THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT MBARARA

CRIMINAL SESSION NO.65 OF 1998

UGANDA…….. PROSECUTION

VS

MWEBAZE NABOTH…….. ACCUSED

BEFORE: THE HON. JUSTICE V. F. MUSOKE-KIBUUKA

JUDGMENT

Miranga Mable, who is referred to in this judgment as "the deceased", lived in Bunenero village, Rubaya, in Mbarara District. She was an elderly lady aged about 60 years. She lived in a simple house comprising two bedrooms which were separated by a sitting room one bedroom was occupied by her. The other was occupied by her son who is the accused in this case.

Very early in the morning of 12th June, 1997, the husband of the deceased, Nathan Kamwerinde, who appears to have been residing elsewhere, called at the home of the deceased. He soon spread word throughout the neighbourhood that the deceased's whereabouts could not be located. A casual search around the house revealed a spot in the compound which was covered by several drops of blood. The decapitated head of the deceased was sighted covered in a heap of harvested beans hardly ten metres away from the house of the deceased. The trunk of the deceased's body was recovered from underneath another heap of similar beans, which was lying nearby.

The accused is now indicted for murder contrary to sections 183 and 184 of the Penal Code Act, in respect of the death of his own mother.

The prosecution in an effort to prove the offence of murder against the accused, beyond reasonable doubt, led evidence from seven witnesses. The summary of the prosecution's case is as set out below.

PW7, Dongo Geoffrey, was a son of the deceased. I-us home was not very far from that of his mother. He and his wife, PW4, Jadres Kekiyungu, were at their home at about 7.00 a.m. on 12" June, 1997. Suddenly, Nathan Kamwerinde, the father of PW7 and husband to the deceased appeared at their home. He inquired whether the two knew where the deceased, whom he had discovered not to have slept at her house the previous night, was.

PW7 and PW4 proceeded to the home of the deceased in an effort to locate her. They were soon joined by PW3, Annet Kyomugisha. She had gone to the deceased's home that morning to collect some medicinal herbs. She was pregnant and she had felt unwell the previous night.

The accused was in the deceased's kitchen preparing porridge. The three witnesses heard the accused talk to himself from inside the kitchen in the following terms, "I told her not to plant Rushare beans and she refused. Now they have cut her." As the three witnesses proceeded into the banana plantation of the deceased trying to find her, each one of them again heard the accused state, "the wild animals cut off her head. Do not talk if you see her body."

The three witnesses effortlessly came across the partly covered head of the deceased. It was partly covered by a heap of harvested Rushare beans.

PW7 knew the accused as having a history of threatening to kill his mother owing to the fact that the mother had been accusing him of and revealing the fact that the accused was a smoker of opium. On one occasion, the accused had chased his mother beating her with a stick up to PW7's home. Three days earlier, PW3 had met the accused talking to himself as he cut some trees in a nearby bush.

PW3 ran to the home of PW6, Baguma Lauben, who was the LC I chairperson of Bunenero village When PW6 came to the scene, he interrogated the accused about the whereabouts of the accused's mother. The accused first denied knowledge of where she was. However, later

he admitted to PW6 that he had decapitated her during the night. He used a panga to sever his mother's head off. He had subsequently thrown the panga into the latrine. The accused then led the witnesses to where the trunk of the deceased was hidden underneath another heap of harvested beans lying not far from the one covering the head.

PW6 arrested the accused and handed him over to special police Constable John Baptist Mujuni, PW5, at Rubaya sub-county headquarters. The accused told *PW5* that he had killed his mother because she had, for a very long time, been pestering him to have sexual intercourse with her. He had become fed up and decided to decapitate her. PW5 handed the accused to the Police at Mbarara Police Station.

PW2, No. 21001, Woman Dt. Constable Twine, visited the scene of crime and drew up a sketch plan, Exhibit P2.

