

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
HCT-00-CR-SC-0818-2019

UGANDA **PROSECUTOR**

VERSUS

KINTU IVAN **ACCUSED**

BEFORE: THE MR. JUSTICE MICHAEL ELUBU

JUDGEMENT

The accused, **KINTU IVAN**, indicted with the offence of Murder contrary to sections 188 and 189 of **the Penal Code Act**. It is alleged in the particulars of offence that on the 1st of December 2018 at Kijjabijjo in Kasangati Town Council in Wakiso district, the accused, with malice aforethought unlawfully killed **BONGOLE YASIN**.

At his arraignment, Kintu Ivan denied the charges thus bringing all the elements of this offence into issue. The prosecution accordingly called 6 witnesses to prove its case while the accused was the sole defence witness.

The brief facts for the prosecution are that on the night of the 30th of November 2018 at Kijjabijjo village in Kira Municipality in Wakiso district, the accused, the deceased and several others at large, were in a bar called Bitebi Bar where a fight broke out. The deceased got out of the bar and stood by the road side - the main road from

Gayaza town. Shortly after, the accused and others rushed out of the bar, went for and started beating the deceased who collapsed and fell by the roadside. At that point the accused and his friends started bragging that they had beaten him. When people noticed that the deceased was badly off, they arrested one Ndawula and the accused whom they handed in to the Police. They returned to the scene to take Bongole to hospital. He was found to be bleeding from the mouth, nose and ears. On transfer to the clinic, he was pronounced dead on arrival. The deceased was buried on the 3rd of December 2018. The accused, on the other hand, was eventually produced in court and charged with this offence.

In his sworn evidence, Kintu Ivan denied committing this offence. He stated that he was a stone dealer working in a stone quarry located in a place called Baghdad which is in Mukono district. He testified that on the 30th of November 2018, he was part of a team of three who delivered stones to a customer up to 2.00 am. After taking the stones, the lorry was to go to Luwero for more materials, but on the way he chose to disembark at a place called Nakasajja. As he was walking home, officers guarding the nearby market arrested and took him to Busukuuma Police Post. From there he was transferred to Kasangati Police Station where he was charged with this offence. He stated that he has never been to Kijabijjo. That he does not know Bitebi bar nor does he take alcohol. That he does not know the deceased Bongole and is surprised to have been charged with his murder.

As this is a criminal case it is trite law that the burden of proof rests with the prosecution and never shifts (**Okethi Okale vs R 1965 E.A 555**). The standard of proof is beyond reasonable doubt (see **Kamesere Moses vs Uganda S.C.C.A 8/1997** (unreported)).

Ms Amy Grace was Counsel for the Prosecution while Mr Muhwezi Anthony represented the accused person on state brief.

With regard to charges of Murder contrary to sections 188 and 189 of **the Penal Code Act** the essential elements are:

- i. There was a death
- ii. The death was caused unlawfully
- iii. With Malice aforethought
- iv. The accused participated.

i. There was a death

PW 1 Kanamugire Shaban and PW 3 Copriano Sempebwa were among the first responders to the incident. They both knew the deceased well and helped to take him to hospital. At the time his body was trembling and blood was from his mouth nose and ears. When he was carried to a nearby clinic the medical officer pronounced him dead on arrival. The body was thereafter taken to Kampala city mortuary where Doctor Male Mutumba conducted a post mortem. Lastly, PW 2 – Nakitto Afuwa confirmed the deceased was her brother. That a friend informed her of events and transported her to the mortuary on the 1st of December 2018 where she saw her brother's dead body. That he was eventually buried on the 3rd of December 2018 in Seeta, Kasawo in Mukono district on the 3rd of December 2018.

From the above, there is overwhelming evidence that Bongole Yasin is dead.

ii. The death was caused unlawfully

The position of the law is that all homicides are presumed to be unlawful unless authorized by law or proved to have been accidental or excusable (see **Gusambizi s/o Wesonga [1948] 15 EACA 63**). This finding is an inference to be drawn from the facts of a particular case.

A homicide is the killing of one human being by another. In this case the deceased was beaten by several people and it was the beating that led to his injury and death. The circumstances in this case show the death to have been a homicide. The beating was neither justified nor lawful. There is no evidence that it was excusable. In the result I find that the beating and death of deceased was unlawful.

iii. With Malice aforethought

As stated, the deceased here was beaten. PW 3 saw a number of people beat him till he collapsed. When PW 1 and PW 3 took him to the clinic he was shaking and also bleeding from the mouth, ear and nose. PW 4, the Police Officer saw him lying on the veranda of the clinic in a pool of blood flowing from the mouth, nose and ears. The post mortem examination established that the cause of death was head injury and blunt force trauma. His occipital bone, which is on the skull was fractured.

Malice aforethought is provided for in S. 191 of **the Penal Code Act** and is deemed to be proved by evidence showing a positive intention, by the accused, to cause death although such knowledge is accompanied by an indifference whether death is caused or not.

