

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**HCT-00-CR-SC-0109 OF 2012**

**UGANDA .....**

**PROSECUTOR**

**VERSUS**

**NORBERT OJOK ..... ACCUSED**

**BEFORE: Hon. Lady Justice Monica K. Mugenyi**

**JUDGMENT**

This case entails an indictment against a one Norbert Ojok for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The facts giving rise to this indictment are that on or about the 6<sup>th</sup> October 2007, while on duty as a traffic police officer at Kabalagala in Kampala district the accused person apprehended a one Rogers Mugenyi (now deceased) for a traffic offence and in the course of doing so, together with other persons still at large, beat up the deceased leading to his death on 9<sup>th</sup> October 2007. The accused denied the charges.

The Prosecution called 5 witnesses – an eye witness to the deceased’s allegedly fatal assault by the accused (PW1), the deceased’s guardian (PW2), the investigating officer in respect of the murder offence (PW3), the investigating officer in respect of the traffic offence (PW4) and a police pathologist (PW5). On the other hand, the defence called 8 witnesses including the accused, who gave sworn evidence absolving himself of responsibility for the deceased’s death. DW1, the traffic officer that apprehended the deceased and handed him over to the accused person, testified that he witnessed the deceased’s arrest but did not observe anything irregular about the arrest; DW3 attested to the circumstances surrounding the traffic offence committed by

the deceased, as well as witnessing his arrest from a distance; DW4 witnessed the deceased's attempt to escape custody; DW5 gave a detailed narrative of the deceased's attempt to escape, his attempt to board a nearby taxi and his subsequent re-arrest; DW6 also saw the deceased attempt to escape from custody but did not witness his re-arrest; DW7 was a pathologist that also attested to the contents of the post mortem report, and DW8 was a police officer that witnessed the deceased's escape and his fall into a nearby trench from which he was re-arrested.

The ingredients that constitute the offence of aggravated murder are first, the fact of death; secondly, that the death was unlawful, and finally, that the death was caused with malice aforethought. See **Uganda vs Kassim Obura (1981) HCB 9.**

Having proved the foregoing ingredients of murder, it must also be proved beyond reasonable doubt that the accused person participated in the proven murder.

It is well settled law that the burden of proof in criminal proceedings lies squarely with the Prosecution and generally, the defences available to an accused person notwithstanding, that burden does not shift to the accused at any stage of the proceedings. Furthermore, the prosecution is required to prove all the ingredients of the alleged offence, as well as the accused's participation therein beyond reasonable doubt. See **Woolmington vs. DPP (1993) AC 462** and **Okale vs. Republic (1965) EA 55.**

The standard of proof required of the prosecution does not entail proof to absolute certainty. The prosecution's evidence should be of such standard as leaves no other logical explanation to be derived from the facts save that the accused committed the crime, thereby rebutting such accused person's presumption of innocence. If a trial judge has no doubt as to the accused's guilt, or if his/ her only doubts are *unreasonable* doubts, then the prosecution has discharged its burden of proof. It does not mean that no doubt exists as to the accused's guilt; it only means that the court entertains no *reasonable* doubt given the evidence adduced before it.

It is trite law that in the event of reasonable doubt, such doubt shall be decided in favour of the accused and a verdict of acquittal returned. Further, inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be

ignored if they do not affect the main substance of the prosecution's case; save where there is a perception that they were deliberate untruths. See **Alfred Tajar vs Uganda EACA Criminal Appeal No. 167 of 1969** and **Sarapio Tinkamalirwe vs. Uganda Supr. Court Criminal Appeal No. 27 of 1989.**

In the present case a post mortem report admitted on the court record as Exh. P3 did confirm the death of the deceased on the 9<sup>th</sup> October 2007. The deceased was identified by his guardian, PW2. PW1 and PW2 did also attest to the deceased's death and subsequent burial. This fact was not contested by the defence. In fact, the accused person did, in evidence, allude to the incidence of the deceased's death as having been unfortunate. I am, therefore, satisfied that the prosecution has proved the fact of death beyond reasonable doubt.

