

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
SITTING AT ENTEBBE**

CRIMINAL SESSION CASE NO. 330 OF 2012

CRIMINAL CASE NO. 044 OF 2011

CRB NO. 709 OF 2011

UGANDA.....

..... PROSECUTION

VERSUS

KAWOOYA

MUHAMED

ACCUSED

Before: HON JUSTICE WILSON MUSENE MASALU

JUDGMENT

The accused, Kawooya Muhamed was indicted for Murder C/S. 188 and 189 of the Penal Code Act. The particulars were that the accused, in the night of 4th November, 2011 on lake Victoria at Kitinda village, Katabi sub-county in Wakiso District, murdered Buwembo Ronald.

Upon arraignment, the accused pleaded not guilty. That meant that it was the duty of the prosecution as stipulated under the law to prove all the essential ingredients of the offence beyond reasonable doubt.

The essential ingredients in the offence of murder are:

- (a) There was death of a human being.
- (b) That such death was caused unlawfully.
- (c) That the death was caused with malice aforethought.

- (d) That the accused participated directly or indirectly in causing the death of the deceased.

As already noted, the duty of proving the above ingredients lies on the prosecution throughout the trial even where accused relies on the defence of alibi. An Accused does not bear the burden to prove his innocence. **Article 28(3)(a) of the Constitution of Uganda** provides that an accused is to be presumed innocent until proved guilty. Therefore an accused should only be convicted on the strength of the prosecution evidence and not on the weakness of his defence even when he appears to be telling lies. The case of **Kooky Sharma and Another Vs. Uganda Supreme Court Criminal Appeal No. 44 of 2000** refers.

To prove the above ingredients of the offence, the prosecution called four witnesses, namely, Nyabongo Edgar, a Supretendant of Police attached to Entebbe Police station (PW1), No. 32318 corporal Wambi Francis, (PW2) Nakibwese Rose, the mother of the deceased (PW3) and Musoke Medi, (PW4). The prosecution also relied on the postmortem report in respect of the deceased which was admitted in evidence at the beginning of the trial Under S.66 of the Trial on indictment Act. The accused on the other hand gave the defence of Alibi and denied the commission of the offence.

As far as the 1st ingredient of the offence is concerned, that is death of Buwembo Ronald, there is no dispute from the defence that Buwembo Ronald died. The postmortem report admitted in evidence Under Section 66 of the T.I.A stated that the cause of death was Asphyxia following drowning.

All the prosecution witnesses alluded to the fact of death of the deceased. In the premises, I find and hold that the 1st ingredient of the offence has been proved beyond reasonable doubt.

I now turn to the 2nd ingredient of the offence. It is now settled law in East Africa since the case of **RV. Gusambizi S/O Wesonga [1948] 12 EACA 65** that all homicides are unlawful unless excused by law. And it is only excusable if caused by accident or in defence of a person or property.

In the present case, a postmortem report in respect of the death of the deceased was tendered in under Section 66 of the Trial on Indictment Act. It was signed by Dr. Moses Byaruhanga, a medical Officer. The cause of death was said to be Asphyxia following drowning. There is no doubt that death by drowning is unlawful.

No one has permission to drown another on the lakes or rivers of Uganda. And even the testimony of PW4, Musoke Medi was elaborate. He testified that on 4th day of November, 2011, at around 5:30am, as he approached the shores of the lake, he heard an alarm. And that someone was saying, **“Kawooya Onzita, Kawooya Onzita”** meaning **“Kawooya you are killing me”**. That was a cry from a person being drowned or killed and so such death cannot be said to be lawful.

All the prosecution witnesses testified that the body of the deceased was found floating on the lake. In the premises, I find and hold that the presumption that the deceased died unlawfully has not been rebutted. It is therefore my conclusion that the deceased died unlawfully and so the 2nd ingredient of the offence has been proved beyond reasonable doubt.

The third ingredient is whether the cause of death was with malice aforethought.

