

**IN THE HIGH COURT OF UGANDA AT MOROTO**

**CRIMINAL SESSION CASE NO. 45 OF 2014.**

**UGANDA V MARUNDA BENARD ALIAS EKALAPATAN MOHAMED**

**BEFORE HON. LADY JUSTICE H. WOLAYO**

**JUDGMENT**

The accused person is indicted with two counts of murder and aggravated robbery respectively.

In count one, it is alleged that the accused person and another on 25<sup>th</sup> March 2011 at Nakiloro village in Moroto district murdered Wambede Siraj.

In count two, it is alleged that the accused person and another at Nakiloro village armed with a sharp object robbed Wambede Siraji of motor cycle reg. no. UDR 235 C BAJAJ, red in color and Uganda shillings 18,000/ the property of Wambede Siraj and immediately before the robbery or soon thereafter the robbery used a deadly weapon to wit a sharp object to stab the said Wambede .

Prosecution was led by Mr. Zerald Amalo RSA while accused person was represented on state brief by Mr. Ogire Gabriel.

Assessors were Mr. Lomilo Joseph and Ms Margret Noma.

Prosecution had a duty to prove beyond reasonable doubt the following elements of murder:

1. Death occurred
2. Death was unlawfully caused
3. Death was caused Intentionally or that the perpetrator did not care if the deceased died as a result of his actions.
4. Participation by the accused persons

Prosecution had a duty to prove the following elements of aggravated robbery

1. Theft of property
2. Accompanied with violence

3. Possession of a deadly weapon
4. Participation by the accused person.

### **Proof of unlawful death**

That death of Wambede Siraj occurred was not disputed. According to PF48 that was admitted by consent, the body was examined on 29.3.2011 . It had a cut on the left jaw, cut wound on the posterior neck, stab wound on the chest, amputated lower limbs . The medical examination determined cause of death as multiple injuries and hemorrhage due to multiple cuts.

From the nature of injuries suffered by the deceased, his death was unlawfully caused.

### **Malice aforethought and participation**

Prosecution relied on PW1 Kocho Aldo Elia; PW2 Otim Simon, PW3 AIP Osakan Paul ; PW4 Ekiri Yusuf as well as medical evidence to prove malice aforethought and participation.

It was the testimony of PW4 Ekiru Yusuf that he is a resident of Lokiriama in Kenya , a boda boda rider who plies the Lokiriama –Moroto route. He also worked with a security outfit in Kenya called Mayumba kumi and that he worked with the sub county chief Lokuruka. It was further his testimony that he knows the accused person as Marunda a friend to his brother Esuzuku Lochomin. According to Ekiru, accused came to their homestead in March 2011 and spent there the whole day. This was two weeks prior to his arrest.

It was Ekiru's testimony that he learnt of the arrest of the accused from chief Lokuruka on 26.3.2011 after which he proceeded to Loya police post and confirmed that the accused person had been arrested with a motor cycle UDR 235 C. The same day, he was taken to Lodwar police station.

Earlier on 25.3.2011, Ekiru had seen the accused person ride with two other people at Nakiloru .

Defense counsel attacked the credibility of this witness in cross examination and in his submissions on the ground that he recorded a police statement the day he testified. However, the

witness testified that he made a statement at Moroto police station in 2011 and also at Lokiriama police station in Kenya.

I found no inconsistencies in Ekiru's testimony and he explained the reason he was involved in the case was that he was part of mayumba kumi in Kenya, security outfit.

To the extent that the accused was known to Ekiru, and to the extent that he identified him in court as Marunda, and to the extent that he identified him at Loya police post in Kenya on 26.3.2011 with a Bajaj motor cycle , I am satisfied that he is a credible witness whose evidence places the accused person as having been possession of a motor cycle which later became a crucial exhibit in this case.

According to Kocho PW1, he is a boda rider in Moroto Municipality and on 24.3. 11 , the accused person and another person found him at Campswahili while he was on duty and asked to be taken to Kenya. It was Kocho's testimony that he recalled the accused because of the squint in his eyes and the dark skin. The accused in fact has squinted eyes and is very dark.

The deal to go to Kenya did not materialize as Kocho's boss, the motor cycle owner ,wanted them to move the next day since it was 6 p.m by the time agreement was reached on the fare.

Another witness PW2 Otim Simon a boda rider and chairman of the boda riders in Moroto was also approached by the accused person on 25.3.2011 at about 3 p.m at Jie street in Moroto for the purpose of taking the accused and his colleague to Namaropus in kenya and back. It was Otim's testimony that negotiations failed when the two declined to produce their identity cards , a requirement established by the boda riders in the event the destination is outside the district. Otim's evidence is that he remembered the accused person because of the squint in the eyes and the dark skin.