With regard to the legality of the deceased's death or the lack of it, the post mortem report detailed the cause of the deceased's death as 'increased intracranial pressure following intracranial haemorrhage due to blunt head injury.' The report also entailed detailed descriptions of the deceased's external and internal injuries. 2 expert witnesses, both specialist pathologists, were called by each of the parties, namely, PW5 and DW7. Neither of the 2 witnesses authored the report in issue, the author thereof having since taken up employment in Namibia and therefore unable to testify. Nonetheless, both witnesses attested to a blunt head injury as the cause of the deceased's death. PW5 explicitly stated that trauma by a blunt object could include a fall. Both witnesses ruled out the deceased's HIV positive status or his drunken condition as contributory factors to the brain haemorrhage that resulted in his death. PW5 stated:

*"Yes the cause of the death is the primary event which leads to a cascade of several things so the blunt force injuries that were inflicted there were the ones that caused the death."*

Asked whether the deceased's HIV positive status would change his expert opinion, the witness stated that this would depend on factors such as whether the deceased was on treatment or not and his CD4 count at the time. When pressed for a direct answer, PW5 categorically stated that the deceased's HIV status would not have changed the cause of the deceased's death. PW2 did testify that the deceased was under an antiretroviral treatment regime but this court finds no

evidence of the deceased's CD4 count. It is reasonable to conclude that given that the deceased was under a treatment regime his HIV status was not a contributory factor to his death.

Similarly, DW7 testified that the deceased's HIV status could have been a contributory factor to his death if there had been prior brain swelling. Such brain swelling was not reported in the post mortem report and therefore may be reasonably deemed not to have been manifest in the present case. With regard to the alcohol factor, DW7 testified that its presence in the blood stream could have been a contributory factor to the blood that was pooled in the brain but so too could the injuries observed. The deceased's HIV status and the alcohol factor were not proven to have contributed to his death or in any way exacerbated the injuries leading to the said death. I find that the totality of the foregoing evidence points to the deceased's death having been a direct result of injuries sustained from trauma to his person.

The legal position on the legality of death or the lack of it is that every homicide is presumed to be unlawful unless circumstances make it excusable. See **R. Vs. Gusambiza s/o Wesonga 1948 15 EACA 65**. The same position was restated in **Akol Patrick & Others vs Uganda (2006) HCB (vol. 1) 6**, where the Court of Appeal held as follows:

**“In homicide cases death is always presumed unlawfully caused unless it was accidentally caused in circumstances which make it excusable.”**

In **Uganda vs Aggrey Kiyingi & Others Crim. Sessn. Case No. 30 of 2006**, excusable circumstances were expounded on to include justifiable circumstances like self defence or when authorised by law.

In the present case no evidence was adduced as would suggest that the deceased's death was either executed in self defence or authorised by law. The question then would be whether it falls within the category of deaths that are classified as homicides. The term 'homicide' entails the killing of a human being by another human being. See **'Dictionary of Law', Oxford University press, 7<sup>th</sup> Edition, 2009, p.264**. It would not, in my judgment, entail injuries incurred by an accidental fall. It is, therefore, important to establish whether the blunt trauma suffered by the deceased resulted from a physical attack on him or could have resulted from an accident of whatever form.

On this issue, DW8 an eye witness to the deceased's attempt to escape from police custody at Kabalagala Police Station testified that the deceased fell face downwards into a nearby trench and it was from this trench that he was re-arrested by the police. In his police statement the same witness had stated that in an attempt to evade re-arrest the deceased had jumped into a water trench. However, DW5 another purported eye witness to the same incident had earlier testified quite categorically that as the deceased run away from the police station he jumped over the trench and, in the process of trying to embark a nearby taxi, hit his head on the upper part of the vehicle's entrance. In a police statement admitted on the record as Exh. P5, DW5 had made no mention of an injury at the taxi entrance, simply stating that the deceased was pulled out of a nearby taxi by members of the public who then beat him up before he was rescued by the police. Clearly, these are 2 very contradictory accounts of the same incident and, to that extent, are neither helpful nor conclusive as to the occurrence of the alleged accidents.

