

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT GULU  
CRIMINAL SESSION CASE NO. 0012 OF 2006**

**UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::PROSECUTION**

**VERSUS**

**NO. 143069 PTE MUMBERE JULIUS :::::::::::::::::::::::::::::::::::::::::::::::::::::::ACCUSED**

**JUDGMENT**

The accused person was charged with the offence of Murder C/s. 188 and 189, of the Penal Code Act. The allegations contained in the particulars of the offence, in the indictment, were that the accused person, on or about the 20<sup>th</sup> day of January, 2005, at Lawiye village in Kitgum district murdered Otto Samuel.

The accused person pleaded not guilty to the offence of murder. The prosecution, as the law requires, was under duty to discharge the burden of proof to prove the guilt of the accused person beyond any reasonable doubt. **Pte Bigirwa Edward vs. Uganda, Sc Criminal Appeal No. 27 of 1992.**

The prosecution led evidence from 10 witnesses. The accused person opted to exercise his right under section 73 (2), of the Trial on Indictments Act, to keep quite and say nothing in his own defence.

The case for the prosecution was that the deceased, Otto Samuel was a boda boda rider in Kitgum Township. On 20<sup>th</sup> January, 2005, at about 10.00 a.m., he got a customer who was a soldier. He was armed with an SMG riffle and was holding a bag. Otto had earlier hired his motor cycle to a self-drive customer. He approached PW5, Obwor Jimmy to lend him his motorcycle to enable him transport the soldier customer to Lawiye village in Madiope Sub County. The distance was about 32 miles. PW5 released his motorcycle, UDC 900Z, to Samuel Otto who took the soldier with him. The soldier was in spotted army uniform.

PW2, Orach Ambrose, saw motorcycle UDC 900Z with a rider carrying a soldier in uniform and armed with a gun pass through Madiope trading centre between 11.30 and mid-day on 20<sup>th</sup> January, 2005. it was moving from Kitgum side and heading for Agoro side. PW2 was the LCI Chairperson for Central village in Madiope IDP camp.

After less than one hour afterwards he saw the same motorcycle at Madiope trading centre. This time it was being ridden by the soldier whom he had seen as a passenger on it about an hour before. The motor cycle had just been ridden from Ogoro side Madiope trading centre where the soldier knocked down three boys. One of the three was PW1, Omwony Richard. PW2 took the soldier and the motor cycle to Madiope Police post. According to both PW2 and PW1, the soldier they took to the police was the accused person. He still had his rifle and bag.

PW6, DC Ekoru Lawrence, also called Kabila, was a Police Officer at Madiope Police Post. He was instructed by the OC, Madiope Police Post to investigate a report made to the OC by some traveling Sudanese that there was a dead body along the road from Madiope to Agoro. He recovered a boda boda rider's identity card from that body in the names of Otto Samuel. The identity card had been issued by the Kitgum Boda Boda Association. He took the body to Kitgum Hospital.

PW8, Dr. Paul Loromo, a Medical Officer was at Kitgum hospital. He carried out the post mortem examination on the body of Otto Samuel on 21<sup>st</sup> January, 2005. The body was of an African male of 30 years. It was well nourished. There was one bullet entry wound on the right side of the neck and one exit bullet wound in the left ribs. According to him the cause of death was **“severe haemorrhage caused by bullet wound”**. The post mortem report is exhibit P2.

In the meantime, the accused person had somehow walked away from Madiope Police post and disappeared. PW6 and other police officers searched for him in vain. The police and army then amounted a joint night operation searching all lodges and hotels in Kitgum town during the night. They could not locate the accused. Afterwards they concentrated at a road block. They found the accused person loaded in the first bus to Kampala. He was eventually charged with this offence.

