

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**  
**HOLDEN AT MBALE**  
**HCT-04-CR-SC-227/213**

**UGANDA :::PROSECUTION**

**VERSUS**

**ISABIRYE JUMA:::ACCUSED**

**BEFORE: HON JUSTICE DAVID WANGUTUSI**

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

The accused Isabirye Juma stands charged with two counts of murder C/S 188 and 189 of the Penal Code Act and four counts of Aggravated robbery C/S to 285 and 286(2) of the Penal Code Act.

On the first count Prosecution alleges that the accused on the 15<sup>th</sup> day of October 2012 at Namagumba in Mbale District murdered one Cherop Micheal.

The second count alleges that the accused on the 15<sup>th</sup> day of October 2012 at Namagumba in Mbale District murdered one Agnes Khaintsa.

Count three alleges that the accused on the 15<sup>th</sup> day of October 2012 at Namagumba in Mbale District robbed one Musinguzi Gordon while using a gun of a hand bag containing four trousers, two shirts, two T-shirts, four shirts, two belts, a pair of slippers and Nokia Phone with the line No.0710193432 all valued at UGX 500,000/=.

The fourth court alleges that the accused on the 15<sup>th</sup> day of October 2012 while at Namagumba in Mbale District used a gun to rob one Salimo Patrick of a G-Tide phone, cash UGX 250,000/= all valued at UGX 350,000/=.

In the fifth count the Prosecution alleges that the accused on the 15<sup>th</sup> day of October 2012 at Namagumba in Mbale District used a gun to rob Sande Kaps of a Warid mobile phone (ZTE) with line No.0700679026 and cash UGX 70,000/= all valued at UGX 130,000/=.

In the sixth count Prosecution alleges that the accused used a gun to rob Chekwel Vanice of cash UGX 20,000/=, clothes( a suit), a pair of ladies shoes, a hand bag all valued at UGX 500,000 on the 15<sup>th</sup> day of October 2012 at Namagumba in Mbale District.

The facts which emanated from the Prosecution's witnesses are that on 15<sup>th</sup> October 2012 at about 1.15 am a motor vehicle taxi left Kapchorwa town destined to Kampala. In the taxi were several passengers and on the way they picked more. The accused was one of those who were picked on the way. He had suspicious looks because he was putting on shades even though it was still dark.

It is alleged that when the vehicle reached Namagumba bridge there was an electric pole that had been put across the road creating an illegal barricade manned by four armed men two on each side of the road. The driver in a panic attempted to drive over the barricade shots rang out from the robbers' guns; he and another passenger were hit. The vehicle overturned and the driver and that other passenger died. The driver was Cherop Michael and the passenger was Agnes Khaintsa.

The Prosecution alleges that the accused then began stealing property from them by ordering the passengers to undress while threatening them with death if they did not hand over their property. He is said to have boxed PW3 Chekwel Vanice. It is also said that as he removed these things from the passengers he passed them over to the armed robbers. Prosecution also alleges that he took some of the properties while the armed thugs also escaped with others. The accused was later on found on the way with some of the properties and the police suspecting him to be part of the gang that committed the robbery charged him with the murder of Cherop Michael and Agnes Khaintsa. The Prosecution also charged him with robbery of Musinguzi Gordon's property in the third count, on the fourth count of Salimo Patrick's property and on the fifth count with robbery of Sande Kap's property and in the six count with robbery of Chekwel Vanice's property.

At trial the accused denied all the charges thus bringing forth all the ingredients of murder and robbery for trial. At the close of the accused's case the Prosecution having called no evidence in

respect of count 3 and count 5 conceded that there was no evidence against the accused in that regard. Having listened to the Prosecution witnesses and the fact that no evidence was brought out in respect to count 3 and 5 this court finds no reason to consider them and the accused is found not guilty thereof in counts 3 and 5.

The burden to prove all the ingredients beyond reasonable doubt fell upon the prosecution;  
**Sekitoleko v Uganda (1967) E.A 531.**

In the charge of murder the Prosecution was enjoined to prove the following essential ingredients;

1. That the death occurred,
2. That it was unlawfully caused,
3. That there was malice aforethought; and
4. That the accused participated in the crime.

