

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

CRIMINAL SESSION CASE NO. 044 OF 2011

5

UGANDA.....PROSECUTOR

VERSUS

10

**A1. NABONGHO IBRAHIM
A2. SINANI KASAMBEKU alias MUGENDA
MBALE.....ACCUSED**

15

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

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JUDGMENT

The two accused persons before court NABONGHO IBRAHIM and KASEMBEKU SINAI alias MUGENDA MBALE were indicted on two counts.

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Court 1 is Aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act.

Count 2 is Murder c/s 188 and 189 of the Penal Code Act.

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The case for the prosecution was that the two accused person and others still at large on 25.06.10 at Irimbi village, Namutumba District robbed Byebye Joseph of a Bajaj Boxer and immediately before or after the said robbery used a deadly weapon on the said Byebye Joseph.

35

And that on the same date and same place, the accused murdered the said Byebye Joseph.

Both accused denied the charges.

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At the preliminary hearing, the following documents were admitted in evidence under Section 66 TIA. That is the post mortem report of the deceased - Exhibit P1 and the two reports of the medical examination of the two accused persons - Exhibits P₂"A" and P₂"B" respectively.

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The prosecution case was based on the evidence of 9 witnesses.

In dealing with the merits of this case, court bears in mind that in all criminal cases, the burden of proof is on the prosecution to prove all the ingredients of the offences beyond all reasonable doubt. The burden never shifts except in some exceptional cases set down by law - **Woolmington vs. DPP [1935] AC 322 & Uganda vs. R.O. 973 Lt. Samuel Kasujja & 2 Others Criminal case No. 08/92.** The accused persons is presumed innocent until proven guilty or otherwise pleads guilty. It is not for the accused to prove his innocence, he only needs to call evidence that may raise doubt of his guilt in the mind of the court. Any doubt in the prosecution case has to be resolved in favour of the accused person.

25 Even where the accused sets up a defence, they do not thereby assume the burden of proving it. It is up to the prosecution to disprove the defence by adducing evidence to show that nevertheless the offence was committed by the accused person(s) - **Wamalwa & Another vs. Republic [1999]2 EA 358 (CAK); Sekitoleko vs. Uganda [1967] EA 30 531 and R vs. Johnson [1961]3 ALL ER 969.**

It is the duty of the court to evaluate both the evidence of the prosecution and that of the defence and determine whether the burden and standard of proof have been discharged by the prosecution.

5

In the present case, in respect to Count 1 of Robbery, the prosecution had to prove the following ingredients of the offence:

1) Theft.

2) Use of violence before, during or after the theft.

10 3) The assailants were armed with a deadly weapon before, during or after the robbery.

4) The accused persons participated in the robbery.

In respect of Count of Murder, the prosecution evidence had to prove that:

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1) There was death of a person.

2) The death was unlawfully caused.

3) There was malice aforethought.

4) The accused killed or participated in the acts causing the death.

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To prove the first ingredient of robbery in the present case i.e. theft, the prosecution relied upon the evidence of PW6 and PW7.

25 According to PW6 and PW7 a brother in law of the deceased, Byebye Joseph the deceased owned and used to ride an old motorcycle. In June 2010, Byebye disappeared with the motorcycle. On 26.06.10, Byebye's body was found in a rice garden at Busembatia, a long Mbale Road, without motorcycle.

PW7 DIP MUWANIKA SAMUEL a retired Police Officer exhibited the charge and caution statement he recorded from A1 - Exhibit P₅. The statement was admitted in evidence after a trial within a trial. The statement indicates that A1 and others took the motorcycle of the deceased after killing him. They kept the motorcycle with their brother in law one Yusuf of Irondo village. The motorcycle has never been recovered.

It was submitted for the state that the above evidence confirms that there was theft. The defence did not dispute the fact of theft.

Indeed the law provides that ***“A person who fraudulently or with intent to deprive the general or special owner of a thing capable of being stolen takes the thing without any claim of right is deemed to have stolen the thing.”*** - Section 254 of the Penal Code Act.

The evidence having established that a motorcycle was taken from the deceased in the circumstances described and has never been recovered, Court finds as a fact that the 1st ingredient of theft was proved to the required standard.

