

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT MASAKA
HCT-00-CR-SC-115 OF 2013

UGANDA.....PROSECUTION

VERSUS

ETOM MOSES.....ACCUSED

BEFORE HON LADY JUSTICE MARGRET C.OGULI-OUMO

(JUDGE)

JUDGEMENT

Etom Moses was indicted with murder contrary to **sections 188 &189 of the Penal Code Act**

The particulars of the offence are that Etom Moses on the 14th day of March 2013, at Lulindi Landing site in the Kalangala district murdered SekuyeBosco.

The accused pleaded not guilty and the matter went to full trial.

The prosecution called 4 witnesses to prove its case . The accused denied the offence and gave a sworn statement.

At the hearing, the state was represented by Mr. David Baxter Bakibinga and the accused was represented by Mr. Herbert Zikusooka on state brief.

The brief facts of the case are that on 13-o3-2013 at around 8:00pm the accused returned home and engaged in a quarrel with his companion.

The quarrel degenerated into a fight , attracting the neighbor's attention.

The deceased who was the accused's father in law happened to be returning home and found the accused assaulting his daughter.

When he asked what was happening the accused boxed him on his face. The accused then picked a piece of wood and hit him on the neck with it whereupon the deceased fell down unconscious.

The accused proceeded to pick a second stick and at this point the residents were around him.

They got hold of his hand tied him up and took him to the chairman's home where he was later taken to kalangala police station

Early the next morning, the deceased was taken to Kalangala Health centre⁴ for treatment while he was in a bad condition.

A short while later, he succumbed to his injuries and died.

The medical evidence showed that he died as a result of heavy bleeding to the left side of the chest.

The accused was arrested and charged with murder.

In all criminal cases an accused person is presumed innocent until proved guilty or he /she pleads guilty. (**see Article 28(3) a of the Constitution.**)

In the case of murder such as the present, the prosecution must prove each and every one of the following ingredients beyond reasonable doubt,

1. That a human being has died ,in this case Sekuya Bosco
2. The death was caused unlawfully
3. That the death was caused with malice aforethought
4. The accused participated in the killing or was responsible for his death.

It is the duty of the prosecution to prove each and every ingredient of the offence beyond reasonable doubt.(see **Woolmington VS DPP [1935] A.C 462.**)

This principle has been reaffirmed in the Ugandan case of **Richard Oketcho versus Uganda SCCA 26/1995**.

As regards the first ingredient, prosecution relied on the evidence of PW2, the daughter of the deceased who testified to court that she witnessed the death of her father Sekuya Bosco at Kalangala Health Centre 4 where he had been taken for treatment after being beaten by the accused.

She also did witness his burial at the cemetery of the health centre.

This evidence was corroborated by prosecution exhibit PE1 PF48B, the post mortem report which was admitted in evidence.

The defense conceded to this ingredient of the offence.

It is therefore my view that the prosecution had proved this ingredient of the offence beyond reasonable doubt.

As regards the second ingredient whether the death was caused unlawfully,

Learned counsel representing the state submitted that it is a presumption of the law that all homicides are unlawful with the exception of the lawful execution of the death sentence or through accident or accidental death.

He submitted that this case does not fall into any of the said exceptions that the death was accidental or caused while executing a death sentence under **section 190(b) of the Penal Code Act**

That a person is deemed to have caused death of another person if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical medical treatment.

Learned counsel for the state submitted that PW2 and PW4 vividly saw the accused strike the deceased with a stick a piece of which is exhibited in court which clearly shows that it was an unlawful Act.

Mr Zikusooka Learned Counsel for the accused contended that the death of Sekuya Bosco was not caused unlawfully owing to the evidence on record which

clearly suggests there was a domestic quarrel between the accused and Pw2 and as a result of the domestic quarrel which was sparked off by PW2 when she confronted the accused at his house which was different from that of PW2 who picked up a stone according to his evidence and hit him on the hand and then picked up a stick and tried to hit the accused

That there was a scuffle between the parties where the accused was struggling to protect himself and from nowhere the deceased emerged and was trying to help his daughter fight the accused and in the course the accused tried to push them and the deceased fell on a hip of firewood where upon he became unconscious. that whatever happened to the victim thereafter resulting to his death was not an act occasioned by the accused and given that the accused pushed these people down and they fell down he did not follow them to inflict any pain on either the deceased or the witness.