Conversely, PW5 clearly explained the injuries reported in the post mortem report. He stated as follows under cross examination:

*“When there is force on the frontal side somebody can bleed from up the scalp and then blood comes out into the eyes, or somebody can bleed at the base of the brain and then blood percolates through the base of the scalp and gets into the eyes. All those are possibilities because the vessels of the brain, actually the major vessels come through the neck and they run at the base of the brain. So most likely when this person got the force it cause those shock waves and does damage to the vessels and that too much bleeding of around 700mls on the left side of the brain.”*

PW5 opined that the frontal haemorrhage under the skin and the black discolouring of the eyes could have resulted from 'blunt force trauma around the frontal' or a 'control quo injury' characterised by trauma to one side of the head and transmission of shock waves to cause bleeding on the opposite side. He then categorically stated that 'the biggest injury was on the right side of the head that led to bleeding over the left cerebral hemisphere.' The witness explained this injury thus:

*“Yes my lord I am saying because the doctor saw injury on the right, in front of the right ear, I am saying the deceased could have been hit on the right side of the head and maybe he fell down and got other injuries on the front side or they could have hit him*

*here in the front of the face and probably fell on the right and got some injury to the right here these are all possibilities.”*

The foregoing piece evidence provides scientific possibilities as to how the injuries reported in the post mortem report could have been incurred, and posits the most likely cause of death. This evidence is cogent and credible, and corroborated by the evidence of PW1, who witnessed a physical attack on the side of the deceased’s head. This court cannot say the same of the blatantly self-contradictory evidence from DW5 and DW8 as to the alleged fall and taxi accident suffered by the deceased. In fact, the defence evidence was riddled with numerous inconsistencies on this issue. Another case in point would be the evidence of DW5 that he observed the deceased to have had a swollen forehead following his re-arrest; the accused himself testified that the only visible injuries he observed on the deceased were around the eye and cheek area while DW7 also testified that the bleeding in the skin and muscles above the skull under the forehead was not visible to the naked eye, only having become apparent upon ‘reflecting’ the skin during post mortem. Indeed the latter injury was classified as an internal injury. These contradictions corrode the credibility of the defence case. In **Paulo Omale vs Uganda Criminal Appeal No. 6 of 1977** (CA) it was held:

**“It is not for the prisoner to prove accident or self defence and he is entitled to be acquitted even though the court is not satisfied that his story is true, so long as the court is of the view that his story might reasonably be true.”**

In the present case, given the serious contradictions of the defence evidence on this issue, this court does not find the defence of accident to be reasonably true. I am therefore satisfied that the prosecution has proved that the deceased’s death was occasioned by an assault on the deceased that was neither lawful nor excusable. I find that the Prosecution has proved beyond reasonable doubt that the deceased’s death was unlawful.

I now revert to the ingredient of malice aforethought or, for present purposes, whether or not the physical attack on the deceased was such as would infer an intention to cause death rather than accidental death. It was alleged by the prosecution that the deceased suffered numerous punches

to his face and kicks to his legs by about 4 police officers, including the accused person; as well as some degree of manhandling.

Section 191 of the Penal Code Act provides as follows on malice aforethought:

**“Malice aforethought may be established by evidence providing either of the following circumstances:**

- (a) an intention to cause the death of any person ...**
- (b) knowledge that the act or omission causing death will probably cause the death of some person, although such act is accompanied by indifference whether death is caused or not ...”**

Malice aforethought in murder trials can be ascertained from the weapon used, that is, whether it is a lethal weapon or not; the manner in which it is used, that is, whether it is used repeatedly or the number of injuries inflicted; the part of the body that is targeted or injured, that is, whether or not it is a vulnerable part, and the conduct of the accused before, during and after the incident, that is, whether there was impunity. See **R. vs Tubere (1945) 12 EACA 63**, **Akol Patrick & Others vs. Uganda** (supra) and **Uganda vs. Aggrey Kiyingi & Others**(supra).

