

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT IGANGA**  
**HIGH COURT CRIMINAL SESSION CASE NO 0412 OF 2010**

**UGANDA.....PROSECUTOR**

**VERSUS**

**MAKOHA DAVID.....ACCUSED**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE.**

**JUDGMENT**

I will first address the issue of lack of jurisdiction that was raised by Defence Counsel, since its resolution will determine whether I proceed to consider the case on its merits or not. Counsel Kyoziira for the accused raised it as a last point in his submissions that that this court had no jurisdiction to handle this matter since there was evidence on record as per the testimony of PW1 that that the offence was committed deep in the waters of Kenya. He cited sections 4 and 5 of the Penal Code Act and contended that this court had no jurisdiction to handle this case. This was opposed by State Counsel Keko Joan who submitted that Defence Counsel was placing heavy reliance on the evidence of PW1 an illiterate man who had no background of geography as to determine that the offence was committed in Kenya. State Counsel also submitted that boundaries of waters between countries are not clear and distinct.

I have addressed the objection raised by the Defence Counsel as well as the laws he has cited and the submissions of both Counsel on the matter. Section 4 of the Penal Code Act, cap 120, spells out the jurisdiction, of the courts of Uganda for purposes of the said Code under which the offence of murder falls. Courts have jurisdiction to try that offence if committed in Uganda by a Ugandan citizen or a person ordinarily resident in Uganda. The record shows this offence was investigated by the Criminal Investigations Department (CID) of the Uganda Police and eventually prosecuted by Director of Public Prosecutions in Uganda. I would take this to mean

that by the time the matter came to this court the said public bodies were acting within their powers and were not handling murders committed in another state. Counsel for the Defence merely relied on a statement made by a witness who is not an expert on Ugandan borders to question the jurisdiction of this court. He did not avail court with evidence to show that the offence was actually committed in Kenya. For those reasons, I would overrule his objection and maintain that this court has the jurisdiction to try this case under section 4 of the Penal Code Act.

The accused person, Makoha David is indicted for murder c/s 188 & 189 of the Penal Code Act. It is alleged that the accused, on the 29<sup>th</sup> January 2010 at Munene on the waters of Lake Victoria, at Sigulu subcounty in Bugiri District murdered Bogere Kiriwajo Ramathan. The maximum penalty for murder is the death penalty.

The brief facts of the prosecution case are that on the evening of 28<sup>th</sup> January 2010 the deceased and a one Mbagambe Moses left their island, Singila island, to go and fish on Lake Victoria using nets. While at the lake they discovered that their three jerrycans used as floaters were missing and had been taken by unknown people. This prompted them to search the vicinity. At about 7 pm on the same day, the deceased and Mbagambe Moses came across the accused who was fishing. He had the three jerrycans that they were looking for in his boat. They approached the accused's boat and Mbagambe held the two boats together so that they don't move. The deceased jumped into the accused's boat. When the deceased attempted to remove the jerrycans from the accused's boat to their boat, the accused person beat the deceased and he fell into the water. Mbagambe reported the drowning to their boss Hussein Swaga who reported it to Singila police station. On 3<sup>rd</sup> February 2010 the deceased's body was retrieved from the lake and taken to Bugiri hospital where postmortem was carried out on 4<sup>th</sup> February 2010. The cause of death was established to be suffocation secondary to drowning in water. The report also stated that the deceased's body was grossly swollen due to excessive ingestion of water. The accused was arrested and charged with murder of the deceased.

The standard of proof required in criminal proceedings is that the prosecution must prove the guilt of the accused beyond reasonable doubt. At the conclusion of the trial, any doubt that remains is resolved in the accused person's favour.

Upon arraignment, the accused pleaded not guilty to the charge. Thus, all the ingredients of the offence of murder are in issue. The prosecution assumes the burden of proof of all ingredients of the said offence.

It is our law generally, that the burden of proof of a criminal offence rests on the prosecution and remains so throughout the trial. It is only in a few specific instances that the burden shifts to the accused. These instances are expressly provided by statute. The charge of murder is however, not one of such exceptions. The duty is therefore on the prosecution to discharge the burden of proof. The accused bears no duty of proving his innocence. In Uganda an accused person is presumed innocent until he or she is proven to be guilty. See **Sekitoleko V Uganda [1967] EA 531**.

In order to discharge the burden of proof, the prosecution called the evidence of Mbagambe Moses (PW1); Swaga Hussein (PW2); PC Muteguya Benjamin (PW3); and Detective Corporal Ejoku Cosmas (PW4).

The accused on his part made a sworn testimony and raised the defence of total denial.

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The ingredients of the offence of murder are:-

- a) The fact of death, in this case, that Bogere Kiriwajo Ramathan is dead;
- b) The death was unlawful, in this case, that the death of the said Bogere Kiriwajo Ramathan, was unlawfully caused;
- c) That the death of the deceased was caused by malice aforethought, in this case, that it was intended that Bogere Kiriwajo Ramathan should die;
- d) That it was the accused who was responsible for the death of the deceased, in this case, that the accused, Makoha David, was responsible for the death of Bogere Kiriwajo Ramathan.