As to whether there was use of violence during the theft or thereafter. The evidence of PW1 the doctor and Exhibit P₁ show that the body of the deceased had external marks of violence. That is, multiple deep cut wounds on the head and elsewhere. This is confirmed by PW3 Kanyago Josephine who first discovered the body in the rice garden. And No. 30816 D/CPL. Mugoya Mohammed who received the information about a dead body dumped in a rice garden on 26.06.10. He visited the scene with PW1 Dr. Gowan and saw the body. He had photographs Exhibits

P3"A" and "B" taken of the body. And he also received Exhibit P₁ the post mortem report of the Doctor.

5 Exhibit P₅ put in by PW7 also confirms that the deceased was hit on the head and killed before the motorcycle was taken. The defence agreed with the prosecution that there was use of violence. This ingredient was also proved to the required standard.

10 The next ingredient is use of a deadly weapon before, during or after the robbery.

According to the evidence of PW1 the Doctor who examined the body, a sharp object was used to inflict the injuries on the deceased. Though the instrument used to hit the deceased was never found the evidence
15 of PW7 and Exhibit P₅ confirm that the deceased was hit on the head.

Under Section 268 (3) (a) (i) of the Penal Code Act, a deadly weapon is defined as ***"any instrument made to or adapted for stabbing or cutting"***.

20

Whatever instrument was used for killing the deceased on the head was capable of cutting as it caused deep cut wounds - Exhibit P₁, and was capable of causing death and indeed caused death.

25 The weapon was a deadly one within the meaning of Section 268 (3) (a) i) of the Penal Code Act. The defence does not dispute this fact. Court therefore finds that the ingredient was proved to the required standard.

The last ingredient of participation will be dealt with together with the participation in the murder case.

To prove the 2nd Count of murder and the 1st ingredient thereof of death,
5 the prosecution relied upon the evidence of PW1 - the Doctor and Exhibit P₁. The report is to the effect that Byebye Joseph is dead. And the cause of death was severe bleeding from the deep multiple cut wounds on the head that led to grave damage to the brain.

10 The death is confirmed by PW3, PW5, PW6 and PW8 together with Exhibit P3A & P3B photographs that show the dead body of the deceased. And Exhibit P₅ the charge and caution statement exhibited by PW7.

15 The body was identified as that of Byebye Joseph by PW6 Jabi James, brother in law of the deceased. The fact of death is not disputed. Court finds that this ingredient was proved beyond reasonable doubt.

As to whether the death was unlawful, court relied upon the
20 presumption of the law that ***“Every homicide is presumed to be unlawful unless it was accidental, excusable or authorized by the law”***. A death is excusable if it occurred under justifiable circumstances for example in defence or property or defence of the person or is authorized by the law. Refer to the case of **Gusambizi**
25 **Wesonga vs. R [1948]15 EACA 65** and **Uganda vs. Okello [1992-93] HCB 68**.

It is apparent from the prosecution evidence of PW1 and Exhibit P₁ and that of PW7 and Exhibit P₅ that the death of the deceased was neither

accidental nor excusable. The death was planned and meticulously executed. And the deceased passed away as a result of severe injuries he sustained on the head during his assault. The death occurred in the prosecution of an unlawful purpose by the assailants of the deceased
5 and the attendant assault that was also unlawful. The defence also agrees that the death was unlawful. Court finds that the ingredient was proved beyond reasonable doubt.

The next issue to determine is whether the killing of the deceased was
10 with malice aforethought.

Malice aforethought is defined under Section 191 of the Penal Code Act as the intent to cause death or the knowledge that the act or omission would cause death of some person – **R vs. Tubere (1945)2 EACA 63;**
15 **Mugao & Another vs. Republic [1972]1 EA 543 (CAN) and Bukenya & Others vs. Uganda [1972]1 EA 549 (CAK).**

To determine whether this ingredient has been proved, the court takes into account the surrounding circumstances in each case. The
20 circumstances include the nature of the wounds inflicted, the part of the body where the injury was inflicted, the type of weapon used and the conduct of the accused person(s) immediately before and after the injuries were inflicted – **R vs. Tubere (supra); Ekadeho s/o Lomuli vs. R [1959] EA 168 (CA) and Uganda vs. Adonia Zoreka & No.**
25 **7770 D/C Kikwemba Criminal case No. 103/87.**

The prosecution evidence in the present case shows that the deceased sustained deep cut wounds on the head that caused severe bleeding and damaged his brain.

