

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT THE SESSION HOLDEN AT MUBENDE
CRIMINAL SESSION CASE NO. 47 OF 2000**

UGANDA PROSECUTOR

VERSUS

1. KALIMINDA JOHN]

2. BYARUHANGA ALEX]..... ACCUSED

3. JUNNY RICHARDS]

BEFORE: THE HON. MR. AG. JUSTICE PAUL K. MUGAMBA

JUDGMENT

The three accused persons were indicted for murder contrary to sections 183 and 184 of the Penal Code Act. In support of its case the prosecution called a total of 4 witnesses. They were Mary Nalongo Nakabu (PW1), Henry Kiggundu (PW2), Dr. Ochan Banda (PW3), No. 25835 D/C Wakubaruhu Herbert (PW4). The accused persons opted to make no statements and called no witnesses.

In summary the prosecution case is as follows. On the night of 27th July, 1998 at about 8 p.m A.2 and A.3 went to the home of PW1 where they bought two bottles of tonto which they took away with them. When they arrived at the home of PW1 they had found the deceased there. They found her in the process of leaving. A.3 offered the deceased some tonto but the deceased declined. The deceased was intent on leaving and left PW1's home ahead of A2 and A3. A short time later A2 and A3 also left and went following the direction the deceased had taken. PW1 heard the deceased and the two accused conversing animatedly as, together, they

went away. The deceased was going to Nonve to visit her mother. The two accused were going to their house which is before Nonve. Two days later the deceased's body was recovered some distance from the house of the accused. The three accused were arrested and indicted for the murder of the deceased. As I have already stated the accused persons opted to make no statement and called no witnesses.

In order for the prosecution to secure a conviction in a case of murder it must prove four ingredients beyond reasonable doubt. The ingredients are:

- (a) that the deceased is dead;
- (b) that her death was unlawful;
- (c) that the person who caused the deceased's death did so with malice aforethought; and
- (d) that it was the accused who caused the deceased's death.

I must now discuss the above ingredients in relation to the evidence on record.

Regarding the first ingredient, all the prosecution witnesses have testified that Regina Nakalyango died. The post mortem report is further evidence of this. I find that the first ingredient has been proved by the prosecution beyond reasonable doubt.

As to the second ingredient, it is a legal presumption that where a person is killed such killing is murder unless such death was brought about in circumstances which show that it was accidental or that it occurred in the process of self defence, defence of another, defence of property or in execution of a lawful sentence. The case of R Vs Gusambizi Wesonga (1948)

15 EACA 65 refers. In the instant case it is contended by the prosecution that deceased was strangled. The post mortem report gives the cause of death as strangulation. Since the exceptions given above are not present in this case I am inclined to hold that the prosecution has succeeded in proving the second ingredient of the offence of murder.

Concerning the third ingredient, malice aforethought is described under section 186 of the Penal Code Act. It is an intention to kill or knowledge that the act or omission causing death will probably cause the death of some person. In establishing whether malice aforethought is present in a given case court takes the following into account:

- (a) the nature of weapon used in causing death;
- (b) the number of injuries inflicted upon the victim;
- (c) the part of the body where such injury was inflicted; and
- (d) the conduct of the killer before and after the death.

The case of R Vs Tubere s/o Ochen (1945) 12 EACA 63 refers. According to the post mortem report the cause of death was strangulation. Whoever strangled the deceased certainly knew death would result. The prosecution has proved the third ingredient beyond reasonable doubt.

The fourth ingredient relates to whether the accused caused the deceased's death. The accused persons were indicted for the murder of the deceased because A2 and A3 had been seen to leave the home of PW1 with the deceased on the night of 27th July, 1998. It is also the state case that the body was found lying in the vicinity of the house occupied by A2 and A3. The state also gave evidence that there were footmarks leading from the place where the body lay towards the house occupied by A2 and A3. The state also gave evidence to the effect that pieces of cloth from the deceased's sash were picked along a track leading from the place where the body lay to the house of A2 and A3. All this is circumstantial evidence. The law on circumstantial evidence was laid out in Simon Musoke Vs R [1958] EA 715 where the Court of Appeal held that in a case depending exclusively upon circumstantial evidence court must find before deciding upon conviction that the inculpatory facts were incompatible with the

innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The same court quoted with approved the case of Teper Vs R [1952] 1 A.C. 480,489 where it is stated:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co - existing circumstances which would weaken or destroy the inference”.

A2 and A3 were seen to leave PW1’s house in the company of the deceased on the night of 27th July, 1998. According to PW1 there was no bad blood between the deceased and any of the accused. In fact A3 had offered her a drink. The body was not found the next day but the day after. Deceased was proceeding to the house of her mother which is after that of A2 and A3. The prosecution has not ruled out the likelihood of her having continued on her journey, after she parted company with A2 and A3, and having arrived safely at her mother’s house. The body was examined by PW3 on 29th July, 1998 and it was described as fresh. The deceased had been with the accused persons on 27th July, 1998. It is possible the deceased could have died on 28th July, 1998 or early 29th July, 1998 and not necessarily at the hands of the accused. According to PW4 accused’s house was 600 metres from the body. Yet there was another house which was nearer, 200 metres from the body. It is also not clear whether the footmarks had not been those of the people who had gone to the house seeking to arrest the accused who were generally known as Bakiga. Mention has also been made of pieces of cloth which had been found from the deceased’s sash. These were not exhibited and no one could state positively whether they actually originated from the original cloth. According to PW4 there were signs of disturbance and when he was asked what these were he stated they looked like a scene where chicken had scratched. I did not find this an impressive description especially so coming as it did from a police investigative officer. Each of the three accused persons was examined by PW3 who found abrasions on each of their backs. PW3 said scratches is the ordinary language for abrasions. That being so and given their status in life, scratches could have originated from the effect of parasites like lice and bed bugs.

Without prejudice to the above, the position of A1 in this case is unique. He was not with A2 and A3 on the night in issue. Yet he was arrested and indicted. There is no evidence on record

implicating A1. Yet he was implicated together with A2 and A3.

The accused made no statement in their defence as they are entitled to do. I find the prosecution has failed to place them at the scene of crime.

The assessors have given me their opinion which was joint. They advised me to find the accused persons not guilty of the indictment and to have them acquitted. For the reasons I have already given I agree with their opinion.

The three accused are hereby acquitted.

Paul K. Mugamba

JUDGE

AG.

07/04/2000