THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CRIMINAL SESSION CASE NO. 064 OF 2008

UGANDA :::::::::::::::::::::: PROSECUTION

VERSUS

1. **HAJJI SEKYEWA AHAMED**
2. **MWANJE BASHIR**
3. **KALUNGI OTHUMAN**
4. **SENFUKA SULAIT ::::::::::::::::: ACCUSED**
5. **MUHAMUDU LUBOWA**

BEFORE: HON JUSTICE MUSOKE-KIBUUKA

JUDGEMENT

All the five accused persons were jointly indicted for the offence of Murder Contrary to sections 188 and 189, of the Penal Code Act, in count number one. In count number two, they were indicted for the offence of Robbery contrary to sections 285 and 286 (2), of the Penal Code Act.

The particulars in the indictment were that on 20th May, 2008, the accused persons at Kakwanzi, in Masaka District, murdered one Kazoora Geoffrey. It was alleged further that on the same day and same place, the five accused persons robbed

Kazoora Geoffrey of a motorcycle, Suzuki, and that before or immediately after the robbery, they used a deadly weapon, which was a knife against Kazoora.

The prosecution led evidence from a total of thirteen witnesses. Each accused person made a statement not upon oath.

The case for the prosecution, as far as it is ascertainable from the prosecution witness, is that PW4, Luutu Geoffrey, a trader at Lukaya Town Council owned a Suzuki 90 c.c. motorcycle, chassis number K90-348972 and engine number k90-372261. He had purchased that motorcycle from Messers Inalu Trading Company Ltd, at Ndeeba, in Kampala. He had not yet registered it in his names for the reason that he still owned the company that sold it to him some balance of Shs. 200,000/=. He, nevertheless allowed the deceased, Kazoora Geoffrey to use that motorcycle as a boda boda rider.

On 20th May, 2008, Kazoora disappeared together with the motorcycle. The police during the investigation, got to know that a black Suzuki motorcycle, cc 90 and numbers less but with engine and chassis number which marked those of

the motorcycle stolen from PW4, had been sighted, by PW6, Mugerwa Edrisa, at Bukomansimbi at the garage of one Ssemanda Patrick. The information which the police received from Ssemanda was that the motorcycle had been taken to Ssemanda's garage by A1 and A2 who were looking for a buyer. Following that information the police arrested A1, A4 and A5. A3 and A2 were arrested subsequently.

Upon arrest, A2 recorded a charge and caution statement in which he implicated himself and all his co-accused at various degrees. The charge and caution statement was repudiated during the trial by A2. However, through a trial within a trial, it's admissibility was proved and it stands on the record as exhibit P.7. A3 was also arrested following his mention by A2 as having taken part in the comission of the two offences.

A1, stated, in his unsworn statement, that the evidence of Ssemanda that he, ssekyewa, had taken the motorcycle to his garage was a lie. He also denied that he had sold the motorcycle in Gomba to one Yiga as PW11, Dsgt. Kiiza Ismail had testified.

On his part, A3 equally denied the two charges. He, however, implicated A1 and A2 when he testified that on 20th May, 2012, A1 and A2 took exhibit P7 to his cosmetics shop at Nyendo and A1 sought either to pledge exhibit P7 to him for a loan of 600,000/= or to sell the motorcycle to him outrightly. He also admitted contacting PW5 Mugerwa Edirisa at Lukaya and PW6, Ssemanda Patrick at Bukomansimbi in an effort to connect A1 and A2, to a possible buyer of exhibit P7. He testified that he was the one who directed A1 and A2 to take the exhibit P7 to Ssemanda's garage at Bukomansimbi. He denied that he took part in the killing of the deceased.

A4 pleaded an alibi. He stated that from February 2008, to 24th May, 2008, he had not been residing at Kakwanzi. He was residing at Lugazi Town Council in Buikwe District. He testified he had been arrested on 26th May, 2008 as he was passing by A1's residence.

A5 testified that he was arrested from the home of his father A1, on 26th May, 2008. He was surprise, subsequently, to learn from the statement of A2 that he had taken part in the killing of the deceased. He denied having done so.

The offence of murder contrary to sections 188 and 189 of the Penal Code Act, has four essential ingredients, which the prosecution must prove beyond reasonable doubt in order to secure a conviction in a murder trial. They are that:-

- the deceased is dead
- the death of the deceased was caused unlawfully
- the death was caused with malice aforethought
- the accused persons participated in the act or omission causing death.