It is well recognised that the head is a vulnerable part of the body which, if targeted by an accused, imputes malicious intent on his part. See **Okello Okidi vs Uganda Supreme Court Crim. Appeal No. 3 of 1995**. Further, in **Nanyonjo Harriet & Another vs. Uganda Criminal Appeal No. 24 of 2002** (SC) it was held:

**“For a court to infer that an accused killed with malice aforethought it must consider if death was a natural consequence of the act that caused the death, and if the accused foresaw death as a natural consequence of the act.”**

What a trial judge has to decide, so far as the mental element of murder is concerned is whether the accused intended to kill. In order to reach that decision the judge is required to pay regard to all the relevant circumstances, including what the accused said and did. See **R v Nedrick (1986) 1 WLR 1025** and **R v Hancock [1986] 2 WLR 357**. The existence of malice aforethought is not a question of opinion but one of fact to be determined from all the available evidence. See

**Nandudu Grace & Another vs. Uganda Crim. Appeal No.4 of 2009 (SC) and Francis Coke vs. Uganda (1992 -93) HCB 43.**

In the present case it was PW1's evidence that he witnessed about 4 police officers repeatedly punching and kicking the deceased's face and legs respectively. His evidence was corroborated by PW2, who testified that when he saw the deceased 1 day after his re-arrest his entire face was swollen. I find no reason to disbelieve this evidence. The fact that the deceased's attackers targeted his face could impute malice aforethought on their part. However, this court must determine whether the proven punches to the deceased's face did, in fact, result in the fatal injuries that were reported in the post mortem report and, perhaps more importantly, whether or not death can be reasonably deemed to have been a natural consequence of his attackers actions or the deceased's attackers can be reasonably deemed to have foreseen death as a natural consequence of their actions.

It was PW5's oral evidence that the deceased could have encountered the force of a blunt object to the front and side of his face. PW1's evidence on the deceased's face having been targeted by his attackers does corroborate this. The same witness' evidence that he saw the accused punch the deceased at the side of his head is additional confirmation of PW5's evidence. PW5 explicitly attributed the massive brain haemorrhage that occasioned the deceased's death to the force applied to his head and attested to by PW1. I do revert to PW1's identification evidence later in this judgment. Suffice to state at this stage that I am satisfied that the punches to the deceased's head by his attackers did cause the fatal injuries that resulted in his death.

Be that as it may, beyond PW1's reference to repeated punching, the ferocity or force of the punches inflicted upon the deceased was not proved by the prosecution. Evidence of the deceased falling as a result of the punching would have been quite useful in this regard, but no such evidence was adduced. This court is therefore unable to determine whether or not the deceased's death can be reasonably deemed to have been a natural consequence of his attackers' proven actions. Therefore this question remains unproved. Similarly, there is insufficient evidence to support a finding that the deceased's attackers foresaw death as a natural result of their actions. The fatal injuries suffered by a deceased person are often quite instructive on whether or not there was an intention to kill by his or her attackers. However, in the present case, the external injuries that were visible to the naked eye did not appear to have been so

serious as would have alerted the deceased's attackers that his life was in danger and thus indicate to court whether or not further beating imputed an intention to kill. The grave injuries observed in the post mortem report were largely internal and therefore not obvious to his attackers. Clearly the attack on the deceased was brutal but death cannot be presumed by this court to have been the anticipated end result of the actions by the deceased's attackers. In the result, I find that the prosecution has not proved the ingredient of malice aforethought beyond reasonable doubt.