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It is not disputed that the head and the brain are very vulnerable parts of the body and injury sustained there can cause death.

The weapon used to inflict the fatal injuries was lethal and the deceased
5 was cut many times - Exhibit P₁.

According to PW7 and Exhibit P₅ the conduct of the assailants was such they planned to cause the death of the deceased so as to take his motorcycle, after which they took the body and dumped it in a rice
10 garden.

That all that evidence is not disputed by the defence.

Court finds that whoever killed the deceased intended to kill him and
15 knew that such injuries as were inflicted would cause death.

The ingredient was proved to the required standard.

What remains for court to determine is whether the two accused
20 persons killed the deceased or participated in the acts that resulted into the death of the deceased.

There was no eye witness to the murder of the deceased. His body was found dumped in a rice garden covered with a grey piece of blanket.
25 The body was buried at the scene until it was identified by the PW6.

To prove this ingredient, the prosecution relied partly on circumstantial evidence and partly on the charge and caution statement of A1

recorded by PW7 the now retired Police Officer and tendered in evidence as Exhibit P₅.

5 The statement contains a detailed account of what transpired from the 25.06.10 when A1 lured the deceased at Upland stage, Mbale up to the time they arrived in Namutumba at the home of his brothers where the plan to kill the deceased was hatched. The part each of the assailants played in the assault of the deceased is set out right up to the time the body was dumped into the rice garden. What happened to the
10 motorcycle after that is also well narrated.

The statement was tendered in evidence after a trial within a trial was held and the objections of the defence to its admission were overruled.

15 Both accused persons denied the offence. A1 in his defence raised an alibi contending that between 24.06.10 and 26.06.10 he was at his home at Kakajo Zone, Bweyogerere. He denied ever having lured the deceased from Mbale or ever having had a motorcycle in his possession.

20 He insisted that he was arrested on 02.07.10 while on his way to Isoola, Namutumba District to buy water melon and tomatoes for sale.

He added that, upon his arrest he was taken to police, assaulted and forced to confess to the murder. He made 3 statements and admitted
25 the charge because he was in pain. However, he said that he never had anything to do with the offence and that he knew nothing about any of the exhibits that were said to have been recovered at A2's home.

At this juncture I wish to remind myself of the long established principle
30 of law that ***"An accused person who raises an alibi does not***

assume the burden of proving it. It is up to the prosecution to adduce evidence placing the accused person at the scene of the crime, showing that nonetheless, the offence was committed by the accused person” -Sekitoleko vs. Uganda [1968] EA 531.

5

As earlier pointed out in this Judgment, A1’s confession is very detailed. It shows that on 25.06.10 at 4.30pm, the accused hired a motorcyclist at Upland stage , Mbale, to take him to Irimbi village. The agreed fee was Shs.20,000/- in addition to which A1 had to meet the cost of fuel.

10 On the way, they picked up another person who however was left at Budaka.

On arriving at Irimbi village, Namutumba District, A1 and the motorcyclist went to the home of Juma and Fazil. The two are brothers
15 of the accused and sons of A2.

While A1 went and greeted his father A2 who stayed in the same homestead, he never informed him about the presence of the motorcycle.

20

A1 agreed with his brothers that he and the motorcyclist would sleep in the kitchen of Fazil. Juma and Fazil requested for the motorcycle, but when A1 told them it belonged to the motorcyclist, they persuaded him to kill the motorcyclist and take the motorcycle.

25

They agreed that they would call him late in the night, to open the door for them and then he A1 would be the first to hit the deceased once on the head. Thereafter Juma and Fazil would finish the job. And that’s what happened.

30

Thereafter, the 3 took the body to a potato shamba, got the motorcycle and took and dumped the body at Buyange, Kalamira swamp. A1 then went into hiding at Irondo village and the motorcycle was hidden there.

- 5 The possibility of such details, including information regarding the family of the accused person being given by someone who was not a participant in the crime is very remote.

PW7 was not the investigating officer and it would therefore take an
10 exceptionally ingenious person to come up with such elaborate details of an event.

