

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CR-SC-0071 OF 2015

UGANDA.....PROSECUTOR

VERSUS

AHIMBISIBWE AMOS & NDYAMUHAKI BRUCE.....ACCUSED (S)

JUDGMENT

BEFORE: HIS LORDSHIP MR. JUSTICE WILSON MASALU MUSENE.

The two accused persons, Ahimbisibwe Amos Alias Sulaibu and Ndyamuhaki Bruse were indicted with the offence of murder C/S 188 and 189 of the P.C.A.

The particulars were that the two accused, on 23/9/2014, at Muhabura village in Kyenjojo District murdered Kahesi David.

When the two accused persons were arraigned in this court, they pleaded not guilty. By virtue of that plea, it was incumbent upon the prosecution to prove all the essential ingredients of murder beyond reasonable doubt. This is because an accused bears no burden to prove his innocence.

Under Article 28 (3) of the Constitution, an accused person is presumed innocent till proved guilty.

The following are the ingredients of murder:-

- (1) Death of a human being. In this case Kahesi David.
- (2) Death was unlawfully caused.
- (3) Death was as a result of malice aforethought.
- (4) Identification of the accused persons as the ones who caused the death of the deceased .

In a bid to prove their case as duty bound by law, the prosecution relied on the post-mortem report in respect of the deceased. The same was admitted in court at the beginning of the trial under S. 66 of the Trial Indictment Act.

The prosecution further called evidence of five witnesses.

These were PW1, Tumuheirwe Feredisa, PW2, Tumuhimbise Ezera, PW3, Karama John, PW4 Bakehwenji Erick and PW5, D/ASP Kibuka Apollo who recorded a charge and caution statement from Ahimbisibwe Amos, A1.

The accused persons on the other hand denied the offences. As far as the 1st ingredient of the offence is concerned, the finding of this court is that there is no dispute. This is because all the prosecution witnesses confirmed that the deceased, Kahesi David died and was buried.

The post mortem report revealed that the cause of death was excessive bleeding from the injuries and cuts inflicted on the deceased. So the ingredient of death was not only proved by the prosecution beyond reasonable doubt, but even the second ingredient that the death was unlawfully caused.

The deceased was found by PW1, Tumuheirwe Feredisa, the father of the deceased lying in a pool of blood unconscious at Godi's home/bar.

Whereas he was still breathing on that morning of 24/9/2014, he was taken to Buhinga Hospital where he died the following day of 25/9/2014. The injuries and cut wounds which caused the death of the deceased confirm that the death of the deceased was unlawfully caused.

The conclusion of this court is that the prosecution has proved the 2nd ingredient of the offence beyond reasonable doubt.

I now turn to the 3rd ingredient of malice aforethought. Malice aforethought is the mental element of the offence of murder. It is defined under S. 191 of the Penal Code Act as the intentional killing of a human being or knowledge that the actions or omissions of the perpetrator will result into death of a human being, whether such a person is the one actually killed or not. In the present case, the post mortem report revealed several cut wounds on various parts of the body of the deceased. These included cut wounds on the head, the eye, the lips, the ear, the chin, a abrasion on the cheeks and cut blood vessel/nerve on the base of the skull. PW3, Karma John testified that he was stabbed by a knife and PW4, Bakehawenji Erick emphasized that by the time they found late Kahesi Godi's Bar, he was badly off. PW4 testified that the deceased had a cut wound on the head. He concluded that before he was assaulted, the deceased was normal and healthy, but they found him unconscious in a pool of blood. It is the finding and holding of this court that in the circumstances, whoever beat the deceased on such delicate parts of the body such as the head, the lips, ears and eyes had the intention or knowledge that such acts would result into the death of the deceased.

Malice aforethought has therefore been established. In conclusion, I find and hold that the third ingredient of the offence of malice aforethought has been proved by the prosecution beyond reasonable doubt.

The fourth and last ingredient of the murder is identification of the accused persons. I shall start with A1, Ahimbisibwe Amos alias Swaibu.

Both accused persons were known to the prosecution witnesses PW1, PW2 PW3 and PW4. They all lived in the same village.

PW2, Tumuhimbise Ezera a brother of the deceased was among the people who found the deceased unconscious at Godi's place, lying in a pool of blood. His testimony was that the following morning when the deceased regained consciousness at Hospital at around 10:00 a.m,

he told him that he was at Godi's bar when Bruce slapped him on the face and Ahimbisibwe and Tugume assaulted him. PW2 added that he died later at 1:00 p.m.

The same evidence of the dying declaration was repeated by PW4, Bakehwenji Erick that the deceased revealed or mentioned the people who assaulted him before he died.

The statements made by the deceased to PW2 and PW4 as to who assaulted him are admissible under section 30 of the Evidence Act. It was made by a person in anticipation of death, when all hope of life is lost, and therefore such a person has no motivation to tell lies. The Supreme Court cases of **Bogere Moses & another Vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1998 and Mureba Janet & others Vs. Uganda [2006] H.C.B Vol.1.** are cases on the point.

