

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT IGANGA**

CRIMINAL SESSION CASE NO. 78 OF 2011

5

**UGANDA.....PROSECUT
OR**

VERSUS

10

**A1. ISABIRYE ROBERT
A2. KASIKO ALI ALIAS TENYWA
A3. MAGUMBA AYUB
A4.**

WERE

YUSUF

15

.....ACCUSED

**BEFORE: THE HONOURABLE LADY JUSTICE FLAVIA SENOGA
ANGLIN**

20

JUDGMENT

The accused persons before court ISABIRYE ROBERT, KASIKO ALI alias
25 TENYWA, MAGUMBA AYUB and WERE YUSUF were jointly indicted for
Murder c/s 188 & 189 of the Penal Code Act.

The prosecution case is that the above named accused and others still at
large during night of 21.01.11 at Kiyunga Trading Centre, Luuka Town
30 Council in Luuka District, murdered Bakaki Bumali.

Each of the accused persons vehemently denied the offence or in any way
participating in the fight that resulted into the death of the deceased.

At the preliminary hearing the post mortem report-Exhibit P₁, and all the medical examination reports of the accused persons-Exhibits P₂A, P₂B, P₂C and P₂D were admitted in evidence under Section 66 T.I.A.

The prosecution case was based on the evidence of 6 witnesses. They
5 dead to prove the following ingredients of the offence beyond all reasonable doubt in order for a conviction to be returned:

(1) Death of a person.

(2) The death was unlawful.

(3) The death was caused with malice aforethought.

10 (4) The accused caused or participated in causing the death of the person.

(5) And that there was a common intention to prosecute an unlawful purpose.

15 This is because the established principle of law is that the burden of proof rests upon the prosecution throughout and never shifts except in a few instances provided for by law. It has further been plaid down by decided cases that, in all indictments for murder, the standard of proof is even higher than in the ordinary criminal cases - Refer to **A. Abonyo &**
20 **Another vs. R. [1962] EA** relied upon in the case of **Uganda vs. Adonia Zoreka & No. 7770 DC Kikwenba Criminal case 103/87.**

Court now proceeds to evaluate the evidence of both the prosecution and the defence and determine whether the prosecution discharged its burden
25 in respect of each of the ingredients.

In respect of the ingredient of death, the prosecution evidence was that a body, identified to be that of the deceased by one Bamukyaye Godfrey, was found lying in a sitting room in a semi permanent house. It was

examined by Dr. Bamudaziza PW1 who found it to be well nourished and without blood stains.

5 However, there were multiple bruises on the head and face. The cause of death wa suspected to be complications of a closed head injury as indicated by the bruises - Exhibit P₁.

The rest of the prosecution witnesses PW2, Tusubira Paul, PW3 Muwitwe Godfrey, PW4 Muweesi Henry, and PW6 D/AIP Nambufu Bernard all
10 confirmed the death of the deceased. And the defence did not dispute the death. Court therefore finds as a fact that Bakaki Bumali is dead. The ingredient was proved to the required standard.

15 As to whether the death was unlawful, the prosecution testified that the cause of death of the deceased on 21.01.11, was due to complications of a closed head injury, as a result of bruises sustained on the head and the face where he was assaulted by a group of assailants. PW2, PW3 and PW4 all confirm that the deceased was assaulted.

20 Counsel for the defence submitted that the testimony of the prosecution witnesses concerning the assault left a lot to be desired as PW2 and PW3 were not at the scene when the assault occurred. He argued that their evidence could not be relied upon to determine that the death was unlawful.

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But as pointed out by counsel for the prosecution and rightly so, ***“Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under
30 justifiable circumstances, for example in self defence or in***

defence of property.” Refer to the East African Court of Appeal case of **Gusambizi Wesonga vs. R. (1948)15 EACA 65.**

5 It is not disputed in the present case that the deceased died as a result of complications arising from an assault of his person. Assault is an offence under Section 236 of the Penal Code Act.

10 It is on record that the deceased was assaulted because he intervened in a conflict to prevent the assault of some young boys who were attending a party.

Without any circumstances to justify the assault that culminated into the death of the deceased, I agree with counsel for the State and find as a fact that the death of the deceased was indeed unlawful.

