

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT TORORO**

**CRIMINAL SESSION CASE NO.35 OF 2000**

**UGANDA .....PROSECUTOR**

**VERSUS**

**NABWIRE JESSICA .....ACCUSED**

**BEFORE THE HON. MR. JUSTICE RUGADYA ATWOKI**

**JUDGEMENT**

The accused person, Jessica Nabwire, was indicted for murder contrary to sections 183 and 184 of the Penal Code Act. It was stated in the particulars of the indictment that the accused on 14/4/1999, at Mumira village, in Busia district murdered Buluma Christopher, who was her husband. The accused denied the offence

The burden to prove a charge lays on the prosecution. It does not shift during trial except in a few statutory offences and murder is not one of these. The prosecution must prove the charge against the accused beyond reasonable doubt. Okech Okale and Another v Republic [1965] E.A. 555, and Sekitoleko v. Uganda [1967] EA 531.

The prosecution produced six witnesses in the attempt to prove the charge against the accused. Dr. Odong Odur examined the accused person on 20/4/99. He found her to be of sound mental disposition. He found her to be a 30 year old lady. His evidence was admitted under section 64 of the Trial on Indictments Decree.

PW2 Raphael Mangeni is related to the deceased. During the night of 13/4/99 the accused went to his house and reported to him that the deceased her husband had chased her away and refused to eat her food. They went together to the deceased's house. They found the deceased outside. The deceased explained that he was refusing to eat his wife's food because she had roasted rather than boiling the meat, which he had bought earlier in the day. He complained also that Nabwire Jessica intended to take away their four goats, which he had been keeping. Mangeni advised the

two to settle their differences. He advised Nabwire to lock up the children's house where she had earlier on taken refuge from her husband's assaults. Mangeni retired to his house thereafter. About twenty minutes later, the accused returned and summoned him urgently. He went and found the door of the house open, as had been the case earlier. He entered the house and found the deceased hanging on a rope which was tied around his neck. The rope was tied on one of the poles on the roof. The deceased was in a sitting position on the bed. He arrested Nabwire Jessica and rushed with her to call Yonasani Okumu the deceased's elder brother. There was candle light inside the deceased's house. When he first saw the deceased, he appeared normal, if slightly drunk and was able to walk by himself. The deceased was a medium sized young man. When he saw him later the second time, the deceased's eyes were wide open and his tongue was protruding outside the mouth. He realized that the deceased was dead. Mangeni was aware that the two, the deceased and the accused had fought about four times previously. He did not see any injuries on any of them from their previous fights.

PW3 Okumu Patrick is a brother to the deceased. He was summoned by Mangeni who informed him that his brother had died. This was at about midnight on the 13/4/99. He rushed to his brother's one roomed house and found him in a fetal position with a rope tied around his neck. The rope was tied to one of the poles in the roofs house. With the help of a candle he examined the body. He observed a swelling behind the neck, on the cheek and on the ribs. The rope had been tied from behind the neck. The distance from the roof on the pole where the rope was tied to the bed was about one and half metres. He made an alarm and many people arrived who wanted to lynch the accused. He took the accused to the police station. He observed bloodstains on the mattress where the body of the deceased was partly lying.

PW4 Adam Mayende is the LCI Chairperson of the area and has so been since 1986. He testified that very early in the morning on the morning of 13/4/99 the deceased came to his house and reported that his wife the accused herein, had removed all the property from the house. On inquiring from the wife, he was informed that she only wanted to take her goats, which she had been looking after. He advised her to return the property including the goats and she promised to comply. At around midnight that same day, he received a report from Mangeni that the deceased had died. He went with Mangeni first to the scene of the crime and later escorted the suspect to

police station. He however managed to look at the body and noted that it looked like the deceased had been beaten on the head, on the cheek and on the ribs.

He saw blood stains at the back of the neck. The deceased was lying on the bed in a kneeling position with a rope tied from his neck up onto a pole in the roof of the house. The rope appeared loose around the neck. The house of the deceased was a single room, round and conical roof. When the police came the following day, they recovered a blood stained stick in the flowers behind the house. He attended the burial of the deceased. When he first saw the deceased the eyes were closed as if the deceased was sleeping and the mouth was also closed with the tongue inside.

