

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

CRIMINAL SESSION CASE NO.138 OF 2014

UGANDA..... PROSECUTOR

VERSUS

A1: MUSITA BYARUHANGA DAVID

A2: PTE SIMON TOM alias MUHAMMAD ALI

A3: KUMAKECH PATRICK alias OKWERA.....ACCUSED

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1] The 3 accused persons; **Musita Byaruhanga David** (A1), **No. RA 169978 Pte Simon Tom** alias **Muhammad Ali** (A2) and **Kumakech Patrick** alias **Okwere** (A3) were indicted for Murder contrary to **Sections 188 & 189 P.C.A** in count I and Aggravated Robbery contrary to **Sections 285 & 286(2) P.C.A** in count II.
- [2] **In count I**, it is alleged that in the night of 7th December 2013 at Kayembe village, Southern Ward in Kiryandongo Town Council, Kiryandongo District, with malice aforethought, the 3 accused persons caused the death of **Kulabako Monica**. **In count II**, it is alleged that during the same time and at the same place as in count I, with intent to rob from **Kulabako Monica**, the accused persons did break, enter and robbed unspecified amount of money, 1 bag of sugar, 1 dozen of empire liquor and at or immediately before and after the said robbery, used pangas, knives and iron bars to kill the said **Kulabako Monica**.
- [3] The accused persons pleaded not guilty to both counts and the prosecution proceeded therefore, to prove its case against the accused persons.
- [4] The prosecution case is as follows; On the morning of 8/12/13 at around 6:00 am, **Harriet Kabonesa** (PW₁) who was a sister to the deceased **Kulabako Monica** found the door of the house of the deceased closed. She inquired from her son **Mutabazi** who was a

neighbor to the deceased and **A1** who was a friend of the deceased but none had sighted the deceased. It was upon the advice of her brother a one **Byembo** that she decided to go and check whether the door was locked. On reaching the door, she passed her hand/arm through the opening thereon and was able to push the curtain aside and see what was inside. On pushing the curtain sideways, she saw her sister the deceased, lying down on the floor with blood flowing. She raised an alarm which attracted people who included her brother **Byembo**. Police was called in. Upon opening the door, they found the body of the deceased with multiple cut wounds on the neck, legs, head, stomach and the eyes speared.

- [[5] The deceased operated a shop/bar in her house. A bag of sugar, beers, waragi and a masai lesu were found missing.
- [6] **A1** was the 1st suspect for he had been the closest friend of the deceased yet upon the deceased's demise, he never appeared bothered and disappeared from the area. **Pte Simon Tom** alias **Muhammad Ali** (**A2**) was also suspected because he was a known robber in Kiryandongo Town. As a result, both **A1** and **A2** and then later **A3** were arrested and charged with the instant offences.
- [7] During trial, **A2** opted to plead guilty to both counts as per the indictment. He was found guilty of both counts and convicted accordingly.
- [8] As regards **A1** and **A3**, they totally denied the prosecution's allegations. **A1** stated that he used to fetch and sell water to people in Kiryandongo Town and on the 7/12/13, he left the town at 5.00pm and left for his home where he stayed with his wife and children until the following day. That otherwise, he never saw the deceased at all on the eve of her death. For **A3**, that he never knew anything about the death of the deceased. That upon arrest by police, he was beaten and forced to admit that he killed or participated in killing the deceased. That otherwise, he never knew **A1** at all save for seeing and getting to know him from prison.
- [9] As in all criminal cases, the prosecution bears the burden to prove the guilty of the accused persons beyond all reasonable doubt. The burden never shifts to the accused except in a few exceptional case provided by law. The prosecution is enjoined to prove all the ingredients of the offences to the required standard; **WOOLMINGTON Vs DPP [1935] AC 462, LUBOGA Vs UGANDA [1967] E.A 440.**

