

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT IGANGA

HIGH COURT CRIMINAL SESSION CASE NO 0453 OF 2010

UGANDA.....PROSECUTOR

VERSUS

AKABWAI BEN.....ACCUSED

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The accused person, Akabwai Ben, is indicted for murder c/s 188 & 189 of the Penal Code Act. It is alleged that the accused on the 8th day of June 2008 at Iganga Main Street round about near post bank in Iganga Town Council, Iganga District murdered Maneno Yonah.

The brief facts of the case as presented by the prosecution are that on 8th June 2009 at around 6 pm, the accused was proceeding for duty as night guard together with his colleague, Sajabi Herbert. When they reached Iganga Main street round about near the post bank, the accused was slightly knocked by the deceased who was riding motorcycle registration number UDM 510D. The accused, who was armed with a gun, shot at the deceased seriously wounding him. The deceased was rushed to Iganga Main Hospital where he died. The accused was soon after arrested with the gun by a one IP Zikusooka Samuel who was in the vicinity.

Upon arraignment, the accused pleaded not guilty to the charge. Thus, all the ingredients of the offence of murder are in issue. The prosecution assumes the burden of proof of all ingredients of the said offence.

The burden of proof of a criminal offence rests on the prosecution and remains so throughout the trial. It is only in a few specific instances that the burden shifts to the accused but murder is not

one of them. The duty is therefore on the prosecution to discharge the burden of proof. See section 101 of the Evidence Act; **Miller V Minister of Pensions [1947] 2 ALL E R 372.**

The standard of proof required in criminal proceedings is that the prosecution must prove the guilt of the accused beyond reasonable doubt. An accused person does not bear the burden of proving his innocence. He is presumed to be innocent until proved guilty or until he pleads guilty. At the conclusion of the trial, any doubt that remains is resolved in the accused person's favour. See **Sekitoleko V Uganda [1967] EA 531.**

In order to discharge the burden of proof, the prosecution called the evidence of four witnesses. These were Sajjabi Aggrey (PW1), Inspector Zikusooka Samuel (PW2), Seargent Eyom Michael (PW3) and Robina Kirinya (PW4).

The accused on his part made a sworn statement and raised the defence of total denial. In addition, as implied from the submissions of defence Counsel, he raised the alternative defence of accident.

The ingredients of the offence of murder are:-

- a) The fact of death, in this case, that Maneno Yonah is dead.
- b) The death was unlawful, in this case, that the death of the said Maneno Yonah, was unlawfully caused.
- c) That the death of the deceased was caused by malice aforethought, in this case, that it was intended that Maneno Yonah should die.
- d) That it was the accused who was responsible for the death of the deceased, in this case, that the accused, Akabwai Ben, was responsible for the death of Maneno Yonah.

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. According to exhibit **P1**, Dr. Kizito of Iganga Hospital examined the body of Maneno Yonah, an adult male of the apparent age of 22 years, on 9th October 2009. The body of the deceased was identified to him by Ibanda Eriabu the LC 1 Chairman of the area, as that of Maneno Yonah. The external marks of violence were a wide

open wound (outlet) and a smaller wound (inlet) at the right pelvis. The internal injuries are a fracture of the right pelvis and dislocation of the said pelvis. The doctor recorded the cause of death and reason for the same as severe anaemia due to the excessive bleeding following a gunshot wound. The smaller inlet and bigger outlet suggest a gunshot wound. It was the evidence of PW1 Sajabi Herbert and PW2 IP Zikusooka Samuel that Maneno Yonah is dead.

The defence did not contest the fact of death of the deceased and agreed to exhibit **P1** being part of the evidence.

In the premises, I agree with the Assessors, and find that the fact of death of the deceased, Maneno Yonah, has been proved by the prosecution beyond reasonable doubt.

Whether the death of the deceased was unlawfully caused:

Death is always presumed to be unlawful unless caused by accident, or in defense of property or person. It was held in **Gusambizi V R [1948] 15 EACA 63** that a homicide unless accidental will always be unlawful unless committed in circumstances which make it excusable. The said presumption is a rebuttable one. It is the duty of the accused to rebut it by showing that the killing was either accidental or that it was excusable. The standard of proof required of the accused is low. It is only on the balance of probabilities. See **Festo Shirabu s/o Musungu V R [1955] 22 EACA 454**.

In this case, it is the evidence of PW1 Sajjabi Aggrey and PW2 Inspector Zikusooka Samuel that the accused pointed his gun at the deceased and shot him. PW1 Sajjabi Aggrey testified that at 5 pm on 8th October 2009 he rode his bicycle to the office of New Uganda Securico in Iganga where he signed for his gun. As he was setting off the accused who was also working for the same employer requested for a lift, since PW1 was going to bypass his place of work. The two rode together on PW1's bicycle. When they reached Iganga Main street round about, the deceased who was riding a motorcycle (boda boda) approached from Jinja road and knocked the behind wheel of their bicycle. The deceased, the accused and PW1 all fell down. The deceased got up first got hold of his motorcycle and wanted to start it. PW1 also got up and told him that he wanted to run away. He let go of the motorcycle and it fell down, and started to run away. At that time PW1 heard the sound of a gun. Then he saw the deceased falling down. When PW1 looked behind he saw the accused standing holding his gun. PW2 Inspector Zikusooka Samuel

who testified that he happened to be at the scene as he was coming from Kaliro police station corroborated this evidence. It was his evidence that on that date at around 6 pm, as he was walking along Main Street near the roundabout he saw a motor cyclist knocking a bicycle where two men dressed in blue uniform were riding. He saw the accused shoot the deceased with one bullet from his gun.

