

**THE REPUBLIC OF UGANDA**

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

**HCT-00-CR-SC- 0094-2012**

**UGANDA .....PROSECUTION**

**VERSUS**

**SENKAALI MUHAMMED & OTHERS.....ACCUSED**

**BEFORE: HON. JUSTICE LAMECK N. MUKASA**

**Representation:-**

Ms. Nabasitu Daisy (SSA) for the state

Mr. Ondim Duncan for A1 and A2 (SB)

Ms. Awelo Sarah for the offender (A3)(SB)

**Assessors:-**

Mr. Muhwezi Ben

Mr. Matovu Michael

Ms. Catherine Namusoke - Court Clerk

Mr. Kawali Muzafalu - Proceedings Recorder

Ms. Halima Kaggwa - Research Assistant

**JUDGMENT:**

Senkaali Muhammad, Mayende Amir and Serunyonyi Farouk were indicted for murder **contrary to Sections 188 and 189 of the Penal Code Act**. The particulars are that the three with the others still at large on the 4<sup>th</sup> day of January 2012 at Lusaka Zone Makindye Division Kampala District murdered Godfrey Lubuulwa.

Under the provisions of **Article 23(a) of the Constitution**, all accused persons are presumed innocent until proved guilty or plead guilty. The burden of proof rests on the prosecution to prove beyond reasonable doubt each of the following ingredients of murder:-

1. The person named in the indictment i.e. Godfrey Lubuulwa is dead
2. The death was caused unlawfully
3. The killing was done with malice aforethought
4. The accused persons or any of them participated in causing the death.

The prosecution adduced the testimonies of Mukisa Alex PW1, Moses Kibirige PW2, Sentamu Hassan PW3, Dr. Kalungi Sam PW4, Mutebi Michael PW5, and Inspector of Police Ndyanabo Joel PW6, Detective Assistant Superintendent of Police Yasmine Janni PW7.

By consent of the prosecution and the defence, the prosecution had relied on police form 24 in respect of each of the accused persons. They are received in evidence pursuant to **Section 66 of the Trial Indictments Act** as follows:-

Police Form 24 in respect of Sekaali Muhammad as Exhibit P1, Police Form 24 in respect of Mayende Amir Exhibit P2, Police Form 24 in respect of Serunyonyi Farouk as Exhibit P3.

At the close of the prosecution's case, this Court found that the prosecution failed to establish a prima facie case against A2 Mayende Amir. He was accordingly acquitted. Both A1 Senkali Muhammad and A3 Serunyonyi gave sworn evidence. They did not call witnesses.

**The first ingredient was whether Godfrey Lubuulwa is dead.**

IP Ndyanabo Joel PW6 testified that they received a report on 2<sup>nd</sup> January 2012 that there was chaos at St. Benedict Zone. They moved into the area and went to one house where they found a body lying into an empty house covered with a few bed sheets. The body was already rotting and the witness arranged a police car which took the body to Mulago for a postmortem.

Dr. Sam Kalungi ,a Pathologist at Mulago Hospital, testified that on 4<sup>th</sup> January 2012, he examined a dead body brought in on 3<sup>rd</sup> January 2012 and identified by one Seggawa John as that of Lubuulwa Godfrey. PW3 Sentamu Hassan testified that he picked Lubuulwa Godfrey's body from Mulago Hospital, mobilized funds and organized transport of the body to Masaka for burial.

With the above undisputed evidence, I find that the prosecution has proved beyond reasonable doubt that Lubuulwa Godfrey is dead.

Dr. Sam Kalungi PW4 testified that he found that there was a yellow Nylon string tied tightly around the neck. The tongue and eyes were protruding and there was concentric bruising around the neck. Internally there was a fractured lower jaw bone, fractured hyoid bone, (small borne of the neck), Organs had started decomposing and there was hemorrhage on the lungs.

The cause of death was asphyxia following strangulation. He explained that asphyxia means lack of oxygen. Anything that blocks air into the air way.

