

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CR-SC-0116 OF 2016

UGANDA.....PROSECUTOR

VERSUS

BUSOBOZI DAVID & BESIGYE BENEX.....ACCUSED

JUDGEMENT

BEFORE: HIS LORDSHIP MR. JUSTICE WILSON MASALU MUSENE.

Two accused persons Busobozi David and Besigye Benex were charged with murder Contrary to Sections 188 and 189 of the P.C.A. The particulars were that the accused persons on 1/3/2014 at Kabarole Hospital in Kabarole District, with malice aforethought, murdered Busumbagya Joyce.

At the time of plea and hearing, A2 Besigye Benex, who had been granted bail by the magistrate's court at the expiry of mandatory period of remand, absconded. When A1, Busobozi David was arraigned, he denied the charge. By that plea, the duty was under the law cast upon the prosecution to prove all the essential elements of murder beyond reasonable doubt.

This is because an accused person does not bear any duty to prove his/her innocence, as he /she is presumed innocent until presumed guilty. This principle of the law has been re-stated in a number of cases including **Sekitoleko vs. R [1967] E. 532**. The same principle has been provided for under Article 28 (3) (a) **of the Constitution of Uganda**.

The essential ingredients of the offence of murder in this case are:-

- (a) Death of a human being, namely Busumbagya Joyce.
- (b) That the death was unlawfully caused.
- (c) That the death was caused with malice afore thought.
- (d) That the accused participated directly or indirectly in causing the death of the deceased.

To prove the above ingredients of the offence, the prosecution relied on the following piece of evidence.

The Post-mortem report of the deceased, Busumbagya Joyce was tendered in court and marked PEI, during the hearing of the case; after the testimony of PW1, Mugarura Jackson a Clinical Officer of Fort Portal Regional Hospital.

The prosecution also relied on the evidence of PW2, Hellen Kobusingye, the Hospital Administrator of Kabarole Hospital, PW3, Petero Kalingaruze, a retired Army Officer and husband to the deceased, and PW4, No. 30064 Corporal Tibesigula Charles, the Arresting Officer.

The accused on his part gave a sworn testimony in which he denied committing the offence and instead tried to implicate the co-accused, Besigye Benex, who is at large.

As far as the first ingredient was concerned, there was no dispute that Busumbagya Joyce died. All the prosecution witnesses, PW1, PW2, PW3, and PW4 alluded to the fact of death of the deceased. Even the accused in his defence did not deny that the deceased, Busumbagya Joyce died. In my view, the prosecution has proved the 1st ingredient of the offence beyond reasonable doubt.

I now turn to the second ingredient of the offence as to whether the death of the deceased was unlawful. The law is now settled in East Africa since the case of **R VS. Gusambizi S/O Wesanga [1948] EACA 65** that all Homicides are unlawful unless excused by law. And it is only excusable if caused by accident or Act of God or in defence of a person or property.

In the present case, the post mortem report of Busumbagya Joyce was exhibited in court after the testimony of PW1 Mugarura Jackson.

There were no external injuries except fractured contused neck structures and PW1's testimony was that the deceased had been injured and was very sick. PW1 added that deceased had difficulty in breathing and had a swollen neck. The injuries were classified as dangerous harm and deceased was referred to Mulago Hospital where she died. The cause of death was stated to be cervical spine trauma.

In the premises, I find and hold that the prosecution has proved the second ingredient of the offence beyond reasonable doubt.

The next ingredient of the offence is malice aforethought. Malice afore thought is defined under S. 191 of the Penal Code Act.

- (1) An intention to cause death of any person.
- (2) Knowledge that the act or omission causing death will probably cause death of a person whether accompanied by a wish that death may not be caused. It is a mental element of the offence which can be inferred from the surrounding circumstances of the offence such as:-
 - (a) The nature of the weapon used.
 - (b) The part of the body targeted.
 - (c) The manner in which the weapon was used.
 - (d) The conduct of the assailant before, during and after the attack.

