

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
CRIMINAL SESSION CASE NO. 302 OF 2013

UGANDA =====**PROSECUTION**
VERSUS
GULE SHEIK TWAHA===== **ACCUSED**

BEFORE: JUSTICE WILSON MASALU MUSENE

JUDGMENT

The Accused, Gule Sheik Twaha was indicted on five counts of Murder contrary to Sections 188 and 189 of the Penal Code Act. In Count 1, the particulars were that the Accused, on the 7th day of August, 2006 at Kobil Petrol Station, Bugolobi in Kampala District, with malice aforethought killed **Oroto Tom Kennedy**.

In Count II, the particulars were that the Accused, on the same date, same place, with malice aforethought killed **Muganyizi Patrick Kateba**.

In Count III, the deceased was **Gatale Claudian**, while in Count IV, the deceased was **Bagonza Herbert** while in Count V, the deceased was **Okiru Charles**.

When the indictments were read and explained to the Accused, he pleaded not guilty. In so doing, the Accused set in motion all the essential ingredients of the offence of murder which were to be proved by the Prosecution beyond reasonable doubt.

The essential ingredients of the offence of murder in this case are:-

1. That there was death of all the five persons namely Oroto Tom Kennedy, Muganyizi Patrick Kateba, Gatale Glaudian, Bagonza Herbert and Okiru Charles.
2. That such deaths were caused unlawfully.
3. That the death was caused with malice aforethought.
4. That the Accused participated directly or indirectly in causing the death of the deceased.

The duty of proving the above ingredients lies on the Prosecution throughout the trial even where the 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 provides that an Accused is to be presumed innocent until proved guilty.

Therefore an Accused should 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: **See Kooky Sharnia and Another Vs Uganda, Supreme Court Criminal Appeal No. 44 of 2000.**

To prove the above ingredients the Prosecution relied on the following pieces of evidence. The Post-mortem reports of Orotu Kennedy, Muganyizi Patrick, Gatale Claudia, Richard Bagonza and Okiru Charles which were tendered in during the hearing. The Prosecution also relied on the evidence of PW1, Birungi Sheilla, a teacher of the Accused in 2006, PW2, Detective Inspector of Police Kasangaki John who recorded the charge and caution statement from Accused, PW3, Lakony Clayton Omono, who was the Branch Manager of the Security group where Accused worked, PW4, Kyenki Richard, a Police Officer to Kiira Police Station and PW5, Okware Zadok, also a Police Officer who searched the home of the Accused. The Accused on his part gave an unsworn defence where he denied the offences and he relied on alibi.

As far as the first ingredient of the offence is concerned, as to whether all the five persons, Orotu Tom Keneddy, Muganyizi Patrick Kateba, Gatale Claudian, Bagonza Herbert and Okiru Charles are dead, all the Prosecution witnesses, except PW1 alluded to the fact of death of the deceased. PW2, PW3, PW4 and PW5 all confirmed in this Court that the five persons died. The Post-mortem reports also confirmed the death of the deceased persons and the nature of injuries that resulted into their death. Even the Accused in his defence also alluded to the fact of death of the deceased persons. In my view, there was overwhelming evidence to prove beyond reasonable doubt that the five persons died. The Prosecution has therefore proved the first ingredient of the offence.

I now turn to the 2nd ingredient of the offence as to whether the deaths of the five persons mentioned was unlawful. Needless to emphasise, it is now settled law in East Africa since the case of **R Vs 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 by an act of God or in defence of a person or property.

The above presumption is rebuttable and it is upon the Accused to rebut it by showing that the killing was either accidental or excusable. The standard of proof required of Accused to

discharge that duty is very low. It is on a balance of probabilities. The case of **Festo Shirabu S/O Musungu VR [1955] 22 EACA 954** is in point.

