

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

HCT-09-CR-SC-0055 OF 2012

**UGANDA:..... PROSECUTOR
VERSUS**

A.1 NAKHABALA ALEX

A.2 BULOLO REUBEN alias GIZAMBA

A.3 MWONJE ISSA NAYIMU

A.4 NAMONO BEATRICE:.....ACCUSED

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Accused persons are jointly charged on 8 counts.

On count 1 accused are charged of murder contrary to section 188 and 189 of the Penal Code Act. The particulars state that accused and others still at large on the 11th day May 2011 at Nasasa village in Mbale District murdered **Wanambisi Geoffrey**. They all denied the charge.

On count 2-8, accused are indicted of aggravated robbery contrary to section 285 and 286(2) of the Penal Code Act on the 11th day of May 2011 at Nasasa village in Mbale robbed **Mafabi Francis, Mafabi Abasa, Mafabi Charles, Weteya Keneth, Kitutu Fred, Nakito Philipo** and **Wanyere Isaac** of various items and used deadly weapons against them to effect the robbery

All accused denied the charges under each count as charged.

On count 1 of murder the prosecution must prove that;

1. There was death.

2. The death was done unlawfully and with malice aforethought.
3. That accused committed the death.

On counts 2 -8, the prosecution has to prove:

1. That there was a theft.
2. That a deadly weapon was used to effect the theft.
3. That accused participated in the said theft.

I will now examine the evidence and the facts in support of this case, issue per issue as here below;

COUNT 1: MURDER

1. Whether there was a death.

Both the learned Resident State Attorney and defence counsel submitted in support of propositions as on record. The defence counsel was of the view that death wasn't proved, however Resident State Attorney referred to the evidence on record and concluded that death occurred.

It is my finding that evidence on record from PW.1, PW.2, PW.3, PW.4, PW.5, shows that **Wanambisi Geoffrey** was pierced with a knife and died as a result. Death was accordingly proved.

2. Whether the death was unlawfully and with malice aforethought

It is trite law that all homicides are unlawful unless authorized by law. There is no evidence to show that the death of **Wanambisi** was excused by law, or was lawful. It is therefore clear from the record that it was done unlawfully with premeditation.

According to *Tubere so/ Ochanan V. R (1945)2 EACA 63*, it was held that malice aforethought is readily proved where a lethal weapon has been used in assaulting the deceased on a delicate part of his body.

Evidence from the prosecution showed that the deceased was pierced with a knife in the back by the assailants (evidence of PW1, PW2, PW3, PW4 and PW5). There was therefore an intention to kill, and malice aforethought was proved. This ingredient was therefore proved.

3. Whether accused persons were the ones who killed the deceased.

The evidence on record as led by PW1, PW2, PW3, PW4, PW5 is to the effect that certain assailants attacked them and robbed them on 11th May 2011 at Mombasa Bar (PW3,PW4,PW5), while PW2 was attacked by the same assailants from the centre of Roko village on the way while going home. PW6 was attacked on 11th May 2011 at Bukenaya in Naminya Buhosi sub-county while going to his home. This was at 8: 30pm-9:00pm.

It's alleged these people were armed with guns and pangas.

It was evidence of PW5 that he was able to identify A1, whom he described as having a scar on the forehead and easily pointed him out in court.

PW7 recorded a charge and caution statement from A.2 Bulolo. The statement was admitted in evidence as PE after a *voire dire*. The statement implicates himself and **Alex Nakhabala, Mwanje Issa** and **Beatrice Namono** as close associates of his in crime.

All accused gave sworn defence and each denied knowledge of the charges.

A1 stated that on 16th May 2011 he was arrested while going to the stadium on charges he knew nothing about.

A2 similarly told court that the charges are unknown to him

A3 said he was at home when police came and arrested him on charges he didn't know.

A4 generally fained lack of knowledge of the charge.

From that evidence there is evidence of PW5. Who is the only eye witness who saw and identified A1. He saw the scar on his face and easily pointed him out to police and also easily identified A1 in court.

The evidence by PW3 (**Wateya**) is that one of the assailants was called "**Alex**" since he heard one of them say" **Afande Alex** don't beat people". This piece of evidence is good as it has a collaborative value which is required if the confession by A2 is to be relied on.

According to *Twamoi vs. Uganda (1967) EA 84*, once a confession is retracted court should accept it with caution before basing on it to convict.

John Serumaga and 3 Ors vs. Uganda Cr. 31/96 CA, the principle was stated that a statement made which affects a co accused can only be used to supplement an otherwise substantial case against them. In other words there must be full admission of guilt in the statement before it is used as a basis of conviction.

Apart from the confession statement made by A2, the only other evidence which implicates the accused is the evidence of PW5 who identified A1. Given the fact that A2 in his confession points at A1 as an accomplice and given the fact that PW3, heard the name" **Afande Alex**" being mentioned, the requirements of the

Twamoi vs. Uganda (1967) EA 84 case, requiring the exercise of caution, and of ***John Serumaga & 3 Ors vs. Uganda Cr. 31/96 CA***, requiring collaboration of an implicating statement of a co-accused are duly satisfied, as against A1 and A2.

However though A2 mentions A3 and A4 in his statement; there is no other independent evidence on record implicating them as required of law.

I am therefore finding that participation in the causing of death of **Wanambisi** has been proved as against A1 and A2, only on the evidence available. No proof exists sufficient enough to implicate A3 and A4; on count 1 of murder. This ingredient is therefore proved against A1 and A2

Counts 2-8: Aggravated Robbery.

