

Murder → M/Slaughter  
5 year

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA.

HOLDEN AT MBALE.

CRIMINAL SESSION CASE NO. 17 OF 1992.

UGANDA .....PROSECUTOR

VERSUS:

DAVID WILSON LUKOKHO ..... ACCUSED

BEFORE: THE HON. MR. JUSTICE S.G. ENGAU.

J U D G M E N T

The accused, David Wilson Lukokho, is charged with murder contrary to sections 183 and 184 of the Penal Code Act. It is alleged that on 12.7.89 at Bushula 11 village in the Mbale District murdered Peter Mayeko alias Mumali.

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In a bid to prove the alleged offence, the prosecution called 3 witnesses. Evidence of PW3 is that the deceased Peter Mayeko was his son. On 22.7.89 at about 8 p.m. the deceased went outside for a long call leaving him inside the house. The deceased heard somebody cutting his maize. Soon he heard the deceased say, "Lukokho are you cutting my maize.?" This was followed by a cry from the deceased that Lukokho had stabbed him with a knife. On hearing this, witness ran to the scene. He found the deceased and the accused at the maize garden. He raised an alarm while at the same time trying to arrest the accused but the accused ran away. The deceased was stabbed on the left side of the stomach. Very many people answered the alarm but the first person to reach the scene was PW2.

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As the condition of the deceased was not good, the witness hired a motor vehicle and took the deceased to Bududa Hospital where he died after 2 days on 24.7.89. It was this witness who identified the body of the deceased to the doctor before the postmortem examination was done. How and when the accused was arrested, the witness did not know. However, PW2 testified that on 22.7.89 at about 9 p.m., he heard the alarm while at his home coming from the direction of the deceased's home. He ran to the scene but did not find the accused. He found the deceased at the maize garden crying while alleging that the accused had stabbed him. The deceased was holding his stomach on the left side. The witness joined PW3 in making alarm which was answered by very many people. The witness in the company of many people went to look for the accused. They did not find him at home but found 4 maize cobs at the fire place under a tree. The witness returned to the scene and helped in taking the deceased to Bududa Hospital.

On 23.7.89 in the early morning hours, PW2 was among the people who went to look for the accused. They found the accused hiding in a mine-pit on Silumbusa hill. They arrested the accused and took him to Bukobero Gombola Headquarters.

The doctor PW1 who carried out the postmortem said that on 25.7.89 at Bududa Hospital, PW3 identified the body of the deceased to him as that of Peter Mayeko. The deceased was a male adult of apparent age of 34 - 35 years old. He was well nourished with no recent scars or any tribal marks on the body. External examination revealed a stab-wound on the left abdominal wall penetrating into the peritoneal cavity. There was omentum prolapsing through that wound. The size of the wound was 6 cm in length.

Internal examination revealed peritonitis which is an inflammation of the inner lining of the abdominal cavity and there was a perforation on the ileum. The hole allowed the contents of the intestines to come out to cause peritonitis. Cause of death was Septicaemic shock which resulted from peritonitis. The witness tendered postmortem report as exhibit P1.

In his defence, the accused in unsworn statement said that on 10.7.89 at about 8 p.m. he was roasting his maize at his home when the deceased came and wanted to eat his maize by force. He resisted but the deceased started throwing away his maize from the fire. As visitors were at his home at the time, the accused and the deceased went into the house of one Waninda to try and settle the matter. The accused says when he was trying to get outside with one maize cob, the deceased grabbed him and beat him with a stick on the back of his head. He showed court the scar.

The accused went outside and picked a knife where his wife was cooking under a tree and stabbed the deceased in self defence. As it was dark, he did not see which part of the body he had stabbed. He went to report the matter to the R.C. 11 Chairman of the area but feared the dogs. So he went and spent the night at the home of one Luka Wabunyokho at the funeral. In the morning, he went back to his home only to be arrested by the R.Cs who took him to the Gombolola Headquarters.

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He says the R.Cs took him with fresh maize instead of the ones which sparked off the trouble. Eventually he was taken to Mbale Police Station and then to court now charged with the present offence.

