THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CASE NO: HCT-03-CR-SC-0720 OF 1999

UGANDA ::

PROSECUTOR

VERSUS

MAIDO ROBERT & 2 OTHERS::::::::::::::::::

ACCUSED

BEFORE: HON. MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:-

The accused person, Maido Robert, is indicted for murder contrary to sections 183 and 184 of the Penal Code Act. It is alleged in the indictment that the accused and others still at large on 9/5/97 at Butangala village, Jinja District murdered Waziko Siragi. He pleaded not guilty to the

indictment. The accused had been facing the charge jointly with one Kaggwa Isaac Musumba. At the end of the prosecution case, court found that Musumba had no case to answer. The evidence had not at all connected him with the commission of the offence. He was accordingly acquitted and discharged. This judgment is therefore in respect of Maido Robert alone.

The material facts of the case as established by the prosecution are that Waziko Siragi was a village mate of the accused person. The villagers suspected Waziko of causing unnecessary deaths in the village due to the practice of witchcraft. They therefore hatched a plan to kill the said Waziko and on 9/5/97 attacked him in his home where they proceeded to murder him. The accused, Maido was arrested, charged and cautioned whereby he admitted the offence.

On the other hand, the case for defence is not a total denial of participation in the killing of the deceased. According to the accused, he was compelled by fellow residents of Butangala village to accompany them to the home of Waziko. On reaching there, his colleague committed the offence. He did not know the circumstances under which Waziko met his death because for him he was assigned guard duties at a nearby house which also belonged to the deceased.

It is trite law that the burden of proving the accused's guilt is upon the prosecution. The said burden never shifts to the accused. He is therefore not required to prove his innocence.

In case of murder like this, the prosecution is required to prove beyond reasonable doubt, inter alia, that a human being was killed, that the killing was unlawful, that the killing was with malice aforethought and that accused directly or indirectly participated in that killing.

To prove the first element of this offence, prosecution relied on the evidence of PW1 George William Ziraba, PW2 Lovisa Nakisuyi, PW4 Dr Mugabi and PW5 David Wagabaza who testified that they saw the dead body of Waziko Siragi. The fact of death is not disputed by the defence. I find that the prosecution has proved beyond reasonable doubt that a human being by the name of Waziko Siragi is dead and that he died on or about the 9th day of May 1997.

As far as the second ingredient of this offence is concerned, i.e. whether or not the death was unlawfully caused, it is the law that death of a human being is presumed to have been unlawfully caused unless it was accidental or it was authorized by law. See **Gusambizi s/o Wesonga Vs R. [1948] 15 EACA 65**. In the instant case, the evidence indicates that the deceased did not meet his death accidentally or in a manner authorized by law. He was attacked and killed in the said attack. It must therefore have been caused unlawfully and I so find.

The next question to consider is whether or not the accused is responsible for the unlawful death of the deceased. It is the prosecution case that he took part in the killing of Waziko. The accused, in his unsworn statement, says he was compelled to go to the scene of

crime and that even then, while there, he did not actively participate in the killing. He says he was threatened with death if he abandoned his colleagues there. The evidence raises two issues:-

1- Compulsion;

2- Common intention.

I will start with defence of compulsion. This is covered under section 16 of the Penal Code Act. It provides:-

> ***"16. A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do not act by threats on the part of the offender or offenders instantly to kill him or do him grievious bodily***

harm if he refuses; but threats of future injury do not excuse any offence".

In law, where a person raises the defence of compulsion, he is seeking to establish that he performed an act involuntarily as a result of another's action.

It is highly just and equitable that a man should be excused for those acts which are done through unavoidable force or compulsion.

I will then move on to common intention before deciding whether or not the defence of compulsion is available to the prisoner. The principle of common intention is essentially that if two or more persons undertake to prosecute an unlawful act and in the process, an offence

naturally foreseeable from the prosecution of such a purpose is committed, each and every one of those persons is deemed to have committed the offence. The prosecution need not prove that accused entered into an agreement or pact to commit an offence. Common intention is inferred from the conduct, presence and actions of the accused or from the failure of the accused to disassociate himself from the commission of the offence. If violence is used in achieving the common intention, then all participants are guilty in equal measure.