In the present case the Post-mortem report of Orotu Kennedy described External injuries as entry wound on the left cervical region and the exit wound on the right posterior crest, 2 x 1cm internal injuries were described as severe laceration of the right lung and liver, massive haemoperitoneum and haemothorax. The cause of death was hemorrhagic shock following the injuries mentioned. The same was signed by Dr. Kalyemenya Ajok, a medical Officer. As regards Muganzi Patrick, the Post-mortem report was signed by the same Dr. Kalyemenya Ajok. The internal injuries were severe laceration of the heart, liver and lungs. As for Gatale Claudia, internal injuries were described as lacerations of the right lung at the apex and liver. There was also a fractured 4th rib followed by massive bleeding which resulted into death. When it came to Herbert Bagonza, the external injuries were on two exit wounds on the sixth and fourth right ribs and inter costal space, with internal injuries as severe laceration of the right lung and massive bleeding. The cause of death was hemorrhagic shock following gun shot.

So given the detailed injuries to the deceased persons as described by the Medical Officers in the Post-mortem reports, there is no doubt whatsoever that the deaths were unlawful.

In summary, the deaths of the deceased persons was as a result of injuries on the heart, liver, lungs followed by massive bleeding and shock as a result of gun shots on each.

PW3, Lakony Claudia Omono, who worked as a branch manager, Security Group (U) Ltd, rushed to the scene of crime on 7/08/2006. PW3's testimony was that people had been shot and he saw a pool of blood at the washing bay of Kobil Petrol Station. PW3 saw two pump attendants and one Security guard, Orotu Keneddy dead. He saw Okiro, another guard and another pump attendant shot but they had not died. He rushed them to Mulago Hospital from where they died.

In such circumstances, I find and hold that the death was neither caused by accident or by an act of God. Whoever shot the deceased persons causing their deaths was not authorized to do so under the law. I therefore find and hold that the Prosecution has proved the second ingredient of the offence beyond reasonable doubt.

I turn to the third ingredient of malice aforethought. Malice aforethought is defined under S.191 of the Penal Code Act to mean:-

1. An intention to cause death of any person, whether such person is the one actually killed or not; or
2. Knowledge that the act or omission causing death will probably cause death of a person, whether that person is the one killed or not, though such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused. Malice aforethought, being a mental element of the offence of murder is difficult to prove by direct evidence. However, the law is now settled that malice aforethought can be inferred from the surrounding circumstances of the offence, such as;
 - a. The nature of the weapon used.
 - b. The part of the body targeted (vulnerable or not).
 - c. The manner in which the weapon was used (whether repeatedly or not)
 - d. The conduct of the assailant before, during and after the attack.

The relevant authorities are **R Vs Tubere S/O Ochen [1954] EACA 63**, and **Akol Patrick & others Vs Uganda,[2006] HCB Vol. 1, page 6**.

In the present case, the Prosecution adduced evidence that the killer weapon was a gun. And indeed the Post-mortem reports revealed that the death was caused by gun shots. A gun is by far a very dangerous and deadly weapon. The parts of the bodies of the deceased persons targeted were around the chest, ribs, with resultant injuries (internal) on the heart, liver, lungs and massive bleedings. All those were no doubt, vulnerable parts of the body targeted by the killer, hence malice aforethought. PW3 and PW4 proceeded to the scene at Bugolobi and found three people dead and two injured. PW4 talked to one of the victims before he died Bagonza Herbert who described to PW4 the person who shot him and the others.

In the premises, in view of the testimonies of PW2, PW3 and PW4, this Court finds that the killing of the deceased persons by gun shots, the gun was indeed a very dangerous and lethal weapon applied on vulnerable parts of the bodies as brought out by the Post-mortem reports. Whoever used the gun had the intention of killing the deceased persons, three of whom died there and then, and two who died from the injuries sustained at Mulago Hospital. For the above reasons, I find and hold that malice aforethought the third ingredient of the offence has been proved beyond reasonable doubt.

