

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE
CRIMINAL SESSION NO.009 OF 2015; CRB 113/2015 KIBUKU

UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

A₁. KAPIO NEKEMIYA

A₂. MWANIKA DAUSON

A₃. PADO ANTHONY

A₄. VUNIKA SEPERIANO

A₅. WANALA RICHARD :::::::::::::::::::::::::::::::::::::: ACCUSED

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] The 5 accused persons; **Kapio Nekemiya, Mwanika Dauson, Pado Anthony, Vunika Seperiano** and **Wanala Richard** were indicted with the offence of murder C/ss to 188 and 189 P.C.A. It is alleged that on the 20/2/2015 at Butoloyi village in the Kibuku District, the accused persons and others still at large murdered a one **Tabiruka Samuel**. Each of the accused persons pleaded not guilty to the offence.
- [2] The prosecution case as can be gathered from the evidence led by the prosecution is as follows;
A1 and **A2** are sons to the deceased. Their mother however passed on. **A4** is a son in law of the deceased. The rest of the accused persons were friends to the deceased person and the family. At the time of his demise, the deceased had 2 wives who included **Janet Kayendeke** (PW1).
- [3] On the 20/2/15, the deceased left home to Kiryolu Trading Centre where he operated a shop. He never returned in the evening. At first his wife **PW1** thought that he had probably gone to his 2nd wife's home. It was on the following day, when his body was recovered in a trench along Budaka Kakutu road in a swamp of Mpolyabigere village at the

bridge. The body had a nylon rope wrapped around the neck and the tongue had been scooped out of the mouth and cut. The deceased's wife (PW1), his son **Mulya Samuel** (PW3), his village mates who included **Mutile Emmanuel** (PW4), his other sons **A1** and **A2** all were able to identify the body as that of the deceased found in a trench at the swamp where it had been disposed of.

- [3] The deceased's wife (PW1) and his son **Mulya Samuel** PW3 contended for the prosecution that the 2 sons of the deceased i.e **A1** and **A2** had always threatened to kill the deceased because he had failed and refused to give them their share of their land inheritance. It is the prosecution case that the 2 sons, **A3**, **A4**, and **A5** and others still at large named as **Guloba**, **Muzafa** and **Azidi** murdered the deceased and disposed the body in the trench at the swamp near the bridge along Budaka-Kakutu road as a way of disposing it.
- [4] In their unsworn statements, save for **A5**, the accused persons stated that they knew and heard about the death of the deceased, they went to the scene but they denied knowledge of who could have murdered the deceased, **Tabiruka Samuel**. As regards **A5**, he denied knowledge of anything including **A1- A4** and the deceased person.
- [5] In all criminal cases, the burden of proving the guilt of the accused beyond reasonable doubt rests always upon the prosecution. That burden does not shift to the accused except in a limited number of statutory cases which is not applicable to the instant case; **WOOLMINGTON Vs DPP**, (1935) A.C 462; **OKETH OKALE Vs R**, (1965) E.A 555 at 559. It is also well established law that an accused should not be convicted on the weakness of his defence but on the strength of the case as proved by the prosecution; **UGANDA Vs OLOYA S/o YOVAN OWEKA**, [1977] HCB 4 at p.6 and **R Vs ISRAIL EPUKU S/o ACHIETU**, (1934) I EACA 166 at 167.
- [6] In the offence of murder, the ingredients of the offence to be proved by the prosecution beyond reasonable doubt as required by **Article 28(3) (a) of the Constitution of Uganda** and disclosed by **S.188 of the P.C.A**;
1. Death of a human being.
 2. That the death of the deceased was caused unlawfully.

