

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT IGANGA**  
**HIGH COURT CRIMINAL SESSION CASE NO 0455 OF 2010**

**UGANDA.....PROSECUTOR**

**VERSUS**

**KIIZA MARIJAN.....ACCUSED**

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

**JUDGMENT**

The accused person, Kiiza Marijani, is indicted for murder c/s 188 & 189 of the Penal Code Act. It is alleged that the accused and others still at large on the 21<sup>st</sup> day of April 2009 at Nawansega Trading Centre in Iganga District, murdered Bantukyaye John.

The brief facts of the case according to the prosecution were that during the month of February 2009, the accused's person's bicycle Jupiter size 22 serial no. SJ 44345 was stolen while parked at a verandah at Nawansega trading centre. The matter was reported to the LCs of the area and to Nakivumbi police post. The search for the bicycle continued until on 21<sup>st</sup> April 2009 when the accused found it with children of the deceased (Bantukyaye John), impounded it and took it to the home of the LC1 Chairman. The deceased appeared before the LC1 Chairman. In the course of the hearing, the accused ran home and brought a purchase receipt which showed the serial numbers matching with those on the bicycle. The LC1 Chairman forwarded the matter to Idudi police post on grounds that it was above his jurisdiction. The Chairman then got a motorcycle to take the deceased and the accused to police, but the accused rejected it, rushed to the trading centre and brought his own. The deceased was put on the motorcycle together with the accused. When they reached the trading centre the accused stopped the motorcycle, jumped down and pulled the deceased off the motorcycle. The accused picked a big stone and hit the deceased on the leg breaking it instantly. Other people joined the accused in assaulting the deceased who was

then set on fire. The accused then brought a hoe and hit the deceased several times on the chest until he died. The information reached the police who came to the scene and found the deceased already dead. A sketch map of the scene was drawn, some photographs of the dead body taken, and a postmortem was done on the dead body. The accused was eventually arrested and indicted accordingly.

Upon arraignment, the accused pleaded not guilty to the charge. Thus, all the ingredients of the offence of murder are in issue. 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. An accused person bears no duty of proving his innocence. Under the Constitution, an accused person is presumed innocent until proved guilty or until he pleads guilty.

The standard of proof required in criminal proceedings is that the prosecution must prove the guilt of the accused person beyond reasonable doubt. At the conclusion of the trial, any doubt that remains is resolved in the accused person's favour. The guiding principle as laid out in **Miller V Minister of Pensions [1947] 2 ALL E R 372** is that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. It was stated in the cited **Miller** case that if the evidence is so strong against a person as to leave any remote possibility in his/her favour which can be dismissed with the sentence "*of course it is possible, but not in the least probable,*" then the case is proved beyond reasonable doubt, but nothing short of that will suffice.

The ingredients of the offence of murder are:-

- a) The fact of death, in this case, that Bantukyaye John is dead.
- b) The death was unlawful, in this case, that the death of the said Bantukyaye John, was unlawfully caused.
- c) That the death of the deceased was caused by malice aforethought, in this case, that it was intended that Bantukyaye John should die.
- d) That it was the accused who was responsible for the death of the deceased, in this case, that the Accused, Kiiza Marijani, was responsible for the death of Bantukyaye John.

**Whether the deceased is dead:**

The prosecution evidence on this issue largely rests on the post mortem report exhibit **P1**, plus the evidence of Kanabira Joel PW1, Kiranda Charles PW2, and Muyinda Zubairi PW3.

According to the post mortem report, exhibit **P1**, which was admitted as agreed evidence, Dr. Bamudaziza, Senior Medical Officer of Iganga Hospital, examined the body of Bantukyaye John, an adult male of the apparent age of 50 years on 22<sup>nd</sup> April 2009. The body of the deceased was identified to him by Kanabira Robinah of Bumpingu as that of Bantukyaye John. The external marks of violence were wounds, bruises and fractures with burns all over the skin. The doctor recorded the cause of death and reason for the same as severe trauma with haemorrhage from the wounds, bruises and fractures, and possible internal organ damage.