- [10] Case law has established that;
“the standard of proof required is not proof to absolute certainty. Nonetheless, the prosecution evidence should be of such standard as leaves no other logical explanation to be derived from the facts, except that the accused committed the offence”; **MILLER Vs MINISTER OF PENSIONS [1947]2 ALL ER 373.**
- [11] In this case, for the offence of murder **C/ss 188 & 189 P.C.A** in count 1, the following ingredients of the offence must be proved before the prosecution can secure a conviction.
- i) Death of the person named in the indictment
 - ii) That the death was unlawfully caused
 - iii) That the death was caused with malice aforethought
 - iv) That the accused person participated in or caused the death of the deceased person
- [12] As regards the 1st ingredient of the offence, i.e death of a person, the prosecution led evidence of the sister of the deceased, **Harriet Kabonesa** (PW₁) who first discovered the deceased’s body lying down on the floor in a pool of blood in the deceased’s house, then **Mutabazi William** (PW₂) who operated a pork joint near the deceased’s bar and was also able to see and identify the body of the deceased as it lay in a pool of blood on the floor in the deceased’s house and **P.c Oringe John Paul** (PW₃), a police scene of crime officer who visited the scene and found the body of the deceased lying in a pool of blood with multiple cuts that led to the death of the deceased.
- [13] The evidence of PW₁, PW₂ and PW₃ was supported and corroborated by the post mortem report (**P.Exh.I**) which confirmed the death of the deceased and it was admitted in evidence as an admitted fact under **Section 66 TIA.**
- [14] As the defence did not dispute the fact of death of the deceased **Kulabako Monica**, I accordingly find that the prosecution has proved beyond reasonable doubt the 1st ingredient of the offence.
- [15] As regards the 2nd ingredient of the offence, i.e **that the death of Kulabako Monica was unlawfully caused**, it is trite law that the law presumes every homicide to be unlawful unless it is accidental or excusable or authorized by the law. The circumstances that make a death excusable include defence of person or properties; **See GUSAMBIZI S/o WESONGA Vs R (1948) 15 EACA 65 and UGANDA Vs OKELLO [1992-1993] HCB 68.**

- [16] In the instant case, there is nothing to show that the death of the deceased fell under any of the above exceptions or that it occurred under circumstances that make death excusable. In his submissions, **Counsel Kasangaki** for the accused persons correctly submitted conceding that the death was unlawfully caused as it was inexcusable. I in the circumstances find that the prosecution has proved this ingredient of the offence beyond reasonable doubt.
- [17] As regards the 3rd ingredient of the offence, i.e **whether the death was caused with malice aforethought**, **Section 191 of the P.C.A** defines **Malice aforethought** as
“Intentional killing of a human being or knowledge that the act or omission will result into death of a human being”.
See also **MUGAO & ANOR Vs R [1972] 1 E.A 543**.
- [18] To determine whether or not the prosecution has proved malice aforethought, court takes into account the circumstances including the nature or number of injuries inflicted, the part of the body injured, the type of weapon used and the conduct of the assailants before, during and immediately after the injuries were inflicted; **See R Vs TUBERE (1945) 12 E.A.C.A 63** and **DAFASI MAGAYI & ORS Vs UGANDA [1965]1 E.A 667 (C.A.K)**.
- [19] In the instant case, it is the evidence of **P.c Oringe John Paul (PW₃)** who visited the scene and took photographs of the scene that the body of the deceased had multiple cuts on the neck and head. Then there was stabbing in the stomach. This was confirmed by the Post Mortem report (**P.Exh.I**). The defence also did not contest this. As a result, I find that whoever inflicted the injuries on the neck, the head and the stomach of the deceased which are vulnerable parts of the body must have intended to kill her or intended for her to die. In the circumstances, I find that the prosecution has proved or established malice aforethought.
- [20] As regards the 4th ingredient of the offence which is the most important one as it was contested, i.e **whether the accused persons participated or they are responsible for the death of the deceased**, the prosecution adduced evidence of PW₁, PW₃ and the charge and caution statements of **Pte Simon Tom (A2)** i.e, **P.Exh.9** and **Komakech Patrick alias Okwera (A3)**, i.e **P.Exh.12**.
- [21] It is clear from the prosecution case that there is no eye witness who witnessed the incident to see and identify the assailants. However, according to **Harriet Kabonesa (PW₁)**, A1 was a close friend of the

deceased and he used to eat all meals from the deceased's place. That however, on the fateful night, he disappeared and did not even attend the vigil. The deceased's masai lesu and certain gumboots were recovered by police from his house.

- [22] According to **Mutabazi William** (PW₂), son to PW₁, and operated a pork joint near the deceased's local bar (about 30 meters away), last saw the deceased on the fateful day at 10.00am and A1 was at the deceased's place.
- [23] The recovery of the masai lesu known to belong to the deceased and a pair of gumboots were corroborated by the evidence of **P.c Oringe John Paul** (PW₃). He took photographs of the scene which included gumboot marks (**P.Exh.6**). According to him, the prints of the gumboots resembled the ones found at the house of the deceased (scene of crime). The pair of gumboots and the lesu were exhibited as **P.Exh.7**. The charge and caution statements of A3 was recorded by **D/AIP Acana James** (PW₄) while that of A₂ who pleaded guilty to the offences was recorded by **D/AIP Ojwika David**. According to **D/AIP Acana James** (PW₄), A3 appeared before him to record the statement when he was fine and willingly thumb printed the statement and he, PW₄ counter signed it.
- [24] **A1** in addition to his alibi defence stated that he was at his home with his wife and children during the fateful night the deceased was slaughtered, denied knowledge of the co-accused persons A2 and A3.
- [25] **A3** also denied knowledge of the co-accused persons A1 and A2. That police beat him and coerced him to admit that he killed or participated in killing the deceased.
- [26] As regards **A1's** alibi, it is trite that by setting up alibi, an accused doesn't assume the burden of proving its truthfulness so as to raise a doubt in the prosecution's case. It is the duty of the prosecution to adduce evidence that places him at the scene of the crime; **CPL. WASSWA & ANOR Vs UGANDA S.C. CRIM. APPEAL No. 49/1999**.
- [27] In the instant case, while elaborating his alibi, A1 stated in his evidence that on the fateful day, he worked the entire day from 7:00am to 6:00pm selling water in Kiryandongo Town. Then from 6:00pm up to night time, he was offloading cement. During cross-examination, he explained that he off loaded cement at 8:00pm while with sons; **Wasswa Isabirye, Walugendo** and **Bashir**. That they used to sleep at the site and at the same time he stated that he went to bed at 8:30pm.