As for aggravated robbery the Prosecution is enjoined to prove;

1. Theft,
2. Presence of a deadly weapon ; and
3. Participation of the accused.

On the issue of death there is no doubt that Cherop Michael died. All the Prosecution witnesses testified that the driver of the vehicle they were moving in was shot by thugs that had way laid them leading to his death. Further his body was identified by Siwa Ashiraf PW2 the conductor of the motor vehicle in which they were travelling to Doctor Muhammed who carried out a post mortem and filed a report Exh P1 on the 15<sup>th</sup> October 2012 declaring the deceased as dead. His death was not contested by the defence. It is therefore my finding that the deceased indeed died.

As to whether Agnes Khaintsa died again all the Prosecution witnesses testified positively to her death. Furthermore, her body was identified by one Mulato to Doctor Rubanza on the 16<sup>th</sup> October 2012. He did a post mortem and came out with a report Exh P2 declaring Agnes

Khaintsa as dead. Lastly the death of Agnes Khaintsa was not contested by the defence to this it is therefore my finding that Agnes Khaintsa died.

On whether the deaths were unlawful, it is trite law that every homicide will be presumed unlawful unless shown to be accidental or sanctioned by law, **Gusambizi S/O Wesonga & Others v Republic (1948) 15 EACA 63**. Since the deaths of Cherop Michael and Agnes Khaintsa were neither accidental nor sanctioned by law, it is my finding that they were 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 inferences of whether malice aforethought accompanied the deaths; **Tubere v Republic (1945) 12 EACA 63**. In considering whether there was malice aforethought it is important for court to consider the type of weapon used, whether that weapon is lethal, the type of the injuries inflicted, and part of the body affected and the vulnerability of the part of the body affected and lastly the conduct of the accused, immediately before, during or after the attack; **Uganda v Turwomwe (1978) HCB 182**.

In the instant case Cherop Michael had sustained gunshot wounds which had led to internal bleeding in the hemthorax which resulted from the accumulation as a result of the gunshot wounds. A person discharging ammunition into the chest of another can only intend the death of his or her victim. It is therefore my finding that whoever discharged these bullets intended the death of Cherop Michael.

Agnes Khaintsa had an open wound which affected her temporal and parietal vessels. The doctor found internal injuries leading to severe bleeding caused by gunshot wounds. Whoever shot her in the head could only have intended death. It is my finding therefore that there was malice aforethought.

On the participation of the accused the Prosecution had little difficulty in establishing that the accused was at the scene of the crime during the incident. The accused himself in his defence told court that he was at the scene of crime. The accused told court that he was in the vehicle together with the complainants and he dozed off then he had a crush at Nampanga. That he heard people shouting outside "leta pesa" that he decided to attack them and they run away. He came

back and asked from one of the passengers for a phone so that he rings police. That then the fellow passengers began giving him their property. When he got out he saw the gunmen but they had no guns and they advised him to go.

From the foregoing it is clear that the accused was at the scene of crime. What remains to be seen is whether the accused was part of the gang that committed the robbery. The Prosecution has alleged that the accused acted in common with the four gunmen who had way laid the vehicle. Common intention was ably described in **Andrea Obonyo & Others v R (1962)1 EA 542** and relied upon in **Oponya v Uganda (1967)1 752** in which their Lordships referred to Section 20 of the Penal Code Act which provides;

*“Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of that purpose an offence is committed of such nature that its commission was a probable consequence of that purpose each of them is deemed to have committed the offence.”*

It would seem therefore that what the Prosecution has to prove here is simply that the two minds of the perpetrators were all thinking of committing the crime which resulted into other crimes. In other words there must be a meeting of minds. It is necessary also to remember here that to prove common intention it is not necessary to prove prior agreement between the assailants. The Prosecution will have done enough if it proves their intention by inference from their actions. The Prosecution would succeed in doing this by proving the presence of the accused persons at the scene of crime, their actions or omissions while there and the failure to disassociate themselves from the attack; **Birikadde v Uganda [1986] HCB 6**.

The question to be answered is, was the accused part of the gang that way laid the passengers. PW2 told court that as soon as the motor vehicle overturned the accused who had all along been trying to hide his identity behind dark shades immediately demanded that the passengers remove their clothes by undressing and handed them over to the gunmen outside. The gunmen also like the accused asked another woman who was seated on the back seat to hand over her clothes, which the accused received and handed over. The accused then went out of the vehicle and disappeared.

When the accused was later on found on the road side PW2 realised that he was the very person who had ordered them to remove their clothes. And they recovered from him stolen properties which included a lesu, jacket, three phones and a sweater.

