

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**  
**HOLDEN AT MBALE**  
**HCT-04-CR-SC-240-2013**

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

**VERSUS**

**A.2 NAKHAIMA PAUL**

**A.3 WALYAULA ROGERS**

**A.4 MALAKA MOSES**

**A.5 NAKHAIMA FRED**

**A.6 MAINA PATRICK**

**A.8 KISOBOYI WILSON:..... ACCUSED**

**BEFORE: HON. JUSTICE DAVID WANGUTUSI.**

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

The accused persons namely Nakhaima Paul, Walyaula Rogers, Malaka Moses, Nakhaima Fred, Maina Patrick and Kisoboyi Wilson were indicted for murder C/S 188 and 189 of the Penal Code Act of one Adukai Geoffrey a police officer who was killed on duty.

The facts as seen from the Prosecution are that Adukai Geoffrey herein after referred to as the deceased in the company of LUD's, Chairman LC.3 Wasolo and GISO of Bubutuon the

24<sup>th</sup> day of September 2012 went to Buweswa Trading Centre to effect the arrest of a detainee who had escaped with handcuffs.

During the search, the deceased shot and killed a member of the community. The deceased and his entourage panicked and attempted to flee the scene. While the others escaped the deceased was not so lucky. A mob that had gathered in anger beat him to death. The accused persons including Patrick Namisi, LC1 Chairman and John Twale were arrested and charged with murder. They all denied the charge thus bringing forth all the issues in a murder case for trial.

In a case of murder such as this the prosecution is enjoined to prove the following; that there was death of a person, that it was unlawfully caused, that it was with malice aforethought and the accused persons participated in this killing. The burden to prove these ingredients beyond reasonable doubt lies on the Prosecution; **Sekitoleko v Uganda (1967) EA 531**.

Beginning with the issue of death there is no doubt that Adukai Geoffrey died. All the Prosecution witnesses testified to the fact that after Adukai shot a member of the community of Buweswa where he had gone to effect an arrest of an escapee people who were angry with his act beat him to death. Evidence also has it that his body was identified by Etiang Peter to Doctor Bumba Ahmed who did a post mortem and in the report Exh P1 he declared Adukai Geoffrey dead. This evidence is not challenged and therefore it is my finding that Adukai died.

On whether the death was unlawful, it is trite that a homicide will be presumed unlawful unless shown to be accidental or sanctioned by law, **Gusambizi S/O Wesonga v Republic (1948) 15 EACA 65**. Since the death in the instant case was neither accidental nor sanctioned by law it is my finding that it was unlawful.

Turning to malice aforethought, this is a state of mind which is hardly proved by direct evidence. The courts have set down the circumstances, which ought to be considered before making the inference of whether malice aforethought was made out from the evidence, **Tubere v Republic (1945) 12 EACA 63**. The court must consider the type of weapon used, the nature of the injuries inflicted, the part of the body affected; whether vulnerable or not, and the conduct of the accused immediately before, during or after the attack; **Uganda v Turwomwe (1978) HCB 182**. In the instant case the deceased's assailants inflicted lacerations and fractures of the frontal bone, orbit, nasal bones, occiput and parietal bones which injuries lead to his death. The brutality used on the

head which was a vulnerable part of the body must have been done by a person or persons who wanted to cause death; **Mwathi v Republic 2007 EA 334**. It is this court's finding therefore that the deceased's death was accompanied with malice aforethought.

The last ingredient is in regard to whether the accused participated in the death of Adukai Geoffrey. I shall deal with each accused in respect of the evidence against him. From the evidence on record most of the accused persons have only a single identifying witness against them claiming that they saw the accused lift a stone and hit the deceased person.