The accused, on 25<sup>th</sup> January, 2005 made a charge and caution statement before PW4, DIP Atube George. The accused denied, during the trial, that he made the statement. But after the trial within a trial, it was established that he did and voluntarily. The statement, which does not amount to a confession on account of containing some exculpatory material in it, **Uganda vs Rev. Fr. Paul Kabishanga & Rev. Sister Nyakato, (1978) HCB 69**, is exhibit P4, on the record.

The SMG rifle No. UE9813, 1999 model, with a round magazine containing 8 rounds of ammunition that were recovered from the accused when he was arrested, are marked exhibits P5 and P6, respectively.

As stated before, the accused exercised his right to keep quiet. However, during the final submissions learned counsel, Mr. Madira, for the accused person, emphasized the defence of self-defence, which the accused person put forward in his charge and caution statement exhibit P4. Counsel also argued and submitted that the accused was never identified at the scene of crime and was not properly linked by the evidence to the commission of the offence. Counsel concluded that the defence of self defence obliterated the essential ingredient of malice aforethought rendering the offence of murder untenable against the accused person in this case.

The offence of murder as created by sections 188 of the Penal Code Act, is constituted by four essential ingredients. Each one of them must be proved beyond any reasonable doubt by the prosecution in order to secure the conviction of an accused person. They are:

- death of the deceased named in the indictment
- unlawful act or omission causing the death of the deceased
- malice aforethought accompanying the act or omission causing death; and
- Participation of the accused person in the act or omission causing death of the deceased.

The fact of the death of the deceased named in the indictment, in this case, is not in dispute. Learned counsel, Mr. Madira stated, in his final submissions, **“ We do not dispute the death of Samuel Otto. He is indeed quite dead”**

However, the duty of court, to evaluate the evidence on record and arrive at its own conclusion on each essential ingredient of the offence charge, is not lessened or replaced by that submission. **Mawanda Edward vs Uganda, SCCA No. 4 of 1999 (unreported).**

PW7, who was the chairperson of the Kitgum Boda Boda Riders Association to which Samuel Otto was a member testified that Otto died on 20<sup>th</sup> January, 2005. PW7 saw Otto's dead body at Kitgum hospital. He also attended his burial.

PW8, Dr. Lenny Paul Lomoro, who wrote the post mortem report, examined a body of a young man aged 30 years. The body was identified to him as that of Otto Samuel by PW3, Ocan Acha George, who was the Secretary for Security, Kitgum District at the time. PW5 and PW6 both confirm that Otto Samuel died on 20<sup>th</sup> January, 2005. There is also the statement of the accused person himself, exhibit P4, in which he states that he shot the accused and he died instantly.

Court, therefore, finds that the prosecution has proved beyond reasonable doubt Otto Samuel, the deceased named in the indictment, died on 20<sup>th</sup> January, 2005.

On essential ingredient number two, the finding of PW8, Dr. Lenny Paul Lomoro was that the cause of death for Otto Samuel was “ **Severe haemorrhage caused by bullet wound**” clearly the shooting of a bullet is an intervene human action in the natural trend of human life. The death arising amounts to a homicide. Unless authorized by law or otherwise excusable, according to the old case of **Gusambizi s/o Wesonga 91948) 15 EACA, 63**, in which the Court of Appeal for Eastern Africa laid down the authentic principle that all homicides are presumed to be unlawful unless authorized by law or if proved to have been accidental or excusable.

The only piece of evidence which could render the shooting of the deceased excusable is in the evidence of PW4, in the charge and caution statement which PW4 tendered in evidence as exhibit P4. That piece of evidence reads as below:

***“There and then he caught me by the collar of my shirt (army uniform). He slapped me. I had my gun put across my back. He pushed me down. He came down to me,***

***caught the sting of the gun. I got up and we started struggling over the gun. The gun was loaded with a bullet in the chamber. As we struggled, one bullet was fired by him. That bullet missed me narrowly. Seeing that this man could kill me. So I kicked him and he fell down. I then shot direct four bullets and he died there and then. That is my statement”***

In the view of court, largely what the accused stated in his charge and caution statement is not true. PW6, who visited the scene of crime just a few hours after the death of the deceased and also removed the body from the scene was able to observe only the motor cycle tyres prints on the ground. He specifically saw no signs of struggle it was a dry season and the ground was clear. The scene was an all weather marrum road. Signs of any struggle would have been clearly visible. PW8 found that the deceased was shot duly by one bullet through the right side of his neck. It exhibited from the left side of the ribs. Where were the four bullets the accused claims to have pumped into the deceased fearing that he would kill him?

