

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL SESSION CASE NO: HCT-OO-CR-SC-SC-0072-2002

UGANDA:.....PROSECUTOR

VERSUS

KIBERU JOHN:.....ACCUSED

BEFORE THE HONOURABLE MR.JUSTICE MOSES MUKIIBI

JUDGEMENT

The accused, KIBERU JOHN, was indicted for murder contrary to section 183 of the Penal Code Act. The particulars of offence alleged that on the 5th day of May 2001 at Kikonda village in the Luwero District, Kiberu John murdered one Nabbowa Violet. On arraignment the accused denied the indictment where upon the prosecution called nine witnesses to prove its case. The accused made an unsworn statement but called no witness in his defence.

The prosecution case is as follows:-

The deceased, violet Nabbowa, was a sister of the accused's mother, and a maternal aunt of the accused. The accused's mother had died and violet Nabbowa, the deceased brought up the accused. The accused and the deceased developed misunderstandings and the deceased alleged that the accused attempted to rape her. The deceased chased the accused from her home. Lubwama permitted the accused to occupy a house, which was opposite that of the deceased.

In the night of 5th May, 2001 at around 1.00 am the deceased went to check on her anthill to see whether white ants would come out. Senoga Dan (PW9), Kalumba Ephraim (PW6) and the accused had slept in the same house in the night of 5/5/20001. Late in the night the accused woke up and told his colleagues that he was going for white ants. He came back after some time and told them that the white ants had not come out.

On 6/5/2001 the accused woke up very early at about 7.00am. He said that he was going to work. After a short time he came back crying. He informed people that his “mother”/aunt had been killed. The body was lying on a path. The accused moved uphill while informing people about his aunt’s death. He headed for the main road where he boarded a taxi for Kampala. The accused was intercepted by police from Bamunanika police post who pulled him out of a taxi at Bamunanika Trading Center. The accused was arrested, taken to Bamunanika police post and detained. CPL. SUSU PETER (PW8) visited the scene at Sekamuli village where he saw the body of the deceased. Later CPL. SUSU PETER (PW8) took DR. MUBEEZI DAVID (PW1) from Nakaseke Hospital to the scene. The doctor examined the deceased’s body. He prepared and signed a postmortem report on police form 48C dated 6/5/2001 in respect of Nabowa Violet, which was admitted in evidence as Exhibit P.1.

CPL. SUSU PETER (PW8) drew a sketch plan of the scene, which was admitted in evidence as Exhibit P.2. He forwarded the accused to the District CID Officer, Luwero Police Station to handle the case. The accused was charged, taken to court and remanded in prison.

The accused, in his Unsworn Statement, denied committing the offence.

He stated as follows:-

He had no grudge with Nabbowa, the deceased. It was the deceased who brought him up. He real mother died first. He was left with the deceased to look after him. His farther died later on. His farther had told him to remain in the hands of the deceased. He (the accused) was residing at Kikonda village in a house belonging to Nsibambi. He had started staying in that house in May, 2000. It was Nalumansi (PW2) who had suggested that he leaves the deceased’s home and goes

to Nsibambi's house to stay with his brothers. He had experienced inconvenience in having to open for the deceased late at night. The deceased used to come home with her manfriends. If he (the accused) returned home late he would find the door closed. The deceased used to ask him to stop disturbing her. That was the reason why he left the deceased's home. It was a Sunday and the deceased had to go to Church. He (the accused) used to prepare tea for the deceased before she went for Church Service. He woke up and went to the deceased's home. He wanted to prepare porridge for her. He got a sigiri (local cooking stove) and put charcoal on it and made a fire. He cleaned the utensils, which the deceased had used the previous night. He put water in a saucepan and put it on the sigiri. He picked a small jericin for collecting milk. He went with the jericin to the home of Nalumansi (PW2). He wanted to find out if the deceased was there. She was not. Nalumansi told him that the deceased might have gone to one Miriya's place. He told Nalumansi (PW2) that he was going to collect milk and that the deceased would find the porridge ready. He had to collect milk for the deceased every morning.

He walked along the road on the way to collect milk. He saw a person who had fallen down. He observed clearly from a short distance. He saw that it was his mother, the deceased. He went back crying. He informed all the residents around. The residents gathered. He went to the LC (Local council). He informed them that his mother had been murdered. He had Shs. 3000/= on him. He took a vehicle to go and inform the relatives of the deceased. The relatives had to put announcements over the radio. He wanted the relatives to come and assist him because he knew nothing. The vehicle, which he had boarded stopped at Bamunanika Town to take on other passengers. He was in deep sorrow. He was removed from the vehicle. The people who arrested him took him to Bamunanika police post. Kayizzi (PW3) was there and he said: "that is the one who murdered the person". He was beaten and detained in police cells. After three days Kayizzi came to police and told him to sell a Kibanja which the accused's farther had left so that he could be realised. Kayizzi came to police twice. Kayizzi then told him that by the time the deceased died she had already sold off the Kibanja. He was transferred to luwero police station. He spent one month in police cells before he was taken to court. He was remanded in prison. He denied having had any misunderstandings with the deceased. He regarded the deceased as his mother and farther.

The accused told court that the deceased had relatives who did not like her. They alleged that the deceased was bewitching their children. In 2000 the deceased was assaulted by her relatives after burial at Waluleta. She was admitted in hospital. Four of the relatives were prosecuted, convicted and sentenced to a one-year jail term.

