

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA

HCT-06-CR-SC-0068 OF 2013

UGANDA..... PROSECUTOR

VERSUS

MATSIKO DAN alias ISMA.....ACCUSED

BEFORE: Hon. Lady Justice Margaret Tibulya

JUDGMENT

The accused stands charged in three counts. In the first count he is charged with aggravated robbery contrary to section 285(2) of the Penal Code Act. It was alleged that on the 23rd of July 2012 at Kanoni village in Masaka district he robbed **NAKABUYE MADINAH** of 200,000/=, three gomesis, two woollen blankets, three bed sheets, four skirts, four blouses for children, one pair of trousers of a child, one old towel, five pieces of Muslim women clothes and one table cloth, all valued at Shs 1,000,000/=, and at the time or immediately before or immediately after the robbery was in possession of a deadly weapons to wit a hand hoe and a hammer on the said **NAKABUYE MADINAH**.

In the second count he is charged with murder contrary to sections 188 and 189 of the Penal Code Act. It is alleged that on the same day and place he murdered **NAKABUYE MADINAH**.

In the third count he is charged with attempted murder contrary to section 204 of the Penal Code Act. It was alleged that on the same day and place he attempted to murder **SSALI JIMMY**.

The brief facts are that on the 23rd 12, 2012 **Pw3 (Emmanuel Kasigwa)** found **SSALI JIMMY, (the complaint in count three)** at the door of the late **Nakabuye Madinah**. **SSALI JIMMY** appeared to have been seriously assaulted and his face was swollen. Thinking that **Nakabuye Madinah** was the one who had assaulted him he went to look for her, only to find

her injured and lying on her back in a pumpkin plant behind her house. The police were contacted and they took her and JIMMY SSALI to hospital.

Pws7 and 8 (**KATONGOLE PASCAL**) and (**HITIMANA STANELY**) of Kanoni B village Kagamb-Rakai District, on getting information about the murder from **Pw3 (Emmanuel Kasigwa)**, arrested the accused and searched his house. They recovered blankets, bed sheets, gomesi's, children's clothes, and other clothes from there. When **KATONGOLE PASCAL** the area LC Chairman asked the accused whether he murdered someone he admitted the murder. He similarly admitted to **Pw1 (Cpl Mudooba Isaiah)** who interrogated him upon getting him from Lwentulege police post to where he had been taken upon arrest, and to **Pw5 (D/IP Rashid Nyanzi)** the investigating officer.

Pw4 (SSEMAMDA IBRAHIM), the son of the deceased testified that his mother died from Mulago hospital. A post mortem report indicating that she died of multiple traumas resulting from assault with blunt and sharp objects was received in evidence (**Exhibit P 1**). His further evidence was that his nephew **SSALI JIMMY** sustained injuries and lost his speech to date. The medical examination report relating to **SSALI JIMMY** showed that he had a scar on the right side of the face lateral to the eye measuring 2cm long. A brain Scan revealed linear fracture of the right lesser wing of the sphenoid and both zeugmas, a commuted fracture of the body and alveolar process of the mandible and mucosal thickening in the ethmoid and maxillary sinus. The report showed that **SSALI JIMMY** suffered grievous harm.

Pw4 (SSEMANDA IBRAHIM) and **Pw2 (SHAMIM NANYONDO)** his sister identified the blankets, their mothers gomesis, bed sheets, children clothes and a plastic bag the accused was arrested with as the properties stolen from their home on the fateful night. The exhibit slip relating to the items is Exhibit P4, and the items were received in court and marked exhibits P6.

Pw5 (D/IP Rashid Nyanzi) recovered a blood stained hammer (**Exhibit P7**) from the victims sitting room, while a blood stained hoe (**Exhibit P8**) was recovered from near the victims house by **Pw2 (NANYONDO SHAMIM)**.

Pw6 (D/IP Babu) recorded a charge and caution statement from the accused (**Exhibit P9**). In the statement the accused confessed to the commission of the crimes.

