

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSIONS CASE NO. 0008 OF 2020

UGANDA.....PROSECUTOR

VERSUS

1. OWORI LAWRENCE}

2. JJAGWE DEO} ACCUSED

3. MUYANJA FAISAL }

4. MUBIRU PETER}

Before: Hon Lady Justice Rosette Comfort Kania.

Ruling

The accused persons, Owori Lawrence alias Ganja, Jjagwe Deo, Muyanja Faizo, Mubiru Peter and others still as large (hereinafter referred to as the accused persons) were indicted with the offence of murder contrary to section 188 and 189 of the Penal Code Act.

It is alleged that on the 30th day of December 2019 at Mukabira Cell, Nsagu Nakawuka in Wakiso District, Owori Lawrence alias Ganja, Jagwe Deo, Muyanja Faizo and Mubiru Peter with malice aforethought unlawfully killed Nakalembe Grâce.

When the charge was read and explained to the accused persons, each one of them pleaded not guilty. A plea of not guilty was entered in respect of each accused thereby setting in issue all the ingredients of the offence charged. Consequently, the prosecution had to prove each of the elements of the offence charged in order to secure a conviction against the accused persons, see **Sekitoleko –vs- Uganda (1967) EA 531**.

At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused persons. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence (see section 73 (2) of *The Trial on Indictments Act*). Where at the close of the prosecution case a *prima facie* case has not been made out, the

1



accused would be entitled to an acquittal (See *Wabiro alias Musa v. R* [1960] E.A. 184 and *Kadiri Kyanju and Others v. Uganda* [1974] HCB 215).

A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, could convict the accused person if no evidence or explanation was provided the defence (See *Rananlal T. Bhatt v. R.* [1957] EA 332). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] ALL E.R 448 and also applied in *Uganda v. Alfred Ateu* [1974] HCB 179, as follows:-

- When there has been no evidence to prove an essential ingredient in the alleged offence, or
- When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

Regarding the standard of proof, the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt. **Section 103 of the Evidence Act Cap 6** provides that, "the burden of proof as to any fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. See **Woolmington vs DPP (1935) ac 462**. Therefore, it is important to note that the burden of proof in criminal cases lies on the prosecution and does not shift to the accused persons. The implication of this is that, accused persons must not be convicted because they have put up a weak defence but rather on the basis of the strength of the prosecution evidence which strongly implicates the accused persons. The standard of proof in criminal cases was articulated in the land mark case of *Miller-vs- Minister of Pension* (1947)2 All ER 372 at 373 where Lord Denning stated that; " That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.

Therefore, prosecution must prove all the ingredients of the offence of murder against the accused persons in order to secure a conviction against them. In the case of **Uganda-vs-Muzamiru Bakubye and Anor High Court Criminal Session No. 399/2020**, it was held that the prosecution must prove the following ingredients beyond reasonable doubt;

- That the deceased is dead
- That the death was caused unlawfully
- That there was malice aforethought
- That the accused person directly or indirectly participated in the commission of the alleged offence.

The prosecution, in an attempt to prove its case against the accused persons relied on two witnesses, Kawooya Haus Salongo, the LCI Secretary for Defence in Ssisa Sub County, Kajjansi Town Council (PW1) and Detective Inspector Lubega James (PW2). Thereafter, Prosecution closed its case. Upon closure of the prosecution's case, the learned defence Counsel Ms. Carolyne Kongai made submissions to the effect that the offence of murder had not been established by the Prosecution evidence so as to warrant putting the accused persons on their defence. The Learned Senior State Attorney, Hope Mutonyi on the other hand contended that the prosecution had succeeded in proving all the ingredients of the offence by the evidence provided by the prosecution witnesses.

Determination of the evidence on each of the elements of murder.

- That there was a death

From the evidence of PW1 who saw the body of the deceased and the evidence on record to wit; photographs of the body of the deceased, the fact that there was a death is not in dispute.

