-

(i) Whether the weapon used, and which caused the death, was lethal; or not.
(ii) Whether the part of the body of the victim, targeted by the assailant was vulnerable; or not.
(iii) Whether the injury was inflicted in a manner that manifests the intention to cause grave damage or injury (as for instance repeated infliction of the injuries); or not.
(iii) Whether the conduct of the accused before, during, and after the attack points to guilt; or not.

Whatever was the weapon used to slice off Rugomoka's penis and tongue, it must have been a sharp instrument. The post mortem medical examination done on the body of the deceased which had to be exhumed and was already badly decomposing did not yield a definite finding. The doctor however opined that from the severance of the tongue and penis, the likely cause of the death must have been caused by the resultant haemorrhagic shock resulting from the bleeding. On the authority of ***Uganda vs Turwomwe [1978] H.C.B. 16,*** malice aforethought can be inferred in the instant case. This ingredient, learned counsel for the accused also conceded, had been established to satisfaction.

It was the issue of the participation of the accused which was well contested by the defence. PW2 testified in Court that from a distance of some ten metres, he had seen the accused and others boxing and kicking the deceased, at the entrance to A4's bar, around 11.00 o'clock of the night preceding the discovery of the dead body. He was, at the time, 14 years of age; and by his own admission had been taking Waragi – a local potent gin – for close to two hours. It was dark outside, with the only light available supplied by a tadhoba (small locally made hurricane lamp) situated inside the bar.

The accused were his very close blood relatives; and when he tried to intervene they threatened they would kill him if he revealed to anyone that they had beaten the deceased. He therefore fled the place while they were still assaulting the deceased. PW2 was a single identifying witness at night. His evidence therefore had to be treated with the caution it deserves. I was under duty to

exercise caution in approaching his evidence before reaching any finding that the accused was correctly identified; and I accordingly 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.*
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> *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…..*
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> *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***; have all re-echoed the need for the exercise of caution, and for testing with the greatest care evidence of identification; especially when conditions for correct identification are unfavourable.

In such situation, the decisions above have advised that the trial Court should 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 conclude that the identification was free from error, or mistake of identity.

In the instant case before me, the identification was made at night, by an infant who had taken potent gin for well over an hour. The light was poor, and the witness was some ten metres away. The attackers were, although well known to the witness, said to be many and mingling in the beating of the deceased. The conditions were certainly not conducive for correct identification of the attackers and the victim. No wonder that the witness contradicted himself over the identities of the participants in the beatings when he named A3 to PW6 amongst the assailants and yet in Court testified that A3 had not come out of the bar.

To rely on the evidence of identification of this infant, operating under the influence of alcohol, alone to place the accused at the scene of the beating would be most unsafe and indeed unfortunate. PW2's state of mind could have been such that he saw things which bore no relationship with what later he claimed to have seen. His boast in Court that it would take a lot more potent gin, than just one bottle, to have him drunk only added to the incredulity with which this Court received his testimony. He was just 14 years of age then. There was therefore serious need to look for such evidence as would point to the correctness of his evidence of identification before I could act on it.

PW5, testified that PW6 – the LC1 Chairman of their village had, at the burial, advised those who had information about the killers of the deceased should write chits and deliver to him; and that it was the anonymous chits, which he saw, naming the accused and others that were taken to police, and led to the arrests of the accused as suspects. PW6 corroborated this; and that subsequent to that, members of his Committee delivered to him anonymous chits, naming the accused and others as the culprits. A3, who at the time was his Vice Chairperson, had also come to him reporting that PW2 was going about naming A1 as the killer; and therefore advised him to have A1 arrested before he could escape.

He then took the chits to police who, with his participation, arrested A1 and A3 from their homes. After this, PW2 freely divulged many names to him including that of A3 as being those he had seen beating the deceased at A3's bar that fateful night. However, the most telling testimony was

that of PW7 who had been in the company of the deceased the evening previous to the body being discovered. They had been together on their way home and he had left the deceased at the Alombo stream around 7.30 p.m. helping some old drunkard called Matwale who was unable to move. The body was discovered about 600 metres from where he had left his brother the previous evening.

At the close of the prosecution case A3 was discharged; there having been insufficient evidence to require her to be put on her defence. Both A1 and A2 testified on oath - A1 testifying as DW1, and A2 testifying as DW2 - and both put up the defence of alibi that they were at their respective homes the fateful night; and that the following morning they had both responded to the emergency drum that had been sounded and had, together with many people, seen the deceased's body at the stream.