3. That the death of the deceased was caused with malice aforethought.
4. That the accused participated in causing the death of the deceased; See **UGANDA Vs DECEMBER ROBERT, H.C.CRIM, CASE No. 208/15, FORT PORTAL.**

- [7] As regards the 1st ingredient of the offence, during the preliminary hearing of the trial of the accused persons, the Post Mortem Report dated 21/2/15 regarding the deceased was admitted as an agreed fact (**P.Exh.1**). All the prosecution witnesses and the accused persons with the exception of **A5** concede that the deceased's body was recovered in a trench at a swamp near the bridge along the road described by police as Kakutu-Budaka Road (**P.Exh.1**).
- [8] The Post Mortem Report (**P.Exh.1**) signed by **Dr. Kirya** detailed the injuries the deceased sustained as bruises over the right arm and flank and a rope mark around the neck. He had a fractured neck and cause of death was established as cardiac respiratory failure. In the premises as a result of the foregoing, I find and hold that the 1st ingredient of the offence that the deceased is dead has been proved beyond reasonable doubt.
- [9] As regards the 2nd ingredient of the offence, all homicides are presumed to be unlawfully caused unless caused by accident or self defence or defence of property or by an act of God; **R Vs Gusambizi S/o Wesonga, (1948) EA CA 65**. In this case, the defence never raised any of the above to excuse the death or that the killing of the deceased fell under any of the above exceptions.
- [10] As regards the 3rd ingredient of Malice aforethought, malice aforethought is defined under **S.191 PCA**;
"an intention to cause death of a person... or knowledge that the act or omission causing death will probably cause the death of some person..."
Malice aforethought is therefore a mental element of the offence of murder and it can be inferred from the surrounding circumstances of the offence such as the weapon used, the part of the body targeted, the nature of injuries inflicted and the conduct of the assailant before, during and after the offence; **PATRICK AKOL & ORS Vs UGANDA, [2006] HCB Vol.1 at p.6.**

- [11] In the instant case, the prosecution relied on the Post Mortem Report (**P.Exh.1**) admitted in evidence under **S.66 of the TIA**. The body of the deceased had bruises over the right arm and flank of the body. What is remarkable however, is the rope mark around the neck and the internal injuries highlighted in the fractured neck (cervical spine). The cause of death was cardiac respiratory failure secondary to strangulation by a rope.
- [12] The foregoing in brief point to the fact that the deceased was strangled to death. He was choked to death by compassing or constricting the throat with a rope and in the process, the normal breathing was seriously obstructed and the result, was death. The act of strangling the deceased by the neck using a rope is sufficient for this court to infer malice aforethought on the part of the assailants.
- [13] The Post Mortem Report never referred to the scooping out of the tongue of the deceased by the assailants. However, evidence of **Mulya Samuel** (PW3) is that when he went to the scene, he found his father's body with multiple bruises on the head with his tongue having been scooped out of the mouth. It was cut off the mouth. There was also a rope around his neck. The same was echoed by the wife of the deceased (**PW2**). This fact appear not to had been challenged by the defence.
- [14] The scooping and cutting of the tongue of the deceased out of the mouth appear to be a practice and cultural belief among some societies in Uganda and it is to the effect that once you remove or cut the tongue of the deceased, then the spirit of the deceased may never come back to haunt the murderer and or reveal whoever was behind the demise of the deceased. I take judicial notice of this cultural belief and this act is also part of the proof that the assailants intended to murder the deceased.
- [15] The sum total of the foregoing prove beyond reasonable doubt the 3rd ingredient of the offence of Malice aforethought on the part of the assailants.
- [16] As regards the participation of the accused persons in the murder of the deceased, in this case, there are 2 key identifying witnesses; **Kanene Wilberforce** (PW2) and **Mubale Emmanuel** (PW4). **Kanene Wilberforce**

(PW2) knew all the accused persons; **A1** and **A2** as being sons to the deceased while **A5** is his village mate and the rest as people hailing from the neighboring villages of Butoloji where the body of the deceased was recovered.

