

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

HCT-05-CR-CO-071-2001

UGANDAPROSECUTION

-VS-

KAMUGISHA JOSHUAACCUSED

BEFORE: THE HON. JUSTICE P. K. MUGAMBA

JUDGMENT

Accused, Kamugisha Joshua, is indicted for murder, contrary to sections 183 and 184 of the Penal Code Act.

The prosecution called seven witnesses in proof of its case in addition to medical evidence and evidence from the Government Chemist and Analytical laboratory admitted under S.64 of the Trial on Indictments Decree. The witnesses who testified were Priska Nyamuomba (PW3), Kanushu Beine Samwiri (PW4), No.22289 D/C Omongin Charles (PW5), Ndebwoha Thomas (PW6), Nyabutono Steven (PW7), Emmanuel Byamukama (PW8) and D/IP Baryabasha Billy (PW9). In his defence the accused made a sworn statement but he called no witnesses.

The brief facts of the prosecution case are that the accused is son to the deceased and that PW3 is mother to the deceased besides, of course, being grandmother to accused. PW3 and deceased lived in the same house but in separate bedrooms while accused lived in the same homestead but in a different house. On 26th July 2000 accused went away after he had promised to bring something to the deceased. Later in the evening PW3 heard a voice call out to the deceased. Afterwards PW3 heard the same voice urge the deceased to drink. The voice was not very audible but she thought it was that of the accused because she also saw him. After accused left PW3 noticed that deceased's breathing sounded irregular. She thought the deceased was vomiting. When she went to deceased's room she found him unconscious. He did not speak to her. She called other people including accused. The deceased died soon afterwards with froth coming from his mouth. There was a bowl of cooked matoke mixed with beans and two small

bottles in the room. Two other bottles were later extracted from the nearby latrine pit used by the homestead. The doctor who performed the post mortem examination extracted part of the stomach, liver, hair and finger nails from the body. The contents of the bottles, the left over meal in the bowl and the extracted items from the body were sent to the Government Chemist/Analyst who found some of them to contain a poison known as carbofuran commonly used to kill banana weevils. Accused was arrested as suspect and was duly charged with the deceased's murder.

In his defence accused denied involvement in the deceased's death.

Before the prosecution can succeed in having the accused convicted it has the duty of proving its case against accused beyond reasonable doubt.

See Leonard Aniseth - vs- Republic [1963] EA 206 and

Serugo - vs- Uganda [1978] HCB 1.

All the following ingredients ought to be proved beyond reasonable doubt.

- (a) that the deceased is dead;
- (b) that his 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.

Regarding the death of the deceased, all the prosecution witnesses testified that the deceased died. Accused also testified to the deceased's death. The post mortem report too confirms this fact. I am satisfied that the prosecution has proved this ingredient beyond reasonable doubt.

Concerning the second ingredient, it is a legal presumption that where a person is killed his or her death is unlawful except where such death came 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,

See R - vs- Gusambizi s/o Wesonga (1948) 15 EACA 65.

Since these exceptional circumstances are not evident in the instant case I am satisfied that the prosecution has proved this ingredient also beyond reasonable doubt. In any case the defence does not contest this ingredient.

Section 186 of the Penal Code defines malice aforethought as an intention to kill or knowledge that the act or omission causing death will probably cause the death of some person. Malice

aforethought according to R - vs- Tubere s/o Ochan (1945) 12 EACA 63 can be elicited among other things from the nature of weapon used in causing death. According to the report of the Government Chemist and Analyst Laboratory which is exhibit P11 the deceased's stomach was found to contain a poison known as carbofuran which is extremely toxic. Whoever caused the deceased to ingest that poison must have known that death would probably result. The prosecution has proved that there was malice aforethought.

The fourth ingredient is whether it was the accused who caused the deceased's death. There is no direct evidence connecting accused to the death of the deceased. All there is circumstantial evidence. Where evidence is circumstantial in order to justify an inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty.

See Uganda - vs- Richard Baguma 11988-19901 HCB 74.

In the instant case no one positively connects accused with any item where poison could have been found, neither the bottles nor the food which was found left over. PW3 in her statement to Police on three occasions never said she saw accused on the night in question. In her testimony in court she first stated that she saw accused but later she said she heard. I do not find her evidence reliable to show that she did see accused on the occasion in issue. The evidence of PW7 that he saw accused coming from the direction of the latrine is also not reliable. While it is true two bottles were recovered from the latrine the prosecution does not show how accused comes to be connected to the bottles. The latrine was used by the people in the entire homestead; including the deceased in whose room some other bottles were found. Both PW7 and accused told court that a grudge subsisted between them although the two were cousins. This court has held in U2anda - vs- Odwong Dennis & Olanya Dickson [1992-1993] HCB. 70 that where prosecution witnesses have a motive to tell lies against the accused their evidence will be disbelieved unless the motive is rebutted by the prosecution. Since there was a grudge and the evidence of PW7 has not been corroborated I find it unreliable. Consequently I find that the prosecution has failed to prove that accused did cause the death of the deceased.

The remaining assessor has given me his opinion on this case. He advises me to acquit the accused. For the reasons I have given in the course of this judgment I agree with that opinion.

Accused is hereby acquitted.

P.K. Mugamba

Judge

23 January 2003

Mr. Ngaruye for accused

Mr. Murumba State Attorney

Accused in Court

MS Tushemereirwe court clerk/interpreter

Court: Judgment read in court.

P.K. Mugamba

Judge