The defense contested the fact that the deceased's death was unlawfully caused. In his sworn testimony the accused testified that after signing for his gun and nine bullets, following incidents where they grab guns, he cocked his gun. It was his evidence that it is true he was on a bicycle ridden by PW1 when the deceased knocked them. He however denied that he stood up, pointed a gun at the deceased and shot him. It was his testimony that when the deceased knocked them, four people fell down. He was injured and he spent many minutes on the ground. He testified that he even lost his understanding. A police officer helped him get up. He testified that he does not know anything about the shooting, and that he was only told at the police that he had killed someone. In his submissions, the Defence Counsel submitted in the alternative that in case the accused is the one who shot the deceased, then it must have been by accident. Thus impliedly he put up the alternative defence of accident, inferring that the deceased's death was excusable in the circumstances.

I have considered the evidence of PW1 which is corroborated by that of PW2 that the accused pointed his gun at the deceased and shot. This is corroborated by the evidence of PW4 a government analyst who examined the deceased's gun serial no. K - 425338, exhibit **P3**. In her report which was admitted in evidence as exhibit **P4** she determined that the gun was capable of discharging ammunition. This therefore means the bullet that hit the deceased was fired from the accused person's gun. In my opinion this rules out the accused person's claim of a possibility that his gun shot by accident. Exhibit **P1** indicates that the deceased died as a result of excessive bleeding due to a gunshot.

In the premises, in agreement with the Assessors, I find that the circumstances of this case where the deceased was shot with a gun which was pointed at him by a person who was not executing a lawful order cannot be accidental or excused.

Whether the death of the deceased was caused with malice aforethought:

Section 191 of the Penal Code Act defines malice aforethought is 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, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused. It was held in **Tubere V R [1945] 12 EACA 63** that malice aforethought is a state of mind that cannot be evidenced by direct evidence, but court can deduce malice aforethought from other factors, including any of the following:-

- 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.

PW1 and PW2 who were eye witnesses testified that the accused shot the deceased. According to exhibit **P1**, the external marks on the body of the deceased were a wide open wound (outlet) and a smaller wound (inlet) at the right pelvis. The internal injuries are a fracture of the right pelvis and dislocation of the said pelvis. The doctor recorded the cause of death as severe anaemia due to the excessive bleeding following a gunshot wound. PW4 Robina Kirinya testified that the gun, exhibit **P3**, was capable of firing ammunition. Her report was admitted in evidence as exhibit **P4**. On the conduct of the accused, it was the prosecution evidence that the accused attempted to leave the scene of crime after the incident but was stopped by an angry mob.

The defense contested the fact that the death of the accused was caused with malice aforethought. The Defence contends that the circumstances under which the weapon discharged the bullet do not justify malice aforethought. It was the evidence of the accused that he did not know how the firearm discharged the bullet, and that after being knocked down he became unconscious. It was his evidence that he only came to know about the shooting and killing of somebody at the police station. The defence concedes that the gun was a lethal weapon but contends that the part of the body that was shot, the lower part of the body, does not show malice aforethought. It is their contention that the said part is not a delicate part of the body. On the conduct of the accused the defence contends that it is that of an innocent person, that he did not

leave his office with a cocked gun to kill somebody but to ward off people who may attempt to steal his rifle.

The question is whether the deceased was assaulted with intention that she should die or with knowledge that death was a probable consequence.

The killer weapon used was a gun. The gun was exhibited in court and admitted in evidence as exhibit **P3**. PW4 Robina Kirinya testified that the gun, exhibit **P3**, was capable of firing ammunition. Her report was admitted in evidence as exhibit **P4**. A gun is a deadly weapon use of which can cause death of another. The accused had cocked it beforehand hence preparing to shoot at any eventuality. That eventuality occurred not in form of an ambush to take his gun as he had anticipated, but in form of being knocked down by the deceased. It does not matter what the eventuality was in the given circumstances for purposes of determining malice aforethought. The deceased was shot in the leg and he died as a result of excessive bleeding due to a gunshot. Whoever shot the gun had had the intention of killing the deceased or knowledge that the act of shooting would probably cause death. The part of the body shot was the lower part of the body. The conduct of the accused in cocking the gun before hand also infers that he was ready to shoot in case of any eventuality. There is evidence also that the accused attempted to leave the scene of crime after the incident but was stopped by an angry mob. This contrasts with the conduct of PW1 and PW2 who organized to report the matter to the police. The accused person's conduct was incompatible with his innocence.

It is my conclusion that the prosecution has proved beyond reasonable doubt that the death of the deceased was with malice aforethought.

