

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT MASAKA**

**Criminal Session Case No. MASAKA-CR-0075 of 2013**

**UGANDA ::: PROSECUTION**

**VERSUS**

**KASUMBA CHARLES**

**KALIBBALA GODFREY ::: ACCUSED**

**J U D G M E N T**

**BEFORE: HON.LADY JUSTICE MARGARET TIBULYA**

The accused stand jointly indicted with two counts. In the first count they are indicted with **Murder** contrary to sections 188 and 189 of the Penal Code. In the second count they are indicted with **aggravated robbery** contrary to sections 285 and 286(2) of the Penal Code.

The brief facts of the case are that Pw4 NamatovuAnnet went to visit the accused persons. She found one Zinunula, the accused's young brother and a motor cycle outside their house. She

entered the house and found them hold Lubegas neck. Lubega was telling them that “**Muko, leave me, what have I done to you?**” It was about 4:30/5:00Pm.

**Pw4** with her 21/2 year old baby and **Zinunula** ran away but A2 ran after them and took them back to the house. A2 then commented that the deal had flopped, and that they should let Lubega go, but Pw4 realized the he had already died because his legs were just being dragged. The accused each held Lubega by hand and dragged him out, leaving Pw4 and Zinunula inside the house. They closed the house. Pw4 heard the noise of hoes digging the ground.

The accused later came back and left the hoes outside. A1 entered while A2 rode away Lubega’s motor cycle which was outside.

Pw4, Zinunula and A1 remained in the house for a week. She was given food and drinks but she was only allowed to go out when she was with them. Towards the end of the week A1 told her that he was going somewhere and told her to remain with Zinunula. When she was told that A1 had gone to Kampala she ran to Sembabule. Meanwhile the relatives of Lubega had started looking for him

While in Sembabule, Pw4 was over-heard telling a friend that those looking for Lubega were wasting their time since he was dead. The relatives and friends of the deceased then questioned her about the issue and she revealed that the accused had strangled him. She showed them where he had been buried and the body was exhumed.

When A2 was arrested he took the police to a parking yard in Nyanama trading centre where the motor cycle **UDT 459R** Red Bajaj Boxer was. The motor cycle was returned to its owner after it was exhibited. The exhibit slip is **exhibit P2**. A1 was got when he went to a parking yard looking for where to sleep and the night guards, suspecting that he wanted to steal from there arrested him.

In his defense A1 (**Kasumba Charles**) said that one day he was in his garden when he heard an alarm coming from his father’s home. When he went there he found people armed with all kinds of implements beating his father. The assailants threatened to kill all relatives of his father. He

ran away and rung A2 to inform him of the death of their father. He moved from Sembabule to Kampala where he got a job. One day he was arrested and beaten while being asked about Luyombya and Kalibbala (A2). He was detained and made to sign things he did not know before he was taken to court.

A2 (**Kalibbala**) said that on the 13th October while at Nyanama he received a call from A1 (Kasumba) informing him of the death of Luyombya. He rung one Nalukwago his sister for better particulars. She informed him that the people who had killed Luyombya had threatened to kill all his relatives. On 19<sup>th</sup> October he was arrested and taken to Sembabule where he was joined on a file with Kulumba, Kisekka and Sekamate. While at Sembabule he was tortured before he made a statement. He was later taken to court.

### **BURDEN AND STANDARD OF PROOF**

The prosecution bears the burden of proving the guilt of each accused person, and this, beyond reasonable doubt. The burden does not shift except in a few exceptions. This case does not fall in the exceptions, see **Woolmington vs. DPP (1935) AC 462, 481 & 482** which has been quoted with approval in **Tuwamoi vs. Uganda EACA 1967 P.84 at Page 97** and in **Uganda vs. Joseph Tole 1978 HMB P 269**.

In a murder charge the state had to prove;

- 1. The death of a human being,**
- 2. That the death was unlawful,**
- 3. There was malice aforethought,**
- 4. The participation of the accused.**

### **THE DEATH OF A HUMAN BEING**

The fact that **Lubega Dominic** died was not disputed by the defense. A post-mortem report (**Exhibit P 1**) was allowed in evidence in this regard. I find that this ingredient was sufficiently proved.