However, the statement was repudiated/retracted by A1. And this court is mindful of the requirement of accepting a repudiated or retracted
15 confession with caution. It is the established principle that ***“Before court can find a conviction on such a confession, it must be satisfied in all the circumstances of the case that the confession is true. The court will only act on the confession if it is corroborated by independent evidence accepted by the court”*** -
20 **Festo Androa Asenwa & Another vs. Uganda SC Appeal No. 01/88** where the case of **Tuwamoi vs. Uganda [1967] EA 84** was relied upon.

In the present case PW6 stated that the deceased used to operate an
25 old motorcycle at Mbale near the University. He disappeared on the night of 24.06.10. His wife reported his disappearance to the in laws and the matter was reported to Mbale police.

PW3 a resident of Kalamira village, Magada sub-county, Namutumba
30 District found the body of the deceased in the rice garden (swamp). The

accused said the body had been dumped in a swamp at Kalamira village.

5 PW4-MUKOSE YUSUF an in law of the accused told court that during the night of 30.06.10 at about 10.00pm, A1 and another person called Juma came to his home with a motorcycle red in colour. They claimed to have run out of fuel. They left and returned with a 3rd person who repaired the motorcycle, refilled it with fuel and left. He never saw the motorcycle again.

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PW5 D/CPL. MUGOYA MUHAMMED by then attached to Namutumba police station stated that one week after the deceased's body was found, he was informed by residents and relatives of the two accused that the deceased had been killed by members of the family of A2.

15

He was further informed that A1 had been arrested at Irondo village, Magada sub-county, Namutumba District. He rushed there with the O/C Operations Wandera and they rescued A1 from the mob and took him to police station at Namutumba. In Exhibit P₅ A1 said he went to hide at
20 Irondo. The investigations further revealed that the motorcycle was repaired by PW9 Yazid Lugomba. It was Bajaj Boxer red in colour No. UDL 286K. It had been handed over to Juma.

PW9 confirmed this when he said Juma a brother to A1 took him on
25 30.06.10 to repair the motorcycle. A1 brought the motorcycle out of one house. The repairs were paid for by Juma and he is the one who left with the motorcycle.

PW8-DETECTIVE JABI SERULO then stationed at Namutumba police
30 station was involved in the investigations. He was informed that the

killers of the deceased were from A2's home at Irimbi, Magada, Namutumba.

He visited the scene of crime with the O/C station Wandera and one
5 Norine Akello. From the door of A2's house they recovered a piece of grey blanket similar to that found on the body of the deceased.

At the kitchen of Fazil, where A1 and the deceased are said to have slept there were blood stains on the wood of the door and the metallic
10 sheets. Pieces were taken as exhibits.

Ash with blood stains was recovered from the same kitchen.

A panga stuck in the soil was recovered from the potato garden where
15 A1 alleged the body was first dumped.

Trousers with what looked like blood stains were recovered from a cassava garden nearby.

20 All the items were exhibited after labeling them with CRB 481/2010. Some of them including body tissue from the deceased's stomach and blood samples from the brother of the deceased were submitted to the Government Analyst.

25 The witness also drew a sketch map Exhibit P₇ showing the homestead of A2 and where the homes of the brothers of A1 were located, plus the potato garden and the cassava garden.

Upon interrogation A2 told PW8 that part of his blanket was used by A1
30 and his other two sons to dispose of the body.

Counsel for the state submitted that all this was sufficient evidence that disproved the alibi of A1. While counsel for the accused argued that the statement could not be relied upon as A1 stated he made it after he was
5 assaulted and forced to admit the offence.

As earlier pointed out in the Judgment, the statement Exhibit P₅ was admitted in evidence after a trial within a trial where court ascertained that it was made voluntarily. The case of **Musinguzi Jones vs.**
10 **Uganda Criminal Appeal 149/2004 CA** relied upon by counsel for the accused is not applicable to the circumstances of the present case.

Court found no evidence that A1 had been tortured before he made the statement or that he coerced at all in anyway. The medical
15 examination of the accused A1 done on 06.07.10 - Exhibit P₂ "A" indicates that the accused was found with no injuries and was of a normal mental status.