I now revert to the participation of the accused person in the present homicide. The identification of the accused person in this case hinges on the evidence of a single identification witness, PW1.

The law relating to a single identifying witness is that court can convict on such evidence after warning itself and the assessors of the special need for caution before convicting on reliance of the correctness of the identification. The reason for special need for caution is that there is a possibility that the witness might be mistaken. See **Christopher Byagonza vs Uganda Crim. Appeal No. 25 of 1997** and **Abdala Nabulere & Another vs Uganda Crim. Appeal No. 9 of 1978**. Indeed in **John Katuramu vs. Uganda Criminal Appeal No. 2 of 1998** it was held:

**“The legal position is that the court can convict on the basis of evidence of a single identifying witness alone. However, the court should warn itself of the danger of possibility of mistaken identity in such case. This is particularly important where there are factors which present difficulties for identification at the material time. The court must in every such case examine the testimony of the single witness with greatest care and where possible look for corroborating or other supportive evidence. ... If after warning itself and scrutinising the evidence the court finds no corroboration for the identification evidence, it can still convict if it is sure that there is no mistaken identity.”**

The test of correct identification was laid down in **Abdala Nabulere & Another vs Uganda Crim. Appeal No. 9 of 1978** as follows:

**“The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the**

**distance between the witness and the accused, the lighting and the familiarity of the witness with the accused.”**

On the question of identification, PW1 testified that he witnessed the accused hit the deceased once on the side of the head. He testified that at the scene of crime he had been standing about 1 metre from where the deceased was but when the beating by the police officers started he drew closer to try and record what was happening on his phone. He further testified that he identified the accused person by a name tag on his police uniform, which he was able to read using the head lamps of cars caught up in the traffic jam at the scene of crime. Under cross examination PW1 maintained that he was able to see the accused punching the deceased because he was the police officer closest to him.

It is common ground in this case that the accused was present at the scene of crime. The accused testified that he was at the scene of crime, dressed in Khaki coloured police uniform, with the name tag on the uniform covered by a reflector jacket but did not assault the deceased. DW1, DW3 and DW5 did confirm that the accused was at the scene of crime. However, while DW1 and DW3 supported his assertion that he was wearing a reflector jacket, DW5 attested to the accused having been in a white traffic uniform. DW5's evidence on how the accused was dressed also contradicted that of the accused and DW3 who had each testified that the accused was dressed in a khaki uniform.

The issue of the accused attire on the day in question is important because it goes to the root of PW1's purported identification evidence. While PW1 testified that he identified the accused by his name tag on his uniform; the evidence of the accused, DW1 and DW3 suggests that the name tag was under a reflector jacket and therefore not visible. However, under re-examination DW3 contradicted his evidence and stated that he saw the name tags of all the police officers that were at the scene of crime but was unable to read their names because he was a distance away. This was a witness that, under cross examination, had stated quite categorically that he saw everything pertaining to the deceased's arrest. Still under cross examination, asked whether all the officers at the scene of crime were dressed in reflector jackets, the same witness stated:

*“I cannot be direct on that whether they were all putting on jackets.”*

This court is aware that the burden of proof rests with the prosecution throughout a criminal trial. However, contradictions on a matter that pertains to the identification of an accused person cannot be ignored, and bring into question the authenticity of the defence evidence on the issue of the accused's participation in the present offence. Conversely, there is no contention from either the defence or prosecution that the scene of crime was well lit – both from street lighting put up in preparation for the impending CHOGM conference, as well as from lighting from nearby shops and the head lamps from cars caught up in the traffic jam. Therefore, the evidence of an eye witness to the said arrest such as PW1 cannot be disregarded given its corroboration by DW3. The sum effect of DW3's evidence was that the accused was dressed in khaki colour uniform; all the other police officers were in police uniform, the colours of which he could not confirm, but all the name tags of all the police officers at the scene of crime were visible even at a distance. This evidence would corroborate PW1's identification evidence as to the attire the accused was dressed in and the visibility of his name tag, by which he was identified at close range.

