

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CR-SC-0208 OF 2015.

UGANDA.....PROSECUTOR

VERSUS

DECEMBER ROBERT.....ACCUSED

JUDGEMENT

BEFORE: HIS LORDSHIP MR. JUSTICE WILSON MASALU MUSENE.

On the 5th day of April, 2015, the residents of Kyaitamba B, Kijura Town Council, Kabarole District were shocked when the body of one of their own, Mugisa William was discovered in a pond of water with cut injuries on the head and mouth.

He was dead. The members of the deceased's family, particularly Tuhaise John suspected the accused, December Robert since December Robert had threatened to kill Tuhaise John or his mother or father.

When the accused was arraigned, he pleaded not guilty.

By virtue of that plea, it was incumbent upon the prosecution to prove all the ingredients of murder beyond reasonable doubt before securing a conviction.

The four essential ingredients in the offence of murder are:-

- (1) The deceased is dead.
- (2) The death of the deceased was caused unlawfully.
- (3) The death was caused with malice aforethought.
- (4) The accused person participated in the act or omission causing death.

The prosecution was handled by Ahimbisibwe Alice while Mr. Ahabwe James was for the accused on state brief.

As far as the 1st ingredient of the offence was concerned, the prosecution relied on the post mortem report, Police Form 48C in respect of Mugisa William, the deceased. The same was admitted in evidence at the beginning of the trial under S. 66 of the T.I.A. The Post mortem report was performed by Mugarura Jackson of Fort Portal Regional Hospital.

The cause of death was stated to be crushed brain tissue and internal haemorrhage in the cranial scalp. Secondly, all prosecution witnesses alluded to the fact of death of the deceased. In the premises and without further Ado, I find and hold that the prosecution has proved the 1st ingredient of the offence beyond reasonable doubt.

I now turn to the 2nd ingredient of the offence, as to whether the death of the deceased was unlawfully caused. It is now settled law that all Homicides are presumed to be unlawfully caused unless under circumstances excused by the law such as caused by accident, Act of God, or in Defence of person or property.

The case of **Patrick Akol & Others Vs. Uganda [2006] H.C.B Vol. 1 page 6** is a case in point. In the present case, the prosecution again relied on the post mortem report admitted in evidence U/S 66 of the T.I.A. The external injuries were cut wounds on the upper lip, cut wounds on the head and cause of death was crushed brain tissue and internal bleeding, likely to have been caused by a blunt object. PW2; Birungi Clovis, who passed near the scene of crime on the fateful day heard the deceased shouting as to why the accused was beating him and why he wanted to kill him.

In such circumstances, it is gangly clear that the death of the deceased was not caused by accident or by an act of God. It was unlawfully caused.

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

The next ingredient is whether the death was caused with malice aforethought. Malice aforethought is defined under S. 191 of the Penal Code Act; as:-

- (a) The intention to cause death of a Human being, whether that person is the one actually killed or not.
- (b) Any unlawful Act or omission which is likely to cause death of a human being, whether such person is the one killed or not

It is therefore clear that malice aforethought is the mental element of the offence of murder and is difficult to tell by direct evidence.

Overtime, however, the courts have held that malice aforethought can be established or inferred from the surrounding circumstances under which the offence was committed.

They include:-

- (i) The nature of the weapon used, whether lethal or not.
- (ii) The parts of the body targeted, whether vulnerable or not.
- (iii) The numbers of times the weapon was used, whether repeatedly or not.
- (iv) The behavior of the assailant before, during and after the attack, whether it was with impunity or not.

The relevant authorities include:-

R Vs. Gusambizi S/O Wesonga [1948] 12 EACA 65.

R.Vs Tubere S/O Ochan (1945) 12 EACA 63; and

Lutulama & 5 others.Vs Uganda, Supreme Court Criminal Appeal No. 38 of 1989.

In the present case, the weapon used was stated to be a blunt object. PW1, Tuhaise John testified that on 3/4/2015, he was at Kijura when accused threatened to kill him or his mother or father at around 6:00p.m.

PW1 told this court how the accused attacked him with a panga and how matters were reported to police but the accused eluded arrest that evening. The following morning, the dead body of his father was found in a pond of water and he suspected the accused because of the earlier threats. Furthermore, Pw1 testified that the accused escaped from the village and was arrested by police elsewhere.