And in the present case, no sooner than the deceased Kahesi David regained consciousness, he revealed the assailants but unfortunately passed on. The dying declaration was corroborated by evidence of PW3 L.C.I Secretary of Defence Karama John who testified that A1, Ahimbisibwe Amos was arrested hiding in the bush at the boarder of Muhabura and Mukunga villages.

The question is why did A1 Ahimbisibwe go in hiding if at all he did not assault the deceased leading to his death. And to crown the identification of A1, Ahimbisibwe, he made a charge and caution statement before PW5, D/ASP, Kibuka Apolo.

PW5 testified that after explaining the charge to the accused and cautioning him, which charge and caution Ahimbisibwe understood and signed, A1 voluntarily admitted having assaulted the deceased.

The charge and caution statement was correctly recorded in both Runyankole/Rukiga, a language understood by A1 and in English. And that was the proper procedure under S. 24 of the Evidence Act, and the Supreme Court in **Festo Androwa Asenwa and Kakooza Joseph Denis Vs. Uganda Supreme Court Criminal Appeal No 34 of 1996.**

The charge and caution statement by A1 was Exhibited in court and marked PE4. Part of the admission by A1 was as follows:-

"I remember very well on 23/9/14, I entered into the bar of one God and found the following people ie Tugume, Sumia, Kigundu Moses, Kaibanda, Bruce and Kahesi (deceased). We started boozing, later at around 2030 h, I was already drunk. As I was moving outside I met the deceased standing in the front of the bar of God and he did not ask me anything. My mind told me to beat him and I hit him thrice with the stick I was having on the head and he fell down and I didn't bother to check whether he was injured seriously or not. I walked away to my home....."

So given such a clear and straight forward elaborate confession by A1 and other circumstantial evidence like A1 running into hiding , and being implicated in a dying declaration, I agree with the unanimous opinion of the Assessors that the prosecution has proved the fourth ingredient of the offence against A1, Ahimbisibwe Amos beyond reasonable doubt.

The defence of A1, Ahimbisibwe that he did not know whether Kahesi is dead or not or anything about his death collapsed when he later changed and admitted that Kahesi died and was his

neighbour. The said defence is therefore rejected as an afterthought and the conclusion of this court is that A1, Ahimbisibwe has been properly placed at the scene of crime. Having found and held that the prosecution has proved all the ingredients of the offence beyond reasonable doubt, and as advised by the Assessors, I find A1, Ahimbisibwe Amos, alias Swaibu, guilty and do hereby convict him of murder Contrary to Sections 188 and 189 of the Penal Code Act.

As for A2, Ndyamuhaki Bruce, this court is satisfied with his defence that he was at the scene of crime on the fateful day of 23/9/2015 as a worker of Godi. He clearly told court all the people who were present including the deceased and accused No. 1.

He clearly told court how those present drunk and how particularly deceased left at 9:00p.m, followed by Ahimbisibwe, only one Gordon to go out and return with the sad news of a collapsed deceased outside. Even after the incident, he did not go into hiding like Ahimbisibwe. He was arrested from his home, an indication that he was not guilty of any wrong doing. A2 also impressed this court in his defence as a truthful witness.

I therefore find that the prosecution has not proved the participation of A2 Ndyamuhaki Bruce beyond reasonable doubt.

Having found and held that the participation of the accused, Ndyamuhaki Bruce has not been proved beyond reasonable doubt and as advised by the Assessors, I do hereby find A2 not guilty. He is hereby acquitted and set free unless there are other pending charges against him.

**WILSON MASALU MUSENE
JUDGE.**

4/5/2018

Two accused present
Mr. Kateeba holding brief for Angella on state brief
Waswa Adams for state.
Assessors present
Ikiriza, court clerk present

Court; Judgment read in open court.

Mr. Adam Waswa for State.

We have no previous criminal records against the convict. He is a first offender. He has been on remand for 3½ years. The offence was procured through violence as confirmed by the post mortem report. The deceased was a young man and life was lost. I pray for a sentence of 40 years.

Signed; (WILSON MASALU MUSENE)

JUDGE.

Mr. Kateeba in mitigation.

The convict was 18 years at the time of commission of the offence. He is in the youth bracket as he is now 21 years. The convict had not committed any other offence before. There was no evidence of grudge but he had drunk from 2:00 am to 9:00 pm. I submit that there was heavy contribution by the alcohol he drunk, which may have affected the intention to kill. The convict has a wife and one child. We agree that life was lost but the convict should not be given along detention.

40 years is too high, as it is beyond 20 years. So I pray for 12 years imprisonment.

Signed: (WILSON MASALU MUSENE)

JUDGE.

Sentence and Reasons:

There is no doubt that the offence in question of taking away one's life with impunity is serious as submitted by counsel for the State.

Acts of drunkenness by the youth in our society have to be fought because they result into murder, rape, kidnapping and smoking opium and other unlawful activities.

The convict is a young man as submitted by counsel in mitigation and he is hereby warned to reform and live a peaceful life after serving sentence. I agree with counsel for the convict that 40 years would be on the higher scale. So instead of 23½ years imprisonment, I subtract the period of 3½ years of remand and do hereby sentence convict to serve 20 years imprisonment.

WILSON MASALU MUSENE

JUDGE.