The last ingredient of the offence is whether it is the Accused who directly caused the death of the deceased persons. The Prosecution relied on the testimonies of PW2, PW3, PW4 and PW5,

and to some extent of PW1. PW1, Birungi Sheila was a teacher of Crane High School in Kitintale where the Accused was studying in 2006, while at the same time working with Security group (U) Ltd. She testified that the Accused was a day scholar when she was contacted by the Police about the murder that took place in Bugolobi. PW1's further testimony was that in

August 2006, Accused was an S.6 Candidate and it was Mock time. And that on the specific day of 7th August, 2006, Accused did not sit for the exams of Economics, paper 1 and paper 2. She added that no reason was given as to why the Accused missed that exam as he did not notify her as a Director of Studies nor any other teacher about his absence. She concluded that she knew the Accused that she knew the Accused as an "A" Level student, and was not mistaken about his identity.

PW2, Detective Inspector Kasangaki John recorded a charge and caution statement from the Accused on 11th June 2006. PW2's testimony was that Accused was physically fine when he recorded the charge and caution statement in the English language which Accused was conversant with. PW2's testimony was that he cautioned the Accused not to say anything unless he wished. And that whatever he would say would be recorded and used in evidence against him at the trial. PW2's testimony was that the Accused understood the caution and that he gave a statement beginning with his background as to how he was born in Yumbe to Bruhan Shaban and Tiberu Nussura. Accused narrated to PW2 the schools he attended and his personal life challenges from the time he left Arua, then Mbale and Kampala where he settled at Arua Park for sometime before being employed as a Security guard with a Security Company. According to PW2, the Accused narrated the challenges at work, particularly the problems with the Manager over unpaid leave. PW2's testimony was that Accused told him that on 6/08/2006, he was at his work place of Kobil Petrol Station up to 4:00 p.m, when he went back to School and left at 10:00 p.m. PW2 added that Accused told him that he went to Angenair with friends and on the way back, he talked to the Security guard at Kobil Station from whom he grabbed the gun and fired in the air. PW2's testimony was that Accused told him that as he fired in the air, those who were asleep woke up and he started firing at random. PW2 added that Accused admitted having shot at the first Askari from whom he grabbed the gun and then as he fired at random, the bullets got deceased persons and that when the gun could not fire any more, he threw the gun down and went to his residence.

PW2's testimony was that Accused told him that the following day of Monday, 7/08/2006, he went to school but did not attend classes. PW2 added that on 8/08/2006, Accused stayed in Kitintale and was arrested on 9/08/2006 and that on 11/08/2006, he decided to repent and tell the truth. According to the extract from PW2's recorded statement which was admitted in evidence, Accused stated as follows:-

“On 9/08/2006 I was at school. So I was arrested and taken to Kireka VCCU. On that day I was asked but I did not tell them anything. On the 10/08/2006 I was called again but I did not tell anything. It was today the 11/08/2006 when I decided to repent and tell the truth that I was the one who killed those people at Kobil. Because it was even in the news paper people had read. Those pump attendants who died I knew them well. There was Gatale Claudia, Orot Tom and Paddy (Kateba). Orot was the guard....”

Although the Accused tried to deny the confession statement on allegations that it was extracted from him after two days of rigorous torture, a trial within trial was conducted by this Court in conformity with the law relating to a retracted/repudiated confession statement. That was in conformity with the decision of the Supreme Court **Justices in Supreme Court Criminal Appeal No. 33 of 2001, Sewankambo Francis and 2 Others Vs Uganda (unreported)**.

In the course of the Trial Within Trial, this Court was alive to the Principles laid down in the **case of Tuwamoi Vs Uganda [1967] EA 84**, and was convinced that the statement was made voluntarily. This Court was also cautious before admitting the confession statement in evidence in view of the Doctrine of Presumption of Innocence as enshrined in **Article 28 (3) (a) of the Constitution**, here in before referred to. This Court rejected the Accused's narrative and allegation of lengthy and systematic torture at Kireka barracks. In view of the Police form 24 which was admitted in evidence **under S.66 of the Trial on Indictment Act**. It revealed two scratches on the left and right neck which were classified as abrasions. The Medical condition of the Accused was stated by the Doctor to be of normal mental status and no abnormalities were mentioned. There were no stab wounds, cut wounds, torn wounds, or any signs of other injury. This Court wondered how a Medical Officer would have failed to detect any other type of injuries if at all the Accused had been hit with a baton on the legs, thighs, around the waist and abdomen or shoulders. This Court also wondered why Accused did not tell the Doctor the other parts of the body that were tortured but only chose to reveal the same in the trial within trial. This

