THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT IGANGA

HIGH COURT CRIMINAL SESSION CASE NO 0011 OF 2012

UGANDA…….PROSECUTOR

VERSUS

MALINZI JOHN……..…….ACCUSED

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The accused person, Malinzi John, was indicted for murder c/s 188 & 189 of the Penal Code Act. It is alleged that the accused and another still at large on the 24th day of July 2009 at Nakazinga village in Namutumba district unlawfully killed Musenge Daudi.

The brief facts of the case as presented by the prosecution are that the deceased and the accused were from the same area of Ivukula sub county in Namutumba district. On 29th June 2009 at around 10.00 am, at Nakazinga village in Ivukula sub county, the deceased, Musenge David found one Wilber up in his tree cutting it while another person was seated under the said tree. The deceased told the said Wilber to come down from the tree. As he was telling Wilber to come down from the tree the person who was seated down called out for the accused who arrived in a short time. The accused then ordered Wilber to throw him the panga and when he threw it the accused threatened to cut the deceased. Wilber and Malinzi then started beating the deceased on his right hand. The deceased alarmed his son a one Musenge Ronnie from a nearby garden. Ronnie Musenge came running to the scene where he found the accused and others at large assaulting the deceased. A police officer No. 3662 PC Mwondha Moses attached to Ivukula sub county police post, whom the deceased had earlier managed to call, also arrived at the scene, rescued the situation, and took the cut branch as an exhibit. The deceased was also taken to Ivukula police post where he reported a case of assault against the accused. The deceased was

issued a Police Form 3 as a complainant and on medically examining him, his injuries were classified as grievous harm. On 25th July 2009, after twenty five days, the deceased passed away. The accused together with Wilber went into hiding, but the accused was arrested from Mpande trading center on 28th August 2011 and accordingly charged.

Upon arraignment, the accused person pleaded not guilty to the charge. Thus, all the ingredients of the offence of murder are in issue.

The burden of proof of a criminal offence rests on the prosecution. It remains so throughout the trial. An accused does not bear the burden of proving his innocence. The Constitution of Uganda provides that he is presumed innocent until proved guilty. It is also trite law that the accused should only be convicted on the strength of the prosecution case and not on the weakness of his defence. See **Sekitoleko V Uganda [1967] EA 531.** Thus, the duty is on the prosecution to discharge the burden of proof beyond reasonable doubt.

In order to discharge this burden of proof, the prosecution called four witnesses, namely Musenge Ronnie PW1; No. 3662 Police Constable Mwondha Moses PW2; Musenge Margret PW3; and No. 30818 Detective Corporal Muhamad Mugoya PW4.

This standard of proof required is that the prosecution must prove the guilt of the accused beyond reasonable doubt. See **Woolmington V DPP [1935] AC 4662.** The law as set out in **Miller V Minister of Pensions [1947] 2 ALL E R 372, at p. 373** that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt or absolute certainty. If evidence is so strong as to leave only a small possibility in a person's favour then the case has been proved beyond reasonable doubt. At the conclusion of the trial of the accused, any doubt that remains is resolved in the accused person's favour.

Section 188 of the Penal Code Act stipulates the ingredients of the offence of murder to be as follows:-

a) The deceased is dead, in this case, that Musenge Daudi is dead.
b) The death was unlawful, in this case, that the death of the said Musenge Daudi was unlawfully caused.

c) That the death of the deceased person was caused by malice aforethought, in this case, that it was intended that Musenge Daudi should die.
d) That it was the accused who was responsible for the death of the deceased, Musenge Daudi.

Whether the deceased is dead:

The prosecution evidence on this issue largely rests on the post mortem report, exhibit **P1**, which was admitted as agreed evidence and the evidence of PW1 Musenge Ronnie, and PW3, Musenge Margret.

Exhibit **P1** indicates that on the 25th July 2009 Dr. Mwindike examined the body of Musenge Daudi an adult male of the apparent age of 54 years. The body of the deceased was identified to him by one Betty Kasanka, as that of Musenge Daudi. The superficial appearance of the body was still and clean. The right side of the head and the lateral aspect of the neck, on the right side, was slightly swollen compared to the left. The special marks were recent scars on the right arm, right forearm, right clavicular region, evident of recent trauma. The external marks were recent soft tissue injuries on the right side of the body evident of recent past violence. In his opinion, the cause of death and reason for the same was that the deceased is likely to have suffered gradual increase in intra cranial pressure suspected to have arisen from slow internal bleeding in the head and neck structures especially on the right side of the body.

