

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CRIM.S. CASE NO. 0099 OF 2015; CRB HOIMA 1473/2014
UGANDA :: PROSECUTOR

VERSUS

A1. NYENDWOHA FENEKANSI
A2. OZELLE ALOYZIOUS :: ACCUSED

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1] The 2 accused persons, **Nyendwoha Fenekansi** (A1) and **Ozelle Alozious** (A2) were indicted with the offence of **Murder C/ss 188 and 189 P.C.A.** It is alleged that on the 2nd day of December, 2014 at Kitole village in the Hoima District, the 2 accused persons unlawfully caused the death of **Kiiza Robert**. The accused persons pleaded not guilty to the offence.
- [2] The prosecution case is that on the fateful day, though the 1st prosecution witness described it as 2nd of June 2014, at around 7:30-8:00pm, a one **Ndyanabo** was seen fighting **A1** in front of a one **Nyakaishiki's** bar. **Emmanuel Kakooza** (PW1) and the L.CI chairperson a one **Andrew Byamugabi** rushed to the scene where they found **A2**, who helped them separate **Ndyanabo** who was fighting with **A1**. At that time, the deceased also appeared at the scene. PW1 and the L.CI chairman later left the 2 accused persons and the deceased at the scene.
- [3] Immediately thereafter, (around 8-8:30pm) a misunderstanding is reported to have occurred between the deceased and the 2 accused persons. **Tumuhaise Mary** (PW2) with the help of solar power house at her home, saw the 2 accused persons, **A2** in particular holding a short stick, chasing the deceased. Later, the deceased was found lying down unconscious in the corridor of a one **Nicholas's bar**. The deceased was rushed to the hospital where he later died.

- [4] Both the accused persons flatly denied knowing and later on killing the deceased. They however alluded to the earlier fight between **A1** and a one **Ndyanabo** though **A1** specifically denied knowledge of either **A2**, the deceased **Kiiza** or **Tumuhaise Mary** who testified that she saw him and **A2** chase the deceased to his eventual death. **A2** on his part denied knowledge of the deceased but admitted knowing **Tumuhaise Mary**, her neighbor.
- [5] The prosecution was represented by **Ms. Nakaggwa**, a state attorney while the accused persons were represented by **Ms. Twesiime Irene**.
- [6] As in all criminal cases, save for statutory exceptional cases of which the present case is not, the burden of proof is on the prosecution to prove all the ingredients of the offence beyond all reasonable doubt; **UGANDA VS R.O. 973 Lt. SAMUEL KASUJJA & 2 ORS H.C.CRIM.CASE NO. 08/92**.
- [7] The ingredients of the offence of Murder are:
- a) That there was death of the person named in the indictment.
 - b) That the death was caused unlawfully.
 - c) That there was malice aforethought.
 - d) That the accused person directly or indirectly participated in the commission of the alleged offence; (See also **UGANDA VS KALUNGI H.C CRIM.CASE NO. 443/2007**.
- a) That the deceased is dead.**
- [8] During the preliminary hearing under **Section 66 of the T.I.A**, the Post Mortem report (**P.F.48 B**) was admitted unopposed (**P.Exh.1**). It confirmed the death of the deceased **Kiiza Robert**, the cause of death was established to be internal brain haemorrhage and trauma. The prosecution witness **Emmanuel Kakooza** (PW1) and **Tumuhaise Mary** (PW2) found the deceased lying down unconscious with wounds on the head in a corridor at **Nichola's** bar. The deceased was rushed to the hospital where he was later pronounced dead as was later revealed by the Post mortem.

