THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0016 OF 2014

UGANDA …… PROSECUTOR

VERSUS

TOKO MICHAEL ANDREW alias COIN ……. ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused in this case is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 16th day of February 2013 at Central Tanganyika Village in Arua murdered one Swadik Yusuf.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that the deceased had a sugar cane plantation in a valley at Central Tanganyika Village in Arua. On 29th January 2013 at around 5.00 pm, he decided to go and inspect the plantation. He found the accused coming out of the plantation with a sugar cane in his hands. He tried to force the accused to go back with him to the plantation to show him where he had obtained it from. The accused resisted and instead started to fight him. The accused was joined by his brother, Drani who pretended to be separating them but was actually siding with the accused. In the process, the accused hit the deceased with the sugar cane at the back of the neck. The deceased collapsed and the two assailants left the scene. One of the neighbours PW4 (Ndito Amina) who had heard the commotion, ran to the scene only to find the deceased on the ground helpless and moaning in pain. He told her the accused had assaulkted him. The accused asked her to inform his wife. Later the accused was taken to Arua Regional Referral hospital where he was admitted

for treatment. Unfortunately he died on 19th Febbruary 2013. The accused who had initially been arrested for assault was charged with murder.

In the unsworn statement he made in his defence, the accused stated that there was an altercation between him and the accused near their houses, as neighbours, regarding the safety of the sugar cane plantation. The deceased lifted the accused head high and ran towards the sugar cane plantation. In the process, he tripped over and fell down hurting his neck. He started groaning in pain. The accused denied being responsible for the death of the deceased.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See *Ssekitoleko v. Uganda [1967] EA 531*). Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v Minister of Pensions [1947] 2 ALL ER 372*).

For the accused to be convicted of murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

The fact of death of a human being may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. In this case the prosecution adduced evidence of a post mortem report prepared by P.W.2 (Dr. Ambayo Richard) and P.W.3 (Dr. Akusa Darlington) which was admitted at the commencement of the trial and received as Exhibit P.E.2, dated 17th February 2013. This evidence is corroborated by the testimony of P.W.1 (O/C CID Swalik Said) which was admitted at the commencement of the trial. He saw the body of the deceased and made a request for the post mortem examination. In his unsworn statement, the accused D.W.1 did not contest this

ingredient. In her submissions, counsel for the accused too does not contest this ingredient. Having considered all the available evidence relating to this ingredient, in agreement with the assessors, I am satisfied that it has been proved beyond reasonable doubt that Swadik Yusuf is dead.

The next ingredient requires proof that the death was caused by an unlawful act. It is the law that any homicide is presumed to have been caused unlawfully unless it was accidental or authorized by law. P.W.2 (Dr. Ambayo Richard) and P.W.3 (Dr. Akusa Darlington) who jointly conducted the autopsy established the cause of death as spinal injury leading to respiratory failure as a result of assault. Their joint report Exhibit P.E.1 dated 17th February 2013 contains the details of the findings. In addition, there is evidence of the dying declaration of the deceased as narrated by P.W.4 (Ndito Amina) who was the first to arrive at the scene where the deceased was lying in agony. P.W.6 (No. 41449 CPL Ceniro Scovia) recorded the statement of the deceased while he was admitted in hospital. The deceased in that statement, which was tendered in evidence as exhibit P.E 5, explained that the injury was as a result of physical assault. He repeated this to his brother P.W.9 (Hassan Yusuf) who participated in taking him to hospital. P.W.8 (Kalsum Saban) one of the neighbours who went to his rescue at the scene, also heard the deceased state that he had been assaulted.