It was the evidence of Kanabira Joel PW1, Kiranda Charles PW2, and Muyinda Zubairi PW3 that Bantukyaye John is dead. Kanabira Joel PW1 testified that he saw the deceased who was his uncle being hit and set on fire until he died. PW2 who was Defence Secretary of the area and PW3 also testified that they saw the deceased die as he was hit him with a hoe on the chest.

The defence did not contest the fact of death of the deceased and agreed to exhibit **P1** being part of the evidence.

There is overwhelming evidence that the deceased died on 21<sup>st</sup> April 2009. I am, in agreement with the Assessors. I am satisfied that the prosecution has proved this ingredient beyond reasonable doubt.

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

The principle on this issue as was held in **Uganda V Nkulungira Thomas** which cited with approval **Gusambizi Wesonga V R [1948] 15 EACA 63** is that a homicide unless accidental will always be unlawful except if committed in circumstances which make it excusable. Thus, death is always presumed to be unlawful unless caused by accident, or in defense of property or person or when executing a lawful order.

It is the evidence of Kanabira Joel PW1, Kiranda Charles PW2, and Muyinda Zubairi PW3 that point to the circumstances of the violent death of the deceased. Kanabira Joel PW1 testified that he saw the deceased being hit with a stone which fractured his leg, then he was set on fire and hit on the chest with a hoe several times until he died. This was also witnessed by PW2 and PW3. The post mortem report exhibit **P1** indicates that the deceased died as a result of severe trauma with haemorrhage from the wounds, bruises and fractures and possible internal organ damage. The photographs, which were admitted in evidence as exhibit **P4**, show the dead body as surrounded by stones, sticks and other unidentified substance. The Doctor observed that stones, clubs and sticks could have been used upon the body. The doctor recorded the cause of death and reason for the same as severe trauma with haemorrhage from the wounds, bruises and fractures, and possible internal organ damage.

The defense did not contest the fact that the deceased's death was unlawfully caused.

It is very clear from the above pieces of evidence that the death of the accused was neither accidental nor excusable. The deceased died a violent death from the wounds, bruises and fractures, and possible internal organ damage. The circumstances in this case where the deceased was assaulted to death and his body burnt cannot be accidental or excused. From the nature of injuries the deceased sustained, this court cannot draw any other inference than that the deceased died from an unlawful cause.

It is my finding, in agreement with the Assessors, that the prosecution has proved beyond reasonable doubt that the death of the deceased was caused unlawfully.

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

The Prosecution case is based on the evidence of PW1, PW2 and PW3 whose testimony is that each independently saw the assault on the deceased take place. It is their evidence that the assault took place in broad daylight between 12.30 and 1 pm at Nawansega trading centre. PW1 and PW2 testified that they were at the scene of crime at the time the deceased was killed and that it is the accused person who killed the deceased. On his part, the accused testified that on the day in question he remained in Nawansega trading centre at the Chairman's place while the deceased was being taken to Idudi Police post. It was his testimony that the deceased was taken as a suspected bicycle thief to Idudi Police post by the

Chairman and the Defence Secretary, and that he never went with them. He testified that the said people rode on Efuraimu's motorcycle. He denied that he was the one who hired the motorcycle. It was the accused person's evidence that he only went to the scene of crime with the Chairman after learning that the thief had been killed. He testified that he did not participate in the assault of the deceased. It was his evidence that he did not know who was killed but that he was a thief of his Jupiter bicycle. He did not say who had participated in the killing of the deceased.

The accused has raised the defence of alibi. This is a defence where the accused alleges that at the time when the offence was committed he was elsewhere. In this case the accused stated that he remained at the Chairman's place when the crime was being committed.

