

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT ARUA**

**CRIMINAL SESSION CASE NO. 0016/2007**

**UGANDA** ::::::::::::::::::::

**PROSECUTOR**

**=VERSUS=**

**JAMILA ZUBEDA** ::::::::::::::::::::

**ACCUSED**

**JUDGMENT**

**(Before Hon. Justice Ausutus Kania)**

Jamila Zubeda, herein after in this Judgment referred to simply as the accused, is indicted for murder c/ss 188 & 189 of the penal code Act. In the first count the prosecution on three counts alleges that the accused on the 25<sup>th</sup> day of May 2005 at Onoko village in the Yumbe District murdered one Sumusa Alia Faiza. The particulars of the second count are that the accused on the 25<sup>th</sup> day of May 2005 at Onoko village in Yumbe District murdered Peace Swaibu. The prosecution alleges in the particulars of the third count that on the 25<sup>th</sup> day of May 2005 at Onoko village in Yumbe District the accused murdered Viko Swaibu. The accused denied all counts and a plea of not guilty was entered on each of the counts.

The case for the prosecution is that on the fateful day while the mother of all the deceased had gone to work in her garden, the accused who was the co wife of the mother of the deceased prepared porridge, laced it with carbon furan, a poisonous substance and gave it to the deceased to eat. After eating the porridge, the deceased there and then reacted violently, started vomiting and eventually died. Where upon the accused was arrested and charged with murder.

The accused who made an unsworn statement denied any part in giving to the deceased porridge that had been laced with poison or carbon furan. Her explanation was that the porridge the deceased ate was prepared and put in her house by the mother of the deceased children.

It is trite that when an accused person pleads not guilty to the offence he is charged with, he thereby puts in issue each and every ingredient of that offence. In such an event the burden of proof is on the prosecution to prove that it is the accused has no burden whatsoever to prove his innocence as he is presumed innocent until his guilt has been proved by the prosecution.

To secure the conviction of the accused the prosecution must prove the guilt of the accused beyond reasonable doubt. Any doubt as to the guilt of the accused must be resolved in favor of the accused leading to his/her acquittal. **See Woolmington Vs DPP (1935) AC 462.**

It is also trite that an accused person is not to be convicted on the weakness of the case for the defence but on the strength of the prosecution case. **See Isreal Epuku s/o Achielu Vs R (1934) I EACA 166.**

In proving the guilt of the accused beyond reasonable doubt the prosecution is under a duty to prove each and every essential ingredient of the offence with which the accused has been charged beyond reasonable doubt. The essential ingredients of murder, the prosecution is under a duty to prove beyond reasonable doubts are that:-

1. The deceased is dead.
2. The death of the deceased was unlawfully caused.
3. That the death of the deceased was caused with malice aforethought.
4. The accused participated in causing the death of the deceased.

The above ingredients in all the three counts will be discussed jointly.

With regard to the fact of the death of the deceased in each of the counts the prosecution relied on the testimony of PW1 Dr Hassan Nassur who carried out postmortem examinations on the bodies of Samusa Alia Faiza, Peace Swaibu and Viko.

To further prove the fact of the death of the deceased PW7 Rehema Dawa the mother of the deceased children, testified that her children Faiza, Peace and Viko died on the 25<sup>th</sup> May 2005, their bodies were subjected to a postmortem and then buried. The prosecution lastly relied on the

evidence of PW8 Amin Omari the LC I chairman of Onoko village who saw the bodies of the deceased children and witnessed their burial.

The fact of death of Samusa Alia Faiza, Peace swaibu and Viko Swaibu was in no way disputed the accused conceded the fact of the death of the deceased and Mr. Madira learned counsel for the accused even conceded that the prosecution has proved the fact of the death of Samusa Alia Faiza, Peace Swaibu and Viko Swaibu beyond reasonable doubt.

In view of the overwhelming prosecution evidence of the prosecution witnesses and the fact that the accused and her counsel conceded that the deceased are indeed dead, I find that the prosecution has proved the first ingredient of the offence of murder beyond reasonable doubt.

With regard to the second ingredient of the offence of murder which is that the deaths of the deceased were unlawfully caused, there is a presumption of law that every homicide is unlawful unless when the death is accidental or for some reason justifiable. **See Busambizi s/o Wesonga Vs R (1948) 15 EACA 65.**

Whether a homicide is accidental or for some reason justifiable or not can only be determined from the circumstances surrounding the death of the deceased. The circumstances leading to the death of the deceased in the instant case, PW2 Dr. Hassan Nassur, PW3 Okuni Stephen, PW8 Amin OMari and PW4 D/C Damba Fred.

