THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASAKA

Criminal Session Case No. 06-CR-SC-0188 of 2013

UGANDA ::PROSECUTION

VERSUS

NAKIRYA REGINA

KIRYOWA JOHN alias KITONE ::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 doing grievous harm C/S 219 of the penal code Act.

The brief facts are that on the 2nd of July 2013 the deceased (Mutebi) approached Pw2 (**Bbuye Peter**) and told him that his cows had been confiscated, and that he had been seriously beaten. The deceased appeared perturbed. They went to Ttaba police post and reported the issue to the in-charge of the post A/IP Joseph Okuku (**Pw4**). They found when one Joseph and Grace, both children of A1 had already explained the matter to the police.

Pw4 (**A/ipOkuku**) told the deceased to go and report the matter to the LC officials. Bbuye's account however was that Pw4 (**Okuku**) infact told them to go back and that he was to be given his cows. When they went back, Mutebi(**deceased**) went to the accused's home leaving Pw2 **(Bbuye)**at the road.

The deceased was not even allowed to untie the cows. He was instead seriously beaten by A2 **(Kiryowa).** Pw2 ran to go and rescue him but he was also beaten and he failed to rescue him.

He raised an alarm to which one Lusembo(**who is now dead**) responded. A1 however warned Lusembo not to go to her home. Other people, for example **Kizito Ali** (Pw3) also came in response to the alarm. Pw3's evidence was that he saw both accused persons beat the deceased.

The deceased sustained injuries on the head and on the private parts. He ran but fell down while vomiting. He was rushed to hospital where he died about four days after.A postmortem examination was conducted and the report is **exhibit P.1.** The cause and reason for the death was found to have been severe open and closed head injuries and damaged brain tissue due to severe trauma over the occipital region, and cardio-pulmonary failure.

In her defense A1 (**Nakirya Regina**) testified that the deceased (**Mutebi**) and **Bbuye** (Pw2) attacked her with sticks and stones, saying that they had been sent to kill her. They assaulted her son A2 **(Kiryowa).** She raised an alarm to which many people responded. The attackers ran away with their sticks.

She later learnt that A2(**Kiryowa**) had gone to report the incident to the police. She went to the police post, and while there she was informed that A2(**Kiryowa**) had been taken to a clinic for treatment.

A2(**Kiryowa**) testified that the deceased (**Mutebi**) and **Bbuye** (Pw2) went to his home armed with sticks and stones. They told him to go away so that they kill his mother A1(**Nakirya**). One of them hit him with a stick on the head and he fell down unconscious. They tried to go and beat A1(**Nakirya**)but she had entered the house and was raising an alarm. The assailants ran away. A2 then went and reported the matter to the police.

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 hasbeen quoted with approval in **Tuwamoi vs. Uganda EACA 1967.**

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 **MUTEBI JOSEPH alias SULAITI**died was not disputed by the defence. A post-mortem report (**Exhibit P 1**) evidencing the fact that he died 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**.

What would amount to excusable or justifiable circumstances would include circumstances like self-defense or when authorized by law, (**Uganda vsAggrey 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, 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 evidence is that the deceased died as a result of trauma and damage to the brain tissue. 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.

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. vsTubere (1945) 12 EACA 63**, **Akol Patrick & Others vs. Uganda** (supra) and **Uganda vs. Aggrey Kiyingi& Others** (supra).

Pw2 (**Bbuye**) testified that the deceased was seriously beaten by A2 **(Kiryowa). Kizito Ali** (Pw3) said that he saw both accused persons beat the deceased and he sustained injuries on the head and on the private parts. He died in hospital about four days later.A postmortem report (**exhibit P.1)** shows that the cause and reason for the death was severe open and closed head injuries and damaged brain tissue due to severe trauma over the occipital region, and cardio-pulmonary failure.

Pw2 and 3's evidence as to how the deceased was assaulted and the medical evidence as to the cause of death provide sufficient basis for the finding that the deceased died due to the assault.

The evidence that he was assaulted on the head was not disputed. A head 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, (**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, (**Nandudu Grace & Another vs. Uganda Crim. Appeal No.4 of 2009** (SC) and **Francis Coke vs. Uganda (1992 -93) HCB 43.**

The medical evidence shows that the cause and reason for the death was severe open and closed head injuries and damaged brain tissue due to severe trauma over the occipital region, and cardio-pulmonary failure.The intention to kill **Mutebi Joseph** cannot be doubted. There is sufficient proof of malicious intent from the evidence that the deceased was severely beaten on the head as supported by 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 main evidence is that of Pw2 (**Bbuye**) and **Kizito Ali** (Pw3)that the deceased was seriously beaten by the accused persons, and that the deceased sustained injuries on the head and on the private parts. In their defence, the accused maintained that the deceased and Pw2 (**Bbuye)**

attacked them with the aim of killing A1 (**Nakirya**)but that when she entered her house, they assaulted A2 (**Kiryowa**) and he fell unconscious. They ran away with their sticks when A1 raised an alarm.

