THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MITYANA/MUBENDE

CRIMINAL SESSION CASE NO. 276 OF 2001

UGANDA …….……..……PROSECUTION

Versus

BASAJJA PAUL…….. ACCUSED

BEFORE: HON. MR. JUSTICE V. A. R. RWAMISAZI-KAGABA

JUDGMENT

Basajja Paul who I shall refer to as "the accused" in the rest of my judgment is indicted for Murder contrary to sections 188 and 189 of the Penal Code Act. The particulars I support of the charge are that Basajja Paul on or about the 18th day of August 2000 at Boma Hill in Mubende District, murdered Kasozi Expedito.

The accused denied the charge and was represented by Edward Muguluma while the prosecution was led by; Vincent Nyonzima, a State Attorney based at Mubende.

The prosecution called fourteen witnesses. The summary facts of the case are that Kasozi Expedito, the deceased was at the bar of Moses drinking alcohol in company of other people in the evening of 13/8/2000. The last person to see the deceased drinking in the bar of Moses was Sekiziivu Samuel (PW11) who shared a room near the residence of the deceased. This was in the night of 23/8/2000 — a Sunday.

During the night of 13/8/2000, Paul Basajja went to the home of Nantumbwe Antonina (PW9). Nantumbwe lived with her two sons, Kamoga Expedito (PW7) and Fred Iga (PW8). (PW8). It was then about 9.00 p.m. Basajja called out Kamoga (PW7), introduced himself as his uncle. Kamoga opened the window, whereupon Basajja threw a panga into Kamoga's bedroom through the window.

This panga was picked by Fred Iga and Nantumbwe Antonina and the same was handed to Bukenya Richard, their Chairman LC. 1. The panga was later exhibited as exh. P7. In the same night 13/8/2000, at about 1.00 a. m - the accused went to the house of Sekiziivu Samuel (PW11) and asked to be let in. Sekiziivu refused to open and the accused went away.

Sekiziivu went to Moses' bar and found the deceased semi conscious with cut wounds on the head. He (PW11) reported the assault on the deceased to Seki who in turn reported to Matovu.

The deceased, then still alive, was taken to Mubende Hospital by Richard Kadidi (PW12), the grandson to the deceased. The deceased died in Mubende Hospital on the 18/8/2000 at 10.00 a.m.

The accused was arrested by the Police at 7.30 p.m. on, the 14/8/2000. He was arrested by the Chairman LC 1 - Richard Bukenya - who was in company of Nuwagaba (a Police officer since retired from the Police Force) and Kadidi. The accused was taken to the Police (Mubende) by Nuwagaba and Bukenya along with the Panga which Nantumbwe had handed to the Chairman (Bukenya). The witness (PW10) had been seeing the panga in possession of the accused.

After making a statement, Richard Bukenya went to the scene and collected bloodstained soil which he handed over to the police. On the same day, 15/8/2000) Bukenya (PW10) collected from the house of the accused a blood stained shirt, which he had been seeing accused wear. He handed the shirt to Nuwagaba (PW2).

The bloodstained shirt, the bloodstained soil and the blood sample of the accused were taken to the Government Chemist in three sealed envelopes by D. C. Balikowa (PW4). The Government Chemist made his analyst report - Exh. P6. That report and the exhibits which were taken to Wandegeya for blood analysis were collected and returned to Mubende CID office by D/C Wankya (PW6).

The report of the Government Chemist, the panga, the blood-stained shirt and the blood stained soil were admitted in court as exhibits P6, P7, P8 and P11 respectively. One of the envelopes that D. C. Balikowa (PW4) took to the Government Chemist contained the blood sample of the accused. The findings of the Analyst about that blood sample are contained in exhibit P6.

In all criminal cases, the burden of proof rests on the prosecution. This burden does not shift to the accused except in a few exceptional cases, but this is none of those exceptions. The prosecution must succeed on the strength of its evidence. Any weakness in the defence or lies told by the accused shall not be relied on to, bolster the prosecution case or be a basis for

convicting the accused. If, after full consideration of the prosecution evidence or the case as a whole, there is some reasonable doubt created about the guilt of the accused, that doubt must be resolved in favour of the accused, and he/she must be acquitted.
I explained to the assessors, as I also warn himself, about, the burden and standard of proof and what a reasonable doubt means in law.