I will now relate the legal principles above to the evidence at hand. According to the evidence of PW2 Lovisa Nakisuyi, she was in the house with her husband and other people when the attack begun. Their house was razed to the ground and all but the deceased escaped.

When she moved out, she saw many people but she was only able to recognize accused, Maido. According to her, she recognized him because he mentioned his name and later he spoke to her. The accused and the witness were not strangers to each other. They were village mates. This evidence of identification is corroborated by the evidence of PW5 Wagabaza. According to PW5, while he was still in the doorway, torches flashing around, he managed to identify Maido. He, accused, called PW5 to where he was but before he reached him, he (PW5) was hit on the head and he fell. In the course of time, he heard Maido who was guarding the room where the other family members had been heaped saying, “bring the dead body and we see”.

On 15/5/97 D/IP Zikulabe (PW3) took a charge and caution statement from the accused at Jinja Police

Station. The statement was objected to by the defence but I admitted it in evidence after a ‘trial within a trial’ as having been made voluntarily and correctly recorded. It is a long statement in form of a confession save that accused maintains therein that he acted under coercion. The accused gave evidence. He did not call any witness in his defence. On the evaluation of the evidence above, accused’s defence of compulsion is not borne out. He actively took part in the attack.

He made no secret of it as he is the one who told PW2 Nakisuyi the reason for the mob attack. At no time did he disassociate himself from the unlawful acts of his colleagues. It is immaterial that he basically did guard duties while others razed the house to the ground and ultimately killed the deceased. The evidence of PW2 Nakisuyi and Pw5 Wagabaza which I found truthful put

accused at the scene of crime when the crime was being committed. His active participation was inconsistent with his defence of compulsion. He had a common intention with his colleagues to harm Waziko and actually did fatally harm him. I therefore reject his defence to compulsion and find that the prosecution has proved beyond reasonable doubt that accused participated in the killing of the deceased.

The question which must finally be answered is whether or not the accused killed Waziko with malice aforethought. Accused may not have picked a brick to throw at the deceased. Indeed the evidence of PW2 Nakisuyi and PW5 Wagabaza appears to suggest so. However, since the attackers had a common intention which they shared with accused, that would not make the accused less guilty. In the case of **R Vs Tubere s/o**

Ochien [1945] 12 EACA 63 it was stated that in deciding whether or not the accused had malice aforethought, the court should consider the weapon used, the part of the body where it was used, the number of injuries inflicted and the conduct of the accused before and after the incident.

In the instant case, police did not recover any weapon used. The doctor was of the view that the attackers may have used the bricks some of which he noticed were blood stained. This was at best speculative since the blood may have dropped on them in the course of the attack. He also saw clubs lying in the vicinity of the scene of crime but none was picked as an exhibit. Absence of weapon makes it uncertain as to what was the actual cause of deceased's death. The other part of evidence is contained in the statement of accused, which

was tendered as exhibit PI. The English translation is exhibit PII. In that exhibit accused narrates how he was co-opted in the plot to attack the deceased. Although he mentioned a number of people, none of them appear to have been arrested in connection with the offence. The other aspect of prosecution evidence is accused's conduct after the offence. He simply went home and the following day around 9.00a.m., he was picked by police. I have been advised by the assessors that this was conduct incompatible with accused's innocence. According to the assessors, a person who had been compelled to take part in the offence would have reported the matter to police first thing in the morning. While I have already ruled out the possibility of accused's defence of compulsion, I am unable to hold that failure to report the matter to police strengthens the inference of malice aforethought. That would be punishing accused for a possible lapse in

judgment. On the contrary, it was open for a person in accused's situation to find fleeing the area wiser than staying around to be picked like a grasshopper. It is the law that the court finds it unsafe to base a conviction for murder on evidence of this nature since it would be unsafe to infer malice aforethought merely from accused's lapse in judgment.

There is also evidence contained I accused's statement to police (exhibits PI and II) that accused left home for drinks. That at the home of Kyaabwe, he bought himself crude waragi, potent gin. This was before the attack. On the statement being admitted in evidence, it became prosecution evidence against the maker. This piece of evidence shows that before this ugly incident, the accused took some alcohol. Although the extent to which accused was drunk was not clearly brought out by the

prosecution evidence, the fact that his judgment may have been impaired by drink cannot be ruled out.

