THE REPUBLIC OF UGANDA

IN TI-TB HIGH COURT OF UGANDA AT RUKUNGIRI

HCT-05-CR-SC-033-2004

UGANDA ………………………………………………………………….PROSECUTOR

VS

Al. BANDEBESA JOHN)
A2. NSUBUGA MOSES)
A3. TURYAMUSHANGAYO ROBERT)
A4. MUGYENYI ROBERT) ……………………………………………….....ACCUSED

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

Initially accused Turyamushangayo Robert (A.3) was indicted with Bandebesa John (A.1) and Nsubuga Moses (A.2) for murder contrary to sections 188 and 189 of the Penal Code Act. At the outset of the trial both A.1 and A.2 were willing to plead to a lesser charge of manslaughter. The State was agreeable. Consequently upon conviction and sentence the two ceased to be party to the proceedings. A.3 however maintained his plea of not guilty even to the lesser charge. He was therefore tried on the original charge of murder.

The prosecution called five witnesses to prove its case. PW1 was D/Cpl. Byakagaba Joseph, PW2 was Kemirembe Constance, PW3 was Tushemereirwe Natalia, PW4 was Mpwerize John and PW5 was Baguma Joseph. Accused called no witnesses on his behalf but he made a statement on oath.

Briefly the prosecution case is that on 22nd April 2001 some cattle had been cut and injured. The deceased was suspected as the person who had injured the animals. The deceased was summoned to the farm where the animals belonged and there he was subjected to brutal beating by several people wielding sticks. These people included the accused. Later in the day the deceased succumbed to death as a result of the assault.

Accused was one of the suspects arrested in connection with the assault and eventual death of the deceased. He has been charged with murder.

In his defence accused agreed he visited the farm but said that when he arrived there he found the deceased had already been assaulted by people he never saw. He was definite the deceased's condition at the time was not bad.

The onus is on the prosecution to prove the case against an accused person beyond reasonable doubt. See *Woolmington vs DPP [1935] A. C. 462.* If any doubt or gap appears in the case of the prosecution that doubt or gap ought to be resolved in favour of the accused. It is not the duty of the accused person to prove his innocence.

In the instant case accused is indicted for murder and the prosecution ought to prove the following ingredients beyond reasonable doubt:

- (i) that the deceased died;
- (ii) that the killing of the deceased was unlawful;
- (iii) that the killing of the deceased was with malice aforethought; and
- (iv) that accused was responsible.

Concerning the death of the deceased, all the prosecution witnesses in their evidence stated that the deceased died. In cross-examination accused also stated that the deceased died. This matter is not challenged anywhere. I am satisfied that this ingredient has been proved beyond reasonable doubt.

It is the position of the law that every homicide is unlawful save where it results from an accident or is excusable by law. See *Gusambizi s/o Wesonga vs R (1948) 15 EACA 63.* The presumption was never rebutted and as such I find that the killing was unlawful. This ingredient has been proved beyond reasonable doubt.

Next this court ought to consider whether there was malice aforethought. Malice aforethought is an intention to cause the death of a person. It is also the knowledge that the act or omission causing death will probably cause the death of some person. It may be gathered from the number of injuries inflicted on the victim, the part of the victim's body to which injury is inflicted,

whether such part is a vulnerable part or not, the type of weapon used and the conduct of the assailant before and after the attack. See *Tubere s/o Ocen vs R (1945) 12 EACA 63.* According to the post mortem report the deceased bore two bruises above the left jaw extending to the left temple. The body also bore laceration and fracture of the left finger. The cause of death was intracranial bleeding. Whoever inflicted the injuries that led to the death of the deceased must have done so with malice aforethought. I am satisfied this ingredient also has been proved beyond reasonable doubt.

Finally the prosecution must prove that the accused was responsible for the crime, In his defence accused conceded he visited the scene. However it was his evidence that when he arrived the deceased was no longer being assaulted. The prosecution however adduced contrary evidence. PW2 stated that she saw accused amongst others assaulting the deceased with sticks. PW3 testified that he saw accused assault the deceased near the neck and saying that the deceased would no longer be able to throw stones. The Chairman L. C. 1, who was PW4, testified also that he had seen accused assault the deceased. It was his evidence that accused and others had declined his suggestion that they cease assaulting deceased and refer the matter to Police. From the evidence above I find that accused was one of the people who assaulted the deceased on the occasion. I find his version as fabricated to clear him of guilt. Section 10 of the Penal Code Act provides:

> 'When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.'

I have no doubt in my mind that in the instant case accused had a common intention with others to prosecute an unlawful purpose which resulted into the death of the deceased. It is however a fact that others of the persons involved in the act have been convicted of a lesser offence of manslaughter, contrary to sections 187 and 190 of the Penal Code Act. As there was common intention that doctrine subsists. Just where there is no knowing who struck the fatal, those convicted must be convicted of the same offence, whether murder or manslaughter. See *Kisegerwa & Anor vs Uganda [1979] HCB 81.* Others of those earlier accused were convicted of

manslaughter. I find it imperative to convict accused herein also of manslaughter rather than murder. See *Uganda vs Sgt. B. Kabagambe & 2 others. Masaka Criminal Session Case No. 158 of 1991* per Mukasa Kikonyogo J., as she then was, (unreported).

The assessors in their joint opinion advised me to acquit accused. For the reasons I have given in the case of this judgment I am not persuaded by that opinion. I find accused guilty of manslaughter and convict him accordingly.

P.K. Mugamba

Judge

12th August 2004

12th August 2004

Accused person in court

Mr. Ndimbirwe for accused

Mr. Twinomuhwezi State Attorney

Mr. Rutaro court clerk

Court: Judgment read in open court

Allocutus:

State Attorney:

There is no previous record on the convict. Treat him as a first offender. He has been convicted of a serious offence. His conduct took the life of a young man. He should be punished. He has been on remand since 2001. Give him a deterrent sentence.

Mr. Ndimbirwe:

Convict believed in his innocence. He is a first offender. He is still young and has been on remand since 2001 — enough time to reflect on future conduct. We pray for a lenient sentence.

Convict:

I have been on remand for 3 1/2 years. I suffer from ulcers. I wish to go and have care of my

family and children. I used to be a teacher and that is how I earned my income. I look after orphans of my brothers. I am repentant and I do not intend to commit the offence again. I shall be a law abiding citizen.

SENTENCE

I have considered the submissions of both counsel and the words of the convict. I have taken into account the fact that he is a first offender and the period he has spent on remand which I deduct from the sentence I would have given him. I have also considered the sentence given to his co-accused. Consequently I sentence him to 4 years' imprisonment.

P.K. Mugamba

Judge

Court: Right of Appeal explained.

P.K. Mugamba

Judge