THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-0032 OF 2003

UGANDA :: PROSECUTOR

VERSUS

A1. GITARO CHRISTOPHER }
A2. SAFARI JOSEPH }::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE PAUL K. MUGAMBA

JUDGMENT

Both Gitaro Christopher (A1) and Safari Joseph (A2) had initially been charged jointly with Murder contrary to section 188 and 189 of the Penal Code Act. A2 was later acquitted of the charge when court to decided close the case for the prosecution he was found with no case to answer.

To prove its case the prosecution called five witnesses. PW1 was Kabuye Saleiman D/ASP, PW2 was Kyantima Ana, PW3 was Gabriel Katarahweire, PW4 was Tukahirwa Esau while PW5 was D/CPL Dema Madesho Bayo. Some evidence was agreed and admitted under section 66 of the Trial on Indictments Act. Such evidence was the post mortem report, the evidence of the handwriting expert, the evidence of the arresting officer and the evidence of the police officer to whom some items of exhibits were handed at Kanungu Police Station.

In his defence A1 made a sworn statement. He called no witness.

Briefly the prosecution case is that A1 was an employee of the deceased while deceased ordinarily lived in Kampala, A1 looked after the deceased's property at Ibarya village in Kanungu District and collected some money from people who used the land. During September 2001 the deceased had returned to the village and found A1 at home. An argument had developed between the

two over money culminating in the killing of the deceased by A1. Later accused deposited the body of the deceased in the nearby pit latrine by first removing the legs that were on top of the pit and later putting them back together with fresh legs. He covered the pit once more. Accused had proceeded to write a chit alleging the deceased was being detained at Gatuna by authorities in Rwanda. Accused deposited both the chiot and the deceased's passport at Kyobugombe where relatives of the deceased lived. Accused later told PW2 that he had accompanied the deceased to the vehicle that was to take the latter back to his home in Kampala. After several days the body of the deceased was found in the pit latrine, handwriting on the suspect chit was found by the handwriting expert to be similar to that on the specimen got from accused and accused made a charge and caution statement admitting to his respectively for the offence.

In his defence which was made on oath accused denied the charge and said he was forced to sign the charge and caution statement.

The prosecution has the onus to prove the case against an accused person beyond reasonable doubt. It is not the duty of the accused to prove his innocence. See **Okethi Okale Vs R [1965] EA 555.**

The prosecution in this case must prove the following ingredients:-

(i) that the deceased is dead;

(ii) that the killing was unlawful;

(iii) that the killing was with malice aforethought; and

(iv) that accused was responsible for the offence.

Regarding the first ingredient, PW1, PW2, PW3 PW4 and PW5 testified that the deceased died. The body was identified by Asiimwe, sister of the deceased. PW3 testified that the clothes the body had on were jeans the deceased used to wear. PW4 gave similar testimony. The post mortem report showed the deceased to be David Bende. I am satisfied the prosecution has proved this ingredient beyond reasonable doubt.

The second ingredient concerns whether the killing of the deceased was unlawful. It is a presumption of the law that every homicide is unlawful. This presumption can be negatived by evidence of the killing being accidental or sanctioned by law. See **Gusambizi s/o Wesonga Vs R [1948] 12 EACA 65.** Since the presumption has not been rebutted I find the prosecution has proved beyond reasonable doubt that the killing of the deceased was unlawful.