- [17] On the 20/2/15 at around 7:00pm while on his way from Budaka Trading Centre, **PW2** found all the accused persons (**A1 - A5**) together with a one **Muzafa** and **Azidi** at the bridge between Budaka and Kibuku pushing a person he described as a sick man on a bicycle carrier. The deceased's head was fallen but the deceased was being held or supported from both sides. He suspected the deceased to be dead and as a result, he did not talk to anybody. He branched into a small path and ran home.
- [18] On the following morning, the body of the deceased was found in the swamp at the bridge where he (**PW2**) had met the accused persons together with **Muzafa** and **Azidi** pushing the deceased on a bicycle. He went to the scene and confirmed the body of the deceased at the scene. It had a rope around the neck and multiple injuries on the head. The tongue had been scooped out of the mouth and cut out.
- [19] According to **Mubale Emmanuel** (**PW4**), he also knew the accused persons very well. It was on the 20/2/15 at around 8:00pm when he was coming from a grinding machine at Kaderuna Trading Centre and when he reached at Butoloyi, he saw a torch flash. He moved to the flash as he also flashed his torch. Then he saw **A1** and **A2** who at first, he did not identify. They were pushing a person on bicycle and he thought they were carrying a sick person to hospital. The sick person had a fallen head. As it was night, he never bothered to identify the sick person. However, as he came closer with his torch, he saw a looped sort of a net tied around the neck of the sick person. It was then that he suspected the sick person being pushed on the bicycle could be dead. Then, he saw these people place the dead person in a trench near the road. It is around this time that he was able to identify **A1, A2, A4, A5, Muzafa, Wakulu** and **Guloba**. **PW4** got scared of what he saw and he therefore decided to proceed home without talking to these people. The next day, at 9:00am, he heard an alarm as people went to the scene, that the deceased's body was at the scene where he saw the accused persons dispose of his body. The jaw of the body was defaced and there was a rope around the neck of the deceased.

[20] The above 2 witnesses identified the accused persons during different hours of the evening. **PW2** was able to identify the accused persons and 2 others still at large at around 7:00pm while **PW4** was able to identify them at around 8:00pm. Though **PW2** was enabled to identify the accused persons by the help of the natural lighting at the time (it was at 7:00 am not yet dark), **PW4** was enabled by the flash light torch he had and the flash light form the accused persons themselves. It is clear from their evidence that none of **PW2** and **PW4** were able to know the person who was being ridden/pushed on the bicycle but both of them were able to notice that the person who was being ridden or pushed on the bicycle had his head fallen. They suspected that he could have been a very sick person who was being taken to the hospital for medical treatment. It is also notable that both **PW2** and **PW4** bumped into the incident at the same spot. Indeed, on the following day, that is the spot where the body of the deceased was found lying with a nylon rope which was first seen as a looped sort of a net by **PW4** around the neck.

[21] The evidence of **PW2** and **PW4** is supported and corroborated by the evidence of **Mulya Samuel** (**PW3**) who on the 20/2/15 at around 4pm while at Kiryola Trading centre where the deceased operated a shop, saw **A5** and **Guloba** together. It should be recalled that **Guloba** was identified by **PW4** as one of the people who were with the accused persons on the night of the eve of discovery of the deceased's body at the bridge trying to dispose of the body. **PW3** tried to join them but upon seeing him, both of them stood up and decided to leave. Nevertheless, **PW3** had noticed **A5** to had stuck a nylon rope inside his stockings. He described the rope as yellow, white and red. Later, **Guloba** returned and joined him at the church. While they were together, he overheard **Guloba** talk to **Muzafa** on phone informing him that he and others should not leave because the person they wanted was closing the shop and coming. Indeed, at that time, the deceased was closing the shop, little did he know or realize that indeed, they were referring to his father, the deceased. **Guloba** then rang **A3** in his presence, mentioning his name as he called, and gave him similar information. When it clocked 8:00pm, they left for home and it was later on the following day that he heard that his father had been killed. He cried and mourned his father.