In **Ilanda Vs R [1960] EA 780** it was held that the onus is on the prosecution to prove that the accused person was not so drunk as to be incapable of forming an intent to kill. In the instant case, I find that the state in which accused was in according to his own statement to police may have affected his sense of judgment. Under section 12 (4) of the Penal Code Act.

> "***Intoxication shall be taken into account for the purpose of determining whether the accused person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence".***

In all the above circumstances, I find that the prosecution has not proved beyond reasonable doubt that the accused participated in the killing of Waziko with malice aforethought. I am unable to follow the advice given to me by the lady and gentleman assessors to convict the accused of murder because they did not appear to have sufficiently addressed their minds to the possible defence of intoxication. If the prosecution found accused's story about his involvement in the offence truthful, I see no cause to doubt that bit of it about drink.

To that extent, the accused is entitled to the benefit of the doubt. I therefore find accused not guilty of murder contrary to sections 183 and 184 of the Penal Code Act. He is acquitted of that offence.

I however find enough evidence on which to base a conviction for manslaughter. He actively participated in the mob that killed the deceased, whatever his state of mind at the material time. To that extent, I am in full agreement with the assessors. I therefore find accused guilty of manslaughter contrary to section 182 of the Penal Code Act and in accordance with section 86 of the Trial on Indictments Decree, convict him of that offence.

YOROKAMU BAMWINE

J U D G E

23/11/2000.

23/11/2000:-

Accused present.

Mr Gyabi Resident State Attorney for state.

Mr Habakurama for accused.

Court:-

Judgment delivered.

YOROKAMU BAMWINE

J U D G E

23/11/2000.

Mr Gyabi:-

We do not have any record of previous conviction on the convict. In passing sentence, court should consider the serious nature of this offence of manslaughter. The maximum sentence is life imprisonment. I would also invite court to consider that there are so many deaths arising from mob justice. The offences are so rampant that they have become source of concern to the public.

There is no reason why people should take the law into their hands. Sanctity of life must be preserved. People like accused taking lives of others should be punished heavily. Court should also consider the violent nature of this offence. Convict and others acted in a bad way. This makes them unfit to live in society. I pray for a maximum sentence that will withdraw accused from the public for a fairly long period of time.

Mr Habakurama:-

The court should be lenient in passing sentence. He is a first convict. He has no record of previous conviction. He is an old man aged 50 years. Keeping him for long in detention will mean death for him considering the life span in Uganda. Keeping accused persons in jail for long is not purpose of court. It is to reform him or teach him a lesson and others with similar intentions. The

circumstances under which the offence was committed should be considered. This court has power to sentence convict to a short period of imprisonment even where the maximum sentence is life imprisonment.

Court should pass sentence as will seem just to the circumstances of the case. He has been on remand since May 1997, a period of about three years. I pray for a lenient sentence.

Accused – Allocutus:-

I was born alone. I have only two children and they are young. My wife died while I was in prison. No one to look after them. My mother who would do that is blind. I pray for sentence that will enable me to go back and look after my children. I have also overstayed on remand.

Court – Sentence reasons:-

The accused is a first offender. He is aged about 50 years. The offence he committed was a very serious one although he is lucky that it has been reduced to manslaughter. Life must be preserved at any cost. The business of people taking the law into their own hands must be checked. One way of court's contribution to such a practice is to pass such sentence to the accused as will deter him from committing a similar offence when released from jail and to serve as a lesson to other would be offenders with similar inclinations. While the accused/convict talks of his own children, he should also reflect on those of his victim. He should count himself lucky that after serving sentence, he will be with them. Taking into account the period he has spent on remand, the fact of his age, his plea in mitigation and the fact of being a first offender, I consider a sentence of twelve

years imprisonment appropriate for a man who committed such a serious offence.

I accordingly sentence him to twelve years imprisonment, the period spent on remand inclusive.

YOROKAMU BAMWINE
J U D G E
23/11/2000.

Court:-

Right of Appeal within 14 days explained.

YOROKAMU BAMWINE
J U D G E
23/11/2000.