The prosecution had to prove beyond reasonable doubt the following essential ingredients for the offence of murder, namely:

1. That a human being by the name Nabbowa Violet is dead;
2. That she died as a result of an unlawful act.
3. That the unlawful act was accompanied by malice forethought.
4. That the unlawful act was committed or participated in by the accused person.

Learned counsel Mr. Bwengye representing the accused person on state brief conceded that:-

1. Nabbowa violet is dead;
2. Her death was unlawfully caused;
3. The unlawful act was accompanied by malice forethought.

The only ingredient in dispute is the participation of the accused person.

The prosecution relied on circumstantial evidence.

Senoga Dan (PW9) testified as follows:

In May 2001 he was at Sekamuli village. He was staying with Kiberu John, in the same house. He was working with Kiberu in renovating a house. He was sleeping with Kiberu in one bed. On Saturday, 5/5/2001 Kalumba (PW6) came. In the night they put one mattress on the floor for Kalumba to sleep on. The witness and Kiberu slept on the bed. At about 2.00am Kiberu moved over the witness from the bed. He said that he was going to trap white ants. He remained outside for about 30 minutes. He came back and told the witness that he had failed to get the ants. The witness then slept with Kiberu until the following morning. Kiberu woke up and

opened the door at about 7.00am. He went to the courtyard of a house, which belonged to the witness' farther. The house was being occupied by the witness' aunt called Nalumansi (PW2). Then the witness heard someone crying from the same courtyard. He went there and asked Kiberu what had happened. Kiberu answered that his mother had been killed. The house in which the witness and Kiberu were sleeping was about 20 feet or less than 10 meters from the deceased's house. The two houses were separated by a path. The area between the two houses was covered by banana and coffee trees. Kiberu did not come back to the house where he was staying with the witness. He moved from the courtyard and went away while crying. Kiberu used not to greet the deceased. In response to cross-examination the witness testified that there is only one thing he used to see:

Kiberu was not greeting his mother. He confirmed that when Kiberu cried that his mother had been killed he by-passed the witness. Kiberu did not tell the witness anything. Kiberu went and talked to Nalumansi (PW2). While in detention at Bamunanika Police Post. Kiberu told the witness that he was arrested while he was going to inform people of his mother's death.

On 5/5/2001 he had gone to Sekamuli village to see his aunt Nalumansi Alice (PW2), and to check on a latrine, which was being constructed. Senoga (PW9) was staying in the same house with Kiberu John. The house in which they stayed belonged to the witness' grand farther, the late Saabwe Daniel. In the night of 5/5/2001 the witness slept on a mattress in a corner of the same bedroom. Senoga (PW9) and Kiberu slept on the bed in the same bedroom. The witness was tired and a bit drunk. He had consumed three mugs of local brew (tonto). He slept early. He left Kiberu and Senoga (PW9) talking. He did not wake up until next morning. He found Senoga (PW9) outside washing an over coat. Kiberu was in the road, coming from downhill and moving upwards. He was crying and saying that his mother had been killed. Kiberu went to the deceased's house and brought a jericane, which he handed to some one to sound an alarm. Kiberu proceeded uphill while crying. Kiberu did not tell the witness and Senoga (PW9) how he had discovered the body. He did not tell them where he was going. Kiberu did not come back to the house where he was staying. He did not pick anything. He just by-passed the house.

Nalumansi Alice (PW2) testified as follows:-

(She identified the accused in the dock as Kiberu).

In May, 2001, it was a Sunday morning, at about 6.30am, when she was called by Kiberu. Kiberu was the son of her neighbour called Violet Nabbowa. She had known Kiberu since she was born. She saw Kiberu who said that he was looking for his mother, Violet Nabbowa. Kiberu said: “she is not at home. I have opened the door but she is not there.”

Kiberu told the witness that his mother had called him at night to go and collect white ants but he had not gone there. The witness told Kiberu that Nabbowa should have been at home. She wondered where she (Nabbowa) had gone so early in the morning. She advised Kiberu to go back and wait for his mother. The witness resumed her sleep. After a short time while she heard some one crying. She woke up and went out. She saw Kiberu crossing to her courtyard. She asked him what was wrong. He answered: “my mother was killed”. He passed by the witness’ home and went away while crying. He followed the road and went upwards. People started to answer the crying by coming to the witness’ home. Her neighbour called Kakoma started to sound a drum. People gathered, and the local authorities came. Kiberu staying in Lubwama’s house, which was situated on the upper side of the road. Nabbowa’s house was on the lower side, in the immediate neighbourhood. Previously, Kiberu had been staying with Nabbowa, his maternal aunt, right from his birth. His biological mother had abandoned him there. However, during Cross-Examination, this witness was referred to her police statement, counsel for the defence read it out to her. She told court that she had been gripped by fear. She admitted that she had departed from the statement she had made to police. She prayed court for forgiveness. She said she had nothing to explain. She reiterated what she had told the police which deferred from her testimony in court. In relation to her police statement the witness testified that:

She told the police that the relationship between Kiberu and the deceased was not good. She told the police that the two had misunderstandings. She told the police that Nabowa chased Kiberu away from her home.

In re-examination the witness told court that she did not know the root cause of the conflict between Kiberu and the deceased.