**Whether the deceased is dead:**

According to the post mortem report, Exhibit **P1**, which was admitted as agreed evidence, Dr. Isabirye of Bugiri Hospital examined the body of Bogere Kiriwajo Ramathan, an adult male of the apparent age of 33 years, on 4<sup>th</sup> February 2010. The body of the deceased was identified to him by Hussein Swaga. The external injuries were a decomposing body with all parts grossly swollen. The skin was peeling off. The Doctor recorded the cause of death and reason for the same as suffocation secondary to drowning in water. The body was swollen due to excessive ingestion of water.

It was the evidence of Mbagambe Moses PW1 and Swaga Hussein PW2 that Bogere Kiriwanjo Ramathan is dead. It is their testimony that they recovered his body from Jinja waters.

The defence did not contest the fact of death of the deceased.

In agreement with the Assessors, the court finds that the fact of death of the deceased, Bogere Kiriwajo Ramathan, has been proved by the prosecution beyond reasonable doubt.

**Whether the death of the deceased was unlawfully caused:**

Death is always presumed to be unlawful unless caused by accident, or in defense of property or person or is excused by law. See **U V Nkurungira Thomas & Anor Cr. Case No. 426/2010** where **Gasangizi Wesonga V R [1948] 15 EACA 63** was cited with approval. An accidental homicide is usually a homicide that happens by chance or unintentionally. However a homicide that is excusable more often refers to a homicide that is committed in execution of a lawful order or in self defence. The above presumption is a rebuttable one. It is the duty of the accused to rebut it by showing that the killing was either accidental or excusable. The standard of proof required of the accused to discharge that duty is very low. It is on the balance of probability. See **Festo Shirabu s/o Musungu V R [1955] 22 EACA 454**.

In this case, it is the evidence of PW1 that they went fishing with the deceased at around 4 pm. When they found that their three jerrycans which they used as floaters had been cut and were missing, the deceased saw the jerrycans inside the accused's boat. They went to collect their jerrycans from him. They brought both boats together and PW1 held them together. The deceased jumped into the accused's boat to get the jerrycans. There was a scuffle and the accused pushed the deceased into the water and he drowned. Exhibit **P1** which was admitted as

agreed evidence indicated that the cause of death of the deceased was suffocation secondary to drowning in water. According to exhibit **P1**, the body was swollen due to excessive ingestion of water.

The prosecution evidence as a whole is that the act of pushing the accused in the water was not accidental, neither was it excusable as the accused was not executing a lawful order.

The defense contested the fact that the deceased's death was unlawfully caused. The accused testified that the deceased jumped from their boat into the accused's boat to demand for jerrycans he claimed belonged to him and PW1. PW1 was holding the two boats together when the deceased jumped from their boat to the accused's boat. That the deceased was prompted to jump from the accused's boat back into his boat when PW1 released the accused's boat due to a strong wind. In the course of doing so he fell into the waters and drowned.

It is clear from the adduced evidence that the deceased died by drowning. It is clear from the evidence that the deceased's falling into the water was not voluntary. He was pushed into the water following a scuffle for jerrycans. The scuffle was in the accused's boat, and only two people, the accused and the deceased were occupying that boat at the time. I do not believe the accused person's version that the boats were held together from the front, or his explanation that the deceased left his boat to jump into their boat after the strong wind had made PW1 to release the accused's boat. First, as observed by the Assessors, it was impracticable to hold two boats together by the front, especially so if the accused was at the other end of the boat as he testified. This is because the opposite end would be raised making it impracticable that a person would hold a boat together with another boat from that end. Even if the accused was not sitting at the other end, it would still be bothersome to hold the two ends together when it can be done with more ease holding the boats horizontally. Since the accused does not deny that PW1 held the two boats together, it is more prudent to believe the prosecution evidence that they were held together at the sides, that is, horizontally, which would make it easy for the deceased to jump from one boat to another. Secondly no sane person would attempt to jump from one boat into another boat amid strong winds in deep waters as claimed by the accused. If a person had to leave a boat in such circumstances, it had to be because that person was forced. It is my opinion that the act that forced the deceased to fall into the water in the given circumstances could not

have been lawful. For those reasons, I do not believe the defence evidence that the accused jumped back into their boat on his own will, missed it and drowned.

There is no other inference than that the deceased was pushed into the waters and the act could not have been lawful, or accidental. This ingredient has therefore been established by the prosecution beyond reasonable doubt.

**Whether the deceased's death was caused with malice aforethought:**

Malice aforethought is an intention to cause the death of any person, whether such person is the person actually killed, or knowledge that the act or omission causing death will probably cause death, although such knowledge is accompanied by indifference as to whether death will be caused or not, or a wish that it may not be caused. Malice aforethought is a mental element of the offence of murder. It involves the state of mind which makes it difficult to be proved by direct evidence. However, it is now established that it can be inferred from the surrounding circumstances of the offence. These circumstances include the following:-

- 1) The nature of the weapon used;
- 2) The manner of use of the said weapon;
- 3) The part of the body affected;
- 4) The nature and extent of the injuries suffered;
- 5) The conduct of the accused before, during and after the killing of the deceased. **See Nkulungira, already cited**, which cited with approval **Tubere V R [1945] 12 EACA 63**.