- That the death was caused unlawfully

The fact that the death was caused unlawfully, is not in dispute. Although the summary of the case in paragraph 11 indicates that the post mortem report (PF48B) established the cause of death of the deceased as asphyxia following manual strangulation, PF48B is not on the file and was not tendered in evidence. Be that as it may, court finds that there is no doubt that the death was caused unlawfully.

- That there was malice aforethought.

The cause of death of the deceased, asphyxia following manual strangulation is indicative of malice aforethought. Accordingly, I find that the death of the accused person was caused with malice aforethought.

- That the accused persons directly or indirectly participated in the commission of the offence

It is on this ingredient of the offence of murder that there is contention.

In the summary of the case, it was stated that there were several eye witnesses to the crime; Kiwanuka Jonathan, Kizito Sudi and Namirembe Teopista who all allegedly managed to identify the accused persons as they committed the crime. However, the prosecution failed to produce the eye witnesses and produced the two witnesses indicated above.

PW1, stated in his testimony that, following information he received from the LCI Chairman on the morning of 31st December 2019, that a murder had been committed in an area called Record within Mekanika in Nsaggu, he went there and found a dead body in a potato garden. He informed court that among the crowd of people that had gathered at the scene, he found a one Kiwanuka who was a resident of the area around the area where the dead body was discovered. The witness informed court that he had ever seen only two of the accused persons in Nsagu. The two accused persons the witness said he had ever seen in Nsagu were A1 Owori Lawrence and A3 Mayanja Faisal. PW1 informed court that after confirming the information provided to him by the Chairman, he went to Nsagu Police Station to report the murder, where he reported the murder to a one Seargent Wandera.

Upon cross examination, PW1 reiterated that he had ever seen A1 and A3 in Nsagu but that he had never spoken to them. He added that he did not find any of the accused persons at the place where the body of the deceased was discovered. PW1 informed court that in his statement to the police, he indicated the following; that he was at the police station to report a murder which occurred in Record in Mekanika, that after reporting the murder to the police, he went to the scene of the discovery of the body with a one Seargent Wandera where it was confirmed that the deceased was a female. PW1 stated that he then signed the statement at the bottom.

PW2 Detective Inspector Lubega James testified that on the 22nd day of January 2020 he reported for duty at Entebbe Police Station and found 3 accused persons in police cells who included, Owori Lawrence alias Ganja, Jagwe Deo and Muiyanja Faizal who were charged with the murder of Grace Nakalembe. PW2 added that there was already a file from Entebbe Police Station in respect of that murder, which file already contained witness statements. PW2 further stated that he was asked to continue with the investigations which he started by going to Nsagu Police Station. PW2 stated that at Nsagu Police Station he found the OC Nsagu Police Post



4

named Patrick whose surname he couldn't remember. He stated that, together with Patrick, he went on the ground and started following leads. PW2 informed court that, there was evidence that A1 and the others were seen with hammers and knives before the murder. The statement of a one Masaba was recorded and added on to the file. PW2 added that on the basis of the evidence available on the file, it was sanctioned and the accused persons were produced in court.

On cross examination PW2 informed court that the leads they followed on the ground in Nsagu were provided by a one Masaba who told PW2 and Patrick that he saw A1 Owor Lawrence alias Ganja and the others with pangas, hammers and knives. PW2 added that, in his view what linked the accused persons to the charges is the statement of Masaba which is to the effect that he saw the accused persons with pangas, hammers and knives. PW2 confirmed that he did not find the said pangas, hammers and knives as the body had already been taken away by the time he visited the scene.

The prosecution did not produce any of the eye witnesses neither did the prosecution produce Masaba. The said pangas, hammers and knives were also never exhibited in court.

