

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT LUWERO**

**CRIMINAL SESSIONS CASE No. 0321 OF 2014**

**UGANDA** .....

**PROSECUTOR**

5 **VERSUS**

**MATOLE CRESPORETO** ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

The accused in this case is indicted with one count of Murder *c/s* 188 and 189 of the *Penal Code*  
10 *Act*. It is alleged that the accused on the 13<sup>th</sup> day of February, 2014 at Wakyato village, Wakyato  
sub-county in Nakaseke District murdered one Nkamuhebwa Thomas.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are  
briefly that the accused and the deceased were both employed as casual labourers by P.W.2  
15 Inspector of Police, Ibrahim Senyonga the then O/c of Wakyato Police Post, in his garden in  
Wakyato. They were engaged in clearing the farm by slashing the bush, cutting down trees and  
burning charcoal. The accused had been his employee for about three weeks when on 14<sup>th</sup>  
February, 2014 the two sons of P.W.2 working on the same project informed P.W.2 that  
morning that when they went to slash, they found a pool of blood covered with ash at the hut  
20 where the accused and the deceased used to reside. P.W.2 went to the scene and confirmed that  
information to be correct. The accused and the deceased were not at the scene. He went back to  
the station and shortly the accused appeared. He asked him where his friend the deceased was.  
The accused said, "I have finished him." P.W.2 called the District headquarters and the following  
morning they came and proceeded to the scene led by the accused, in handcuffs.

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At the scene the accused revealed that he had hidden the body in a hole dug by a wild animal  
near his hut. It was about ten metres from the hut. It is the accused who showed them the hole.

The body was not visible but the District C.I.D asked the accused to retrieve the body. He removed the soil. Beneath it there was a polythene bag which he removed and the body was then visible. The head was missing. When he was asked where the head was he said that it was inside the hut. The accused directed the CID and they recovered the head from the hut wrapped in the shirt of the deceased. He had smeared what appeared to be salt on the neck and he had done the same to the trunk at the point of the cut. The body was taken to the hospital for a post mortem. Photographs were taken at the scene by the SOCO. In his defence, the accused denied being an employee of P.W.2, he denied having known the deceased before the day his body was recovered, he denied ownership of the panga and being resident in the shack near the location where the body was found, and stated that the accusation against him was false. He attributed it to the fact that he was being framed by people scheming to confiscate logs he had hewn in his business of charcoal burning at Wabusaana.

Since the accused pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against him beyond reasonable doubt. The burden does not shift to the accused person and the accused can only be convicted on the strength of the prosecution case and not because of weaknesses in his defence (see *Ssekitoleko v. Uganda [1967] EA 531*). The accused does not have any obligation to prove his innocence. By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure his conviction. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

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For the accused to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

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Death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. In the instant case the prosecution adduced a post mortem report dated 15<sup>th</sup> February, 2014 prepared by P.W.1 Dr. Kato Richard, a Medical Officer of Luwero Health Centre IV, which was admitted during the preliminary hearing and marked as exhibit P. Ex. 1. The body was identified to him by a one D/AIP Okiria James as that of Nkamuhebwa Thomas. P.W.2 Inspector Ibrahim Senyonga, a former employer of the deceased, testified that he saw the body at the scene. P.W.3 No. 38986 D/Cpl Mpiirwe Albert, the SOCO who was present at the scene when the body was recovered and took several photographs, exhibited as P. Ex. 3A-H. In addition, P.W.4 No. 22879 D/Sgt Maima Peter, the investigating officer too saw the body at the scene, and arranged for its post mortem examination. In his defence, the accused admitted having seen the body at the scene although he had not known the deceased before recognised exhibits P. Ex. 3A-H as those of the body he was at the scene. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Thomas Nkamuhebwa died on 13<sup>th</sup> February, 2014.

The prosecution had to prove further that the death of Thomas Nkamuhebwa was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or it was authorized by law (see *R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*). P.W.1 who conducted the autopsy established the cause of death as “murdered with a sharp edged object.” Exhibit P. Ex. 2 dated 15<sup>th</sup> February, 2014 contains the details of his other findings which include a “head completely severed off. Torso at the sides. Large blood vessels of the neck and bones severed.” P.W.2, P.W.3, and P.W.4 all of whom saw the body at the scene described the injuries they saw in a similar manner. Exhibits P. Ex. 3A-H present a graphic image of the body in that condition. A blood stained panga Exhibit P. Ex. 6 was recovered from a sack a short distance away from the location where the torso was found. The head was recovered from the same sack. The torso was found buried in a hole, covered with polythene and soil. In his defence, the accused admitted having been present when the body was recovered under those circumstances.