Court held that in view of Accused's detailed confession statement which included his family background and upbringing, the work challenges made before a Police Officer above the rank of Assistant Inspector of Police who properly administered the caution to Accused in a language he understood (English) could not have been obtained through coercion. The allegation of torture by the Accused before the confession statement were rejected by this Court as an afterthought to misleadingly attract the sympathy of Court. This Court further rejected the submissions of Mr. Ondimu for the Accused that Accused was blindfolded, thrown in a boot of a car and confined in a room and that torture is not only physical but mental. That was attractful reasoning but was unfortunately not supported by evidence, particularly Medical evidence as I have already pointed out. This is because as was held in **Akol Patrick & Others Vs Uganda, [2006] HCB Vol. 1 page 6**, a Court of law bases its Judgment on evidence adduced by credible witnesses and not on fanciful theories or attractive reasoning.

This Court further found corroboration of the confession statement in the evidence of PW1, Birungi Sheilla, the teacher of the Accused who told this Court that on the fateful day of 7/08/2006, Accused did not attend School and missed Mock examinations. PW2's testimony was that Accused told him he did not attend classes on 7/08/2006.

Furthermore, PW3, Lakony Clayton Omon, who was the Branch Manager and head of investigations of Security Group (U) Ltd, testified that on 7/08/2006, there was an incident at night which took place where Accused was guarding. And that people had been shot dead. PW3 further testified that when he reached the scene, he found two pump attendants and one Security Guard, Orotu Keneddy dead. And then another Security Guard called Okiro was shot but he had not died. And he took them to Mulago Hospital where he talked to Okiro before he died. PW3 told Court that Okiro told him that Accused was not happy with the manager as he was not coping with School and that the Accused was not happy with the pump attendant. That testimony of PW3 also corroborated the confession statement made by Accused before PW2.

PW3's further testimony was that when he interrogated the Accused, the Accused told him that he was being frustrated and wanted to show his satisfaction.

PW4 stated:-

“I asked the Accused and he told me he was being frustrated and wanted to show his satisfaction. He told me he was annoyed and repeated it five times. Then he told me he decided to shoot the people at the Petrol Station.....”

The evidence of PW3 further corroborates the confession statement of Accused to PW2. Accused repeated the same admission before PW3, his branch manager at the time. In my humble view, such conduct by Accused of repeating the same admissions to two persons cannot be said to be conduct of an innocent person, particularly when he was said to have repeated five times to PW3 that he was annoyed.

PW4, Kyenkya Richard, a Police Officer attached to Kiira Road Police Station also proceeded to the scene of murder at Bugolobi where according to him three people were shot dead and two injured. He added that they recovered uniform of Security Group and he proceeded to Mulago to guard the two victims. PW4’s testimony was that Bagonza Herbert, who was a family friend and who was on oxygen told him that the person who shot him was tall and slender and putting on a red cap of Security Group. And that after X-Ray, he was transferred to Ward 3A, where he became weaker and died. That description in the circumstances matched the Accused and is not only corroboration of earlier witnesses but circumstantial evidence.

PW5, Okware Zadok, another Police Officer searched the house of the Accused on 11/08/2006. A search Certificate was tendered in Court and marked P3.

PW5’s testimony was that he found a long sleeved shirt with blood stains and that he also recovered a pair of jungle boot with mud on it. Two shirts of the Security Company, a belt and a torn trouser and two caps of the Security Group were also recovered. He concluded that there was a black pair of trouser with mud, one whitish dirty sock, a Khaki Jacket and a blue raincoat. The above items recovered from Accused’s house, particularly along sleeved shirt with blood stains and a pair of jungle boot with mud on it were pieces of circumstantial evidence pinning or connecting the Accused with the crime in question.