That in that regard the death of the deceased was accidental and can't be apportioned to the accused.

That PF48 b states that the cause of death is as a result of severe beatings on the chest and the evidence of PW2 and PW4 is that the accused the accused hit the deceased on the neck with a stick.

That the neck cant be the chest and these contradictions should be treated in favour of the accused and believe the accused's evidence that Sekuye's death was accidentally caused.

It is a presumption of the Law that all Homicides or deaths are unlawful unless they are accidental or caused in the execution of a sentence under the Law.(see **Gusambizi S/o WesongaVsR (1948)EACA P.165**, where it was held that a Homicide unless allowed by law is always unlawful.

The fact that the death occurred in the midst of a domestic quarrel doesnot make it lawful.

Secondly, the Evidence of Pw2 and PW4 both was that the accused hit the deceased on the chest with a stick. I did observe the gestures of PW2 when she

was testifying, though she said neck, she put her hand on her chest towards the neck but not on the neck and I observed her demeanor. She was a person who appeared to be a truthful and straight forward witness.

There was no evidence that there was a hip wood of the firewood at the scene of the scuffle and the medical evidence PE48 corroborates the evidence of PW2 & PW4 that the deceased sustained injuries on the chest.

If the deceased was pushed by the accused who was trying to remove the stick from him. If they had been facing each other struggling for the stick and he was pushed, he would have fallen backwards and been hurt on his back but the medical evidence does not seem to show that he suffered an injury on his back.

In addition to this if he fell on a hip of firewood he would have sustained some scratches which he never did but only severe beatings on the chest which is consistent with the evidence of PW2 and PW4.

I find that there was no contradiction in the evidence of the prosecution but it was only the interpretation of the counsel for the accused himself. However if he pushed both of them PW2 doesn't say they were pushed.

I therefore find that the death of Sekuya was not caused accidentally but was unlawfully which resulted from the severe beating to the chest inflicted by the accused.

I also find that the killing does not fall in the category which is allowed by law and I am satisfied that prosecution has proved beyond reasonable doubt that the death was caused unlawfully.

This brings me to the 3rd ingredient of whether the death was caused with Malice aforethought. Counsel for the state submitted that Malice aforethought is prescribed under section 191 of the penal code Act. That it is defined as intention to cause the death of any person whether such person is the person actually killed or not.

That it is a practice of the courts in relying on the following ingredients to determine the presence of malice aforethought-

- 1) Nature of weapon used against the deceased and in this case a stick with a sizeable thickness which is exhibited in court.
- 2) The part of the body of the victim which is struck. In this case PW2 and PW1 testified that the deceased was struck on the neck and head which is a very sensitive part of the body.
- 3) The number of blows delivered- in this case according to pw2 and pw4 it was one blow on a sensitive part.

That courts have also gone ahead to show that the attacker takes the victim as he finds him. If the attacker finds him as an egg shell ,even one blow is enough on a sensitive part.

That in this case the deceased was a small old man who the accused in his testimony agrees was a small old man even smaller than the daughter whose head could barely be seen above the witness box.

That such a blow would have a devastating effect on him.

- 4) The conduct of the accused after the incident. In this case after the deceased collapsed on being struck , the accused instead of offering assistance went to the bar to continue drinking . That such conduct is not proper.

In reply, Zikusooka learned counsel for the accused that Malice aforethought as prescribed under s. **191 of the Penal Code Act** entails that the accused person must have had a premeditated plan /intention to cause the death of another

That the evidence on record shows that the accused person together with pw2 had a domestic quarrel over who would be staying with their child

That pw2 wanted to leave a very young child in the hands of the accused and that is how the fight ensued.

That there was no evidence on record to show that the accused used a weapon or excessive force against pw2 so as to cause any bodily injury or grievous harm and there is also no evidence on record to suggest that the accused ever planned to have a quarrel or fight with PW2 .

That there is no evidence on record to show that the accused person knew his father in law before or he planned to cause his death.

He contended further that the evidence on record is only to the effect SekuyaBosco only came in during the scuffle and it was during that scuffle that the accused person over powered him and Muzee was pushed down and fell on the firewood.

That in that respect one cannot be convicted on the element of Malice a forethought in the absence of evidence suggesting intention to cause death.

