

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT THE SESSION HOLDEN AT MUBENDE
CRIMINAL SESSION CASE NO. 48 OF 2000**

UGANDA:..... PROSECUTOR **VERSUS**
KAWOYA MATHIAS:..... ACCUSED

BEFORE: THE HONOURABLE .AG.JUSTICE PAUL K. MUGAMBA

JUDGMENT

The accused was indicted for murder contrary to sections 183 and 184 of the Penal Code Act. At the time of hearing this case, after both sides had admitted the evidence of Dr. Sempijja of Mityana Hospital which showed that the deceased Kakooza Matia died of head injury consistent with internal haemorrhage, the prosecution called 3 witnesses. They were Lawrence Ndiko (P.W.1), Mpoza Emmanuel (P.W.2) and Nakidde Robinah (P.W.3).

The accused gave unsworn evidence and called no witnesses.

Briefly the prosecution case was as follows. On 8th September 1998 the deceased Kakooza Matia died of head injuries sustained earlier in the afternoon. The accused had been a boyfriend of the mother of P.W.1 and the deceased. His girlfriend had died sometime earlier leaving him in her house which was near that of the deceased. The accused was in the process of moving away from that house and taking with him items of property. Earlier in the day accused had come with PW2 the Local Chairman of L.C.1 and, in the presence of the deceased, taken away what appeared all he had in the house. Later that afternoon accused returned alone and claimed that he had forgotten his graduated tax tickets and a bottle in the house. The deceased was reluctant to allow the accused, who was holding a club, into his mother's house. However when the accused insisted and proceeded to enter the house deceased went following him and entered the house too. A fight followed which culminated in a noise like that of thumping and a statement by the deceased that he had been killed by the accused. When PW1 entered the house he found accused holding the deceased by the neck. Accused also held a club. Blood flowed from the ears and nose of the deceased. Deceased died later that night after he was taken to a clinic. Accused was later arrested and indicted for the murder of the deceased.

In order for the prosecution to succeed in securing a conviction for murder it must prove four ingredients of the offence beyond reasonable doubt. The four ingredients are;

- (a) that the deceased died;
- (b) that the death of the deceased was unlawful;
- (c) that the deceased was killed with malice aforethought; and
- (d) that it was accused who committed the offence.

With regard to the first ingredient, a post mortem report made by Dr. Sempijja of Mityana Hospital was admitted in evidence. The Doctor had examined the body of Kakooza Matia on 9th September, 1998. The body had been identified to him by PW1, a brother to the deceased. PW3, widow of the deceased also testified that accused died on 8th September, 1998. I am in no doubt that the prosecution has proved beyond reasonable doubt the fact of deceased's death.

The second ingredient concerns whether the killing of the deceased was unlawful. It is incumbent upon the prosecution to prove that the killing was unlawful. At law every homicide is unlawful unless it was committed accidentally or in circumstances which show that it was excusable such as where it was in self defence, defence of another or defence of property. The case of Gusambizi Wesonga (1948) 15 EACA 65 articulates this proposition. In view of the evidence on record it is necessary to see if the killing of the deceased was lawful. It is the evidence of PW1 and PW3 that there had been a fight between the deceased and the accused in the house of Nantale. A sound like that of thumping was heard by the two witnesses who also heard words to the effect that accused was killing the deceased. Later on the two witnesses saw deceased with a big wound on the head, with blood flowing from the nose and ears. The accused on the other hand stated in his defence that he does not know how the deceased sustained the fatal injury on the head. I am satisfied that given the above evidence of the injury sustained by the deceased, his eventual death was a result of an unlawful act. The act was not accidental nor could it be said to have been excusable. The prosecution has proved that the killing was unlawful and the accused has not challenged this.

The next ingredient is whether the killing of Kakooza was accompanied by malice aforethought. Malice aforethought as defined under section 186 of the Penal Code Act means

intentional killing of a person by another, knowledge that one's act or omission will probably result in the death of that other person. Certain factors are taken into account in deciding whether malice aforethought is present. These factors are such as the nature of the weapon used in causing death, the number of injuries inflicted upon the deceased, the part of the body where such injury was inflicted and the conduct of the killer before and after the death. The case of R Vs Tubere s/o Ochen (1945) 12 EACA 63 is pertinent.

According to the postmortem report, the deceased died owing to head injury consistent with internal haemorrhage. In the post mortem report the doctor stated that there were no weapons identified at the site which would have been used upon the body. It is not clear what could have inflicted that injury on the head since when it occurred only the deceased and the accused were in the house. As the two were fighting the possibility of deceased's head hitting against any object cannot be ruled out. Mention is made of a big stick or club by PW1 and PW3 which both witnesses stated the accused had come with and which he had gone within to the house where the fight had taken place. However according to the testimony of PW2, wife of the deceased, when accused came PW1 had not yet come. According to PW3 it was she who had sent for PW1 when she realized the fight between accused and deceased called for intervention. That being the case, there is no way PW1 could have seen accused on his arrival. That leaves only the testimony of PW3 concerning the club. PW1 also mention the club at a later stage when he went into Nantale's house to separate the accused and deceased. According to him accused was holding the stick. He does not say accused applied the stick on any part of deceased's body. According to PW1 when he arrived in the house while one hand of the accused held the stick on the held deceased by the neck. It is not clear what happened to the club. It was never exhibited. Suffice it to say that there was only one wound on the deceased.

