

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

HCT-05-CR-SC-0001-2006

UGANDAPROSECUTOR

VS

A1 BYAMUGISHA MOSES alias PEREGESI)

A2 NAMARA MASON SIZON)

A3 NUWAMANYA NELSON KASHEIJA)ACCUSED

BEFORE: THE HON. MR. JUSTICE P K MUGAMBA

JUDGMENT

Byamugisha Moses alias Peregesi (A.1), Namara Mason Sizon (A.2) and Nuwamanya Nelson Kasheija (A.3) are jointly charged with murder, contrary to sections 188 and 189 of the Penal Code Act.

The prosecution called evidence of ten witnesses. PW1 was Mwesigwa Asafu, PW2 was Tukashaba Winnie, PW3 was Oworinawe Milton, PW4 was Eriesafu Kyampaka, PW5 was Mbagaya Manasi, PW6 was Tumuhimbise Dick, PW7 was Turyashaba Pascal, PW8 was Karuru Stephen, PW9 was Zaribaberi Katugutu, while D/C Akampa Benedict was PW10. The death certificate was agreed as evidence of death.

All accused persons denied participation in the offence alleged against them. They gave sworn statements in their defence but called no witnesses.

In brief the prosecution case is that on the night of 9th July 2002 the deceased was walking back to a clinic nearby from her home. She was carrying some money and food with her. On the way she was set upon by A1, A2 and A3 who assaulted her with a thick stick variously described as used for pounding or a hoe handle. Her husband eventually found her lying in a banana plantation with blood flowing from her head. She was carried to the clinic but was later taken to Nyakibare Hospital owing to the severity of her injury.

She died soon after her arrival at the hospital. Her death was caused by injuries she sustained when she was assaulted on the head. There was evidence of strange activities and movements by the accused persons on the night material to this case. All the three accused were consequently arrested and charged with this offence.

It is the duty of the prosecution to prove the case against the accused persons beyond reasonable doubt. See **Sekitoleko vs Uganda** (1967) EA 531. Any weakness in the prosecution case should be resolved in favour of the accused. Where the charge is murder the prosecution ought to prove the following ingredients:

- i. That the deceased died,
- ii. That the killing of the deceased was unlawful,
- iii. That there was malice aforethought, and
- iv. That accused participated in the offence.

It was the evidence of all prosecution witnesses that Nyakahima Jovanis died. Exhibit P1 is the Death Certificate. It shows Nyakahima died. The death is not contested. I find that this ingredient has been proved beyond reasonable doubt.

It is a presumption of the law that the killing of a human being is unlawful except where it is accidental or excusable by law. See **Gusambizi Wesonga vs R** (1948) 15 EACA 63. Unless this presumption is rebutted by the defence the presumption remains. In this case the defence has not rebutted the presumption. Consequently I find this ingredient has been proved beyond reasonable doubt also.

Generally malice aforethought is the intention to bring about the death of some person, whether the person intended is the one killed or not. The facts of this case do not show how the deceased came to be assaulted. All there is is circumstantial evidence. It is possible however to infer malice aforethought from surrounding circumstances such as the type of weapon used, the part of the body on which injury is inflicted (whether that part of the body is vulnerable or not), the number of injuries inflicted as well as the conduct of the attacker or attackers before and after the attack. See **Tubere s/o Ochen vs R** (1945) 12 EACA 63. According to the Death Certificate death was due to brain injury following assault. It is not clear what was used in the assault from

reading of the certificate. However a thick stick was found near the scene where the deceased was found by PW4 after injury. It is not clear from the record what the proximity between the two spots was. It is unclear also whether the blood and hair said to have been on the stick were human and if so whether they were extracts from the deceased. In the circumstances one cannot determine that the stick Exhibit, P.2, had been used to assault the deceased. The type of weapon used still eludes me. Nevertheless whoever assaulted the deceased did so on a vulnerable part of the body and must have intended the deceased's death. The fact that the assailant or assailants attacked an old lady who was on her own and abandoned her to her fate is also indicative of the intention to bring about her death.' I am satisfied the prosecution has proved malice aforethought beyond reasonable doubt.

PW1 testified that he had bought land from the father of A1 and that on several occasions A.1 had expressed displeasure about the sale. He had vowed to kill either PW1 or members of his family. PW8 stated that A.1 was a known bully in the area and even he as Chairman of L.C 1 lived in fear of A.1. He testified that PW1 had reported threats on him by A. 1 and that a council meeting had been held resulting in the banishment of A.1 from the area. For the record PW8 said he did not have evidence of that with him. PW4 stated that the deceased had told him that A.1 was one of the assailants. PW5 gave evidence that on the night in issue he had seen A. 1 and others of the accused talking discreetly. He never knew what they talked about but later he saw A.1 pick Exhibit P.2 from an eatery belonging to a lady. A.1 had then joined A.2 and A.3. He saw all accused persons walk together towards the road to Rwashamaire. It was his evidence he saw A.1 pick the stick at a distance of 50 yards and he recognized it as Exhibit P.2. The evidence of PW6 was that on the material night he had seen A.1 and A3 go by the place where he was roasting meat. They passed two metres away. The stick was being carried by A.3. He was able to identify the two accused because he knew them before and there was light emitted by a lantern and from the moon. He saw A. 1 and A.3 head towards Rwashamaire. It was his evidence that later on the people carrying the deceased after the assault also came from the direction of Rwashamaire. The testimony of PW7 was that he had gone near a stream after the deceased died and there he had seen A.1 washing a shirt and trousers. A. was having only a pair of underwear on. The clothes A. 1 washed had blood. A. 1 had moved away and later he had worn the wet clothes he had been washing. PW7 did not inquire of A. 1 concerning this strange spectacle because he feared him as

a rogue and bully. PW9 testified that exhibit P.2 was found in his banana plantation about 40 metres from his house and 10 metres from the house of Byampa where A. 1 lived.