DW2 is the mother of the accused who testified that on the day in question at about 8 p.m., she was talking to the accused in her house. At about 9 p.m., she heard somebody knocking at the door. When she opened the door, the person accused them of stealing some maize. That person was the deceased. She remained confused over the allegation but soon a fight broke out between the accused and the deceased. The deceased overpowered the accused who managed to slip outside. It was at that moment that she heard the deceased cry that he was stabbed. She also went outside and started raising alarm which was answered by very many people including PW2. Both accused and the witness ran away for fear of their lives.

It is submitted that to prove the offence of murder, it must be established that the victim actually died. That it was the accused who caused his death and that the death was caused with malice aforethought.

PW2 and PW3 testified that Peter Mayeko actually died and they buried his body. The medical officer, PW1, testified that before he carried the postmortem, PW3 identified the body to him as that of Peter Mayeko. Medical report tendered as exhibit P1 confirms that Peter Mayeko actually died in Bududa Hospital where PW1 carried out the postmortem. It is submitted that all that evidence proves beyond reasonable doubt that the victim in the instant case actually died.

Evidence of PW2 and PW3 is that it was the accused who killed the deceased. He stabbed the deceased with a knife and evidence of the accused also confirms that point. The prosecution puts the scene of crime at the maize garden when the deceased caught the accused stealing maize. The defence story puts the scene of crime at the home of DW2. The question here is, which story should court believe? It is submitted by the learned State Counsel that the court should believe the prosecution story because both PW2 and PW3 who went to the scene found the deceased in the maize garden holding the stomach and saw the stab-wound on the left side of the abdomen with intestines coming out.

In that condition, the deceased could not walk  $\frac{1}{3}$  of a mile away to the home of DW2. In cross-examination, PW2 said that when a search team went to arrest the accused, they did not find him or his mother - DW2 at home except one Yafesi Waninda.

As regards causing death with malice aforethought, the State Counsel submitted that by failing to get the accused at home by the arresting team soon after the incident and by arresting the accused the following morning while hiding in a hole on Sulumbusa hill (evidence of PW2), the behaviour of the accused shows that he had a guilty mind at the time. In addition, the prosecution relies on the weapon used and the part of the body stabbed which was delicate. It is submitted that a knife was used in the instant case and the abdomen stabbed was a vulnerable part of the body. In R. Vs Busambuzi Wesonga (1948) 15 E.A.C.A. 65, homicide is always unlawful unless accidental or committed in circumstances making it excusable and part of the body affected and weapon used can be a basis on which intent can be inferred. In the light of all that it is submitted that causing death with malice aforethought in the instant case is proved by the prosecution beyond reasonable doubt. All in all it is submitted that the prosecution has proved its case beyond reasonable doubt and as such the accused should be convicted as charged.

The defence, however, submits that the prosecution has failed to prove the offence of murder to the degree required in a criminal case. The learned defence Counsel put the prosecution case into 3 parts, namely:-

In the first place, the medical evidence of the doctor, PW1. It is submitted that this evidence puts the cause of death as peritonitis which was the inflammation of peritorium. In cross-examination, the doctor admitted that this could have been due to the delay in taking the deceased to the hospital. The doctor said that if the deceased had reached the hospital earlier, he would have been saved.

In Gichunge Vs. R (1972) E.A. 546, where "death was due to pneumonia and tetanus following a stabbing injury to the chest," it was held inter alia that in view of the possibility that death had been caused by an intervening circumstance, it had not been proved that death was caused by the appellant.

A conviction for unlawfully causing grievous harm in relation to murder was substituted. It is submitted that in the instant case, death was caused by peritonitis and as such the accused was not wholly responsible for the death of the deceased man.

Secondly, the defence is wondering whether the prosecution wishes the dying declaration here to be received in these proceedings as res gestae or as evidence admissible under section 30 of the Evidence Act. Whatever the case is, it is submitted that the dying declaration in the instant case is inconsistent according to PW2 and PW3 who received it and as such it cannot be received in these proceedings with certainty.

