THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

CRIMINAL SESSION CASE NO. 0109 OF 2012

UGANDA :: PROSECUTOR

VERSUS

JAMTOO SILVESTER BOYI :: ACCUSED

BEFORE: HON. JUSTICE BYABAKAMA MUGENYI SIMON – RESIDENT JUDGE

JUDGMENT

The accused herein is indicted for murder contrary to section 188 and 189 of the Penal Code Act. It is alleged that on the 10th January 2012 at Kyarumbeiha Village, in Masindi District he murdered Bagonza Junior. He pleaded not guilty hence this trial. Briefly, the prosecution case is that on the fateful day the accused attacked the deceased Bagonza Junior with a hoe and injured him severely. The deceased was rushed to Masindi Hospital with injuries on the head to which he succumbed later in the day. The accused was arrested and charged. He elected to remain silent at the trial.

The burden of proof in a criminal case rests on the prosecution and it does not shift to the accused. The standard of proof is beyond reasonable doubt.

The ingredients of the offence of murder are;-

1. Death of a human being
2. Unlawful of death
3. Participation of the accused
4. Malice aforethought

There is overwhelming evidence that the deceased Bagonza Junior is dead. This is borne out of the testimonies of Tindyebwa Godfrey (PW3), Byakagaba Patrick (PW4), Kunihira Tom (PW5) as well as the admitted postmortem report by Dr. Bateganya. According to the doctor's finding the brain was shattered and blood was oozing out. The cause of death was damage of the brain and excessive bleeding. Considering the evidence of the said witnesses, which was largely uncontested, I come to the finding that the first two ingredients have been proved.

I now come to participation. The evidence led by the prosecution to prove this ingredient is mainly by that of Tindyebwa Godfrey (PW3) as single identifying witness. In a series of decisions by the courts, it has been reiterated time and again that where prosecution is based on the evidence of single identifying witness, the court must exercise great care so as to satisfy itself that there is no danger of basing conviction on mistaken identity. The need of testing with greatest care the evidence of such witness is more paramount when the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error. Refer to; ***Abdala Bin Wendo & Another versus R***

(1953) EACA 166, Roria versus Republic (1967) EA 583, G.W. Kalyesubula versus Uganda, Criminal Appeal No. 16/1977 (unreported) Abdalla Nabulere & Another versus Uganda Criminal Appeal No. 09/1978, Bogere Moses & Another versus Uganda, Criminal Appeal No. 01/97 and Isanga Lazaro & 2 Others versus Uganda, Criminal Appeal No. 19/1999.

In the instant case, Tindyebwa Godfrey (PW3) testified that the accused is his maternal uncle, therefore he knew him quite well. The time was about 9:00Am and he stood about three (3) metres from the accused as he cut the deceased with a hoe. The scene was a village path. It was not suggested there was anything obstructing his view. He was composed and steadfast while giving evidence. In my view the conditions at the scene were favourable for a correct and unmistaken identification of the assailant by PW3. The correctness of his identification is also bolstered or strengthened by the findings of the doctor, in that Tindyebwa said the accused cut the deceased on the head with a hoe which is corroborated by the doctor's finding to the effect that the body had cut wounds on the head.

Being mindful of the need to warn myself of the danger of basing a conviction on the unsupported identification evidence, I have not found any reason suggesting that Tindyebwa's evidence actuated by ill will or other reason towards the accused person. On the contrary, the deceased's father Byakagaba Patrick told court that he had no problem with the accused who is his paternal uncle. Both Tindyebwa and Byakagaba wondered why the accused attacked the deceased. Considering all the circumstances of this

case, I can safely come to the finding that the accused was positively identified by Tindyebwa as the assailant. The ingredient of participation is therefore proved.