See: (1) Woolmington vs. D.P.P. (1935) A. C. 462

(2) Sekitoleko vs. Uganda (1967) E. A. 631

(3) Tindigwihura Mbahe vs. Uganda - Criminal Appeal No. 9/1987 (S.C.)

This case rests purely on circumstantial evidence as there was no eye witness to the assault on Kasozi which led to his death. Circumstantial evidence is facts and events surrounding the fact or facts in issue. Such evidence must always be narrowly and cautiously examined, because it may be fabricated to cast suspicion on another person. 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 circumstantial which would weaken or destroy the inference. In order for the prosecution to succeed, the circumstantial evidence must be such that it is incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused. I explained to the assessors the test to be applied and the standard of proof required when a conviction is to be based on purely circumstantial evidence.

See: (1) Leonard Mpoma vs. Republic - Criminal Appeal 103 - DSM —75(1978) LR TN 58

(2) Joseph Magezi vs. Uganda - Criminal Appeal 8/1993 (S.C.)

(3) Teper vs. R. (1952) A. c. 480

(4) R vs. Taylor, Weaver & Dorovan - 21 - Crim. App 1. Reports 20 CCB

The accused is indicted for murder which consists of four ingredients, namely: -

a) That Expedito Kasozi is dead.

b) That he died throu.gh an unlawful act

c) That whoever inflicted the injuries, from which Kasozi died, did so with malice aforethought

d) That it was the accused who is responsible for Kasozi's death.

See: (1) Uganda vs. Kassim Obura & another vs. Uganda - (1981) HCB 9

(2) Uganda vs. Harry Musumba (1992) 1 KALR 83

The death of Expedicto was not seriously contested as there was abundant evidence to prove the same. After he was injured, he was seen with wounds on the head by Nantumbwe, (PW9) Bukenya (PW10) and Richard Kadidi (PW9). Kadidi and others took Kasozi to the hospital where he died four days after admission. His body was seen by Kadidi who organised its burial. Dr. Kiiza (PW1) treated the deceased on admission in Mubende hospital and later prepared a postmortem report and Death Certificate on the deceased after he (Kasozi) died. (Refer to Exhibits P1, P2 and P3). I am left with no doubt, that the death of Expedito Kasozi has been proved beyond reasonable doubt.

Every homicide is unlawful unless it excused under some provision of the law. Kasozi was cut on the head where he sustained serious cut wounds. Whoever inflicted those injuries on him had no legal justification to do so. I also find the injury and killing of Kasozi were unlawful.

See (1) Uganda vs. Night Kulabako Jennifer vs. Uganda - C.S.C.61/1991 1

(2) Uganda vs. Harry Musumba (1992) 1 KLR 83

Section 191 of the Penal Code Act states the circumstances where malice aforethought is presumed to exist. Malice aforethought is a conclusion from the circumstances of the assault. In arriving at the conclusion, whether malice aforethought has been proved or not, the court may consider,

a) the number of injuries inflicted,

b) the part of the body on which the injuries are inflicted,

c) the nature of the weapon used,

d) the gravity of the injuries and

e) the conduct of the accused before and after the attack

See: (1) Uganda vs. John Ochieng - (1992-93) HCB 80

(2) R. vs. Tubere s/o Ochen (1945) 12 EACA 63

(3) R. vs. Yakobo Ojambo s/o Nambio (1944) 11 EACA 97.

According to both Exh. P1 and Exhibit P.2 the deceased received severe deep cut wounds on the head which led to his death four days later. There were no other intervening acts. Although the panga, Exhibit P7 was not availed to the doctor (PW1) to comment whether the injuries were caused by that weapon, I am confirmed in my holding by the evidence of

Bukenya (PW10) Nantumbwe (PW9) and Kamoga (PW7) that it was the panga Exh. P7 which is likely to have inflicted the injuries reflected Exhibits P1 and P2.

The panga though used for domestic purposes, is a lethal weapon when used to inflict harm on people. The injuries were grave, inflicted on a delicate part of the body and a lethal weapon was used to inflict the injuries on Kasozi. I hold therefore, that whoever inflicted those injuries of the deceased had the necessary malice aforethought. Any person who commits any of the acts listed in section 196 of the Penal Code Act is presumed to have caused the death of that person. Kasozi was a human being within the definition of section 197 of the Penal Code Act.

His death followed four days after being assaulted. There was no intervening fact between the assault and his death. I therefore find that Kasozi was killed by the person who inflicted the fatal head injuries on him in the night of 13/8/2000.