I am satisfied that the conditions that prevailed at the scene of crime did favour correct identification of the accused as one of the officers that inflicted fatal injuries upon the deceased. In fact, the fatal effects of the punch to the side of the deceased's face that was attributed to the accused person were convincingly explained to this court by PW5. In **Rugarwana Fred vs Uganda Criminal Appeal No. 39 of 1995** (SC) medical evidence was held to be capable of corroborating the fact of defilement. Similarly, I do hold that the medical evidence in this case did corroborate PW1's evidence on the assault of the deceased by the accused. It was a common thread in the accused's evidence that he was not at the scene of crime alone and was not the only police officer that recorded a statement in respect of the present offence. The accused wondered why he alone had been prosecuted. This court does share the accused's consternation on this issue. Nonetheless, being a joint offender with others would not exonerate the accused of his participation in the present offence. Section 20 of the Penal Code Act clearly outlines the legal position with regard to joint offenders in prosecution of a common unlawful purpose – each such offender is deemed to have committed the offence arising from such unlawful purpose.

I therefore find that the prosecution has proved beyond reasonable doubt that the accused participated in the present homicide. In the result, I would depart from the joint opinion of the assessors and acquit the accused, Norbert Ojok, of the offence of murder contrary to sections 188 and 189 of the Penal Code Act; but do find him guilty of the offence of manslaughter contrary to sections 187(1) and 190 of the Penal Code Act. I do hereby convict him of the said offence.

**Monica K. Mugenyi**

**Judge**

25<sup>th</sup> April, 2013

### **SENTENCE**

I carefully listened to both counsel on mitigation of sentence in respect of the convict.

The Sentencing Guidelines provide for 3 categories of offenders based on the harm inflicted upon a victim and the culpability of the offender. While the prosecution evidence in this case clearly proved that the deceased died from grave injuries inflicted upon him by about 4 police men; the convict's culpability in this offence was only proved by 1 punch to the side of the deceased's face. I would be hesitant to attribute this sole punch to the death of the deceased but it was one of a number of them that caused his fatal injuries. This would classify the present case in the second category of offences, which are characterised by grave harm and less culpability. The starting point in terms of sentencing for offenders within that category of offences would be 9 years imprisonment; while the applicable range thereto would be 5 – 12 years imprisonment.

I quite agree that the convict being a first offender deserves a degree of leniency to distinguish his penalty from repeated offenders. I also do agree with defence counsel that the convict appears remorseful and does have demonstrated family responsibilities. These considerations serve as mitigating factors that would reduce on the term sentence applicable to the present convict.

Be that as it may, this court would seemingly fail in its duty if it upheld the interests of one party at the expense of another. In that regard, I do agree with Learned State Counsel that a family was deprived of a child who had relative promise for the future, not to mention the sheer anguish of his death. No amount of restitution could ever recompense that loss. I do agree with learned State Counsel that as a member of the security forces the convict did have a duty to protect and not curtail the lives of others. This case is distinguishable from that in respect of Brig. Tumukunde cited by defence counsel because in the cited case there was no loss of life. However, I am mindful that having spent only 2 years in service at the time, the convict was prone to mistakes and his offence should be considered within that context. Considering the reformation principle of sentencing, I do believe the convict falls within the category of offenders that is susceptible to reform and use in future.

Finally I do take into account the constitutional duty upon me to consider the period spent in lawful custody when imposing a term sentence. In the present case the convict spent a total of close to 6 months on remand.

In the premises, and with due regard to established law as cited above, I do hereby sentence the convict – Norbert Ojok to 10 years imprisonment to run from the date hereof.

**Monica K. Mugenyi**

**JUDGE**

25.04.2013

Right of appeal explained.

**Monica K. Mugenyi**

**JUDGE**

25.04.2013

Present:

Ms. Margaret Nakigudde for the State.

Mr. Yunus Kasirivu for the defence.