It seems to be common cause that on the day in issue, at the accused's home, there was some violent interaction between the accused persons on the one hand, and the deceased and Bbuye (Pw2), on the other hand. The only question to be answered relates to what exactly transpired during that interaction.

The only evidence to independently clarify this is that of Pw3 (**Kizito Ali**) and the medical evidence. Pw3 said that he saw both accused persons assault the deceased. His evidence supports **Bbuyes** (Pw2's) in this regard, and is in turn supported by the medical evidence which shows that the deceased was severely assaulted and he sustained damaged brain tissue. The accused put up a denial, claiming that A2 was the victim and that he fell unconscious, but Pw's 2 and 3's evidence as corroborated by the medical evidence negates the defense's account of events. The defense's account is against the weight of evidence and cannot be believed. It is a pack of lies and it is rejected.

SELF-DEFENCE

It is the lawthat even if an accused does not raise a defence but there is evidence of it, the court has a duty to avail it to him, see **MANCINI Vs D.P.P (1942) A.C** 1, which was followed with approval in **DIDASI KEBENGI Vs UGANDA (1978) HCB 216.**

In **Kebengi (supra)** it was held thatit is the duty of the court to deal with all the alternative defences, if any, if they emerge from all the evidence as fit for consideration notwithstanding that they are not put forward or raised by the defense, for every man on trial for murder is

entitled to have the issue of manslaughter left to the assessors if there is evidence on which such a verdict can be given, to deprive him of this constitutes a grave miscarriage of justice".

The defense of self-defense is a complete defense to a homicide, and if proved may lead to acquittal of the defendant, see **Uganda Vs Sebastian Otii (1994-1995) HCB 21**.

In considering the defense of self-defense under **S. 15 of the Penal Code Act**, the principles of English Law apply. These are that a person who is violently or feloniously attacked can repel force by force and if in so doing he kills the attacker that killing is justifiable, provided there is reasonable necessity for killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or apprehended from the attack is really serious. In such cases there appears to be no duty in law to retreat.

In other cases of self-defense where no violent felony is attempted, a person is entitled to reasonable force against an assault, and if he is reasonably apprehensive of serious injury, provided he does all that is necessary in the circumstances to retreat or avoid a fight or disengage from the fight, he may use such force, deadly force included, in the circumstances.

In either case if force used is excessive, but there are other elements of self-defense present there may be conviction of manslaughter.

In ***Palmer Vs R (1971) 1 ALL E.R 1077*** it was held that the question of whether a person acted in self-defense or not is one of fact and each case must be considered and judged on its facts and surrounding circumstances.

In this case the evidence was that the deceased went to the accused's home to get his cows which had been confiscated. The only evidence on record is that he was severely beaten, and any rescue efforts were resisted by the assailants (**the accused persons**). The accused's claim that A2 was the one who was assaulted cannot be believed. It is against the weight of evidence.

The facts and circumstances surrounding this case are such that the accused were not violently or feloniously attacked or assaulted by the deceased to justify their actions. The defense of self-defense is not available to them.

COMMON INTENTION

S. 20of 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 perpetuator 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 assaulting the deceased. Beyond that it is in evidence that A1 (**Nakirya**) threatened those who tried to rescue him and A2 (**Kiryowa**) assaulted Pw2 (**Bbuye**) when he went to rescue then deceased. Even without applying the doctrine of common intention there is sufficient evidence that each of the accused persons directly participated in assaulting the deceased.The doctrine is also applicable since they obviously shared a common intention to assault the deceased.

In agreement with the lady and gentlemen assessors i find that all ingredients of the offence of murder were proved. I find each of the accused persons guilty of murder and convict each of them as charged.

GRIEVOUS HARM

The state has to prove'

1. **the accused assaulted the victim**
2. **that the victim sustained harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.**

Whether the accused assaulted the victim

The victim testified that the accused assaulted him when he went to rescue the deceased. His evidence was lent credence by that of PW3, (**Kizito Ali**) who saw both accused persons assault the victim. The accused persons don't deny the violent interaction with the victim on the day in issue. They only maintain that they were the victims. The medical evidence however shows that the victim, (**Bbuye**) sustained deep cut wounds on the occipital region of the head, and that a skull X-ray is necessary. This evidence supports the complaint of assault. I am satisfied with the evidence that Bbuye was assaulted.

Whether the victim sustained harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.

The medical evidence (Exhibit P1) shows that the victim sustained **"DANGERUOS BODILY HARM",** and I agree with that classification given the evidence that the victim was seriously assaulted and he sustained deep cut wounds on the head. I find that the state has proved that the victim sustained grievous harm, and convict each of the accused persons of causing grievous bodily harm as charged.

Margaret Tibulya

Judge

29th April 2016