Kayizzi Fred (PW3) testified as follows:-

He resides at Kikonda village, Bamunanika Sub County. On 6/5/2001, which was a Sunday, before 7.00am, he heard the sound of a drum, warning residents of danger. Then he heard the cries of a person who was approaching.

Then he saw Kiberu. (The witness identified the accused in the dock). Kiberu was going uphill. He said that his mother had been killed. The witness asked him where the incident had taken place. Kiberu did not reply. He continued crying and went upwards. Kiberu's mother was called Violet Nabbowa.

The witness knows that Kiberu and the deceased had misunderstandings. They used to quarrel. Kiberu would pick deadly weapons and utter threats to kill the deceased. Kiberu would pick up a hoe or a panga and threaten to kill the deceased. The witness, as a neighbour, used to see this. He had witnessed the last quarrel slightly over a month before the incident. The witness saw Kiberu and the deceased quarrelling. Kiberu picked a hoe and said to the deceased. "One day I will kill you". Kiberu was no longer staying at his mother's house. He was staying in a house nearby. The witness went to the scene. He found people gathered. The LC1 Chairman asked him to follow Kiberu and bring him back. The witness started looking for Kiberu at 7.30am. He found Kiberu at 8.00am, at Bamunakika, a distance of four miles from Kikonda village. When the witness reached Bamunanika Town he went to Bamunanika police post. He informed the police that he was looking for Kiberu following the death of his mother. Thereafter, the witness saw a motor vehicle parked at Bamunanika Town. He saw Kiberu boarding a taxi heading to Kampala. He tipped the police who stopped the vehicle and got Kiberu out. Kiberu was taken to Bamunanika police post. The witness asked Kiberu where he was going. Kiberu said that he was going to the city to inform his elder brother. Kiberu did not disclose the brother's names. The witness went back to Kikonda village to inform the LC1 Chairman.

In response to cross-examination the witness testified that:-

He had known Kiberu for over ten years.

He had also been seeing the deceased. Kiberu and the deceased used to quarrel seriously. Kiberu would pick a hoe or a stick and threaten the deceased. The deceased was Kiberu's

maternal aunt. The deceased had looked after Kiberu from his infant days. Kiberu left his mother's house because of disagreements. There was no other child of the deceased. There was no other relative of the deceased at Kikonda village.

Musajjakawa Ibrahim (PW4) testified as follows:-

On 6/5/2001 when he was at his home at Kikonda village he heard the sound of a drum at about 6.00am Then he saw Kiberu John crying as he walked by. Kiberu told the witness where he was going. He did not come back. The witness asked the Secretary for defence LC1 to follow Kiberu and ask him to come back. Six months earlier Nabbowa (the deceased) had reported to the witness that Kiberu had attempted to play sex with her. Following that incident Nabbowa and Kiberu had separated. Kiberu started living in a vacant house in the neighborhood, which had belonged to a deceased old man.

During Cross-Examination the witness testified that Kiberu had no other relatives in Kikonda village or in the neighbouring villages. The witness suspected Kalumba Ephraim (PW6) and Senoga (PW9). They had slept with Kiberu during the night of the murder. Kalumba Ephraim (PW6) and Senoga (PW9) were present at the scene. The witness sent another person to go to Katikamu County to inform the deceased's relatives of her death.

SPC MUTEBI EDWARD (PW5) testified as follows:-

He is attached to Bamunanika police post. On 6/5/2001 just before 8.00am one Kayizzi (PW3) came to the police post and talked to the O/C CPL. SUSU (PW8). The O/C directed the witness to go and arrest Kiberu. The witness found Kiberu John sitting in a taxi. Kayizzi identified Kiberu to the witness. Kiberu had placed his hands on the seat in front of him and he was facing down. The taxi was at Bamunanika trading center. The witness informed Kiberu that he was needed at the police. Kiberu left the taxi. The witness took him to the police post. He handed him to the O/C.

No. 27426 CPL. SUSU PETER (PW8) testified as follows:-

He is a police officer attached to Bamunanika police post. On 6/5/2001 he was the O/C. At about 8.05 hrs he was at the police counter making entries into the Station Diary. He had with him two special police constables (SPCs) Magero and Mutebi (PW5). Kayizzi Fred (PW3) came in and reported the murder of one Nabbowa Violet. Kayizzi said that he suspected one Kiberu John. Kayizzi informed the witness that Kiberu was in a taxi heading to Kampala. The witness sent the two SPCs Magero and Mutebi to arrest Kiberu for interrogation. Kiberu was arrested and detained at the police post.

The witness visited the scene at Sekamuli village. He drew sketch plan. He saw footmarks from an anthill up to the place where the deceased's body was found. The scene was about 100 metres away from the deceased's home. (The sketch plan is exhibit P.2). The witness saw footmarks of one person from an anthill, which was about 10 metres away from the place where the deceased's body was lying. He went to the deceased's house. He entered the house. He saw the deceased's property disorganized. Her clothes were scattered in her bedroom. He saw no signs of blood. During Cross-Examination the witness told court that Kiberu had told him that he was going to inform relatives. He confirmed that when he entered the deceased's house he saw no traces of blood. He saw no marks of struggle on the deceased's body.