If the accused has shot the deceased under the circumstances he described in exhibit P4, then why did he not report the incident at the nearest police post which was at Madiope? He did not do so even during the period he stayed with the OC and PW6 at Madiope police post after PW2 had taken him there after the accident. Why did he take the deceased's motor cycle and start riding it at his own pleasure which resulted into the accident in which PW1 was injured?

And lastly, why did the accused snick away from the police post at Madiope and disappeared if he had such prominent and eloquent a defence? It is quite clear that the accused shot Otto not because danger to him but because he either wanted to steal his motorcycle or for some other unknown reason.

But even if court were to believe that there was a struggle between the deceased and the accused, the accused was armed with a riffle, AK 47, the deceased was not armed with anything. How could the deceased have paused a serious attack that could place the accused in immediate peril and necessitating instant action (shooting) to avert the danger? ***Ojapan Ignatius vs Uganda, SCCA No. 25 of 1995 (unreported)***

In light of the brief analysis set out above, court finds that the defence of self defence is clearly not available to the accused person. What he stated in his statement to the police but never repeated in court were mere lies fabricated to deceive the police. The death of the deceased remains a homicide that is not excusable.

Court, therefore, finds that the death of Otto Samuel was caused by an unlawful act of shooting him with a gun.

Malice aforethought can be established in two ways according to section 191 of the Penal Code Act. It may be proved by direct evidence showing intention to kill a human being.

It may also be proved by evidence showing the circumstances under which the deceased died.

It is clear that the evidence in the instant case does not show direct intention to cause the death of the deceased person or any other human being.

However, malice aforethought may be inferred from the evidence of the circumstances under which the deceased died. The Court of Appeal for Eastern Africa in the authoritative decision in **Tubere s/o Ocan, vs Rese 19451 I EACA, 63** set specific circumstances to be examined by the trial court in order to decide whether constructive malice aforethought can be inferred or not. They are:-

- the type of weapon used
- the nature of the injuries inflicted
- the part of the body affected
- the conduct of the attacker before and after the attack.

In the instant case, the weapon used was a gun, exhibit P5, an SMG rifle, AK 47. It can be said that the human mind has not been able to come up with any more lethal ordinarily used weapon than a gun. It is very lethal, indeed! Where such a lethal weapon is used malice aforethought is easily inferred. In the case of **Otim Gabriel Ogola vs Uganda, SCCA No. 16 of 1993**, for instance, the accused had cut the deceased to death with a panga. Their Lordships,

the Justices of the Supreme Court of Uganda made the following observation with regard to the inference of malice afore thought

***“the appellant inflicted serious cut wounds on the deceased with a panga. He must have intended to kill him”***

According to PW8, the deceased was shot in the right side of the neck. The neck, whether of an animal or a human being, is probably the most vulnerable part of the body. The numerous slaughter houses throughout the world bear testimony to that degree of vulnerability. Animals are often slaughtered by cutting the neck.

The accused states in exhibit P4 that he shot the deceased direct and from close range. Clearly he intended to kill him.

The conduct of the accused after shooting the deceased speak volumes about his intention. He never cared. He first rode away upon the motor cycle of the deceased and enjoyed himself but because, he probably did not know how to manage the motor cycle fully, he ended up in an accident.

From those circumstances, court cannot help to draw the inference of constructive malice aforethought on the part of accused person in this case.