[28] This court did not understand Ali's alibi when states,

“we used to sleep at the site”.

I found it incomprehensible while reconciling with his earlier statement that he was at his home with his children and then during cross examination, that he went to bed at 8:30pm. The statements were not adding up.

[29] On the other hand, **A1** denied knowledge of **A2** and **A3** who implicated him in their charge and caution statements. He stated that he only came to meet and know them in prison. It is however, his statement/evidence that while in prison, that both **A2** and **A3** tortured him not to reveal anything that he had discovered about them; i.e that they knew each other and that **A2** was implicating **A3** over the murder of the deceased.

[30] One however wonders why **A2** and **A3** would torture **A1** when he never knew them and they never knew him, if **A1**'s evidence is to be believed. If **A1**'s evidence is credible, then it is expected that he would be a stranger to **A2** and **A3**. It is my view that the above revelation of **A1** as regards what took place in prison between him, **A2** and **A3** is proof that all of them knew each other. The torture of **A1**, if at all it took place, it would have been intended to gag him confessing to and disclosing their participation in the murder.

[31] Secondly, **A1**'s alibi which was not adding up as regards whether on the fateful night he slept at the work place where he was offloading cement, or at his home, was further discredited and rendered un believable by his narration of what took place in prison between him with **A2** and **A3**.

[32] A masai lesu identified by **PW₁** to had belonged to the deceased was found at **A1**'s place. **A1** admitted that the lesu was not his. He however never denied that it was recovered at his place. Whereas I agree with counsel for the accused persons that the lesu in question was not the only lesu in Uganda that could only be owned by the deceased given there could have been any other bearing similarity, I still feel it is important for this court to note bearing in mind a common adage/saying that;

“Is it when my goat is missing that a neighbor's dog defecates fur?”

The dog could have eaten somebody else's goat but the discovery of fur in the neighbor's dog faeces is a pointer for suspicion. The masai lesu was a suspected stolen item. **A1** did not make any attempt to account for its existence in his house. Court is entitled to presume that he feloniously obtained it. The deceased's murder coinciding with the

recovery of the deceased's missing masai lesu in A1's house cannot just be ignored.

[33] At the scene, there were gumboot marks. A pair of gumboots were recovered from A1's house. The recovered gumboots were not subjected to scientific analysis to determine whether they were the actual ones that could have left behind the marks at the scene. There was no evidence that blood splashed upon them or that they had any blood stains. However, A3 in his charge and caution statement revealed that with the help of a torch flash, he was able to see A1 putting on boots and that A1 played a role in the murder of the deceased. That because of A1's relationship with the deceased, he was the one who planned and paved the way for them to access the deceased and slaughtered her. A2 in his charge and caution statement revealed the same and added that it is A1 who recruited them in the commission of the offences.

[34] As regards A3, it is his case that he was beaten with a baton and forced by police to admit that he killed and participated in killing the deceased. However, P. F24 in respect of A3 admitted under **Section 66 TIA** by consent (**P.Exh.3**) does not bear him out that he had any marks of torture or that he was tortured. This claim or allegation of torture was not at all put to PW₄ during the trial or during the tendering of the charge and caution statement. A3 only attempted through his counsel to object to it as regards the language used but later conceded to its exhibition in court. I find A3's albeit late objection and claim that he was tortured to record the statement as a mere afterthought. The charge and caution statement has details that could only be obtained from its author and not any other person. It contained the truth which matched in material aspects with that of A2, hence rendering it more credible by its contents. Both charge and caution statements detailed what role each played at the time and during the murdering of the deceased and the motive.

[35] In **TUWAMOI Vs UGANDA [1967] EA 84**, it was held that,
"A trial court should accept any confession which has been retracted or repudiated with caution and must before finding a conviction on such a confession be fully satisfied in all circumstances of that case that the confession is true."