The last ingredient for my consideration is malice aforethought. Malice aforethought cannot be proved by direct evidence as it is a disposition of the mind. It can only be inferred from the circumstances surrounding the commission of the offence, such as the nature of injuries inflicted on the body of the deceased, part of the body affected, whether it is a vulnerable part of the body and the weapon used. Refer to; ***R versus Tubere (1945) 12 EACA 63 and Uganda versus Francis Gayira & Another (1994 – 95) HCB 16.*** In ***Uganda versus Turwomwe (1978) HCB 15*** malice aforethought was inferred from the fact that a panga which is a dangerous weapon was applied on the neck of the deceased which is vulnerable part of the body and the accused in that case was convicted of murder.

In the instant case, the weapon identified by Tindyebwa was a hoe. Without a doubt a hoe is a dangerous weapon if applied wrongly. The head is without question a vulnerable part of the body. The postmortem report reveals the head had the following injuries:-

1. open fracture on the occipital bone with brain oozing
2. open fracture of borne of forehead
3. Multiple fractures of the lower jaw.

Internally the brain was shattered and oozing. The said injuries clearly reveal the said hoe was applied on the head more than once and it was

applied with some considerable force. In those circumstances, there can be no doubt in acting as he did the accused had the requisite or necessary malice aforethought.

It is not known why the accused attacked the deceased who at 10 – 13 years, was still a child. According to Section 8 (3) of the Penal Code Act motive is irrelevant in determining criminal liability. However, where motive is established by evidence, it becomes a relevant fact in determining intention. Refer to***; Tinkamalirwe & Another Versus Uganda (1988 – 90) HCB 5.***

In their unanimous opinion, the gentlemen assessors were of the view that the prosecution had proved all the essential ingredients of the offence beyond reasonable doubt. They therefore advised me to find the accused guilty of murder as indicted. I do entirely agree with the said opinion.

In the result and for the foregoing reasons, I am satisfied the prosecution have discharged the burden of proof in the instant case. I therefore find the accused guilty of murder contrary to section 188 and 189 of the Penal Code Act and do convict him according.

SIGNED

BYABAKAMA MUGENYI SIMON

RESIDENT JUDGE

1ST OCTOBER 2013

ALLOCTUS

Kumbuga: The convict is a first offender. He has wasted court's time well knowing he committed the offence. He is not remorseful from the time of commission of the offence to the time of trial. Even at the time of arrest he threatened to violence on those arresting him. All the circumstances show that he had the necessary malice aforethought to kill the young boy. He killed the child in a brutal manner. Life is sacred, Holy and is God given. The convict does not deserved mercy and exist in a human community. I pray for maximum sentence against the convict.

Kizito The convict has been on remand on since 12th January 2012. He is an elderly man of 77 years. I pray for leniency against the convict. I pray for a custodial sentence.

Accused: I do not have much to add.

Deceased's father

The convict should be sentenced to at least 15 years imprisonment.

SENTENCE

I have carefully listened to the submissions of both sides on sentence. Court has observed time and again that human life is scared lives of others. The convict murdered the deceased in cold blood and thereby snuffed out the budding life of a 13 year old child. The convict is not remorseful at all and at 77 years he is expected to be the fountain of wisdom to the younger persons in his community. His conduct was therefore despicable and warrants a sentence commensurate to the severity of his crime. The court cannot shun its responsibility in dealing firmly with offenders of the convict's caliber and also warning other wound be offenders to desist from such conduct.

Ordinarily the offence of murder attracts to severest of sentences in particular given the circumstances of this case.

Court however takes cognizance of the fact that the convict is a first offender and at 77 years, he is clearly in the evening hours of his life. He has been on remand for 1 year 9 months today. However, there is need to keep him away for a while so that he reflects on the magnitude of his conduct and once reformed, hopefully he will rejoin his community a changed person.

Accordingly, I sentence the convict to 17 years imprisonment taking into account the period spent on remand. You have the right to appeal against conviction and sentence.

SIGNED
BYABAKAMA MUGENYI SIMON
1ST OCTOBER 2013