They had attended the vigil and burial of the deceased. A1 further testified that he was arrested, released on police bond, then re-arrested and charged in Court. He had no grudge with anyone and could not tell why he was implicated in the killing of the deceased. A2 confirmed that at the burial, the LC1 Chairman had announced that those with information on the death of the deceased should anonymously send it to him.

From evidence on record, there was no witness to the incident that led to the bizarre death of Rugomoka. The evidence of the assault on Rugomoka by the accused at the bar that night can, at the most, only be circumstantial. Owing to the fact that the evidence regarding the identity of the killer of the deceased Rugomoka is wholly circumstantial, before conviction based on it can be justified, the Court must establish that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of guilt; and further, that there are no co-existing circumstances that would negative the inference of guilt.

There is an almost endless number of authorities affirming this legal position, running from the leading case of ***Simon Musoke vs. R. [1975] E.A. 715; Sharma & Kumar vs. Uganda; S.C. Crim. Appeal No. 44 of 2000;*** to ***Byaruhanga Fodori vs. Uganda, S.C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12.*** In the last case, at p. 14, the Supreme Court of Uganda spelt out that:-

"It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See ***S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480****)."*

In addition to this, in the case of ***Tindigwihura Mbahe vs. Uganda S.C. Crim. Appeal No. 9 of 1987***, Court issued a warning to trial Courts to treat circumstantial evidence with caution, and narrowly examine it, due to the susceptibility of this kind of evidence to fabrication. Therefore, before drawing an inference of the accused's guilt from circumstantial evidence, there is compelling need to ensure that there are no other co-existing circumstances which would weaken or altogether destroy that inference**.**

In the matter before me, even if I were to accept that the accused had assaulted the deceased at the bar that fateful night, that evidence alone would not have pinned the accused down as the villains who had savagely dismembered his penis and tongue in a ritual – like manner, and left his body by the riverside. There is the very reasonable hypothesis that the deceased in fact met his death at the hands of unknown villains at the stream where his brother PW7 had left him trying to help the drunkard. In this regard the villains could be anyone with the purpose and motive to carry out such bizarre enterprise.

His own brother, PW7, who claimed to have left him allegedly to give relief to a drunkard, close to where his body was found the following morning, being the last person to have seen him alive, would have had no lesser duty to explain the demise of the deceased than the accused who had been named in an altercation with him far removed from the scene where his body was found. This was a co-existing circumstance surrounding the death. This therefore negated rather than pointed to the guilt of the accused in that regard.

The accused testified to have been at their homes that night. This alibi was not assailed. They all responded to the traditional call when the emergency drum was sounded in the morning. They all attended the burial and the vigil; and were all arrested by the police from their homes. Even the scheme by the Chairman LC1 that anonymous chits be sent to him with names of the suspects did not cause them to disappear from the village. If anything, A3 was concerned that A1 had been

named in a rumour as being responsible for the murder; and advised that the latter be arrested. Their conduct was far from being compatible with guilt. They only served to point irresistibly towards their innocence.

Even if I were to attach any importance to the evidence of PW2, I would still find the evidence adduced by the prosecution against the accused as being merely suspicious, but wanting; and not sufficient to rule out the possibility of the alternative hypothesis compatible with the innocence of the accused. In the ***Kazibwe Kassim*** case (supra), the Supreme Court, after evaluating the evidence on record, held as follows:-

> *"In the instant case, like the case of* ***R v Israili – Epuku s/o Achietu (1934) E.A.C.A. 166,*** *we are of the opinion that the evidence did not reach the standard of proof requisite for cases based entirely on circumstantial evidence. We are unable to hold that the evidence contains any facts which, taken alone amounts to proof of guilt.*
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> *The cumulative effect of the circumstances said to tell against the appellant is not such as to satisfy us that he must have been connected with the death of the deceased. Although there was suspicion, there was no prosecution evidence on record from which the Court could draw an inference that the appellant caused the death of the deceased to justify the verdict of manslaughter."*

In the premise then, as was the case with A3, I find it unsafe, in the instant case, to convict the accused basing on the evidence on record. I have to resolve the doubts in favour of the accused. I am therefore in agreement with the lady and gentleman assessor that the prosecution has failed to establish, beyond reasonable doubt, that the accused are guilty of the death of Rugomoka as charged. I therefore acquit and discharge each of them. Unless being held for any lawful cause, they must each be set free forthwith.

Chigamoy Owiny – Dollo

JUDGE

12 – 06 – 2009