Mr. Ondim argued that the string was only 3cm long and the doctor did not determine the strength of the string and how long it had been around the neck. Counsel wondered what actually caused the oxygen blockage. Dr. Kalungi explained that what was of importance was to determine that the string caused the injuries to the neck.

The above evidence shows that Lubuulwa Godfrey's death was neither natural, accidental nor authorized by the law. The presumption is that all homicides unless accidental or authorized by law are unlawful.

See *Gusambizi Son of Wesonga Vs R (1948) Volume 15 EACA 65*. I accordingly find that the prosecution has proved beyond reasonable doubt that the death was unlawful.

**The third ingredient was whether it was caused by malice aforethought.**

*Section 191 of the Penal Code Act* stipulates that malice aforethought is deemed established by evidence showing either of the following:

***“An intention to cause the death of any person whether that person is the person actually killed or not***

***a) Knowledge that the act or omission causing the death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by***

*indifference whether death is caused or not or by a wish that it may not be caused”*

The doctor’s findings was that the cause of death was asphyxia, (lack of oxygen) due to strangulation (blockage of the air into the air way). Anybody who tightly tied a Nylon string around the deceased neck must have known that it would block the air way and stop the entry of oxygen. With lack of oxygen, the victim was bound to die. I accordingly find that the prosecution has proved beyond reasonable doubt the ingredient of malice aforethought

**The last ingredient was whether any of the accused persons participated in causing the death.**

There was no eye witness to the circumstances leading to Lubuulwa’s death. PW1 Mukisa Alex testified that on 3<sup>rd</sup> January 2012 upon learning of Lubuulwa’s death, he went to the deceased’s residence; he found that the body had already been picked by the police. When he looked inside the house, he found that the deceased’s house had been swept of all the deceased’ property.

He was informed by the people who had gathered, when the police broke into the house, that when they broke into the house, there was only the body and the house was empty. The witness went back to where the mourners had gathered for the vigil.

When he told them what he had found, one Sentamu Hassan PW3 told him that he had that morning been at Meddie’s (short for Muhammad) and seen properties which had not been there before. They moved to Meddie’s residence and PW3 rang him but that he refused to come over. The witness

created an opening in the door to Meddie's room, flashed light inside and immediately saw chairs which he identified as those of the deceased.

The mourners gathered and the search for Meddie started. The chairman of the area called in the police who came and maintained security until the morning hours when the house was opened and the properties taken away by the police. He testified that Meddie disappeared from the area.

PW3 Sentamu Hassan testified that Meddie had borrowed his phone charger and in the morning of 3<sup>rd</sup> January 2012, he went to Meddie's home to pick his charger. That when Meddie opened the door to his room and waved off the curtains to give the witness the charger, the witness saw chairs, two mattresses, a TV set, DVD player, a woofer and carpet which he identified as belonging to Lubuulwa.

The room Meddie was occupying had been left to him by PW3's friend one Alex. The witness had been visiting the house while Alex was still there and during the period of Meddie's occupation thereof and was aware that there had been no such properties in the house before. The witness left and later in the day he learnt of Lubuulwa's death. It is then that he told Mukisa Alex PW1 of the properties he had seen in Meddie's house.

They informed the Chairperson St. Benedicto Zone called Uncle Joe Wanyara who called the Katwe police station. PW3 further testified that he rang Meddie but Meddie told him that he had gone to Entebbe. They arrested Barbra, Meddie's girlfriend and handed her to the police to help trace Meddie. He further testified that in the course of searching for Meddie, they went to where Meddie's brother Serunyonyi Farouk was residing and operating a salon in Lusaka Zone. They found he was not there. They went

to St. Benedicto Zone where they found Farouk A3, Mayende A2 and the third person who escaped. They arrested A2 and A3 and handed them over to the police.

PW2 Moses Kibirige was Senkaali Muhammad's Landlord. He testified that on 1<sup>st</sup> January 2012 at around 3:00a.m, the security light were on and through his window he saw Meddie with someone else carrying chairs into Meddie's house; Their houses were room apartments on the same building. The following morning Meddie who was with another person whom the witness identified as A3 in the dock asked for a key to the toilet; the witness handed the key to A3.

