

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 24/98

FORO YAHAYA..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

(Appeal from a judgement of the High Court of Uganda
at Masaka (Mr. Justice V.R. Kagaba) dated 8/7/98 in
C.S.C. No. 83 of 1995)

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ;

HON. MR. JUSTICE S.G. ENGWAU JA;

HON. MR. JUSTICE A. TWINOMUJUNT, JA.

JUDGMENT OF THE COURT

On 23.9.93 the body of 70 year old Maria Namuna, hereinafter called deceased, was found lying in a bush near the place where her cattle used to graze. It had two cut wounds, one on the scalp and another on the abdomen. According to the medical evidence the cause of death of the deceased was hypotocemic shock due to the cut wounds.

The appellant was arrested the following morning in connection with the murder of the deceased. He was subsequently charged, tried and convicted of the murder of the deceased, contrary to section 183 of the Penal Code.

He was sentenced to death. Hence this appeal against the conviction and sentence.

The prosecution case against the appellant was that on 22.9.93 he went to the home of the deceased, lured her into going with him to the grazing place to see one of her cattle which he

claimed, falsely, that it was sick and that when they reached that place he raped her and then killed her lest she reported the rape. He later verbally confessed to the murder to Paulo Sabiti PW2 and Stephen Twahika (PW3) and also made a written confession (exhibits P3 and P4) to Assistant Inspector of Police Samuel Kato (PW1).

At his trial the appellant made his defence in an unsworn statement. He was silent about the day of the incident (22.9.93) but stated that on 23. 9. 93 he was in the search party of PW2 and PW3 and others when the deceased's body was discovered. He denied having killed her.

In convicting the appellant, the trial Judge relied on the circumstantial evidence of how the appellant had tricked the deceased to go with him on the fateful journey, the confessions to PW2, PW3 and PW1, the evidence of PW2 which was to the effect that the appellant had led him to his house and shown him a panga which was hidden under a bed and the evidence of PV that upon the discovery of the decomposing body of the deceased, the appellant had tried to run away but was restrained by the people around. The appellant's defence of denial was rejected by the trial Judge.

The appeal is based on one ground only, namely:-

“The learned trial judge erred in law and in fact in holding that the inconsistencies in the prosecution's case were minor, hence wrongly convicted the appellant.”

On the available evidence there can be no doubt that the deceased was murdered. There was no eye witness to the killing. The conviction of the appellant was based on circumstantial evidence and the confessions he i& alleged to have made to the police and to PW2 and PW3. The circumstantial evidence which tends to incriminate the appellant is, first, that of Turyahika (PW3), a grandson of the deceased, who claims that on the fateful day at about 1.00 p.m. the appellant went to their home looking for the deceased. The deceased was not at home then. PW3

asked the appellant why he wanted the deceased. The appellant replied that she had promised him a job, of thatching a house. The appellant went away promising to return later. Indeed he returned an hour later. The deceased had not returned yet. The appellant waited until she returned. The appellant then told her that one of her cows had collapsed near a dam. He did not allude to the alleged job of thatching the house and, surprisingly, he had not informed PW3 about the cow.

The appellant and the deceased then went away together to see the cow while PW3 went somewhere else to water other cows. PW3 returned home at about 5 p.m. The deceased had not returned. PW3, who was only 20 years old at the time, went to the home of the area Local Council Chairman (PW2) and informed him about the disappearance of the deceased while in the company of the appellant. As already pointed out, PW2 mounted a search on the following morning which led to the discovery of the body of / the deceased in a bush. It was the evidence of PW3 that when the body was discovered the appellant who was with the search party, tried to run away by moving backwards but was told not to run away. He was then arrested.

The testimony of Paulo Sabiti (PW2) was that following a report he received from PW3 he organised a search for the missing old woman. He even went to the house of the appellant and took him for the search. When the body of the deceased was sighted PW3 immediately complained that she must have died at the hand of the appellant.