Although in her final submissions, counsel for the accused did not contest this ingredient, the accused DW1in the unsworn statement he made in his defence said the deceased tripped over a hole in the ground and toppled over thereby sustaining the injury. It is the duty of the court to determine whether there was any lawful excuse or justification for the assault for example if it was accidental or in self defence. I find the defence of the accused that the deceased died accidentally incredible. It is not easy to perceive how a person, who did not fall from a height, could break the back of his neck from what is ordinarily soft, swampy soil. His behavior of not offering any help or showing any concern toward the deceased in such circumstance would be consistent with conduct of a sadist. Therefore having considered all the available evidence relating to this ingredient, in agreement with the assessors, I am satisfied that it has been proved beyond reasonable doubt that the death of Swadik Yusuf was caused unlawfully.

The next ingredient requires proof that the unlawful act was actuated by malice aforethought. Malice aforethought is defined by section 191 of the *Penal Code Act* as either an intention to

cause death of a person or knowledge that the act causing death will probably cause the death of some person. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. Malice aforethought is a mental element that is difficult to prove by direct evidence. Courts usually consider weapon used, the manner in which it was used and the part of the body of the victim that was targeted. In the dying declaration, the deceased mentioned the weapon as a piece of sugar cane. PW2 (Dr. Ambayo Richard) and PW3 (Dr. Akusa Darlington) who conducted the autopsy established the cause of death as spinal injury. There was a contusion at c4 – c7 (a cervical spine trauma) and prolapsed (outer portion of the vertebral disc was torn, enabling the nucleus (inner portion) to extrude through the fibers) intervetebral disc c5 – c6 (the spinal segment located just beneath the middle of the cervical spine which helps provide the neck with structural support and flexibility). They also found a healing abrasion on the left elbow measuring 1 cm by 1 cm. They also found a wound on the medial side (toward the middle) of the right knee measuring 1 cm by 1 cm too. These findings are contained in Exhibit P.E.1 dated 17th February 2013.

In this case a piece of sugar cane was found concealed near the place where the deceased was found lying in agony. Discovery of this piece of sugar cane corroborates the dying declaration of the deceased to the effect that a piece of sugar cane was used to hit him on the neck. Anyone who uses a piece of sugar cane to hit a delicate part of the body such as the back of the neck would in my view have reasonable foresight that it is likely to cause death, more so if it is done with such a reckless disregard for the probability of the death of the deceased ensuing. In both instances, it would be the equivalent of an expressed intent to kill. Fatal injuries inflicted on vital or vulnerable parts of the body in a deliberate manner may support such an inference. Although the accused DW1 said that the deceased tripped over and fell down, his version of the events is inconsistent with the nature of the injury.

The law is that court is required to investigate all the circumstances of the case including any possible defences even though they were not duly raised by the accused for as long as there is some evidence before the court to suggest such a defence. In this case, I have considered the possibility of self defence. 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 defence where no violent felony is attempted a person is entitled to reasonable force against an assault, and if he is reasonably in apprehension 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 defence present there may be conviction of manslaughter. In the case before me, although the accused said the deceased at one point in time attacked him before lifting him up and carrying him to the potato garden, if there was any attack it had ended before the accused was carried to the potato garden. At the spot where the deceased collapsed, there is no evidence to suggest that the accused was under any form of attack that would have necessitated repulsion with the aid of that piece of sugar cane. In that case, this defence is not available to him as well.

Therefore having considered all the available evidence relating to this ingredient, and finding that there is no plausible defence that would reduce the degree of culpability of the accused, in agreement with the assessors, I am satisfied that it has been proved beyond reasonable doubt that the death of Swadik Yusuf was caused with malice aforethought.

To prove the last ingredient, that it is the accused that caused the unlawful death, the prosecution should adduce credible evidence placing the accused at the scene of the crime as the perpetrator of the offence. The only identifying witness was the victim who is now dead. The prosecution relied on his dying declaration. A dying declaration is a statement made by a person as to the cause of his or her death, or as to any circumstances of the transaction which resulted in his or her death, whether the person who made it was or was not, at the time when it was made, under expectation of death. The law is that evidence of dying declaration must be received with caution because the test of cross examination may be wholly wanting; and particulars of violence may have occurred under circumstances of confusion and surprise, the deceased may have stated his inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Particular caution must be exercised when an attack takes place in the darkness when identification of the assailant is usually more difficult than in daylight. The fact that the deceased told different persons that the appellant was the assailant is no guarantee of

accuracy. It is not a rule of law that in order to support conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is generally speaking very unsafe to base conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subjected to cross examination unless there is satisfactory corroboration.

