

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT RUKUNGIRI**

**HCT – 05 – CR – CSC – No.0100 - 2008**

**UGANDA ..... PROSECUTOR**

**Versus**

**KAMUSIIME DANIEL ..... ACCUSED**

**BEFORE: HONOURABLE MR. JUSTICE YOROKAMU BAMWINE**

**JUDGMENT**

The accused KAMUSIIME DANIEL is indicted for murder contrary to Sections 188 and 189 of the Penal Code Act. It is alleged that on 04 – 02 – 2007 at Katookye Trading Centre in Rukungiri District he murdered TUZIRWEGYE JACKSON alias MUREFU.

The accused pleaded not guilty to the indictment.

The substance of the prosecution case against the accused person is that on 04 – 02 – 2007 around 9:00pm, the accused and the deceased were at Katookye Trading Centre having good time; that later they picked a quarrel whereby the accused person picked a big stone and hit the deceased on the head with it and collapsed immediately to the ground. That he started bleeding heavily and died on his way to Hospital. The accused is said to have tried to run away but was apprehended. Hence the charge of murder.

In a murder case the prosecution must prove beyond reasonable doubt that a human being was killed; that the death was unlawfully caused; and that the killing was with malice aforethought within the meaning of Section 191 of the Penal Code Act. The prosecution must further prove that the accused directly or indirectly participated in the killing.

Regarding death of a human being called Tuzirwegye Jackson alias Murefu, there is the post mortem report of Dr. Ronald Tumusiime of Nyakibale Hospital. It was tendered in evidence by a colleague, Dr. Rutahigwa, since the author could not easily be got. He examined a body of a person identified to him as that of Tuzirwegye Jackson by one Kabongoya Hope on 5 – 2 – 2007.

There is also the oral testimony of PW1 Kabongoya Hope, mother to the deceased; PW2 Twehikye Anthony; and PW3 Akankwasa Amos, that Tuzirwegye died on 4/2/2007 and burial was on 6/2/2007.

The defence has not disputed the fact of death. This court has no reason for not believing these witnesses.

I make a finding that one Tuzirwegye Jackson alias Murefu died on 04 – 02 – 2007.

The next point to consider is whether or not his death was unlawfully caused.

The law presumes that every homicide is unlawful unless it is accidental or excusable. A homicide is accidental if it happens by chance or unintentionally. It is excusable if committed in execution of a lawful sentence or in self-defence.

The postmortem report gives the cause of death as brain contusion and haemorrhagic shock. The Doctor (PW1) did explain that brain contusion refers to injury to the brain that sort of crushes it (the brain) but does not break it. It is fatal. Haemorrhagic shock is caused by excessive bleeding. Coupled with the above is the evidence of PW2 Twehikye and PW3 Akankwasa who saw the deceased being hit on the head with a stone. The defence has also not disputed the fact of the death being unlawfully caused.

From the evidence of all these witnesses, Tuzirwegye's death was not caused otherwise than unlawfully.

I make that finding.

I now turn to the question as to whether or not the accused was responsible for the unlawful death of the Tuzirwegye.

The case for the prosecution is that the accused did kill the deceased. In his sworn defence, the accused has denied any hand in the death of the deceased.

The evidence connecting the accused with the commission of the offence is of a direct nature. According to PW2 Twehikye Anthony, he was at one Baguma Silvano's Bar/Shop when the accused picked a stone and hit Tuzirwegye with it on the head. The said Tuzirwegye collapsed to the ground. He never got up. Moments later he was pronounced dead. The accused made an attempt to run away but he was apprehended there and then.

The same story is repeated by PW3 Akankwasa Amos. He too saw the accused move to the road, pick a stone and hit Tuzirwegye with it on the head. The witness participated in giving a short chase to the accused, apprehending him and later handing him over to the police.

In his defence, the accused admitted having been at the Trading centre that evening. He claimed that he went home and moments later he was arrested from his home for allegedly causing disturbance at the Trading Centre.

If have understood the nature of his defence, it is an alibi. Where an accused person sets up an alibi in answer to a claim, he does not thereby assume the duty of proving the same.

His duty stops at raising it.

It is the duty of the prosecution to produce evidence that rebuts it, and that puts him at the scene of crime when the crime was being committed. The accused's alibi in this case has been rebutted by the direct evidence of PW2 Twehikye and PW3 Akankwasa who saw him in the act of assaulting the deceased and participated in his apprehension. In view of this direct and credible evidence, I have no slightest doubt in my mind that Tuzirwegye's killer had no opportunity to escape from the scene of the murder. He was apprehended there and then and handed over to the police. That killer is none other than the accused herein, Kamusiime Daniel.

This ingredient of the offence has also been proved beyond reasonable doubt.

This leads me to the issue as to whether or not the killer had malice aforethought.