Who is the person responsible of Kasozi's death? As already observed, there was no eyewitness to the assault. The nearest witness to Kasozi's last hours is Sekiziivu Samuel (PW11) who saw Kasozi and accused in the bar of Moses about 8.00 p.m. while in his room at about 8.00 p.m. Sekiziivu heard an object being hit three times and a human voice say. ***"Kuja twende"*** which means, ***"let us go".*** The accused was wearing a white striped shirt while in the bar. Later the same night, the same accused went to the house of Nantumbwe — threw there a panga Exhibit P/7. That was about 9.00 p.m. at 1.00 a.m. during the same night the accused went to the house of Sekiziivu (PW11) asked to be let in but Sekiziivu refused to let him in.

Can we say these movements were innocent or was the accused getting restless after assaulting the deceased at the bar? The conduct of an accused after the commission of the offence may provide good and strong circumstantial evidence pointing to his guilt and participation in the crime.

I find in this regard, the movements of the accused from the bar after Sekiziivu heard those three bangs followed by a voice saying ***"kuja twende"*** are a pointer to accused trying to find asylum and dispose of the killer weapon after he had assaulted the deceased at the bar where he was found unconscious with cut wounds and in a pool of blood next morning.

In the case of Uganda vs. Simbwa — Criminal Appeal No. 37/1995, the Supreme Court held that the fact that the accused's disappearance from his home and village soon after the incident in which the deceased was killed, was strong corroboration of the accused's participation in the commission of the crime.
See also: Waibi vs. Uganda - (1978) HCB 218

I find as implicating circumstantial evidence in the conduct of the accused after Sekiziivu was the accused in the bar with other drinkers and thereafter hear a bang three times in the same place where the deceased was found next day in a pool of blood. Immediately after the bang (three times) the accused rushes to hide of dispose "his" killer weapon at the house of Nantumbwe. As if that is not enough, the accused abandons his house that night and goes to hide at Sekiziivu's home but the later turns him away. All this conduct on the apart of the accused points irresistibly to his guilt.

The other circumstantial evidence implicating the accused is the panga Exh P.7. This panga was taken to the house of Nantumbwe (PW9). The accused was identified by his own vice for he told Kamoga ***"I am Paulo, your uncle".*** His voice was recognised by Fred Iga (PW8). Accused vanished after throwing the panga through the window of Kamoga. Why did he behave so strangely at the time of the night?

The panga Exhibit P.7, besides being taken by him to Nantumbwe's house, was known to be the property of the accused. Bukenya (PW10) had always seen that panga — Exh P.7 with the accused — and he used it to do casual work in the village. I believe the panga — Exh P.7 is the property of the accused which he took to Nantumbwe's house. It was the same panga which was exhibited in court after Nantumbwe handed it to the police and the police exhibited in court.

Although no one saw accused cut the deceased with that panga, the description of the injuries by Dr. Kiiza on exhibits P1 and P2 leave me with no doubt that those injuries were inflicted with a heavy sharp object, such as a panga. I also find as a fact that it was the panga exhibit P7 which the accused used to cut Kasozi though the panga did not bear any blood stains when the accused sought to dispose of it or hide it away at the house of Nantumbwe (PW9).

Another incriminating evidence is contained the blood stained soil (Exh. P11), the blood stained shirt, exhibit P8, and the Government Chemist report — exhibit P6. The blood stained soil was collected from the scene of assault where the deceased had been lying in a pool of blood by Bukenya. (PW1O) The same Bukenya collected the blood-stained shirt from among the belongings of the accused and from the accused's house. Counsel for the accused tried to question the role of Bukenya when he collected the blood stained soil and the accused's blood stained shirt. I see no impropriety in what Bukenya did. He was the Chairman of LC 1 whose duty, among other things is to maintain law and order in his area.

The Chairman is the government representative in his village and is the person directly responsible with assisting in government matters which would involve the police in their investigations of crimes. I will therefore treat Bukenya as a reliable and independent witness when considering the role he played in the investigating of this case.

The blood stained shirt exh. P8 was testified upon by Bukenya. Bukenya had been seeing accused wearing that shirt in the village. Sekiziivu saw the accused wear a white striped shirt while in the bar in company with the deceased but Exh. P8 was not put to him for identification. The same shirt was found with blood stains from among the accused's property when Bukenya was handling those properties to Mwesige for safe custody.