The last essential ingredient relates to the responsibility of the accused person for shooting the deceased.

In exhibit P4, the accused, even though he included a lot of untruthfulness in that statement agreed that he shot the deceased dead. Court accepts that part of the statement of the accused person because it finds it to be truthful.

The second piece of evidence which prosecution produced to incriminate the accused person consists of circumstantial evidence.

As a rule, in order for circumstantial evidence to constitute the sole basis for conviction of an accused person, it must be such that it creates moral certainty that the accused is guilty of the

offence charged. It must be incapable of explanation upon any other hypothesis than that of the guilt of the accused. There must not be some other co-existing factors that lessen the inference of guilt drawn by the court from it. *Simon Musoke vs Regina (1958) EA 715 and Teper vs R (1952) 2 ALL E.R. 447*

Both PW2 and PW7 were at the Kitgum Boda boda stage very early in the morning for work. They saw the accused person arrive at the stage at about 9.00 a.m. He was in full army combat uniform with both a rifle and a bag. The accused sat at the boda boda stage for about one full hour until he negotiated with the deceased to take him to Madiope. They left at about 10.00 a.m, on the motor cycle belonging to PW5. They were seen at Madiope trading centre by PW2 riding towards the scene of crime, which was only a few miles along Madiope-Agoro road.

Less than an hour afterwards, PW1 and PW2 saw the accused involved in an accident at Madiope trading centre while riding the same motor cycle which the deceased and the accused had been seen riding less than an hour before. When both motor cycle and the accused were taken to the police post at Madiope, the accused wisely sneaked away and disappeared together with his gun and bag. Soon afterwards, the body of the deceased was discovered along the road to Agoro. The cause of death was shooting with a gun. The accused was arrested the following morning aboard a bus heading for Kampala.

That set of circumstantial evidence, in the view of this court creates moral certainty that it was the accused who killed the deceased. The circumstantial evidence is incapable of any other logical explanation except the guilt of the accused person in this case. Court finds no co-existing factors that would negate or lessen the inference of the accused's guilt drawn from that circumstantial evidence.

Learned counsel for the defence raised the question of failure by the prosecution to tender the motor cycle in evidence and without offering any explanation for the failure. It appears, and court agrees with learned counsel for the state, that the motor cycle was not a very relevant exhibit at this trial. The offence being tried was murder and not theft or robbery of motor cycle UDC 900Z. Its production as an exhibit would have been of little relevant evidential value.

Lastly defence, in the final submissions, complained that the accused person was never identified at the scene of crime but that all the witnesses who identified him only did so in court during the trial. The case of **Uganda vs Evaristo Nyanzi, HC Criminal Session case No. 46/87**, was cited as basis for the above submission. Court considered the case of Evaristo Nyanzi to be distinguishable from the instant case. The evidence in Nyanzi's case was direct evidence intending to prove court acts constituting the offence of treason. The evidence in this case is circumstantial. No witness claim to have seen the accused committing the offence at the scene of crime. But PW1, PW2, PW5 and PW7, all saw the accused involved with the deceased as the last person seen with him. Each one of them identified the accused to that extent so did PW6.

The circumstantial evidence is duly corroborated by exhibit PW4 in which the accused admits shooting the deceased dead,

Court, therefore, find that the prosecution's evidence proved, beyond reasonable doubt, that the accused was the person who shot the deceased dead on 20<sup>th</sup> January, 2005.

The gentlemen assessors in this case returned an unanimous joint opinion. It was to the effect that the prosecution had proved its case beyond any reasonable doubt and that the accused person be convicted as charged.

In view of the reasons set out in this judgment, court has no reason to differ from that joint opinion. Court accordingly convicts the accused person of the offence of murder c/s 188 and 189, of the Penal Code Act.

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**V. F. MUSOKE KIBUUKA**

**JUDGE**

**21.11.2008**

