

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**HCT – 01 – CR – SC – 0065/2015**

5 **UGANDA.....PROSECUTION**

**VERSUS**

**1. KUSEMERERWA JOHN**

**2. TUKUGIZE KISEMBO**

**3. TUMWINE ROBERT**

} .....**ACCUSED**

10

**BEFORE: HIS LORDSHIP HON.MR WILSON MASALU MUSENE**

**Judgment**

The accused were indicted with the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act. It is alleged that the accused and others still at large, on the 30<sup>th</sup> day of  
15 September 2014, at Mirongo I Village in Kyenjojo District, with malice aforethought murdered Bahemuka Estakio.

Resident Senior State Attorney Wasswa Adam appeared for the prosecution and Mr. James Ahabwe appeared for the accused on State Brief.

A1 pleaded guilty and was convicted on his own plea of guilty. The trial then produced with  
20 the other two accused and the prosecution produced two witnesses to prove its case against the two accused (A2 and A3). A2 and A3 did not produce any witnesses save for themselves and they gave sworn testimonies.

The prosecution has a duty to prove each and every ingredient of the offence since the  
25 accused is presumed innocent until proved guilty. **(See: Ojapan Ignésious versus Uganda, SC Crim App No. 25 of 2005)**

**Section 101 (2) of the Evidence Act** provides that;

*“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”*

It is further provided under **Section 103 of the Evidence Act** that;

5 *“The burden of proof as to any particular fact lies on that person who wishes the Court to believe its existence, unless it is provided by law that the proof of that fact lie on any particular person.”*

The standard of proof in criminal cases is beyond reasonable doubt. This however, does not mean proof with utmost certainty. If evidence is so strong against an accused as to leave only  
10 a remote possibility in his favour, which can be dismissed with a sentence: ‘of course it is possible but not in the least probable’, the case is proved beyond reasonable doubt; but nothing short of that will suffice. (**See: Miller versus Minister of Pensions [1947] 2 ALL E.R. 372**)

Similarly, in **Uganda versus Dick Ojok (1992-93) HCB 54**: it was held that in all criminal  
15 cases, the duty of proving the guilt of the Accused always lies on the Prosecution and that duty does not shift to the Accused except in a few statutory cases and the standard by which the Prosecution must prove the guilt of the Accused is beyond reasonable doubt.

With respect to the nature of evidence required, the Accused persons can only be convicted on the basis of evidence adduced before Court, such evidence must be credible and not  
20 tainted by any lies or hearsay, and otherwise it will be rejected by the Court for being false.

Prosecution must prove all the ingredients of the Offence of Murder in order to sustain a conviction thereof. In the case of **Uganda versus Bosco Okello [1992-93] HCB 68 , Uganda versus Muzamiru Bakubye & Anor High Court Criminal Session No.399/2010**, where it  
25 was held that Prosecution must prove the following ingredients beyond reasonable doubt:-

1. That the deceased is dead;
2. That the death was caused unlawfully;
3. That there was malice aforethought;

4. That the Accused person directly or indirectly participated in the commission of the alleged Offence.

**That the deceased is dead:**

The prosecution witnesses all told Court that the deceased person had died and there was a post mortem report to corroborate this evidence. Thus, without doubt the prosecution ably proved this ingredient beyond reasonable doubt.

**Unlawful death:**

All homicides in Uganda are presumed by law to be unlawful except where such deaths are excusable by law itself. Such excuses consist of the following;

- 10 1. Death caused accidentally.
2. Death occasioned in defence of life or property.
3. Death which is carried out in the execution of a lawful sentence.
4. Death that is occasioned as a result of extreme and immediate provocation.

In the instant case the deceased's head was cut off and under no circumstances does this fall under any of the above exceptions therefore the prosecution proved this ingredient beyond reasonable doubt.

**Whether there was malice aforethought:**

**Section 191** of the Penal Code Act which lays out circumstances under which malice aforethought is deemed to be established. These are:

1. An intention to cause the death of any person, whether such person is the one actually killed or not.
2. Knowledge that the act or omission will probably cause death of same person, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused.

In the instant case the deceased died due to amputation of the head, loss of brain tissue, cardiovascular failure leading to multiple organ failure leading to death. The head of the deceased was cut off with a sharp object and this was a very gruesome act that cannot be

recovered from because its only result is death. A sharp object was used in the execution of the offence to wit a panga and the body part attacked is what governs the functionality of the whole body. The deceased and the accused were said to have had a grudge over land. I find that all the circumstances when put into consideration prove that there was malice  
5 aforethought.

**Participation of the accused:**

PW1, Tuhaise Peter told Court that A2 was his neighbour and A3 his cousin. That he had known the two since childhood. That the deceased was his uncle and was killed by A1 after he had killed his cow. PW1 added that on the fateful night he had the wife and children of the  
10 deceased crying who told him that his uncle had been killed. That the Police mounted a patrol at night who came with a sniffer dog. That the sniffer dog led them to A1's home and he was arrested. That A1 confessed to have killed the deceased with A2 and A3.

PW1 also added that the sister of A1 told him that A1 and A3 had spent the whole day sharpening their pangas to kill and after killing the deceased they rejoiced. That the accused  
15 persons had a grudge with the deceased over land.

PW2, Beatrice Keyara, also told Court that she knew the accused since childhood. That the deceased was her husband, whose head was cut off and when it was recovered it was found wrapped in the shirt of A1. That A1 was arrested because he admitted killing the deceased and said that he did it with A2 and A3 who are all close friends. PW2 basically corroborated  
20 the evidence of PW1.

DW1, Tukugize Kisembo, in his defence told Court that he heard A1 say that he was the one that killed the deceased and he did not assist A1 in killing the deceased and that he could not remember where he was on the fateful day.

DW2, Tumwine Robert, in his defence stated that A1 admitted that he killed the deceased and  
25 A1 is his brother. That what PW1 said was incorrect, that he did not assist A1 in killing the deceased and raised an alibi.

I have carefully analysed the evidence on record and studied the post mortem report which was admitted in evidence under **Section 66** of the Trial on Indictment Act. The external injuries were amputation of the entire nose, ears, amputation of bilateral eyebrow and total  
30 amputation of the head. I have also examined the photographs of the remains of the

deceased's body and my finding is that A1, Kusemererwa John who pleaded guilty and is serving sentence could not have done that elaborate chopping off of the head alone. DW1, Tukugize Kisembo told Court that he could not remember where he was on that particular date. That was in my view a blatant lie to escape the course of justice. I also do not believe the testimony of DW2, Tusiime Robert of Alibi because the prosecution witnesses have placed him at the scene of crime.

PW1 and PW2 also testified that A1, Kusemererwa John confessed that he was assisted by A2 and A3 in the commission of the offence. The Prosecution witnesses also stated that the accused had been known to them for a very long time since childhood and so there could not be any mistaken identity.

Under **Section 132** of the Evidence Act, an accomplice shall be a competent witness against an accused person and a conviction based on such evidence is not illegal. Since the confession was made in the presence of PW1 and PW2. In the circumstance, and as advised by the Assessors, I find and hold that the two accused are guilty as charged and are accordingly convicted of the offence of murder contrary to **Sections 188** and **189** of the Penal Code Act.

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**WILSON MASALU MUSENE**

**JUDGE**

**13/05/2019**