Learned counsel for the defence Mr. Bwengye submitted that what was disputed was the participation of the accused in carrying out the unlawful act, which caused the deceased's death. He submitted that it was the defence case that the accused never killed the deceased. He submitted that the evidence is circumstantial. He cited: NSUBUGA V.Uganda, Criminal Appeal No. 16/98 (S.C). It was held in that case that circumstantial evidence must always be narrowly examined as evidence of this kind may be fabricated to cause suspicion on another. It is necessary before drawing an inference of guilt from such evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. Counsel submitted that the evidence is too weak to link the accused with the crime. He submitted that there are other Co- existing circumstances, which on close examination would weaken or destroy the inference of guilt. Learned counsel cited: R.V. KANJI GORDHAN Criminal Appeal No. 58 of 1948, reported in (1948) EACA 84 where the Court of Appeal for Eastern Africa held that an

accused person cannot be convicted hereby because his evidence is disbelieved either in whole or in part, if there arises from the evidence as a whole reasonable doubt as to whether the prosecution has proved that he committed an offence. Counsel reiterated that the prosecution has the burden to prove the guilt of the accused beyond reasonable doubt. Counsel suggested that there were other people who could have killed the deceased.

Commenting on the evidence adduced by the prosecution the learned defence counsel said that there was the evidence of Kayizzi (pw3) who said that the accused had gone away when they wanted him to be around. Counsel pointed out that Kalumba (PW6) and Senoga (PW9) did not implicate the accused in the deceased's death. Counsel conceded that the prosecution adduced some evidence, which casts suspicion on the accused, but it is not enough to prove his guilt. He submitted that the accused is innocent. He invited court to acquit him.

The learned State Attorney Mr. Bakora Brian conceded that the prosecution evidence was purely circumstantial. He submitted that the prosecution case was based on past conduct of the accused and his conduct after the said homicide. Counsel ran through the prosecution evidence. Thereafter, he invited court to draw inferences that it was the accused who woke up at night, went to the deceased's house, woke her up, cut her and then took her to the path. Counsel invited court to believe the prosecution story. He submitted that all the circumstances point to the accused as the person who murdered the deceased. Counsel submitted that circumstantial evidence is very often is the best evidence. It requires intensified examination. He cited:

R V. Taylor Donovan (1928) 21 A.C.20. Counsel submitted that it is the law that before the court can base a conviction on circumstantial evidence it must be convinced conclusively that there are no other facts, which are inconsistent with the guilt of the accused. Counsel also cited. Serwadda V.Uganda (1978) HCB 175 Simon Musoke V.R (1958) E.A.715.

Learned counsel considered the defence case and invited court to disregard the accused's story. He prayed court to use the accused's previous conduct as alleged to corroborate the prosecution evidence.

He cited: R.V.Okecha S/o Ololia (1940) 7 EACA 74.

Counsel invited court and the assessors to find that the prosecution has proved all the ingredients of the offence of murder beyond reasonable doubt. He prayed court to convict the accused as indicted.

Where the evidence is circumstantial it must be such that it produces moral certainty beyond reasonable doubt that it is the accused person who committed the crime.

In order to support a conviction circumstantial evidence must point irresistibly to the accused person as the one who committed the offence for which he is charged. Circumstantial evidence must be inconsistent with the innocence of the accused person.

See: Charles Kayemba V.Uganda (1985) HCB 9. (CA).

Circumstantial evidence should be incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused person.

See: Uganda V. Stephen Mawa alias Matua (1992-93) HCB 65.

Simon Musoke V. R. (1958) E.A.715 (CA).

It is the duty of court and the assessors, in dealing with circumstantial evidence, to consider every possible set of circumstances, in the process of determining whether the evidence is incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused person. The court and the assessors must examine every other reasonable possibility, and test it against the evidence.

Senoga Dan (PW9) testified that on Saturday, 5th May, 2001 Kakumba (PW6) came to Sekamuli village. He found the witness and Kiberu building. It was at around 11.00am. Kalumba gave the witness money. The witness in turn gave money to Kiberu to go and buy pork for lunch. Kiberu went away but never returned. The witness worked with Kalumba (PW6) until 6.00pm. The two went home when they opened the door and entered the house they found the pork already fried. Kiberu had left it there. The witness and Kalumba (PW6) ate the pork and, thereafter, went to a drinking place owned by one nicknamed "Nairobi". They consumed local brew (Kwete). When they went home they found Kiberu in the house.

Kalumba Ephraim (PW6) testified that on 5/5/2001 he arrived at Sekamuli village between 12.00 and 1.00pm. He reached the home of Nalumansi Alice (PW2) his aunt, at 6.30pm. He was in the company of Senoga Dan (PW9). They went to Nairobi's place to drink. Kiberu found them drinking at that place, and he left them there. The witness and Senoga Dan (PW9) left the drinking place between 9.00 and 10.00pm. They found Kiberu in the house where they slept.

At least it is clear to me from the evidence of Senoga Dan (PW9) and Kalumba (PW6) that Kiberu John, the accused, was not in the company of these two witnesses from around mid-day on 5/5/2001 until night fell. It is also established from that evidence that on that day the accused did not share lunch or supper with the two witnesses. According to Kalumba (PW6) the accused dropped into Nairobi's drinking place briefly and went away. The earliest the two witnesses saw the accused was after 9.00pm at the house where they slept.

Senoga Dan (PW9) told court that the accused used not to greet the deceased. He confirmed this statement during cross-examination. Kayizi Fred (PW3) testified that he had witnessed a quarrel between the accused and the deceased slightly over a month before the deceased was found dead. Kiberu had picked a hoe and said to the deceased: "one day I will kill you".

