

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CR-SC-0098 OF 2014.

UGANDA.....PROSECUTOR

VERSUS

RWABWOGO MICHAEL.....ACCUSED

JUDGMENT.

BEFORE: HIS LORDSHIP MR. JUSTICE WILSON MASALU MUSENE.

The accused, Rwabwogo Michael was indicted with the offence of murder C/S 188 &189 of the Penal Code Act.

The particulars were that the accused, and others still at large I the night of 11/12/2013 at Kyarusozi old village in Kyenjojo District, with malice aforethought, unlawfully murdered Nsungwa Christopher.

When accused was arraigned in court, he pleaded Not guilty. By virtue of that plea, it was incumbent on the prosecution to prove all the ingredients of murder beyond reasonable doubt. This is because an accused person is presumed innocent till proved guilty or till he pleads guilty.

See: Article 28 (3) of the Constitution of Uganda.

The ingredients of the offence of murder as far as this case is concerned are:-

- (1) Death of Nsungwa Christopher.
- (2) Death was unlawfully caused.
- (3) Death was as a result of malice aforethought
- (4) Identification of accused as the one who caused or participated in the killing of the deceased.

The prosecution relied on the post mortem report in respect of the deceased, Nsungwa Christopher which was performed by Dr; Tumwine Charles of Kyarusozi Health Centre IV.

The cause of death was stated to be brain damage following injuries around the neck and head and Dislocation of the spinal code.

The prosecution also called evidence of four witnesses, PW1 Kyahurwa Josephine, PW2 David Katebalirwe, PW3 Kunihira Beatrice and PW4, No. 38451, Sgt. Orach Mark, a dog handler at police.

The accused on the other hand gave sworn testimony in his defence whereby he completely denied participating in the killing of the deceased.

As far as the first ingredient of the offence is concerned, all the prosecution witnesses alluded to the fact of death of the deceased.

The same was also confirmed by the post mortem report. The prosecution has therefore proved the 1st ingredient of the offence beyond reasonable doubt.

On the second ingredient of the offence, it is now settled law that all Homicides are presumed to be unlawfully caused, unless caused by accident, an act of God or in defence of property or person.

See: R.V.Gusambizi S/O Wesonga (1948) 12 EACA 65.

The post mortem report in this case revealed many injuries on the head and around the neck leading to dislocation of the spinal code.

Cause of death was stated to be brain damage. Such death was in the circumstances unlawfully caused.

The third ingredient of malice aforethought as defined under S. 191 of the Penal Code Act is the intentional killing of a human being or the act or omission resulting into death of a human being. It is now settled law that malice aforethought can be determined by the nature of injuries, the parts of the body targeted and the conduct of the assailant before, during and after the commission of the offence.

See: Akol Patrick & others V. Uganda [2006] H.C.B Vol. 1 page 6.

In the present case, the deceased was injured around the neck, the head and spinal code which are sensitive parts of the body.

Whoever caused such injuries and leading to brain damage and death did so out of malice aforethought.

This court therefore finds and holds that the prosecution has proved the 3rd ingredient of the offence beyond reasonable doubt.

I now turn to the contentious ingredient of participation of the accused.

PW1 Kyahurwa Josephine in summary testified that on the morning of 11/12/2013, she ran to where Topista Kajumba was crying and was told that Christopher Nsungwa had died. She added that it was the sniffer dog which led police to the house of the accused.

PW2, David Katebalirwe was the one who discovered the dead body of the deceased on 11/12/2013 at 6:00 a.m. He then alerted the sister of the deceased, Topista Kajumba and others. PW2 also talked about blood stained clothes which were allegedly found in the home of the accused and taken by the police.

Unfortunately, no such blood stained clothes were exhibited, nor was there any scintilla of evidence that they were forwarded to the Government Analytical Laboratory for sample testing to find out whether the blood thereon matched with that of the deceased.

That was indeed very poor handling of investigations by police. And to make matters worse, the Investigating Officer was never called as a witness and there was no mention of the alleged blood stained clothes recovered in the accused's house.

PW3, Kunihira Beatrice testified that she owned a restaurant where the accused and the deceased ate from after selling bricks.

She stated that the accused warned the deceased over UGX 5,000= and the next day, Nsungwa was dead.