The next ingredient to consider is whether the killing was with malice aforethought. This is in the interest to bring about the death of another person. A person has malice aforethought when he apprehends that his act or omission might result into the death of another. Malice aforethought can be gathered from the number of injuries inflicted, the part of the body where injury is inflicted, the nature of weapon used and the conduct of the killer before and after the attack. See **Uganda Vs Ochieng [1992-1993] HCB 80.** According to the post mortem report exhibit P1 the body was decomposed and there were three multiple fractures on the limbs. The cause of death was described as violence. From the above there is no way of telling what the cause of death was. Suffice it to say that whoever killed the deceased escaped after placing the deceased's body in the pit latrine. It is not clear what type of weapon used in a very material consideration. See **R Vs Joseph s/o Byarushenyo & Another [1946] 12 EACA 187.** There is also the extra judicial statement, exhibit P5, where the maker stated that there was a quarrel between him and the deceased

after which the maker and the deceased fought culminating in the maker picking up a stick and hitting the deceased twice in the head. This extra judicial statement was repudiated by accused. When a confession has been restricted or repudiated it requires more corroboration before it can be relied on against the maker. See **Ismail Kamukolse Vs R [1956] 23 EACA 521.** Hitting the deceased with a stick twice on the head in the course of a fight is no evidence of malice aforethought in my view. It borders instantaneous reaction. In the result I do not find the prosecution to have proved malice aforethought beyond reasonable doubt.

The final ingredient for consideration is whether the accused perpetrated the crime. Accused had repudiated the charge and caution statement which the prosecution said was made by him. In the charge and caution statement the maker admits to having caused the death of the deceased by hitting the deceased in the head. In his defence accused stated that he was forced to sign the charge and caution statement. It was accused's defence also

that he did not participate in the killing of the deceased because he was not in the area at the time. He had gone home to Kisoro, which is many miles away. He said he had not seen the deceased whom he last saw in August 2001. Accused said he returned to the village from Kisoro on 20th September 2001. He was emphatic he was not in the area on the material date of 13th September 2001.

When an accused person sets up the defence of alibi it is not his duty to prove it. The prosecution must disprove it by adducing evidence, which places the accused at the scene of crime. See **Uganda Vs Phostin Kyobwengye [1988-1990] HCB 49.**

Since the confession has been repudiated there is need for corroboration with regard to this part of it where the maker of the confession admits responsibility for the killing of the deceased. See **Ismail Kamukolse Vs R** (supra). There is the laboratory report of a handwriting expert, which was admitted. It is exhibit P

II and shows that on confession the questioned doubt (the chit found at Kyobugombe) with the specimen (obtained from the accused) the Forensic examiner of Questioned doubts was of the opinion that the person who wrote the specimen also wrote the document in issue. In short the author of the specimens was the accused himself was in the opinion of the Forensic examiner of Questioned doubts also the author of the chit which was dropped at Kyobugombe alleging that the deceased was in the custody of Rwanda authorities at Gatuna whereas the deceased was already dead. Then there is evidence of PW2 who testified that she had been told by accused that the deceased had left for Kampala and that he (accused) had accompanied him to the road.

I have considered also the evidence of PW3 who testified that on two occasions he had sought to use the pit latrine where the body was eventually discovered that the accused had forbidden him to enter it. It was accused's evidence he was arrested on 5th October 2001 and that he never at any time ceased to use the pit

latrine. If that was so he would not in all his alleged innocence, have failed to perceive the suck of the decomposing body.

Furthermore he would not have failed to notice the fact that the latrine had been opened up and fresh timber and fresh ground had been placed on top of it. Such lack of concern in my opinion is owing to the knowledge he already had that the remains of the deceased had been deposited in the latrine. That is the reason why he stopped PW3 from using the latrine.

I find all that evidence by the prosecution leads to the conclusion that accused participated in the killing of the deceased. I find his alibi in the circumstances disproved since a person who was absent, as he alleges he was, could not have taken the steps above to try and cover up the crime. That he did is evidence of his guilt.

In their joint opinion the assessors advised me to find accused guilty as charged and convict him. I have shown in the course of this judgment that the element of malice aforethought has not been proved beyond reasonable doubt.

Accordingly I do not agree with the opinion of the assessors. I instead find accused guilty of the lesser offence of manslaughter contrary to sections 187 and 190 of the Penal Code Act and convict accordingly.

PAUL K. MUGAMBA

JUDGE

13/8/2004.