This witness insisted in cross examination that he spent about 15 minutes with the accused person negotiating the fare and therefore had sufficient time for the appearance of the accused person to register in his mind .

It was also Otim's evidence that he knew Siraj, a fellow boda rider .

It was Otim's evidence that the following Sunday, he was called by District Police Commander who informed him that the chief of Lokiriama near the border, had informed him that a dead

body had been discovered along Nakabal-Nakiloro road . On making inquiries, Otim was informed by the father of Siraj that he had been missing since Friday .

To the extent that the accused was sighted in Moroto on 24<sup>th</sup> or 25<sup>th</sup> March 2011 and made it known he wanted to be taken to Kenya has been sufficiently proved by the prosecution. The accused has an unmistakable squint in both eyes that cannot be missed. Moreover, both Kocho and Otim saw him during broad day light before Siraj disappeared.

According to PW3 AIP Osakam Paul, he has worked in the police for 29 years and in March 2011, he was Deputy regional CID officer Moroto. On 25.3.11, he was the acting regional CID officer Moroto when he received a report that Siraj Wambede had been hired by two Kenyans to take them to Lokiriama but he had not returned. On 26.3.2011, Siraji's uncle Yusuf suggested that Siraji could be in trouble.

It was AIP Osakam's evidence that on 27.3.2011, he proceeded to Nakiloro trading centre where a dead body had been found on the Uganda side of the border. There was a pool of blood on the left side of the road to Kenya and signs of struggle involving three people while the body was five meters away from the scene of struggle.

The body was later identified by PW5 Elias Mwambu maternal uncle, as that of Siraj Wambede . Mwambu had last seen Siraj on 25.3.2011 in Moroto town as he went about the business of boda boda rider .

According to AIP Osakam, he proceeded to Lokiriama police post in Kenya where he met the sub county chief Lokuruka who informed him that he was at Lokiriama check point on 25.3.2011 at 7 p.m when two people came riding on a motor cycle but refused to stop at the check point whereupon police made chase and arrested the accused person at Longorekipi with a motor cycle, cash 18,000/ Uganda shillings , and a nokia phone ,while his partner fled.

It was AIP Osakam's evidence that he proceeded to Lodwar police station in Kenya where he had learnt that the accused was being held and he was advised by SSP Nyaga of Kenya police that the accused was a prison escapee and he was to face pending charges in Kenya first before being extradited to Uganda.

In October 2013, after extradition process was complete, AIP Osakam proceeded to Lodwar police station and was handed the accused and exhibits which included a motor cycle UDR 236C red in colour; cash 18,000/; a wallet , and a bag for which he acknowledged receipt in writing. The letter on Kenya police headed paper Turkana County CID headquarters dated 21.11.2013 was marked PEx. 3. The letter indicates that Marunda Benard , motor cycle reg. No.UDR 235 c, 18,000/ and a nokia phone were handed by Edward Mutemi D/OCPD Lodwar to AIP Osakam on 22.11.2013.

The evidence of AIP Osakam was vigorously challenged by defense counsel who submitted that the events leading to the discovery of exhibits and the arrest of the accused person were hearsay as neither chief Lokuruka nor Kenya police came to testify.

The rationale for inadmissibility of hearsay is that the person who attests to the existence of a fact is not available for cross examination to test her truthfulness. **3A Wigmore, Evidence para 884 ( Chadbourn rev. 1970)** explains as follows:

*‘when the statement of a person not in court is offered as evidence of the fact stated, the real ground of objection is that it has not been subjected to the test of trustworthiness which the law regards as desirable before listening to any testimonial evidence, namely, the test of cross examination’*

While hearsay evidence is generally inadmissible, there are exceptions to the rule. In this case, AIP Osakam received the information in his official capacity as a head of the CID regional office in Moroto. He received the information from Lokuruka in his official capacity and therefore had no personal interest in the matter. In **Kakooza Godfrey v Uganda, SCA No. 3 of 2008**, where evidence of recent possession of property was given by Kenya police but they did not testify, the Supreme court found that the police officer received information as police officer and it was admissible in evidence.

The information received by AIP Osakam shows how the accused person broke through a police checkpoint at the Kenya border at Lokiriama, police made chase and arrested him with the motor cycle he was riding with another person who escaped. The accused person was arrested and detained with the motor cycle and other exhibits he was found with, namely, a nokia phone and cash . 18,000/. Because the accused was wanted on other criminal charges in Kenya, he was

detained there until he was formally extradited and the same AIP Osakama collected him from the police station at Lodwar where he had been initially detained in March 2011 when he was arrested with the motor cycle.

