

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CRIMINAL SESSION CASE NO.0528 OF 2017**

**UGANDA**

**PROSECUTOR**

**VERSUS**

**1. KAWEESI JOWERIA**

**2. ORISHABA RACHAEL**

**ACCUSED**

**3. LUSWATA JOSEPH**

**BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI**

**JUDGMENT**

The Accused were indicted for Murder contrary to Sections 188 and 189 of the Penal Code Act. The brief facts are that on the 21<sup>st</sup> February 2016 at Gaba , Makindye Division the accused and others at large killed Kalema Charles.The Accused are in another Count charged with Aggravated Robbery contrary to Sections 285 and 286(2) of the Penal Code Act. It is the Prosecution case that on the 21<sup>st</sup> February 2016 at Gaba, the accused and others at large robbed Kalema Charles of a motor cycle valued at shillings 4,000,000/- and in the process administered a substance that rendered him unconscious.

In a bid to prove its case, Prosecution called Serwanja Geoffrey(PW1),D/AIP Twinamatsiko Erasmus (PW2),Kiryowa Deziderio (PW3),Namazzi Diana(PW4) Mable Prossy(PW5) and Dr.Male Mutumba (PW6).

**Evidence by the Prosecution.**

Serwanja Geoffrey(PW1) told Court that he owned motor cycle Registration Number UEB 752 G which Kalema Charles used for transport business. They had agreed on a payment of shillings 15,000/= per day which Kalema used to remit on a weekly basis since July 2015.On the 23<sup>rd</sup> February 2016,PW1 received a phone call from a Police Officer at Gaba who told him that Kalema was at Mulago Hospital.PW1 went to Gaba Police station for details and learnt that the motor cycle was robbed. He proceeded to Mulago Hospital from where he learnt that Kalema Charles had died that same day. He attended the burial ceremony at Mityana.

PW1 further told Court that he owned the motorcycle but it was registered in the names of his brother Kiryowa Deziderio (PW3) since he did not have a Tax Identification Number requisite for its registration. This was confirmed by PW3 who tendered in Court a Logbook for the motor cycle as a Prosecution exhibit.

D/AIP Twinamatsiko (PW2) was attached to Kabalagala Police station and on the 25<sup>th</sup> February 2016 received a file originating from Gaba Police Post concerning a robbery of a motor cycle from Kalema Charles. PW2 went to Mulaga hospital and learnt that Kalema Charles died on the 23<sup>rd</sup> February 2016. He obtained a copy of a Postmortem report and interviewed A1 who had been arrested by Gaba residents on the 21<sup>st</sup> February 2016. According to PW2, A1 confessed to the crime and named A2, A3 and a one Sheilla as people they were with together with another man only known to A3.

A1's confession that was not exhibited in Court was stated to be that on the 21<sup>st</sup> February 2016, they used motor vehicle Registration number UEG 752 G to stop Kalema Charles who was riding a motorcycle. A2 boarded the motorcycle and directed the rider to Abuja Restaurant at Gaba as the vehicle followed them. A1, A2, Sheilla and Kalema Charles entered the restaurant while A3 remained in the car. They ordered for drinks and later A1 moved out and brought packed food which she served them but A3 had identified the pack for Kalema Charles.

Kalema Charles later fell unconscious and they moved out of the restaurant but A1 was stopped by the owner and other residents while others fled in the car driven by A3. The Bar owner's concern was that they could not leave an unconscious person in her premises. A1 was taken to Police and Kalema Charles was also taken to Gaba Police on regaining consciousness. PW2 told Court that A1 led her to the car stage from where he impounded vehicle number UEG 752G. The vehicle owner confirmed that A3 had hired it for two weeks and had returned it to him on the 22<sup>nd</sup> February 2016. The car owner was not produced as a witness but an exhibit slip was admitted as Prosecution evidence.

PW2 further told Court that Luswata Joseph (A3) was arrested on the 28<sup>th</sup> September 2016 and he admitted knowing A1 and A2. A3 is alleged to have confessed his presence at Abuja restaurant with A1 and A2 on the 21<sup>st</sup> February 2016. A3 allegedly told PW2 that a one Lagemwa rode away the motorcycle after getting the key from A3. In cross examination, PW2 told Court that chloroform was found in the body of Kalema Charles during the postmortem examination. PW2 could not explain why Lagemwa was not charged with the others.