PW3 also travelling in the same vehicle told court that as they approached Namagumba River the driver who was trying to escape from the thugs accelerated, hit the pole and the vehicle overturned. The driver was shot in the process. The woman who was seated next to him did not have money and he ordered her to remove her clothes handing them over to the armed men outside. That when he demanded for her panties and bra she begged him to excuse her which angered him and he boxed her. He then took clothes from people who were seated behind her while gunmen were checking those seated in front. He took their bags, clothes and phones and she was able to see all these because the accused had removed his shades and the inside motor vehicle lights were on.

The accused then disappeared through the boot of the motor vehicle. She said when later on police came and they were continuing towards Mbale they were waved done by some people and one of those who climbed the vehicle putting on one of the passenger's jacket carrying that passenger's bag, shoes and phones was the accused. PW3 told court that she lost a lesu but recovered a bag and shoes however her London suit was not recovered.

The accused in his defence told court that he removed these things from the complainants to save them from being stolen. I find a lot of difficulty in believing him. The manner in which he conducted himself by threatening them with death if they did not hand over their clothing to the extent of asking them to undress and in respect of PW3 to the last piece of cloth is not action of a person who was helping people in trouble.

If indeed he was saving them, their clothes and property, he would not have handed them over to the robbers. He went to the extent of boxing PW3 in the stomach when she failed to remove her panties and bra. Those were not acts of a good samaritan. What shows that he took the things with intentions of robbing them is his conduct when he went to his aunt's place PW1 Nusula Katono. PW1 sent him to PW4 Mulume Sulaiman the LC1 Chairman who stated that when the accused reached the chairman's place and they told him to take them to where the incident had

taken place, the accused sorted out the good things and put them in one bag and the old things in another and decided to abandon the one with the old things.

PW4 told court that the phones he had were ringing all the time and the accused answered them and told the ringer to stop ringing. The separation of the clothes, sorting into good ones and bad ones, abandoning those he thought were old and useless, the refusal to give his location to people who were ringing only means that the accused person had participated in the robbery and had no intentions of helping the passengers but of permanently depriving them of their property. In fact it is PW4 who took the bag with old things he had abandoned to the police.

The accused told a lie when he said he is the one who called the police because PW6 Patrick Salimo who also lost a phone G-Tide and UGX 250,000/= told court that the conductor was able to phone the DPC Chemonges who came to their rescue. This evidence was not challenged. All in all his ordering the victims to undress and surrender their clothes, boxing PW3 who refused to remove her panties, handing them over to the armed thugs and all the time working together as they removed the items from those seated in the front of the vehicle is sufficient action from which is inferred his intentions of acting together with the four armed thugs which amounts to common intention.

His action shows that he and those thugs acted together to prosecute an unlawful purpose of robbery which resulted into the death of the two deceased persons. There is no doubt that while the four would way lay the vehicle the accused was the inside man travelling with the passengers who were to be their victims. Under these circumstances it does not matter whether the accused pulled the trigger of the guns that shot the deceased persons. What matters is the accused with others formed a common intention to prosecute an unlawful purpose and in the course of that prosecution the thugs shot and killed two people which was a probable consequence of that robbery a situation which renders the accused guilty of the murders because he is deemed to have committed the offences; **Andre Obonyo & Others v R (Supra)**

Earlier the accused through his advocate had intimated of using the defence of insanity. For an accused to rely on insanity as a defence he must prove that at the time of committing the act he was laboring under such a defect of reason from the disease of mind as not to know the nature

and quality of the act he was doing or if he did know it that he did not know that what he was doing was wrong; **the Mc’Naughten Case (1843) 10.**

A medical examination was ordered by this court and Doctor Julius Muron found that at the time of the offence, the accused had a normal level of functioning and that he had clear standing of events of the incident. Furthermore the accused himself in his defence told court that he was not insane even at the time the incident occurred. This defence of insanity was therefore not available for the accused person.

The gentleman assessor advised court to acquit the accused because he was not guilty as a consequence of insanity. For the reasons I have given herein above I with the greatest respect decline. All in all the Prosecution having proved that the accused through execution of robbery, having formed a common intention with the thugs caused the death of Cherop Michael and Agnes Khaintsa I find him guilty of both the offences of murder and accordingly convict him as charged.

The Prosecution also having proved that the accused person participated in the theft of Salimo Patrick’s G-Tide and UGX 250,000/=and also in the robbery of Chekwel Vanice’s UGX 20,000/=, clothes, a pair of ladies shoes and a hand bag he is found guilty and accordingly convicted in both counts of robbery.

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**DAVID K. WANGUTUSI**

**JUDGE**

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