- [22] It is therefore not a coincidence that the deceased's body was found with a nylon rope around its neck. The issue of the colours of the rope as seen by **PW4** earlier in the day and those on the rope found around the neck of the deceased is immaterial as it does not necessary mean that the exact rope seen with **A5** is the same that was used to strangle the deceased. They could have changed ropes or **PW4** could have mis-described the colour of the rope due to the distance between him and **A5**. The wife of the deceased (**PW1**) described the rope as she saw it around the neck of her dead husband as blue in colour.
- [23] In the circumstances of this case, I ignore the description of the rope by colours. What is vital is that it was a nylon rope and this is what was found around the neck of the deceased. The discrepancy of the description of the nylon rope by colours by **PW4** as seen during the day with **A5** and the description by other witnesses including the wife of the deceased (**PW1**) who described it as blue as seen on the body of the deceased is very minor and this court is ready and can safely ignore it since it does not point to a deliberate untruthfulness; **UGANDA Vs DUSMANI SABUNI [1981] HCB 1**.
- [24] In conclusion, I do find that at the material time **PW2** saw the accused persons pushing the deceased on the bicycle, supporting him on all sides, it was at 7:00pm and the lighting condition was still favourable for correct and proper identification. **PW4** found the same group but this time disposing off the body at around 8:00pm and he was able to identify the accused persons by the help of a torch flash light from his own small torch and that of the accused persons themselves which lighted the whole scene, and he was eventually able to identify all the accused persons including those suspects who are still at large; I am guided on this aspect by **ABDALLA BIN WENDO & ANOR Vs R, [1953] EA CA 166**.
- [25] It should be noted that **PW2** never saw the accused persons dispose of the body. The disposal of the body was witnessed by **PW4** who appeared later at the scene. It should also be noted that witnesses were estimating time and were not looking at any gadget of time. The logic of different times or timing is therefore explainable. Lastly, what is clear is that the accused persons were very well known to the identifying witnesses to the extent that there weren't any mistaken identity.

Conduct of the accused persons before the demise of the deceased and after his death.

- [26] The wife of the deceased (**PW1**) together with the accused's brother **Mulya Samuel** (**PW3**) testified that **A1** and **A2** had previously been threatening that they would kill the deceased because he had refused to give them their share of the land. At one time, the deceased reported these threats to the Local authority (L.C). It is the prosecution case that this was the motive behind the murder of the deceased. Motive in criminal prosecution is always an important aspect of criminal prosecution. This is grounded on the fact that a person in his normal state of mind cannot commit a crime without a reason or motive. The existence of a motive made it more likely that the accused would commit a crime; **UGANDA Vs BURIRIMWEZI & 2 ORS, H.C.CRIM.SESSION CASE No.070/14, MASAKA.**
- [27] It is the prosecution case that the accused persons were present during the burial of the deceased but it is evident that **Guloba, Muzafa and Azidi** disappeared and are still at large. These were identified with the accused persons on the night of 20/2/15 when they were trying to dispose of the body of the deceased. It is the evidence of **Bamwise Joram** (**PW5**) that he wanted to arrest the accused persons at the burial but failed because of insufficient man power. That however, after the burial, all the suspects disappeared. They were located after a month and that is why they had to be arrested at dawn 3:00am. **A5** resurfaced in April and he was also picked from his home.
- [28] The total sum of the conduct of the accused persons; the threats of killing the deceased and the disappearance from the village immediately after the burial of the deceased yet some of them like **A1** and **A2** were family members are factors inconsistent with the innocence of the accused persons regarding the murder of the deceased. When the above is looked at alongside the accused persons' disposal of the body of the deceased in such a manner intended to create an impression that the deceased was murdered by strangers using a rope, I am satisfied that the inculpatory facts are incompatible with the innocence of the accused persons and are incapable of explanation upon any other reasonable hypothesis than that of guilt; **SIMON MUSOKE Vs R, (1956) E.A 715.** In this case, it has not been

shown by the defence that the accused persons disappeared from the village because they felt that they had been implicated in the murder. In fact, it is the defence case that police at the scene inquired as to whether anybody knew about the killers of the deceased but nobody mentioned their names. The same occurred at the burial. Then what made the accused persons to disappear from the village is inconsistent with their innocence. The accused persons' mere flat denial is therefore in the circumstances rejected. The prosecution led cogent evidence implicating **A1, A2, A3, A4 and A5**. In agreement with the honourable assessors, I find the accused persons guilty of the offence of murder of the deceased **Tabiruka Samuel** and I convict each of them accordingly.

Dated and delivered at Mbale this 15th day of **September, 2020**.



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Byaruhanga Jesse Rugyema
JUDGE.