The Principles governing cases depending on circumstantial evidence have long been settled and applied in many cases including **Teper Vs R. [1952] 2 All E.R 447**. The same Principles were followed nearer home in **Simon Musoke Vs R [1958] E.A.715** and by the Supreme Court of Uganda in the **case of Kooky Sharma and Kumar Vs Uganda Supreme Court Criminal Appeal No. 44 of 2000**.

It was held that in a case depending on circumstantial evidence, a Court must, before deciding on a conviction find that the inculpatory facts are uncompartible with the innocence of the Accused and incapable of explanation upon any other hypothesis than that of guilt.

In the present case, apart from the confession statement which was admitted in evidence, the circumstantial evidence as brought out by the evidence of PW1, PW3, PW4 and PW5 irresistably point to the Accused in the dock, Gule Sheikh Twaha as the person who shot the five deceased persons at Kobil Petrol Station Bugolobi on the night of 7/08/2006 and caused their death. I therefore reject the Assessors' Opinion that the fourth ingredient of the offence has not been proved. The circumstances as outlined above based on the Prosecution evidence pin the Accused at the scene of crime.

The defence of total denial and alibi of the Accused were an afterthought which was merely meant to confuse the Court and divert the Course of Justice. The fourth ingredient of the offence has therefore been proved by the Prosecution beyond reasonable doubt. Having found and held that the Prosecution has proved all the ingredients of the offence beyond all reasonable doubt, I do hereby convict the Accused on five counts of Murder contrary to Section 188 and 189 of the Penal Code Act.

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W. M. MUSENE

JUDGE

05/06/2014

06/06/2014

Accused present

Samali Wakooli for State.

Namawejje Sylvia for Accused.

Aida Mayobo, Court Clerk present.

Court Assessors present.

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W. M. MUSENE

JUDGE

Court:

Judgment read out in open Court.

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W. M. MUSENE

JUDGE

Prosecution: Samali Wakooli

The Prosecution has no previous conviction record. That notwithstanding, life was lost. It is a gift from God. Five innocent people died. This is a case which calls for death penalty. The manner of random shooting was uncalled for. Convict turned on the people he was to protect. The convict targeted parts of the body which were vulnerable. His conduct of going into hiding before arrest should be considered. The deceased lost families who are helpless. So I pray for a maximum penalty.

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W. M. MUSENE

JUDGE

M/S Sylvia Namaweje in mitigation:

This Court be persuaded by the fact that convict is a first offender and so should not be given a harsh penalty. I pray that there were elements of provocation. So the convict should be given an opportunity to reform.

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W. M. MUSENE

JUDGE

Sentence and Reasons:

There is no doubt whatsoever that the offences in question are very grave and serious. They involved loss of five lives. No one has the right to unlawfully terminate another person’s life over flimsy excuses that one was frustrated and annoyed as the convict in this case. I want to take this opportunity to warn people like convict now and members of the general public that everyone must learn to control their tempers under whatever circumstances. Once life is lost, it is gone forever and cannot come back. In such circumstances, and where the convict killed five people, a deterrent maximum penalty would be called for so as to deter such cruel barbaric crude and uncivilized conduct and behavior. No one should be allowed to play about with a lethal and dangerous weapon like a gun as if he/she was shooting at wild animals in Murchison falls National Park. This Court is aware of the sentencing guidelines whereby the views of the relatives of the deceased are to be sought. But being an old case of 2006, such relatives cannot be traced and Court cannot keep on waiting. I have considered all the aggravating factors as raised by the Prosecution and actually mentioned some of them.

I at the same time take into consideration the mitigating factors raised by M/S Sylvia Namaweje for convict, particularly age of convict. All in all, I am persuaded not to sentence convict to death despite the death of five people he caused. Convict is never the less a very dangerous person who deserves to be out of society in the interests of protection of the others.

In the circumstances, I do hereby sentence convict to imprisonment for life in each of the five counts. The sentences will run concurrently.

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W. M. MUSENE

JUDGE

06/06/2014