Section 191 of the Penal Code Act defines malice aforethought as;

- (a) An intention to Cause death of any person whether such person is the person actually killed or not.

(b) Knowledge that the Act or Omission causing death will probably cause death of some person, whether such person is the one 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 law is now well settled that malice aforethought being a mental element of the offence of murder is difficult to prove by direct evidence. However, malice aforethought can be inferred from the surrounding circumstances of the offence such as:-

- (a) The nature of weapon used
- (b) The part of the body targeted.
- (c) The manner in which the weapon was used.
- (d) The conduct of the accused before, during and after the attack. See **RV. Tubere S/O Ochen [1945] 12 EACA 63**

In the above case, the Appellant was convicted for murder after assaulting the deceased seriously with a walking stick, causing severe injuries from which the deceased died. Shortly, afterwards the Appellant himself did not deny the use of the stick.

On appeal, Sir Sheridan observed:

“With regard to the use of a stick in cases of Homicide, this Court has not attempted to lay down a hard and fast rule. It has a duty to perform in considering the weapon used, the manner in which it is used and the part of the body injured in arriving at a conclusion as to whether malice aforethought has been established and it will flow more readily from the use of say, a spear or a knife than from the use of a stick; that is not to say that the Court takes a lenient view where a stick is used. Every case has of course to be judged on its own facts”.

In the present case, the circumstances were peculiar in that there was an alleged fight on the lake and drowning of the deceased. May be what is relevant from the principles laid down in the case of **RV. Tubere S/O Ochen (Supra)** is the conduct of the accused before, during and after the incident.

PW3, Nakibwere Rose, the mother of the deceased testified that whereas his son went fishing at Kitinda on 3rd day of November, 2011 at 9:00am, when she rang the following day, his phone was off. She added that upon inquiries from his friend called Kiiza, she was informed that the boat of Buwembo and his clothes had been seen but not Buwembo himself.

She added that the following day, one Rasta revealed that the accused had admitted to him that he fought with the deceased and thereafter threw him in the waters. She added that the deceased bit the finger of accused and that when the accused was arrested, he had a wound on one of the fingers.

PW3 added that the following day the body of Buwembo Ronald alias Boy was recovered from the lake shores and it had a swollen neck and a wound on the head, with blood coming out. During Cross examination by Counsel for accused, PW3 stated that the deceased used to go with Kawooya Joseph for fishing and that the accused used to threaten him. And **in Re-examination, PW3** stated that she was told by the deceased that accused had threatened him four times and even chased him from the fishing waters.

The conduct of the accused threatening the deceased before was an indication of malice aforethought in the circumstances but even more relevant was the testimony of PW4, Musoke Medi alias Rasta who more or less brought out “a dying declaration” by the deceased. PW4 testified that as he was approaching the lake at 5:30am, he heard an alarming shouts of “**Kawooya Onzita**

“Kawooya Onzita” translated in English to mean Kawooya you are killing me, “Kawooya you are killing me”.

PW4 testified that the alarm was coming from the lake. PW4 added that after 30 minutes, he saw accused coming from the direction where the alarm came from. PW4 testified that Kawooya, accused told him that some boy was stealing his nets and that he (accused) had fought him and boy had bitten his fingers. Accused showed PW4 the injured finger which had a wound PW4’s further testimony was that accused had told him he had drowned the boy in the lake.

PW4 added that accused got a boat and removed his nets. And that upon return, accused gave PW4 fish with a request that PW4 conceals everything he had heard from him.

PW4 added that the clothes of the deceased were recovered by fishermen at 9:00am, and the following day the body of the deceased was recovered from the lake floating. And that it was the body of boy, the deceased which had wounds on the head and face.

In view of the outgoing summary of the testimonies of PW3 and PW4, I find and hold that the conduct of accused of warning the deceased four times before the incident, then the fighting and drowning him in the lake and the conduct of trying to bribe PW4 with fish so as to silence PW4 from revealing what he heard and saw were all clear manifestations of malice aforethought. In the premises, I find and hold that the prosecution has proved the 3rd ingredient of the offence beyond reasonable doubt.