P.W.2 testified that when he first went to the scene he found a pool of blood covered with ash and the blood-stained panga recovered near the scene too had traces of ash on its rubber handle. Concealment of the decapitated body, the head, the suspected murder weapon and the spilled blood are all consistent with a homicide than any other possible causes of death. Not having  
5 found any lawful justification for the assault as described by the eyewitness, I agree with the assessors that the prosecution has proved beyond reasonable doubt Thomas Nkamuhebwa's death was unlawfully caused.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice  
10 aforethought. Malice aforethought is defined by section 191 of the *Penal Code Act* as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. This may be deduced from circumstantial evidence (see *R v. Tubere s/o Ochen (1945) 12 EACA 63*).

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Malice aforethought being a mental element is difficult to prove by direct evidence. Courts usually consider first; the nature of the weapon used, secondly manner in which it was used and  
thirdly the part of the body that was targeted. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably  
20 cause death. There is no direct evidence in this case regarding this element. Proof of intention is entirely based on circumstantial evidence. Despite the absence of direct evidence of intention, on basis of the circumstantial evidence, malice aforethought can be inferred from use of deadly weapon which PW.1. opined was "a sharp edged object" (a bloodstained panga was recovered concealed at the scene) and the manner in which it was used (the head was completely severed  
25 off the torso) and the part of the body of the victim that was targeted (the neck). The ferocity with which the weapon was used can be determined from the impact (major vessels and bones of the neck were completely severed). Any human being who inflicts such injury on another must be deemed to have knowledge that it will probably cause the death of the victim. The accused did not offer any evidence on this element. I find, in agreement with the assessors that the  
30 prosecution has consequently proved beyond reasonable doubt that Thomas Nkamuhebwa's death was caused with malice aforethought.

Lastly, there should be credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence. The accused denied any participation. He denied being an employee of P.W.2, he denied having known the deceased  
5 before the day his body was recovered, he denied ownership of the blood-stained panga that was found concealed at the scene, he denied being resident in the shack situated near the location where the body of the deceased was found, and stated that the accusation against him is false. He attributed the false accusation to the fact that he is being framed by people scheming to confiscate logs he had hewn in his business of charcoal burning at Wabusaana. The burden lies  
10 on the prosecution to disprove his defence by adducing evidence which proves that he was a participant in the commission of the crime.

To refute his defence, the prosecution relies entirely on circumstantial evidence. Where the prosecution case rests on circumstantial evidence, it is the requirement of the law that in order  
15 for the court to sustain a conviction on basis of such evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for  
20 the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Simon Musoke v. R* [1958] EA 715, *Mwangi v. Republic* [1983] KLR 327, *R v. Kipkering Arap Koske and another* (16) EACA 135 and *Sharma Kooky and another v. Uganda* [2002] 2 EA 589 (SCU) 589 at 609). The entire circumstantial evidence in this case irresistibly points to the guilt of the accused.

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The incriminating circumstantial evidence in this case is woven together by the following strands;- the accused was a co-worker of the deceased (the accused denied this); the accused bore a grudge against the deceased for repeatedly stealing his food; the accused led the police to the location where the body was found (the accused stated it is the police that took him there); it is  
30 him who retrieved the head from the sack (he denied this and stated it is P.W.2 who came with it on a motorcycle; the sack belonged to the accused (the accused denied this); it was near his

shack (the accused denied this and claimed to be resident at Wabusaana); the same sack contained a blood-stained panga recognised by P.W.2 as belonging to the accused (he denied this); he led the police in the recovery of all these items (he claims to have been coerced).

I have considered the defence presented by the accused by way of denial of most of the  
5 incriminating aspects, further stating that recovery of the body was done by the police, that he was coerced into holding the severed head of the deceased after it was recovered and that he is being framed in a ploy to take his logs at Wabusaana he had hewn in preparation for charcoal burning. This is a situation in which the court is asked to assess the credibility of witnesses on either side from their oral evidence, that is to say, to weigh up their evidence to see whether it is  
10 reliable. The determination must largely be based on its reasonableness or unreasonableness in light of all the circumstances of the case and of the views formed by the court on the reliability and credibility of the witnesses. The version advanced by the accused is unimpressive or unpersuasive on account of the fact that incriminating a migrant labourer in such a carefully executed murder simply to dispossess him of his hewn logs is glaringly improbable. None of the  
15 prosecution witnesses was discredited by cross-examination. He never put his defence to the key witnesses regarding his theory of the case, which substantially emerged as an afterthought during his defence. The prosecution evidence was not discredited by cross-examination.

