THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-CSC-1O1-2006

UGANDA ……………………………………………………………………..PROSECUTOR

VS

BYAMUKAMA HERBERT ………………………………………………………….ACCUSED

BEFORE: THE HON. MR. JUSTICE P K MUGAMBA

JUDGMENT

Herbert Byamukama is charged with murder, contrary to sections 188 and 189 of the Penal Code Act. Eight witnesses were called by the prosecution in support of its case. PW1 was Tinkamanyire Jackson, PW2 was Kyomuhangi Jessica, PW3 was Tugume Emmanuel, PW4 was Minyeto Henry AIP, PW5 was No. 22406 D/C Wenareba Justus, PW6 was Dr. T. Mugisha, PW7 was No. 26856 D/C Benedict Akampa while Mable Bagambe testified as PW8. The prosecution report is Exhibit P.2 while the blanket is Exhibit P.4. In his defence the accused person gave a sworn statement. He did not call witnesses on his behalf.

Briefly the prosecution case is that the deceased and accused resided in the same village. Accused went to deceased’s house and strangled the latter to death after he had molested her sexually. After that accused carried away the deceased’s blanket and hid it under an avocado tree on his grandfather’s land. Following his arrest, as a suspect accused described to the authorities the place where he had deposited the blanket. The blanket was later recovered at the place accused had indicated. Accused was charged with the murder of the deceased.

In a criminal offence the onus is on the prosecution to prove the charge against an accused person beyond reasonable doubt. See *Sekitoleko v Uganda* [1967] EA 531. Where the charge is murder the prosecution ought to prove that the person alleged to have been killed died, that the killing was unlawful, that there was malice aforethought and that accused perpetrated the offence.

Concerning the death of Joy Tindyera there is the evidence of PW1, PW2, PW3, PW4, PW6, PW7 and PW8 who stated that the deceased died. Exhibit P.2 shows a postmortem examination was carried out on the body of Joy Tindyera. There is no evidence contesting the prosecution evidence of the death of the deceased. This ingredient has been proved beyond reasonable doubt. It is a presumption of the law that every killing of a human being is unlawful, the exceptions being where death results from an accident or where it is allowed for by law. See *Gusambizi s/o Wesonga v R* (1948) 15 EACA 65. Medical evidence shows the death of the deceased was brought about by strangling done by human grip. There is no suggestion anywhere that this was accidental or that it was legally done. I am satisfied this ingredient also has been proved by the prosecution beyond reasonable doubt.

The prosecution ought to prove that there was malice aforethought attending the killing of the deceased. This is the intention to bring about the death of a human being. Evidence of malice aforethought may be direct or circumstantial. There is no direct evidence of malice aforethought. However malice aforethought may be gathered from surrounding circumstances. The type of weapon used, the part of the body on which injury is inflicted (whether it is vulnerable or not) and the conduct of the assailant before and after the attack are factors to be considered in this respect. See *Tubere s/o Ochen v R* 1945) 12 EACA 63. In the instant case someone with deliberation used hands to strangle the deceased. Force was applied on the deceased's neck. There is evidence also that sexual molestation led to the prolapse of the deceased's uterus. Doubtless whoever was involved in the attack on the deceased did nothing to ensure the survival of the deceased. Instead that person or persons fled the scene leaving the deceased to her own devices, assuming she was still alive. I have no doubt prosecution evidence has proved beyond reasonable doubt that there was malice aforethought.

The prosecution must prove also that accused participated in the alleged offence. No one saw the person who committed the offence. None of the witnesses said they saw the perpetrator of the crime. What is available is circumstantial evidence. In a case depending exclusively upon 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 reasonable hypothesis than that of guilt. See *Simon Musoke v R* [1958] EA 715. According to PW8 the Chairman L.C.1, accused was arrested as a suspect

because he was notorious for raping old women in the locality. After accused was arrested he mentioned the spot where the deceased's missing blanket was to PW3, PW4, and PW7, amongst others. The blanket was recovered in a banana plantation. It was under an avocado tree in the land of accused's grandfather. According to PW4 accused did not physically lead the party to the site where the blanket was recovered. He described the place to them enabling them to go to the site. PW4 said that the mob was so outraged that they would have lynched accused had he ventured out to the site.

Accused's defence was an alibi. He said he was arrested on his way back from the garden by PW3, the Secretary for defence. It was his evidence he was not involved in the crime as he was at his home when the offence is said to have been committed. When an accused person sets up a defence of alibi he does not assume the duty to prove it. The prosecution is responsible to disprove it 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 both the prosecution evidence and the alibi in light of *Bogere Moses & Anor v Uganda* Supreme Court Criminal Appeal No. 1 of 1997 where it was noted:

> 'Where the prosecution adduces evidence showing that the accused person was at the scene of crime and the defence not only denies it but also adduces evidence showing that the accused was elsewhere, at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept one version and then hold that because of that acceptance per se the other version is unsustainable.'

Accused said he was not at the scene at the material time. As noted earlier it was he who directed several of the prosecution witnesses and others where to find the deceased's blanket. That blanket was recovered at the direction of the accused himself. He was privy to where it was found and did not explain how it was he knew where the blanket was. There was also evidence of PW8 who said accused had been arrested as a suspect because he was notorious for sexually molesting old women in the locality. In *Didas Kasenge v Uganda* Criminal Appeal No. 19 of 1977 (unreported) the Uganda Court of Appeal aptly noted:

> ‘Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination it must follow that he believed that the testimony given could not be disputed at all. Therefore, an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or palpably untrue’.

Consequently I find the alibi of the accused person a fabrication designed to escape liability in the case. The prosecution has proved beyond reasonable doubt that accused participated in the crime.

The assessors in their joint opinion said the prosecution had proved the case against accused beyond reasonable doubt. They advised me to find accused guilty and convict him. For the reasons I have given in the course of this judgment I agree with that opinion. I find accused guilty of the charge of murder and convict him accordingly.

P.K. Mugamba

Judge

7th May 2008