PW2 then asked the appellant to show him the deceased's cow which was alleged by the appellant to have collapsed and died but the appellant stated that there was no such cow and that in fact he had taken the deceased to have her dress repaired and not in connection with a cow. At that juncture PW2 decided to take the appellant to the police in connection with the death of the deceased and informed him accordingly.

It was then that the appellant is said to have made a clear confession to PW2. The evidence of PW2 on the point reads as follows:

“Foro told ‘Ekisirani kyankutte omuntu nemuta.’ Translated into English - it means: ‘Bad luck came upon me and I killed her’. I asked Foro what reason for killing that old woman - told me he first had sexual intercourse with her. After I had done that thing to her I knew she is going to accuse me. I will then be arrested. That the deceased pleaded with Foro not to kill her. That she would give him (Foro) whatever he wanted but spare her. Foro told me that the deceased gave him 8,000/= in order that accused may spare her life. That he (Foro took the Shs. 8,000/= but still killed her because he knew, if she was alive, she would report him and he would be arrested.”(sic).

The appellant is then said to have led PW2 to his (appellant’s) house and shown PW2 the panga which PW2 took away. The panga was handed to the Police by PW2 but for reasons which are not clear, it was not exhibited. It should also have been examined for blood tests.

PW3 who was present when the appellant spoke to PW2 stated as follows:

“The body was found at 11.00 a.m. on Thursday 23/9/93. Foro then told Sabiti in my presence and hearing (a metre apart) that he was the one who killed that person. Sabiti asked him why he killed her, Foro said he had raped her and when he realised she was to report him, he decided to kill her.”

On 27/9/93 the appellant made a statement to the Police at Masaka Police Station, under charge and caution. It is exhibit P3 (Luganda version) and exhibit P4 (English translation). At the trial the defence challenged that statement on the ground that the appellant had made it not voluntarily but after he had been beaten by the police. But after a trial within trial the learned

trial judge was satisfied that the statement was made voluntarily and that it was true. It was accordingly admitted in evidence.

In that statement the appellant gave a somewhat different story of the event. He stated in part;

“I did not commit murder. It is KAPERRE who killed her who was bought by ZIDOLI MUHAMADI who stays at Lwemusibya village. I recall very well our father MUCEZANGALO MUSITAFU gave 5 cows to the deceased to graze. Our father died in February 1993 and left the cows with the deceased. After the death of our father, we demanded our cows from the deceased but she refused. My elder brother then prepared to kill her. He told me of the preparation. I also gave him go ahead. Thus he bought that who killed her(sic). That is all on 22/9/93 my elder brother told me to be present to witness the killing after giving the money.(sic). KAPERRE went with the woman and I followed him. Reaching on the bush KAPERRE cut the woman with a panga once on the right side of the stomach. I also boxed her once on the same side. She fell down and died. We went back home.”

The appellant's unsworn statement of defence states thus;

“On 23/9/93 I was at my home cultivating at 10.00 a.m. Kabundigiri Abdu called me to accompany him to the house of the Chairman - Sabiti (PW2). We were many people who assembled there. Twahika (PW3) was among the crowd. Sabiti asked Twahika where the old woman had vanished. Twahika told him she vanished yesterday. That they had not found the deceased at home when they came from watering the animals. All of us decided to mount a search for the deceased. While we were searching we heard an alarm raised by another group who were searching. I went to where the alarm was being made. I saw the body of Maliya Namuna. People started crying. Someone out of the crowd called my name out. Sabiti, the Chairman, asked me if I was the one who killed that person as he had been told by her children. I denied causing the death of that person. I told Sabiti that

we had all answered the alarm. They decided to take me to the Police. I was taken to Sembabule Police Station. That is all I have to state.”

