

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CR-SC-0191 OF 2002

UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

KAFURUKA ALICE :::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. ELDAD MWANGUSYA:

JUDGMENT:

The accused KEFURUKA ALICE is indicted for the offence of murder c/s 188 and 189 of the Penal Code Act. The particulars of the offence are that she, on the 10th day of January 2002 at Mbaguta cell Kamukuzi Division, Mbarara District murdered AHEREZA FLAVIA.

The accused denied the indictment upon which the prosecution assumed the murder of providing all the ingredients of the offence of murder which are as follows:-

- (1) That as a fact Ahereza Flavia the person named in the indictment is dead.
- (2) That her death was unlawfully caused.
- (3) That her death was caused with the requisite malice aforethought.
- (4) That the accused was responsible for her death or participated in her killing.

The prosecution adduced evidence of five witnesses to establish the above ingredients. In discharging the ingredients the prosecution is required to prove all the of them beyond any reasonable doubt. This burden does not shift and the accused never assumes the burden of proving his or her innocence and in case of any reasonable doubt the doubt is resolved in favour of the accused who will be entitled to acquittal. This court is enjoined to evaluate the entire case before arriving at any conclusion as to the guilt or innocence of the accused and this entails evaluation of the

prosecution case together with the defence of the accused to avoid a decision of the case based on facts adduced from one side.

The case for the prosecution is briefly that the deceased, NUWAHEREZA FLAVIA was a student at Mbarara Central School. She was in Senior Four. Sometime in April 2002 she complained of stomach and requested her sister, NAHURIRA DIANA (PW1) to escort her to a nurse so that she receives treatment. They went together to a place in Ruhano where they found the accused in the compound. The accused and deceased went inside the house leaving Diana outside where she was offered a chair. The accused and deceased spent about twenty minutes inside the house. When they came out the accused assured the deceased that she would be alright. The deceased and her sister left and on their way the deceased told Diana that the purpose of her visit to the accused was to get an injection to terminate a pregnancy and that she had been injected through the navel (umbilical area). Following this visit the deceased developed complications which necessitated another visit to the accused. This time she went with another of her sisters, AINE PHIONA (PW4). Aine was left outside while the accused went inside the house where they spent about forty minutes. The deceased later left with her sister whom she did not tell what had

transpired inside the accused's house. Consequent to these visits the deceased started complaining of severe headache and she developed a stiff neck. She was rushed to the clinic of DR. TURIMU CALEB (PW2) a gynecologist obstetrician who started the deceased on treatment for meningitis. The deceased did not respond to the treatment administered and she died the following morning at 9.00 a.m.

According to DR. TURIMU the deceased died of septicemia which is a general term for an infection in the blood system. A postmortem examination was performed by DR. SENDI BWOCH a specialist pathologist. On opening the body of the deceased he found a dead baby of 34 to 36 weeks gestation. There was a punctured perforation on the front top side of the uterus which is known as a fundus. The perforation could easily be seen because it was emitting gas bubbles. The perforation had reached deep to the fetus and the amniotic fluid had leaked into the abdominal cavity. The leaking had developed into an infection which extended to the blood. There was pus in various cavities within the abdominal cavity behind the uterus. The baby in the uterus was macerated. The cervix of the uterus was swollen but not bruised and the mucus plug was intact. The urinaus bladder was full of urine.

The cause of death was severe sepsis associated with death of a baby in the uterus resulting in depletion of the mother's factors that control bleeding. This is associated to multiple organ failure leading to death. These complications were as a result of criminal interference with the pregnancy.

On the other hand the accused denied having killed the deceased. Although she admitted having seen the deceased with her sister Diana she did not administer any drugs to her. She only advised them to seek medical attention elsewhere because the decease was badly off. The accused admitted that she was a herbalist but only gave the deceased a glass of orange to drink. She denied the visit of the deceased with Fiona.

From the above facts the defence conceded that the prosecution had proved the first ingredient of the offence of murder and from the testimony of Diana Nahurira (PW1) Phiona Aine (PW\$) DR TURIMU CALEB (PW2) and DR. SENDI BWOGI (PW4) there is not doubt that the person named in the indictment is dead. These witnesses include the sisters of the deceased who had taken her to DR. TURIMU's clinic where she died. DR.