Malice aforethought is not easily proved by direct evidence, as intention resides in the mind. For that reason, the High Court and superior courts have held in a long line of decisions, that malice aforethought can be inferred from: the type of weapon used; the nature of the injuries inflicted; the part of the body affected; and the conduct of the perpetrator before and after the attack. (See **Amis Katalikawe & 2 Ors V Ug SCCA 17/94** Unreported).

In this case the beating must have targeted the head with such force that the skull was fractured. That conduct by itself is sufficient to prove malice aforethought. The

intention was proved by the force of the blows that fractured the skull and jubilation that the deceased was finished. There may have been indifference whether or not the injury may result in death but the circumstances were sufficient to prove this element.

iv) Whether the accused person participated in the commission of the offence

The accused in this matter stated that he was arrested from Nakasajja by officers guarding the market there and eventually taken to Kasangati Police station. He added that he has never been to Bitebi bar let alone to Kijjabijjo and was certainly not there on the date of the date in question. Finally that he does not know the deceased person. His evidence is therefore a denial which amounts to an alibi.

The law is that an accused person who sets up an alibi does not thereby assume the duty to prove it. The burden remains on the prosecution to prove to the required standard of proof that the accused was at the scene of crime (see **Moses Bogere & Anor Vs Ug SCCA 1/97**).

The prosecution evidence is that PW3 was Copriano Sempebwa, a boda boda who lived in Kijjabijjo. Towards midnight on the night of the 30th of November 2018 he stopped to buy chips near Bitebi bar. There was a lot of shouting in the bar and what sounded like people fighting. Shortly thereafter the deceased ran out and stood about 10 meters from PW3. Lights on the nearby buildings and along the road lit the area properly. Shortly thereafter a group of about 10 people including the accused came out of the bar and saw the deceased. They rushed at and started beating him till he collapsed. The group then started bragging that they had beaten the deceased.

Just then, PW 1, Kanamgurie Shaban, who doubles as the defence Secretary was in his house when he heard the commotion. The house is near the bar and he could hear the sound of someone being beaten. He came out and found the accused, Ndawula

and others shouting that they had beaten the deceased and he was finished. They appeared to be jubilating or bragging and some were ululating.

When they realised that the deceased had collapsed, the accused and others attempted to flee. The accused, Ndawula and 2 others were arrested.

A person called Kabugo Lawrence went and called PW 4 PC Okiror who was on duty at the Kijjabijo Police Post. He came to the scene dressed in civilian clothing and together with the people around took the accused to the police.

These two witnesses confirmed that the area was well lit with electric light.

To allay the danger of mistake and wrongfully convicting the innocent person, a court should ordinarily test identification evidence for its quality. The test was clearly enunciated by the Court of Appeal in **Abdalla Nabulere and 2 Ors vs Ug Cr App No.9 of 1978** as follows,

The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.

In this case PW 3 stated he was not sure whether the accused is the person he arrested because he now has no hair. However he was certain that the man who beat the deceased is the one he arrested and took to the police. He stated he was standing only about 10 meters away and there was sufficient light. Besides the entire incident took about 25 to 30 minutes. Immediately after the man was bragging that he had beaten the deceased. He arrested him together with defence secretary. It is also true that PW 1, the defence secretary, arrived to find the accused bragging that he had beaten the

deceased. PW 1, PW 3 and the public chased and arrested the accused when he attempted to flee. Together they took him to the Police. PW 1 knew the accused and had no doubt as to his identity. PW 4 Okiror came to the scene immediately after the report had been and found the accused had been arrested as the person who had beaten the deceased. Together with the public, they took him to the police post. All these witnesses confirmed the area was well lit at the time.

The accused in this case has disputed the prosecution case and states he was not even in Kijjabijjo on this day. I agree that PW 3 the only eye witness to the beating is not sure whether the accused is the person he saw. This coupled with the fact of the alibi set up by the accused requires this court to examine the evidence closely.

I find the following passages cited in **Tumuheire v Uganda** [1967] 1 EA 328 relevant here:

As was said by Lord Normand in *Teper v. R.* (1) ([1952] A.C. at p. 489):

Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another ... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence.

In *R. v. Taylor, Weaver and Donovan* (2) the principle as regards the application of circumstantial evidence was enunciated in these words:

Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.

The direct evidence of identification is questionable. The court is therefore left to examine circumstances here. The series of events at Bitebi bar on the 30th of November 2018 show the person who beat the deceased is the one who PW 1 and PW 3 arrested. PW 1 identified the arrested culprit as the accused. They took him to the post. PW 4 was present as one of the arresting persons but people did not know him because he was not wearing uniform. He stated it was the accused who he re-arrested on that day. This set of circumstances prove with almost mathematical precision that it was the accused who beat the deceased and was arrested at Kijjabijjo on that day. It is not true that he was in Nakasajja as he said.

In the result, I find that the accused has been identified and placed at the scene of crime. For those reasons his alibi cannot stand and it is the finding of this court that he participated in the commission of this offence.

I there find, in agreement with the assessors, that **Kintu Ivan** is *guilty* on the offence of Murder Contrary to Sections 188 and 189 of the PCA and are hereby *convict* him.

Dated at Kampala this Day of November 2022

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Michael Elubu

Judge