15 The next issue to determine is whether the killing was with malice aforethought.

To reach a decision on this issue, I bear in mind the provisions of Section 191 of the Penal Code Act which lays out circumstances under which malice aforethought is deemed to be established. These are:

- (a) An intention to cause the death of any person, whether such person is the one actually killed or not.
- (b) Knowledge that the act or omission will probably cause death of same person, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused.

30 Case Law has established that ***“In deciding whether or not the prosecution has discharged its burden, the court looks at the surrounding circumstances in each particular case that include***

the nature and number of injuries inflicted, the part of the body injured, the nature of the weapon used and also the conduct of the accused immediately before and after the attack” - See **Uganda vs. John Ochen [1992-93] HCB, Uganda vs. Adonia Zoreka & No. 7770 DC Kikwemba Criminal case 103/87** where the trial Judge 5 relied upon the case of **R. vs. Tubere (1945)12 EACA 63 and Ekadeho s/o Lomuli vs. R. [1959]EA 168 (CA).**

The prosecution evidence in the present case is that the deceased 10 sustained multiple bruises on the head and face that resulted into complications of a closed head injury that caused his death. The head has been established to be a vulnerable part of the body. And injuries deliberately and repeatedly inflicted upon the head have been held to be intended to cause death or to be accompanied by knowledge that they 15 would probably cause death. Refer to **Mwathi vs. Republic [2007]2 EA 334.**

The nature of the weapons used to inflict injuries upon the deceased 20 included according to PW2, PW3 and PW4, a bicycle lock, sticks/clubs and a metal/iron bar.

Counsel for the accused argued that, without any of the alleged weapons having been exhibited, there was no proof that any had been used and therefore malice aforethought had not been proved. However, Case Law 25 to the effect that ***“Failure to produce an exhibit is not detrimental to the prosecution case: - Uganda vs. Katushabe [1988-90] HCB 59.***

Court agrees that the weapons described by the prosecution witnesses would be lethal more so if used repeatedly on a vulnerable part of the body.

5 Concerning the conduct of the assailants immediately after the assaulting the deceased, PW2 and PW3 said that A2, A3 and A4 ran away from the scene when confronted about their actions. Such conduct is normally not conduct of an innocent person and is indicative of malice aforethought. However, there are other factors surrounding the case which when
10 examined critically may rebut the inference of malice aforethought. I will comment more on this issue later in my Judgment.

The next ingredient is whether the accused persons were responsible for the death of the deceased. The prosecution relied upon the evidence of
15 PW2, PW3 and PW4 to try and prove this ingredient.

All the witnesses agree that on the date in question there was a get together function at Kiyunga village organized by one Taduba Robinah. There was music and many people gathered. PW2 lived about 50 metres
20 from the place where the function was held.

During the night, at about 1am, PW2 was woken up from his sleep by Ali and Geoffrey who told him that the deceased was being assaulted. PW2 rushed to call PW4 Muweesi to go with him to the scene where deceased
25 was being assaulted. PW4 lives about 50 metres from PW2's home.

At the scene they found the deceased had been dragged from where the function was to the road nearby and was lying in a trench. The assailants were still there assaulting him. PW2 identified A1 who was armed with a
30 bicycle lock. A2 had a stick, A3 a metal bar, while A4 was using his hands.

There was a bright security light at the scene as it was next to a parking yard. When confronted, the assailants ran off towards the junction.

5 While taking the deceased to Kiyunga Hospital, PW2 found the accused persons near the road by the junction. They were wondering if the deceased was dead.

10 PW2 handed over the deceased to Ali and another person and he and PW4 arrested A1 and took him to Kiyunga police post. While he acknowledged that he was told there had been a fight at the function, PW2 did not know who began the fight as he was away when it began. The deceased was PW2's best friend.

15 PW3 Muwitwe Geoffrey first saw all the accused persons at the function that fateful day at the dance. At about 1.00am A1 & A3 with their group beat up young boys who included Julius Butanakya, Mateeka Farid and Musalwa, as they were dancing with girls and chased them away. When the deceased intervened the accused A1 and A2 together with many other people began assaulting the deceased, A3 and A4 were also part of the
20 Assailants.

This witness confirmed that A1 was armed with a bicycle lock, A2 with a metal bar, while A3 and A4 had sticks. The accused hit the deceased on the head. When he tried to separate them PW3 was also assaulted (has scars on the fore head). He then ran away to call PW2 and PW4.