After two days on Wednesday morning, people gathered at his place saying that Meddie had killed someone. While still there the police came and opened the house and the witness saw the chairs which he had seen being carried in. The witness went away and when he came back, he found that the properties had been carried away. The witness did not see Meddie again until while in court.

IP Ndyanabo PW6 testified that on 3<sup>rd</sup> January 2012 while on duty at clock tower, he received a report that there was chaos at St. Benedict Zone. He moved there with two sections of the anti-riot police i.e. 24 policemen, to restore order. On reaching there they found a violent crowd about to kill Farouk A3; they rescued him and as they moved they found another group surrounding A2. They also rescued him, arrested them and took them to clock tower.

They stayed in the area over night and got information that there was a house where property belonging to the deceased had been found. They found

the door to the room kicked open; he caused the room to be locked with properties inside, put the house under guard and the following day, the house was opened in the presence of the local leaders and the neighbors. The properties were listed on a search certificate tendered in evidence as exhibit P5.

The properties recovered which included two mattresses, a woofer, TV set, sofa set, DVD, 3 basins, 4 saucepans, 2 pairs of shoes, metallic case containing books, plates, cups, clothes, curtains and a bed were tendered in evidence by PW7 as exhibits. PW6 identified the items as the properties they recovered from A1's apartment. PW2 identified the sofa set as the chairs he had seen being carried by Meddie into his house /apartment. PW1 and PW3 identified the items as the properties recovered from Meddie's apartment some of which they identified as those which belonged to the deceased.

On the above evidence Miss Nabasitu, for the State, argued that A1 was required to put up an explanation of how he came into possession of the properties of the deceased. In his defence A1 stated that amongst the properties that had been exhibited in court, he was able to identify those that belonged to him as a pair of shoes, clothes, and mattress six (6) inch by four (4). He further testified that the metallic suit case belonged to one Alex his boss and the former occupant of the apartment. He said that he did not know anything about the other items exhibited in court.

The learned Senior State Attorney argued that A1 was found in recent possession of the deceased's property and had not given an explanation of how he came in possession of the properties. She submitted that he stole the



property and participated in killing the deceased. She cited **R Vs Bukai son of Abdullah (1949) 16 EACA page 84** where it was observed:-

***“That case often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support the presumption of burglary or of breaking and entering but of murder as well and of all circumstances of a case pointing to no other reasonable conclusion; the presumption can extend to any charge however penal.”***

However this doctrine of recent position is applicable in line with the rule relating to circumstantial evidence that inculpatory facts against an accused person must be incompatible with innocence and incapable of any other reasonable hypothesis than that of guilt.

In **Katende Ssemakula Vs Uganda Supreme Court Criminal Appeal No. 11 of 1994**, it was stated:-

***“Another requirement concerning circumstantial evidence that must be narrowly examined because evidence of this kind may be fabricated to cast suspicion on another. It is therefore necessary before drawing the influence of the accused guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence see:-  
Temper Vs R 1952 AC page 480 at 489, Simon Musoke Vs R 1958 East Africa Page 715”.***

Invite you also to look at **Uganda Vs Albino Ajok High Court Criminal Case No. 117 of 1974.**

Further, the guilt founded on the doctrine of recent possession may be guilty of either stealing or of receiving the properties in question.

In *Andrea Obonyo and others Vs R (1962) EA 142*, the East African Court of Appeal held that where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt; and if a finding that he stole the articles depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the articles has been excluded”.

In the instant case, the evidence shows that the late Lubuulwa Godfrey’s body was recovered from his room apartment. The apartment had been swept empty of all his property. The property identified by PW1 and PW3 are those of Lubuulwa Godfrey which were found in A1’s apartment. PW2 who was A1’s landlord testified that he had seen A1 with another person carry a set of chairs into A1’s apartment. The set of chairs was among the items identified as the late Lubuulwa’s property.

In his testimony A1 stated that he did not know anything about the properties exhibited save for the few he identified as his and Alex’s.

