

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA ATM BARARA

HCT-05-CR-CSC-0081-2006

UGANDAPROSECUTOR

VS

A.1 TUMUHAIRWE JONAH

A.2 MUGISHAJUSTUS alias KAMARAHO

A.3 MUHUMUZA RICHARDACCUSED

A.4 MUTUNGI ROBERT

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

JUDGMENT

Tumuhairwe Jonah (A.1), Mugisha Justus alias Kamaraho (A.2), Muhumuza Richard (A.3) and Mutungi Robert (A.4) were initially charged jointly for the offence of murder, contrary to sections 188 and 189 of the Penal Code Act. The prosecution called twelve witnesses to prove its case. Ampeire Oscar was PW1, Asiiimwe Innocent was PW2, John Atwine was PW3, John Babimanya was PW4, All Lugudo was PW5, No. 28218 D/C Tuhabwe Robert was PW6, No. 18279 D/Cpl. Mushabe Denis was PW7, No. 18946 D/Sgt. James Musinguzi was PW8, Joy Kiyampeire Kamukama was PW9, Vincent Mubangizi was PW10, Atuhaire Scovia was PW11 while No. 27655 D/C Calisti Ayamba was PW12. Medical evidence of the postmortem examination as well as that on Police Form 24 concerning examination on the accused persons was agreed and admitted under S. 166 of the Trial on Indictments Act. The postmortem report is Exhibit P.1; the report by the Government Analyst is Exhibit P.6. First information at Kazo Police Post by A.1 is Exhibit P.9.

At the close of the prosecution case A.4 was found with no case to answer and was acquitted. In defence A.1 gave an unsworn statement while A.2 and A.3 made their statements on oath.

Briefly the prosecution case is that on the night of 30th September 2004 all the accused persons killed Edgar Mwijukye at his house in Kakoni village. Thereafter the deceased's body was

carried away to A.2's land which is 3 kilometers distant. The body had a big cut wound on the neck and was found abandoned in the bush. A.1 went and reported her involvement in the killing of her husband, the deceased, to Kazo Police Post. Others of the accused were eventually arrested and charged accordingly.

The onus is on the prosecution to prove the offence against an accused person beyond reasonable doubt. It is not the responsibility of the accused person to prove his or her innocence. See *Sekitoleko v Uganda* [1967] EA 531. Where the offence is murder the prosecution ought to prove that the person alleged to be dead is actually dead, that the killing of the deceased was unlawful, that there was malice aforethought and that accused perpetrated the offence.

Regarding the first ingredient, all prosecution witnesses excepting PW5, PW8 and PW9 testified that Edgar Mwijukye died. Medical evidence in Exhibit P.1 was agreed and shows the postmortem examination was carried out on the body of the said deceased. Even the accused persons in their respective defences stated that Edgar Mwijukye died. I find this ingredient has been proved by the prosecution beyond reasonable doubt.

The prosecution must prove that the killing was unlawful. It is a presumption of the law that every homicide is unlawful except where it results from an accident or where it is allowed for by law. The deceased was cut on the neck and the wound was very deep. That wound affected the trachea and the great blood vessels. There is no evidence to rebut the presumption that the killing was unlawful. In the circumstances I find this ingredient also has been proved by the prosecution beyond reasonable doubt.

The other ingredient to be proved by the prosecution is malice aforethought. This is the intention to bring about the death of a human being. Malice aforethought may be direct or could be gathered from surrounding circumstances. In her unsworn statement in defence A.1 stated that a knife was used to inflict injury on the neck of the deceased after he returned home and found A.1 having sexual intercourse with another man in the house. It is possible to infer malice aforethought from the type of weapon used to inflict injury, the part of the body on which injury is inflicted (whether or not it is a vulnerable part of the anatomy) and the conduct of the assailant or assailants before and after the attack. See *Tubere s/o Ochen v R* (1945) 12 EACA 63. A knife

was used in this case to inflict a wound on the neck where not only the trachea was affected but also the vital vessels in the neck. The assailant or assailants carried the body away to a distant place where they abandoned it in the bush. I find all this evidence points to malice aforethought. The prosecution has proved this element beyond reasonable doubt.

The prosecution must prove beyond reasonable doubt that the accused perpetrated the offence. It is the evidence of PW2 that on the night in issue he saw A.1, A.2 and A.3 and that he was forced by A.2 to carry with them the deceased's body to a destination he no longer recalls. Significantly he did not report to any authority or individual that A.2 using a spear had forced him to carry the body. I need note here that A.2 was known as a bosom friend of the deceased, It is also the evidence of PW1 and PW4 that accused went first to the deceased's bedroom and later beckoned others to go there and see blood spots which were there. I note that A.2 participated in the search for the deceased's body and never attempted to escape. It is PW3 who implicates A.2 and A.3 in the murder of the deceased. Further evidence is given by PW8 who testified that A.1 had mentioned A.2 to him in connection with the murder of the deceased. However A.1's defence relating to how the deceased came to die does not involve A.2. It was A.1's defence that the deceased was killed by someone, not indicted, on the night of 30th September 2004. On 31st October 2004 she reported the matter to Kazo Police Post. She did not disclose the identity of the person responsible for killing her husband either to the people who went to her house looking for the deceased or to Police. The report made to Police as first information stated that she reported the death of her husband by herself. That first information is Exhibit P.9.

In their respective defences, which were sworn, A.2 and A.3 stated that they were not at the scene of murder at the material time. They denied involvement. When an accused person sets up a defence of alibi he does not assume the responsibility to prove it. It is the duty of the prosecution to disprove the alibi by adducing evidence which destroys the alibi and places accused squarely at the scene of crime. See Sentale v Uganda [1968] EA 365.

I have considered the prosecution evidence particularly that of PW3 which implicates A.2 and A.3 in the murder of the deceased. I note A.1 does not mention that either A.2 or A.3 were anywhere near the scene. I note also that A.1 mentioned PW3 in connection with the death of the deceased. I find the uncorroborated testimony of PW3 unreliable in the circumstances and I

reject it. I have considered also the evidence of PW8 which implicates A.2 but I do not find this evidence sustainable either, given that A.1 has herself not mentioned A.2 in connection with the murder. All in all I do not find the alibi of A.2 and that of A.3 disproved by prosecution evidence. I do not find that they participated in the crime alleged against them.

Regarding A.1 there is evidence that she went to Kazo Police Post and reported herself to have killed her husband. When A.2 and others went to her house looking for the deceased A.1 did not come out clearly and state that her husband was dead. Instead she ran away. If her husband had been killed by someone else one would have expected her to report that person to the authorities. She never did. I am satisfied the deceased was killed by no other than A.1 herself. A.1 did participate in the alleged offence and the prosecution has succeeded in proving this ingredient beyond reasonable doubt.

The assessors gave varying opinions. Mr. Bashasha for one advised that the prosecution had proved all ingredients of the offence against all accused persons save that of participation. He advised that the three accused be found not guilty of the charge and acquitted. The other assessor, Ms Talent Asimwe was of the opinion that the prosecution had not proved the charge against A.2 and A.3 and that they should be found not guilty and acquitted. However regarding A.1 she was of the opinion the prosecution had proved the charge against her beyond reasonable doubt and that she should be convicted as charged. For the reasons I have given in the course of this judgment I do not agree wholly with the opinion of the first assessor. I find the opinion of the second assessor agrees with my finding on the matter and as such I am inclined to follow it. Consequently A.2 and A.3 are found not guilty of the charge of murder and are accordingly acquitted. I find A.1 guilty of the charge of murder and convict her accordingly.

P.K. Mugamba

Judge

7th May 2008