25 By the time he returned to the scene with PW2 and PW4 the accused had stopped assaulting the deceased but were standing by watching but the deceased could not move and his head was swollen although he was not bleeding.

30

While the witness knew that the accused fought the young boys over a girl, he did not know why they fought with the deceased.

5 There were bright security lights from the building nearby that lit the scene. Confirmed that PW2 carried deceased from the scene but he could not go with him. PW2 went ahead of him when they returned to the scene.

10 PW4 Muweesi Henry testified that he runs a video library and a film shack. He got to know A1 as he is the one who arrested him and handed him over to police on the date in question. He used to see A2, A3 and A4 in Kiyunga village.

15 He recalled that PW2 called him late that night and informed him of the assault of the deceased. He went with PW2 and they found deceased on the road side. Among the many people at the scene he recognized A1 who was armed with a bicycle lock and threatening to hit deceased some more.

20 After handing over A1 to police he returned to his work place.

PW5 Bogere Michael a Police Officer was in charge of Kiyunga police post. He received A1 from PW2 and PW4 the morning of 22.01.11 about 1am who informed him that A1 and others who had fled had assaulted the 25 deceased. He rearrested A1 and detained him on charges of assault. He entered case in the station Diary and recorded statements from witnesses.

30 He learnt of the death of deceased about 8.30am. PW2 named the rest of the accused among others and they were arrested. The witness went to the scene on 26.01.11 and drew a sketch map. Matter was handed over

to District CID Officer to investigate. He had provided security for the function but the fighting happened away from the function.

5 PW6-D/AIP Nambafu Bernard got to know the accused when they were reported to have assaulted the deceased. He learnt of the death of the deceased on 22.01.11 at about 8.00am. The District C.I.D Officer Agigi Daudi tasked him to go to where the body was. At Kiyunga they found A1 in custody. I went to Bulango and saw the body of deceased and arranged for post mortem. A2, A3 and A4 were arrested in the course of
10 investigations - identified by PW2 and PW3 and they made statements. PW5 and others also investigated the matter.

All four accused persons gave general denials of the offence. A1 stated that on the night in question he was not aware of the function but
15 attended a disco dance for a campaign rally. At about 10.00pm people from Kiyunga began chasing away people who were not from there. Denying ever beating up deceased or being involved in any fight, A1 said he did not know why he was arrested. Denied ever telling police that fighting broke out at the Disco. But that A3, A2 and A4 were all there.

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A2 (DW2) said he was in Kiyunga Town that night but did not know anything about death of the deceased. On his way home about 10.00pm he met people who had arrested someone he did not know on allegations of assault. Eventually he too was arrested from his village Namukubembe
25 by 2 men on a motorcycle. Doesn't know why A1 said he was at the Disco. At sometime he says he saw PW2 at the scene and saw A1 arrest. Denied giving police any of the information in his statement.

DW3 Magumba Ayub denied any involvement in the death of deceased. While he was at the Disco nothing happened there although youth fought nearby. However that he never went to the scene but left for home later.

5 On the way home he was chased by youth from Kiyunga. He was arrested the next day at Namukubembe village. Did not see A2 or A4 at the Disco. Denied ever telling police that A1, A2 and A4 were at the Disco.

A4 (DW4) Were Yusuf was at the Disco at about 8.00pm when PW2
10 required all people who were not from Kiyunga to leave. He got scared and left although before that he saw Suubi fighting with someone he did not know. He was arrested on 22.01.11 on ground that he had been at the Disco. Got to know of the fight at police. Left Disco about 10.00pm. Denied telling police that A1, A2, A3 Suubi and Zigidi and others were at
15 the disco and does not know why police included their names in his statement.

At this juncture I wish to remind myself that it's not for the accused to prove their innocence but for the prosecution to prove their guilt.

20

The offence that results into the death of the deceased was committed at night. This calls for critical examination of the evidence on either side, to ensure that court was rightly impressed by the prosecution witnesses. That is their honesty and accuracy, in order to rule out the possibility of
25 mistaken identity - **Roria vs. Republic [1967] EA 583.** This is, because identification of a assailant at night is usually more difficult than it would be in broad day light.