#### **THAT THE DEATH WAS UNLAWFUL**

It is trite law that every homicide is presumed to be unlawful unless circumstances make it excusable, see **R. Vs. Busambiza s/o Wesonga 1948 15 EACA 65** and **Akol Patrick & Others vs Uganda (2006) HCB (vol. 1) 6**. The term ‘homicide’ has been invariably defined as the killing of a human being by another human being, see **‘Dictionary of Law’, Oxford University press, 7<sup>th</sup> Edition, 2009, p.264.**

Conversely, what would amount to excusable or justifiable circumstances would include circumstances like self-defense or when authorized by law, (**Uganda vs Aggrey Kiyingi & Others Crim. Sessn. Case No. 30 of 2006**).

*Excusable homicide* has been defined as **‘the killing of a human being that results in no criminal liability because it took place by misadventure or an accident not involving gross negligence.’** On the other hand, *lawful or justifiable homicide* is deemed to occur **‘when somebody uses reasonable force in preventing a crime or in arresting an offender, in self defence or defence of others, or in defense of his property, and causes death as a result.’** See **‘Dictionary of Law’, Oxford University press, 7<sup>th</sup> Edition, 2009, pp.216, 264.**

In the present case no evidence was adduced to suggest that the deceased’s death was excusable, justifiable or accidental. The condition the deceased was found in points to the deceased having been unlawfully killed. The evidence is that a rubber string was found tied around the neck of the body of the deceased. Medical evidence shows that the deceased died of strangulation. The accused simply denied responsibility for the deceased’s death. They did not claim that his death was lawful. I find that the deceased’s death was sufficiently proved to have been unlawful.

## MALICE AFORETHOUGHT

Section 191 of the Penal Code Act provides that “**Malice aforethought may be established by evidence proving either of the following circumstances:**

- (a) **an intention to cause the death of any person ...**
- (b) **knowledge that the act or omission causing death will probably cause the death of some person, although such act is accompanied by indifference whether death is caused or not ...”**

Malice aforethought in murder trials can be ascertained from the weapon used, (*whether it is a lethal weapon or not*); the manner in which it is used, (*whether it is used repeatedly or the number of injuries inflicted*); the part of the body that is targeted or injured, (*whether or not it is a vulnerable part*), and the conduct of the accused before, during and after the incident, (*whether there was impunity*). See **R. vs Tubere (1945) 12 EACA 63**, **Akol Patrick & Others vs. Uganda** (supra) and **Uganda vs. Aggrey Kiyingi & Others** (supra).

Pw4 (**Namatovu**), testifying about how the deceased met his death said that she saw both accused persons holding Lubega’s neck while he was asking them what the problem was. He was later dragged out of the house dead and was buried.

Pw4’s evidence tallies with the evidence of Pw3 (**Bukenya**) that the deceased’s body had a rubber string around its neck, and the medical evidence that the deceased had died of strangulation. The evidence as to the presence of the rubber string around the neck and the medical evidence as to the cause of death provide sufficient basis for the finding that the deceased died due to strangulation.

A neck is a vulnerable part of the body which if targeted by an assailant, imputes malicious intent on his part. In **Nanyonjo Harriet & Another vs. Uganda Criminal Appeal No. 24 of 2002** (SC) it was held that “**For a court to infer that an accused killed with malice aforethought it must consider if death was a natural consequence of the act that caused the death, and if the accused foresaw death as a natural consequence of the act.**”

What a trial judge has to decide, so far as the mental element of murder is concerned is whether the accused intended to kill. In order to reach that decision the judge is required to have regard to

all the relevant circumstances, including what the accused said and did. See **R v Nedrick (1986) 1 WLR 1025** and **R v Hancock [1986] 2 WLR 357**. The existence of malice aforethought is not a question of opinion but one of fact to be determined from all the available evidence. See **Nandudu Grace & Another vs. Uganda Crim. Appeal No.4 of 2009** (SC) and **Francis Coke vs. Uganda (1992 -93) HCB 43**.

In the present case the post mortem report indicates that the victim died of **strangulation**. Undoubtedly, whoever tied the rubber string around the deceased's neck did so with the full knowledge that his actions would result in death and did foresee death as a natural consequence of these actions.

