

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CRIMINAL SESSION CASE NO.0006 OF 2014

UGANDA ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

NTEBEKEINE YOSAM:::::::::::::::::::::::::::::::::::::ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused was indicted for Murder contrary to Sections 188 and 189 of the Penal Code Act. It is alleged by the Prosecution that on the 19th April 2013, the accused murdered Nelson Nankunda.

In a bid to prove its case the Prosecution called six witnesses and the accused gave a sworn testimony and called one witness. Counsel agreed to admit in evidence the report on the examination of the body of the deceased and a report on the medical examination of the accused at the preliminary stage of the trial.

Mpirirwe Polycarp was the first prosecution witness who testified as PW3. His evidence was that on the 19th April 2013 at about 10.00pm while walking home he saw the accused standing near a heap of bricks at his rented quarters. The accused stopped him and picked a brick while moving towards PW3. Mpirirwe grabbed the accused asking him what he was up to and it is then that the accused recognized him as the area Councilor. The accused asked PW3 whether he had seen the deceased and a one Beatrice on the way which the witness denied.

PW3 told Court that the accused then narrated to him how the deceased and Beatrice had taken his keys and money and threatened to harm them if he did not get back what they had taken from him. PW3 advised the accused to report to the authorities and moved on to his home.

On the 20th April 2013 PW3 was told by people he met at the home of Tukasirwa Patrick that a person had been killed. He walked with them to where the body was at a spot near

where he had met the accused in the evening. PW3 found the accused and a one Kamugisha at the scene and when the accused saw him he tried to move away but was arrested on his instructions. PW3 then narrated what the accused had told him about the deceased the previous evening. The accused had changed clothes and PW3 advised that a search be conducted at the home of his mother where he claimed to have slept. A wet black pair of trousers and a pink shirt with spots of blood were recovered and taken by Police together with the body of the deceased.

PW4 Reverend Tukamwebonera George, the father of the deceased was informed of the death of his son on the 20th April 2013 and he came to the scene which was near the house rented by the accused. He saw a pool of blood near the house and the body was in a pond next to the house. The accused was at the time locked in the house. PW4 escorted the body to Kabale hospital where a Postmortem was conducted and the body released to him for burial.

PW5 Tukasirwa Patrick is the Chairman of Rwaganiro village where the accused rented the house near which the body of Nankunda Nelson was found. On the 20th April 2013, at 7.00am he was visited by Kamugisha and Maniraguha who told him of a dead body near the house rented by the accused. The accused came around and they all walked to where the body was. PW5 saw bricks with blood near the house and part of the body was lying in a pool.

PW3 narrated what he had heard in the evening and when the accused tried to move away he was arrested and locked up in his house for fear of mob justice. A search at the home where the accused claimed to have slept yielded a wet pair of trousers and t-shirt with blood spots which were taken by Police. Court heard that the Accused's mother told PW5 that the accused had come from their garden at night putting on the clothes taken by Police.

PW6 Tugumisirize Juventa was at her family bar where the deceased was drinking with a one Beatrice when the accused joined them. The accused briefly left and then came back claiming he had lost his keys. The accused was advised to go and look for them in the bar he had been to before coming over to that place. He left at 9.00 pm threatening to harm the deceased and Beatrice if he did not find the keys and the deceased left the bar at 10.00pm. PW6 learnt of the death of the deceased on the 20th April 2013 in the morning.

PW7 Kamugisha Ponsiano was walking with a one Imaniraguha when they saw the accused standing near his home early on the 20th April 2013. They saw blood near where the accused was standing and when they inquired he denied any knowledge of its source claiming he had

slept at his mother's home. PW7 and Imaniraguha later saw more blood near a pool of water in which hang part of the deceased's body. The accused refused to move with them to report to PW5, the village Chairman but he later came following them. He was later arrested when he tried to run away on seeing PW3 coming to the scene.

PW8 AIP Muyambi David is the Police Officer who first visited and secured the scene of crime. He received a call from PW5 and came over to rescue the suspect from possible mob violence. He narrated that the body was in a pool near a house and near it was a pair of wet black trousers that Police from Kabale took for further investigations.

In his defence the accused told Court that he spent the night at his mother's home and while going to work at 7.30 am in the morning, he met PW7 and Imaniraguha who told him that they had seen blood and a dead body at the house he was renting. They all went to report to the Chairman who came back with them to the scene. The accused told Court that Police came and he was requested to record a statement. He denied meeting PW3 the previous evening and even having ever seen him in their village.