The circumstances in the present case under which PW2, PW3 and PW4
30 said to have identified the accused persons had elements of surprise

combined with fear and the darkness of the night. There were many people at the scene, PW2 was not present when the fighting began. He was called from his home. When PW3 tried to intervene in the fight he was also assaulted. He had seen all the accused for the first time at the
5 function. PW4 was also not at the scene. He went there upon being informed by PW2.

For all those reasons court should and I hereby do so, ***“warn itself of the danger of convicting on identification evidence where the witness
10 only see the perpetrates of an offence fleetingly and under stressful circumstances” - Kalume vs. Republic [1998] LLR 693 (CAK).***

What is required in such circumstances is some other evidence connecting
15 the accused persons to the offence, that goes to show that the witness could not have been mistaken. Refer to **Roria vs. Republic [1969]EA 583, Uganda vs. R.O. 973Lt. Samuel Kasujja and Others Criminal case 08/92 and Tomasi Omukono vs. Uganda Criminal Appeal No. 04/97.**

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In the present case PW2 was adamant that he knew all the accused persons before that date. He had known A1 for about 2 years and the rest of the accused for about 10 years.

25 While PW3 did not know the accused before, he had seen them earlier at the function. By the time the fighting broke out at 1pm, all accused got involved. He saw them assault the deceased when he intervened to save the young boys.

The two witnesses were adamant that A1 was armed with a bicycle lock. A2 with a metal bar and A3 and A4 with sticks. It has been established that, ***“recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of an assailant - Kalume vs. Republic [1998]1 LLR 693 (CAK)*** where the case of **Anjonani & Others vs. Republic** was applied.

10 The prior knowledge of the assailants by prosecution witnesses and the prior association with them by PW2 made it possible for them to identify the accused among the many people at the scene. Their identification was also made possible by the bright light that was at the scene of the crime which is not denied by the accused. All admitted they were at the Disco.

15 The evidence of PW2 and PW3 is further strengthened by that of PW4 who participated in the arrest of A1 and noticed when they got to the scene that he was armed with a bicycle lock and was threatening to hit the deceased some more.

20 On the way to take deceased to hospital, the other accused who had run away from the scene were found on the way and they wondered if deceased was dead.

25 The evidence of PW2, PW3 and PW4 is further strengthened by the testimony of PW5 and PW6 who affirmed that the witnesses apart from handing over A1 to police named the rest of the accused as having participated in the assault of the deceased. All the rest of accused admitted that they were arrested the next day 22.01.11 from Namukubembe village.

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For all those reasons, I find that all the accused persons were positively identified and placed at the scene of crime where the deceased was assaulted and that they, participated in the assault.

- 5 According to PW6 the accused admitted their participation in the assault of the deceased. Their defences are therefore rejected as lies and an afterthought to try and get themselves off the hook.

The contradictions or discrepancies counsel for the accused claimed were
10 in the testimony of the prosecution witness did not go to the root of the prosecution case. No two witnesses can give the exact same description of events - Case Law. In the present case the evidence of the prosecution was the same in material particulars. There was no indication of deliberate untruthfulness.

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PW5 Police Officer explained that there were Police Officers at the scene while other witnesses said there was no security, is explained by the fact that the deceased had been dragged away from the function venue to the side.

20

There is also nothing to indicate that the police did not make investigations since it is on record that they went to the scene, recorded witness statements and arrested A2, A3 and A4 from their village. The issue that they solely relied on information given to them by PW2 should
25 have been brought out in cross examination otherwise it does not carry weight with the court.

Court accordingly finds that all the accused persons were placed at the scene of crime and participated in assaulting the deceased, inflicting
30 injuries that resulted into his death.

The accused attacked and assaulted the deceased because he intervened in a fight where they were assaulting other young boys. The evidence of the prosecution points sufficiently existence of a common intention to execute an unlawful purpose. The law provided that, ***“Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of that purpose an offence is committed of such nature that its commission was a probable consequence of that purpose, each of them is deemed to have committed the offence - Section 20 P.C.A & Andrea Obonyo & Others vs. R. [1962]1 EA 542 (CAN), Opoya vs. Uganda [1967]1 EA 752 (CAK) and Isingoma vs. Uganda [1986]1 EA 155 (SCU).***

The Court of Appeal has held that ***“To prove common intention, it is not necessary to prove prior agreement between assailants. It is sufficient to prove their intention which can be inferred from their actions. It can be inferred from the presence of the accused, their actions or omissions to disassociate themselves from the attack.” - Birikadde vs. Uganda [1986] HCB 6.***

While there is no evidence of prior agreement in the present case, none of the accused disassociated themselves from the attack; they instead participated in it.