Musajjakawa Ibrahim (PW4), the LC1 Chairman of Kikonda village, told court that the accused and the deceased used to live in the same house. However, six months before the deceased was found dead, the two had separated.

Nalumansi Alice (PW2) testified that the accused had been staying with the deceased from his birth. This witness told court that she was not aware of any reason why the accused left the deceased's house. She explained that the accused had grown and left his mother's house. However, when the witness was cross-examined about her police statement she admitted that she had told the police that the relationship between the accused and the deceased was not good. She had told police that the two had told police that the two had misunderstandings. I find that Nalumansi Alice (PW2) was inconsistent in her narration of the relationship between the accused and the deceased. She offered an explanation. She said that she had been gripped by fear. She said that she had nothing further to explain. She prayed court for forgiveness. It appears to me

that Nalumansi Alice (PW2) did not want to say things, which she thought, might implicate the accused. She withheld information, which would point a bad picture of the accused. In my view the inconsistency was over a matter, which did not go to the root of the case. However, I find that this witness was deliberately untruthful on this point.

It is open to the court to find that a witness has been substantially truthful even though she lied in some particular respect.

See: Hadijja Nasolo V. Uganda, Criminal Appeal No. 15/98 (CA).

The veracity of a witness must be assessed on his/her evidence as a whole.

I have found Nalumansi (PW2) untruthful in one part of her evidence, and I don't find her explanation satisfactory or reasonable. So I will treat, the remainder of her evidence with great caution.

See: Alfred Tajar V. Uganda E.A.C.A.

Criminal Appeal No. 167 of 1969.

Tomansi Omukono and Anor V. Uganda, Criminal Appeal No. 4/1997 (CA).

On the evidence on record I find as a fact that the accused and the deceased were on bad terms. I cannot think of any reason why Senoga Dan (PW9) would lie about the relationship between the accused and the deceased. So I do believe his evidence. Senoga Dan (PW9) testified that the deceased's house was in a distance of about 20 feet from the house where he and Kiberu were staying. So in my view, Senoga (PW9) was in position to notice the relationship between the two. In that kind of proximity I think the accused and the deceased were bound to bump into each other quite often.

The question to consider here is this:

What was going on in the accused's mind which would prevent him from greeting a woman who had looked after him in infancy?

Learned counsel Mr. Bwengye commented that the accused was not mad to burn the very fingers which had fed him. The accused himself denied having had any misunderstandings with the deceased. He said that he regarded the deceased as his mother and father. In light of the evidence on record I don't believe the accused on this point.

Senoga Dan (PW9) told court that at about 2.00am the accused moved over him from the bed and said that he was going to trap white ants. He remained outside for about 30 minutes. I cannot think of any reason why Senoga Dan (PW9) should have lied about this. So I do believe this evidence.

Kalumba (PW6) corroborated Senoga's evidence that Senoga (PW9) and the accused slept on the same bed in the bedroom. Senoga Dan (PW9) testified that the accused woke up and opened the door at about 7.00am. He went to the house occupied by Nalumansi (PW2). Senoga Dan (PW9) told court that the accused talked to Nalumansi (PW2) told court that on a Sunday morning at about 6.30am the accused came to her and said that he was looking for his mother, the deceased. According to this witness the accused said:

1. That he had opened the door of the deceased's house but she was not there; and
2. That his mother had called him at night to go and collect white ants but he had not gone there.

The question to consider here is this:

Had the accused actually gone to the deceased's house?

The accused told court that on the said Sunday morning he woke up and went to the deceased's house to prepare porridge for her. He said that he lit up a local cooking stove and put a saucepan containing water on the stove. He told court that he used to prepare tea for the deceased before she went for church service.

I found the story of the accused inherently probable. Musajjakawa Ibrahim (PW4) told court that he went to the deceased's house. He found the deceased's beddings in disarray. CPL. Susu Peter (PW8) testified that he went to the deceased's house, and when he entered he saw that her property was disorganised; her clothes were scattered in the bedroom.

In my view if the accused went to the deceased's house, opened the door, lit up a local stove, and cleaned the utensils, which the deceased had used, that was enough time for him to notice the state of things in the house. He would be expected to call out the deceased, and if there was no answer, he would try to find out what had happened. He would notice the state of the deceased's bedroom. If he had noticed the condition of the house he should have told Nalumansi (PW2) about it. So I do not believe the accused's story that he went to the deceased's house early in the morning because:

1. He was not on good terms with the deceased, and there is no way he could go to prepare tea or porridge for someone he could not even greet.
2. The disorganized condition of the house was there for any one to see but he never mentioned this to Nalumansi (PW2).

The next question to consider is this:

If the accused never went to the deceased's house why did he tell Nalumansi (PW2) that he had done so?

Nalumansi (PW2) testified that after a short while the accused came back and told her that his mother had been killed. He went away crying. Senoga Dan (PW9) testified that he heard someone crying in the courtyard. The accused said that his mother had been killed. Kalumba Ephraim (PW6) testified that when he woke up next morning he went outside. He saw the accused in the road coming uphill. He was crying that his mother had been killed

In my view the accused went to Nalumansi (PW2) to prepare her for the news to come of the discovery of the deceased's body. In order to claim that he had discovered the body the accused had first to be seen looking for the deceased. According to Nalumansi (PW2) the accused had told her that the deceased had called him at night to go and collect white ants but he had gone there. This was an explanation offered before the accused had discovered the body. Why did he have to explain? Why did he have to deny having met the deceased at night?