Namazzi Diana (PW4) operated a clinic at Gaba trading center near Abuja Restaurant. Her evidence was that on the 21<sup>st</sup> February 2016, she heard a one Kiconco the restaurant owner calling for help to arrest a girl who was fleeing from the premises. Kiconco was complaining that the girl and others had left an unconscious man in her premises. The girl was arrested and taken to Police and the victim was later taken to Police. PW4 could not identify the arrested girl in Court and did not know her names.

Mable Prossy (PW5) was employed by Kiconco as a waiter in Abuja Restaurant and was at work on the 21<sup>st</sup> February 2016. She served three girls and a motorcycle rider who were seated outside under a security light. Later one of the girls left and returned with food which she served to the group including the boda boda rider. The girls briefly left and on return sat on either side of the boda rider. One of the girls pointed at the motorcycle showing it to a man PW5 did not recognize who rode it away. The girls left the boda rider behind but Kiconco followed them and returned with A1 as others fled in a car she did not identify.

PW5 identified A1 and A2 as part of the group and confirmed it was A1 who was accosted by Kiconco. She further narrated that she remained with A1 for about 30 minutes before she was taken to Police. PW5 further narrated that when the boda rider regained consciousness he told her that his motorcycle had been robbed by the girls whom he had carried from Makindye. They had lured him to the restaurant claiming that the person to pay for the transport fare was to find them at the restaurant. PW5 did not see the accused sedate the boda rider or see A3 at the restaurant. Her evidence was that the girls spent about two hours drinking, eating and dancing at the restaurant.

Dr. Male Mutumba (PW6) examined the body of Kalema Charles from the City mortuary on a request from Gaba Police Post. The examination was carried out on the 25<sup>th</sup> February 2016 and the death was reported to have occurred on the 23<sup>rd</sup> February 2016. According to the Postmortem report a photocopy of which was exhibited as secondary evidence, the body had a canula in the arm which according to PW6 was evidence that the deceased had been to a medical facility.

PW6 saw a blood clot and bleeding all over the brain surface. The temporaris muscle above the ear was contused and the bone beneath fractured. He attributed the cause of death to blunt force trauma which could have resulted from a fall from a height, hitting the head with a blunt object or a road accident. PW6 could not be specific as to what happened to the deceased.

### **Evidence by the defence.**

A1 denied the offence and raised an alibi to the effect that she was arrested from Gaba as she was going to meet her boy friend on the 21<sup>st</sup> February 2016. She told Court that she knows A2 as a maid to her Landlord whose name she does not know and that she saw A3 in Court for the first time. A1 denied being at Abuja restaurant with A2 and A3 on the 21<sup>st</sup> February 2016. A1 disowned a Police statement in which she is reported to have confessed that she is the head of a group of sex workers at Makindye who rob and kill their clients.

A2 raised an alibi claiming she was at her work place on the 21<sup>st</sup> February 2016 but knew A1 as a neighbor at Makindye. Her evidence was that she did not know A3 before this case was taken to Court. A2 claimed to have received a call from a man claiming to be a boy friend who had just returned from Dubai. When she went to find out who the caller was, a Police woman arrested her and she was taken to Kabalagala Police where she found A1.

A3 told Court that he did not know A1 and A2 before they met in Court. He could not remember where he was on the 21<sup>st</sup> February 2016 but told Court he was arrested from Katala and taken to Kikumbi Police Post with a man he did not know. A3 claims that he was taken to Konge Police Post where he spent three weeks before being charged with the others at Makindye Court.

### **Submissions by Counsel for the accused.**

Counsel for the accused submitted that death was not proved by the Prosecution since the body allegedly examined by PW6 was not identified by anybody according to the Postmortem report. He further argued that there was no evidence of the use of chloroform as

the weapon that caused the death which PW6 attributed it to blunt force trauma .The identification evidence of PW5 was attacked by Counsel arguing that a crowd gathered at the restaurant and there was not ample light to identify the accused.It was further pointed out that PW5 was not specific about who rode away the motorcycle.