TURIMU himself who treated the deceased before she died and DR. Sendi Bwogi who performed post mortem examination. I make a finding that the prosecution proved this ingredient beyond any reasonable doubt.

The prosecution also established that the death of the deceased was unlawfully caused. There is a presumption that in all cases of homicide death is unlawfully caused and is rebuttable if it is proved that death was caused accidentally or is excusable in law. This presumption was not rebutted in this case because according to DR. SENDI BWOGI the complications from which the deceased died were as a result of a criminal termination of a pregnancy and since the action of whoever killed the deceased was criminal it follows that the resultant death was unlawful. He finding of this court is that the death of the deceased was unlawfully caused.

I will discuss the issue of the participation of the accused next. The prosecution adduced evidence that the deceased visited the accused on two occasions. After the first visit she informed her sister that the accused had injected her through the navel to terminate a pregnancy. DR. BWOGI who performed the postmortem ascertained that the deceased had been

pregnant and a crude method was used to terminate the pregnancy. This medical evidence is consistent with what the deceased told her sister following the 1st visit. The accused admitted that the deceased visited her with her sister but stated that the deceased was in such a bad condition that she advised them to go and seek medical attention. Diana Nahurira who testified to the first visit did not know of the reason they had gone to the accused's house until the deceased told her what had transpired. If the deceased was in the serious conditions described by the accused this witness would have noticed it. Then the second visit which the accused denies. From the evidence Aine Phiona who went with the deceased on this visit I find that this visit took place and I see no reason as to why the deceased went back if the accused had chased her away on the first visit. This second visit was a follow up to the first visit as apparently the deceased had developed complications.

Mr. Dhabangi raised an issue with the fact that both visits followed the same pattern and concluded that it raised suspicion. The pattern complained of was that on both occasions only the deceased and the accused went inside the house leaving the escorting sisters outside. I do not see anything strange with the visits following a similar pattern because

whatever was taking place was meant to be a secret between the accused and the deceased who shared the secret with one of her sisters. But Phiona Aine came to know of the secret while at DR. TURIMU's clinic when the deceased revealed that the accused had injected her to terminate her pregnancy. There was the issue of the name given by the deceased as to the woman who had injected her. Phiona testified that the name given by the deceased was Tereza. The accused is known as Alice. To me since both sisters of the deceased physically identified the accused as the woman at whose home they went to discrepancy in the name is immaterial. It may as well be that the accused was using the name Tereza to hide her real identity as the act of abortion is a criminal act. I therefore find that the prosecution has proved that the accused is the person who injected the deceased with a substance that caused the death of the foetus in her womb leading to an infection as a consequence of which the deceased died.

The last issue is whether if the intention of the accused was merely to terminate a pregnancy the resultant death of the deceased was caused with malice aforethought. According SMITH and HOGA's Criminal Law cases and materials sixth Edition at page 396 an intention to kill, or to

cause grievous bodily Harm to a foetus amounts to murder because the mensrea of murder is established. The learned authors come to this conclusion after quoting a passage from the case of Attorney General's Reference (No. 3 of 1994) 1996 2 ALL ER where it was stated as follows:

“In the eyes of the Law the foetus is taken to be part of the mother until it has an existence independent of the mother. This is an intention to cause seriously bodily injury to foetus is an intention to cause serious bodily injury to a part of the mother, just as an intention to injure her arm or leg would be so viewed. This consideration of whether a charge of murder can arise where the focus of the defendants intention is exclusively the foetus falls to be considered under the head of transferred malice as the case where the intention is focused exclusively or partially on the mother herself.” (Underlining mine for emphasis).

So the doctrine of transferred malice is applicable even where the intention is to terminate a life of a foetus which is not an independent human life and on this doctrine the offence committed is murder c/s 188 and 189 of the Penal Code Act because malice aforethought is established.

The assessors advised this court to convict the accused for manslaughter because in their opinion malice aforethought was not established. This to them was because the accused was motivated by money to do the act which was not intended to kill the deceased but the unborn baby. I do not agree with this opinion because a distinction has to be drawn between an intention and a motive and in this case the motive is immaterial since it has been established that the accused had the intention to kill which is the essential element in establishing malice aforethought.

In conclusion, therefore, I find that the prosecution has established all the essential ingredients that constitute the offence of murder. The accused is found guilty and is accordingly convicted as charged.

Eldad Mwagunsya

JUDGE

3/2/2006_