Under Section 191 of the Penal Code Act, malice aforethought is deemed to be established by evidence providing either of the following circumstances:-

**“(a) an intention to cause the death of any person, whether such person is the person actually killed or not; or**

**(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may be caused”.**

Malice aforethought, that is, intentional killing, is really a state of the mind.

It is difficult for a person to know what the other is thinking about. In deciding whether malice aforethought has been established, the courts have over the years had to take into account, inter alia, such factors as:

- (i) the nature of the weapon used;**
- (ii) the number of injuries inflicted;**
- (iii) the part of the body where the injury was inflicted; and**
- (iv) the conduct of the killer before and after the incident.**

From the evidence of the first eye witness to the incident, PW2 Twehikye Anthony, he went to Katookye Trading Centre and sat in one Sajja's shop where he found the deceased. Time was around 6:30pm. After about 3 minutes, a lady called Sharon joined them. The deceased bought her a bottle of soda, she took it and around 8:00pm, the witness, the deceased and the lady went to another part of the Trading Centre. At this other place, the deceased and the lady, Sharon, went to some shop below the road. For the witness, he went to Baguma Silvano's shop, bought a glass of waragi, went outside and started enjoying it. After about 5 minutes, the deceased joined him in the company of the accused. As they came, the accused following the deceased, they were quarrelling about something, judging from the gesturing the two were making towards each other. Moments later, the accused attacked the deceased and one Kahigi separated them. The accused then went and picked a stone and hit the accused with it. The rest is history.

The witness did not know what sparked off the quarrel between them since he had not been with them where they had been.

The other witness, PW3 Akankwasa, gave a similar account. For him by the time he came into the picture, he found the accused telling the deceased that he would beat him and the deceased was asking him why. As they were quarrelling, accused moved to the road, picked a stone and hit the deceased with it. He saw the stone, measuring about 2kgs. PW2 Twehikye's estimate was that of about 1kgm.

The external injuries which the doctor saw included a laceration on the left parietal prominence with an inward depression skull fracture about 3cm x 4cm x 2cm. It is this

injury, going by the findings of the doctor, which led to brain contusion and haemorrhagic shock.

I have already indicated that neither PW2 Twehikye nor PW3 Akankwasa claims to know what sparked off the quarrel. The accused has not offered one either. If anything, his evidence is that he never quarreled with anybody that night; that he knew Sharon but he did not see her at the trading centre.

I advised the assessors, as I advise myself now, that in a case of murder there are some defences available to the accused person by the law. Court may consider any possible defence even though the accused has not raised it so long as it arises from the prosecution evidence. Some of the defences, if proved, would reduce the charge of murder to that of manslaughter, that is, killing without malice aforethought.

I mentioned to them a possibility of an accidental killing. The evidence on record does not accommodate any possibility that Tuzirwegye was accidentally killed.

If anything, the evidence on record excludes any possibility of an accidental killing, given that the assailant simply went to the road, picked a stone and aimed it at the deceased. Such is not evidence of an accidental killing.

Learned counsel for the accused, Mr. Ndimbirwe Arthur, alluded to the possibility that the attacker may have been drunk, given evidence of prosecution witnesses of persons being high on drinks at the Trading Centre.

Much as there is indeed evidence of persons being high on drinks at the Trading Centre that fateful evening, there is no evidence that those persons included the accused person. If anything, the accused's case is that he indeed went to Baguma Silvano's Bar / Shop for no other purpose but to seek loose change for the money he had worked for that day and that he got it. He does not allude to taking any beer in his evidence.

I have also considered the possibility that the accused may have been provoked by anything the deceased may have done or said to him thus making him lose his self-control and act in a heat of passion by hitting the deceased with a stone on the head. The effect of this would be to reduce the charge to manslaughter.

In his defence, the accused denied knowledge of the deceased prior to the incident. He said that he did not know him.

From PW2 Twehikye's evidence, the deceased and Sharon went to some place below the road. After about 5 minutes, the deceased joined him where he was seated. He was this time in the company of the accused and judging from their gestures, they had been quarrelling over something. He did not know what it was that sparked off the quarrel.

What then is a provocative act? Section 193 of the Penal Code Act offers a definition. Under this Section, **'Provocation'** means and include except as stated in Subsection (3) to Subsection 5 thereof, any wrongful act or insult of such nature as to be likely-

**“(a) when done or offered to an ordinary person; or**

**(b) when done or offered in the presence of an ordinary person to another person –**

**(i) .....**

**(ii) .....**

**to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered”.**

From the authorities, it must be such an act or insult as to deprive an ordinary person of his self-control. The assault must have been done in the heat of passion caused by sudden provocation (as defined) and before the passion thus aroused has had time to cool.

In the instant case, if the deceased did or said anything which the accused may have found to be provocative, it was at the place where he, the deceased, went with Sharon because that is where he picked the accused person from to move to Baguma Silvano's shop where PW2 Twehikye was seated.