According to PW2, the deceased told him at the maize garden that when he got out from the house of PW3, the deceased's father, he heard someone cut his maize. He tip toed and held the accused with both hands. It was Lukokho, now the accused, who stabbed him on the right side of the abdomen. Medical report is that the stab wound was on the left side of the abdomen.

On the other hand evidence of PW3 is that at 8 p.m. on the day in question, the deceased went outside for a long call and he (PW3) while inside the house, heard the deceased say, "Lukokho you are cutting my maize." Soon thereafter PW3 heard the deceased say, "Lukokho, you have stabbed me with a knife." It is submitted that there is no evidence to prove that PW3 ever talked to the deceased in regard to the dying declaration.

All in all, it is submitted that the veracity of the dying declaration and its having been made by the deceased should have been tested. In the instant case, the dying declaration is so inconsistent according to those who received it that it cannot be received in these proceedings and it should be rejected: Tuwamoi Vs. Uganda (1967) E.A. 84.

Thirdly, the prosecution case is based on the evidence of eye witnesses. Evidence of PW3 is that when he heard the deceased cry that he was stabbed, the witness ran to the scene, found the deceased holding the intestines which were already out, and the accused was also still at the scene of crime.

He tried to arrest the accused but he ran away. He raised alarm which was answered by PW2 who did not find the accused at the scene. Defence submission is that evidence of PW2 does not corroborate PW3 by pinning the accused at the scene of crime. Similarly, evidence of PW2 that they found some 4 maize cobs at the home of the accused stands on its own because PW3 never mentioned anything to do with the said maize cobs. It is the defence contention that the investigating officer who visited the scene of crime should have been called to give an independent evidence in that regard.

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It is the defence case that the deceased attacked the accused at his home. The deceased hit the accused at the back of the head and the scar was shown to the court. As the deceased was still hard on the accused, he picked a knife and stabbed him in self defence. Evidence of DW2 is that the deceased overpowered the accused who in the protection of his life repulsed the attacker in the way he did. It is submitted that the accused did not use excessive force in the circumstances: Agustino Okware Achodote Vs. Uganda (1979) HCB 74.

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Having heard both sides of the case, the court has considered the following issues:-

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In the first instance, it is not in dispute that Peter Mayeko alias Mumali is dead. Evidence of PW1, PW2, PW3 and even that of the defence confirms this first element. Exhibit P1 is yet another confirmation on this point. The court finds that Peter Mayeko alias Mumali actually died on 25.7.89 at Bududa Hospital.

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The second essential is who caused the death of Peter Mayeko alias Mumali? According to the prosecution, evidence of PW2 and PW3 reveals that it was the accused who caused the death of the victim, Peter Mayeko alias Mumali. However, the defence admits that the accused stabbed the deceased with a knife, but contends that in cross-examination, the doctor, PW1, admitted that this could have been due to the delay in taking the deceased to the hospital. The doctor also said that if the deceased had reached the hospital earlier, his life could have been saved. In addition it is the contention of the defence that the cause of death was peritonitis which was the inflammation of the peritorium which is to be taken into account as the intervening factor for which the accused should not be wholly held responsible for causing the death of the victim.

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In order to resolve the above contentions, the court relied mainly on the evidence of the doctor, PW1, inter alias who carried out the postmortem on the body of the deceased victim. Medical report, exhibit P1, reveals both external and internal examination of the body. External examination reveals a stab wound on the left abdominal wall penetrating into the peretonial cavity. There was omentum prolating through that wound, measuring 6 cm. in length. Internal examination reveals peritonitis which is an inflammation of the inner lining of the abdominal cavity and there was a perforation on the ileum. The hole allowed the contents of the intestines to come out to cause peritonitis. Cause of death was septicaemic shock which resulted from peritonitis.

In addition, evidence of PW2 and PW3 points a finger at the accused as the person who caused the death of the deceased Peter Mayeko. Both witnesses say that it was the accused who stabbed the deceased with a knife on the left abdomen. The accused also in his evidence admits stabbing the deceased with a knife.

