

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CRIMINAL SESSION CASE NO.0055 OF 2017

UGANDA ::::::::::::::::::::::::::::::::::::::::::::::::::::::: PROSECUTION

VERSUS

A1. TAYEBWA STEVEN

A2. JANUARY FRANCIS ::::::::::::::::::::::::::::::::::::::::::::::: ACCUSED

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] The 2 accused persons; **Tayebwa Steven** alias **Nanfuka** (A1) and **January Francis** (A2) were indicted for the offences of **Murder C/ss 188 & 189 PCA in Count 1&II** and **Aggravated Robbery C/ss 285 & 286(2) PCA in Count III**.
- [2] It is alleged that on the 3rd day of August, 2016 at Kagombe village (River Muzizi) in Kagadi District, with Malice aforethought, the 2 accused persons caused the death of **Mukombe Zakayo** (count1) and **Tumuheirwe Susan** (Count II) and at the same time robbed **Mukombe Zakayo** of **Shs. 2,000,000/=**.
- [3] **January Francis** (A2) pleaded not guilty to the offences while **Tayebwa Steven** (A1) pleaded guilty to the 3 Counts and opted for plea bargain upon which he was found guilty of the **3 Counts** and was convicted accordingly.
- [4] The deceased persons were husband and wife. They had sold their maize and rice which they had harvested from Kagombe Forest Reserve where they had camped for cultivation of crops. During the night, while in their field hut, they were attacked, killed and then drowned in the swamp of River Muzizi. When the deceased couple got missing, their

children who include a one **Habyarimana James** commenced a search for them as they also reported the couple's disappearance to police.

- [5] During a joint search by the L.Cs, police and community members who included the 2 accused persons, the 2 bodies were recovered from the papyrus reeds of River Muzizi. It is upon recovery of the 2 bodies that the 2 accused persons disappeared from the searching party. However, after the burial of the deceased persons, **A2's** workers who included **A1** were found relocating **A2's** cattle and properties. Some of **A2's** properties were located in the forest unattended.
- [6] As a result, the 2 accused persons became suspects. **A1** was arrested when found being part of the team that was removing **A2's** things from his house and taking them out into hiding. Upon arrest, **A1** revealed how he got involved in the murder of the couple and the other people he was with who included a one **Kule** referred to as pastor and a one **Tom. Kule** and **Tom** had also been working/cultivating in the Kigomba Forest where the deceased persons were killed from.
- [7] A search for **A2, Kule** and **Tom** was intensified, **A2** was after sometime located in the forest in **Bore Kibaale district** burning charcoal by one of the daughters of the deceased persons.
- [8] In his sworn statement to court, **A2** admitted that he heard about the missing couple; **Zakayo** and his wife **Tumuhairwe**. That he joined the search party that started from the deceased persons' house. The search led them to River Muzizi where they recovered the bodies of the deceased couple. That however, when the bodies were taken for burial, on his way home, he met a one **Christman Dean** who told him that he was being suspected as being one of the murderers. That after a week, he started getting threats from the family members of the deceased persons spear headed by **Habyarimana** which he reported to police and the L.C1 chairperson. Then that thereafter, he left the village and went into hiding. In the meantime, people destroyed his home, banana plantation, coffee and crops during his hiding. He was arrested from Kagadi where he had relocated. He also admitted knowing **A1** who he described as a casual labourer in the area and **Kule** alias **pastor** whom he came to know in 1996 when he came to the area, Katereza looking for food.

- [9] It is axiomatic that the duty to prove the guilty of an accused person beyond reasonable doubt lies on the shoulders of prosecution throughout and it never shifts to the accused; **Woolmington Vs DPP (1935) AC 462** and **Oketh Okale & Ors Vs R (1965) EA 555 at 559**.
- [10] As regards **counts 1 & II** of murder, the prosecution can only secure a conviction after proving inter alia, the following ingredients of the offence beyond reasonable doubt.
1. That the person(s) named in the indictment as deceased are dead.
 2. That the death was caused unlawfully.
 3. That there was malice aforethought; and
 4. That the accused person(s) directly or indirectly participated in the commission of the alleged offence.
- See Uganda Vs Bosco Okello [1992-93] HCB 68** and **Mukumbe Moses Bulo Vs Uganda S.C.Crim. Appeal No.12 of 1995**.
- [11] In **count III of Aggravated Robbery**, the prosecution case can secure a conviction after proving inter alia, that there was theft, that the theft was accompanied by violence or threat of use of violence, possession of a deadly weapon in the process of stealing and finally that the accused directly or indirectly participated in the commission of the offence. See **Uganda Vs Obua Polycarp and Anor, H.C.Crim.Case No.454 of 2015[2019] UGHC 3**.
- [12] As regards the charge of murder in **counts 1 & II**, as to whether the deceased persons were dead, during the preliminary hearing, (under **S.66 TIA**), the Post Mortem Reports of the 2 deceased persons; **Zakayo Mukombe** and his wife **Susan Tumuheirwe** were exhibited as **P.Exh.1 & 2**. The 2 reports are to the effect that the deceased persons were dead and the cause of death was established as strangulation and then that the bodies were therefore thrown into a river. 2ndly, the photos of the dead deceased persons were also admitted as agreed upon facts and were marked **P.Exh.6**.
- [13] Both **Habyarimana** (PW2) son of the deceased couple and **P.C Denis Muru** (PW3) participated in the search for the missing couple and were among those who recovered the bodies from river muzizi. **A2** himself admitted that the bodies of the deceased couple were recovered from the river.