The accused in cross examination informed Court that he had gone to his Parents' home at 4.00pm the previous evening and did not leave until the following day. He denied having gone to the bar and drinking with the deceased as Court was told by PW6. The accused attributed his presence in the dock to PW7, Kamugisha who has a land dispute with his mother and therefore hates him. He further denied the clothes recovered from his parents' house and any attempt to escape when he saw PW3 at the scene.

Vanise Musimenta the mother of the accused testified as DW2. Her evidence was that the accused came home at 4.00pm on the 19th April 2013 and stayed for the night. PW7 came to their home on the 20th April 2013 in the morning and asked whether the accused was around. DW2 learnt from a village girl that a person had been killed and they walked to where the body was. DW2 further told Court that people wanted to kill her and the accused. She denied having any grudge with PW5, the Chairman or having any dispute with PW7. She in cross examination told Court that she found the accused at the crime scene and confirmed to Court that she slept in a different bedroom from the accused and could not have known if the accused went out at night.

The Prosecution has the onus to prove all ingredients of the offense beyond reasonable doubt and this burden does not shift except in a few statutory offences. In **Miller V Minister of Pensions {1947}2 ALL ER 372,**

It was stated that beyond reasonable doubt does not mean proof beyond a shadow of doubt or absolute certainty. That if evidence is so strong against a person as to leave only a small possibility in his /her favour, the case is proved beyond reasonable doubt.

It is also the position of the Law that the accused does not have the burden to prove his innocence; a conviction can only be secured on the strength of the Prosecution evidence and not on the weakness of whatever defence the accused presents before Court.

Criminal Case 0426/2010 Uganda Vs Nkurungira Thomas; SCCA No.26/1995 Oketcho Richard Vs Uganda.

The accused in this case fronted an alibi to the effect that he was at his Parents' home all through the night. Under the Law, the accused is under no obligation to prove his alibi but the duty lies on the Prosecution to adduce sufficient evidence to deflate the alibi by placing him at the scene of crime

Criminal Case No.434/1994 Uganda Vs Photo Oring; Uganda Vs Phostin Kobwengye [1988—1990] HCB 49.

The Prosecution in this case must prove that the deceased is dead; that the killing was unlawful; that the killing was with malice aforethought; and that the accused was responsible for the offence.

Regarding proof of death a Postmortem report on the body of the deceased was allowed in evidence by consent of Counsel. The body was examined on the 20th April 2013 at Kabale Hospital and the cause of death established to be intracranial haemorrhage. Under Section 66 of the Trial on Indictments Act a fact or document admitted by consent of Counsel is deemed to have been proved. This sufficiently proves this ingredient of the offence beyond reasonable doubt.

SCCA No.23/1989 Uganda Vs Abbasi Kanyike

The second ingredient concerns whether the killing was unlawful. Under the Law every homicide is presumed to be unlawful and this is only negated by evidence of the killing being a result of an accident or sanctioned by Law. The presumption that this was an unlawful death was not rebutted by the defence and I find that the Prosecution proved this ingredient of the offence beyond reasonable doubt.

Gusambizi s/o Wesonga Vs R [1948]12 EACA 65

Malice aforethought is the intent to bring about the death of another person. A person has malice aforethought when he apprehends that his acts or omission might result into the death of another. This can be inferred from the nature of the weapon used, the number of times it is used, the particular parts of the body attacked and the conduct of the assailant before and after the commission of the offence.

Uganda Vs Ochieng [1992-1993] HCB 80

The Postmortem report indicated a depression on the head of the deceased the bleeding from which led to his death .It suffices to conclude that whoever caused the injury to the deceased intended that death occurs much as it is not clear as to what type of weapon was used.

The Prosecution witnesses did not see the accused committing the offence. What was availed to Court is circumstantial evidence and for this Court to justify an inference of guilt, the inculpatory facts must be incompatible with his innocence and incapable of explanation, upon any other reasonable hypothesis than that of his guilt.

Uganda V Robert Baguma [1988—1990] HCB 74

It was the evidence of PW3, Mpirirwe Polycarp that on the 19th April 2013 at about 10.00pm, he met the accused near where the body was found. That the accused almost hit him with a brick and he had to grab him. The accused asked about the deceased and threatened to cause injury to him and Beatrice unless they gave him his money and keys.PW6 on the other hand saw the accused with the deceased in the bar and the accused left threatening to do harm to the deceased and Beatrice if he did not find his keys. The accused left the bar before the deceased.

