

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION CASE NO. 0492 OF 2016

UGANDA

PROSECUTOR

VERSUS

- 1. KALULE MUSA alias SAM**
- 2. YENGA AMANGA BLAISE**

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT.

The accused were indicted for Murder contrary to sections 188 and 189 of the Penal Code Act in Count 1.It is particularized by the Prosecution that on the 2nd February 2013,the accused and others at large unlawfully killed Zziwa John Bosco at Matugga,Wakiso District. The accused are also indicted for Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act. The particulars of this Count are that the accused on the 2nd February 2013 robbed Zziwa John Bosco of motor vehicle UAS 713 M and in the process used deadly weapons on the said victim.

The accused denied the offences and the Prosecution called six witnesses in a bid to prove the case against them.

Prosecution Evidence.

Detective Corporal Obalang Michael(PW1) was deployed at Buwambo Police Post in 2013.On the 4th February 2013 a report was received that a dead body had been seen in a sugar cane garden at Matugga.PW1 with other Officers proceeded to the scene and saw a dead body identified as that of Zziwa John Bosco from the voter's card retrieved from the clothing .The hands and legs were tied with a rope looped around his neck .One of the people in the crowd that had gathered identified the deceased as a former taxi driver and informed his relatives.PW1 recorded statements from witnesses and filled Police form 48 requesting for a postmortem to be carried out on the body.

Detective Assistant Inspector Opio John(PW2) was attached to Kasangati Police station in 2014.On the 22nd March 2014,he was handed a file transferred from Arua Police station in which Yenga Amanga Blaise (A2) was the suspect in a Murder and Robbery investigation involving Zziwa John Bosco.PW2 also received a Toyota Premio motor vehicle with

Democratic Republic of Congo number plates 2443/AA/25. The same vehicle bore inscriptions UAS 713 M on the side mirrors, indicators and windscreen. On interviewing A2, he revealed that the vehicle had been taken to Ariwara Congo by a one "Kalule Muganda" on the 6th February 2013.

As a car dealer, A2 had been approached by Kalule Muganda to look for buyers and indeed the vehicle was bought by a one Bebe Alhaji. A2 told PW2 that he got his commission and confirmed that he could ably identify Kalule Muganda. Further investigations revealed that Kalule Muganda was an inmate at Luzira Prison and PW2 arranged for an identification parade which was conducted by Assistant Inspector Ngobi Isaac (PW4). Yenga Amanga (A2) identified Kalule Musa from the parade as the person he knew as Kalule Muganda in the DRC and as the one who had sold motor vehicle UAS 713M to Bebe Alhaji on the 6th February 2013.

Dr. Kitayimbwa Mayinja (PW3) is a Police Surgeon employed by the Uganda Police Force who carried out a post mortem on the body of Zziwa John Bosco on request by Matugga Police Post. The body was identified as that of Zziwa John Bosco by a brother in law. The body had a long sisal rope tightly wound around the neck, knotted above the Adam's apple. PW3 attributed death to asphyxia following upper airway obstruction in ligature strangulation.

Stephen Awor (PW6) told Court that the deceased was his employee assigned motor vehicle UAS 713 M for special hire services. On the 2nd February 2013, the deceased left the office at 6.00pm and did not return the following morning as expected. The known phone contact was off and a report of his disappearance was made to Police but on the 4th February 2013, they received information that he was dead and the body was at the City mortuary. PW6 and others attended the burial of their former staff.

In March 2014, PW6 received a phone call from Police with information that motor vehicle UAS 713M had been recovered from Arua and was at Kasangati Police station. Documents in support of ownership were availed to Police for verification and the vehicle was released to PW6. The vehicle had Congo number plates but the inscriptions of its Ugandan registration numbers could still be seen, PW6 told Court.

In the course of the trial, the Director of Public Prosecutions withdrew charges against Yenga Amanga (A2) and introduced him as a Prosecution witness (PW5). His evidence was that he was resident at Ariwara in the DRC where he operated as a car dealer. On the 4th February 2013 he was approached by the Manager of Osea Lodge at Ariwara who told him that Kalule (A1) had a motor vehicle he was selling. PW5 linked Kalule to a one Bebe Alhaji who bought it. On the 14th March 2014, PW5 heard that the vehicle had been impounded in Uganda. Uganda Police Officers crossed over to DRC from where he was taken to Arua to record a statement but ended up as an accused person in the case.