- [9] Since the Post Mortem Report was uncontested and the evidence of both **PW1** and **PW2** was not challenged as regards the death of the deceased, I find the 1st ingredient of the offence proved beyond reasonable doubt.

b) Whether the death of the deceased was unlawful

- [10] The law presumes every homicide (the killing of a human being by another) unlawful unless it is excusable, accidental or authorized by the law. The circumstances that make a death excusable include defence of the person or properties or death by natural causes; See **GUSAMBUZI WESONGA VS R (1948) 15 EACA 65** and **UGANDA VS OKELLO [1992-93] HCB 68**. In the present case, it was not shown that the death of the deceased fell within the exceptions of homicide. Instead, the evidence as per the Post Mortem Report (**P.Exh.1**), the deceased died of multiple strikes that crushed the skull. The death was in the circumstances not justified, it was unlawful.
- [11] In the premises, I accordingly find the death of the deceased unlawful and the 2nd ingredient of the offence is in the circumstances found to have been proved beyond reasonable doubt.

c) Malice aforethought

- [12] It is defined by **Section 191 PCA** as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person.
- [13] In the instant case, the question would be whether whoever assaulted the deceased and inflicted the lethal blow that crushed the skull as reflected in the Post Mortem Report (**P.Exh.1**) intended to cause death or knew that the manner and degree of assault would probably cause death. According to **Tumuhaise Mary** (PW2), the deceased was found lying down unconscious with a hit wound on the head. As per the Post Mortem Report, the reason of death was internal cerebral haemorrhage with direct trauma to the brain matter. The head being a vulnerable part of the body, I find that whoever assaulted the

deceased and inflicted the lethal blow that crushed the skull, intended to cause death and knew that the manner and degree of the assault on the head would cause death. In the premises, I find the 3rd ingredient of the offence duly proved beyond reasonable doubt.

d) Participation of the accused persons

- [14] It is the evidence of **Emmanuel Kakooza** (PW1), a shop attendant and resident of Kitole village where the offence was committed that he knew the deceased as a worker of a one **Zahara**, a village mate. That while with the L.C1 chairman **Andrew Byamugabi**, they saw **Ndyanabo** fighting with **A1**. They rushed to the scene where they found **A2** who also joined them to separate the duo from fighting. The deceased also came to the scene and upon the fight ending, **PW1** and the chairman left the scene leaving behind the 2 accused persons and the deceased at the scene of the fight.
- [15] Later, after a few minutes, **Tumuhaise Mary** (PW2) with the help of solar light at her home, while standing on the veranda, saw the 2 accused persons, **A2** holding a stick chasing the deceased. Later, she (**PW2**), the L.C1 chairperson and others found the deceased lying unconscious in the corridor of a one Nicholas' bar. The deceased was rushed to the hospital where he shortly died from.
- [16] From the forgoing, it is clear that there is no eye witness who saw any of the accused persons do the actual striking of the deceased with the lethal blow that crushed his head. However, case law has established that,

“the standard of proof required is not proof to absolute certainty. Nonetheless, the prosecution evidence should be of such standard as leaves no other logical explanation to be derived from the facts, except that the accused committed the offence”;

WOOLMINGTON VS DPP (1935) AC 462, MILLER VS MINISTER OF PENSIONS [1947]2 ALL ER 373 and UGANDA VS SSEBUUFU MUHAMMED & 7 ORS H.C.CRIM.SESSION NO.493 OF 2015.