In my view the only reasonable inference to draw is that the accused already had knowledge of what had happened to the deceased.

In his statement the accused said that he picked a small jericin for collecting milk and he went with it to home of Nalumansi (PW2). He stated that he told Nalumansi (PW2) that he was going to collect milk. Nalumansi (PW2) did not mention the jericin for milk, or the fact that the accused was going to collect milk. I cannot think of any reason why Nalumansi (PW2) should have withheld this information if she knew it. In my view the story of taking a jericin to collect milk was intended to answer the question:

Where were you going when you discovered the body of the deceased?

In light of the misunderstandings between the accused and the deceased it is inconceivable that the accused would wake up every morning to go and collect milk for her.

The accused stated that he walked along the road on the way to collect milk. He saw a person who had fallen down. He stopped a short distance away but saw clearly, it was his mother who had fallen down. He went back crying. It is clear from this testimony that the accused did not examine the body. He did not call out. The question now arises:

How did he know immediately that the deceased had been murdered?

How did he know that the person lying down was completely dead?

The accused did not say that he called people to come and confirm that his mother was dead. He did not say that he wanted people to assist him establish what exactly had happened to his mother. He, all the same, concluded that his mother had been murdered. The only reasonable inference for me to draw is that he already had prior knowledge of what had happened to the deceased.

Dr. Mubeezi David (PW1) testified that on 6/5/2001 he proceeded to Kikonda village to perform a postmortem. He found a body, which was identified, to him by Namusoke Deborah as that of Nabbowa Violet. He examined the body. He found a deep cut wound, deep up to the skull on the occipital parietal area (at the back of the head). It was one deep cut wound. The deceased had multiple fractures of the skull in the same area. Brain tissue was visible. In his opinion the cause of death was head injury with external and internal hemorrhage.

Nalumansi Alice (PW2) testified that she went to the place where the body was. It had been thrown by the roadside. It was on a path used by vehicles. There was a polythene bag laid on

the ground. The body was lying on that bag. It was dressed in an old gomesi with no hands. Beside the body were dry reeds used to make a fire to attract white ants. There were sleepers. A box of matches was placed on the deceased's chest. The body was lying on its back. There was a black polythene bag tied at the back of the head. When the Doctor came he removed the polythene bag from the head. The witness saw hair on the head full of blood. She saw blood at the back of the head.

Musajjakawa Ibrahim (PW4) testified that he found Nabbowa Violet killed. She had a wound at the back of the head. He did not see any marks of struggle. CPL SUSU Peter (PW8) testified that he visited the scene at Sekamuli village. He found Nabbowa Violet dead. She had a cut wound on the hind part of her head. He saw no marks of struggle on the deceased's body. Musajjakawa Ibrahim (PW4) and CPL. Susu Peter (PW8) corroborated the evidence of Nalumansi Alice (PW2) describing the features at the scene where the body was found.

If the deceased's body was lying on its back, and there was a black polythene bag tied at the back of the head, and the body had one deep cut wound at the back of the head, and there were no marks of struggle on the body, then how did the accused know, by a mere glance at the body from a distance, that the deceased had been murdered?

Kalumba Ephraim (PW6) testified that the accused did not tell him and senoga (PW9) how he had discovered the body. He did not tell them where he was going. He did not come back to the house. He just by-passed the house. He proceeded uphill while crying.

Senoga Dan (PW9) testified that the accused did not come back to their house. He did not tell the witness anything about the death of his mother. He by-passed the house and went away crying.

If the accused had just accidentally discovered the body of his mother how did he immediately decide on what to do, or where to go, without sitting down to discuss even with the people he was staying with? How could a person who was going down to fetch milk discover his mother

murdered, and immediately decide within himself to go away without narrating to his friends how he had discovered the body, or better still, taking them to see where the body was?

Kayizzi Fred (PW3) testified that he heard cries of a person coming, and he saw the accused going uphill. The accused said that his mother had been killed. He continued crying and went upwards.

Musajjakawa Ibrahim (PW4) testified that he saw the accused crying as he walked by. The accused told him that his mother had been killed. He went uphill. He did tell the witness, an LC1 Chairman, where he was going. The accused did not come back.

Kayizzi Fred (PW3) testified that the LC1 Chairman asked him to follow the accused and bring him back. He started looking for Kiberu at 7.30 am but found him at 8.00am at Bamunanika Town, a distance of four miles from Kikonda village. He saw the accused boarding a taxi heading to Kampala.

SPC Mutebi Edward (PW5) testified he arrested the accused from a taxi at Bamunanika Trading Center. The accused had placed his hands on the seat in front of him and he was facing down.

In his statement the accused said that he had Shs.3000/= on him. He took a vehicle to go and inform the relatives of the deceased. Kayizzi Fred (PW3) testified that while at Baamunanika police post he asked the accused where he was going. The accused said that he was going to the city to inform his elder brother. CPL.Susu Peter (PW8) testified that the accused told him that he was going to inform relatives.

