

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

HCT-05-CR-SC.0080-2005

UGANDAPROSECUTOR

VS

TUMUHAIRWE DAVIDACCUSED

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

The charge against Tumuhairwe David is that of murder, contrary to sections 188 and 189 of the Penal Code Act. Four witnesses were called by the prosecution to prove its case. Festo Kafura was PW1, Gosbert Kafura was PW2, Irene Kazarwa was PW3 while Katwiromunda James testified as PW4. Medical evidence contained in the post mortem report was agreed under section 66 of the Trial on Indictment Act. The report is exhibit P.1.

Briefly the prosecution case is that on the 17th February 2001 accused, who was an employee of both PW1 and the deceased, remained at home with the deceased. Earlier the deceased had sold off a bull and had entrusted the accused with the task of counting the proceeds of the sale. Later when PW2 had returned from an errand to sell milk he had sighted accused at home but accused had somehow gone away. Accused had however returned later and had taken part in forcing the door to the deceased's house open. After the door was opened the deceased's body was found in the house and soon afterwards accused had left the locality. He was afterwards arrested about 30 miles away. The body of the deceased was found lying face down under the deceased's bed in the family bedroom. The doors both to the house and the bedroom were found locked earlier. The cause of death was crushed brain after the forehead was hit by a blunt object, probably.

In his defence accused made a sworn statement. He denied involvement in the alleged offence. He said he had taken cattle out to graze and did not know how the deceased met her death.

The onus is on the prosecution to prove the case against the accused person beyond reasonable doubt. See *Sekitoleko vs Uganda [1967] EA 531: Woolmington vs DPP [1935] AC 462*. An accused person bears no duty to prove his innocence but his conviction depends upon the strength of the prosecution case. The prosecution ought to prove the following ingredients beyond reasonable doubt:

- a) Death of the deceased;
- b) An unlawful act or omission resulting into the death of the deceased;
- c) Malice aforethought and
- d) Participation of the accused in the offence.

Regarding the fact of death of the deceased all the prosecution witnesses testified that the deceased died. Accused also gave evidence to the effect that the deceased died. Agreed medical evidence shows that the body which was examined was that of Janeti Kafura, the deceased. I am satisfied that the prosecution proved this ingredient beyond reasonable doubt.

Concerning the second ingredient, the killing of any person is unlawful except where such killing is accidental or excusable by law. See *Gusambizi s/o Wesonga* (1948) 15 EACA 63. The defence has not rebutted the presumption that the killing was unlawful. I am satisfied that this ingredient also has been proved by the prosecution beyond reasonable doubt.

The prosecution ought to prove that there was malice aforethought. There is no direct evidence of how the deceased met her death. Malice aforethought may however be gathered from surrounding circumstances such as the number of injuries inflicted, the part of the body where the injury was inflicted (whether it is a vulnerable part or not) the nature of weapon used and the conduct of the assailant before and after the attack. See *Uganda v Ochieng* [1992 —1993] HCB 80.

According to the post mortem report there was a big cut wound on the deceased's forehead and the brain was crushed probably by a blunt object. I am satisfied that whoever inflicted that injury on the head, a vulnerable part of the human anatomy, knew that death would most probably

result and did so with malice aforethought. Furthermore whoever assaulted the deceased had left the victim either dead or ailing before locking the house. If the victim was already dead the assailant or assailants had had the mission accomplished and did not want any connection with the death of the deceased. On the other hand if the deceased was at the time not yet dead whoever assaulted her must have intended to shut out any possible assistance. Needless to say the assailant or assailants left the scene, a sign that they had malice aforethought. According to PW2 there was a string tied deep in the neck of the deceased. No other witness makes mention of this. The post mortem report does not mention it either. Finding this piece of evidence unsupported I find it of no value. Nevertheless I am satisfied that whoever assaulted the deceased did so with malice aforethought. The prosecution has proved this ingredient beyond reasonable doubt.

The prosecution has the onus to prove that accused participated in the alleged crime. There is no direct evidence concerning who brought about the death of the deceased. What evidence is available is circumstantial. Where a case depends exclusively on circumstantial evidence the court must, before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. That was the holding of the Court of Appeal for East African in ***Simon Musoke vs R*** [1958] EA 715 which added that before drawing the inference of the guilt of the accused from the circumstantial evidence it is necessary to ensure that there are no other co-existing circumstances which would weaken or destroy the inference.

In the instant case the circumstantial evidence relied on by the prosecution to prove the charge against the accused includes the fact that early on the day in issue PW2 and PW3 had seen accused in the company of the deceased and others at home. Secondly there is the evidence of PW2 that earlier on the deceased had sold a bull and had given money paid to her for the bull to accused to count for her. There is no evidence apart from that of PW2 regarding the sale of the bull and the money and in any case the money, if any could have been disposed of by someone else. There is also the testimony of PW2 that he found it significant to have espied accused at a distance on his return from Biharwe only to lose sight of accused later. Respectfully, I do not find this noteworthy given that accused was generally around the premises and was available at the time the house was forced open. As admitted by PW2 in his testimony accused's

movement was not restricted as he could go outside the vicinity of the home to entertain himself and others. PW2 found it inordinate that when the body of the deceased was discovered inside the house accused appeared to grieve more than PW2, the actual grandson. Here again I find nothing significant tending towards accused's involvement in the crime given that emotions are subjective. As for the 'suspicion that accused ran away because he was guilty, accused in his defence stated that he escaped when he heard that porters were to be arrested as suspects and that he feared being arrested for something he had not done. PW2 himself told court that the issue of arresting porters as suspects had been discussed. Even when accused ran away he did not hide his identity. It is his evidence and that of PW4 that he gave to PW4 his proper identity and told him that he had run away because he feared being arrested. In all the evidence given by the prosecution I find nothing pointing towards accused's participation in the crime. The prosecution has been unable to prove this ingredient beyond reasonable doubt.

The gentlemen assessors in their joint opinion have advised me to find accused not guilty of the charge and to have him acquitted. For the reasons I have given in the course of this judgment I agree with that opinion. Accused is accordingly acquitted.

P.K. Mugamba

JUDGE

11th April 2005