The blood on the shirt (Exh. P8) and the blood stained soil (Exh. P11) were found to be the same blood group A, which was that of the deceased. On the other hand, the blood group of the accused is O. ***(see Exh. P.6 the Government Chemist and Analyst Report).***

From the above analysis, the conclusion and inference to be drawn is that the accused, the owner of the panga Exh P7 used it to cut the deceased. In the course of the assault, the deceased's blood spilt on the ground (Exh. P11) and on the shirt (Exh. P8) which the accused was seen wearing as he sat in the bar with the deceased and which belonged to him (accused) according to Bukenya. The evidence of Mr. Lugudo — Exh. P6 is evidence of an expert which the court may apply to arrive at a fact in issue. I have no doubt that Lugudo's opinion is based in his knowledge and expertise.

See: (1) Kit Smile Mugisha vs. Uganda - (1976) HCB 246

(2) Uganda vs. Suigaiman Ndibarema & another (192) HCB 4

The conduct of the accused in the night of 13/8/2000 and 14/8/2000 together the evidence of the deceased's blood on his shirt leads irresistibly to one conclusion, and that is that the accused killed the deceased.

In his defence the accused denied killing the deceased. He said he was arrested from his house at 7.30 p.m. on the 14/8/2O00. In other words the accused was raising the defence of alibi. It is trite law that when an accused person puts up the defence of alibi, the prosecution has the legal burden to negative it with evidence. The accused has not burden to prove the alibi. If the prosecution fails to negative that alibi then, the accused must be acquitted.

The court must examine carefully the evidence for that of the prosecution, in rebuttal. If there is a doubt created, after considering all the evidence, that doubt must be resolved in favour of the accused.

See: (1) Abdu Ngobi vs. Uganda - Criminal Appeal 10/1991 (S.C.)

(2) Wanda Alex and two others vs. Uganda - Criminal Appeal 42/1995 (S.C.)

(3) Siraji Sajabi vs. Uganda - Criminal Appeal 31/1998 (C.A)

(4) R. vs. Chamulon Wero Olango (1937) 4 EACA 46

On the basis of the circumstantial evidence I have highlighted herein above, I find the prosecution has negatived the accused's alibi and placed him squarely at the scene of crime in the night of 13/8/2000. I reject the accused's alibi as lies.

The defence raised a few contradictions in the prosecution evidence. I note in particular the story of Bukenya PW10 and Margaret Nabwire (PW13) as to the state of accused's house when Bukenya retrieved the blood stained shirt (Exh. P18) and the substance on the shirt. I observed the two witnesses in court. Whereas Bukenya was straightforward in the presentation of his testimony, Nabwire was extremely elusive and dodgy. She did not want to tell the truth about the event of visiting the accused's house. She was prepared to call blood on the shirt "red soil" though she admitted the shirt Exhibit P.8 was got from the accused's house. I prefer to rely on Bukenya's evidence which was not tainted with lies. Nabwire was to a good extent lying about what she saw when she was at the accused's house with the Chairman, Bukenya (PW10).

The law concerning the contradictions, which I explained to the assessors, is that it is not every inconsistency that will result in the testimony of a witness being rejected. It is only grave inconsistency, unless satisfactorily explained, which will usually, but not necessarily result in the evidence of a witness being rejected. Minor inconsistency will not usually have that effect unless the court thinks they point to deliberate untruthfulness.

See (1) Wasswa Stephen and another vs. Uganda - Criminal Appeal No. 31/1999 (S.C.)

(2) Col. Sabuni vs. Uganda (1981) HCB 11

(3) ***Tindigwihura Mbahe vs. Uganda - Criminal Appeal 9/1987 (S.C.)***

Applying the above principles to the contradictions which exist between the evidence of the prosecution witnesses, I find those contradictions are minor and do not affect the evidence of Bukenya (PW10). I put little reliance on the evidence of Nabwire who I found to be a liar to good extent.

See: (1) Uganda vs. Rutaro (1976) HCB 162

(2) Anthony Barugahare vs. Marita Ntarantambi (1987) HCB 95

An accused person is entitled to have any defence, whether raised by him, the prosecution or can be deduced in court, in his or her favour. In this regard, I advised the assessors to consider whether the defence or provocation or intoxication could be availed to the accused. Both the assessors advised me to acquit the accused as charged.