[36] In the instant case, being guided by the above authority, with caution, taking into account all the circumstances of this case, to wit; the

detailed nature of A3's charge and caution statement detailing the motive of the murder and the role each of the accused played in murdering the deceased, corroborated by that of A2 and then the conduct of both A2 and A3 in prison as revealed by A1, coupled with lack of evidence that he was coerced to make it, I am satisfied that A3's confession is true.

[37] As a result, considering the fact that A3's charge and caution statement referred to **A1** having put on a pair of gumboots during the commission of the offence and there were marks of gumboots at the scene, coupled with the recovery of a pair of gumboots from A1's house and a masai lesu known to have belonged to the deceased, placed him at the scene of the crime thus collapse of the alibi. I am satisfied beyond reasonable doubt that both A1 and A2 participated in the killing of the deceased notwithstanding the fact that it is A2 who did the actual slaughtering of the deceased.

Under **Section 20 P.C.A;**

“When two or more people form a common intention to prosecute an unlawful purpose in conjunction with one another and 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.”

See also **ISINGOMA Vs UGANDA [1986-1989]1 E.A 155(S.C.U).**

[38] It is trite law that,

“common intention may be inferred from the presence of the accused persons, their actions and omissions of any of them to dissociate from the assault”; **P Vs OKUTE [1941] E.A.C.A 80.**

[39] In this case, I find that there is sufficient evidence adduced by the prosecution to prove beyond reasonable doubt that there was a common intention between **A1, A3** and others to kill the deceased and it was accomplished with the gruesome murder of the deceased.

[40] For all these reasons given, I find that the prosecution has proved beyond reasonable doubt the case of murder against **A1** and **A3** and this is also the position of the gentlemen assessors. I find **A1** and **A3** guilty of the offence of murder contrary to **Sections 188 & 189 P.C.A** and I convict each of them accordingly.

COUNT II: AGGRAVATED ROBBERY

- [41] The offence of Aggravated Robbery under **Sections 285 & 286(2) P.C.A** is committed upon the prosecution proving the following essential ingredients of the offence.
- i) Theft of property belonging to the victim/complainant.
 - ii) Use of violence or threat of use of violence during the theft.
 - iii) Possession of a deadly weapon during the theft.
 - iv) Participation of the accused persons in the commission of the offence.
- [42] In the instant case, both **A1** and **A3** pleaded not guilty to the offence and as summed up to the gentlemen assessors, once a plea of not guilty is entered, proof of all the ingredients of the offence charged becomes an issue; **ENDRIO ROSE & ANOR Vs WANI RICHARD and ANOR H.C.CRIM. SESSION CASE NO.172/2016.**
- [43] In this case, the **particulars of the case named an unspecified amount of money, 1 bag of sugar and 1 dozen of “empire” liquor as the items allegedly stolen from the deceased’s house during the murder.**
- [44] As already observed, none of the prosecution witnesses witnessed the incident/theft. As correctly put by **Mr. Kasangaki** for the accused persons, it is not known whether these alleged items were in the house or not and there is no proof that they were owned by the deceased. No witnesses led evidence that these items were in the deceased’s house before the murder of the deceased. As a result, there is no evidence of theft and in its absence, as some of the essential ingredients of the offence, the entire charge of aggravated robbery collapses.
- [45] In the circumstances, I find that the offence of aggravated robbery has not been proved. Both **A1** and **A3** are therefore not found guilty of the offence and they are acquitted of this offence accordingly. They only remain found guilty of the offence of murder.

Dated at Masindi this 5th day of August, 2021.

Byaruhanga Jesse Rugyema

JUDGE.

SENTENCE:

A1 and **A3** are first offenders who have been convicted of the offence of **murder** which carries a maximum sentence of death. The deceased **Kulabako Monica** was confronted with gruesome murder while in the hands of the accused persons of which **A1** was her old friend in Kiryandongo Town Council. The murder arose out of greed for the deceased was suspected to be in possession of lots of money.

The deceased died a very painful death because she was hacked all over. The scene of her body was extremely ugly. She was literally slaughtered. It was an exhibition of how a human being can be cruel to the other.

Though there is no evidence that she had dependants or a family that depended on her, I, nevertheless insist that she was entitled to live like any other human being and did not whatsoever deserve the kind of death she met.

Considering the age of the accused persons i.e. 50 years and 33 years respectively, as submitted by state Counsel, the manner of the murder of the deceased, the serious nature of the offence as it carries a maximum sentence of death, they deserve a deterrent sentence. This is not a matter for consideration of a maximum sentence of death because what motivated them to kill the deceased is not clear. In the circumstances of this case, I consider a **sentence of 30 years of imprisonment** appropriate. Since both of them had been on remand for a period of **7 years and 8 months**, they are to serve a **sentence of 22 years and 4 months imprisonment**. Right of appeal explained.

Byaruhanga Jesse Rugyema

JUDGE

5/8/2021