Whether the accused participated in the killing of the deceased:

The prosecution case is based on the evidence of PW1 and PW2 whose testimony is that they saw the accused shoot the deceased. It is their evidence that the assault took place in broad daylight around 5.30 pm or 6 pm at Iganga Main street roundabout. PW1 and PW2 testified that they were at the scene of crime at the time the deceased was killed and that the accused pointed his gun at the deceased and shot him. PW2 did not know the accused before that but he identified him from the dock as the one he saw shoot the deceased.

On his part, the accused did not deny being at the scene of crime. He however denied ever killing the deceased. It was his testimony that he left for work with a cocked gun and on his way at the roundabout along Iganga Main street, he was knocked down by the deceased who was riding a motor cycle. He fell down and sustained injuries. He also became unconscious. He completely denied knowledge of the shooting. He said he came to know about the shooting while at the police. It was his testimony that it was a police officer who picked him and took him to the police station.

The defence contends that if it is true that the accused person's gun shot the deceased to death, it went off by accident and the accused did not intend to kill the deceased. The law on this situation is that a person is not criminally responsible for an act or omission which occurs independent of the exercise of his or her mind, or for an event which occurs by accident.

The evidence of PW1 and PW2 that the accused was at the scene of crime was corroborated by the accused himself in his sworn testimony. The accused denied firing the gun. This however is rebutted by expert evidence exhibit **P4** read together with the testimony of PW4 Robina Kirinya. This evidence, in addition to corroborating that of PW1 and PW2, confirms that the gun, exhibit **P3**, was capable of firing ammunition. Exhibit **P3** correctly identified by PW2, PW3 and PW4 as bearing the serial number K 425338, type SAR was confirmed as the gun that was removed from the accused at the scene of crime. It is the same gun that PW4, the ballistic expert, examined and determined that it was capable of firing ammunition. In further corroboration exhibit **P1** confirms that the internal injuries on the deceased, that is, a fracture of the right pelvis and dislocation of the said pelvis, in form of a smaller inlet and bigger outlet, suggest a gunshot wound.

I find it difficult to believe the accused person's defence that he lost consciousness after the incident only to recover it while at the police station. In his sworn testimony he told court that after the incident, a police man got him up and they walked to the police station. It was his testimony that at that time, he was not understanding, and that he started understanding when they reached the police station. It is inconceivable that the accused walked in an unconscious state to the police station, let alone being able to tell that it was a police officer who walked with him to the police station, or being able to distinguish, as he did while giving evidence, that the police officer was not PW2. This makes me to be inclined to believe that the accused deliberately omitted his act of shooting the deceased in his evidence to save himself from blame.

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. But if upon proved facts two inferences may be drawn about the accused person's conduct or state of mind, his untruthfulness is a factor which court can properly take into account as strengthening the inference of guilt. What strength it adds depends on all the circumstances and especially on whether there are reasons other than guilt that might account for the untruthfulness.

The defence contends that PW2 is a liar, particularly the involvement and nature of participation of the accused in the alleged murder. The defence doubts that PW2 witnessed the actual shooting of the deceased.

The defence has not adduced evidence showing PW1 to have a motive to tell lies against the accused person. In his testimony the accused referred to PW1 as his friend. PW1's evidence is corroborated by other independent evidence as analysed above. I have no reason for that matter to find that PW1 is a liar.

The defence further contends that there are major inconsistencies in the prosecution evidence that would lead court to doubt whether it is the accused who shot the deceased. I did consider that PW1 and PW2 gave conflicting accounts of what the accused did after being knocked down by the deceased. PW2 testified that after the accident the accused immediately stood up followed by PW1 and lastly by the deceased, and that immediately after standing up, the accused shot the deceased at close range. PW1 testified that he left the accused who was still lying on the ground, and that in the process was preventing the deceased from running away from the scene of crime. Also PW2 testified that after the shooting he arrested the accused and handed him over to the police. On the other hand PW1 testified that he ran to the police with the gun and handed it over to police requesting them to come and rescue the accused who they found being beaten by a mob. PW1 also testified that the police shot in the air and the accused was taken to the police station by the police.

It is the law that only grave inconsistencies that are not explained satisfactorily that will usually result in the evidence of a witness being rejected but minor inconsistencies will not have that effect unless they point to deliberate untruthfulness.

The evidence adduced by the prosecution implicating the accused as having committed the crime is both direct and circumstantial. It is possible that due to lapse of time some finer details were forgotten by the witnesses in their pieces of evidence. I find them to be minor. I am satisfied that the entire prosecution evidence considered as a whole irresistably points to one conclusion, that the accused is the one who unlawfully caused the death of the deceased.

For reasons already highlighted above, I have not accepted the alternative defence that if it is true that the accused person's gun shot the deceased to death, it went off by accident and the accused did not intend to kill the deceased. The Assessors were also of the same opinion. I will therefore not dwell on this issue.

It is my conclusion therefore, in agreement with the Assessors, that the prosecution has proved each of the ingredients of the offence of murder against the accused beyond reasonable doubt. I accordingly find the accused guilty of murder and convict him as charged.

PERCY NIGHT TUHAISE

JUDGE.

05/07/2012.