The intention to kill **LUBEGA DOMINIC** cannot be doubted. There is sufficient proof (**Pw4's**) (**Namatovu's**) evidence of malicious intent which is corroborated with the medical evidence.

I therefore find that the prosecution has proved beyond reasonable doubt that the deceased's death was procured with malice aforethought.

### **THE PARTICIPATION OF THE ACCUSED**

In each of their defenses, the accused put up denials maintaining that they did not know or kill the deceased.

The prosecution sought to rely on Pw4's (**Namatovu**) evidence that she saw both accused persons strangle, kill and bury the deceased. Pw4 (**Namatovu**) knew each of the accused persons well, and the incident took place during day time (**between 4:30 and 5:00Pm**). There was no possibility of mistaken identity, and there is no reason why Pw4 could tell lies against her friends. Her evidence was neither discredited nor shaken by the defense in cross examination.

Moreover it was even corroborated by other independent evidence such as Pw5's (**Kitimbo Abdallah**) that A2 (**Kalibbala**) led the police to recover the motor cycle which was stolen from the deceased. This evidence lends support to Pw4's evidence that A2 (**Kalibbala**) rode away the motor cycle after killing its owner. Added to that is Pw1 (**Nabaweesi Rose**), Pw2 (**Kiwanuka Jamil**) and Pw3 (**Bukenya George**)'s evidence that the deceased's body was exhumed from behind the accused's uncle's house near A1's (**Kasumba's**) home.

The Medical evidence as to the cause of death also supports Pw4's evidence that the deceased was strangled. Pw4 impressed me as a witness of truth. I believed her evidence and rejected the denials of each accused person.

### COMMON INTENTION

S. 20 of the Penal code Act provides that,

*“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence”.*

In **No.441P.C ISMAILKISEGERWA & ANOR Vs UGANDA (C.A NO. 6 of 1978)**, it was held that in order for the doctrine to apply, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence.

The evidence in this case is that both accused persons participated in killing the deceased. Even without applying the doctrine of common intention there is sufficient evidence that each of the

accused persons directly participated in killing of the deceased. The doctrine is however also applicable since they obviously shared a common intention to kill the deceased. The state has proved beyond reasonable doubt that each of the accused persons killed **Lubega Dominic** and in

agreement with the **lady and gentleman** assessors i find each of them guilty of murder and convict each of them as charged in the first count.

## **ROBBERY**

### **THE INGREDIENTS FOR AGGRAVATED ROBBERY.**

1. Theft of property,
2. use or threat to use a deadly weapon during immediately before or immediately after the theft or robbery or causing death or grievous harm,
3. Participation of the accused.

## **THEFT**

Pw4's (**Namatovu**) evidence that after both accused killed him A2 (**Kalibbala**) rode away the deceased's motor cycle, taken together with Pw 5's (**Kitimbo**) evidence that he got A2 with the motor cycle in **Nyanama** leaves no doubt that he stole the motor cycle and moved it to Kampala (**asportation**) as per **Sula Kasiira Vs Uganda Criminal APPEAL No.20 of 1993**), having shared a common intention with A1 (**Kasumba**) to steal it. This sufficiently proves the ingredient of theft against each of the accused persons.

### **THE CAUSING OF DEATH OF LUBEGA DURING, IMMEDIATELY BEFORE OR IMMEDIATELY AFTER THE ROBBERY.**

I believed P4w's evidence about the killing of the deceased and the theft of the motor cycle. I have already found that **Lubega** was killed by the accused persons before A2 rode away the motor cycle. The evidence relating to the cause of death of **LUBEGA** coupled with the recovery of the motor cycle with A2 (**Kalibbala**) leaves no doubt that death was caused during, immediately before or immediately after the robbery.



### **PARTICIPATION OF THE ACCUSED.**

I have already found, on the basis of Pw4's (**Namatovu**) evidence who saw both accused persons strangle, kill and bury the deceased, and Pw5's (**Kitimbo Abdallah**) that A2 (**Kalibbala**) led the police to recover the motor cycle which was stolen from the deceased, that each accused participated in the commission of the offence of robbery.

In agreement with the lady and gentleman assessors I find each accused person guilty and convict each of them of the offence of aggravated robbery contrary to section 285(2) of the Penal Code Act.

**Margaret Tibulya**

**Judge**

**4<sup>th</sup>May 2016.**