When the evidence of the prosecution is looked at together with that of
20 A1, I find that the accused's alibi and general defence were disproved as lies. A1 was placed at the scene of the crime and the evidence of the prosecution shows that he participated on own his free will in the murder of the deceased.

25 The prosecution witnesses were firm and not shaken in cross-examination.

As to counsel for the accused's submission that the informer who led PW5 to the accused's home and all the people who were present during

the search never testified, I find that there is no required number of witnesses to prove a certain fact.

PW8 explained why there was no search warrant – the residents were
5 up in arms and wanted to destroy the homestead of A2. The doubt about the search and the possibility of the exhibits having been recovered elsewhere is belied by the sketch map of the homestead Exhibit P.

10 PW8 appeared to be a reliable witness.

The motorcycle could not be exhibited as it was never recovered.

The independent evidence of prosecution witnesses PW3, PW4, PW5,
15 PW6 and PW8 corroborated the confession made by A1 to PW7.

In any case, the Supreme Court has emphasised that **“Corroboration is not necessary in law and court may act on a confession alone if fully satisfied after considering all the material points and
20 surrounding circumstances that a confession cannot but be true” - Festo Androa Asenwa’s case (supra).** Apart from the corroborating evidence the reasons for believing the confession of A1 to be true have already been set down in this Judgment.

25 A2 on the other hand exercised his right to remain silent under Section 73 of the TIA.

An accused has no duty to prove his innocence and a conviction depends upon the strength of the prosecution case and not upon the
30 weakness of the defence case.

The prosecution case against A2 was that he must have known about the killing of the deceased and aided and abetted the crime by providing part of the blanket that was found at his house. That this is
5 evidence that shows he participated in the killing of the deceased.

While PW4 said that A2 was with A1 when they took the motorcycle to his house claiming they had ran out of fuel, he was contradicted by PW9 who says it was Juma s/o A2 who took him to repair the motorcycle at
10 Nabikabala village Magada sub-county. He clearly stated that Juma was not one of the accused before court. This was a major contradiction that went to the root of the case and was not explained.

According to PW7 - A2 was never implicated even in the charge and
15 caution statement of A1 - Exhibit P₅.

The only evidence linking A2 to the offence was the piece of blanket similar to that found on the body of the deceased that was found at A2's house. This is circumstantial evidence.
20

Case Law has established that, ***"To find a conviction exclusively upon circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt"*** -
25 **Charo vs. Republic [2007]1 EA 43 (CAK).**

The exhibits including the blanket were recovered from A2's homestead but this is a homestead he shared with his two sons Juma and Fazil who have never been arrested.
30

The evidence in exhibit P₅ is that the accused A2 was never informed of the presence of the deceased at the home.

5 A2 professed his innocence from the outset and according to PW7 never confessed to the killing of the deceased.

PW8 says that he told him that the blanket was used by his sons to dispose of the body. But without any other evidence indicating that A2 participated in the killing of the deceased I find in the circumstances
10 outlined above that the charge against A2 cannot be sustained.

While common intention can be inferred from the actions of A1, his agreement with his brothers to kill the deceased and rob him of his motorcycle, his failure to disassociate himself from the commission of
15 the offence **Anonio Baitwababo vs. Uganda SC Criminal Appeal 08/09**, there is no concrete evidence that A2 assisted in the disposal of the deceased's body. It is more likely in the circumstances that A2 was charged because he was the owner of the homestead where the abominable act was committed and he is the father of A1 and his 2
20 brothers.

For all those reasons I agree with the Assessors that A1 Ibrahim Nabongho should be found guilty and convicted while A2 Kasambeku Juma should be acquitted.

25

Accordingly A1 is hereby found guilty on both counts. Count 1 Aggravated robbery c/s 285 and 286 (2) of the Penal Code Act and he is convicted of the same. He is also found guilty of murder c/s 188 and 189 of the Penal Code Act and is convicted of the same. While A2 is

acquitted on both counts and should be set free forthwith unless otherwise held on other legal charges.

5 **Flavia Senoga Anglin**
Judge
07.10.13

07.10.13:

Both accused present

Katami Lydia for state present

Ngobi Balidawa for accused present

5 Both Assessors present

Counsel for State: Case is for Judgment.