I now turn to the 4th ingredient about identification of accused as the person who committed the crime in question. PW1, Nyabongo Edgar, the Entebbe District Police Commander testified that he knew the accused when he visited the scene where the group of

people **(mob)** were trying to lynch him for killing someone by drowning the body in the lake Victoria.

PW1 testified that upon rescuing the accused from the mob, accused admitted having killed the deceased and he showed PW1 the spot on the lake where he had dropped the body. PW1 added that the following day, the body surfaced at the very spot where accused had thrown it. PW1 concluded that accused told him they had disagreed on the casting of the nets for fishing.

PW2, No. 32318 corporal Wambi Francis was with PW1 when they went to rescue the accused at Ntinda Village on the shores of lake Victoria. He told this Court how he physically pulled accused from the mob amidst stone throwing. PW2 also testified as to how accused confessed having killed the deceased and thrown him in the lake. The rest of PW2's testimony was like that of PW1. PW2 also revealed what PW4, Musoke alias David had told him. This Court finds and holds that the testimony of the prosecution witnesses were very consistent about the identity of the accused as the person who killed or drowned the deceased in the lake. The testimony of PW4, Musoke Medi alias Rasta plus the accused at the scene of crime. This is not to forget the dying declaration of the deceased as revealed by PW4.

The law on dying declaration is that it is made by the deceased person on the verge of death when all hope in life is gone. And when his/her conscious is silenced by no other motive other than to tell the truth. The relevant case is **Tuwamoi Vs. Uganda [1967] E.A. 84**, where the Court of Appeal for East Africa echoed the principles on the basis on which evidence of dying declarations should be acted upon.

Earlier on, the same Court in **Mdiumaude V. Republic [1965] E.A. 193** held that normally, the declaration of a person in extremis is entitled to great weight as such declarations are made under the Solomon sense of impending death. And in **Migezo**

Mibinga Vs. Uganda [1965] E.A 71, the Court of Appeal for East Africa, emphasized the need for corroboration of the dying declaration which would lead to the positive identification of the assailant.

This is where the evidence of PW4, Musoke Medi alias Rasta is relevant. He testified that as he approached the lake in the morning hours of 5:30am, he heard someone shouting on the waters

“Kawooya Onzita” Kawooya Onzita” in luganda. Translated in English, was **“Kawooya you are killing me, Kawooya you are killing me”**.

That was indeed a dying declaration made by a person in despair, on the waters of lake Victoria, when he was desperate and alone with the accused who was strangling and drowning him in the waters of the mighty lake Victoria.

It was a sad moment in the life of the deceased. There was no motive for telling lies at such a last hour, when the deceased knew he was about to meet his creator. The dying declaration was collaborated by the immediate appearance of accused after 30 minutes from the direction of the lake where the alarm had been made. The relevant portion of PW4’s testimony was:-

“After 30 minutes, I saw accused coming swimming from the lake. When he reached where I was, he told me that some boy was stealing his nets and they fought. The boy had bitten his fingers. He showed me the finger and it had a wound. He told me he left the boy on the waters on the lake”.

Indeed, the following day, the marines police discovered a floating dead body of the deceased Buwembo Ronald alias Boy on the waters of lake Victoria at the very spot the accused had

showed PW2 and PW1, police Officers who rescued him from the mob which was about to lynch him.

The accused's denial in his defence was in the circumstances merely evasive, aimed at dodging the course of Justice. That was because accused clearly told this Court that he had no grudges with either Musoke Medi alias Rasta (PW4) and the District Police commander Entebbe, supretendant of Police Nyabongo Edgar (PW1) or No. 32318 Corporal Wambi Francis (PW2). The wound which the deceased inflicted on the finger of the accused through biting was also further corroboration of the dying declaration. During Cross examination by Counsel for state, Accused stated:-

“I had a wound on my finger and there is a scar but I was pieced by the fish borne. It was before the death of the deceased”.