PW5 confirmed that the vehicle he had identified at Arua and at Kasangati Police stations was the one Kalule sold to Bebe Alhaji. He confirmed that he identified A1 at an identification parade at Luzira Prison. Asked if he knew Kalule before, PW5 informed Court

that he first met him on the 4th February 2013 and they met on two occasions before the vehicle was sold off.

Evidence by the defence.

In his defence, the accused (A1) denied the offences and told Court that he met Yenga Amanga Blaise (PW5) at Luzira Prison but not at Ariwara, DRC as alleged. The accused denied ever giving PW5 a vehicle to sell and raised an alibi to the effect that on the 2nd February 2013, he was an inmate at Luzira Prison serving a five and a half years sentence for smuggling cigarettes. The accused further told Court that he escaped from Luzira Prison in 2014 and was sentenced to three years imprisonment in the same year. The accused told Court that he never escaped from Prison in 2011 and that he had recorded his alibi in the Plain statement he refused to sign because his Lawyer was not present.

Evidence by a Court Witness.

At the close of the defence case, Court invoked its powers under Section 39(1) of the Trial on Indictments Act. An Order was issued for the Officer in Charge Luzira Prison, to produce records relating to the periods the accused was an inmate at the facility. Assistant Commissioner of Prisons Twesigye Celestine (CW1) responded to the Court Order and appeared as a witness with a compiled report from 2010 when the accused was first admitted at Luzira.

Prison records indicate that the accused was first remanded to Luzira on the 30th July 2010 for stealing motor vehicles in cases listed as NAK.571/2010 and NAK.573/2010. He was discharged on file NAK.571/2010 but convicted and sentenced to four years imprisonment in NAK.573/2010 on the 15th December 2010.

While serving the sentence in NAK.573/2010, the accused was charged with stealing another motor vehicle vide Criminal Case No. NAK.997/2009 to which he pleaded guilty on the 22nd July 2011 and was sentenced to One and a half years. The accused was further charged with stealing motor vehicles in Criminal Cases No. NAK.996/2009 and NAK.354/2011 which are yet to be disposed of. On the 28th June 2011, the accused was again charged with stealing a motor vehicle in NAK.362/2011 but he escaped from Luzira Prison on the 20th October 2011 prior to delivery of the judgment on the 1st November 2011.

The accused was re-arrested on the 17th October 2013 and charged with Escaping from lawful custody. Court sentenced him to three years on the 11th November 2013 but the sentence was set aside on Appeal on the 8th November 2017. The accused was charged with the offences before this Court on the 16th May 2014 but escaped from Kasangati Court on the 11th July 2014 only to be re-arrested on the 30th January 2016.

The net effect of the evidence of CW1, was that the accused was at large and not at Luzira Prison on the 2nd February 2013 as he claims in his alibi.

Summary of the Law.

The Prosecution is required to prove the guilt of the accused person on both counts in the Indictment and the burden does not shift save where there is a specific statutory provision to the contrary. All the ingredients of the offences the accused is indicted for must be proved and the standard required is that the proof must be beyond reasonable doubt. The standard is met only when, upon considering the evidence adduced, there is a high degree of probability that the accused in fact committed the offence. In determining whether the Prosecution has discharged its burden, Court has to take into account both the evidence of the Prosecution and the defence.

Uganda V Hussein Agade. HC Criminal Case No.1/2010.

The accused in this case raised an alibi as his defence and he does not have the burden to prove it. It is incumbent on the Prosecution to discredit the alibi by adducing evidence that places him at the scene of crime as the perpetrator of the crime he is indicted for.

Matete V Uganda SC Criminal Appeal No.53/2001.

Decision of the Court on Count 1:Murder.

To secure a conviction, Prosecution is required to prove that Zziwa John Bosco is dead and that his death was unlawfully caused with malice aforethought by the accused person.

It was the evidence of Corporal Obalang Michael(PW1)that a body identified to be that of Zziwa John Bosco was recovered from a garden at Matugga and he prepared a Police form 48 requesting for a Post mortem. The examination was performed by Dr.Kitayimbwa (PW3) and a report to the effect was admitted in evidence. Stephen Awor(PW6)attended the burial ceremony. It is the finding of this Court that this ingredient of the offence was satisfactorily proved by the Prosecution.