The above position of the law has been embodied in a number of cases including **R.V Tubere S/o Ochon (1954) EACA 63 and Akol Patrick & others Vs. Uganda [2006] H.C.B Vol. 1 pages 6.**

In the present case, the part of the body was the neck which was swollen upon admission. According to PW1, the deceased had difficulty in breathing and had abrasions on the lower lip. The injuries were classified as dangerous harm and since Kabarole Hospital could not manage the condition, she was referred to Mulago Hospital where she died. Similar testimony was given by PW2, Hellen Kobusingye that by the time of admission, the deceased could not turn her neck.

It is the finding and holding of this court that the attack and injury of the deceased on such delicate part of the body like the neck which was twisted and resulted in difficulty in breathing was dangerous and hence malice aforethought.

I therefore find and hold that the prosecution has proved the 3rd element of the offence beyond reasonable doubt.

The fourth and last ingredient of the offence is identification of the accused. PW3, the husband of the deceased, knew the accused, Busobozi David very well and clearly identified him after arrest by his deceased wife. Conditions following correct identification existed, although it was at night. The accused was dragged near the gate by the deceased and there was electricity light. That came out of the testimony of PW3, Petero Kalinganize and PW4 Corporal Tibesigula who re-arrested the accused.

PW4 also testified that the deceased, who was speaking with difficulty, told him that it was the accused, David Busobozi who strangled her in the fight between her and the accused. The accused, in his defence did not deny knowledge of the deceased nor her husband, PW3. And the accused did not deny being at the scene of crime, except that he wanted to shift the blame to Besigye Benex who was not around.

In the premises, I find and hold that the accused, Busobozi David was properly identified by PW3 and PW4 as the person who strangled and twisted the neck of the deceased that resulted into difficulty in breathing and consequent death at Mulago Referral Hospital.

In my view, the prosecution has proved the 4th ingredient of the offence beyond reasonable doubt that it was the accused now in the dock, Busobozi David who fought with and injured the deceased, Joyce Busumbagya, thereby causing her death.

The defence of the accused that it was Benex Besigye who had been arrested or involved is hereby rejected as an afterthought with the intention of confusing court to evade justice.

Having found and held that the prosecution has proved all the ingredients of murder beyond reasonable doubt, and as advised by the Assessors, I find the accused, Busobozi David guilty. I accordingly do hereby convict him as charged.

Wilson Masalu Musene
Judge.

4:5:2018

Accused present

Cosma Kateeba for accused

Adams Waswa for State.

Assessors present

Ikiriza, Court clerk present

Signed: (Wilson Masalu Musene)
Judge.

Court: Judgment read in open court.

Signed: (Wilson Masalu Musene)
Judge.

Mr. Waswa Adams for State

There are no previous records. He can be treated as a first offender. He has been on remand for 4 years .

The offence is serious. The maximum penalty is death. It was procured through violence. Convict is not remorseful as he involved a full trial. I suggest 30 years imprisonment.

**Signed: (Wilson Masalu Musene)
Judge.**

Mr. Kateeba Cosma in mitigation

The convict is a young man aged 27 years. He still has a long life ahead. He can reform and be a useful citizen. Although the offence is grave, the convict had a right to a trial as a constitutional right.

The convict has a wife and two children. There was a fight, although unreasonable force may have been used. So I pray for mercy and propose 10 years imprisonment.

**Signed: (Wilson Masalu Musene)
Judge.**

Sentence and reasons.

This court has from time to time warned persons like the convict against taking the law in their hands and beating others with impunity resulting into death. Life is a God given gift which should not be taken away arbitrarily. I have considered the mitigating and aggravating factors raised. I come to the conclusion that a sentence of 22 years is appropriate.

I subtract 4 years of remand and do hereby sentence convict to serve 18 years imprisonment.

**Wilson Masalu Musene
Judge.**