The evidence of PW5 Aisha Buna with regard to the circumstances of the deaths of the deceased is that that fateful day the deceased were with her playing under a mango tree when they were called away by their elder brother. After an hour the said brother of the deceased came back to her and informed her that the accused who was referred to as Arusu had locked the children in her house to eat porridge. The witness ran to the scene and immediately saw the deceased staggering out of the house and vomiting. Peace and Samusa Alia Faiza died there and then but Viko was hurried to a health centre and died on arrival. From the above circumstances PW5 Aisha Buna concluded that the deceased must have eaten poison in the porridge they were given to eat.

PW8 Amin Omari gave evidence that on going to the scene he found many flies had died in the plate from which the children had eaten porridge and on a bowl containing porridge.

PW2 Dr Hassan Nassur who examined the bodies of the deceased testified that on examining the bodies of the deceased he concluded that they could all have been poisoned. He accordingly took sample from the stomach contents of each of the deceased and sent these for a toxology test to the central laboratories in Wandegeya in Kampala. The postmortem reports in respect of the bodies of Viko Swaibu, samusa Faiza Alia and Peace Swaibu were tendered and marked Exhibits P2, P3 and P4 respectively.

PW4 D/C Dramba Fred testified that on the 25/5/2005 he rode to the scene of crime in Onoko village and collected a sample of vomit and took it to Yumbe police station and went to collect other samples which had been prepared by PW2 Dr. Hassan Nassur. He collected all these samples, labeled them and completed police form 17A in respect of samples from each deceased person and took these to the central laboratory in Wandegeya. The police forms 17A are collectively Exhibit P8 on the court record.

PW3 Okuni Stephen a Government analyst testified that he received 3 sealed packages with the seals intact from PW4 D/C Dramba Fred on the 27/06/2005 and that the packages were opened in the presence of the said PW4 D/C Dramba Fred. He testified that he examined the contents of the first package in respect of the deceased Samusa Alia Faiza which comprised of stomach and contents, FF 770/2005, vomit F 771/2005 and Rodent killer F 772/2005. he found samples F770/2005 and F 771/2005 to contain carbonfuran whereas he found sample F 772/2005 to be carbonfuran which is a class 5 poison which may kill when injected. His report in respect of this examination is Exhibit P5 on the Court record.

The Government analyst testified that he also examined the second package F 773/2005 containing the stomach and contents of Peace Swaibu and found them to contain the same Carbon furan. The report in respect of this sample was exhibited as P6.

PW3 Okuni Stephen finally testified that he also examined the vomit from Viko Swaibu which was labeled F 775/2005 and also found it to contain the same class 5 poison known as Carbon furan capable of causing death once injected. The report compiled by PW3 Okuni Stephen is Exhibit P7 on the court record.

Mr. Madira, learned counsel for the accused disputed the unlawfulness of the deaths of the deceased. He contended that the evidence regarding the death of the deceased is purely circumstantial and it does not prove that the deaths were a result of lethal poison having been administered. He also agreed that there was no evidence that the porridge the deceased ate was laced with poison more so because the porridge the deceased ate was not analyzed by PW3 Okuni Stephen. Counsel suggested that the deaths of the deceased could as well have been accidental.

It is true evidence of how the deceased person in this case met their deaths is circumstantial but this in no way diminishes the fact that their deaths were unlawfully caused. It is now trite that circumstantial evidence is as good as direct evidence if not better because it capable of proving a proposition with mathematical accuracy. **See R Vs Taylor Wear & Donovan (1928-29) 21 Cr. App R.20.**

In the instant case the circumstances that tend to show that the deaths of the deceased were unlawful are the following:- The deceased were called into the house of the accused and given porridge to eat. As soon as they had eaten the porridge all of them reacted by violently vomiting and loosing consciousness. Within a short time they died. Their bodies were subjected to a postmortem and Dr Hassan Nassur concluded that they must have died of poisoning and so he accordingly extracted samples of their stomach contents and the vomit of two of the deceased and forwarded these together with a rodent killer commonly known as Nematoc which was recovered near the scene of crime to the central laboratories in Wandegeya for analysis. After carrying out an analysis on this samples PW3 Okuni Stephen found the stomachs with contents and the vomitum to contain carbon furan which is a deadly class 5 poison. As regards the rodent killer it was found to be carbon furan with characteristics of being capable of causing death once injected. Also circumstantial is the evidence of PW8 Amin Omari which was that at the scene he observed that many flies had died in the container from which the deceased were said to have eaten the porridge.