It is the evidence of PW1 Musenge Ronnie, and PW3, Musenge Margret, that the deceased, Musenge Daudi, is dead.

The defence contends that the state had failed to prove each of the factual ingredients included in the legal definition of murder. In essence, the defence is disputing even this ingredient of the fact of death of the deceased.

I have looked at the evidence adduced by the prosecution on the factor of death of the deceased. The evidence of the prosecution witnesses that the deceased is dead is corroborated by medical evidence, exhibit **P1.** There is therefore overwhelming evidence that the deceased died on 24th July 2009.

I am satisfied that the fact of death of the deceased, Musenge Daudi, has been proved by the prosecution beyond reasonable doubt.

Whether the death of the deceased was unlawfully caused:

The law as established in **R V Gusambizi s/o Wesonga [1948] 15 EACA 65** is that every homicide is presumed to be unlawful unless caused by accident, or in defense of property or person or is authorized by law.

In this case, it is the evidence of PW1, Musenge Ronnie and PW3 Musenge Margret that point to the circumstances of the death of the deceased. PW1 testified that he found the accused beating the deceased. PW1 also testified that at the time the deceased was assaulted by the accused, he complained of headache and neck pain until he died. This is corroborated by the evidence of PW3. The deceased died on 24th July 2009, following an assault that was occasioned to him on 29th June 2009. The post mortem report, exhibit **P1**, indicated that the deceased suffered gradual increase in intra cranial pressure suspected to have arisen from slow internal bleeding in the head and neck structures especially on the right side of the body. Exhibit **P2** which was admitted in evidence as agreed evidence indicated that the deceased sustained injuries as a result of an assault on him which was classified as grievous harm.

The defence however contends that the state had failed to prove each of the factual ingredients included in the legal definition of murder. The accused testified that while digging, he received a call from Kasenga Alex DW1, that his herdsman a one Wilber had been arrested by the deceased. When he arrived at the scene he found the deceased with Wilbur together with other people. He joined others who were pleading with the deceased to release Wilbur. It is then that the accused learnt that Wilbur had been cutting a branch of a tree belonging to the deceased, which had prompted the latter to arrest the former. The deceased accepted the pleas. The accused as DW1, together with other defence witnesses DW2 and DW3 denied that the deceased was ever assaulted by the accused or that the two quarrelled. It was their evidence that if there was any assault it was between Wilber and the deceased but not between the accused and the deceased.

In the circumstances where the defence is denying that any assault was occasioned on the deceased, and that no ingredient of murder was proved by the prosecution, I am inclined to look

at the evidence adduced and determine whether the deceased's death was with violence, and whether the killing was unlawful.

I have considered the evidence in exhibits **P1** and **P2**, together with other evidence as to the cause of death and nature of injuries occasioned on the deceased. It is clear from the evidence, especially regarding the nature of injuries on the deceased which were recorded to be a result of an assault, and which were medically classified as grievous harm, that the death of the deceased was certainly not excusable, accidental or justifiable. The death of the deceased was unlawful.

I therefore conclude that the prosecution has proved beyond reasonable doubt that the death of the deceased was caused was caused unlawfully.

Whether the death of the deceased was caused with malice afore thought:

Section 191 of the Penal Code Act defines malice afore thought as an intention to cause the death of any person, whether such person is the person actually killed or not, or knowledge that the act or omission causing death will probably cause death though such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused. In **R V Tubere s/o Ochen [1945] 12 EACA 63** it was held that malice aforethought, being a state of mind, is difficult to prove by direct evidence. Generally, malice aforethought can be inferred from the surrounding circumstances such as:-

1) The nature of the weapon used;
2) The manner of use of the said weapon;
3) The part of the body affected;
4) The nature and extent of the injuries suffered;
5) The conduct of the accused before, during and after the killing of the deceased.

In this case, exhibit **P2** reveals that the nature of injuries inflicted on the deceased by the assault was classified as grievous harm, and he was found to have a dislocated left shoulder plus a cut on the right forearm. The postmortem report exhibit **P1** reveals that the deceased had recent scars on the right arm, right forearm, right clavicular region, evident of recent trauma. The cause of death is likely to have suffered gradual increase in intra cranial pressure suspected to have arisen from slow internal bleeding in the head and neck structures especially on the right side of the body.

The defense contested the fact that malice afore thought could be inferred from the circumstances of this case.

