

**THE REPUBLIC OF UGANDA**

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

**Criminal Session Case No. MASA-KA-CR-0080 of 2011**

**UGANDA:.....PROSECUTION**

**VERSUS**

**TWINAMATSIKO MOSES:..... ACCUSED**

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

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

The accused stands indicted with the Murder of **BYEKWASO JOY** contrary to Sections 188 and 189 of the Penal Code.

Brief facts.

On the day before the murder the deceased was attacked by one Muhwezi Samwiri and others. There was a scuffle in which the accused hit Pw1 (**Owokushaba Derrick**) with a stone on the head and Pw3 (**Mulamuzi Duncan**) and one Kashaija sustained injuries. Pw3 (**Mulamuzi Duncan**) and Kashaija were admitted in a clinic.

The next morning the deceased prepared food which was to be taken to Pw3 (**Mulamuzi Duncan**) and Kashaija who were in the clinic.

Pw2's (**Owomugisha Eric**) account of events was that he was taking the food with one Eva and on the way, the accused (**Moses**) who had a panga and a stick and **Tumuhirwe** who had a stick emerged out of the bush by the road side and assaulted Eva. The accused tried to cut Pw2 but the panga landed on the bicycle which he had. He threw the bicycle down and ran back home.

At home he alerted Pw1 (**Owokushaba Derrick**) and **Dan** that they were going to be killed. As Pw1 (**Owokushaba Derrick**) was running away from home he looked behind and saw the accused (**a.k.a Musa**) coming with a spear and a panga. Pw1 (**Owokushaba Derrick**) came back home later in the evening and found when **Joy Byekwaso** had been killed. The body bore cut wounds on the neck and the arm.

Pw2's (**Owomugisha Eric**) further evidence was that as he was still alerting the people at home of the impending danger, Tumwine, Tushabe and others came from Roberts home. He then ran away and hid in a thicket which was on a hill about 150 meters from the home, from where he saw all that took place.

After about 30 minutes he saw the accused and Tumuhirwe join the other intruders. They broke the windows of the house in which the deceased had hid and lit dry banana leaves which they threw inside the house. The deceased came out of the house and as she was running to the banana plantation, the accused hit her with a stick in the back and she fell down.

The other assailants joined him and assaulted her. The accused cut the deceased on the neck with a panga and she died. Pw2 came out of the thicket after the police had come to the scene, an hour after the assault. He could see what was happening because he was hiding up a hill over-looking the scene of the murder.

Pw4 (**Byamukama Godfrey**) was at one Kashangaki's home when he saw the accused (**armed with a panga**) in the road which goes to the deceased's home. He also saw Tumuhirwe and Tumushabe each with a stick. They went to Tumwine Edisa's home, and after some time he saw them going to the deceased's home.

There is a distance of about 1.5Km from Kashangaki's where he was to the deceased's place only that it is bare ground with no trees. From where he was he saw the house burning and he

also the accused cut the deceased with a panga. There are no trees in the area and yet there is a valley between the homes. He could therefore see what was going on at the scene. When he went to the scene he found the deceased dead. From the time he saw the accused persons go to the deceased home to the time he found the deceased dead was an hour. He rung the chairman LC111 who rung the police. The dead body bore cut wounds on the head, hands and the legs.

According to Pw6 (**Cpl Muhwezi Justus**) the accused admitted having killed the deceased using a panga which he said he had thrown in the bush. The accused led him to recover the blood stained panga from Lwebitebe hills in a bush about 500 meters from the scene. It was handed over to Pw5 (**D/Sgt Kigaye**), and received in evidence as exhibit P1. At the scene Pw5 saw the body which bore cut wounds.

In his defense the accused testified that one Sunday the deceased with Kashaija Bernard, Munene Duncan, Kanyama and Eva assaulted him. Ambrose and Sam were badly assaulted and he took them to a clinic in Kakyera. As he was going back home at about 9:00 Pm he heard voices of people talking from his home. He went to one Constance Tumuheirwes home and when there, one Edisa Tumwine came running and told him that his house had been burnt. He spent that night at Edisa Tumwines home.

The next morning he was alone in the garden when Kanyama and the deceased attacked him. They threw a stone at him and he dodged it. He ran away and entered Edisa Tumwines house. Fearing that it could be set on fire he came out.

The deceased hit him with a stick on the head. The stick bounced back and landed in the grass. The deceased then told Kanyama to kill him. Kanyama raised a panga to cut him but the accused had a stick which he raised to protect himself. The panga hit the stick. The deceased also had a panga. The accused protected himself from both attackers. He does not know which of the pangas hit the deceased and she fell down. Kanyama ran away.

