**THE REPUBLIC OF UGANDA**
**IN THE HIGH COURT OF UGANDA**
**HOLDEN AT MBALE**

**HCT-04-CR-SC- 0017-2012**

**UGANDA.....PROSECUTOR**
**VERSUS**
**KUTEREMA GODFREY.....ACCUSED**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

The accused in this case stands indicted of murder c/s 188 and 189 of the Penal Code Act. The accused denied the charge.

The prosecution has the burden to prove the case beyond all reasonable doubt. The prosecution therefore has to prove that:

(i) There was death of a human being.
(ii) The death was unlawfully caused.
(iii) The killer did so with malice aforethought.
(iv) The accused is responsible for the death.

**ISSUES AND RESOLUTION:**

**(1) Whether there was death of a human being**.

**PW.1 (Ziita), PW.2 (Wolimbwa), PW.3 (CPL, Abdhalla), PW.4 (Dt. CPL Otimani)** gave evidence that **Khayemba John Wamono**- had died. The post-

mortem (PE.1) further confirmed that there was indeed a death of K**hayemba John**. Death of a human being was accordingly proved.

**(2) Whether the death was unlawfully caused**.

I take judicial notice of the principle in ***R V. Gusambiza [1948] 15 EACA.65***, that all homicides are unlawful save where exempted by the law or where they arise out of accident. This is also the position in Article 22 (1) of the Constitution of Uganda (1995).

Evidence led by prosecution shows through PW.1, PW.2, PW.3 and PW.4 that the cause of death was an assault occasioned upon the deceased as described by the witnesses and PE.1 (the post-mortem report).

The defence contends that the above evidence is inconclusive as to the cause of death. In submissions, the defence case is that there are grave discrepancies on the cause of death which ought to have been explained by the police surgeon who was never called in evidence. Counsel relied on the case of ***Joseph Rujumba v. Uganda (1992-1993) HCB*** referring to the holding by **C.J. Wambuzi** (as he then was) that the doctor's description of the object that caused the injuries is important while establishing the cause of death.

It was the conclusion of counsel that it was possible that deceased could have died of natural causes.

The prosecution however submitted that evidence on record sufficiently shows that this death was a result of unlawful means. I agree because on top of the testimonies of PW.1, PW.2, PW.3, and PW.4, there is the exhibit PE.3 (statement by deceased), which clearly states that deceased was assaulted using sticks and a

panga. The deceased reported that as a result of the assault he became unconscious, and developed various pains all over the whole body. As a result of this report, PW.4 told court deceased was sent away with Police Form 3 to go for treatment. He died shortly thereafter. The medical examination report (post-mortem) which was exhibited as PE.1 shows that deceased suffered head injuries resulting from blunt impaction of the head repeatedly inflicted.

The above evidence in my view consistently shows that the cause of death was unlawful. Contrary to the submissions by the defence, the fact that the witnesses described the injuries inflicted as they perceived them is explained by the fact that it was the deceased who told them what he suffered. His testimony via PE.3 shows he was assaulted all over the body this includes parts of his body described by the witnesses and deceased himself in PE.3. This ingredient is therefore proved.

**(3) Whether the killer did so with malice aforethought**

To prove malice aforethought, court is guided by the provisions of section 191 of the Penal Code Act, to hold that there was;

a) An intention to cause death.
b) Knowledge that the act of the accused might cause death.

The State relied on the case of ***Tubere v. R [1945] 12 EACA. 63***, holding that regard must had to the type of weapon used, nature of injuries inflicted, the part of the body affected and the conduct before, during and after the offence is committed.

I disagree with the argument by defence counsel that prosecution ought to have given reasons why accused is alleged to have killed deceased, as a basis of determining if he had malice aforethought. In their submission the prosecution stated that they proved malice aforethought through their evidence which shows that;

(a) The beating was repeated and it affected all parts of the body.

(b) PW.4's evidence that accused warned the mother one **Watsemwa Ketula** that she was ashaming them by loving a young man and they would beat her up, hence showing that accused had planned the offence.

(c) PE.1 shows that there was repeated use of a blunt object to impact on the head leading to head injury. The beating was said to have been repeated several times on the head which is a vulnerable part of the body.

(d) The victim was left unconscious and was dumped in a forest after the beating.

(e) The victim died within 3 days after the beating.

Given the above circumstances, I agree with the observation by the prosecution that whoever did the beating, did so well aware that such severe and repeated beating might cause death. The above behaviour is consistent with an inference of premeditation and is not explained by any other intention save- the desire to kill. This ingredient is for the above reasons proved.

**(4) Whether accused is responsible for the death;**

The evidence on record regarding accused's participation is wholly circumstantial; and hinged upon a dying declaration made by the deceased.

It was the submission of the defence that there was no eye witness testimony, and that the rest of the evidence on record is hearsay. Defence relied on the case of ***SIMON MUSOKE V. R. (1958) EA 775***, restated in ***Twinomugisha Alex alias Twine and Others v. Uganda SCCA No. 35/2002***, holding that;

> "*Where a case depends solely on circumstantial evidence, there must be an irresistible inference of guilt from the surrounding circumstances before a conviction may be entered in a case and the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of guilt of the accused*."