That whereas as PE3 was tendered in court, the accused person denied ever having used a stick to inflict pain on either PW2 or deceased.

That there is a material contradiction as to exhibit PE1 and pF48 in which it was stated that the injuries were on the chest which were caused by severe beatings and this is an expert evidence on PE3.

And the evidence of those at the scene is to the effect that the accused inflicted pain using a stick on the neck.

That the pieces of evidence contradictory in material cant relied upon ,more so in a charge of this nature where the accused if found guilty may suffer death.

And so the court should find malice aforethought not to have been proved beyond reasonable doubt.

That Section 191 of the Penal Code Act provides that malice a forethought may be proved by direct evidence or circumstances indicating knowledge by an accused person that his/her conduct would probably cause death however courts recognize the difficulty of proving an accused person's mental disposition and have thus agreed to infer that mental disposition from circumstances surrounding the death and they are the following;

- a) The weapon used whether it was lethal or not
- b) The part of the body which was targeted i.e whether it was a vulnerable part or not.
- c) The manner in which the weapon was used i.e whether repeatedly or not or the number of injuries inflicted and

d) The conduct of the accused before, during and after the incident i.e whether there was impunity.

See RvTubere (1945) 12 EACA 631.

I have reviewed the evidence on court record , the deceased was hit once with a stick of a considerable thickness which broke into two showing that the impact was great.

The deceased was first boxed on the head and then hit on the neck.

I did observe the witness who was speaking in Lunyankole and according to her gesture ,the deceased was hit on the top left side of the chest ,towards the neck he was an old man of 60 years of age and one blow was enough to put him down considering the size of the accused and the size of the victim

The part of the body hit was vulnerable.

After hitting the deceased and knowing that he had fallen down unconscious,the accused acted with impunity when he first proceeded to the bar for more drinks.

In view of the above, and fortified by the conditions as set out in the case of **Tubeere** (supra) are fulfilled. I am satisfied that the prosecution had proved beyond reasonable doubt that that the killing was caused with Malice a forethought.

This brings me to the final ingredient of participation of the accused.

The incident occurred at 5-5:30 pm on that day and the incident followed a heated argument between PW2 and the accused over paternal responsibility.

That the accused did put himself at the scuffle scene as he said he was part of the scuffle that ensued and his participation is not in doubt.

That whereas he participated, he raised two defenses,

Accident, that during the scuffle, he over powered the deceased who fell on a pile of firewood.

That the evidence of PW1 and PW4 and PE1 the postmortem report are not in agreement with this contention.

That it shows there was a blow delivered against the person of the deceased and this was not accidental and court should not believe the story of accident.

I have reviewed the evidence in connection to the defense of accident ,the evidence of PW2 is that the accused first boxed the deceased on the head and then hit him with a stick on the neck . This is in consonance with the evidence of Pw1 who said when he saw the deceased when he was brought the head and chest were swollen.

PW4 also told court that the accused hit the deceased on the neck.

I did observe the gestures of the witness PW2 , and the way she put her hand to show where the stick struck. It was at the chest and this is corroborated by PF48 PE1 that the deceased suffered a blow to the chest.

Although the accused claimed it was an accident,he hit the deceased more than once .PW4 also stated that he hit him on the head and neck.

Hitting someone not once but twice can't be said to be an accident so I discount the question of accident.

The accused also raised the issue of intoxication

Counsel for the state submitted that this defense under section 12(4) of the Penal Code Act is not an absolute defense as the section provides exceptions to it.

That under the section, where an accused raises intoxication as a defense, he must at the time of the offence or act complained of not knowing that the act or omission complained of was wrong and did not know what he was doing.

That the state of his intoxication must be caused without his consent by malice or negligence of another person.

That in this case Etom Moses told court that he himself purchased the mukomboti he drunk at around midday and he himself went to Steve's bar.

That in this case he himself voluntarily bought the alcohol and that he took this alcohol to obtain Dutch carriage since earlier on in the day he had had an argument with PW2 over paternal responsibility so he did this to confront the situation head on.

That section 12(2) b provides for a situation where intoxication makes a person so insane that he is not aware of what he is doing.