In *Eraiza Kasaija Vs Uganda Supreme Court Criminal Appeal No. 21 of 1991*, it was stated:-

*“From evidence of recent possession ..... Of circumstantial evidence is that if the accused is in recent possession of stolen property for which he has been unable to give a reasonable explanation, the presumption arises that he is either the thief or the receiver of the*

*stolen goods according to the circumstances. Hence once the appellant has been proved to have been found in recent possession of stolen property, it is for the accused to give a reasonable explanation. He will discharge this onus on the balance of probabilities, whether the explanation could reasonably be true. If he does so then an innocent possibility exists which receives the presumption to be drawn from other circumstantial evidence”.*

The accused Senkaali Muhammad did not give any explanation as to how the deceased's property came into his apartment. PW2 Senkaali's landlord testified that since the recovery of the properties from Senkaali's apartment, he has never seen Senkaali again. PW3 testified that after picking his charger from A1, he went to the salon for a haircut. While there, he heard people saying that Lubuulwa had been killed. He went to Meddie's salon and told him what he had heard but that Meddie's reaction was of a person who was not aware of any death. That he after wards recalled the properties he had seen in Meddie's house and reflected that the chairs he had seen were Lubuulwa's. It is then that the process to arrest A1 started.

He testified that he rang A1 who told him that he had gone to Entebbe. In his testimony, A1 stated that on 31<sup>st</sup> December 2011, he left his saloon at around 11pm and walked straight to his residence and he stayed there until the following day 1<sup>st</sup> January 2012 at 8:00a.m when he left for his salon. At 6:30p.m he left his salon and went to Kampala; he left Kampala at around 7:00p.m and went back to the salon, closed it and went to Enid's corner at Makindye. At around 8pm he went to Abayitababiri on Entebbe road where he spent the night with his girl friend called Natasha. On 2<sup>nd</sup> January 2012, he traveled to Kanoni Gomba.

A1's testimony that he on 1<sup>st</sup> January 2012 went to Abayitababiri corroborates PW3's testimony that when he rang A1, he told him that he had gone to Entebbe. PW3 testified that he knew A1's girlfriend called Barbara; that they looked for her arrested her and handed her to the police to assist and trace A1. Detective ASP Yasumin Jamine PW7 testified that Tusubira Barbara who told her she was A1's girl friend was arrested by the residents of the area when she had gone to pick A1's clothes from a Dobbi.

That on 9<sup>th</sup> January 2012, the witness used Barbara to call A1 and made an arrangement with A1 to meet in Gomba Kanoni. That as by arrangement A1 was on 10<sup>th</sup> January 2012 arrested from Gomba trading centre. In his testimony, A1 said that on 2<sup>nd</sup> January 2012, he travelled to Gomba Kanoni to survey the possibility of setting up a salon there.

While there, he rang Barbara Tusubira and requested her to take him some transport money to bring him back to Kampala. That when Barbara came to bring the money she came with a police officer PW7 and he was arrested and taken to Kibuye police post. The evidence of A1 shows that he left his place of residence on 1<sup>st</sup> January 2012 and did not return until his arrest on 10<sup>th</sup> January 2012. His evidence corroborates PW7's statement that he was arrested at Gomba Kanoni with assistance of Barbara Tusubira.

Mr. Ondim counsel for A1 argued that prosecution had failed to adduce the evidence putting the accused at the scene of murder and further that the prosecution had failed to discharge its burden to disprove the accused defence of Alibi. He sighted *Matete Sam Vs Uganda Supreme Court Criminal Appeal No. 53 of 2001* where it was stated:-

***“We have held in a number of cases that where an accused person pleads an alibi as a defence, the prosecution must do more than merely place him or her on the scene of crime.***

***They must disprove or otherwise discredit the defence of alibi. The mere putting the accused on the scene of crime is not enough. We can only reiterate what we said in the Bogere Moses’ Case Supra.***

***“Where the prosecution adduces evidence showing that the accused person was at the scene of crime and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both the versions judiciously and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se, the other version is unsustainable”.***

Senkaali’s defence is that in the night of 31<sup>st</sup> December 2011 and 1<sup>st</sup> January 2012 from 11pm to 8:00a.m he was at his home. On 1<sup>st</sup> January 2012, he went to his salon then traveled for shopping at Kampala, went back to the salon closed and went to Enid’s corner from where he traveled to Abayitababiri where he spent a night. On 2<sup>nd</sup> January 2012 traveled to Gomba where he stayed until his arrest on 10<sup>th</sup> January 2012.