Regarding whether the death was unlawful, it is the presumption of the law that all homicides are unlawful except where death is proved to have resulted from an accident or is authorized by the Law.Death in the case of Zziwa John Bosco was a result of asphyxia due to blockage of the upper airway by ligature strangulation. The accused was strangled to death which satisfies the ingredient of the unlawful nature of his death.

Malice aforethought is the intention to cause death. It is a question of the mind which can be deduced from the circumstances in which the death was caused .It can be inferred from the nature of weapons used in assaulting the deceased, the parts of the body attacked and the intensity of the attacks. The conduct of the assailant after the commission of the crime can also be used to infer malice aforethought .Death in the instant case was by strangulation using a tight rope around the neck.

According to Dr.Kitayimbwa(PW6),the neck had ligature abrasions of a horizontal orientation as opposed to vertical ones seen in suicide cases. The abrasions were deeper at the noose of the rope implying greater pressure was administered around the Adam's Apple.A rope can be a dangerous weapon especially when applied to a sensitive part of the

body like the neck .The hands and legs of the deceased were tied by the same rope looped around the neck.

Considering the part of the body attacked and the state in which the body was found ,i have no doubt in my mind that whoever assaulted the deceased had the intention of ending his life. This ingredient of the offence was therefore proved beyond reasonable doubt.

The accused denied participation in the offences he was charged with and claims to have been an inmate at Luzira when the offences were committed. All the Prosecution witnesses did not see the accused committing the offences he is charged with and hence the accusations are premised on the circumstantial evidence of PW5.It was argued by the Prosecution that the accused was seen in possession of the stolen vehicle on the 4th February 2013 at Ariwara ,DRC and Court was invited to apply the doctrine of recent possession to find the accused guilty of both offences.

It is plain evidence that the accused was not found in possession of the vehicle on 14th March 2014 when it was impounded at Arua. The evidence of PW5 is to the effect that the accused was in possession of the vehicle on the 4th February 2013 before he sold it to Bebe Alhaji who did not appear as a witness in Court.

Case Law suggests that;

“ In the case of circumstantial evidence surrounding a robbery or theft,if the prosecution adduced adequate evidence to show that the accused was found in possession of goods recently stolen or taken as a result of robbery,the accused must offer some credible explanation of how she or he came to be in possession of the goods would justify his or her conviction.”

Izongoza William Vs Uganda.SC Criminal Appeal No.06/98.

I find it imperative to analyze the evidence of PW5 with that of the accused in order to make a finding as to the applicability of the doctrine of recent possession.PW5 had been a co-accused on the same Indictment. It was argued by the defence that he had denied the offence until he was granted a nolle prosequi and turned into a Prosecution witness hence his evidence requires corroboration.

To the extent that PW5 was the only witness who saw the accused with the vehicle on the 4th February 2013 ,no corroboration of his evidence is required since no particular number of witnesses are needed to prove a fact under section 133 of the Evidence Act. Court is only required to warn itself of the danger of convicting on the basis of the evidence of a single identifying witness.

Uganda V Mukasa[1976]HCB 87.

It is also trite that PW5 was not accomplice in this case since he did not participate as a principal or as an accessory in the commission of the offences, the subject of the trial so as to necessitate corroboration of his evidence. All that is required is to test the credibility of his

evidence for Court to make a finding that the accused had possession of the vehicle on the 4th February 2013. Corroboration of the evidence by PW5 would have been necessary if he had confessed to the crime as an accomplice implicating the accused.

Uganda V Kato Kajubi Godfrey CA Criminal Appeal No.39/2010.

It was not disputed by the defence that the vehicle in question was recovered from Congo and had foreign number plates but with UAS 713 M inscriptions apparent on some parts of the body work. Exhibit Slip No.34229 of 27th March 2014 was tendered in evidence by PW2, the case Investigating Officer.

PW4 carried out an identification parade at Luzira and PW5 who had met with the accused on two occasions identified him as Kalule who had possession of the vehicle on the 4th February 2013 at Ariwara, DRC. The accused endorsed on the Identification Parade Report admitted in evidence which certifies that he agreed with the procedures followed in the exercise. If there had been any complaint about the exercise, the accused should have refused to sign the Identification Parade report like he did in the case of the Charge and Caution statement.