Detective Sgt. Okao investigated the crime. On the 14/4/99 he visited the scene of the crime and found PW4 and PW3 at the scene. He found the body inside the house lying on the bed facing down but with the head raised by a rope, which was tied around the neck. The rope was tied to a pole roof. He observed blood around the neck and cheek. The legs were dangling while the rest of the body was on the bed. A search outside the house revealed a short stick with one flattened end. The stick was blood stained. When he observed the deceased the mouth was closed, as were the eyes. He observed a bruise on the cheek and another one on the ribs.

PW6, AIP Ouma Paul is a police officer. He visited the scene of crime together with Sgt. Okao PW5. He found the body on the bed hanging by the neck with the rope tied to a pole on to the roof. He examined the body and found a bruise on the neck, a cut wound on the back, and a bruise on the left cheek. The body was on a mattress. There were blood stains at the back of the neck. The legs were dangling from the bed. They recovered a stick which was stained with blood and treated it as an exhibit. The rope from which the deceased was hanging was also treated as an exhibit.

Doctor Odong Pancras Odur examined the body which he found in the house. This was on 14/4/1999. The body was lying in a prone position with a rope around the neck. The rope was tied to a pole on the roof of the house. There was no blood on the clothing. The body had an abrasion on the left eye, and on the right wrist. Blood was oozing from the nose. There were no other injuries or infirmities on the body. The cause of death was due to an open head injury caused by a blunt object. Evidence of this was the blood which was oozing from the nose. The

Doctor ruled out suicide. The sole of the right foot had soil of a texture which was different from that in the house. An examination of the neck revealed some rope impressions which were not tight enough for a person to hang from.

Under cross examination, the doctor said that the deceased could have been able to touch the roof of the house where the rope was tied if he stood on the bed. He also said that a fall on a hard surface like the wooden part of the bed could cause the type of injuries which he described. Such a fall could also cause bleeding from the nose. He confessed that this was his first live suspected suicide case, in his medical practice, his other experience being from training exercises. He said that in cases of death by hanging, what is looked for are signs like a swollen head, broken trachea, blood, and ruptured vessels. He did not see any of these in this case. He explained that an open head injury is an injury which causes other external signs like the oozing of blood from the nose, meaning that the inside of the head is injured.

The accused gave sworn testimony. She did not call any witnesses. She said that she was married to the deceased, and they had two children at the time of his death. She was three months pregnant then and had since given birth, to the child whom she was carrying at the time of giving her testimony.

On that fateful day, the deceased her husband who was a boda boda, bicycle rider, took her sister's goods to Busia. Later in the evening at about 7.00 pm., he brought meat and said he wanted to retire early to bed, and so she should not boil the meat but rather, roast it. She did as instructed but the deceased refused to eat. The deceased expressed his worries about her intentions to run away from him. He told her that should she decide to go away she should take the children with her as he would not be around himself. There was a quarrel and he chased her out of the house. She went to a neighbour, and relative, PW2 Mangeni for help. Mangeni came with her and advised the deceased to stop drinking waragi as this seemed to be the cause of his problems.

When Mangeni returned to his house the deceased continued quarrelling and she had to take refuge outside. She first went to the house of the children of her brother in law, but he followed her. She hid outside the house first in the bushes and later on the veranda, cautiously listening for

her husband to fall asleep so that she could also get inside to sleep. While she was outside, she saw a goat without a rope. She assumed that it had cut itself loose from its rope. She moved cautiously back into the house and found her husband hanging on a rope with his body partly on the bed, and partly dangling. He had died. She made an alarm and run to Mangeni to inform him. He called other neighbours who came and stated beating her accusing her of having killed her husband. She was assaulted by the villagers using a stick, a torch and sleepers. She was saved by her brother in law who took her to the police station.