The law is that an accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer. It was held in **Chemonges Fred V Uganda Criminal Appeal No. 12/2001** that it is trite law that the Appellant did not have to prove his alibi but once the prosecution has succeeded in placing him at the scene of crime, this entitles the learned Judge to reject his alibi. The general rule is that the prosecution must stand or fail by the evidence they have given. Their evidence must put the accused squarely at the scene of crime. In this case has prosecution succeeded in putting the accused at the scene of crime?

It was the evidence of Muyinda Zubairi PW3 that he heard the deceased utter the following words, ***"Kiiza why do you beat me with a stone?"*** PW3 did not know the accused before that, but he identified him from the dock as the one he saw kill the deceased. Kanabira Joel PW1, Kiranda Charles PW2, and Muyinda Zubairi PW3 all testified that they saw the accused hit the deceased until he died. It was their testimony that the accused brought a hoe and hit the deceased in the chest and he died. PW1 and PW2 knew the accused as they were from the same village of Nawansega. The offence was committed in broad daylight and mistaken identification is ruled out. All the three prosecution witnesses witnessed the incident from close range. PW1 was about thirty five metres away from the scene of crime, having followed the motorcycle that transported the accused, the deceased, and PW2 the Defence Secretary. PW3 was only eight metres from the scene of crime. PW3 particularly remembered the accused because he had heard the deceased calling him by his name that, ***"Kiiza why do you beat me with a stone?"*** when he first attacked him.

I am satisfied with the prosecution evidence that the accused was correctly identified and squarely placed at the scene of crime at the time the incident occurred. This would entitle me to reject his alibi that he was at the Chairman's place when the incident took place.

The defence alluded to the contradictions in the prosecution evidence and submitted that they are grave. The eye witnesses gave different versions of the sitting arrangement on the motorcycle. Secondly PW1 and PW2 testified that they saw four people on the motorcycle, but PW3 stated that they were three. PW1 also stated that the deceased was putting on a white shirt, but PW2 told court that the colour was army green. PW2 told court that the bicycle stolen from the accused was roadmaster while other prosecution witnesses said it was Jupiter.

It is the law that only grave inconsistencies that are not explained satisfactorily that will usually result in the evidence of a witness being rejected, but minor inconsistencies will not have that effect unless they point to deliberate untruthfulness. The prosecution contends they are minor due to lapse of time. I have carefully analysed the foregoing contradictions. With lapse of time, considering that the offence was committed about three years ago, one can forget the colour of a shirt the deceased was putting on, the sitting arrangement on a motorcycle or even the number of people who were sitting on it. A witness can also be excused from remembering the type of bicycle that was stolen especially since he was not its owner. In my opinion, the said contradictions and inconsistencies do not go to the root of the case, and the witnesses never intended to lie.

In the circumstances, with the above evidence, the defence of alibi and even total denial are not accepted by this court. Thus, in agreement with the Assessors, I am satisfied that the prosecution has discharged the burden of proving beyond reasonable doubt that the accused participated in the killing of the deceased.

**Whether the death of the deceased was caused with malice aforethought:**

Section 191 of the Penal Code Act defines malice aforethought as 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 whether death is caused or not, or by a wish that it may not be

caused. In **Tubere V R [1945] EACA 63** it was held that malice aforethought is a state of mind hardly proved by direct evidence. Courts have set down the circumstances which might be considered before making inference whether malice aforethought was made out. Generally, malice afore thought can be inferred from any of 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.

In this case, as stated in exhibit **P1**, the external marks of violence were wounds, bruises, fractures and burns all over the skin. The doctor recorded the cause of death as severe trauma with haemorrhage from the wounds, bruises and fractures, and possible internal organ damage. PW1 and PW2 were eye witnesses who testified that the deceased was hit on the right leg with a stone which fractured his leg rendering him unable to move. PW2 told court that after the accused hit him with a stone the deceased was in great pain and could not walk. PW1, PW2 and PW3 also testified that the deceased was then hit with a hoe three times in the chest and he died.