The evidence of PW3 and PW6 negative the evidence of DW2 that the accused stayed at home all the night and left for work on the 20th April 2013.How could both PW3 and PW6 have related the Accused's anger about the keys and the two people he threatened unless they

heard it from him? What could explain the presence of the dead body near the house rented by the accused, with broken pieces of bricks next to it and near where he had confronted PW3 with bricks?.

Kamugisha who testified as PW7 narrated how the accused was found standing near the house he was renting. PW7 and Imaniraguha saw blood and the body which the accused allegedly had not seen yet it was a few meters away from where he was standing. What then was he doing at the scene of crime that early when he had slept at his Parents' home?

The accused attributed his being framed to Kamugisha who he said had a land dispute with his mother DW2. In her evidence however, DW2 denied having any dispute with Kamugisha. I find this not only to be a grave contradiction in the evidence of both witnesses but an attempt by the accused to tell lies to Court about PW7 who was the first person to see him at the scene of crime.

The accused told Court that he met Kamugisha and Imaniraguha while going to work on the 20th April 2013. On the other hand DW2, the mother told Court that it was Kamugisha, PW7 who came to their home in the morning while the accused was still at home. I find this to be another grave contradiction in the evidence and a confirmation that the accused could leave his parents' home without the knowledge of his mother DW2. It also confirms the evidence that he was at the bar at night and the mother sleeping in a different bedroom did not know.

The evidence adduced by all Prosecution witnesses was clear about the failed attempt to escape from the scene by the accused when he saw PW3 coming with PW5. This was not rebutted and the only inference to be drawn is that the accused knew what had transpired between him and PW3 the previous evening. The attempt to escape is not conduct of an innocent person and it justifies the evidence of PW5 and PW7 that he had to be locked away to avoid mob justice by the enraged crowd.

Counsel for the accused raised contradictions in the evidence relating to the clothes retrieved from the house of DW2. There were contradictions as to who conducted the search and the colour of the shirt recovered from the house. PW7 on the other hand did not see any recovery of cloth from the home of DW2 but recalls seeing a black pair of trousers said to belong to the deceased. All these exhibits were not produced in Court.

Counsel for the Prosecution conceded to the contradictions remarking that they are minor and do not go to the root of the case. I wish to observe that failure to produce exhibits in Court by

the Prosecution does not necessarily mean that the Prosecution has failed to discharge its overall burden.

Katushabe V Uganda [1988—1989] HCB 59.

It was also pointed out by Counsel for the accused that PW7 was with a one Imaniraguha when they allegedly met the accused at the scene of crime on the 20th April 2013. It was argued that Court should draw a negative inference from the decision not to call Imaniraguha as a witness. Section of 133 of the Evidence Act does not prescribe a particular number of witnesses to prove any fact and this Court cannot draw a negative inference from the decision not to call a particular witness. The accused himself in his defence mentioned meeting Kamugisha with Imaniraguha..

The law is that Court is required to investigate all the circumstances of the case including any possible defences even though they were not raised by the accused for as long as there is some evidence before Court to suggest such a defence. PW3 and PW6 told Court that the accused was enraged by the alleged taking of his keys and money from him by the accused. Did this amount to provocation under section 192 of the Penal Code Act?

I suggest it could not and the accused could not argue that he committed the offence in the heat of passion. He left the bar and walked to the chosen place to prepare for the attack. The accused asked PW3 about the deceased and got the appropriate advice to report his complaint to the authorities which he never did. There was enough time for the anger to cool since there was a lapse of an hour from when he left the bar to when he attempted to assault PW3.

Before I take leave of this case, I find it pertinent to make a comment on the threats attributed to the accused by PW3 and PW6. These were made against the deceased and Beatrice on the same evening the deceased met his death. The law is that past threats on the deceased by his or her assailant can be good evidence leading to conviction, there must however be sufficient proximity between the threats and the occurrence of the death in order to form a transaction. I find this relevant to the evidence of PW3 and PW6 in this case. The proximity of the threats to the death of the deceased considered with all other evidence circumstantially points to the guilt of the accused.

Uganda Vs Dr. Aggrey Kiyingi HC Criminal Session Case No.0030 of 2006.

It is my finding that the circumstantial evidence adduced by the Prosecution squarely places the accused at the scene of crime. I find him guilty of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act and i accordingly convict him.

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Moses Kazibwe Kawumi

Judge

7th August 2017.