She denied having ever beaten her husband. She said that when she returned to the house, she found him already dead. She said she had no intentions of taking away the goats and that even at that time they were still in their home. She categorically denied killing her husband.

It is a cardinal principle of the criminal justice system that the burden of proving the guilt of an accused person lies upon the prosecution throughout the trial. R. Vs. Johnson (1961) 3 All E. R. 969 and Sekitoleko vs. Uganda (1967) E. A. 531

Thus an accused person has no duty to prove his or her innocence. Even where he or she opts to keep quiet throughout the trial or offers a weak or incredible defence he or she can only be convicted upon the strength of the prosecution's case against him or her

In a charge of murder the prosecution has to prove beyond reasonable doubt, four essential ingredients of that offence. They are:

- a) that a human being is dead;
- b) that death was caused by an unlawful act or omission;
- c) that act or omission causing death was accompanied by malice aforethought; and
- d) that the accused participated in the unlawful act or omission.

In his final submissions Mr Okuku, learned Counsel for the accused said that he was not contesting the ingredients of the offence charged, except that he strongly contested the participation of the accused in the offence. It was the defence contention that prosecution evidence was only circumstantial. There was no direct evidence. This was conceded by the prosecution. Such evidence fell far below what is required to sustain a conviction

With regard to the ingredient of the death of the deceased, there was the evidence of the doctor who examined the body, PW2 Raphael Mangeni who was called by the accused to come as soon as the death was discovered, PW3 Okumu Patrick the brother of the deceased who arrived at the scene and found his brother dead and people beating the accused, and also Adam Mayende the 70 years old LC 1 Chairperson of the area. That evidence, coupled with the evidence of the two police officers leaves no doubt at all in my mind that Buluma Christopher is indeed dead. I therefore find that the prosecution proved that ingredient of the offence beyond reasonable doubt.

The next ingredient in the offence of murder is that the death was unlawful. The position of the law is well settled by the East African Court of Appeal decision in the case of Gusambizi Wesonga And Others vs. R. (1948) 15 EACA 63. It was there held that “a homicide unless accidental, will always be unlawful except if it is committed in circumstances which make it excusable. See also Uganda vs. Francis Ghana And Another (1994-5) HCB 16.

In the instant case, the evidence of the doctor was that the deceased died from an open head wound due the blood oozing from the nose. It was his opinion that a blunt object was used to inflict the injury. While the doctor’s conclusions seem in certain aspects doubtful but at least from his observations and from those of the other prosecution witnesses like PW2, PW3, and PW4, it is clear that the death was not accidental. It certainly was not lawful. I therefore find that the prosecution proved beyond reasonable doubt that the death of Buluma Christopher was unlawful.

The prosecution had to prove that the death was caused with malice aforethought. This is a state of mind which is hardly ever proved by direct evidence. The court has set down the circumstances which ought to be considered before deciding whether or not malice aforethought has been made out. Tubere vs. R. (1945) 12 EACA 63. The court must consider the type of weapon used, the nature of the injuries inflicted, the part of the body affected; whether vulnerable or not, and the conduct of the accused before, during, and after the attack. Uganda vs. Turwomwe (1978) HCB 182.

The evidence of PW2, the first person on the scene was to the effect that he found the deceased with his mouth open, with the tongue protruding from the mouth. The doctor said that the death

was from an open head injury. This was because of the bleeding from the nose. The doctor said however that those types of injuries were as consistent with an assault using a blunt object, as they were consistent with a fall onto a hard surface like the wooden bed on which the body was found. The parts of the body on which the injuries were inflicted were the head, and neck. These are vulnerable parts of the body. It would appear to me that whoever inflicted these injuries on the deceased did so with the intention to cause death. I would therefore have no hesitation whatever in deciding that the ingredient of malice aforethought was proved by the prosecution beyond reasonable doubt.

That lives the all important question as to whether this unlawful death was caused by the accused person. The prosecution sought to prove this ingredient by circumstantial evidence. There was no eye witness to the incident.