According to PW2 on the material night when she was attending to her sick child at a clinic A.2 had gone there after the deceased left for home. A.2 had told her he wanted to buy drugs at the clinic for his sick father. He bought no drugs on the occasion. When PW2 answered A.2 on inquiry that the deceased had gone home to collect food and money, A.2 had left. Later PW2 was told by the deceased after the assault on her that A.2 was one of the people who had assaulted her. It was the evidence of PW3 that on the material night when the deceased went home to collect provisions for those people at the clinic A.2 had visited and asked her if she wanted to take food and money to the clinic. The deceased had replied in the affirmative whereupon A.2 had gone away. Later A.2 returned after the deceased had left for the clinic. He went following the direction he had taken. Later the deceased told PW2, PW4 and PW5 that A.2 was one of the people who assaulted her. PW5 testified that he had earlier on seen A.2 talking discreetly with the other accused persons.

The deceased mentioned A.3 as one of the people who had assaulted her on the night in issue. This she disclosed to PW4 and PW5. It was PW5 who testified that earlier in the evening he had seen A.3 with the other accused having discreet discussions. He did not know what they discussed, he said. PW6 said while he roasted meat in the trading centre A.3 had passed within two metres of where he was, carrying the stick, Exhibit P.2. He had been able to identify him as there was light from the lantern and moonlight.

The accused persons were all well known to the prosecution witnesses as they lived in the same locality.

In their defences the accused persons stated that they were not present at the scene. It was a defence of alibi throughout. When the defence is of alibi the defence is not under a duty to prove it. It is the prosecution which is responsible to disprove the alibi by adducing evidence which places the accused person squarely at the scene of crime. See **Aniseth vs R** [1963] EA 206. According to Byamugisha (A.1) he was never in the village where the offence took place. He lived elsewhere, he said, and did not know the deceased or the prosecution witnesses except his

uncle PW8. A.2 on the other hand said at the time of the alleged assault he was at his home. A.2 stated that he did not leave his home either on 9th July 2002 or on 10th July 2002. He was arrested on 11th July 2002 when he was attending a funeral at the home of the deceased. On his part A.3 said while he knew the deceased he did not know how she had died. At the time of his arrest, he said, he did not know she had died. He said he did not know A. 1 before his arrest and denied involvement, in the offence.

Where evidence is circumstantial, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt if an inference of guilt is to be justified. See *Simon Musoke vs R* [1958] EA 715. I have looked at the evidence of various prosecution witnesses regarding Exhibit P.2 — the stick. It is not claimed by anyone as his or her tool so that it could gain some identity. It was said to have been seen at night and recognized later after the death of the deceased. No special features mark out the stick seen at night as the one presented in court as Exhibit P.2. I find no significance in the evidence by PW5 that he had seen the three accused talking discreetly. He had no evidence of what their exchanges could have been about, if he did see them. There was also mention of the road heading towards Rwashamaire. Respectfully I do not see anything significant about this as it could have been possible the accused persons and the deceased never met along the road that night. There was the reported washing of clothes by the stream. The clothes were said to contain blood. But it was the testimony of PW7 also that the person who was washing the clothes was at a distance and went away. I am not persuaded by the evidence that the witness actually saw blood or if it was blood it was blood drawn from the deceased.

Next I must consider the statements allegedly made by the deceased to PW2, PW4, and PW5 implicating the accused persons. A statement in that vein is known as a dying declaration. In *Tindigwihura Mbahe vs Uganda* Criminal Appeal No. 9 of 1987 (unreported) the Supreme Court of Uganda stated:

‘.....evidence of dying declaration must be received with caution because the test of cross-examination may be wholly wanting; and have occurred under circumstances of confusion and surprise; the deceased may have stated this inference from facts concerning which he may have omitted important particulars for not having his attention called to

them. Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is usually more difficult than in daylight. The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case. It is not guarantee of accuracy. It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased, made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration

See also *Oketh Okale and others vs Republic* [1965 EA 555- and *Tomasi Omukono And Another vs Uganda* Criminal Appeal No. 4 of 1977.

I do not find satisfactory corroboration of the dying declaration. Rather what happened most likely was a hotch potch of various incidents ingeniously married and designed to make it appear like the accused persons were involved in the offence. I am not satisfied the prosecution has disproved the alibi of any of the accused persons.

Consequently I do not find that any of the accused persons participated in the offence.

The gentlemen assessors gave me a joint opinion in which they advised me to find accused persons guilty and convict them as charged. For the reasons I have given in the course of this judgment I respectfully disagree with the opinion. I find accused persons not guilty and acquit them of the charge.

P.K. Mugamba

JUDGE

20th June 2006