Lastly was PW4, No. 38451, Sgt Orach Mark, the dog handler. He went to the scene of crime with the dog and introduced the same to the scene where the body was. He testified that after the dog had sniffed around, it moved up to the door way of the accused and stepped there. PW4 was told that the accused had already been arrested by the L.C.I Chairman.

The accused, in his defence stated that he heard about the death of Nsungwa while in police custody otherwise he did not participate in the killing of the deceased. The Accused added that on the night of 11/12/2013, he was at his home sleeping after returning from Kyarusenzi Trading Centre at 8:00 p.m. The accused added that the following morning, he left his home and went to work in the Tea Estate and was arrested at 9:00 am while at work.

Thereafter, he was taken to Kyamukenyi police post and accused denied ever quarreling with the deceased over UGX 5,000=.

In his final submissions, Mr. Kwesiga Michael for the State stated that PW4, the dog handler placed the accused at the scene of crime as the dog led the team to the accused's house.

Counsel added that there was corroboration from PW3, Kunihira Beatrice whose testimony was that the accused and the deceased had a confrontation and the accused had threatened the deceased. He therefore concluded that prosecution had proved participation of the accused beyond reasonable doubt.

Mr. Kateeba for the accused on the other hand submitted that there is no eye witness testimony as far as the participation of the accused in the commission of this offence. He added that even the circumstantial evidence must be such that the inculpatory facts are of no other hypothesis than the guilt of the accused.

And that the inference of guilt must not be weakened. Mr Kateeba also criticized the sniffer dog of police in that it did not follow the accused up to the place where he was despite having moved on foot from his home to Katoratora's tea plantation.

He also submitted that since PW2 was the first person to reach the deceased and even touched and shook him, then the sniffer dog should have picked the scent of PW2.

He quoted the case of **Wilson Kyakuruhaga VS. Uganda Court of Appeal Criminal Appeal No. 51 of 2014**, where the court of Appeal warned against relying on sniffer dog evidence without corroboration.

I have carefully considered and analysed the submissions on both sides as well as the evidence as a whole.

PW2, David Katebalire testified that when police entered the house of the accused, they recovered blood stained clothes which were partly torn and that the police took them.

As I have already stated and for emphasis it was fundamental and necessary that those clothes be exhibited and samples be taken to Government Analytical Laboratory (GAL) in Wandegaya for purposes of finding out whether the blood on those clothes matched with the blood of the deceased. That would have created a water tight case against the accused.

Unfortunately, the blood stained clothes were never exhibited and even the Investigating Officers never testified. He/she would have explained to court what happened to the blood stained clothes PW2 had testified about, and that created a big dent in the prosecution case as far as participation of accused was concerned.

Secondly and as correctly submitted by counsel for the accused, the accused was arrested at the place of work and by the time the sniffer dog went to his home, the accused was already arrested and in police custody.

That created some doubts in the prosecution case. It would have made a difference if the sniffer dog went to the home of accused before he was arrested. The arrest of the accused therefore pre-wasted the findings of the sniffer dog and its handler.

Furthermore, when PW4 No. 38451/Sgt Orach Mark was cross-examined by counsel for the accused, he stated that if anyone touched the body of the deceased, the dog would lead him where that person was.

PW2, Katebalirwe David was the first person to see the body and he even touched it and shook it to confirm he was dead. The question lingering in the mind of court is why the sniffer dog did not also go to where Katebalirwe was and instead went to the accused's home, when he had already been arrested and in police custody.

That as well cast doubt in the prosecution case and leaves this court thinking a lot as to whether the sniffer dog was properly trained or not. The other factor was that the scene of crime was not preserved as emphasized by the court of Appeal in the case of **Wilson Kyakuruhaga** referred to.

In the circumstances and in view of what I have outlined, I find and hold that the prosecution has not proved the 4th ingredient of the offence beyond reasonable doubt. And where all the ingredients of the offence have not been proved, then the accused cannot be convicted. This is also on the advice of the Assessors,

I accordingly do hereby acquit the accused and set him free unless there are other pending cases against him.

.....
Wilson Masalu Musene
Judge.

31/5/2018

Accused present

Mr. Claude Arinaitwe holding brief for Mr. Kateeba Cosma

Mr. Kwesiga Michael for state

Assessors present

Ikiriza, court clerk present

Signed: (Wilson Masalu Musene)
Judge.

Court; Judgment read out in open court.

.....
Wilson Masalu Musene
Judge.