Serunyonyi Farouk testified that he last saw A1 on 1<sup>st</sup> January 2012. Of particular relevancy is the killing of Godfrey Lubulwa. The prosecution’s evidence is that PW2 on 1<sup>st</sup> January 2012 at 3:00a.m, that is the night of 31<sup>st</sup> December 2011 and 1<sup>st</sup> January 2012, saw A1 and another person carry a set

of chairs into A1's room. That set of chairs was on 3<sup>rd</sup> January 2012 found in A1's room or apartment and identified as the deceased's.

It was on 3<sup>rd</sup> January 2012 when PW1 and PW3 learnt of the death and it was on that day that PW6 recovered the body from the deceased's room. PW3's testimony is that he on 3<sup>rd</sup> January talked to A1 and he later told him on phone that he was in Entebbe. It was on the 3<sup>rd</sup> January 2012 when PW6 received a report of the chaos and moved in with his team to query the commotion which was in search of Lubuulwa's killers. It was in the course of this search that PW3 rang A1 when he replied that he was in Entebbe.

PW6's testimony was that when the body was recovered, it had started rotting. PW4 testified that when he examined the body on 4<sup>th</sup> January 2012, it was decomposing; therefore the death must have been before 3<sup>rd</sup> January 2012 and the prosecution's evidence shows that A1 left the area on 3<sup>rd</sup> January 2012. I believe A1 that when he left the area, he went to Abayitababiri and later traveled to Gomba Kanoni. But the prosecution's evidence show, and I believe it, that he left the area on 3<sup>rd</sup> January 2012 and not before.

In the premises he was still within the area of murder by the death of Lubuulwa. Mr. Ondim further contended that the prosecution's case was founded on suspicion. Counsel sighted ***Uganda Vs Abdul Guloba (1978) HCB 29*** where it was held that no conviction can be held on mere suspicion. With due respect to counsel, I do not agree that the prosecution's case is founded on suspicion; it is founded on the doctrine of recent possession.

This is further corroborated by A1's conduct. PW3 testified that when he learnt of Lubuulwa's death, he talked to A1 about it that A1 was indifferent.

PW1, PW3, A1 and the deceased were young men and residents of the same area. PW1, PW2, PW3 and PW6 testified that following the news of Lubuulwa's death and the finding of his properties in A1's house, the residents went around looking for the suspected killers, what PW6 described as chaos in the area.

In such circumstances, A1 left the area and kept away until his arrest on 10<sup>th</sup> January 2012 in Gomba Kanoni. Such is not the conduct of an innocent person. Considering all the circumstances as evidenced above, I find that prosecution has proved beyond reasonable doubt that Muhammad Senkali participated in the killing of Lubuulwa Godfrey.

As regards Serunyonyi Farouk PW2 testified that on the 31<sup>st</sup> December 2011 1<sup>st</sup> January 2012 he at 9:00a.m saw Senkaali with another person carry a set of chairs into Senkaali's room that time he did not identify this other person. He however stated that in the morning Senkaali and Serunyonyi came to him and asked for a key to the toilet which he handed to Serunyonyi.

In his testimony, Serunyonyi stated that on 3<sup>rd</sup> January 2012 PW2 gave him a key to the toilet. That at around 7:30a.m on his way from his salon going to Bwaise when he reached Meddie's place, he felt a need to answer nature. He went to Meddie's room and knocked but it was locked. He saw PW2 standing at his door way, he approached him and asked to be assisted with a key which was given. That he eased himself and gave back the key and proceeded on.