Court: Judgment delivered in open court.

10

A1 found guilty on both counts and is convicted accordingly. A2 acquitted on both counts.

Counsel for State:

15 I pray court imposes a death sentence on the convict A1 for the following reasons. The convict has been found guilty and on both counts which carry a maximum sentence of death.

20 The convict took away an innocent life in the most gruesome manner. A deadly weapon was used and innumerable injuries were inflicted on the deceased in a bid to take away his motorcycle.

25 The circumstances after the deceased was killed were also gruesome and savage. His body was dumped in an unknown persons land and the chances of finding it were minimal and left to chance.

The accused betrayed the trust of the deceased who had willingly accepted the idea of spending the night at his home.

These cases are rampant in this jurisdiction and many youth are dying due to the acts such as of the accused person, considering that many youth are involved in the boda boda business. There is need for deterrence and only such sentence as death will deter such actions.

5 The motorcycle that was stolen was never recovered and we pray that the owner of the motorcycle be compensated. I so pray.

Counsel for accused:

I have 5 factors in mitigation.

10 The convict before court is a first offender, with no previous criminal record. The principle in law is that such a person deserves leniency.

The period spent on remand since July, 2010 i.e. 3 years and 2 months. Court should consider this as an mitigating factor.

15

The convict is a married man with a wife and 5 children. He is the sole bread winner of the family and court should take that into account.

The convict is already incapacitated. He is maimed as a result of the
20 process of the arrest.

Prosecution has prayed for a death sentence but in reply I submit that this court is enjoined with discretionary powers for sentencing. The right to life is a fundamental right and the death sentence does not act
25 as a deterrent as a convict does not live to see what happens thereafter. Instead such a sentence has served to encourage offenders to use more violence because they expect no mercy in the criminal justice system.

Court should invoke the principle of equality of sentencing bearing in mind that precedents show that convicts of aggravated robbery and murder have been given lesser sentences than death. Court should take those factors in account and awards 10 years in prison.

5

Accused:

I pray court to show mercy and release me considering the period I have spent on remand to go back and take care of my family. I am sick. I have pain in the chest, back and the legs.

10

Court: SENTENCE

The convict is sentenced to imprisonment for life on Count 1 and imprisonment for life on Count 2. Sentences to run concurrently.

Reasons:

15

- The degree of injury occasioned to the victim was fatal.
- He was repeatedly struck on the head with a weapon until he died.

20

- There was meticulous premeditation and planning of both offences by the convict and his brothers still at large.
- The convict went to Mbale, lured a motorcyclist-the deceased to bring him home.
- At home he persuaded the deceased to spend the night with him in the kitchen of his brother Fazil.

25

- Though the weapon was never recovered, it was a deadly weapon capable of causing death and indeed it caused death.
- The convict and his brothers deliberately caused loss of life in the course of commission of the offence of robbery, just to take a motorcycle from the deceased.

- The convict and his brothers deliberately targeted and caused the death of a defenceless person who trusted them to be safe, when he agreed to spend the night at their home.
- The convict though part of a group played a major role in luring the victim, persuaded him to spend the night, agreeing to open the door of the kitchen for his brothers and being the one to first hit the deceased on the head and the others to finish the gruesome job.
- Thereafter, there was an attempt to conceal and dispose of the evidence. The body of the deceased was dumped in a rice field as if he was a beast of no value.
- The crime negatively impacted on the family of the deceased and the community, who had the unpleasant task of identifying the body after it was buried to add to the grief of their loss.
- Such crimes for which the convict has been convicted are rampant and many people are not safe to carry out their ordinary business in order to care for their family.
- The motorcycle was never recovered.

Though a first offender the convict deserves a deterrent sentence for all those reasons I have stated. His plea for mercy has been noted by he ought to have taken into account that the deceased also had a family that needed love and care.

Imprisonment for life will suffice to meet the ends of justice. In addition to which the owner of the motorcycle should be compensated.

Right of Appeal against conviction and sentence explained to convict.

Flavia Senoga Anglin

Judge

07.10.13

Convict: I will appeal against sentence and conviction.

5 Court: The record to be prepared and availed to accused for purposes of appeal.

Flavia Senoga Anglin

10 **Judge**

07.10.13