

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT RUKUNGIRI**

**HCT-CR-11-CSC-070/2012**

**CRIMINAL CASE RUK. 00-CR-CSC-40/2010**  
**CRB 1572 /2010**

UGANDA ..... PROSECUTOR

**VERSUS**

ABINSINGUZA BRIAN.....ACCUSED

**BEFORE HON. MR. JUSTICE J.W KWESIGA**

**JUDGMENT**

BRIAN ABINSINGUZA is indicted for Murder Under 188 and 189 of the Penal Code Act. It is alleged that on 4<sup>th</sup> November, 2010 at Rushoroza ‘A’ village, Rukungiri District the Accused person Murdered Tumwine Elias.

The Accused person pleaded not guilty and the burden of proof remained on the prosecution. The general rule in a Criminal trial is that the burden of proving the guilt of an accused person rests upon the Prosecution throughout the trial and never shifts to the defence. See: **Woolington Vs DPP [1935] AC 462 and Ssekitoleko Vs Uganda (1967) EA 531.**

Thus an Accused person, during a trial such as this one, bears no duty to prove to his innocence. For he is presumed to be innocent until he is proved guilty or he pleads guilty. The Prosecution had to prove beyond reasonable doubt death of the deceased, an unlawful act or omission that caused death, malice aforethought and participation of the Accused person.

The Prosecution story is that the deceased and the Accused person had been in a party or wedding and they were together until after midnight, they developed a quarrel, fought and the Accused killed the Deceased. The Defence of the Accused person is that while the two were together at night on the way home, they were attacked by unknown people and each of them ran to his direction and he does not know how the deceased met his death. I will now set out the summary of the witnesses evidence before I analyse the evidence to establish whether the Prosecution proved the case against the Accused person beyond reasonable doubt. Proof of death was done. The Prosecution relied on the evidence of Dr. Ndyamutunga who examined the body of Tumwine Elias and prepared the Post-mortem report PE 1 dated 6<sup>th</sup> September, 2010. The body had a wound and depression on the skull that caused death due to brain injury. PW 3 Atahungura Joseph the deceased’s father further proved that Tumwine Elias died on 6<sup>th</sup> September 2010 and was buried. The above evidence proved the fact of death beyond reasonable doubt.

On whether death was unlawfully caused, the medical report shows that injury was inflicted on the deceased, with such force that caused a depression in the skull and damaged the brain leading to bleeding from the wound and through the nose. There is no doubt this was out of an authorized act and not done accidentally. Every homicide is unlawful unless it is proved to have been caused accidentally or under justifiable circumstances.

See: **Gusambizi S/O Wesonga Vs R. (1948) 15 E.A.C.A 63.** Regarding malice aforethought, the medical evidence shows there was a wound on the head measuring about 10 cm long with a depressed fracture of the skull and bleeding from the nose and ear. He died of open head injury, there is no indication as to what possible weapon if any was used to cause the skull fracture. The charge and caution statement admitted as P.E 3. has been considered to trace malice aforethought. The Accused statement that the deceased was his friend, they spent the whole day together, they were attacked by people they met on the way. Before they separated, the deceased who had earlier assaulted the Accused who had earlier, assaulted the Accused apparently out of being drunk. He alleged that the Accused was drunk and he threw a stone at the deceased and run home before he knew whether the stone had hit the deceased.

I have considered these circumstances namely, the two were at all material times friendly to each other. Both were under influence of alcohol. They got involved into a quarrel and the Accused threw a stone once.

PW 5 Natukunda Edisa, she heard the Accused and deceased quarreling or fighting at about 1:30 a.m. She heard them say "*Brian I will beat you*", "*Tumwine I will beat you.*" She testified that she heard slaps. She ignored them and believed they would separate themselves.

PW 4 Ahimbisibwe Philiip, when he asked the deceased what had happened, the last words he stated was that he had been hurt by Brian. He died before giving the details. The above is the only available evidence. From the evidence of Natukunda PW 5, the two young men appear to have fought each other. The charge and caution statement appears to corroborate this fact when the Accused statement that the deceased used his tyre sandal to assault the Accused, abused the Accused and the Accused threw a stone. The medical evidence proves that there was a single open wound and depressed point of the skull most likely the point of the stone impact. There is no evidence that when he threw the stone he intended to kill or knew that death would result from his unlawful action.

The Prosecution did not prove that the Accused had specifically targeted the head, the vulnerable part of the body. The charge and caution statement in the instant case does not amount to a confession because it contains some exculpatory material or disclaimer of malice aforethought. It only corroborates evidence of participation and audio identification by PW 5 Natukunda Edisa. In my view the intention to cause death or knowledge that the unlawful act would cause death has not been proved. The Accused person denied participation. However

the evidence of Natukunda Edisa puts him squarely in the arena of the fight he had with the deceased. This has been corroborated by the charge and caution statement that he has retracted in his defence. Owing to the reasons which I have set out above my findings are that the Accused person caused death of the deceased by unlawfully throwing a stone at the deceased but without malice aforethought.

In my view the Assessors advice did not consider the Accused persons charge and caution evidence or the Evidence of identification by Edisa Natukunda which proves participation. In view of this, I do not agree with the Assessors opinion and advice. I do hereby find the Accused person guilty of **Manslaughter** contrary to **Section 187 and 190 of the Penal Code Act** and I Convict him accordingly.

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**J.W.KWESIGA**  
**JUDGE**  
**13/12/2012**

**In the presence of :**

Mr. Baguma Batson RSA for the State.  
Mr. Bwagi Jonathan- for the Accused person  
Ms. Ampaire Everlyne- Court Clerk.

**PRE-SENTENCING FACTS**

**STATE:** No previous record against the Accused, the Accuses has not been remorseful. The convict should be kept away for reform.

**DEFENCE:** The convict is a first offender. He is remorseful. He did not intend to kill. The circumstances, the two were under influence of alcohol. He is a young man capable of reforming. He is only 20 years old. He has been on remand since November, 2010. We pray for a light sentence.

**SENTENCE**

**COURT:** I have considered the fact that the Accused is a young man who acted recklessly under influence of alcohol. The fact that he killed his own friend will always haunt him. However he needs to be kept in custody to give him a chance to reflect over his action, reform and come back, hopefully as a mature responsible person.

I sentence him to **(5) five years imprisonment.**

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**J.W.KWESIGA**  
**JUDGE**  
**13/12/2012**