At the hearing of the appeal Mr. Eric Muhwezi who represented the appellant argued that there were three contradictions in the State case which were major and thus vitiated the conviction of the appellant. The first was that the alleged confession to PW2 and PW3 was in contradiction with that made to the Police in exhibits P3 and P4. The second contradiction was with regard to the discovery of the pana from the appellant. According to PW2 the appellant led him alone to his house and gave him the panga but according to PW3 the panga was found in a bush 10 metres from the scene of crime. It was the appellant who showed the panga to PW2 and PW3. The third contradiction according to Mr. Muhwezi was that according to PW3, when the deceased’s body was discovered, the appellant tried to run away whereas according to PW2 the appellant did not do such a thing.

With respect to Mr. Muhwezi, we see no serious contradictions in the written and oral confessions. Clearly in both confessions the appellant admits having participated in the killing of the deceased. The only difference is that to the police he did not allude to the rape and also named two other parties to the killing. In both confessions he cites a panga as the murder weapon. In any case these so called contradictions lie not in the evidence of the prosecution witnesses but in the statements of the appellant. They do not therefore affect the credibility of the prosecution witnesses.

Again we cannot agree that PW2 contradicted PW3 as to the conduct of the appellant upon the discovery of the body of the deceased. Clearly the two witnesses were testifying about two separate events or occasions. The evidence of PW2 on the point was to the effect that PW2 and others went to the house of the appellant on the morning of 23.9.99. They found him digging in his garden. They asked him to join them in the search for the / missing Maria. Appellant agreed and went with them. Later PW2 arrested the appellant after the discovery of the body of the deceased and following complaints implicating him with the demise of the deceased.

According to PW2 the body of the deceased was discovered not by his team but by the group comprising, among others, PW3. And so PW2's statement that:

“Accused did not try to run away, either at his garden or after his arrest.”

does not seem to be in contradiction with that of PW3 that:

“On discovering the body, Foro who was with us tried to run away.”

In fact the evidence of PW3 was simply that the appellant tried to fall back which led some of the people around to think that he was about to run away. We do not think that these matters which were not even put to the trial Judge were of any consequence.

We agree that the versions of PW2 and PW3 regarding the panga cannot be reconciled. The trial judge addressed this inconsistency and attributed it to the lapse of time of about five years from the date of incident to the time the witnesses testified. As the trial Judge pointed out, the evidence regarding the panga was of little value, if any, as it was not the prosecution case that that panga was the murder weapon.

The Director of Public Prosecutions did not send a State Attorney to argue this appeal although they were served with the hearing notice. But even without hearing of what the Director of Prosecutions would have said to us, we are satisfied that the evidence against the appellant was overwhelling. PW3's unchallenged evidence as to the events of 22/9/93 clearly shows that the appellant took the deceased away on that day under false pretences. He gave PW3 two conflicting reasons for wanting to take the deceased away. He gave a third conflicting reason to PW2. The appellant was the last person to be seen with the deceased before she died. Her body

was discovered in the direction where she and the appellant had gone. In our view the confessions of the appellant to PW2, PW3 and the police put the matter beyond any doubt.

It is not necessary to establish the motive for the killing. But in this case the appellant stated the motives although he gave a different one in the separate confessions. That was his decision. The deceased was killed in a brutal manner with what must have been a lethal weapon, given the injuries she sustained. She was assaulted on vulnerable parts of the body. Her assailant(s) must have either intended to kill her; if not they must have anticipated death as the probable result of the assault. Therefore the killing was done with malice afore thought. If the appellant was with others in committing this act on the deceased, then he would still be liable on the principle of common intention.

As the trial judge rightly observed the defence of provocation was not available to the appellant. There would be no basis for the defence of self defence either.

In the result, we find that the appellant was rightly convicted as charged.

The appeal is dismissed.

DATED at Kampala this 12th day of May, 1999.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE
JUSTICE OF APPEAL

S.G.ENGWAU

JUSTICE OPPEAL

A.TWINOMUJUNI

JUSTICE OPPEAL