In my view the act of going to break sad news to relatives is noble and innocent. However, one would be expected to inform his house-mates and immediate neighbours what he was going to do. Kayizi Fred (PW3) testified that there was no other relative of the deceased at Kikonda village. Musajjakawa Ibrahim (PW4) testified that the accused had no other relatives in Kikonda village or in the neighbouring villages. The deceased's relatives were in Katikamu County. In the circumstances of the case the accused was entirely in the hands of his neighbours and the local authorities. Nalumansi Alice (PW2) was no stronger to the accused. The accused must

have seen Nalumansi (PW2) for many years previously. He should for many years previously. He should have sat down with Nalumansi (PW2) and others who answered the alarm to discuss the incident and decide on what to do. He should have taken the people to the place where he had seen the body. If the accused suspected that his mother had been murdered he should have been concerned to know what the local authorities would decide to do. The evidence on record was that the accused kept moving on up hill and he never went back to see the body. I find that the only reasonable inference to make is that the accused was eager to get away. I do not believe his explanation that he was going to inform relatives. If that had been the case he should have told at least one person where he was going.

I think the accused used his wailing as cover to go through the village without raising suspicion. I do not think that the accused cried along the way because of feelings of sorrow and great loss. He must have known that if he went crying the villagers would be shocked by the news and think that he was merely informing people around. At that time nobody would stop him or ask him where he was going. In my view the accused's plan had worked.

I had opportunity to see the accused in the dock when he was testifying. His demeanour when he made his statement gave a poor impression of him as witness. I particularly observed the accused as he narrated the part of the story relating to the discovery of the deceased's dead body, and what he did afterwards. As he narrated the discovery of the body I saw nothing on his face to show that he had any feelings for the deceased. He told above story; completely emotionless; without even pausing to relive the event as it unfolded. It was as if he was narrating a legend, which did not concern him. I also had opportunity to observe the accused when he talked about his real mother. He said:

"My mother had died first". Immediately upon making that statement the accused wept and he brought a handkerchief to wipe his eyes. His voice also changed. So in my view, the accused's demeanour, as he narrated facts relating to the death of the deceased, showed that he had no good feelings for her.

One assessor, Mr. Bashir Busuulwa Kayongo gave the opinion that the prosecution did not ably adduce enough evidence to incriminate the accused squarely in the crime. He advised court to

find the accused innocent and to set him free. I carefully listened to his opinion. I found that the assessor experienced difficulty in evaluating the prosecution evidence and establishing primary facts first. He equally had problems drawing inferences from proved primary facts. He lacked clear vision in trying to ascertain whether in respect of the inferences, which could be made, there was no reasonable explanation to them other than the guilt of the accused person. With due respect to the assessor he sounded as if he had got himself armed with the statement of the accused to fight off the prosecution evidence. He did not for a moment ask himself whether or not what the accused had said was the truth. So he sounded more like counsel for the accused than an impartial assessor of evidence on both sides. The assessor looked at the prosecution evidence as a challenge to the accused's story, and he was always quick to dispose of the challenge. Referring to the prosecution evidence that the accused used not to greet the deceased, the assessor said:

"I feel that this act of not greeting is not tanta mount to obstinate behaviour or disobedience. This could not deter the accused from fulfilling his Sunday routine"

For the reasons I have given I cannot follow the opinion given by this assessor.

The second assessor Mr. Serunkuma Isaac also gave his oral opinion. He listed the ingredients of the offence, which had to be proved. He listed the third ingredient of offence as this:

"That the unlawful act was accompanied by malice a forethought"

This ingredient had been conceded by learned counsel for the defence, Mr.Bwengye. It was not in dispute. On this ingredient the assessor said:

"The 3rd ingredient was proved by PW1 and PW8. There are some contradictions from PW2, PW4 and PW9. They have not proved this ingredient beyond reasonable doubt".

With due respect to the assessor he displayed some element of being confused. With regard to the ingredient whether or not it is the accused who was responsible for the deceased's death the assessor said:

"PW6 and PW9 were sleeping in the same house. The investing officer failed to charge them for the said murder. They were released within three days". So in the view of this assessor the accused should have been left free also. The assessor did not evaluate the prosecution evidence against the accused person. The assessor asked this question:

“If it was the accused who killed his mother in the night what was the intention of going there in the morning?” Apparently, the assessor found no answer to this question. So he considered the accused to be innocent. Apparently the assessor found the task of establishing primary facts from the evidence very difficult. Then drawing inferences from proved primary facts was not any easier task. In conclusion the assessor said this:

“The investigating officer failed to do his work. They just grabbed the accused from a Taxi and took him to police cells. Prosecution has failed to prove the third and fourth ingredients beyond reasonable doubt”. For the reason I have given I am unable to follow the opinion of the second assessor.

I have considered the evidence of Musajjakawa Ibrahim (PW4) and CPL.Susu Peter (PW8) about the condition inside the deceased’s house. In my view the state of the deceased’s property showed that whoever entered the deceased’s house did so far an unlawful purpose.

I have also considered the description made by Nalumansi (PW2) Musajjakawa (PW4) and CPL.Susu Peter (PW8) of the features found at the scene where the deceased’s body was lying. I have considered CPL. Susu’s estimation of the distance from the said scene to the deceased’s house as being about 100 meters. I have considered the evidence of Nalumansi Alice (PW2) that there was a black polythene bag tied at the back of the deceased’s head. In my view it may be inferred that the attacker of the deceased tried to prevent blood from dripping from the wound which had been inflicted on the deceased’s head. In my view this piece of evidence lends support to the theory that the body of the deceased was carried to the path where it was found.

