

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

HCT-04-CR-SC-257 OF 2013

UGANDA:.....PROSECUTOR

VERSUS

**A1 KAKUNGULU JAMES *alias* KUNSALA
A2 NDINYWA MANSUR *alias* KOWA
A3 MWANANI YAFESI *alias* BALILAINE**

}.....**ACCUSED**

BEFORE: HON. JUSTICE HENRY I. KAWESA

JUDGMENT

Accused are charged of murder. All accused denied the charge.

The prosecution have the burden to prove that;

1. There was death.
2. The death was unlawful.
3. There was malice aforethought.
4. Participation of the accused.

The prosecution called a total of 9 witnesses. Prosecution also relied on exhibit P1-P7. The defence was by accused giving unsworn testimony. That being the evidence the court found as follows.

1. Death

Evidence of PE1, (Postmortem Report),PW1, PW3 and PW7 showed that a death occurred.

2. Death was unlawful.

Evidence on record through PE1 and PW1, PW2, shows that deceased was cut, stubbed and pierced.

The law is that all homicides are unlawful unless accidental or excused.

(See **Cheskit Matayo V. Uganda Criminal Appeal NO. 95/2004 Court of Appeal of Uganda**). The evidence on record shows that the death was not accidental neither was it excused. The ingredient is therefore proved.

3. Malice aforethought

The law under Section 191 of the Penal Code Act provides for malice aforethought. The case of **Cheskit Matayo V Uganda Criminal Appeal NO. 95/2004**, relied on **Uganda V John Ailing (1992-93) HCB 80**, and held that malice aforethought is discernable from the following facts including the part of the body injured, type of weapon used, extent of body injuries and conduct of accused.

From evidence on record the deceased was cut in the neck and throat which are all sensitive parts. Any assailant aiming at those parts is deemed to have intended to kill. This ingredient is proved.

4. Participation of the accused.

The prosecution relied on evidence of PW1, PW2, and PW3 who all saw the accused hitting and chasing the deceased. Prosecution also relied on the doctrine of recent “threats” to connect accused to the alleged death.

In defence all accused put up an alibi. Counsel for defence also relied on contradictions in the prosecution’s evidence which pointed out the difficulty in the conditions of identification so as to cast doubt on the prosecution’s evidence.

I have examined all the evidence and cautioned myself as I did caution assessors on the dangers of convicting on this evidence without testing it for cogency, trustworthiness, consistency and collaboration.

I have noted that evidence of PW1 and PW2 contains some minor inconsistencies in their description of the clothing of the accused where jacket colours were interchanged.

Counsel for defence referred to witnesses referring to “Jackson” not “James” Kakungulu and concluded that was a different person before court.

Counsel also said the witnesses contradicted each other on various aspects of the evidence and should not be believed.

Having carefully watched all witnesses in court, and carefully reviewed all evidence, I am convinced that the conditions for identification by PW1 and PW2 of the accused were conducive. It was towards morning. There was morning light. The accused talked to the deceased. They forced the door open. There was a sort of mob which followed, and as deceased tried to run a chase ensued. PW1 ran towards them and kept a distance and saw whatever happened.

Her testimony of the chasing, the beating and killing along the way to the point of death in the Mango tree is corroborated by PW2,PW3,PW4,PW5,PW6, PW7,PW8 and PW9 from their narrations of the episode . I am further convinced that the holes in the doors of PW1 and PW2 were sufficient from their description in evidence to let the witness observe what was happening.

I find corroboration of PW1 and PW2's evidence from evidence of PW6, PW7, PW8, PW9 who informed court of the chain of causation leading to this matter. I also found a lead in the fact that a land dispute resulted into a community meeting called to calm tempers arising after the death of accused's father. I find a nexus between the alleged grudge and the uttered "threats" which were pronounced before police officers in very clear terms that retribution would be metted out if the death occurred. Indeed death of accused's father happened and the reactions to it was as promised a massive attack on the deceased who was allegedly the cause of the prior death. The evidence from the prosecution of PW1 and PW2 is of eye witnesses.

Evidence of PW6, PW7, PW8, and PW9 is circumstantial but with evidential value showing existence of prior *mens rea* to met out revenge and confirms the occurrence of events as narrated by PW1 & PW2.

I do not find any evidence on record of a mistaken identity. The contradictions pointed out are minor and were explained away by other witnesses who confirmed that indeed there are people who did go to deceased's home drug him out of his home and kill him. PW1 and PW2 positively identified them not by clothing alone but by their voices and the fact of being close relatives whom they knew very well.

The failure to correctly see the colour of their jackets was not therefore fatal as it never went to the root of the chain of causation. The quality of the identification was good, the witnesses were reliable and truthful. Cross-examination only helped to bring out more facts about the extent of the grudge between these people.

It never destroyed the quality of this evidence. I do not agree that the Kakungulu mentioned by PW1 and PW2 is different, due to the confusion of the names “Jackson” and “James”. The fact is that in the village people pass by different names and at times the use of petty names makes it difficult for witnesses to refer to one name consistently.

However, PW1 and PW2 did point out the accused by finger (pointing) at them as the ones they saw at the scene of crime and that fact sufficiently discharges the doubt created by the said name reference.

The prosecution through its evidence sufficiently places the accused at the scene of crime. The evidence of eye witnesses PW1 and PW2 is very strong and was not destroyed.

It was further corroborated by PW3, PW4, PW5, PW6, PW7, PW8 and PW9, and PE1, PE2-PE7.

I am satisfied that participation of the accused was sufficiently proved by the prosecution.

Assessors were of the opinion that accused are culpable and court should convict them. I do agree with them and find that the prosecution has proved the charge against all the accused persons. I find them guilty of this charge and do convict each one of them accordingly. I so order

Henry I. Kawesa

JUDGE

28.07.2016