In the light of all that the court is satisfied that it was the accused who caused the death of Peter Mayeko. The mere fact that his life would have been saved if he was quickly rushed to the hospital is an opinion of the doctor which is no less than mere speculation with due respect to him. It is also my humble opinion that there was no intervening circumstance which might have caused the death of the victim in the instant case. Gichunge's case (supra) is distinguishable in the present case. It is also to be noted that whether the accused committed the alleged offence at the maize garden or at his home is immaterial.

The last ingredient for consideration is whether the accused caused the death of the victim with malice aforethought. The prosecution relies on the fact that soon after the incident the accused ran away from the scene of crime. He was followed by a search team soon thereafter in which PW2 took part, but the accused was not found at his home. Early the next morning, PW2 in the company of the R.Cs of the area mounted a search and the accused was found hiding in a hole of Silumbusa hill where he was arrested.

It is submitted that this action of the accused shows he had a guilty mind. In addition, the prosecution relied on the weapon used and the part of the body injured. In the instant case a knife was used which the prosecution treats as a deadly weapon capable of causing death and the left abdomen was a vulnerable part of the body injured, all of which the intent can be inferred, Busambuzi Wesonga's case (supra) refers. 5

The defence, on the other hand, admits stabbing the deceased with a knife but argues that the accused did so in self defence. The deceased hit the accused with a stick on the back of the head and according to DW2, the deceased overpowered the accused. A big scar at the back of accused's head was shown to the court. 10

Whereas I do concede to the State submission regarding proof of malice aforethought as outlined above, no explanation is given to rebut the defence allegation that the deceased hit him at the back of his head with a stick which big scar was shown to the court. It is on record that when the deceased heard someone cutting his maize at the garden, he tiptoed and held him from the back with both hands. In order to escape the arrest, the accused cut the deceased on the abdomen with a knife and ran away with some maize cobs which PW2's group found at the fire place at the home of the accused soon after the incident. By then the accused had again run away from home when he heard the voices of the arresting team approaching him. 15 20

In a situation as presented above by both sides, it is difficult to draw a line on malice aforethought against the accused person. The court finds it safe to allow the accused to enjoy the benefit of self defence. However, it is to be noted that defence of self defence does not exonerate the accused altogether from blame. At this stage I do not wish to comment on the dying declaration. 25 30

Court finds the accused guilty of a less cognisance offence of manslaughter contrary to sections 182 and 185 of the Penal Code Act and convict him of the same accordingly. On this conviction I do concede to the opinions of the gentlemen assessors.



S.G. ENGWAU

JUDGE

6.8.93.

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10.8.93: Accused before court.  
Mr. Owori for accused present.  
Nandaula for the State.  
Judgement delivered in open court.

S.G. ENGWAU

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JUDGE

10.8.93.

Nandaula: The circumstances under which the accused committed the offence were grave in that he was found stealing maize and he killed the deceased. The accused knew the deceased and found stealing maize would not harm him. Evidence is that the accused was related to the deceased which would not go to the extent of stabbing the deceased. Society must be protected from such people who go to steal other people's property and end by killing them.

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Accused is first offender but deserves harsh sentence to deter him from committing such offence again and also to deter others. Pray for maximum sentence of life imprisonment be imposed on the accused.

S.G. ENGWAU

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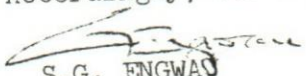
JUDGE

Mr. Owori: Accused is now aged 33 years. He is first offender. He acted in self defence. He has been on remand for 4 years. At his arrest, the accused was married with one child but since then the wife has left him. Father of accused died and the child is now under the custody of DW2 who is a widow. Conduct of the accused shows that he did not plan to kill the deceased. Longer custodial sentence would not serve the interest of justice. Pray for accused to be on probation. Condition of the child also be put into consideration.

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Sentence: Having considered the circumstances under which this offence was committed and also taking into account the submissions of both sides, court has also taken judicial notice that manslaughter cases are rampant in this district. Court should protect society against such people. Accordingly, the accused is sentenced to 5 years' imprisonment.

  
S.G. ENGWAU  
JUDGE

10.8.93.