PW6 told Court that the vehicle was last seen with the deceased on the 2nd March 2013 and he was reported dead on the 4th March 2013. The vehicle was recovered in March 2014 around the time PW5 was arrested from DRC and taken to Arua and returned to him before he eventually sold it.

PW5 told Court that he first met the accused when he was introduced to him by the Manager of Osea Lodge and they met again with the buyer of the vehicle. I have no doubt that there was ample time and favourable conditions for PW5 to identify the accused at the time. This was confirmed by the latter identification of the accused from the Parade at Luzira Prison by PW5.

The accused on the other hand claimed to have been an inmate at the time the vehicle disappeared and the deceased found dead. The evidence of the Court witness however does not support this assertion. At the time, Prison records show that the accused had escaped from lawful custody and was at large. It is also not true that the accused was serving a sentence for smuggling cigarettes as he told Court. He was at the time serving a sentence for stealing a motor vehicle before escaping from Prison. It is also not true that the accused escaped once from lawful custody as he told Court since records by the court witness indicate another escape from Kasangati on the 11th July 2014.

On evaluating the evidence of both PW5 and that of the accused, I find the evidence of PW5 relating to the possession of the vehicle by the accused in DRC on the 4th February 2013 more credible than the discredited alibi of the accused. Why did he have to tell lies about where he was on the 2nd February 2013? Why did the accused have to lie about the offence he had been convicted of before escaping from Prison? Why did the accused also have to lie about the number of times he had escaped from lawful custody? I find the alibi fronted by the accused to be an afterthought that lacks credibility.

I find the fabricated alibi, the lies about the reasons for being in Luzira Prison, the proximity of the period between the disappearance of the vehicle and the appearance of the same in Congo, to be cogent corroborating evidence to the circumstantial evidence about the death of Zziwa John Bosco. The accused is by that evidence squarely placed at the scene of crime by the Prosecution .

Bogere Moses & Anor V Uganda.SC Criminal Appeal No.1/1997.

I find the accused guilty of Murder contrary to section 188 and 189 of the Penal Code Act .I accordingly convict him.

Decision of the Court on Count 11: Aggravated Robbery.

To sustain a conviction on the charge of Aggravated Robbery, Prosecution is required to prove that there was theft and use of violence by the Accused person. It was conceded by the defence that there was a theft of motor vehicle UAS 713 M that was in the possession of Zziwa John Bosco on the 2nd February 2013. The evidence of PW6, the owner of the vehicle sufficiently proved the fact of the theft. This ingredient of the offence was therefore sufficiently proved.

It was also conceded by the defence that there was use of violence at, before or after the theft of the motor vehicle. The Prosecution case was that deadly weapons including iron bars, a hammer and a rope were used in the execution of the Robbery. The evidence of Dr. Kitayimbwa (PW3) and Corporal Obalang Michael (PW1) indicated that a rope was used to strangle the deceased .I have held here in above that a rope can be a deadly weapon depending on the purpose and nature of application on a sensitive part of the body like the neck. This ingredient of the offence was hence proved by the Prosecution.

The defence contested the participation of the Accused in the Aggravated Robbery. It is a fact that the participation of the accused is inferred from circumstantial evidence in this case since nobody saw him commit the offence. The evidence of PW5 who saw him in possession of the motor vehicle on the 4th February 2013 sufficiently linked him to the crime. This was only two days after its disappearance and it is not the kind of item that changes hands at a fast rate like any other consumables. PW5 ably identified the accused in an identification parade. The evidence of PW5 was further corroborated by the defective alibi raised by the accused.

I find the following passage relevant to the circumstances of this case;

“It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession ,the evidence is even stronger and more dependable than eye witnesses evidence of identification in a nocturnal event. This is especially so because invariably the former is verifiable, while the latter solely depends on the credibility of the eye witness.”

Bogere Moses & Anor V Uganda (Supra).

I am alive to the need to warn myself of the danger of convicting the accused on the evidence of PW5 as the single identifying witness in this case. I am convinced that he was a truthful witness who ably identified the accused and his testimony was corroborated by the discredited alibi raised by the accused.

On the basis of the above analysis, it is the finding of this Court that all ingredients of the offence of Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act, were proved beyond reasonable doubt by the Prosecution. I find the accused guilty as charged and accordingly convict him.

Moses Kazibwe Kawumi

Judge

13th February 2018.