Similarly, the offence of robbery contrary to sections 285 and 286 (2) of the Penal Code Act, has four essential ingredients. They are that:-

- there was theft of property;
- there was use of violence during the theft;
- death or grievous harm was caused or that the accused person or persons were in possession of a deadly weapon;
- the accused participated

In respect of either offence in the indictment, prosecution and the three defence counsel who

were involved in this case agreed that prosecution had proved beyond reasonable doubt all the ingredients of the two offences expect for the participation of the accused persons in either of those two offences.

Court is dully aware that even where counsel for the defence has made a submission that an essential ingredient of the offence charged is not in contest, the trial court still remains under duty to evaluate the evidence and make a specific finding in respect of each of the essential ingredients of the offence charged. ***Mawanda Edward vs. Uganda, SCCA No. 4 of 1999*** unreported).

In respect of the offence of murder under count number one, court has evaluated the evidence of PW4, who was the employor of the deceased. There is also the evidence of PW8, DC Asiimwe John, and PW12, AIP Batgerize Apollo, both of whom recovered the body of the deceased, which body was identified by the deceased's uncle one Kyakumanya, as that of Kazoora Geofrey. The above evidence was never controverted by the defence. Accordingly court finds that the prosecution proved the essential element of the death of the deceased beyond any reasonable doubt.

The post mortem report exh. P2, which was made by Dr. Bawakanya, then at Masaka Referral hospital, was admitted into evidence by the consent of the defence counsel. It states that the cause of death was the result of cut wounds on top of being strangulated. Clearly, the deceased's death was not from natural causes. It amounted to a homicide. It was, therefore unlawfully caused. ***Gusambizi S/O Wesonga Vs. R. (1948) 15 EACA 65.***

Similarly, the post mortem report shows that the deceased's body bore two deep cut wounds effected by a sharp cutting instruments and that the head was almost severed from the main body. It also shows that a corrosive substance was poured on the body following the killing. That evidence too which was not controverted by the defence leaves no doubt at all that whoever cut and strangled the deceased did, indeed, intend to cause his death or at least he or she must have been aware that death would result from such acts. In court's view, malice aforethought has been proved beyond any reasonable doubt.

With regard to the offence of robbery contrary to sections 285 and 286, of the Penal Code Act, the evidence of PW4, Luutu Godfrey, PW6, PW7, PW8,

PW12 and DW3, leave no doubt whatever in court's mind that exh. P7 was stolen from the deceased on the day he was killed.

The use of violence is evident in the evidence of PW7, especially the charge and caution statement of A2 and the post mortem report exh. P2. The evidence of both PW8 and PW12, who recovered the body from the bush, where it was damped after the deceased had died, shows that the theft of the motorcycle was executed with significant violence.

In the original indictment, in the particulars of the offence of robbery in court number two, the prosecution stated that before, during or after the robbery, the accused person used a deadly weopon, to wit a knife upon Kazoora Geoffrey. In the final submissions however, and without first seeking leave of court to amend the indictment, prosecution submitted on the fact that death was caused during the robbery and made no mention of the allegations relating to using a deadly weapon as was mentioned in the indictment.

Court, in that regard, notes that section 286 of the Penal Code Act was amended by the Penal Code Amendment Act, 2007, Act 8 of 2007. The amendment came into force on 17th August, 2007.

The indictment in this case was filed in the High Court on 28th August, 2008. By that date the phrase **“uses or threatens to use a deadly weapon”** had long been replaced by ***“an offender is in possession of a deadly weapon”.*** It would, therefore, appear that the indictment itself was defective to that extent.

Court, in those circumstances, has considered all the possible options available to court, including declaring the charge of robbery in count two altogether defective and the possibility of the prosecution amending the indictment at such a late hour of the trial. Both those options were discarded. So was the option of going along with the prosecution’s hiding corner of arbitrarily substituting the words, “used a deadly weapon to wit, a knife on **Kazoora Geadfrey”, with “caused the death of Kazoora Geofrey”,** which phrase does not appear in the indictment filed in court.

Instead, court has chosen to resort to it’s own interpretation of the two phrases, ***“used a deadly weapon, to wit, a knife on Kazoora Geoffrey***” and **“were in possession of a deadly weapon**, ***to wit a knife. “***

Court is aware of the fact that the particulars of the charge, in a criminal trial, should reflect as near as possible the language of the provision of the law under which the charge is being preferred against an accused person.