Regarding the offence of Aggravated Robbery, it was submitted for the accused that ownership of the motorcycle was not proved since it was not registered in the names of PW1.Counsel further submitted that PW5 did not see who rode away the motorcycle and it is the person who should have been charged with the offence. It was finally submitted that given that the body examined by PW6 did not have traces of chloroform ,there was no proof that a deadly weapon was used in committing the Robbery.

### **Submissions by the Prosecution .**

Prosecution on the other hand submitted that the death of Kalema Charles was proved by PW1 and that he sustained the injuries leading to his death as a result of the substance administered by the accused .Counsel pointed out that Kalema rode to the restaurant and had a good time with the accused until he lost consciousness. It was further submitted that PW5 saw A1 pointing at the motorcycle before a man rode it away. Counsel further pointed out that circumstances favoured a proper identification of the accused by PW5.

### **Summary of the Law.**

For the Prosecution to secure a conviction on the Murder charge,there must be proof that Kalema Charles is dead; that his death was unlawful; caused with malice aforethought and that the accused directly or indirectly participated in causing it.

The ingredients to prove on the charge of Aggravated Robbery are that there was a theft of a motorcycle; that actual violence at, before or after the theft was used; that the assailants were armed with a deadly weapon during or after the theft and that it is the accused who participated in the robbery.

The burden of proof is on the prosecution to prove all the elements of the offence to the threshold of proof beyond reasonable doubt. The burden of proof does not shift to the accused except in a few statutory offences. Where any accused raises an alibi as a defence, he or she carries no burden to justify it. The Prosecution is required to adduce strong evidence to place the accused at the scene of crime to discredit the alibi.

Any conviction is based on the strength of the Prosecution evidence and not on the weakness of the defence raised by the accused. A decision can only be arrived at after evaluating the evidence of both the Prosecution and defence witnesses on all the ingredients of the offence the accused is charged with.

### **Decision of Court on Count 1: Murder.**

Prosecution is required to prove that Kalema Charles is dead.PW1 who employed him told Court that he learnt of his death at Mulago hospital and even attended the burial ceremony at

Mityana.PW2 told Court that he learnt of the death from the Casualty Police Unit at Mulago hospital from where he obtained a copy of the Postmortem report .Dr.Mutumba (PW6) admitted that what was exhibited in Court was a draft of his report. He could not explain how Police acquired it since final reports are typed.PW6 however owned the report since he wrote it and the stamp of his office was affixed thereon.

It was argued for the defence that death was not proved on account of the failure to show who identified the body to PW6 which raised a possibility that another cadaver was examined and not that of Kalema Charles.It is trite that death can be proved by any other means and not only through a Post mortem report.PW1 who employed the deceased told Court that he attended the burial.PW2was told by Colleagues at the Police unit that the victim referred by Gaba Police died on the 23<sup>rd</sup> February 2016 and even had the draft report. I find that evidence persuasive enough to prove that Kalema Charles is dead.

As to whether Kalema's death was unlawful, regard is to the legal presumption that all homicides are unlawful except in cases where death is a result of an accident or is authorized by the Law .Death in the instant case was stated to have been as a result of a head injury.PW6 suggested possible causes to be blunt trauma force,a fall from a height or a road traffic accident. Counsel for the accused argued that the report did not indicate that chloroform was used to cause the death .Prosecution on the other hand argued that death was a result of the substance administered on the deceased by the accused.

It is pertinent to note that the suggestion of the use of chloroform by the accused emanated from PW2 who stated that it was detected in the body parts of the deceased by PW6.This was not correct evidence. The Indictment only mentions the use of a substance that made the deceased unconscious. PW5 who spent time with the accused at Abuja restaurant however was emphatic that she did not see any of the accused sedating the deceased.

PW6 was uncertain about the trigger to the head injury that caused the death. It could have been a hit on the head with a blunt object, a fall from a height or a road traffic accident and this certainly happened after the deceased had been carried away from Abuja restaurant. In view of the doubt created by the Prosecution evidence, it cannot be held with reasonable certainty that the death was unlawful. This ingredient of the offence was not therefore proved to the required standard by the Prosecution.