- [17] In the instant case, though both accused persons denied knowledge of the deceased, it is unchallenged evidence of **Emmanuel Kakooza** (PW1) that upon separating **A1** who was fighting with a one **Ndyanabo** at **Nyakaishiki's bar**, they left the deceased with the 2 accused persons. After a few minutes, **Tumuhaise Mary** (PW2) saw the accused persons chasing the deceased and later, the deceased was found lying unconscious in the corridor of a one **Nicholas' bar**.
- [18] The law relating to single identifying witness is that court can convict on such evidence after warning itself and the assessors on the special need for caution before convicting on reliance of the correctness of the identification. The reason for special need for caution is that there is possibility that the witnesses might be mistaken, see **CHRISTOPHER BYAGONZA VS UGANDA CRIM. APPEAL BO.25 OF 1997** and **ABDALA NABULERE & ANOR VS UGANDA CRIM.APPEAL NO.9 OF 1978 reported in [1979] HCB 77**.
- [20] In the instant case, I do warn myself of the needed special caution as I did to the assessors. The deceased had earlier on been left with the 2 accused persons at **Nyakaishiki's bar**. A few minutes later, **Tumuhaise Mary** (PW2) who knew very well the deceased as a village mate who was working for a one **Zahara** and her brother **Adnani** saw the 2 accused persons whom she knew as village mates, **A2** being his neighbor, a fact admitted by **A2**, chasing the deceased while **A2** was armed with a stick.
- [21] Though we are not told in evidence how satisfactory the solar light at PW2's home was, **PW2** explained that she was able to see the 2 accused persons chasing the deceased with the help of solar light implying that the solar light in question was sufficient for her to properly identify the accused persons chasing the deceased. Again, though at the time she could not tell where the chase ended, she later found the deceased with head wounds lying unconscious at **Nicholas' bar**. The chain of events therefore started from **Nyakaishiki's bar** where **PW1** left the deceased with the 2 accused persons, then, the logical reported misunderstanding that developed between the accused

persons and the deceased as stated by **PW2** that led the 2 accused persons chasing the deceased up to where he was found with the fatal wounds on the head, a crushed skull that eventually led to his death.

- [22] It is my view that the flat denial of the accused persons is a mere afterthought. After assaulting the deceased, the 2 accused persons left the scene and could not be found by those who rushed to the scene. The misstating of the date of the incident by **PW1**, as **2/6/2014** is immaterial and therefore can be ignored since **A2** himself correctly stated the date as **2/12/2014** which is consistent with the date of the alleged commission of the offence in the indictment.
- [23] I am satisfied that the conditions for a proper identification by **PW2** to identify the 2 accused persons chasing the deceased were good and she was able to see and identify them chase the deceased to his eventual death.
- [24] The prosecution evidence left no other logical explanation to be derived from the facts, except that it is the 2 accused persons who killed the deceased. In the premises, I find and hold that the prosecution has proved the 4th ingredient of the offence beyond reasonable doubt.
- [26] Having found and held that the prosecution has proved all the ingredients of the offence of murder beyond reasonable doubt, as advised by the joint assessors opinion of lady and gentleman assessors, I do hereby find the 2 accused persons guilty and I do accordingly convict each of the accused persons of the offence of murder contrary to **Sections 188 & 189 PCA**.

Dated at Masindi this 2nd day of **March**, 2022.

Byaruhanga Jesse Rugyema
JUDGE

SENTENCE

- [1] The 2 convicts, **A1** and **A2** have been found guilty of the offence of murder which carries a maximum sentence of death. However, death sentence is no longer mandatory in this country as per **Susan Kigula Vs A.G Constitutional Appeal No. 3 of 2006**. The death sentence is only reserved for rarest of the rare cases for which I have not been able to find this case to be as per the facts of this case. The manner in which the deceased was murdered may not call for a death sentence. The murder appear to had occurred out of a fight between the accused persons and the deceased.
- [2] The 2 convicts are aged 58 and 42 years respectively but the deceased whose life they unlawfully took was of the apparent age of 22 years as per the Post Mortem Report (**P.Exh.1**). He was growing up and had reached a productive age and therefore, loss of his life must have very much affected his parents and dependants. There is nothing on record to suggest that the fight that culminated in the deceased's death had been provoked. It is also a fact that the 2 convicts are 1st offenders but again, this court has not been able to see any remorsefulness on the part of the convicts though it is still apparent that they still have room to reform.
- [3] The sentencing range for murder is from 30 years imprisonment to death presently as per the sentencing guidelines. Upon consideration of the totality of the above, I do find a **sentence of 30 years** as appropriate for each of the accused persons. However, considering the fact that the convicts have been on remand since 12/12/14, ie a period of **7 years & 2 months**, I sentence each of the convicts to and shall serve a **sentence of 23 years and 10 months** term of imprisonment.
- Right of Appeal explained

Byaruhanga Jesse Rugyema

JUDGE

3/3/2022.