1. Whether there was theft.

Prosecution led evidence of PW2, PW3, PW4, PW5,

PW2- Mafabi Francis who is appearing as the victim in count 2 told court that he was robbed of a Nokia 1600, and 30,000/= shillings, PW3- Wataya Keneth appears as the victim under count 5, told court that he was robbed and they took his phone Kability and shs, 90,000/=.

PW4 Kitutu Fred appearing as a victim under Count 6, told court that they robbed him of his phone Nokia 1600.

PW6- Wanyera Isaac, victim in count 8, stated that he was robbed of a phone and shs 30,000/=. There is no evidence led on count 3, 4 and 7, I have found sufficiently that witnesses showed that theft occurred as charged on counts 2, 5, 6 and 8. No proof however was shown regarding counts 3, 4 and 7.

2. Whether a deadly weapon was used during the theft.

The evidence through PW2, PW3, PW4 and PW6, all told court that assailants had guns and used pangas and a knife to pierce and kill one of the victims. The theft was violent and involved pointing a gun at the victims. There is no doubt that a “gun” and a “ panga” and “ knife” are all deadly weapons and have been held so in other earlier decided cases

3. Whether accused are the culprits.

The evidence on record is dependent on the identification by PW5 of A1, and the confession statement by A2. This evidence is collaborated by what PW3 heard as the thugs mentioned **Alex**’s name as “**Afande Alex**”.

Further corroboration is famed in evidence of PW8 Jabi Serulo, whose testimony details information he received from accused as an investigating officer. His evidence tallies with what PW7 informed court was contained in A2’s confession statement. The participation of accused was denied by all accused who told court each in defence that they lacked knowledge of these allegations.

I am however inclined to believe the Resident State Attorney’s conclusion on this evidence that the confession details a lot of information with near mathematical accuracy of what PW8 explains as having transpired. Much of the details conform with what prosecution witnesses told court. The accused persons did not impress me as truthful.

Basing on evidence of A2’s confession, and the direct identification of A1 by PW5, I find that A1 and A2’s participation in this robbery is proved. I earlier on

quoted the relevant case law as contained in *Twamoi vs. Uganda (1967) EA 84 and Serumaga & Ors vs. Uganda Cr. 31/ 96 CA*.

I find that A1 and A2 did participate in the robbery. I don't find collaborating evidence against A3 and A4 and for that reason I hesitate to find them liable though A2 mentions them in his statement.

Having found as above on the entire evidence and facts, I agree with the opinion of the assessors in this case for a finding that;

On count 1 of murder contrary to section 188 & 189 of the Penal Code Act A1 and A2 be and are hereby found guilty of murder contrary to Section 188 & 189 of the Penal Code Act and they are accordingly convicted thereof.

Aggravated Robbery contrary to Section 285 & 286 of the Penal Code Act A1 and A2 are found guilty and are convicted of Aggravated Robbery Contrary to Section 285 & 286 of the Penal Code Act on Count 2, Count 5, Count 6 & Count 8 respectively.

A3 and A4 are not found guilty of all charges on all counts 1-8 and are acquitted thereof. I so order.

Henry I. Kawesa
JUDGE
10.09.2014

10.09.2014

Accused present.

Kyabakaya Enoch: for the defence

Annet Namatovu: for the state

Kyabakaya Enoch: case is for judgment and we are ready

Court: Case judgment read in open court in the presence of the parties above.

Henry I. Kawesa
JUDGE
10.09.2014

Resident State Attorney: The convicts are found liable on murder and Aggravated Robbery. We pray that, on Count 1- the life of a young man was lost

On Counts 2, 5, 6 & 8, witnesses lost property. We pray for compensation as the law makes it mandatory. All accused are young but committed grievous offences. We pray that the period of remand be put in consideration.

Kyabakaya: It's my submission that prosecution's statement that they are first offenders is true. The demeanour portrays remorsefulness. They have been in custody since mid 2011. We pray that same is considered as sentence is passed. It's our prayer that both convicts are young, youthful and of responsibility. A1 has an elderly mother he was taking care of. A2 has a family. They both fend for these families. It's our prayer that the court invokes wisdom and mercy as it sentences the convicts to allow them come and serve the nation, the defence so prays.

A1 (**Nakhabala**): I pray for leniency. I have young children and I am an orphan and have been on remand for long.

A2 (**Bulolo**): Pray for mercy. I don't pray for heavy penalty, my children are alone. I have been on remand. I pray that the remand period be considered.

Henry I. Kawesa
JUDGE
10.09.2014

Court: sentence and reasons

Count 1 Murder

This is a capital offence with a maximum penalty of death upon conviction in the rarest of cases. The circumstances of this case would operate to mitigate this from the maximum. However life is irreplaceable. The deceased was a young man. There is need to deter and reform. Given all mitigations, and period spent on remand, the accused will each serve 15 years imprisonment on this count.

On counts 2, 5, 6 and count 8, which are of aggravated robbery, there is need for reform and deterrence. The victims lost property in the process. Given mitigations and period spent on remand each accused will serve a further custodial period of 2 years on each count. These sentences will run consecutively to enable the effect as above be attained. I so order.

Each accused will compensate the victims of the crime in equal amounts as per charge sheet of Shs 50,000/= I so Order.

Henry I. Kawesa
JUDGE
10.09.2014