The evidence of PW1 makes it clear that whatever took place was terrifying and whoever watched the incident was frightened and trembling. As I said before some of the accused persons were identified by single identifying witnesses. This identification by one witness creates problems under certain circumstances. The problem that this raises was stated in **Roria v Republic (1967) EA 583 at 584** in the following words;

*“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner L.C recently in the House of Lords as the course of debate, there may be a case in which identity is in question; and if any innocent people are convicted today, I should think that nine cases out of ten if there are as many as ten-it is on a question of identity. That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”*

Their Lordships of the Court of Appeal restated this position ten years later in **George Kalyesubula v Uganda Criminal Appeal No.16 of 1977** in these words;

*“The law with regard to identification has been stated on numerous occasions. The Courts have been guided by **Abdallah Bin Wendol & Anor v R and Roria v Republic** to the effect that although a fact can be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting identification especially when the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can be reasonably be concluded that the evidence of identification can be safely accepted as free from the possibility of error”*

Re-emphasizing the foregoing points in **Abdalla Nabulere and Anor v Uganda Criminal Appeal No.9 of 1978**, their Lordships laid out points to be considered before placing reliance on the evidence of a single identifying witness thus;

*“The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.”*

PW1 said he saw Malaka, Maina and Kisoboyi, A.4, A.6 and A.8. He said they hit the deceased with stones twenty five meters away from him. From his evidence this must have happened towards 7:00pm. He described the gathering as an angry mob. He said that prior to that he had heard an explosion which turned out to be a bullet shot and he and his customers were trembling.

Although they could still have been light enough a scared and trembling witness watching a mob that was moving up and down struggling to stop people escaping on motorcycles and in a situation where civilians unaccustomed with fire arms had grabbed a gun the identification evidence of such a witness would require support from some other independent evidence.

What would have been evidence in support from PW3 who also saw the accused persons instead weakened the testimony of PW1. PW3 told court that when they came back from the cinema hall and the mob tried to stop them he rode off and was chased by A.4 and A.6. Going by the testimony of PW1 it might have now been approaching 7:00pm. PW3 said they chased him for fifteen minutes. In my view if they chased him for fifteen minutes they must have taken longer on their return journey which certainly must have been after 7:00pm when they returned to the scene of crime.

From the evidence of PW1 and PW3 is painted a picture of two people who were in two different places at the same time. If they were busy beating the deceased then they could not have chased PW3 and yet PW3 told court that immediately they came the crowd became rowdy and that he was chased by A.4 and A.6.

He told court he had the opportunity to look at and observe A.4 and A.6 for fifteen minutes as they chased him. In my view if these people were away chasing PW3 they were away from the scene of crime at the time the deceased was being assaulted.

PW3 told court that the time he took off the beating of the deceased had not begun. The mob was trying to restrain them from escaping. In my view if the chase took fifteen minutes these being human beings the return journey must have taken longer.

A.4 in his sworn statement told court that on the day this incident took place he was away from the village having gone to Namitsa to circumcise “Basiinde” one of whom was the son of DW1 Situma Mumali and nephew of DW2 Clememt Dikett. DW1 and DW2 gave him support and said A.4 was a surgeon “Umukhebi.” They told court that on the 24<sup>th</sup> September 2012, A.4 went to their home and circumcised their sons. After which they hosted him on local brew “malwa.” This evidence was not dislodged by cross examination.

When the accused set up this alibi he did not assume the duty of proving it. It was still upon the Prosecution through evidence to carry the accused person and not only put him at the scene of crime but having done so to proceed to show that while there, he committed the offence complained of. This the Prosecution did not do. Put against the evidence of PW1 and PW3 which contradicted itself on a very core issue of identification leaves the accused’s alibi undisturbed.

The contradiction between PW1 and PW3 seriously weakened and dented the evidence of PW1 so gravely that for it to stand those contradictions had to be satisfactorily explained. They pointed to deliberate untruthfulness on the part of PW1 or PW3 if not both, which affected the main substance of the Prosecution case. These contradictions could not be overlooked because they seriously affected the value of their evidence; **Twehangane Alfred v Uganda Court of Appeal Civil Appeal No. 139 /2001**. The evidence of PW1 and PW3 having lost its value, the required standard of proof beyond reasonable doubt against A.4, A, 6 and A.8 is not established.

A.2 is said to have been identified by PW12 Lydia Ndelema, she told court that when the deceased and his colleagues arrived they packed in her compound and the rest went away leaving PW4 the GISO in the compound. She said she heard many voices and many people chased and stoned OC. She said she saw A.2 with a stone. She also said she saw A.4 and A.6 with a stone. She said they were many people and that amongst those stoning the OC were those she named.