From the fact that all the deceased died soon after having eaten the same porridge and when the samples taken from their bodies were examined, they were found to contain the same deadly poison carbon furan and the container from which they had eaten had many dead flies, the only inference to draw is that some person must have introduced that poison into the porridge before giving it to the deceased. The proposition of Mr Madira that the deceased could have eaten the

porridge accidentally is not believable. I accordingly find that the deaths of all the 3 deceased persons were caused unlawfully. The prosecution has proved this ingredient beyond reasonable doubt.

I now move to the third ingredient which is that the deaths of the three deceased persons were with malice aforethought. Malice aforethought as defined in section 191 of the penal code Act is a state of mind and as such incapable of being proved by direct evidence. It can only be inferred from the circumstances of the commission of the offence. Factors used to infer the existence of malice aforethought includes;

- a) The nature of injuries inflicted
- b) The parts of the body on which the injuries were inflicted
- c) The weapons used.

If the weapon used was a deadly one to inflict fatal injuries to a vulnerable or vital part of the body of the deceased, malice aforethought is easily inferred. In the instant case carbon furan a substance categorized as a class 5 poison was administered to the deceased persons in porridge. This poison is described as one that may kill once ingested and being very poisonous. By its nature this poison is a deadly weapon within the context of Section 286 (3) (ii) of the penal code Act as amended by the penal code (Amendment) Act 8/2007. It was ingested through the alimentary canal thereby destroying vital organs along its way e.g. the liver and kidneys.

I accordingly find that whoever laced the porridge with carbon furan and administered it to the three deceased persons leading to their deaths did so with malice aforethought. The prosecution has therefore proved beyond reasonable doubt that the deaths of Samusa Alia Faiza, Peace Swaibu and Viko Swaibu were caused with malice aforethought.

With regard to the fourth ingredient of the offence of murder which is the participation of the accused in causing the deaths of the deceased, the evidence tendering to implicate the accused is purely circumstantial. This evidence briefly that on the fateful day 25/5/2005 the accused who were playing near the house of their grandmother PW5 Aisha Buna were called by their elder brother to their house. After about an hour later the same elder brother to the deceased alerted PW5 Aisha Buna that the accused who was the step mother of the deceased had locked them in her house to eat porridge. PW5 Aisha Buna ran to the scene and then the deceased ran out of the house dazed, vomiting and collapsed. She attempted to give them first aid but Sumusa Alia Faiza

and Peace Swaibu died there and then and Viko Swaibu died on the way to the Health Centre. The accused on being tasked as to why she had given poison to the deceased fled the scene and took refuge at Barakala police post. PW8 Amin Omari who came to the scene saw that flies had died in the place from which the deceased were said to have eaten the porridge.

PW6 Naima Amaguru the next day found a can of Namatoc a drug ordinarily used for destroying ant hills by tobacco farmers near the homestead in the bush. PW2 Dr. Hassan Nassur performed postmortems on the bodies of all three deceased persons and because he suspected the cause of death to have been poisoning he took samples from the stomach and stomach contents and vomits from the bodies of the deceased. These together with the Namatoc were then forwarded by PW4 D/C Dramba Fred to Central Laboratories at Wandegeya for scientific analysis. PW3 Okuni Stephen the Government analyst found the body parts and vomit contained Carbon furan which is a poisonous substance classified as class 5 poison and he found that the Namatoc was Carbon furan. He compiled reports to this effect see Exhibits P5, P6 and P7.

It is now trite that to say evidence is circumstantial is not a derogation of such evidence because circumstantial evidence is very often the best evidence as it is evidence of surrounding circumstances, which by intensified examination is capable of proving a proposition with the accuracy of mathematics, See R Vs Taylor Wear and Donovan (Supra).

Though it is often the best type of evidence, it is necessary before drawing the inference of the accused's guilty from circumstantial evidence to be sure that there no coexisting circumstances which would weaken or destroy the inference. This cause is necessary because this type of evidence may be fabricated. See Teper Vs R (1952) A.C 489.