The accused has not set out in his defence any circumstances that raised any inference of any provocative acts. And at Baguma's place, in the presence of PW2 Twehikye, nothing was said by the deceased that the accused could have interpreted to be provocative.

If anything, from the evidence of the said PW2 Twehikye, the two shared a bottle of beer between themselves. Then the accused 'neck tied' the deceased. One Kahigi separated them.

It was at this point that the accused went to the road, picked a stone and hit the deceased with it on the head.

From the evidence of PW2 Twehikye and that of PW2 Akankwasa, the accused did not do all that following what the deceased may have told him and / or done to him at Baguma's shop. It would appear that the accused had harboured anger over a period of time and when he had the chance, space and time to vent it out on the deceased, he did so without any hesitation at Baguma's shop. In all these circumstances, he did not do what he did in the heat of passion caused by sudden provocation and before he had time to cool within the meaning of Section 193 of the Penal Code Act.

From the evidence of these two eye-witnesses, PW2 Twehikye and PW3 Akankwasa, which I have found truthful, the accused did what he did unprovoked, deliberately, intentionally and callously, not caring whether death would be caused or not.



True, court has not had the opportunity to view the killer stone. No explanation has been offered to court as to its non-production at the hearing in view of PW3 Akankwasa's evidence that police picked it and took it away.

Be that as it may, the two witnesses have sufficiently described it to court despite the variation in description as to size, which was to be expected of two witnesses testifying on the same item which they did not measure at the time. Pw2 Twehikye thought it was about size of his clenched fist, between 2 - 3kg according to him; whereas PW3 Akankwasa thought it was about 2kg, twice the size of his clenched fist, according to him. Learned counsel for the prosecution, Mr. Waligo Emmy, has invited court to find that the contradiction in the prosecution evidence relating to the size of the stone is minor and therefore worth ignoring. Like the assessors, I have accepted that submission. It was in my view a matter of difference in opinion, not intended to mislead the court. Taking even the lower estimate of the two, that is the size of PW2 Twehikye's clenched fist, it was a deadly weapon to assault a person with in a vulnerable part of the body, the head. Its impact was devastating. It caused an inward depression skull fracture and the deceased died on impact. In my view no reasonable person would not contemplate that death would result from accused's criminal act.

From this evidence, court has come to the conclusion, as did the assessors Mr. Betubiza John Fred and Kamugisha Stanley, that the prosecution has proved beyond reasonable doubt that the unlawful death of Tuzirwegye was caused with malice forethought.

Both assessors in their joint opinion were unanimous that the accused person was responsible for Tuzirwegye's death. They advised me to find him guilty of the offence he is charged with. After serious consideration of the prosecution and defence evidence together, the law involved and after adequate caution to myself on the issue of malice aforethought, I entirely agree with their joint opinion. No evidence has been presented to court to warrant reducing the charge to manslaughter. I therefore find the accused guilty of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act and convict him as indicted.

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**YOROKAMU BAMWINE**  
**JUDGE**  
**25/11/2009**

**25/11/2009**    **Accused** present

**Mr. Waligo** for state

**Mr. Matsiko** foe accused

**Both assessors** present

**Court:**        Judgment delivered.

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**YOROKAMU BAMWINE**  
**JUDGE**  
**25/11/2009**

**Mr. Waligo:** There is no previous record against the accused.

We invite court to note that it is a false belief that those you disagree with should be killed. Many people have been killed thus way. Society is going back to days of Okonkwo where man's worthy was determined by number of heads harvested. This is not acceptable in modern society. We call for a punitive sentence.

**Mr. Matsiko:** He is a first offender. He is aged 26 years. He has been on remand since December, 2006, now 2 years and 11 months. I invite court to consider the conjugal rights of the convict's innocent one. Punishment is to rehabilitate that very person. I pray for a punishment that will see victim rehabilitated and living a different life, not him dying where he is. I so pray.

**Convict:** Since I have lost case, I pray for a punishment I can manage.

**Court: Sentence - reasons for it.**

The accused is a first offender. However, he started his criminal journey on a very sad note. He took the life of an equally young man for no apparent reason. Life is dear. No person has right to end it except in excusable circumstances. A person who goes out for a good time with others is entitled to return home in one piece, not pieces as did Tuzirwegye.

I have considered the time spent on remand and the various pleas for mercy. Most are of course weighed down by the barbaric nature of the convict's act. Being a first offender, however, I am inclined to reduce the maximum sentence of death to imprisonment. Doing the best I can, I consider a sentence of eighteen (18) years imprisonment adequate punishment, given that no punishment, however, severe would be equated to the lost life. He is so sentenced.

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**YOROKAMU BAMWINE**

**JUDGE**

**25/11/2009**