She said she was trembling and run away. She then contradicted herself when she said she run away and that she watched for two hours from 6:00pm to 7:00pm. The evidence of this witness is difficult to believe. First of all six to seven cannot be two hours. Furthermore, PW3 told court that A.4 and A.6 were not there at because they chased him.

PW12 herself said that she was scared and that she runaway. It is the same witness who said she stood there for two hours, and if she watched for two hours a big portion of the watching was done in darkness. A trembling witness, running away coupled with the multitude of the people she said charged the deceased and the darkness that must have engulfed the place are all circumstances most unfavourable for positive identification; **See Abdallah Nabulere & Anor v Uganda Criminal Appeal No.9 of 1978.**

Her evidence is further weakened by the grave contradictions when she says she ran away because of fear and at the same time said she stayed and watched for two hours. This contradiction goes to the root of the matter in as much as there is deliberate untruthfulness which affects the main substance of the Prosecution case.

As for A.3 he was mentioned by PW4 as the person who tried to prevent the deceased from running away. PW4 did not say that he participated in the beating. From the evidence given before court he is shown as a person who was restraining a person who had killed someone from running away. He may have been reckless in not thinking of what the people around might do but such recklessness did not amount to intentions to kill. In the absence of positive evidence of malice aforethought and actual participation in the beating of the deceased, the Prosecution falls short of establishing the participation of A.3 in the beating and causing death of the deceased.

Turning to A.5 the Prosecution alleged that since he had been in possession of a phone that they believed belonged to the deceased he must have been one of those who participated in the murder of the deceased.

PW6 told court that through her investigation she found out that a telephone believed to belong to the deceased had been used by the accused person. She called PW5 who was in actual possession of the phone and he told her that he had got the phone from A.5. That she then arrested A.5 who told her that he had received the phone from PW5. She said in these circumstances she didn't know whom to believe and that without the print out she could not tell

whether A.5 had really committed the offence. This print out she relied upon was not exhibited in spite of the several adjournments to enable the attendance of the author.

In seeking to connect the accused person to the murder of the deceased the Prosecution relied on the doctrine of recent possession. The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation of how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver; **Bogere Moses & Anor v Uganda Criminal Appeal No. of 1997.**

In such a situation before court can rely on that doctrine as a basis for conviction of accused, the possession must be positively proved. First that the property was found with the suspect, secondly that the property was positively the property of the complainant, thirdly that the property was stolen from the complainant and lastly that the property was recently stolen from the complainant. The issue as to time is important because some property like the handsets move easily from one to the other. In the instant case PW6 told court that the phone was used by A.5 at 10:00pm three hours after the deceased had been killed.

She however produced no evidence by way of oral evidence of a person who had seen the accused use that phone at 10:00pm or of a print out to show that the accused's number had been used in that phone or to prove that the deceased was on that day in possession of that very phone.

The phone as exhibited had common features that you would find on any G-Tide by way of colour and shape. There was no evidence to suggest that this phone was the one that the deceased owned. There was even no evidence to suggest that it had been stolen from him and lastly there was no evidence to suggest that it had been stolen from him recently.

If it had been shown that the phone Exh P.13 really belonged to the deceased and it had been stolen recently but had been taken for charging by A.5 to PW5 where he had direct access and could use it at any time to his benefit then the doctrine of recent possession would have been satisfied. In the instant case since there was no evidence to prove ownership, theft and recent theft the doctrine could not apply. The reliance on the doctrine of recent possession to connect the accused to the regrettable deeds of that day is misplaced; **Isaac Ng'ang'a Kahiga vs Republic Criminal Appeal No. 272 of 2005.**

The lone gentleman assessor advised this court to acquit all the accused persons. For the reasons I have given hereinabove I fully agree with him. The Prosecution having failed to prove beyond reasonable doubt the participation of the accused persons I find each and every one of them namely; A.2 Nakhaima Paul, A.3 Walyaula Rogers, A.4 Malaka Moses, A.5 Nakhaima Fred, A.6 Maina Patrick and A.8 kisoboyi Wilson not guilty and accordingly acquit them.

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**DAVID K. WANGUTUSI**

**JUDGE**

**DATE: 13<sup>th</sup> January 2017**