In cross examination he said that he surrendered to the police and told the police that he had murdered someone. In answer to a specific question the accused confirmed that he is the one who murdered the person. He further said that he led the police to the recovery of the murder

panga, but that the panga was not his. The deceased was pierced once in the neck. The incident took place at mid-day.

In re-examination he said he picked the panga and hid it fearing that Kanyama and Munene could use it to kill him. The pangas at the scene were for Kanyama, Munene and the deceased, who had gone to kill him.

Dw2's (**Muhwezi Samwiri**) evidence was that there was a land dispute between the accused and the deceased. Further that the accused was frustrated in trying to have it resolved.

Dw3 (**Nagaba Clinton**) said that he saw Kashija, Kanyama and the deceased chasing the accused with pangas and sticks. He ran to go and inform their aunts Tumushabe and Tumuheirwe, and does not know what followed.

### **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**.

In a charge of murder the state has 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 JOY BYEKWASO died was not disputed by the defence. A post-mortem report (**Exhibit P 4**) was allowed in evidence as an agreed fact. 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 body was found in, bearing cut wounds on the neck and arms, points to the deceased having been unlawfully killed. The accused simply denied responsibility for the deceased's death. He did not claim that her death was lawful. I find the fact that deceased's death was unlawful sufficiently proved.

#### **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 evidence as to how the deceased met her death is that she was beaten with sticks and cut with a panga. The evidence of Pw1 (**Owokushaba Derrick**), Pw2 (**Owomugisha Eric**), Pw4 (**Byamukama Godfrey**) and Pw5 (**D/Sgt Kigaye**) is that the body bore cut wounds on the neck and the arms. The medical evidence (exhibit P4) also supports that evidence and attributes the death to Hemorrhagic shock following multiple cut wounds,

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 evidence in the post mortem report and that of the witnesses who saw the body leaves no doubt that whosoever cut 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 those actions. The intention to kill **JOY BYEKWASO** cannot be doubted.

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 prosecution sought to rely on two pieces of evidence to prove that the accused committed the offence.

1. The evidence of eye witnesses; Pw2 (**Owomugisha Eric**) and Pw4 (**Byamukama Godfrey**)
2. The evidence that the accused admitted the commission of the offence and led the police to the recovery of the murder Panga.

The accused denied commission of the offence and said that he was attacked by the deceased and two others and that during the scuffle, the deceased was cut by either her own or her colleagues panga which bounced after it hit a stick the accused had used to protect himself.

First of all, the prosecution evidence was clear that the accused went to the deceased's home and killed her from there. The contention that the deceased was the one who attacked the accused from one Edisa Tumwine's home was only advanced at the defense stage. Pw 1(**Owokushaba Derrick**), Pw2 (**Owomugisha Eric**) and Pw4 (**Byamukama Godfrey who seemed to have been a neighbor to both parties and an independent party in the matter**) all said that the attack took place at the deceased's home. Pw 2 and 4 testified that the accused hit the deceased with a stick in the back and when she fell down the accused cut her with a panga.

Basing on the way they answered questions put to them, the eye witnesses impressed me as witnesses of truth. Their evidence was corroborated by the medical evidence that the deceased died after she sustained multiple cut wounds on the neck and hands. The defense evidence that she sustained one pierce wound and that she died due to a self or “friend” inflicted pierce wound is against the weight of evidence.

Pw6 (**CplMuhwezi Justus**) testified about the issue of admission of the offence by the accused. It is surprising that the accused was not asked to make a confession given that in both cross examination and re-examination he accepted that he admitted the killing to the police, and even led the police to the recovery of the murder panga (**exhibit P1**) from the bush about 500 meters from the scene. The accused’s explanation that the panga belonged to either the deceased or the person she was with, and that he hid it only because he feared that the assailants could use it to kill him is an obvious afterthought which I reject. I did not believe this explanation in view of the credible evidence that he is the one who murdered the deceased, hid the murder weapon and actually led the police to where he had hidden it.

### **SELF-DEFENCE**

It is the law that 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 that it 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 Oti (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 accused went to the deceased's home and killed her. The facts and circumstances surrounding the case are such that the accused was not violently or feloniously attacked or assaulted by the deceased to justify his actions. The defense of self-defense is not available to him.

I did not find merit in the defense and i accordingly reject it. In agreement with the gentlemen assessors i find the accused guilty of the murder of **Joy Byekwaso** and convict him as charged.

**Margaret Tibulya**

**Judge.**

**13<sup>th</sup> June 2016**