It may be pertinent to examine the conduct of the accused before and after the incident resulting into the death of the deceased. Earlier in the day accused had come to collect his property from Nantale's house. Deceased had insisted accused come with the L.C 1 chairman, PW2. When accused had collected his property in the presence of L.C 1 claim, he told the chairman that he had forgotten certain items of property at the house, to wit graduated tax tickets, a bottle and a thread. PW2 was in no position to help him go back to collect these items as he was proceeding to a funeral. He testified, however, that there was a misunderstanding between accused and deceased. When accused returned later in the

afternoon he told deceased that he wished to take the remaining items of property. Deceased is on record as refusing accused permission to proceed to the house, saying that there was nothing more belonging to the accused. He further stated the accused did not pay graduated tax. According to PW3 the two had quarrelled for about one hour before accused decided to proceed to Nantale's house where he was immediately followed by the deceased. After the fight accused did not resist arrest.

I have carefully considered the circumstances of this case leading to the death of Kakooza and find that malice aforethought is missing.

The final ingredient to be proved by the prosecution is whether it was the accused who committed the offence. As I have indicated earlier the evidence implicating the accused is purely circumstantial. It was held by the Court of Appeal for Eastern Africa in Simon Musoke Vs R [1958] EA 715 that in a case depending exclusively upon circumstantial evidence court must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. In the same case the earlier case of Teper Vs R (2) [1952] AC 480,489 is quoted where it is stated:

“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 inference.”

According to the evidence of PW1 and PW3 there was a fight between accused and deceased in Nantale's house. Accused himself does not deny that such a fight took place, save that accused stated in his defence that PW1 and another brother, Sengo joined the deceased to fight him. I do not find accused's version convincing as the fight would not have lasted as long as it did nor culminated in the event it did had it been a joint fraternal effort. I believe, however, the prosecution evidence that the fight was between accused and deceased only and, for sure, there is no way of telling how it was brought about but accused did cause the death of the deceased. My finding therefore is that accused is responsible for the death of the

deceased.

In the course of prosecution evidence some contradictions have been apparent. PW1 said he was present when accused came the second time to collect his remaining articles of property while PW3 states that PW1 came in answer to summons from her to come and intervene in the fight between accused and deceased. PW1 testified that he heard deceased call out that Kawoya was killing him, by name, while PW3 testified the accused merely said the man was killing him. I do not find these contradictions go to the root of this case and I attribute it to the confusion abounding at the time and the lapse of time. Indeed those contradictions are insignificant and could be overlooked; see Uganda Vs Dusman Sabuni [1981] HCB 1.

All in all, I find all ingredients proved by the prosecution beyond reasonable doubt except that of malice aforethought. In this I agree with the joint opinion of the assessors.

I find the accused guilty not of murder but of manslaughter and convict him of manslaughter, contrary to section 182 and 185 of the Penal Code Act.

Paul K.

AG. JUDGE

04/04/2000

Allocutus

Ms Nandaula:

The convict is a first offender. He has been convicted for a serious offence carrying life imprisonment. The circumstances under which the offence was committed, accused used free to enter a house purporting to look for some property. He came around with a club which he used on the deceased. The conduct deserves a deterrent sentence so that he learns conflict shall not be resolved by fighting. I pray for a deterrent sentence. Deceased was not armed at all.

Ms Bugembe:

This is a first offender. He is an old man of 70 years who doesn't have long to live. I pray this be considered. He should be given a chance in life as a freeman. He has children the youngest is 5 years. They still need his care. I pray you consider circumstances under which this offence was committed. Accused had just lost his girlfriend. He had been made to leave the home where he lived by the deceased. His mind was already upset and the deceased provoked him further by denying him entry into his girlfriend's house. In such circumstances when passing sentence court should have mercy on the old man. I also pray you consider his period on remand. I pray for lenient sentence.

Accused:

I pray for a lenient sentence so that I go back and take care of my family. The man who took care of the children has since died.

SENTENCE

I have heard submissions of both counsel regarding sentence. I have also heard counsel's plea regarding his family responsibility and his concern for the future of his children. The circumstances under which the offence was committed were such that it need not have occurred had accused exercised self control. I take account of the fact that he is an old man but his offence was grave. I sentence him to 11 years imprisonment. His period on remand shall be taken into account.

Paul K. Mugamba

AG.JUDGE.

04/04/2000.

Right of Appeal explained.

Paul K. Mugamba

04/04/2000.

AG.JUDGE

Judgement read in open court.

Right of Appeal explained.

Paul K. Mugamba

04/04/2000.

AG.JUDGE