15/9/20

5 accused persons present

Mr. Muliro for state

Mr. Wamimbi for defence

Ms. Acam holding brief for defence, counsel Kanyago also holding brief for defence.

Mr. Masola: Clerk

2 Assessors present

Court: Judgment delivered in the presence of the above.

State: This is a very grave offence which requires a deterrent sentence. The deceased was brutally killed, the tongue was scooped out and cut, and the convicts were close relatives of the deceased. **A1** and **A2** are his children. Their action was driven by greed for share of their father's land. It is our prayer that a message is given to the public that is only God who gives life and therefore, he is the one to take it away. I pray for a deterrent sentence of 40years.

Ms. Acam: All the convicts are first offenders with no record of convictions. They have been on remand since 18/3/15. As all convicts are family men and bread winners respectively, their families were dependent on them. **A1** is aged 50 years and appear to be remorseful basing on his demeanor throughout the trial. **A2** is of advanced age. The period he has been on remand has tamed him and he is respectful.

A3 is aged 55 years and suffers from chronic renal failure. His condition requires constant medical attention.

A4 is aged 30 years that is a developmental age bracket. He can be useful to the nation and the community in future.

A5 is aged 50 years and by virtue of his age, he deserves leniency.

All the convicts have been on remand for a period of **5 years, 5 months** and some days and through this period, they have learnt lessons and basing on the report from prisons, they have reformed. The state prayed for a deterrent sentence of 40 years but long sentences do not reform or deter inmates from committing offences. In the circumstances, we pray for a lenient sentence as court judiciously exercises its discretion.

Court: Matter stood over for the sentence.

SENTENCE

- [1] The accused persons/convicts are first offenders aged 43 years (**A1**), 52 years(**A2**), 55 years (**A3**), 30 years (**A4**) and 45 years (**A5**) as per their own statements during defence. These are all productive years of a human being. They are definitely family men and bread winners and their families must have been dependent on them.
- [2] I note that **A3** has a chronic renal failure as per the medical documents brought to the attention of court. The medical problem appear to be as old as 2015 but what is of concern is, such a man with this medical condition getting himself involved in the gruesome murdering of a fellow human being.
- [3] The deceased was brutally murdered, had his tongue scooped out of the mouth and cut probably for ritual purposes. The deceased also had dependants on him including his 2 wives and other children. **A1** and **A2** are his own sons while **A4** is a son in law. It is a disturbing state of affairs considering the high likelihood of the fact that the motive to kill was greed for share on his land. It was premeditated killing.

- [4] I do find that the aggravating factors outweigh the mitigating factors.
- [5] All the accused persons have been on remand since 18th March, 2015 which translates to **5 years and 6 months** period spent on remand. I note that in **Bukenya Vs Uganda, Crim. Appeal No.51/17 (C.A)**, the court of Appeal confirmed life imprisonment for a 36 year old man. In **Sunday Vs Uganda, Crim. Appeal No.13/06 (C.A)** the court of Appeal again maintained life imprisonment for a 35 year old man. In **Byaruhanga Vs Uganda, Crim. Appeal No.144 of 2007**, the court of appeal slapped 20 years imprisonment for a 29 year old convict who drowned his 7 months' old baby.
- [6] Bearing the above in mind and that murder is a very serious offence which attracts a maximum sentence of death and that the accused persons have been close people to the deceased, I do sentence each of the accused to **25 years term of imprisonment**. In compliance with **Article 23 (8) of the Constitution**, I take into account the period of **5 years and 6 months** the accused persons have been on remand, the accused persons shall now serve a **sentence of 19 years and 6 months**.

Right of Appeal explained as regards both the conviction and the sentence.

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Byaruhanga Jesse Rugyema
JUDGE.

16/9/20

5 accused persons present

Mr. Muliro for state

Mr. Wamimbi for defence

Ms. Acam holding brief for defence, counsel Kanyago also holding brief for defence.

Mr. Masola: Clerk

2 assessors present

Court: Sentence read in the presence of the above.

Signed

Byaruhanga Jesse Rugyema
JUDGE.