PW2, Birungi Clovis testified that when he left the trading centre on his way home, he heard the deceased shouting, “December, why are you beating me?” PW2 also testified that he identified the voice of December warning the deceased not to raise an alarm.

PW2 feared and took another route to his home.

PW2 also concluded that when the secretary for Defence Haruna Juruko went to arrest the accused, the accused ran away, and was arrested at Kihora. It is therefore the finding and holding of this court that the behavior of the accused before the death of the deceased, notably attacking PW1 and threatening to kill PW1 or his father or mother were clear manifestations of impunity and intention to kill, hence malice aforethought.

Secondly, the following morning, the deceased was found dead in a pond and the accused escaped from the village. The Act of escaping was not an act of an innocent man, hence malice aforethought.

Even PW3, No. 42994 D/Corporal Nyangoma Rosemary stated that she knew the accused before as he had been arrested earlier about 20 times on charges of assault, theft and violent behavior.

The body of the deceased was found immersed in water, according to the postmortem report. The deceased was dressed in a red shirt torn and stained in blood and external marks of violence included cut on the upper lip, head and crushed brain tissue.

The parts of the body targeted, particularly the head were vulnerable, a clear manifestation of intention to kill, hence malice aforethought.

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

The fourth and last ingredient is identification of the accused. Counsel for the accused put up as pirated defence to the effect that the prosecution had failed to place the accused at the scene of crime. He added that the evidence of a cap belonging to accused being found near the scene of crime was denied by the accused.

It was further submitted that the accused was not the only person in the village with that type of cap. Counsel for accused also wondered why PW2, Birungi Clovis, who was a friend of the deceased, could not go to his rescue when he heard deceased crying, “December, why are you beating me?”. Counsel also wondered why it was only PW2 who heard the crying voice of the deceased and not any other persons who were passing on the way.

In reply, M/s Ahimbisibwe for State submitted that PW2 heard and identified the voices of both the deceased and that of the accused very well. She also added that the cap of the accused was found near the scene of crime and identified by PW1.

She further submitted that according to the evidence on record, accused had been seen several times wearing the same cap, which was exhibited in court by PW4. Counsel for State added that the accused had not only threatened PW1, but also to kill PW1’s father or mother. And that since the deceased was father of PW1, there was no other reasonable hypothesis in the circumstances other than the guilt of the accused. She concluded that the prosecution had proved the 4th ingredient of identification of accused as the one who killed the deceased.

A close scrutiny of the prosecution evidence reveals that the accused was well known to the prosecution witnesses; PW1 Tuhaise John and PW2 Birungi Clovis. The accused was stated to be a resident of Kijura. PW1's evidence was that the accused slapped him and chased him with a panga. The accused was reported to police. The accused not only threatened PW1 but also vowed to kill PW1 or his father, or mother and the following day, the dead body of PW1's father William Mugisa was found in a pond of water. Such a coincidence could not be taken for granted and accused's defence that he did not know the dead person is not believed by this court.

Furthermore, PW1 found and identified the cap which the accused was putting on the previous day near the scene of crime. The same evidence was corroborated by PW2 who confirmed that the cap was greenish in colour and that the accused was putting it on the previous day. So although counsel for the accused submitted that there could be many people in the village with similar caps, the particular cap of the accused was seen by PW1 and PW2 the previous day and it was the same cap abandoned near the scene of crime. And to compound the guilt of the accused, both PW1 and PW2 testified that when the LCI secretary for defence Haruna Juruko went to arrest the accused, he ran away and was arrested at Kihora. In my view, the act of accused running away into hiding was not an act of an innocent person who should have been expected to join other villagers to bury the deceased.

In my view that was impunity which inconsistent with innocence. It has been held in a number of cases that all such evidence must not be incapable of any other explanation upon any other hypothesis other than the guilty of the accused person. Such cases include:-

R V. Bukari S/o Abdullah (1949) EACA 84 and Simon Musoke V. R [1958] E.A. 715.