- [14] With the foregoing evidence, I am satisfied that the prosecution proved beyond reasonable doubt that the couple **Mukombe Zakayo** and **Tumuheirwe Susan** were dead.
- [15] As regards the 2nd ingredient of the offences, i.e, is whether the death of the deceased was unlawful, death is always presumed to be unlawful unless caused by accident, or in defence of property or person or by an act of God; **R Vs Gusambizi S/o Wesonga (1948) E.A.C.A 65**. The above presumption is rebuttable and it is upon the accused to rebut it by showing that the killing was either accidental or excusable; **Festo Shirabo S/o Musungu Vs R (1955) 22 E.A.C.A 954**.
- [16] In the present case, it is apparent that the accused also conceded that the death was unlawful for it was inexcusable. I find that this 2nd ingredient of the offence has been proved by the prosecution beyond reasonable doubt.
- [17] As regards the 3rd ingredient of the offence, that is, Malice aforethought, this is defined under **S.191 PCA** as an intention to cause death of any person or knowledge that the act or omission causing death will probably cause death of a person. Malice aforethought being a mental element of the offence of murder can be inferred from the surrounding circumstances of the offences such as, the nature of the weapon used (lethal or not), the part of the body targeted (vulnerable or not) and the manner in which the weapon was used (whether repeatedly or not); **See R Vs Tubere S/o Ochen (1954) E.AC.A 63** and **Akol Patrick & Ors Vs Uganda (2006) HCB Vol.16**.
- [18] In the instant case, the Post Mortem Reports (**P.Exhs 1 & 2**) of the deceased persons reveal strangulation of the deceased persons as was evidenced by lack of neck rigidity and then the bodies being drowned into the river. **Tayebwa Steven** (DW1) who participated and witnessed the death of the deceased couple testified that the deceased persons were strangled to death. Thereafter, the deceased persons' bodies were thrown into a river.
- [19] The foregoing clearly show that whoever was behind the strangling of the deceased couple had intended them to die. The neck is one of the vulnerable parts of the body for strangulation suffocates the victim to

death. In the premises, I find that the prosecution has proved beyond reasonable doubt the required malice aforethought.

- [20] The last and the most important element of the offence is whether the accused persons were one of the participants in the murder of the deceased couple. In its bid to prove participation of the accused in the commission of the offence, the prosecution, first of all managed to have the charge and caution statement and the extra judicial statement of **Tayebwa Steven** (A1/DW1) admitted as agreed facts under **S.66 TIA**. According to both statements made by A1/DW1 (**P.Exh.5**), it is **A2** who lured **A1** into the commission of the offence and he witnessed both the accused (**A2**) and **Kule** break the neck of the deceased persons by way of strangulation. Thereafter, **Kule** and his colleague Tom disappeared.
- [21] Though while testifying, **Tayebwa Steven** (A1/DW1) appeared to shield **A2**, both the charge and caution statement together with the extra judicial statement were admitted as agreed facts and therefore the contents of the 2 documents have to be taken as correct therefore reflecting the truth.
- [22] Besides, by applying the rules concerning corroboration and confession of a co-accused; **R Vs Okitui S/o Odeke (1941) E.A.C.A 294**, such corroboration is found in the evidence of the son of the deceased couple, **Habyarimana** (PW2) and **Denis Muvu** (PW3). According to **PW2**, when the deceased couple were pronounced missing, the entire community, together with L.Cs and police mounted a search for the deceased couple. The search party included the accused (**A2**) and (**A1**). It was upon the recovery of the 1st body of **Zakayo** that both **A1** and **A2** took off and eventually the accused (**A2**) disappeared from the village. This was followed by the acts of **A2's** workers relocating **A2's** cattle and other properties. **A2's** cattle became stranded around for lack of attention and some of **A2's** properties were located in the forest unattended. **A1** was arrested when found to be part of the team that were relocating **A2's** properties into a hiding place.
- [23] **A2** who was an ordinary resident of Katereza "A", Kyenjojo Sub County, fled the village and was located deep in a forest in Bora, Kagadi (former Kibaale) District, the fact he himself admitted. In **Remigious Kiwanuka Vs Uganda, SC Crim. Appeal No.41 of 1995**, it was held that;

“The disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence. This is because such sudden disappearance from the area is incompatible with innocent conduct of a person.”