Section 82 (1) of the Trial on Indictments Act, spells out the duty of the judge to sum the evidence to the assessors and guide them on the relevant law and then record their opinions. But sub-section (2) of the same section states that the Judge is not bound to conform with the opinion of the assessors. But if he chooses to differ with their opinions, the Judge must give his reasons for doing so. (Subsection 3).

See: (1) Mohammed Bachu vs. R. (1956) 23 EACA 399.

(2) Habib Kara Vesta & others vs. R. (1934) 1 EACA 191

(3) Kasule vs. Uganda - Criminal Appeal 10/1987 (1992-93) HCB 38

It appears the assessors did not appreciate let alone consider the direct and circumstantial evidence under which the attack took place. They did not address their minds to the evidence of Bukenya, Nantumbwe, her children and Sekiziivu. These were witnesses whose evidence implicated the accused directly and or circumstantially.

Sekiziivu testified how he saw accused and deceased in the bar. There was evidence of the strange movements of the accused from the house of Nantumbwe and Sekiziivu. There was evidence of the shirt and panga which Bukenya identified as being the accused's property. There was the evidence of Mr. Lugudo and his findings on Exhibit P.6.

If the assessors had considered this evidence properly, their finding would have been different. In any event, the assessors did not state whether they disbelieved the prosecution evidence or some of it.

As they (assessors) misdirected themselves on the law and evidence, I will reject their opinions as being based on their assessors' own imagination. The trial judge is not, in way, bound by the opinions of the assessors though he must give reasons if he decides to disagree with it (opinion).
See: (1) John Kuka vs. Uganda -Criminal Appeal 1/1992 (S.C)
(2) Habib Kara Vesta and others vs. R. (1934) EACA 191
(3) R. vs. Mwita s/o Samo (1948) 15 EACA 128.

It is not disputed that the assault on the deceased — Kasozi took place in or at Moses' bar where the accused and the deceased where sighted drinking at about 8.00 p.m. of 13/8/2000. Although we do not know who had drunk what and how much, it cannot be ruled out that both accused and deceased were acting under the influence of alcohol when the attack took place.

Section 12(4) of the Penal Code Act provides "Intoxication" shall be taken into account for the purpose of determining whether the person charged had formed the intention, specific or otherwise, in the absence of which, he or she would not be guilty of the offence.

In Chemingwa vs. R. (1956) 53 EACA 451 the Court of Appeal for Eastern Africa (then) held that intoxication may provide a defence by enabling the accused to prove temporary insanity or by indicating that he was incapable of forming the intention necessary to constitute the offence.

In the first class, the onus is on the accused to show the insanity. In the second, the onus never shifts from the prosecution. I will also borrow the words of Karokora J. (as he then was) in ***Uganda vs. Robert Kanyankole (1984) HCB 23.*** Where he said:
"Although malice aforethought could readily flow from the nature of the injuries inflicted, the type of weapon used, and the vulnerable part of the body on which it was used, a deadly weapon held by a drunken man does not necessarily import malice aforethought."

In the instant case, we do not know how long the deceased and accused had been drinking before the attack. We do not know if the attack was backed by any motive, we do not know if there was any quarrel between the two before the attack. There was no evidence of any past misunderstanding which leaves the motive for this killing a mystery and or unexplained.

As was observed by the Court of Appeal for Eastern Africa (then) in the case of ***R. vs. Joseph s/o Byarushengo and another (1946) 13 EACA 187***, where it is doubtful on the evidence that the accused intended to kill or cause grievous harm to the deceased, he should be given the benefit of the doubt and be found guilty not of Murder hut of Manslaughter.
See: Also R. vs. Kabia Arap Serem (1947) 7 EACA **73.**

After addressing myself to the law on intoxication and the facts of this case, I find that the killing of the deceased was not accompanied by the required malice aforethought.

The accused may have been acting under the influence of alcohol when he inflicted the fatal blows on Kasozi. Like the assessors found, I find the prosecution has not proved the offence of Murder against the accused. He is acquitted on that charge. However, in disagreement with the opinion of the assessors, I find the accused killed the deceased and the killing was unlawful. The prosecution has proved the offence of manslaughter against the accused. I therefore find the accused guilty of the offence of manslaughter and convict him for the same under sections 187 and 190 of the Penal Code Act.

V. A. R. Rwamisazi-Kagaba
Judge
27/7/2004