I am satisfied that the defence of the accused corroborates the dying declaration. In the unsworn statement he made in his defence, the accused DW1did not deny having been at the scene of the crime only that he had a different version of the events, which version has been rejected as untrue. His defence of accident having been rejected and self defence discounted, he has been effectively placed at the scene of the crime as the perpetrator of the offence. The element of causation does not appear to be contested. Evaluate all the evidence and determine whether it is the accused that caused the death of the deceased. Having considered all the available evidence relating to this ingredient, in agreement with the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that it is the accused who caused the death of Swadik Yusuf.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby convict the accused for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Arua this 25th day of August, 2016.

Stephen Mubiru

Judge.

30th August 2016

3.10 pm

Attendance

Ms. Andicia Meka, Court Clerk.

Ms. Harriet Adubango, Senior Resident State Attorney, for the prosecution.

Ms. Olive Ederu for the convict on State Brief.

The convict is present in Court.

SENTENCE AND REASONS FOR SENTENCE

The convict was found guilty of the offence of murder c/s 188 and 189 of the *Penal Code Act* after a full trial. In his submissions on sentencing, the learned State attorney prayed for a deterrent sentence on the following grounds; the offence carries the maximum penalty of death. Life is sacred and ought to be respected. He therefore deserves a deterrent sentence for him and other members of society who might consider killing others.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender and a relatively young man at the age of 38 years. He was looking after his elderly parents and younger siblings. He has been on remand since February 2013. He is remorseful. In his *allocutus*, the convict prayed for lenience on grounds that he was a student at Lodonga P.T.C before his arrest. He was diagnosed as Hepatitis "B" positive while in prison.

The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of the worst cases of Murder. I do not consider this to be a case falling in the category of the most extreme cases of murder. I have for that reason discounted the death sentence.

Where the death penalty is not imposed, the starting point in the determination of a custodial sentence for offences of murder has been prescribed by Item 1 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35 years' imprisonment. I have taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Bukenya v Uganda C.A Crim. Appeal No. 51 of 2007*, where in its judgment of 22nd December 2014, the Court of Appeal upheld a sentence of life imprisonment for a 36 year old man convicted of murder. He had used a knife and a spear to stab the deceased, who was his brother, to death after an earlier fight.

Where there is a deliberate, pre-meditated killing of a victim, courts are inclined to impose life imprisonment especially where the offence involved use of deadly weapons in committing the offence. In this case, there is no direct evidence that the convict used such a weapon, although the evidence established he used a sugar cane. I have excluded the sentence of life imprisonment on that ground. I have nevertheless considered the aggravating factors in this case being; the attack occurred as the deceased was asserting his proprietary rights over his sugar plantation and it was a vicious strike at the neck of the deceased. Accordingly, in light of those aggravating factors, I have adopted a starting point of twenty years' imprisonment.

I have considered the fact that the convict is a first offender, a relatively young man with family responsibilities. I consider a reformative sentence to be appropriate in the circumstances. I for that reason consider the period of fourteen (14) years' imprisonment to be an appropriate reformative sentence in light of the mitigating factors. In accordance with Article 23 (8) of the Constitution and Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, to the effect that the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account, I observe that the convict was charged on 22nd February 2013 and been in custody since then. I hereby take into account and set off a period of three years and six months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of ten (10) years and six (6) months, to be served starting from today.

The convict is advised that he has a right of appeal against both conviction and sentence within a period of fourteen days.

Dated at Arua this 30th day of August, 2016.
Stephen Mubiru,
Judge.