On the conduct of the accused, the prosecution evidence is that the accused was angry as a result of his bicycle being stolen by the deceased. PW2 told court that they could not rescue the deceased as the accused was very wild like an animal and they feared him. It was their evidence that after the attack the accused and others went ahead and burnt the deceased's body.

The defense did contest the fact that the death of the accused was caused with malice aforethought. Defence Counsel submitted that the post mortem report exhibit **P1** does not show that the chest was attacked, and that the stone, hoe, stick, rice husks and petrol were not exhibited. On the conduct of the accused the Defence contends that his conduct was not that of a guilty person as he reported the theft of his bicycle to the LC1 Chairman as a good responsible citizen.

The question is whether the deceased was assaulted with intention that she should die or with knowledge that death was a probable consequence.

The court has already made a finding that the death of the deceased was caused unlawfully and under very violent circumstances. PW1, PW2 and PW3 all gave consistent evidence about how the deceased was assaulted first by the breaking of his leg which made it impossible for him to run, then being set on fire, and being hit with a hoe in the chest until he died. This evidence is corroborated by the independent evidence of the postmortem report exhibit **P1**, which stated the external marks of violence on the body to be wounds, bruises, fractures and burns all over the skin. The description of the position of the body and its surroundings was that it was lying by the roadside with burns, fractures and bruises. The weapons lying around were clubs, stones and sticks. This is also corroborated by the photographs exhibit **P4** which show the body surrounded by stones, sticks and other substances.

I do not accept the defence submission that the chest was not mentioned in the medical report. The report talked of the body having wounds, bruises fractures and burns all over the skin. The cause of death is indicated in exhibit **P1** to be apparently severe trauma with heamorrhage from wounds, bruises and fractures and possible internal organ damage. This would be consistent with the prosecution evidence that the assault on the accused included being hit first with a stone on the leg, being set on fire and being hit with a hoe three times in the chest. The chest is a vulnerable part of the body injury of which can cause death. There is no doubt that whoever inflicted these injuries intended that the death of the deceased occurs, or knew or ought to have known that death was an inevitable consequence in the circumstances.

The other aspect I considered on this issue is the conduct of the accused before during and after the commission of the crime. By insisting on bringing a motorcycle of his choice despite being offered one by the Chairman, the accused had, as correctly observed by the Assessors, planned the events of the day as they would unfold in advance. Before they reached the destination of Idudi police post where they were supposed to take the deceased as a suspected bicycle thief, he decided to execute his master plan before the law could take its course at the police station. He pushed down the deceased from the motorcycle and started his ravage attack, first by fracturing his leg with a stone to prevent him from running away. This was clearly brought out by the sworn testimonies of PW1, PW2, and PW3, who were all eye witnesses to the incident. PW1 had followed the motorcycle which was taking the accused, the deceased and PW2 to Idudi police station though it never reached there. PW1 was able to follow closely on a bicycle because the



motorcycle was moving at a very low speed. PW3 was not a resident of Nawansega trading centre where the incident occurred, but he happened to be near the scene of crime waiting for transport to take his merchandise (rice) to his place of business in Bugiri. All the three prosecution witnesses witnessed the incident independent of each other, each in their own separate circumstances. Conspiracy to lie is therefore out of question. From the foregoing, I am inclined to conclude that the accused carefully planned and executed his plan, and that was to cause the death of the deceased even before he could reach the police station of Idudi.

It is my finding, in agreement with the Assessors that the prosecution has proved beyond reasonable doubt that the death of the deceased was with malice aforethought.

Accordingly, I agree with both Assessors and conclude that the prosecution has proved all the ingredients of the offence of murder against the accused beyond all reasonable doubt. I do find the accused guilty as charged. I convict him accordingly.

**PERCY NIGHT TUHAISE**

**JUDGE.**

**05/07/2012.**