However, in the instant case, court thinks that the defect in the longer age used by prosecution in the indictment and the departure from the language used in subsection (2) of section 286, in as far as the deadly weapon is concerned, is not quite materially fundamental. Court does not think that that departure caused the accused persons any prejudice in fully understanding the charge and preparing and presenting their respective defences. Any person who was a deadly weapon must, certainly be in possession of that deadly weapon. The amendment of 2007, to subsection (2) of section 286, of the Penal Code Act, appears to have aimed only at expanding the scope of a deadly weapon at the scene of crime. It is no longer restricted to ***use or threat to use it during, before or after the commission of the robbery***. It's mere possession, at the scene of crime, is sufficient.

Since, there is ample evidence in the evidence of PW7, particularly in the charge and caution

statement of A2, and the evidence in the post mortem report exh. P.12, which evidence has not been controverted, court finds that prosecution proved beyond reasonable doubt that the persons who stole exhibit P7 from the deceased were in possession of a deadly weapon; to wit, a knife.

Of course, court is aware that no knife was recovered and exhibited in court by the prosecution. But the position of the law appears to be that failure to recover or to produce an exhibit in court is not fatal to the prosecution's case if witnesses who clearly saw it describe it adequately in court. To court's view, the evidence of PW7 and the post mortem report, contains adequate description of the weapon used at the scene of crime. **Uganda Vs. Katushabe 1988-1990 HCB 59.**

In light of the above analysis and evaluation, court duly agrees with all learned counsel in this case that prosecution proved the first three essential ingredients of the two offences in the indictment beyond any reasonable doubt.

Court now turns to the last essential ingredient of each offence in the indictment.

Regarding the offence of murder, court agrees duly with learned counsel for A1, Mr. Kamugunda that there appears to be no substantial evidence either direct or circumstancial that A1, took part in the killing of the deceased. The prosecution relied upon circumstances evidence of A1 being found in possession of the stolen motorcycle. As a rule, in order to constitute a good basis for a conviction, circumstantial evidence must be such as creates moral certainty of the guilty of an accused person. The evidence must not be incapable of any explanation upon any other hypothesis other than the guilt of the accused person. **R. Vs. Bukari S/O Abdallan (1949) 16 EACA 84 and Simon Musoke Vs. R. 1958 E.A. 715**. The above principle does not apply to A1 in this case. He is not covered by the confession of A2, with regard to the offence of murder. Yes the evidence of both A3 and PW5 and PW8 shows that he was in possession of the stolen motorcycle. But that would not lead to the conclusion that he participated in the murder in light of the evidence if PW7.

Court dully agrees with the three gentlemen assessors that A1 should be acquitted of the

charge of murder in count No. 1 and he is so acquitted

A2 implicates himself fully in his confession, exh. P7. However, he retracted and repudiated that confession during the trial. As a rule, a retracted confession calls for great caution before it is accepted and before founding a conviction upon it. The court must be fully satisfied, in all the circumstances of the case, that the confession is true. Usually the court will act upon a retracted or repudiated confession when it is corroborated in some material particulars by some independent evidence accepted by the court. However, corroboration is not necessary in law. The court may act on a confession alone if it is fully satisfied that it is true after considering all material points and surrounding circumstances **Tuwamoi Vs. Uganda 1967 E.A. 84.**

In the instant case, the confession of A2 is duly corroborated by the evidence of PW8 and PW12, to the effect that he gave those witnesses information that led them to where the body of the deceased had been damped. There is also the evidence of PW6 and DW3 that A2 was seen in possession of exhibit P7, the motorcycle stolen from the deceased when he was killed.

In the circumstances, therefore, court agrees fully with the unanimous opinion of the three gentlemen assessors that A2 is quilt of the offence of murder as prosecution has proved it against him beyond any reasonable doubt.

The evidence against A3, in relation to the offence of murder in count number one is only the confession of A2 who names him as the person who stubbed or cut the deceased with a knife as A2, A4 and A5 held the deceased. The position of the law seems to be that although a confession by a co-accused can be taken into account against a fellow co-accused but it only constitutes evidence of the weakest kind. It can only be used as lending assurance to other evidence. It cannot be used to form the basis of the case against a co-accused person. ***Erisa Isabirye vs. Uganda E.A.CA of 1969 and Ondendo S/O Anzungu and Others vs. R. [1968] E.A. 239.***

The reason for this approach was given by the court of Appeal for East Africa in ***Sulemani Waibi And 2 Others Vs. Uganda in Criminal Appeal No. 095 of 1973***. It was, that because to a co-accused, the confession is hearsay evidence and it is evidence which a co-accused cannot test or explain by way of cross-examination.