The direct evidence of PW1 and PW3 on the injuries sustained by the deceased is corroborated by the medical evidence in form of exhibits **P1** and **P2**. Exhibit **P1** reveals that the injuries on the deceased's body were evidence of recent past violence. Exhibit **P2** reveals that the deceased (then complainant) was found to have a dislocated left shoulder plus a cut on the right forearm classified as grievous harm. It is evident that whatever had been used to assault the deceased must have been used with purpose and venom. The nature and extent of the injuries was deep. The injuries were classified as grievous harm. The part of the body affected, that is, the head and neck area among others, are very delicate parts of the human body. There can be no doubt that the person who inflicted these injuries intended that the deceased should die, or knew, or ought to have known that death was an inevitable consequence.

In the circumstances, it is my conclusion that the prosecution has proved beyond reasonable doubt that the death of the deceased was with malice afore thought.

Whether the accused participated in the killing of the deceased:

The prosecution's case is that the deceased died as a result of the injuries inflicted on him by the accused when he assaulted him following a dispute over the cutting down of a tree. The deceased had refused the Wilber to cut down his tree. PW1 who was a son to the deceased testified that the deceased called him from a nearby place where he had gone to clear a bush for cultivation of potatoes. At that time PW1 was weeding a nearby groundnut garden with his mother PW3. He ran to where his father was clearing the bush. He saw the accused boxing the deceased. The accused's brother a one Muwesi Clovis and their son called Wilbur were also standing by. Clovis Muwesi was holding a panga. PW1 testified that since one of them was holding a panga he could not do much. He only went on his knees requesting them to let the deceased go. They left the deceased when PW2, Police Constable No. 3662 Mwondha Moses who had been called by the deceased arrived at the scene. According to PW1 and PW3 the deceased was bleeding on his right arm after the incident. He then received first aid but later began to complain about headache, chest pain and neck pain. He died at Bukoona on 24th July 2009 when he was being taken from a health unit to Nakavule Hospital .

PW2 testified that a case of assault was opened at Ivukula Police post. That the medical form on which the deceased had been examined came out categorizing the nature of injuries inflicted on the accused as grievous harm. When the accused was summoned through the LC1 of Mpande and requested to make a statement, he refused. The accused was arrested when the form indicating grievous harm was brought back. The matter was forwarded to Namutumba police post.

The accused testified that while digging, he received a call from Kasenga Alex, that his herdsman a one Wilber had been arrested by the deceased. When he arrived at the scene he found the deceased with Wilbur together with other people. He joined others who were pleading with the deceased to release Wilbur. It is then that the accused learnt that Wilbur had been cutting a branch of a tree belonging to the deceased, which had prompted the latter to arrest the former. The deceased accepted the pleas. The accused as DW1, together with other defence witnesses DW2 and DW3 denied that the deceased was ever assaulted by the accused or that the two quarreled. It was their evidence that if there was any assault it was between Wilber and the deceased but not between the accused and the deceased. Thus though the accused does not deny that he was at the scene of crime he denies that he was the one who assaulted the deceased.

I have analysed both the prosecution and the defence evidence. The testimony of PW1 that he saw the accused beating the deceased at about 8.30 am is corroborated by the evidence of PW2 and PW3 who testified that they came to the scene of crime and found the accused there. PW1 and PW3 also testified that the deceased bleeding on the hands. According to PW1, as the accused was assaulting the deceased, Wilber was standing nearby holding a panga. PW3 also testified that the accused was quarreling with the deceased. PW3 advised the deceased to go for treatment. This evidence is further corroborated by independent medical evidence in form of exhibits **P1** and **P2** both of which confirm that the deceased was assaulted. PW1 and PW3 are familiar with the accused who is their neighbor. PW1 was not far from the accused, or was at close range, when he witnessed the assault. PW2 identified the accused in the dock as the person he found at the scene of crime when the deceased rang him to inform him that he was assaulted. This strong evidence defeats the defence evidence that the deceased was not assaulted. I believe the evidence of PW1 who was an eye witness to the assault as truthful since it is corroborated by

not only the evidence of PW2 and PW3, but also the independent medical evidence exhibits **P1** and **P2.**

I do not believe the accused person's version that he was not the one who assaulted the deceased and that he only came at the scene to plead for his herdsman. He was positively identified before court as the person who assaulted the deceased. The defence version of the evidence that the deceased was never assaulted, when compared with other independent evidence on record, particularly the medical evidence, makes it not feasible that the deceased was never assaulted. The defence version that the deceased was not assaulted is irreconcilable with the Doctor's findings in exhibit **P2** that the deceased sustained a dislocation of the left shoulder joint and a cut on the right forearm, classified as grievous harm. PW2 a police officer also gave credible evidence that the deceased reported a case of assault against the accused after the incident and a file to that effect was opened. The other evidence on record particularly the testimony of PW1 indicates that it is the accused who inflicted the injuries on the deceased.