The prosecution however in submission insisted on connecting the accused with this crime by pointing out that, PW.1- saw the deceased leave home in company of **Masaba**. PW.2 confirmed that deceased was in a relationship with the mother of accused which the defence conceded to.

Further the evidence of PW.1, PW.2, PW.3 and PW.4 is that deceased made a dying declaration to them naming accused as the culprit. Prosecution inferred from that evidence, that accused was the guilty culprit.

The evidence of this nature needs to be treated with a lot of caution. The case of ***Simon Musoke v. R. (1958) EA 775*** held that before conviction on the basis of circumstantial evidence the court must be satisfied that all reasonable explanations lead to one inference of the guilt of the accused. When this case and that of ***Twinomugisha Alex v. Uganda*** are considered am warning myself of the dangers posed by this type of evidence. I indeed warned the assessors of this danger.

In the same way the case of ***Mibulu Edward v. Uganda Cr. App. 17/1995*** cautions that evidence of a dying declaration should be received with caution and the circumstances under which the identification was made must be analysed. There is always need for corroboration, but lack of it will not result in rejection of the evidence where circumstances rule out mistaken identity.

With the above cautions I set out to consider the evidence on record and make the following findings and conclusions.

Section 30 of the Evidence Act allows the admission of dying declarations- section 30 (a) and (b), further empower this court to rely on the testimonies of PW.3 (who recorded deceased's statement) and PE.2 (The deceased's statement). Corroboration of these pieces of evidence is found in the testimonies of PW.1, (Who saw the deceased leave for the accused's home, and was later told by deceased that "**Kuterema** (accused) had hit me and almost killed me.". PW.2 (who said deceased told him accused had assaulted him PW.3 a Police Officer who received deceased, recorded his statement and his complaint was that Kuterema (accused) and **Paul Maliro** had assaulted him. **PW.4 Dt. CPL Otimani**, received the report of the deceased showing that he had been assaulted by accused and another **Paul Maliro**. This witness testified that accused was reported to have uttered a threat against **Watsemwa Ketula** regarding a love affair between her and deceased.

In my final analysis, contrary to what defence argues, I find the testimonies of PW.1, PW.2, PW.3 and PW.4 truthful, consistent and honest account explaining the circumstances of the deceased's death. I do not believe the defence's assertion that the prosecution's case is a made up story to implicate the accused.

Accused in defence put up an alibi and attempted to explain that the witnesses have a grudge against him. I however do not believe his defence for the following reasons:

The accused claimed that he was part of the local defence system of the area. He told court that on the fateful day he was carrying out patrol with **PW.4 Otimani Nicodemus,** who testified against him and gave drastic evidence against him. It is not believable that as a colleague to the police, he could have failed to know that a murder had occurred in his area. His insistence that he came to know of this death during the court session, sounds untruthful. He told court that the witnesses were having grudges against him relating to land. But he insisted that he had never known that **Khayemba** had died. He denied knowledge of the relationship between deceased and his mother, yet he accepted that he could not have participated in the murder of people he catered for.

This is contradicting all State witnesses who made it clear that this love affair was a matter well known to everybody.

The testimony of PW.4 (**Otimani**) who accused claimed was with him at time of crime destroys his defence of alibi because **Otimani** never said so in court.

With all the above loopholes, the standard of proof necessary as laid down in the decided cases on alibi like ***Bogere Moses & Another v. Uganda SCCA 1/97*** has been satisfied by the prosecution.

I find that the defence case is full of deliberate lies. As held in ***CHESAKIT MATAYO V. UGANDA CRIM. APPEAL 95/2004 CA***, where the accused tells

lies, the lies have the effect of corroborating the truth of the prosecution evidence. I believe the prosecution case, and disbelieve the defence for reasons stated above.

I find that participation of the accused in this crime has been proved.

In a joint opinion both assessors reached the same conclusion and advised the court to convict the accused person as charged.

In conclusion I find that the prosecution has proved the case against the accused person beyond all reasonable doubt. I find him guilty as charged and do convict him accordingly.

**Henry I. Kawesa**

**JUDGE**

**22.01.2014**

22.01.2014

Accused present.

Resident State Attorney (**Chekwech**).

**Wamimbi Jude** for accused.

Resident State Attorney: Matter for Judgment.

Court: Judgment delivered as above.

**Henry I. Kawesa**

**JUDGE**

**22.01.2014**

**Resident State Attorney:**

Convict is a first offender. On conviction the convict suffers death. He has spent 3 years on remand. The offence is rampant and the victim died. I pray for deterrent sentence to deter him from committing similar offences. I also pray for rehabilitation.

**Henry I. Kawesa**

**JUDGE**

**22.01.2014**

**Counsel Jude:**

Convict is young man of 23 years capable of reforming. I pray a remand period be considered. I pray for sufficient punishment; pray for a lenient sentence.

**Henry I. Kawesa**

**JUDGE**

**22.01.2014**

**Accused**: I am praying for leniency to be set free.

**Sentence:**

Upon conviction murder carries a maximum of death. The accused is a first offender. Has been on remand for 3 years. The mitigations will operate to remove him from death. However as observed by Resident State Attorney, the sentence

should deter others and rehabilitate him. Accused is sentenced to a custodial period of 12 years. I so order.

**Henry I. Kawesa**

**JUDGE**

**22.01.2014**