The fish borne was the biting teeth of the deceased. And accused stupidly told this Court open lies when he went on to state that he did not show Musoke Rasta (PW4) that wound. The question is if he did not show it to PW4, then how he (Musoke) could have known about that wound on his fingers. And this Court could read nothing but open lies in the eyes of the accused from the witness stand.

In the premises, I find and hold that the prosecution has proved the fourth ingredient of the offence beyond reasonable doubt. The accused, Kawooya Muhamed, now standing in the dock is the one who killed and drowned Buwembo Ronald on Lake Victoria at Kitinda village Katabi Sub- County.

Having found and held that the prosecution has proved all the ingredients of offence beyond reasonable doubt, and as advised by the joint opinion of the gentlemen Assessors, I do hereby convict the accused of murder contrary to Section 188 & 189 of the Penal Code Act.

Signed by:

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WILSON MASALU MUSENE

JUDGE

15/01/2014;

15/01/2014;

Accused present

Mbaine for state

Basaza for accused

Assessors present

Betty Lunkuse, Court Clerk present

Court: Judgment read out in open Court.

Signed by:

Wilson Masalu Musene
Judge

M/S. MBAINE FOR STATE;

The convict is a first offender, but the offence is rampant. I pray for maxim penalty as the convict took the law in his hands and terminated the life of a young man aged 22 years. He left behind a wife and 2 children. The convict was older than the deceased and instead kept on threatening the deceased and later murdered him. I therefore, pray for a deterrent sentence.

Signed by:

WILSON MASALU MUSENE
JUDGE

M/S. GLORIA BASAZA;

The convict is a first offender and advanced in age. He has two wives and 8 children. The convict informed me that the deceased was a stubborn person and provoked the accused. I pray for a lenient Sentence other than death.

Signed by:

WILSON MASALU MUSENE
JUDGE

SENTENCE AND REASONS;

A young man, Buwembo Ronald, who was at the prime of his life lawfully struggling to earn an honest living through fishing, was mercilessly murdered by the convict, Kawooya Muhamed on the pretext that he was interfering with his fishing area and lakes. I want to state it categorically and clearly that all the people of Uganda, wherever they come from have the right to fish in lake Victoria and /or any other lake and rivers in Uganda.

There is no body of whatever status who has a monopoly over the lake. It was therefore sad, barbaric crude, cruel, satanic for the convict to have murdered the deceased in such a manner, only comparable to the horrific stories of what international pirates do on the High seas. The young man helplessly pleaded with the convict not to kill him as reflected in the dying declaration brought out by Medi Musoke alias Rasta, (PW4).

It was indeed a very tragic death of Buwembo Ronald. This Court further finds that the murder of the deceased was maliciously

planned and pre-meditated, following the earlier four warnings and threats to the deceased as brought out in the evidence of the helpless mother, (PW3). Such a highly planned and maliciously executed murder of the deceased by the convict deserves a very harsh penalty. A harsh penalty is necessary so that people can learn to value the sanctity of life.

And the Courts of law in this Country must live up to the expectations of the people and take bold steps to respond to negative challenges as those posed by terrorists and merciless murderers of law abiding citizens. Such people like convict now deserve no mercy. Counsel for the convict in mitigation has stated that the convict was provoked. That is now too late as the defence of provocation was not raised at or during the trial. And much as the convict is said to be having a wife and 8 children, so as the deceased, who as I have already stated was aged 22 years and left equally a wife and 2 children. The circumstances under which the offence was committed have been noted as emphasized by M/S. Mbaine for state. Thus, this Court finds that its hands are tied, a strong message has to be sent to the people of Uganda. Reckless killing and murder has to be eliminated if not avoided altogether.

In the circumstances, and in view of what I have outlined, I am constrained to give the maxim penalty. You are therefore hereby sentenced to suffer death in the manner prescribed under the law.

Signed by:
WILSON MASALU MUSENE
JUDGE
15/01/2014;