In ***Ezera Kyabanamaizi vs. R [1962] E.A. 309***, the same court stated that a statement made by a co-accused person, whether oral or written, implicating his or her co-accused, can only be used to supplement an otherwise substantial case against him or her. That principle was followed by the Supreme court of Uganda in ***John Sserumaga & 3 others vs. Uganda SCCA No 31 of 1996.***

In the instant case, court finds no ***otherwise substantial case made*** by the prosecution against A3 that exhibit P7 can supplement. The other evidence on record relating to A3's activities of connecting A1 and A2 to possible buyers of exhibit P& do not make up a substantial case against him which the confession of A2 can supplement. It constitutes circumstantial evidence which can be explained upon any other hypothesis other than the guilt of A3.

Accordingly, court does not agree with the numinous opinion of the gentlemen assessors that prosecution proved the charge of murder against A3 beyond any reasonable doubt. A3 is acquitted of the charge of murder in count number one.

As for A4 and A5, court is in full agreement with the three gentlemen assessors that prosecution

has not led any evidence requiring a conviction of any of these two accused persons on any of the two charges in the indictment. The only evidence against each one of them in regard to the two charges of murder and robbery, is the confession of A2. The reasons court has given with regard to A3, relating to the application of evidence of a co-accused person apply to these two accused persons as well. There is no ***otherwise substantial case*** that the confession of A2 can supplement in relation to them.

Besides, A4, during his defence put up an alibi to the effect that on the day the under and the robbery took place he was not at Kakwanzi. He testified that he was at Lugazi, in Mukono District. The prosecution evidence did not destroy that alibi and place A4 at the scene of crime. **Bogere Moses And Another Vs. Uganda SCCA No. 1 of 1997 and Kagunda Fred Vs. Uganda, SCCA No. 14 of 1998 (unreported)**

In light of the above, court agrees with the three gentlemen assessors that both A4 and A5 be acquitted on both charges because prosecution has not proved either of those two charges against any of those two accused persons beyond any reasonable doubt.

Regarding the charge of robbery, contrary to sections 285 and 286 (2), of the Penal Code Act, after acquitting A3, A4 and A5, of it, there remains only A1 and A2.

With regard to A1, court finds no evidence on record directly pointing to A1 as having participated in the robbery. There is, however, evidence from PW6, PW7, PW8, PW11 and PW12 that A1 received the stolen motor cycle. He was seen with it by several witnesses looking for a buyer. There is sufficient evidence on record that he finally sold it to one Yiga of Kifamba in Gomba District. He shared in the proceeds that sale. He gave 500,000/= to A2 out of the sale proceeds.

He received the motor cycle knowing or having reason to believe that it was stolen property.

In the circumstances, court would acquit A1 of the charge of robbery contrary to sections 285 and 286 (2) of the Penal Code Act and convict him, instead of, the lesser cognate offence of receiving stolen property, contrary to section 314 of the Penal Code Act.

For A2, there is sufficient evidence on record which proves that he took part both in the killing of the

deceased and also that he participated in robbing exhibit P7 from the deceased.

Court upon that evidence, agrees with gentlemen assessors that he be convicted of either charge in the indictment.

In the final result, court acquits A3, A4 and A5 of either charge in the indictment. That is to say, the offence of murder contrary to sections 188 and 189 of the Penal Code Act, in count number one, and the offence of robbery contrary to sections 285 and 286 (20 of the Penal Code Act.

Each one of them is to be released from custody today if no other charges are pending against any of them.

similarly, court acquits A1, of both charges of murder contrary to sections 188 and 189, of the Penal Code Act and the offence of robbery contrary to sections 285 and 286 (2) of the Penal Code Act. It instead, convicts him of the offence of receiving stolen property contrary to section 314, of the Penal Code Act.

For A2, court convicts him of the offence of murder contrary to sections 188 and 189, of the Penal Code Act. It also convicts him of the offence of

robbery contrary to sections 285 and 286 (2), of the Penal Code Act.

V.F. Musoke-Kibuuka

(JUDGE)

23/08/2012