It has been often said by the courts that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. See R. Vs. Taylor Wear Donovan [1928] 21 Cr. App. R. 20. However such evidence ought to be approached with caution because, as was pointed out by Lord Normand in the case of Teper Vs. R. [1952] AC. 489, "evidence of this kind may be fabricated to cast suspicion on another, it is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other existing circumstances which would weaken or destroy the inference." The above was cited with approval by the Court of Appeal in Waibi Vs. Uganda [1978] HCB 218.

For a conviction to be based on circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. R Vs. Kipkering Arap Koske And Another (1949) 16 EACA 135.

The circumstantial evidence sought to be relied on by the prosecution was the existence of the family dispute concerning goats. This was testified to by Mangeni the neighbour and relative, plus the perennial LCI Chairperson of the area Adam Mayende. The accused in her testimony

said that there was no truth that she intended to take the goats away, which seemed to be the deceased's fear. It is clear that there indeed existed some dispute between the accused and her husband concerning goats.

The other piece of circumstantial evidence was that the theory of this being a suicide was negated by the evidence. This comes from the evidence of the doctor, and from that of the two police officers who visited the scene and viewed the body. I do agree that the doctor's testimony cast doubt on the theory that the accused could have committed suicide. I am not satisfied that the doctor's evidence completely dispelled that doubt. He said that his conclusion on the cause of death was from the oozing of blood from the nose. His conclusion for this was because of the presence of a stick which apparently the police found on the scene and which appeared to be blood stained. The stick did not form part of the evidence. In any case, the accused also stated that she was assaulted prior to being taken to the police. The doctor's examination report of the accused indicated that she had a swelling on the left cheek. This would tend to confirm her story. The possibility of such a stick having been used on the accused could not be ruled out.

Mangeni who saw the body first said that the mouth of the deceased was open with the tongue hanging out and the eyes were protruding, all indications of a possible suicide. The doctor said death was due to an open head injury. He explained this to mean an injury which affects and damages the inside of the head, such that the injury is manifest by an external sign like bleeding from the nose. He said that in cases of suicide of which he had no practical experience, what are looked for are signs like blood, ruptured vessels, etc. In this case there was blood. There was also an apparent injury to the inside of the head. The possibility of ruptured vessels was not discounted.

The accused in her defence said that the deceased used to assault her whenever he was drunk. This happened on that fateful night. She was chased from the house. The accused followed her up to house of the children of her brother in law. In the attempt to get her, the accused was even chased by dogs. This is consistent with the doctor's evidence that the deceased had soil in one of his toes which was of a texture different from that inside the house.



Court was shown by a prosecution witness a man who was of the apparent height and size of the deceased. This was a stout well built young man. The accused on the other hand is a small and short woman. The prosecution sought to convince court that this woman killed her husband, dragged him on to the bed put a rope around his neck, then pulled the rope with the dead body up and tied it on the pole in the ceiling. For her to achieve this, she would have to have been assisted, in view of her size, the size of the deceased, from the evidence of those who knew him and the time frame. Mangeni said that he was away for only about 20 minutes when the accused returned to inform him of the death of her husband.

Mead J., in the case of Uganda Vs. Leo Mubyazita and 2 Others [1972] 2 ULR 3 , said that to support a conviction, circumstantial evidence had to be such as to produce moral certainty to the exclusion of all reasonable doubt. This has not been done to my satisfaction. I am left in some doubt as to the participation of the accused in this offence. It is the law that where a doubt has been created in the prosecution evidence regarding an essential element in the offence charged, such doubt will be exercised in favour of the accused.

One lady assessor advised me to Convict the accused as charged, because she was satisfied that the accused's participation had been proved. For the reasons I have given regarding my doubts about the inconclusiveness the circumstantial evidence, I am unable to accept her opinion. The other lady assessor advised me to acquit the accused. I have no reasons to differ from her opinion.

I therefore find the accused not guilty of the offence of murder contrary to sections 183 and 184 of the Penal Code Act, and I acquit her of the same accordingly. She is to be set free and at liberty forthwith unless she is held on other lawful charges. It is so ordered.

**RUGADYA ATWOKI**

**JUDGE**

**20/03/01**