25

Court finds that the prosecution proved at least 2 ingredients of the offence to the required standard.

However, as indicated earlier in this Judgment, I wish to comment further about the issue of malice aforethought. While the injuries sustained by

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the deceased are normally suggestive of malice aforethought, the circumstances clearly point to the fact that there was fighting among youth over girls. The deceased intervened whereupon the wrath of the accused was turned upon him.

5

It would appear to me that the acts of the accused persons were committed in the heat of passion occasioned as what they might have deemed as unnecessary intervention of the deceased, coupled with their unhappiness with the young men who were dancing with the girls. Such is the foolishness of youth that they do not stop to think about the consequences of their actions. But that is no ground for which to let them not take responsibilities of their actions. It is for those reasons that in disagreement with the opinion of the assessors I would not acquit them entirely but find them guilty of manslaughter.

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All the accused are accordingly acquitted of murder and found guilty of manslaughter and they are all convicted of the same under Section 187 of the Penal Code Act.

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Flavia Senoga Anglin

JUDGE

01.10.13

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01.10.13:

All accused before court

Katami Lydia for state present

Muzuusa Stephen for accused

30 Ngobi Balidawa holding brief.

Both assessors present

Counsel for State: Matter is for judgment.

5 Court:

Judgment delivered in open court.

Accused acquitted of murder and found guilty of manslaughter c/s 187 of the Penal Code Act and are convicted of the same.

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Flavia Senoga Anglin

JUDGE

01.10.13

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Counsel for state:

The offence for which the accused have been convicted carries a maximum penalty of life imprisonment.

There is a high incidence of this kind of offence within this jurisdiction.

20 The accused took away a life that could have been useful to the nation and deprived the deceased's family of his company. I therefore pray for a deterrent sentence appropriate in the circumstances.

Counsel for accused:

25 We have about 5 factors in mitigation.

The accused are all first offenders and no previous criminal record. Sending them to prison for a long period may expose them to hard core criminals. Where they will learn methods of committing even more serious crimes. We pray that a shorter period be considered. The accused have

been on remand for a long time i.e. since January 2011 it is about 2 years and 8 months. We pray that court considers this while sentencing.

5 The convicts are married men with families to look after. They need to regain their freedom to continue with their family and parental obligations. We pray therefore that a shorter period be considered.

The age of the offenders. They are all youthful offenders and need more rehabilitation than punishment as there is hope that they are reformed.
10 We pray court takes that factor into account.

The circumstances under which the offence was committed - facts indicate that there was a fight. Court should therefore consider that they acted out of provocation and self defence. What transpired was therefore an
15 accident.

The offence carries a maximum sentence of life imprisonment. However, court has unfettered discretion to give a lesser sentence. We pray court exercises that discretion.

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A1: I pray court releases me.

A2:

I pray court exercises leniency. I have learnt from the period spent in
25 remand.

A3:

I pray court shows mercy and lets me go home considering the long period spent in remand.

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A4: I pray for mercy from court so that I may go home.

Court: Sentence at 2.00pm. Accused further remanded till then.

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Flavia Senoga Anglin

JUDGE

01.10.13

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Later at 2.15pm:

All accused before court

Katami Lydia for State present

15 Ngobi Balidawa for accused for present

Both assessors present

Court: The accused are sentenced to imprisonment for 4 months each.

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Reasons:

The accused are first offenders who have no previous criminal record.

They have been on remand for 2 years and 8 months.

25 The circumstances under which the offence was committed show there was no intention to kill the deceased. The accused are young people who appear to have been carried away by the recklessness of youth and failed to exercise reason and attacked the deceased who was only trying to stop them from assaulting other youth.

30

However they appear repentant and since justice is not about revenge which even it is exercised can never bring back the life of the deceased and court considers that long incarceration will only serve to harden them and not rehabilitate them the 4 months imprisonment to make a total of 3
5 years considering the time they have spent on remand will suffice to meet the ends of justice. Perchance during that time they will learn to control their tempers.

Right of appeal against conviction and sentence explained to the accused
10 persons.

Flavia Senoga Anglin

JUDGE

01.10.13