Mr. Bakibinga submitted that the accused was not temporarily insane as he narrated the event although he was choosing those that favored his case and when confronted by counsel, he stated that he was too drunk to recall and the defense of intoxication does not stand and should be as an after thought

Mr. Zikuusoka counsel for the accused contented that when he went to drink it was not a premeditated plan to get drunk to cause havoc but he became intoxicated only at the point when there was provocation from PW2 that was an attack from PW2 and when it ensued he became intoxicated.

That the actions of PW2 had a serious negative effect on the accused's mental judgment.

That under **section 12(4)** given the circumstances of the case, there was no evidence to suggest that the accused formed any intention to cause harm or injury.

That court believes that at the time of the commission of the offence, when the accused pushed off PW2 and the deceased he was under temporary insanity

Section 12(2)a of the Penal Code Act is very clear on when someone can take advantage of the defense of insanity by reason of intoxication.

The relevant section provides as follows:-

“intoxication shall be a defense to any criminal charge if by reason of the intoxication the person charged at the time of the act or omission complained of didn't know that the act or omission was wrong or didn't know what he or she was doing and

a)the state of intoxication was caused without his/her consent by the malicious act of another person, or..”

In this case the evidence on record shows that the accused went out to purchase the mukomboti he drunk himself, he even bought some and took to his home and consumed with his friends at around 2:00pm and then continued to Steve’s bar ,even after the deceased collapsed unconscious he went on for another drink.

All these he did voluntarily on his own.

You cannot say that it was at the time when PW2 attacked him when he became intoxicated to the extent of not knowing what to do . I dismiss that allegation as not true because you can’t switch on and off the intoxication when it is convenient to you.

I therefore find that the accused was not intoxicated to the extent of not knowing what he was doing within the meaning of section **12 (2)a of the Penal Code Act** and the defense of insanity by the accused by reason of intoxication is not available to him.

The gentlemen assessors advised court to find this ingredient not to have been proved beyond reasonable doubt together with ingredient No.3 but this was as a result of extraneous information they obtained outside that in the court record and I am not bound to follow that opinion.

Consequently, I find that the prosecution had proved that the accused participated in the commission of the offence as he was identified by Pw2, PW4 and he himself put himself at the scene of the crime at the time.

I therefore find him guilty and convict him of the offence as charged.

Antecedents

State: I have no known criminal record in respect of the accused. However he committed a serious offence in which an innocent life was lost .

The deceased was a defenseless old man who as a parent sought to defend his daughter who had been violently assaulted by the convict. She was being strangled and a concerned parent he had to come to rescue her.

Even if the convict and PW2 had issues with regard to case of their child, resorting to violence was no solution.

As PW2 stated, even the convict is that he wanted to enjoy her company but not the child from the relationship.

The convict was never remorseful throughout the trial and sorry for what had happened.

It is our prayer that he be given a deterrent sentence.

So we pray.

D.C : The convict has been on remand for 1 year and 1 month.

He is still a young man aged 39 years old with high chances of reform .

We pray that you give him a lenient sentence

We also invite court to look at the circumstances surrounding the commission.

We pray that you have mercy on the convict.

We so pray.

Convict : I have 5 children that I left at home

At my age of 39 years I had never committed any offence before.

I have stayed in Buganda for 8 years in the same place and I had never committed any offence. I had never appeared even before an LC1.

I pray that court gives me a lenient sentence which can serve and come out and go and look after my people.

SENTENCE AND REASONS

Etom Moses was indicted for murder contrary C/S 188 &189 of the Penal Code Act.

The particulars of the offence are that the accused on the 14th day of March 2013 at Lulindi Landing Site in the Kalangala District murdered Sekuye John Bosco

The accused pleaded not guilty and the matter went to full trial.

The accused denied not committing the offence and the prosecution called 4 witnesses to prove its case and the accused was convicted.

No evidence was brought as to whether the accused had other criminal charges before.

The accused is married with 5 children whom he left in his home in the district of Alebtong.

He has been on remand for 1 year and 1 month .

He alleged he was remorseful.

However the convict was convicted with an offence which carries a maximum sentence of death on conviction.

He has not shown any remorsefulness since the commencement of his trial.

Court sentences him to 14 years imprisonment and he has a right to appeal against the sentence and conviction.

Hon. Lady Justice Margaret C. Oguli-Oumo

(Judge)

13/05/2013

Present

1. Baxter Bakibinga for the state
2. Zikusooka Herbert for the accused on state brief