This corroborates PW2's evidence that Serunyonyi was at Meddie's that morning and that the witness gave the offender a key to the toilet. But PW2 in cross examination categorically stated that he did not identify the person

with whom A1 carried the chairs and that that person was not Serunyonyi. PW3 testified that Serunyonyi was arrested only because he was Meddie's brother apparently to assist in tracing Meddie just as Barbara was arrested.

The prosecution's evidence is that on going to Serunyonyi's salon –cum- residence, he was found to have left the place and was found in the neighboring zone where he was found in a room with Mayende and Assuman and arrested by the residents who included PW3. Serunyonyi testified that in the night of his arrest, that is 3<sup>rd</sup> January 2012, at around 11pm, he was sleeping in his salon –cum- residence when one Assuman, his workmate, came over and told him that his brother Meddie had committed an offence properties of the deceased had been found in his house and residents were searching for Meddie. That he feared and asked to go with Assuman and spend a night at his. They went and when they had just entered a group of people came and arrested him and Mayende Assuman escaped. Assuman and Mayende were staying together.

In cross examination he explained that he feared because of what had some time back happened to his family. That while in Kayunga Meddie was arrested in connection with the death of one Mzee Hakkim. Any one related to Meddie was attacked and this had led to their parents and other members of their family migrating to Makindye. Fearing a reoccurrence of a similar incident or and being found alone at his residence; he sought refuge at Assuman/Mayende's residence.

In his cross examination, A1 admitted his earlier arrest while in Kayunga.

In view of PW3's testimony that they went to Serunyonyi's salon –cum- residence and to Assuman's/Mayende's residence in search of Meddie



because they were relatives of Meddie and that Serunyonyi was arrested because he was Meddie's brother; I find Serunyonyi's explanation for his conduct to have moved away from his residence and sought refuge at Assuman/Mayende's residence very probable. That considered together with PW2's testimony that Serunyonyi was not the person whom he had seen carry chairs with Meddie into Meddie's house creates doubt as to the participation of Serunyonyi in the commission of the offence charged.

In the premises I find that the prosecution has failed to prove beyond reasonable doubt that Serunyonyi Farouk participated in causing Lubuulwa Godfrey's death.

In the final result I agree with the opinion and advice of the gentlemen assessors and I find A1 Senkaali Muhammad guilty of murder and is accordingly convicted.

I find A3 Serunyonyi Farouk not guilty and is accordingly acquitted.

Before I take leave of this matter I find it necessary to comment that in all cases where children are suspected to be in conflict with the law the Police must abide with the provisions of the Children's Act regarding arrest, interviews and detention.

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**Lameck N. Mukasa**

**Judge**

**18/03/2013**

## **SENTENCE:**

The convict is convicted of murder contrary to **Section 188 and 189 of the Penal Code Act.**

The offence carries a maximum sentence of death on conviction. In aggravation of sentence counsel for the State argued that the convict is not a first offender since he had prior to this offence been arrested and charged of murder of Mzee Hakim in Kayunga.

Counsel stated that following to his release on banditry bail the convict did not turn up for trial in respect of that case. There is no evidence adduced to show that, the prosecution in respect to that case resumed following his arrest in connection with this case. I agree with the counsel for the convict that it is court which determines the guilt of an accused. In view of the fact that the convict has never been tried and convicted in respect of that earlier offence I regard the convict the first offender. However in view of the convict's own admission that he was earlier arrested and charged with murder of Mzee Hakim and the convict's father's statement when his view was sought by court that the convict's conduct in society has not been good I find that the convict has not been a good citizen and has lived the life of a questionable character. The convict is however a young man capable of reform and has been on remand since January 2012 a period of one year and 2 months which I must take into account when sentencing. I must also consider that court like any other State organ has to protect people's life and their properties' safety.

In consideration of all the above and the submissions of counsel for the State and the convict, the views as expressed by the victim's father and one of the assessors, the convict is sentenced to 22 years imprisonment. You have a right of appeal against conviction and sentence or both.

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**Lameck N. Mukasa**

**Judge**

**18/03/2013**