The defence alluded to a number of inconsistencies in the prosecution case and contended that they are grave as to warrant the said evidence being rejected.

The law on inconsistencies and contradictions is that only grave inconsistencies that are not explained satisfactorily will usually result in the evidence of a witness being rejected. Minor inconsistencies will not have that effect unless they point to deliberate untruthfulness. A contradiction is minor if it does not go to the root of the case, and where the witness never intended to lie. It is legitimate for the court to find that a witness has been substantially truthful even though he or she lied in some particular respect. The veracity of a witness must be assessed on his evidence as a whole. If he or she has been found to be untruthful in one part of his or her evidence then, in absence of a reasonable explanation, the reminder of his or her evidence should be accepted only with grave caution.

I have considered the evidence of PW1 that he responded to his father's call and found the accused holding the deceased by the chest while punching his stomach. Is it a contradiction that the accused was boxing the deceased in the stomach yet exhibit **P1** indicates the cause of death as gradual increase in intra cranial pressure suspected to have arisen from slow internal bleeding in the head and neck structures especially on the right side of his body? I have also considered

the evidence of PW1 that the Police Officer PW2 found the accused walking away, yet PW2 himself testified that he did not find the accused quarrelling with or assaulting the deceased. Are these contradictions? If so, are they minor or major?

I do not accept the defence contention that the evidence of PW1 that he found the accused boxing the deceased contradicts exhibit **P1** which indicates cause of death as due to internal bleeding in the head and neck structures. I do not find any contradiction on this circumstance. PW1 clearly stated that when he arrived at the scene he saw the accused holding the deceased and at the same time boxing him. He also testified that in the process he found that the deceased was bleeding but he did not know how he got the wound. PW3 stated that she did not witness the assault but that when she followed PW1 to the scene the accused looked dirty and was bleeding on the right hand side where there was a cut. This evidence is clearly corroborated by exhibit **P1** and **P2.** PW2 stated that when he reached the scene after being called by the deceased, he asked what the matter was and the deceased told him that the accused had assaulted him. Taken as a whole, it is clear from the pieces of evidence that the assault started earlier than the arrival of PWI on the scene; that PW3 who arrived after the assault only witnessed the quarrel, while PW2 found the accused walking away after the assault and the quarrel. Thus PW1's evidence that the Police Officer PW2 found the accused walking away, yet PW2 himself testified that he did not find the accused quarrelling with or assaulting the deceased is clearly not a contradiction. It only infers that PW2 arrived when the assault and the quarrel were over. It does not go to the main substance of the case. It does not discredit the prosecution evidence concerning the identification of the accused regarding his having assaulted the deceased. I found the witnesses evidence to be truthful with no deliberate falsehoods. On the contrary the defence contention that PW1 and PW2 lied to court has not been corroborated by any independent evidence on the record. No prosecution witness has been proved by the defence to have a motive to tell lies against the accused person. Neither is there any independent corroborative evidence on record to support the contention of the defence. The conduct of the accused, found in the testimony of PW4, that he disappeared after the incident and even jumped police bond is not conduct compartible with his innocence. The evidence of PW4 on this matter was hardly discredited by the defence in their cross examination of the witness. Likewise the evidence of the defence witnesses DW2 and DW3 that there was no assault on the deceased and that the accused never participated in the

assault of the deceased were hardly convincing in the face of the prosecution evidence which was amply corroborated by independent evidence.

For those reasons I find the accused person's testimony to be untruthful. The law is that in a case where an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove his guilt. However, if, on proved facts two inferences may be drawn about the accused person's conduct or state of mind, his or her untruthfulness is a factor which court can properly take into account as strengthening the inference of guilt. The strength it adds depends on all the circumstances and especially on whether there are reasons other than guilt that might account for the untruthfulness.

In the given circumstances, and for the foregoing reasons, I do not agree with the Assessors. I find that it is the accused who assaulted the deceased which assault led to the death of the deceased. I am satisfied that the prosecution has discharged the burden of proving all the ingredients of the offence of murder against the accused beyond reasonable doubt.

Thus, I find the accused guilty as charged, and I accordingly convict him.

PERCY NIGHT TUHAISE

JUDGE.

05/07/2012.