In his defence the accused said that he was arrested on the 26th July 20012, but that he did not see anything being recovered from his house. He does not know how the exhibited items were brought. He only saw the items on the 5th of April 2016, at the hearing.

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.**

The main aspect of the state evidence include a confession the accused is said to have made to the police, and evidence that recently stolen properties of the victim were recovered from the accused. This being so, it is prudent to first determine the legal issues relating to this evidence since it is bound to come up through the process of resolution of all other issues in the case.

The confession

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**). In this case the confession was quite detailed. It for example mentions the instrument, a hoe which was used in the attack. A blood stained hoe was indeed recovered from the scene. The statement also mentioned details of what happened at the scene which could have only been known by the assailant. The fact that even **Sali Jimmy** had been injured during the attack could only be known to an attacker who knew the family. There is evidence that the accused used to work for the deceased. On the basis of those facts I believe that the confession is genuine and could on its own form the basis for conviction.

I however believe that the necessary corroboration was furnished by the fact that recently stolen property was recovered with the accused. The accused denied that the property was recovered from him but P.w's 7 and 8 (**KATONGOLE PASCAL**) and (**HITIMANA STANELY**) were independent witnesses who had no reason to wrongly incriminate the

accused. They appeared to be witnesses of truth. I believed their evidence about the recovery of the properties with the accused.

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

“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).

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. We therefore have to work backwards, starting from the fact of recovery of the properties. Prosecution relied on the direct evidence of P.w's 7 and 8 (**KATONGOLE PASCAL**) and (**HITIMANA STANELY**) who testified that assorted properties identified by **Pw2 (SHAMIM NANYONDO)** and **Pw4 (SSEMAMDA IBRAHIM)** as belonging to the deceased were recovered from the accused's house. This is against the background that the deceased had been attacked and injured at night. In addition the state sought to rely on the accused's statement in which he confessed to the theft.

At the trial the accused denied the charges, maintaining that he did not see any properties being recovered from his house at the time of his arrest. I did not believe his account of events given the evidence of the eye witnesses **Pw's 7 and 8 (KATONGOLE PASCAL)** and (**HITIMANA STANELY**) who were independent and struck me as having been witnesses of truth. I believed the prosecution evidence that the stolen properties were recovered from the accused's house.

For theft to be proved there must be asportation (**carrying away**) of a person's goods without their consent, see **Sula Kasiira Vs Uganda Criminal APPEAL No.20 of 1993**.

Pw's 7 and 8 (KATONGOLE PASCAL) and (**HITIMANA STANELY**) evidence coupled with the detailed account of what took place in the confession, leads to no other conclusion than that the properties were indeed recovered from the accused's house to which they had been carried after the 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 defence did not dispute the fact that **Nakabuye Madinah** died from injuries sustained during the attack. A post mortem report indicating that she died of multiple traumas resulting

from assault with blunt and sharp objects was received in evidence (**Exhibit P 1**). **SSALI JIMMY** also sustained injuries and lost his speech to date. The medical examination report relating to **SSALI JIMMY** showed that he had a scar on the right side of the face lateral to the eye measuring 2cm long. A brain Scan revealed linear fracture of the right lesser wing of the sphenoid and both zeugmas, a commuted fracture of the body and alveolar process of the mandible and mucosal thickening in the ethmoid and maxillary sinus. The report showed that **SSALI JIMMY** suffered grievous harm.

Moreover a blood stained hoe and a hammer which the state maintains were the instruments of attack were also exhibited. It is instructive that the charge and caution statement (**Exhibit P.9**) also mentions the fact that a hoe was used to injure the deceased. I believed the evidence that those were the weapons that were used in the attack. Instruments such as hoes and hammers are deadly, and don't need to be proved to be so beyond common knowledge.

The evidence relating to the injuries sustained by **Madina Nakabuye** and **Jimmy Ssali**, coupled with the recovery of the hoe and hammer that were used in the attack leave no doubt that there was use or threat to use a deadly weapon during, immediately before or immediately after the theft or robbery and that grievous harm was caused during that attack.

