

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA (CRIMINAL DIVISION)**

**HCT-00-CR-SC-0060-2016**

**UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR**  
**VERSUS**

- 1. MUGISHA ABDUL (A1)**
- 2. ETONGOLIT JOSEPH (A2) :::::::::::::::::::::::::::::::::::::: ACCUSED**

**BEFORE: HON. MR. JUSTICE J. W. KWESIGA**

**JUDGMENT**

Mugisha Abdul and Etongolit Joseph are jointly indicted with Murder Contrary to Sections 188 and a89 of the Penal Code Act. It is alleged that the two Accused persons on 9<sup>th</sup> May 2015 at Mulago playground, Kampala District murdered Imalingati Ibrahim. Each of the Accused persons pleaded not guilty.

The moment an Accused person pleads not guilty to a criminal charge, each and every allegation of a fact including the identity of the Accused person becomes an issue that the state/prosecutor has a duty to prove.

The Accused person is presumed to be innocent until he pleads guilty or he is proved guilty. (See Article 28 (3)(a) of the Constitution of the Republic of Uganda.

The prosecution will have proved the Accused person guilty of murder if it adduces evidence that proves beyond reasonable doubt that:-

- (a) The person named as the deceased is actually dead.
- (b) That the death was caused unlawfully.
- (c) That the death was caused with malice aforethought.
- (d) *That the Accused person participated in causing the death, (See Uganda Versus Okello 1992-93<sup>^</sup> HCB 68. G Okello J. (as he then was) held "To prove murder, it must be shown that the deceased is dead, his death was unlawfully caused, it was caused by the Accused person with malice aforethought The burden is on the prosecution to*

*prove the case beyond reasonable doubt".*

I will examine the available evidence regarding each of the essential elements of the offence stated above.

**(a) Death:**

It is not in contention that Imalingati Ibrahim is dead. PW3, Imalingati Michael testified that on the 9<sup>th</sup> May 2015 he saw the deceased's dead body and he authorized port-mortem examination. PW2, Dr. Karungi Sam carried out a post mortem examination, made a report PE.I. This is proof beyond reasonable doubt that the deceased named in the indictment is actually dead.

**(b) Was this death caused unlawfully?**

There is a legal presumption that homicide is unlawful unless excused by law. The presumption can be rebutted by evidence to show it was accidental or that it was permitted in law in the circumstances such as caused in self defence or by mistake. The burden to rebut this presumption is on the Accused or Defence. (See: *Uganda Versus Okello (Supra V R. Versus Busambiza S/O Wesonga T1948^ 15 EACA 65.*

PW4 Korobe Samuel on the 9<sup>th</sup> May 2015 was with the deceased. In the night after 11:00 p.m while moving towards Mulago Hospital at a playground, they were confronted by two men who chased them. He ran towards the hospital while the deceased ran towards TASO in another direction. They separated between 11:00 p.m and 12 midnight. His friend Imalingati was found dead.

He was arrested by police and while in the cells he recognized A1 Abdul as one of the people that chased him. A2 was also in the same cells. PW4 made first statement on the 10<sup>th</sup> May 2015. He was arrested on the 18<sup>th</sup> May 2015, made a second statement on the 19<sup>th</sup> May 2015. Both statements were admitted as defence exhibits D1 & D2 to show that the second statement was an afterthought and not made freely but to secure his release.

Under cross-examination by Mr. Ojambo and Ms. Suzan Wakabala he told court that he did not see the deceased being beaten. It was dark. The first statement was made freely while the second was while he was under arrest.

PW5, Anna Grace Alupo (D/AIP) noticed that the deadbody had bruises on the face and knees. She was led to the scene of crime by O/C Mulago Police Station who was not called as a witness.

PW6, Olum Francis, an illiterate Police Constable was in a patrol operation commanded by O/C Kawamara. Himself and Kawamara entered the play ground called Kasawe while crime Preventers followed the road. He saw two boys being chased by A1 and A2 towards Mulago.

That while he was 3 metres from Kawamara, A2 reported to Kawamara that the boy they chased fell down and collapsed. That he did not understand the response by Kawamara for it was in Luganda.

Kawamara was the Officer in charge of the operation leading the Accused persons and PC Olum. He is the Police Officer who mobilized these crime Preventers for the night patrol and he is the police officer that is stated in evidence to have been at the Mulago play-ground where the chasing of the deceased started from.

He is the same Police Officer that led police officers from Wandegeya police station to what was referred to as the scene of crime. However, conspicuously, he was not called in this trial as a prosecution evidence and this created a break in the chain of evidence of the prosecution. What

remained created a lot of doubt in the state case. For example, P/C Olum alleges that A1 and A2 chased the deceased and they reported to Kawamara in Luganda which he does not understand that the boy they chased fell down and collapsed.

If this is true, what steps did Kawamara take? If it is true what is this that they reported to Kawamara which Olum did not understand? The Accused persons denied being the people who chased the deceased, Kawamara would have been the best person as the commander to tell court who he deployed for that purpose and place.

The most appropriate inference that this court makes is that the prosecution omitted this witness to avoid evidence that would have helped court to know what truly happened.

In my view, this was a proper case to have ended in a *"no case to answer"* stage but it was deliberately put to defence to display the incompetence of the police operations and investigations.

Secondly, it is clearly that whoever prepared this case for trial after the police file was close should have been more thoughtful and terminate the case without indulging this court in this tedious, useless and expensive exercise of costly maintaining the Accused persons in prison and engaging the court's without considering the cost and economic implication and burden. It is high time that those who throw every allegation for trial should be mindful that this involves employing financial and human resources that would have been economically put to a better use.

Time and money spent on this case or any/many others of this type should be avoided so that the State Attorneys and the Judicial Officers are effectively engaged in trials and litigations over the ever increasing case backlog in this country.

The prosecution has failed to adduce evidence that proves that the death of Imalingati was caused unlawfully with malice aforethought by any of the Accused persons.

The Assessors' opinion is that the prosecution proved death of the deceased but failed to prove unlawfulness of the death or participation of the deceased.

I agree and I find the case against the Accused was not proved. They are hereby acquitted.

J.W KWESIGA

Judge

5/4/2018

**In the presence of:-**

- > Both Accused persons
- > Mr. Wanamama Mics-Isaih - SSA for the State.
- > Mr. Muluruzi Julius for A1 on private brief.
- > Mr. Kayemba Edward - Court Clerk