In this case, from the evidence of PW1 who was an eye witness, the deceased was pushed into the lake. The question is whether the deceased was pushed into the lake with intention that she should die or with knowledge that death was a probable consequence. PW1 testified that they were deep into the waters of the lake. After the incident it took him five hours to row back to the land. This infers that they were very far from the land. The pushing of the deceased from this part of the waters, well knowing how deep into the waters they were, and how impracticable to swim to shore would imply that the person who pushed the deceased into the water intended that he would die or had knowledge that his act would probably cause death, although such

knowledge is accompanied by indifference as to whether death will be caused or not, or a wish that it may not be caused.

In this case where no weapon was used, court also looked at the evidence adduced on conduct of the accused before, during and after the killing of the deceased. If the accused was not the assailant why did he not attempt to rescue the deceased, or not report the deceased falling into the water on returning to the land? He went on with his business as if nothing had happened. Is such conduct compatible with the accused's innocence? Is that how an ordinary person would react to the situation at hand? Does it suggest intention that a person should die?

The defense did contest the fact that malice aforethought could be inferred from the circumstances of this case. The accused justified his conduct by testifying that he never reported because he did not know where the person came from, and that he never had anything on him to show that somebody had dropped into the waters. He also testified on oath that he did not attack the deceased because they were two with his colleague yet for him he was alone. Secondly that he was holding fishing nets. Could this be enough to justify why he never attempted to rescue the deceased, or to support his evidence that there was never a scuffle between him and the deceased? The defence contends that the conduct of the accused was that of an innocent man as he never went into hiding neither did he hesitate to go to police when requested.

This court finds that it may be understandable that he did not attempt to rescue the deceased, given that there was a strong wind and it would be impracticable to swim in that part of the waters. In any case, even PW1, who was a colleague of the deceased never attempted to rescue him given the circumstances. This court however, finds it unbelievable that the accused did not bother to report that a person, albeit unknown to him, had fallen from his boat into the waters. Equally unbelievable is his explanation that he did not know where the person came from, or that that he never had anything on him to show that somebody had dropped into the waters. A law abiding person would take trouble, just like PW1 did, to report the incident, more so when the person had fallen into the water from his boat. I find this conduct incompatible with the accused person's innocence. For those reasons I do not believe the evidence of the accused in justifying his conduct as to why he never reported the incident to police.

In that respect I agree with the Assessors and find that the prosecution has proved beyond reasonable doubt that the death of the deceased was caused with malice aforethought.

**Whether the accused participated in the killing of the deceased:**

The prosecution case is based on the evidence of PW1 who testified that he saw the accused push the deceased in the lake. It was his evidence that there were only two boats in the waters that morning. The time was around 6 am. PW1 testified that there was an issue relating to lost jerrycans of the deceased and they were suspecting the accused. That the deceased jumped into the accused's boat to get his jerrycans. There was a scuffle and the accused pushed the deceased in the lake.

On his part, the accused denied having murdered the deceased. He denied that there was a scuffle between him and the deceased. He testified that on the day in question he was approached by the deceased and his friend who were in search of their jerrycans. The deceased's colleague got hold of the accused's boat from the front part. The deceased then jumped into the accused's boat. Shortly after a very strong wind came and forced the deceased's colleague in the other boat to release the accused's boat. This prompted the deceased to jump from the accused's boat back to their boat but he missed and fell into the lake.

PW1 testified that there were only two boats in the waters that morning, that which he occupied with the deceased and that of the accused. He also stated there was an issue relating to jerrycans, and that the deceased jumped from their boat to that of the accused to get back their jerrycans. The two talked about the jerrycans. This was corroborated by the accused himself in his sworn testimony. The testimonies of PW1 and the accused differs only in two material particulars, that that there was a scuffle and that it is the accused who pushed the deceased into the waters.

After carefully looking at the testimony of PW1 I find that he was a truthful witness. He identified the accused properly. He did not know the accused before the incident but he was able to identify him from the dock. He witnessed the incident at close range at around 7 am in the morning. So he could not have been mistaken about the identity of the accused and about what happened. He had no reason to lie about the incident. In fact he had everything to lose because he could also have been a suspect, having been with the deceased until he met his death. The



prosecution has proved beyond reasonable doubt that the accused participated in the killing of the deceased.

It is my finding therefore, in agreement with the Assessors, that the prosecution has proved all the ingredients of the offence against the accused beyond reasonable doubt.

I therefore find the accused guilty of murder contrary to sections 188 and 189 of the Penal Code Act and I accordingly convict him as indicted.

**PERCY NIGHT TUHAISE**

**JUDGE**

**05/07/2012.**