In Uganda Vs Yowana Baptist Kabandize [1982] HCB 93, it was held that,

“Conduct of the accused immediately after the death of the deceased of running away from the scene of crime and of being in a restless mood...showed a guilty mind.”

- [24] In the instant case, **Habyarimana** (PW2) testified by observing that the accused persons and other suspects still at large who included **Kule** and **Tom** fled the village before anybody suspected them. Then **A2** started relocating his cattle and other properties. These cannot be actions of an innocent person. **A2** must have been working out a way to disappear from the village for good.
- [25] Though the accused claim to had left the village out of fear of being suspected as one of the killers of the deceased couple, my view is that if that is the position, he should have reported the threats against his life and for protection from either the local authorities or police. During cross examination, he conceded that he never reported to police the threats against his life as a result of this incident. There is also no evidence that he surely reported it to the local authorities.
- [26] As a result, I find that the above accused’s conduct upon recovery of the bodies from River Muzizi point to nobody else but the accused as one of the killers of the deceased couple. The conduct of the deceased upon recovery of the bodies amply corroborated the charge and caution statement and the extra judicial statement of **A1/DW1** which I find generally in fact true. I find that the prosecution has proved beyond reasonable doubt that the accused (**A2**) participated in the killing of the deceased couple.
- [27] In agreement with the lady and gentlemen assessors, I find that the prosecution has proved its case of murder against the accused person and as a result, I find the accused guilty of **counts 1 & II** and he is convicted of the same accordingly.

- [28] As regards **count III of Aggravated Robbery C/ss 285 & 286 (2) PCA**, the ingredients to be proved by the prosecution are;
- (i) Theft of property belonging to the victim.
 - (ii) Used violence or threat of use of violence during the theft.
 - (iii) Possession of a deadly weapon during the theft.
 - (iv) Participation of the accused in the theft; **Uganda Vs Obua Polycarp** (Supra).

In this case, there is no evidence that the deceased couple had sold their rice and maize as claimed by the prosecution. Though **Tayebwa** (A1/DW1) stated that the assailants wanted and got money from the deceased couple, he did not reveal how much money was taken from the deceased persons if at all there was any. He contradicted himself by stating that he remained outside the hut of the deceased persons as **Kule** and group robbed and murdered them while at the same time, he claim to had witnessed the taking away of money from the victims. In my view, I find that the prosecution failed to adduce evidence that there was theft of the alleged Ugx 2,000,000/=, the property of the victims/deceased persons.

- [29] From the foregoing, I find that the prosecution failed to prove beyond reasonable doubt the offence of **Aggravated Robbery** against the accused.

- [30] All in all, the accused person (**A2**) is found guilty of murder of the deceased persons **Mukombe Zakayo** and his wife **Susan Tumuheirwe** in **counts 1 & II**. The accused person (**A2**) is therefore in the premises accordingly convicted of the offence of **Murder C/ss 188 & 189 PCA**.

Signed, dated and delivered at Masindi this **28th** day of **September, 2022**.

Byaruhanga Jesse Ruyema
JUDGE.

28th/9/22

A2 present

Ms. Akello for state

Ms. Akankunda for defence

Mr. Thembo: Clerk

Ms. Akello: 2 people were killed in cold blood. Their bodies were dumped in the swamp. The deceased were parents who were valuable to their families and society at large. This offence of murder attracts a death sentence. I pray for a deterrent sentence that shall serve a lesson to him & others. Death sentence shall serve the purpose.

Ms. Akankunda: The convict prays for lenience. He is a 1st offender aged 37 years, and therefore deserve leniency. He has a family and children to take care of. He therefore prays for mercy.

SENTENCE

- [1] The convict is a first offender who has been found guilty of murdering a couple and later dumping the bodies in the swamp of R.Muzizi. The death of the couple caused anxiety among families and the communities at large.
- [2] The offence of murder carries a maximum sentence of death but case law now has it that death sentence should be awarded in the rarest scenarios; **Aharikundira Vs Uganda [2018] UGSC 49**. It is my view that this is not a case of the rarest of the rare;
- a) There is no evidence that the convict was a continuous threat to the society.
 - b) There is no evidence that the convict cannot be reformed and rehabilitated.
 - c) The convict is 37 years of age i.e in his productive years and was therefore 31 years when he committed the crime.
 - d) Though the murder was planned and therefore, a deterrent sentence is desired, he is a family man and the death sentence would have an effect on others.

e) The offence is now rampant in this region (considering the statistics from his court).

- [3] In the premises, I avoid a death sentence and consider **30 years of imprisonment** on each **Count, 1 & II** as appropriate which are to run concurrently.
- [4] The convict has however been on remand since **2/9/16** and as a result, taking into account the period he has spent on remand, he is to serve a sentence of **23 years and 11 months** term of imprisonment on each **Count, 1 & II**. The sentences shall run concurrently.

Right of Appeal explained

Dated at Masindi this **29th** day of **September, 2022**.

Byaruhanga Jesse Ruyema
JUDGE.