The body was concealed in such a manner that only a person complicit in killing the deceased  
20 could have known where to find it. According to section 29 of *The Evidence Act*, facts deposed to as discovered in consequence of information received from a person accused of any offence, so much of that information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. The head was recovered from a sack contained a blood-stained panga which by its unique features P.W.2 recognised and identified as belonging to the  
25 accused. In the result, the prosecution version is more believable than that of the accused. That defence having been disproved, in agreement with the assessors I find that there are no other co-existing circumstances which would weaken or destroy the inference that it is the accused who committed the offence. In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby find the accused guilty and  
30 convict him for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Luwero this 31<sup>st</sup> day of January, 2018.

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Stephen Mubiru

Judge.

31<sup>st</sup> January, 2018

5 Later.

Attendance

Court is assembled as before.

**SENTENCE AND REASONS FOR SENTENCE**

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The convicts were found guilty of the offence of murder c/s 188 and 189 of the *Penal Code Act* after a full trial. In his submissions on sentencing, the learned Resident State attorney prayed for a deterrent sentence on the following grounds; although the convict has no previous record, the maximum punishment is death. The manner in which the offence was committed was brutal and terrifying. Decapitation of the deceased indicates a high degree of pre-meditation and she prayed that he be given a the maximum punishment.

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Counsel for the convict prayed for a lenient custodial sentence on the following grounds; the convict has been on remand since 10<sup>th</sup> March, 2014. He is 35 years old and illiterate. He can reform given an opportunity. He is a foreigner from Tanzania. He could not control the anger of the deceased having stolen his posho on repeated occasions. He prayed for a custodial sentence. One of the reasons for sentencing is reform. Given an opportunity the convict can reform. He proposed 35 years' imprisonment. In his *allocutus*, the accused prayed for a lenient sentence on the following grounds; he will not repeat the same offence. He has a family at Bukoba Tanzania. He has three children and a wife. He prayed for a sentence he can complete to enable him return home and be buried there. He proposed ten years' imprisonment and that the period of remand be considered too.

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Murder is one of the most serious and most severely punished of all commonly committed crimes. The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. In cases of deliberate, pre-meditated killing of a victim,

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courts are inclined to impose the death sentence especially where the offence involved use of deadly weapons, used in a manner reflective of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of the sanctity of life. This maximum sentence is therefore usually reserved for the most egregious cases of Murder  
5 committed in a brutal, gruesome, callous manner.

I have considered all the mitigating factors mentioned by the convict and his counsel, especially the fact that the accused prayed for lenience. I must say that there are offences where even all the mitigating factors I have reproduced above cannot mitigate the punishment due to the gruesome manner in which the offence was committed. I have for example considered *Mugabe v. Uganda*  
10 *C.A. Cr. Appeal No. 412 of 2009*, where the Court of Appeal in its decision of 18<sup>th</sup> December 2014, confirmed the death sentence for a thirty year old convict who following an allegation of rape against him, was heard threatening that he would kill a member of the deceased's family. The deceased was aged twelve years and on the fateful day he was sent by his father to sell milk at a nearby Trading Centre. He never returned home. The relatives made a search for him and his  
15 body was discovered in a house in a banana plantation. The appellant had been seen coming out of a house near that plantation. On examination of the body of the deceased, it was revealed that the stomach had been cut open and the heart and lungs had been removed. His private parts had also been cut off and were missing from his body. The cause of death was severe haemorrhage due to cut wounds and the body parts removed. The accused pleaded guilty on arraignment. He  
20 was sentenced to death despite his plea of guilty.

The convict before me committed the offence in the worst of the worst of manners. It was a gruesome, senseless killing. It is an offence, which the grounds the convict and his counsel have advanced, will not mitigate. The deceased was killed in a particularly gruesome manner. He was  
25 decapitated and his body disposed of in a disgraceful and unceremonious manner. I know a life can never be adequately compensated, not even with another life but the death penalty remains one of the lawful sentences for this type of crime. The court should not balk out of the duty entrusted to it to express public indignation towards some of the extreme modes of perpetration of crime. It is one that deserves the death sentence if only to exact retribution for the undignified,  
30 brutal and horrendous manner in which the deceased was killed and also to deter other would be offenders. I therefore sentence the accused to suffer death. He is to be hanged until he is dead. I



so order. The convict is advised that he has a right of appeal against both conviction and sentence, within a period of fourteen days.

Dated at Luwero this 31<sup>st</sup> day of January, 2018.

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Stephen Mubiru

Judge.

31<sup>st</sup> January, 2018.