The uncertainty as to whether the death was unlawful impacts on the determination as to whether it was caused with malice aforethought since the intention to cause death cannot be established. I do not find this ingredient of the offence proved by the Prosecution. I have further found no evidence to prove that the accused caused the death of Kalema Charles.

Save for the proof that Kalema Charles is dead, Prosecution failed to prove all the other ingredients of the offence. I therefore acquit all the accused persons of the offence of murder.

### **Decision of Court on Count 11: Aggravated Robbery.**

Theft of property must be proved as an ingredient of the offence of Aggravated Robbery.PW1 and PW2 confirmed to Court that a motor cycle was bought and registered in

the names of PW2. A copy of the Logbook was exhibited in Court. It was not disputed by the defence that PW1 employed the deceased to ride his motorcycle. PW5 told Court that there was a motorcycle parked outside the restaurant which was ridden away by a man she did not identify. PW5 further narrated that when the deceased regained his senses, he told her that his motorcycle had been stolen. This evidence satisfactorily proves theft of a motorcycle from Abuja restaurant on the 21<sup>st</sup> February 2016.

It was argued by the Prosecution that a substance intended to render Kalema Charles unconscious was applied by the accused and this amounts to a deadly weapon in the context of Section 286(3)(b) of the Penal Code Act. Counsel further argued that it does not matter what substance was used as long as the objective of rendering the victim unconscious was achieved. Counsel for the accused on the other hand argued that there was no evidence of the use of chloroform in the medical report which implies that there was no proof that a deadly weapon was used in the alleged robbery.

Section 286 (3)(b) of the Act defines any substance that qualifies to be classified as a deadly weapon by the intention for which it is used on the victim. Use of alcohol or any food for the intended purpose of rendering a robbery victim unconscious would in my opinion be construed to amount to use of a deadly weapon under that provision of the Law.

It was not disputed that the accused came to the restaurant with the victim and bought him food and drinks served by PW5 for about two hours until he lost consciousness. The girls stepped out and returned to sandwich the victim on the seat and soon thereafter pointed out the motorcycle to the unidentified man who rode it away. They fled from the scene and A1 was grabbed as she boarded the car used by the others. PW5 told Court in her evidence in chief that A1 and A2 are the girls she saw in the restaurant. She was however not emphatic in cross examination that it was A2 she saw on the 21<sup>st</sup> February 2016. PW5 exonerated A3 as she did not see him at all on that day.

The narration by PW5 does in my view corroborate the evidence of PW2 as to how the whole scheme was contrived. It further corroborates what the deceased is alleged to have stated that he was lured to the restaurant and told that the person to pay the transport fare was to be found at that place. What could otherwise explain the act of buying food and drinks for a cyclist they did not know or plan to harm? Where then did the money for the drinks and food emerge from if they had no transport fare originally? Why could the accused have abandoned the friend they had shared with for almost two hours?

I do not find the argument about possible mistaken identity valid given the circumstances described by PW5. She spent two hours with the accused and would get closer to them as she served their drinks. PW5 told Court that the accused sat under a security light on the verandah. PW5 spent thirty minutes with A1 after others had fled from the scene. The attempt by A1 and others to flee the scene abandoning the deceased does in my view point to guilty conduct after commission of the offence.

The accused did not directly ride away the motorcycle but evidence of PW5 shows that they were in collusion with the unidentified person who rode it away. This was timed to happen

after the deceased was unconscious and they attempted to flee when he was still in that state. This lends credence to the argument of the use of the deadly weapon to render him unconscious. Under Section 20 of the Penal Code Act, both A1 and A2 are joint offenders in the prosecution of a common purpose of robbing the motor cycle.

PW5 was the single identifying witness whose evidence can only be used for a conviction after warning oneself of the implicit danger of possible mistaken identity. I have duly warned myself and I am fully persuaded that she correctly identified the accused as the perpetrators of the crime. One of the Assessors advised me to acquit A2 and A3 but for the reasons stated herein above, I find both A1 and A2 culpable.

I find Kaweesi Joellia (A1) and Orishaba Rachael (A2) guilty of Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act. I convict them accordingly. I acquit A3 of Aggravated Robbery and he should be released forthwith unless he is held on another lawful charge.

Moses Kazibwe Kawumi

Judge

20<sup>th</sup> February 2018.