

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASAKA

Criminal Session Case No. MASAKA-CR-0061 of 2013

UGANDA ::: PROSECUTION

VERSUS

ATUHAIRE EDWIN alias ROBERT

MULINDWA BRIAN alias IBRA ::: 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. 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 on the 30th November 2012, Pw1 (D/IP Babu Bernard), got information about a dead body that had been dumped at Bwala. He recovered the body, which bore a rope (Exhibit P.5) tied around the neck and the legs. He took the body to the mortuary. Radio announcements were made and the relatives of the deceased came and identified him as Kalyango Steven.

On the same the day the accused were arrested from Kampala while trying to sell the motor cycle which had been robbed from the deceased.

Pw2 Kiyimba Gerald then employer of the deceased testified that the deceased was operating his motor cycle, **UDX 811J** red in color. He got concerned when he took two days without talking to the deceased. A search for him yielded no results. He reported the matter to the authorities, and later got information about a dead body that the police had recovered from Bwala. He went to the mortuary and identified the body as of Kalyango Steven his employee.

He later got information about the recovery of the motor cycle from Kampala. With Pw6 (**D/AIP Lukwago Abdulkarim**) they went to Kampala CPS, where he identified the recovered motor cycle **UDX 811J** red in color as belonging to him. While at CPS Kampala the accused persons

were also shown to him as the ones who had been arrested selling the motor cycle. Upon proof that it was his motor cycle it was returned to him.

Pw3 (**Rushesha Charles**) recorded a charge and caution statement (**Exhibit P.2**) from A1 (**Atuhaire**). A1 admitted the commission of the offence. Pw4 (**D/IP Nyanzi Rashid**) also recorded a charge and caution statement (**Exhibit P.3**) from A2 (Mulindwa Brian alias Ibra), who also admitted the commission of the offences.

Pw5 (**Rose Nampiinga**) an ex-girlfriend of A1 testified that A2 was A1's friend. She knew Kalyango Steven (**the deceased**) whom A1 had introduced to her in 2012 as his Uncle.

One day Kalyango Steven he called her asking her to keep the motor cycle for him. A1 also rung her telling her to keep the motor cycle since he and Kalyango were to go somewhere. The deceased went to her place of work from where they proceeded to her residence where kept the motor cycle. The deceased told her that he would collect it the following day at 10:00 a.m. They then returned to her place of work from where the deceased waited for the accused persons so that they may go to wherever they had planned to go.

She and the deceased stood outside waiting for A1. A1 and A2 later came, but they stopped down the road. It was 8:00 pm. A1 rung the deceased who told her that they had come, pointing at them (A1 and A2). She saw them with the help of the light outside. A1 was putting on a **light green** shirt. A2 was carrying a sack over his back. The deceased went with the accused persons. After a short while A1 came back putting on a **black** shirt. He asked her for the key to the house

so that he gets the motor cycle. Thirty minutes later he returned the key to her and gave her two sweets.

When she went back home the next morning she did not find the motor cycle in the house. She tried to ring the accused's number but it was off. Later A1 rung her while under detention and informed her that Kalyango had been killed.

BURDEN AND STANDARD OF PROOF

The prosecution bears the burden of proving the guilt of the 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**.

MURDER

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 KALYANGO STEVEN died was not disputed by the defence. 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, 7th 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 defense or defense of others, or in defense of his property, and causes death as a result.' See **'Dictionary of Law', Oxford University press, 7th 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 rope was found tied around the neck, and legs of the deceased. 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 unlawful.

THE CONFESSIONS

The accused are said to have confessed to the murder and the robbery. Since the confessions are key to the resolution of the major questions in the case I will first deal with the legal issues posed by their existence before I launch into resolving the rest of the issues in the case.

It is the law that a court should not base a conviction on an uncorroborated retracted confession, but may if it cautions itself and the assessors about the danger of doing so (**TUWAMOI VS UGANDA 1967 EA 84**).

For the confessions in this case I find the necessary corroboration in the fact that the detailed accounts in each of them corresponds with other evidence such as what was found at the scene. I will here-below outline the key aspects of the evidence that fit in well with the account in the accused's confessions;

- Pw1's (D/IP Babu) evidence that he found a rope tied around the neck and legs of the deceased who had been dumped in a maize garden fits in well with the confessions of the accused that they tied the deceased with a rope which A2 had, and threw him in a maize garden.
- The medical evidence that the deceased died of Asphyxia due to strangulation also tallies well with the admission that the accused tied a rope around the deceased's neck.
- There are aspects of Pw5's (**Nampiinga**) evidence which also lend credence to the confessions;
 - Kalyango Steven and A1 asked her to keep Kalyango Steven's motorcycle at her home.
 - She saw A1 and A2 go with the deceased shortly after that. A1 was putting on a **light green shirt** and A2 was carrying a sack containing unknown things over his back.
 - After a short while A1 came back putting on a **black shirt** and asked her for the key to her house so that he gets the motor cycle. Thirty minutes later he returned the key to her and gave her two sweets.
 - When she went back home the next morning she did not find the motor cycle in the house.

- She next heard from A1 when he rung her while under detention, informing her that Kalyango had been killed.

THE DOCTRINE OF RECENT POSSESSION

The prosecution sought to rely on the evidence that the accused were arrested with the motor cycle that had been stolen from the deceased. The accused denied that the motor cycle was

recovered from them, each saying that they were arrested from Masaka and not from Kampala. The prosecution did not adduce evidence as to how the accused were arrested. (**Nampinga**) Pw5's evidence that after the deceased left his motor cycle at her home, A1 (**Atuhairwe**) went and got the key to the house saying that he wanted to get the motor cycle. Further that she gave it to him, he went and later returned the key to her. Also that when she went home the following morning she did not find the motor cycle at home, leaves no doubt that he is the one who removed the motor cycle from where the deceased had kept it.