Musajjakawa Ibrahim (PW4) testified that he saw blood in the bedroom of the deceased. There was blood on the bed and on the and on the mat, which was on the floor below the bed. He saw blood on the floor of the bedroom. A lot of water had been powered in the bedroom.

CPL.Susu Peter (PW8) testified that he saw no signs of blood. I think this witness concentrated his attention on the place where the deceased’s body was found. He was Pre-occupied by drawing a sketch plan of the place. It is possible he paid little attention to the deceased’s bedroom. I think Musajjakawa Ibrahim (PW4), as the LC1 Chairman of the village; he had more time to observe details. Since the deceased had no other relatives in the village the LC1

Chairman had to carry out additional responsibilities in respect of the deceased's home and property. I think this gave him opportunity to check everyone and to notice every thing. I cannot think of any reason why the LC1 Chairman should have claimed to have seen blood when it was not there. I prefer his evidence to that of CPL. Susu Peter (PW8) on this point. In my view the evidence of Musajjakawa (PW4) of seeing blood in deceased's bedroom links well with the evidence of Nalumansi (PW2) of seeing a polythene bag tied at the back of the deceased's head, where there was a deep cut wound. I infer from the above evidence that the deceased was fatally injured in the house and she was carried to the path where the body was found. In my view this evidence suggests that there were more than one person involved in killing the deceased. The evidence also suggests that the killing of the deceased was pre-arranged.

The intention to kill may be inferred from the nature of the harm which caused the death. There is no burden on the prosecution to prove the nature of the instrument which was used in inflicting the harm , nor is there any obligation to prove how the instrument was obtained. I think that if there is sufficient evidence from which it can be inferred that some lethal weapon was used in the prosecution of an unlawful common design resulting in death all those proved to have shared in that common design would be responsible for the killing, which ensued.

See: SOLOMON MUNGAI AND OTHER V.R (1965) E.A 782 (C.A).

It is my view that the circumstantial evidence adduced by the prosecution in this case is incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused person. I find that the conduct of the accused was inconsistent with his innocence. I find that the facts proved by the prosecution are such that there are no Co-existing circumstances, which can destroy the inference of guilt. In my view the evidence points irresistibly to the accused person as having participated in the killing of the deceased. I am of the opinion that the accused acted in concert with others unknown. In my view the failure on the part of the police to track down possible accomplices does not make the accused innocent when there is evidence which clearly implicates him.

I find that the prosecution has proved beyond reasonable doubt all the four ingredients of the offence of murder against the accused person. In the result I hold that the accused participated in

the murder of the deceased. I find him guilty of murder contrary to section 183 of the Penal Code Act, and I convict him accordingly.

MOSES MUKIIBI

JUDGE

14/3/2003.

14/3/2003 at 4.55 pm.

Mr.Bakora SA for State.

Mr. Bwengye SB for the accused.

Accused person is in court.

Ngobi: Court Clerk/Interpreter.

Court: Judgment is read in open court.

MOSES MUKIIBI

JUDGE

14/3/2003.

Court: At the beginning of this trial the accused informed this court that he was born on 12/10/1985. He was on remand at UPPER PRISON Luzira.

The court ordered the transfer of the accused from Luzira prison and remanded him at Naguru Remand Home. There is uncertainty about the age of the accused. I direct that the Registrar High Court makes arrangements with Naguru Remand Home to have the accused examined by a Doctor so that a report can be furnished to court about his age. This case is adjourned to Thursday, 20/3/2003 at 10.30 am for court to receive the Doctors Report. The accused is remanded at Naguru Remand Home.

MOSES MUKIIBI

JUDGE

14/3/2003.

20/3/2003 at 12.20 pm.

Mr. Bakora SA for State.

Mr. Bwengye on SB for the accused

Accused/convict is in court.

Ngobi: Court Clerk/Interpreter.

ORDER

Court: At the beginning of this trial the accused/convict informed court that he was born on 12/10/1985. For purposes of commencing the trial this court accepted the statement of the age by the accused/convict. An order was made transferring him from Luzira Prison and remanding him at Naguru Remand Home. Now the accused/convict has been convicted. A trial Judge is not free to determine the age of an accused person simply by observing him in the dock. In doubtful cases the court has to call for such expert or other evidence as is available.

See: Ndahura George V.Uganda Supreme Court Criminal Appeal No. 31/91 (unreported).

Njuguma S/O Karanja V.R (1954) 21 EACA 196 (CA).

In the instant case the registrar of this court has arranged for the medical examination of the accused by a medical officer at Forensic Consultation Clinic. A report has been furnished to court which shows that the accused's age is estimated to be 19 years. In the instant case the offence was committed in the night of 5th – 6th May, 2001. It, therefore, appears to this court that

the accused/convict was under the age of 18 years in May, 2001, when the offence was committed.

According to the provisions of S.104 (1) of the trial on Indictments Decree, 1971, a sentence of death can not be pronounced on or recorded against a person convicted of an offence, if it appears to the court that at the time when the offence was committed he was under the age of 18 years, but in lieu thereof the court shall order such person to be detained in safe custody pending an order made by the Minister Under Subsection (2) of S.104.

In the result it is hereby ORDERED that the accused/convict, KIBERU JOHN, be detained at UPPER PRISON Luzira pending the order of the minister under Section 104(2) of the Trial on Indictments Decree, 1971. Order accordingly.

MOSES MUKIIBI

JUDGE

20/3/2003.