Dr. Tumwebaze, PW1 examined the body of the deceased at Mbarara hospital, in the presence of Dt. Constable Tumwine. The body comprised a decapitated head and trunk. They belonged to a well-nourished female of about 60 years of age. The cause of death was stated to be external hemorrhage following decapitation. The post mortem report made by Dr. Tumwebaze is Exhibit P1.

The evidence of both PW1 and PW2 was admitted vide the provisions of section 64 of the TID during a preliminary hearing.

In answer to the charge of murder, the accused made an unsworn statement in which he presented a total denial of the allegations against him. According to him, he thought that his mother was still alive. He stated that he was arrested from his home on 12th June, 1997, for reasons he did not know. He was arrested by the LC 1 chairperson who together with other village mates subjected him to severe beating.
As was stated by this court in *Uganda vs. Harry Musumba (1992) 1 KALR* . in a trial upon an indictment for the offence of murder, the prosecution must prove, beyond reasonable doubt, the following essential ingredients:

a) death of a human being;

b) that death arose from an unlawful act or omission

c) malice aforethought; and

d) Participation of the accused in killing the human being.

The defence submitted that this court should regard the three essential ingredients of the offence of murder as proved beyond any reasonable doubt by the prosecution. Those were: that the deceased is dead, that she died as a result of an unlawful act and that the accused participated in killing her.

On the basis of the evidence of PW3, PW4, PW6, PW7 and that of Dr. Tumwebaze, PW1, this court is dully satisfied that Miranga Mable, the deceased in this case, is dead. That evidence proves that fact beyond reasonable doubt.

Secondly, the evidence of all the prosecution witnesses was that the deceased was decapitated. Dr. Tumwebaze determined the cause of death as hemorrhage following decapitation. No one would doubt that an act of decapitating a human being without lawful authority is indeed unlawful. Accordingly, this court is itself satisfied that the prosecution has, in the instant case, proved that the deceased died as a result of an unlawful act which was decapitation.

Regarding the participation of the accused in the commission of this offence. There is the evidence of PW6, Baguma Lauben, the LC 1 chairperson of Bunenero village. It was to the effect that the accused admitted to him that he had decapitated the deceased. The accused made the same admission to PW5. He led PW3, PW4, PW6 and PW7 to the spot where the decapitated body of the deceased had been hidden under a heap of beans. All that evidence was left unchallenged by the defence. The evidence, therefore,

proved beyond reasonable doubt that it was the accused who caused the death of the deceased.

I will now move to the only point of serious contention in this case. That is whether or not the prosecution has proved beyond reasonable doubt that, in killing the deceased, the accused did so with malice aforethought.

Both counsel, Mr. Murumba, for the State and Mr. Dhabangi, for the accused submitted on this point at length.

On his part, Mr. Murumba anchored his arguments into the provisions of section 186(b) of the Penal Code Act and the principles laid down by the Court of Appeal for Eastern Africa in *Tubere s/o Ocan vs. R (1945) E A. C* A. 63. He submitted that constructive malice should be inferred in this case as the evidence showed that a lethal weapon, a panga, had been used. The head which is a vulnerable part of the body had been decapitated. There was the evidence of PW7, which showed that the accused had had a history of threatening to kill his mother and that the court should take it that the accused intended the natural consequences of his actions.

Without directly contradicting the submission by the state, counsel for the defence submitted that the prosecution's evidence itself had put into issue the question whether or not at the time the accused cut the head of the deceased he was capable of forming the necessary intention to establish guilt on his part upon a charge of murder. Counsel contended that the burden of poof lay upon the prosecution in view of the evidence of a long history of use of opium by the accused, to prove that at the time the accused committed the actus reus he also had mensrea. That he was not intoxicated by opium or if he was, in spite of intoxication he was capable of forming the necessary intention.

The provisions of subsections (4) and *(5)* of section 13 of the Penal Code Act, are quite relevant to the above submission. They provide:

"(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed the intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purposes of this section, "intoxication" shall be deemed to include a state produced by narcotics or drugs."