In their confessions they indicate that they rode to Kampala. That evidence taken together with the evidence of Pw2 (**Kiyimba Gerald**) and Pw6 (**D/AIP Lukwago Abdulkarim**) that they got the accused from Kampala with the motor cycle convinces me that the accused's account of events is a pack of lies. I believed the evidence that they were arrested from Kampala and with the motor cycle.

In **Bogere Moses & Anor vs Uganda Cr. Appeal No. 1 of 1997** (SC) it was held that:

“It ought to be realised that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing so that if there is no innocent explanation of possession, the evidence is even stronger and more dependable than the eye witness's evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable while the later solely depends on the credibility of the eye witness.”

In the later case of Siragi & Another vs. Uganda (supra) the doctrine of recent possession was further clarified:

“The doctrine of recent possession of stolen goods is an application of the ordinary rule relating to circumstantial evidence. The fact that a person is in possession of goods soon after they are stolen raises a presumption of fact that that person was the thief or that that person received the goods knowing them to be stolen, unless there is a credible explanation of innocent possession. It follows that the doctrine is applicable only where the inculpatory facts, namely the possession of the stolen goods, is incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must also be sure that there are no other co-existing circumstances that weaken or destroy the inference of guilt. The starting point for the application of the doctrine of recent possession, therefore, is proof of two basic facts beyond reasonable doubt; namely, that the goods in question were found in possession of the accused and that they had been recently stolen.” (emphasis mine).

In this case there is evidence that the motor cycle was got with the accused persons within a few days of its theft. I find that the confessions were sufficiently corroborated as I have demonstrated, and that they can be safely relied on to ground convictions on both counts.

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)**.

The only pointer as to how the deceased met his death is information in the accused's charge and caution statements that they got hold of him and tied his legs and the collar of his shirt with a rope which Mulindwa (A2) had in a bag. This information tallies with the evidence of Pw1 (D/IP Babu) that he found a rope tied around the neck and legs of the dead body, and the medical evidence that the deceased died of Asphyxia due to strangulation.

The evidence of the presence of the rope around the neck and legs of the dead body and the medical evidence as to the cause of death provide sufficient basis for the finding that the deceased died due to strangulation with a rope.

A neck is a vulnerable part of the body which if targeted by an accused, 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 Asphyxia due to strangulation. In their confessions the accused said that they tied a rope around the deceased's neck and legs after getting him drunk, so he could not talk. Undoubtedly, whosoever tied the

rope around the deceased's neck did so in 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 Kalyango Steven cannot be doubted. There is sufficient proof of malicious intent from the admitted actions of the accused which are corroborated in the medical evidence on the court record.

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

The accused denied commission of the offence but I did not believe them in view of the evidence on record which directly links them to the offence of murder. The main pieces of evidence in this regard are the accused's confessions, (exhibits P2 and p3) which were detailed as to what they did, and which I have found to be sufficiently corroborated. Further relevant evidence was that of Pw5 (Nampinga) about the accused's suspicious movements on the fateful night, e.g., how A1 (**Atuhairwe**) after changing shirts got the key to her house saying that he wanted to get the motor cycle which he got, the evidence that the accused were arrested while selling the motor cycle which Pw2 (Mulindwa) identified as the one the deceased had been operating, leaves no doubt that the accused are the ones who killed Kalyango.

I rejected their denials and in agreement with the gentlemen assessors i find each of them guilty of the murder of Kalyango and convict each of them as charged.

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

It should be remembered that the only person who could have testified to the theft is the deceased. But (**Nampinga**) Pw5's evidence that after the deceased left his motor cycle at her home, A1 (**Atuhairwe**) went and got the key to the house saying that he wanted to get the motor cycle. Further that she gave him the key and he went and later returned it to her. Also that when she went home the following morning she did not find the motor cycle at home, leaves no doubt that he is the one who removed the motor cycle from where the deceased had kept it.

In their confessions they indicate that they rode to Kampala. That evidence taken together with the evidence of Pw2 (**Kiyimba Gerald**) and Pw6 (**D/AIP Lukwago Abdul karim**) that they got the accused from Kampala with the motor cycle leaves no doubt that they stole the motor cycle and moved) it to Kampala (**asportation** as per **Sula KasiiraVs Uganda Criminal APPEAL No.20 of 1993**).This sufficiently proves the offence of theft.

THE USE OR THREAT TO USE A DEADLY WEAPON DURING IMMEDIATELY BEFORE OR IMMEDIATELY AFTER THE THEFT OR ROBBERY OR CAUSING DEATH OR GRIEVOUS HARM.

The defense did not dispute the fact that Kalyango died from Asphyxia due to strangulation as per the post mortem report that was exhibited in court. I believed the evidence that a rope was used in the attack. The lethal nature of a rope when tied around the neck does not need to be proved to be so beyond common knowledge.

The evidence relating to the cause of death of Kalyango coupled with the recovery of the rope still tied around his neck leave no doubt that death was caused during, immediately before or immediately after the theft or robbery and that grievous harm was caused during that attack.

PARTICIPATION OF THE ACCUSED.

I have already found, on the basis of the accused's confessions, (exhibits P2 and P3) and on the evidence of Pw5 (**Nampiinga**) and the evidence that the accused were arrested while selling the motor cycle which Pw2 (**Mulindwa**) identified as the one the deceased had been operating, that both accused participated in the commission of the offence.

In agreement with the gentlemen assessors I find each accused 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

29th April 2016.