PExh. 3 , the letter by Kenya police handing over the accused person and exhibits to AIP Osakam is credible evidence that the said Marunda was found in possession of these exhibits. This letter is admissible under **section 77(1) of the Evidence Act** which recognizes original public or official documents of a foreign country .

The fact that AIP Osakam was involved in investigations into the disappearance of Siraji on 25.3.2011 ; that the accused was identified by Kocho and Otim on 25.3.2011 in Moroto looking to hire a boda to Kenya; that Siraj was found dead on 27.3.2011 at Nakiloro on the road to Kenya but within Uganda ; that AIP Osakam visited Lodwar police station Kenya on 26.3.2011 , 28.3.2011 and 30.3.2011 where he met the accused who was in custody and saw the money and motor cycle ; that the said accused person was handed to Osakam by Kenya police on 22.11.2013 at Lodwar in Kenya along with the motor cycle , cash and a nokia phone ; the identification of the accused by Ekiru PW4 at Loya police post on 26.3.2011 with a motor cycle and later in court constitute a series of events that are closely interconnected and that link the accused person to the disappearance and eventual death of Siraji.

These events constitute circumstantial evidence which leads to the irresistible inference that it was the accused who killed the deceased and then took away his motor cycle.

The evidence of recent possession of the motor cycle by the accused was very strong circumstantial evidence that he was responsible for the death of Siraji who was last seen riding it prior to its coming into possession of the accused moreover illegally because the actual owner Mwambu PW5 confirmed he had given to Siraj and not the accused person.

The motor cycle was identified by PW5 Mwambu as the motor cycle he had bought for Siraj to do boda boda business and it was the same motor cycle Siraj was riding on 25. 3.2011 when he last saw him.

PW6 Namono Zaituni , identified the Nokia phone as belonging to her deceased son Siraji.

In **Katumba John Bosco and another v Uganda, SCA 34 of 1999**, the Supreme court reiterated its position that

*‘ in the case of circumstantial evidence surrounding a robbery or theft, if the prosecution adduces adequate evidence to show that accused was found in possession of goods recently stolen or taken as a result of a robbery, the accused must offer some credible explanation of how he came to possess the goods, otherwise the evidence of recent possession would justify his or her conviction’*

In his defense, the accused gave sworn testimony in which he stated that he was in jail at the time Siraj died and therefore he could not have killed him. It was his evidence that he was in prison and was released on 20.1.11 and re-arrested on escape charges on 14.2.11 and returned to prison on 16.3.2011 where he stayed and was charged on 4.4.11 with escaping . He stayed in prison until 10<sup>th</sup> October 2013 when he was brought to Uganda .

There is some truth in the evidence given by the accused person in as far as he confirms he was re—arrested in March 2011 because indeed he was arrested on 25.3.2011 and detained when he broke through a border post without stopping and was chased and arrested , then detained at Lodwar police station where AIP Osakam found him between 26<sup>th</sup> and 30<sup>th</sup> March 2011.

It is also true that he served a two year sentence in Kenya after which he was handed to Uganda police on 22.11.2013., a fact attested to by AIP Osakam in his evidence in cross examination.

However, the accused person’s claims that he was in jail on 25.3.2011 do not hold because he was placed in Moroto on 25.3.2011 by Kocho and Otim and in Lodwar police station on 26<sup>th</sup>, 28<sup>th</sup> and 30<sup>th</sup> March 2011 by AIP Osakam. Two weeks prior to 25.3.2011, he was seen by PW4 Ekiru at the home of his brother in Lokiriama.

With respect to murder, I find that the circumstantial evidence of possession of property that had been in possession of Siraj and then the fact of his unlawful death as well as cut wounds found on the body lead to the inference that the accused murdered the deceased with malice aforethought.

With respect to aggravated robbery, the very fact that the accused was found in possession of property that belonged to the deceased is credible evidence that the accused violently robbed the deceased.

I agree with the two assessors that the state has proved beyond reasonable doubt both murder and aggravated robbery as indicted. He is accordingly convicted of both counts as indicted.

**DATED AT MOROTO THIS 29<sup>TH</sup> DAY OF JULY 2016.**

**HON. LADY JUSTICE H. WOLAYO**

### **Sentence**

As submitted by the state, the deceased was a vulnerable young man who honestly believed that the accused person was a genuine passenger only to be betrayed and killed. The community impact statements show that the community seeks protection of the boda industry from criminal elements.

The family suffered loss of their young son.

That the accused is a young man is a mitigating factor.

Appropriate sentence is 40 years imprisonment on each count.

As accused person has been on remand since November 2013, he is sentenced to 37 years and four months imprisonment on each count.

Sentence to run concurrently.

Right of appeal explained.

All Exhibits to the returned to the family of the deceased.

**LADY JUSTICE H. WOLAYO**

**29.7.2016.**