PARTICIPATION OF THE ACCUSED.

The prosecution sought to rely on two main pieces of evidence in this regard. The first was the accused's confession and the second was fact that recently stolen property was recovered from the accused. I have already found that the confessing was genuine and could on its own form the basis for a conviction. Nonetheless there was corroboration of the confession from the fact that recently stolen properties were recovered from the accused's house.

I find that the accused's participation in the commission of the offence was been sufficiently proved. In agreement with the gentlemen assessors I find the accused guilty and convict the accused of the offence of aggravated robbery contrary to section 285(2) of the Penal Code Act.

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 **Nakabuye Madina** 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 defence or when authorised 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 arresting an offender, in self defence or defence of others, or in defence 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 before this court as would suggest that the deceased’s death was excusable, justifiable or accidental. The accused simply denied responsibility for the deceased’s death. I am therefore satisfied that the deceased’s death was unlawful.

MALICE AFORETHOUGHT

Section 191 of the Penal Code Act provides that “**Malice aforethought may be established by evidence providing 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, that is, whether it is a lethal weapon or not; the manner in which it is used, that is, whether it is used repeatedly or the number of injuries inflicted; the part of the body that is targeted or injured, that is, whether or not it is a vulnerable part, and the conduct of the accused before, during and after the incident, that is, 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).

It is well recognised that the head is a vulnerable part of the body which, if targeted by an accused, imputes malicious intent on his part, see **Okello Okidi vs Uganda Supreme Court Crim. Appeal No. 3 of 1995.** Further, 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 pay 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, which indicates that the victim died of multiple traumas resulting from assault with blunt and sharp objects was received in evidence (**Exhibit P 1**). In his confession the accused said that he thoroughly beat the victim and left

her bleeding. There can be no doubt that he intended to kill the victim. There is sufficient proof of malicious intent in the medical evidence and in the accused's confession.

A blood stained hoe and hammer recovered from the scene of crime also corroborated the medical evidence that indeed dangerous weapons had been used to inflict the injuries. They are certainly capable of causing death and are they lethal. Given the number and nature of injuries observed in the post mortem examination it is reasonable to conclude that the lethal weapons were used repeatedly.

Undoubtedly, whosoever inflicted the wounds to the deceased did so in the full knowledge that his actions would result in death and did foresee death as a natural consequence of these actions. 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's confession coupled with the fact that the deceased's stolen properties were got with him leave no doubt that he was the killer. In agreement with the assessors, In agreement with the gentlemen assessors i again find that the prosecution has proved that the accused murdered **NakabuyeMadinah**. I find him guilty and convict him as charged.

THE ATTEMPTED MURDER OF SSALI JIMMY

According to **CHERUIYOT VS R [1985] EA 47**, the essential ingredient of attempted murder is the specific intent to murder. In this case the state has to, inter-alia, prove that the accused had the intent to cause the death of **SSALI JIMMY** and there should be manifestation of the positive intention by an overt act.

The main evidence against the accused is his own confession that he thoroughly beat the victim. The medical examination report showed that **SSALI JIMMY** had a scar on the right side of the face lateral to the eye measuring 2cm long. A brain Scan revealed linear fracture of the right lesser wing of the sphenoid and both zeugmas, a commuted fracture of the body and alveolar process of the mandible and mucosal thickening in the ethmoid and maxillary sinus, and that he suffered grievous harm.

There is uncontroverted evidence that **SSALI JIMMY** lost his speech as a result of the injuries. The extent of injuries supports the view that the accused intended to cause death to **SSALI JIMMY**. The manifestation of an overt act was the repeated beating as evidenced by the multiple injuries inflicted on the victim.

In agreement with the gentlemen assessors I find that there is sufficient proof that the accused intended to kill the victim, I find him guilty and convict him with the offence of attempted murder of **SSALI JIMMY** as charged in the third count.

Margaret Tibulya

Judge

29th April 2016.