In the instant case, the accused did not raise the defence of intoxication in answer to the charge. The issue was mainly raised by counsel during final submissions and as it arose out of

the evidence adduced by the prosecution. In those circumstances, therefore, the accused bore no burden to prove that he was intoxicated at the time he committed the offence in question. The prosecution remained with the duty to negative the doubt or possibility of intoxication in the instant case by leading evidence proving that the accused had the capacity to form the necessary intention. The principle was discussed by the Court of Appeal for Eastern Africa in *Mafabi s/o Mafabi vs Reginam, Criminal Appeal No. 151 of 1956.*

Similarly, the distinction between a situation where an accused seeks to set up a defence of insanity by reason of intoxication and one, as in the instant case, where the submission is merely that the accused was, by reason, of intoxication, incapable of forming the specific intention required to constitute the offence required, was stated by the Court of Appeal for Eastern Africa in the following words, in *Manyara v R (5) (1955) 22 E.A.F.C. 502:*

"It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused."

The same principle was re-stated by the same court in *Nyakite s/o Oyugi v R (1959) E.A/ 798*

In the instant case there was sufficient evidence from the prosecution's witnesses themselves, to raise doubt whether at the time the accused killed his mother he had the capacity to form the specific intention required for the commission of the offence of murder. The prosecution, therefore, should have led evidence to negative that doubt. But even police form 24, in relation to the accused, was not put in evidence. The doubt still persists.

In the circumstances, therefore, I duly agree with the unanimous opinion of the lady and gentleman assessors in this case, as well as with counsel for the defence, that the prosecution has not proved beyond reasonable doubt that the accused, in this case, killed the deceased with malice aforethought.

The accused is acquitted of the offence of murder contrary to sections 183 and 184 of the Penal Code. He is, instead, convicted of the offence of manslaughter contrary to section 182 of the Penal Code Act.

V. F. Musoke-Kibuuka

Judge

8/06/2001

8/06/2001

Accused in court

Mr. Dhabangi for accused on state brief

Mr. Waninda — for state

MS Tumuhimbise — court clerk

Court: Matter for judgment.

Judgment read and signed

Mr. Waninda

We have no record of the convict. He should be treated as a first offender. The offence of manslaughter is a very serious offence. The convict severed the head of his mother. He is very dangerous to society. If he can kill his own mother, he could kill anyone else he comes across. I pray he be given maximum sentence.

V. F. Musoke-Kibuuka

Judge

8/06/2001

Mr. Dhabangi:

The accused is aged 29 years. He has been on remand since 1997. He had a wife and two children. The biggest child is 8 years. The other *is* 4 years. My Lord, we live in a world of contradictions. We lost an old woman in a very horrifying manner. The accused must be punished for it. Yet he gave me instructions that I should seek the mercy of this court. He believes it was not him who did it.

He gave me instructions that he is repentant that he will not continue to smoke drugs. We pray for mercy.

V. F. Musoke-Kibuuka
Judge

Accused:
I have nothing to say.

V. F. Musoke-Kibuuka
Judge
8/06/2001

Court: Sentence And Reasons:
The convict in this case stands in a very unique position. He is not merely convicted of murdering a human being. He is convicted of murdering his own mother. He thus abused and terminated the most fundamental relationship a human being can have.
By that gross act, he showed himself as a very dangerous person who cares nothing for any member of society. He is a dangerous person who shows no remorse or any sign of repentance. He must, therefore, be punished serious and kept out of circulation for some time until he reforms. I have considered him as a first offender. I have also considered his relatively young age at 29. I have also taken into account his social responsibilities to his own family. But even with all factors considered, if he had not been on remand for 3 years, I would have sentenced him to 15 years of imprisonment. I have reduced that period by three years. I sentence him to 12 years imprisonment.

V. F. Musoke-Kibuuka.

Judge
8/06/2001

Court: Right of Appeal explained.

V. F. Musoke-Kibuuka

Judge

8/06/2001