The other piece of circumstantial evidence connecting the accused with the offence is that of PW2, Birungi Clovis who clearly knew the deceased and heard him at around 9:00 p.m cry out "December why are you beating me?". PW2 also heard accused reply: - "Don't make an alarm. I shall beat you"

PW2 told this court that he heard Mugisa's cries from a distance of 50 metres and as he feared to be beaten, he took another route to his home. PW2 concluded:-

"The following morning as I was going to see Mugisa, I saw people gathered around a pond in a swamp. The police were around. I also went there and confirmed Mugisa William dead. I confirmed from the cries of help that it was December, the accused who killed Mugisa."

In my view, the cries by the deceased heard by PW2 were cries of a desperate person in danger and qualify to be a dying declaration as was held by the **Supreme Court in Mureeba Jane et al & others V. Uganda [2006] HCB Vol. 1**. Such statement is also admissible under S. 30(a) of the evidence Act. That section provides that verbal statements of relevant facts made by person who is dead and when the statement is made as to the cause of his or her death or as to any circumstances which resulted into his or her death and were made under expectation of death are relevant.

This court also found the demeanour of PW2 very steadfast and he impressed court as a witness of truth. I therefore reject the submissions of counsel for the accused that there was a possibility that another person could have murdered the deceased.

PW3, No. 42994 D/ Corporal Nyangoma Rosemary visited the scene of crime with other police officers, she recovered a jacket and gum boots which were identified as belonging to the deceased and a cap identified as belonging to the accused. She also recovered a blood stained stick. PW3 also confirmed that PW1, Tuhaise had reported to police that accused had threatened to kill him or his father or mother and that the accused was a very violent person who had been arrested 20 times before on charges of theft, assault and violent behavior.

In conclusion, the finding and holding of this court is that the totality of the circumstantial evidence outlined in this case and the facts proved by the prosecution are such that they produce moral certainty beyond reasonable doubt that it is the accused now in the dock December Robert who killed Mugisa William.

Having found and held that the prosecution has proved all the ingredients of the offence beyond reasonable doubt, and acting on the advise of the Assessors, I find the accused guilty and convict him of murder Contrary to Sections 188 &189 of the Penal Code Act.

Wilson Masalu Musene

Judge.

2/5/2018

Accused present

M/s Alice Ahimbisibwe for State

James Ahabwe for accused

Assessors present

Ikiriza, Court clerk present

Signed: (Wilson Masalu Musene)

Judge.

Court: Judgment read in open court.

Signed: (Wilson Masalu Musene)

Judge.

Ahimbisibwe Alice for state.

I have no previous criminal records but it was the evidence of PW3 that the convict had been arrested 20 times before this case. He is therefore notorious. The convict took court through a lengthy trial, showing that he is not remorseful.

The maximum penalty is death. At the age of 26, he had graduated to offences of murder. He is a dangerous person. I pray for a deterrent sentence of 50 years imprisonment.

Signed: (Wilson Masalu Musene)
Judge.

Mr. Ahabwe James in mitigation.

The convict is a first offender. The criminal record of the state Advocate is not correct as the arrests by Nyangoma cannot constitute a criminal record as he was not convicted.

That is why I propose he is a first offender. He is a young man who can reform and contribute to the development of this country.

He has been on remand for 3 years. The convict has a young family of a wife and two children who need care. So I pray for a lenient sentence.

Signed: (Wilson Masalu Musene)
Judge.

Sentence and Reasons.

Article 126 (1) of the Constitution provides that Judicial power is derived from the people and shall be exercised by the courts in the name of the people and in conformity with the values, norms and aspirations of the people. The aspirations of the people of Uganda are a quest for a peaceful society, where law and order, and where lives of the people are guaranteed and protected.

That is why the same Constitution, which is the supreme law of the Land provides for sanctity of life. No one is allowed to take away one's life unless authorized by the law. It is therefore the duty of the courts to punish those who commit serious crimes with impunity such as the convict in this case, harshly so that other members of the general public can learn and avoid taking the law in their hands.

I have considered the mitigating and aggravating factors raised on both sides. Whereas I agree that the convict is a young man likely to reform, all the same he killed a human being and life lost is never regained except in heaven. The Convict is said to be having two children who need his care, but so is the deceased who is gone and left behind a family.

This court is therefore inclined to agree with submissions of counsel for State that a deterrent sentence is necessary.

However, I find 50 years proposed by counsel for the State on a higher side. So instead of 28 years, I subtract 3 years of remand and do hereby sentence the convict to serve 25 years imprisonment.

**Wilson Masalu Musene
Judge.**