I have carefully evaluated the prosecution evidence in relation to the ingredient of participation of the accused persons in the murder. I am of the view that in the absence of any evidence to the contrary, the evidence adduced by the prosecution does not establish the ingredient of participation of the accused persons in the murder of the deceased. To place the accused persons at the scene of the crime, the prosecution would have needed to adduce credible direct or circumstantial evidence placing the accused persons at the scene of the crime. In this case, the prosecution leans heavily on circumstantial evidence of a quality so flimsy that no reasonable tribunal would place the accused persons on their defence basing on that evidence. PW1's testimony neither places the accused persons at the scene nor implicates them in any way. PW1 only informed court that he saw the body of the deceased and reported the murder to the police. PW1's testimony was worthless, of no evidential value whatsoever in proving the participation of the accused persons in the murder of the deceased. Nothing in his testimony pointed to the participation of the accused persons in the murder of the deceased. PW1's testimony was utterly useless, below the standard required to place the accused persons on their defence because it did not in the slightest way allude to the participation of the accused persons in the dock, in the murder of the deceased person.

The evidence of PW2 did not rate any better in terms of its value in placing the accused persons at the scene of the crime as the perpetrators of the offence. Court heard from PW2 that, on the ground in Nsagu, he was informed by a one Masaba, who the prosecution did not produce in court as a witness that, that A1 Owor Lawrence aka Ganja and the others were seen with knives, pangas and hammers before the murder. The prosecution provided no clarity on the

location of the sighting of the accused persons with the weapons, neither was there any information relating to the time and date on which the accused persons were seen with the said weapons. No effort was made to provide a description of the aforementioned weapons, neither was there any information on whether the said weapons had been recovered as they were not tendered as exhibits and no further mention was made of them in relation to the murder.

Although the eye witnesses were not called to give their testimony, the summary of the case which bore summaries of the statement of the eye witnesses, merits mention. Although the prosecution did not tender the post mortem report in evidence, the cause of death on the summary of facts in paragraph 11 states that the post mortem examination on Police Form 48B established the cause of death as asphyxia following manual strangulation. Paragraph 8 of the Summary of the case indicates that Kiwanjuka Jonathan watched from a nearby unfinished structure as the accused persons clobbered the deceased with sticks, pangas, a hammer and knives following which they dumped the unconscious victim in a potato garden. It is further stated in paragraph 9 of the summary of the case that, another eye witness, Kizito Sudi arrived at the point when the accused persons were searching the body of the deceased. The witnesses who allegedly watched the accused persons murdering the deceased make no mention of the deceased person being strangled as stated in the post mortem report. The photographs of the body of the deceased person do not indicate the injuries consistent with having been clobbered with knives, pangas, hammers and sticks by four young men. The said eye witnesses did not testify in court.

Owing to the fact that there was no direct evidence, this court is left with no option but to rely on circumstantial evidence to make the determination of whether or not the prosecution has succeeded in establishing a prima facie case against the accused persons. I am not persuaded that the evidence adduced by the prosecution witnesses is of a quality that unequivocally places the accused persons at the scene of the offence as perpetrators of the offence. No reasonable tribunal could on the basis of that evidence conclude that the accused persons murdered the deceased person.

Having evaluated the evidence, I have formed the opinion that if the accused persons chose to remain silent, this court would not have evidence sufficient to hold them responsible for the death of the deceased. I therefore find that no prima facie case has been made out requiring the accused persons to be put on their defence. In the premises, I accordingly;

Acquit you, Owori Lawrence alias Ganja of the offence of murder c/s 188 and 189 of the Penal Code Act you are set free forthwith unless there are other charges against you.



Acquit you, Jjagwe Deo of the offence of murder c/s 188 and 189 of the Penal Code Act you are set free forthwith unless there are other charges against you.

Acquit you, Muyanja Faisal of the offence of murder c/s 188 and 189 of the Penal Code Act you are set free forthwith unless there are other charges against you.

Acquit you, Mubiru Peter of the offence of murder c/s 188 and 189 of the Penal Code Act you are set free forthwith unless there are other charges against you.



Rosette Comfort Kania

Judge

18th March 2024