In the instant case the circumstances that irresistibly point to the participation of the accused in the deaths of the deceased are that the accused had locked the deceased in her house as they ate porridge. Soon after having eaten the porridge the deceased came out staggering one by one and then started vomiting after which they collapsed and soon there after died. The accused fled the scene when it was put to her that she was the one who caused the death of the deceased and she took refuge at Barakala Police Post when PW8 Amin Omari arrived at the scene he saw that flies had died in the plate from which the deceased were said to have eaten the porridge. The following day PW6 Naima Amaguru discovered what later turned out to be Namatoc on the compound in the homestead. PW2 Dr.Hassan Nassur conducted postmortems on the bodies of

the deceased and was of the opinion that they died as a result of being poisoned. Samples of the stomach and the contents, the vomit of one of deceased and the Namatoc discovered near the scene were sent for analysis to the Government Central Laboratories in Wandegeya for analysis and PW3 Okuni Stephen the Government analyst found the first two samples to contain carbon furan a very deadly poison classified as a class 5 poison while the last was found to be carbon furan.

After subjecting the above circumstances under intensified examination there can be no doubt that the accused give to the deceased porridge that laced with carbon furan and that the deceased all died as a consequence of eating that porridge. That it was the accused who had laid the porridge for the sole purpose of poisoning the deceased can be inferred from the accused conduct of locking up the deceased in her house as the deceased ate the porridge. The participation of the accused in the deaths of the deceased is corroborated by the fact that the accused fled the scene as soon as fingers were pointed at her as the person who caused the deaths of the deceased. It is now trite that the conduct of an accused person fleeing from the scene of crime is incompatible with the innocence of an accused person.

The accused in her unsworn statement suggested that the porridge was made and taken to her house by the mother of the deceased and that if any thing the poison was put by her. I find this proposition very unbelievable preposterous and reject this line of defence. I also reject the submission by Mr. Madira that if the children died after having consumed the poisoned porridge, the poison was accidentally introduced into the porridge. I find that the prosecution has proved beyond reasonable doubt that the accused participated in causing the deaths of all the deceased persons. I according find the prosecution has proved beyond reasonable doubt that the accused participated in causing the death of all the deceased persons.

In the result the prosecution having proved all the four ingredients of the offence of murder beyond reasonable doubt, in agreement with the unanimous opinion of the two Assessors I find the accused guilty of the murder of Sumusa Alia Faiza in count 1, Peace Swaibu in count 2 and Viko Swaibu in count 3 c/ss 188 and 189 of the penal code Act and convict her accordingly.

AUGUSTUS KANIA

JUDGE

8/4/2008

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R.A Explained

A.KANIA

JUDGE

8/4/2008

**Mr. Anguzu** – The convict is a first offender. She has been on remand for 2 years 10 months and 8 days. Murder is perhaps the most serious offence in this country. The circumstances of this case are aggravated in that the accused murdered 3 young children who were her step children. This created a very big loss. Sections 189 of the penal code prescribes the death sentence for murder. However the Constitutional Court in C.Petition 6/2003 Susan Kingula & 416 Ors has now ruled that upon commutation for an offence like murder Court can only pass a death sentence after hearing representations from the prosecution and the accused. In other words court has discretion not to impose a death sentence.

Taking into account the incriminating circumstances in this case and the manner these offences were committed, we pray for the death sentence on each of the 3 counts.

**Mr. Madira**

The convict is still a young woman aged 25 years. The convict is also a person who suffers from mental illness which is posnilarly known here as Jihni. I agree with the RSA that Section 189 prescribes the death sentence. We also agree with the authority in Constitution petition No 6/2003. It is now settled that the death sentence is constitutional, however it is not mandatory.

We pray this court to exercise its discretion to give a custodial sentence but not the death sentence. We so pray.

A.KANIA

JUDGE

8/4/2008

**COURT:** Sentence and the reasons for the same.

Murder is one of the most reprehensive and abominable offences on our statute book which attract the death sentence. The severally of sentence no doubt reflects the gravity of this offence. This court has stated over and over again that life is a God given gift which no one has the

authority to take away. This court will do everything to make sure that peoples lives are not unnecessarily wasted as was the case in this case.

This instant offence was aggravated by quite a number of circumstances. The lives of these three children, all children of the same mother were cut in their prime. This were little innocent children who could not and did not play a role in the conflict and rivalries of the adult world. They were step children of the accused to whom they must have looked as a mother and protector. The accused instead turned out to be their murderer, the conduct of the accused merits the stiffest of all sentences.

I have carefully listened to the representations made by the learned RSA and the mitigation by the learned Counsel for the accused. I have particularly noted the fact that she is a young woman, a first offender and has already spent 2 years 10 months and 8 days on remand. These antecedents would ordinarily be in favor of the accused.

I have read and appreciated the position on the death penalty as stated in constitution petition No 6/2003 Susan Kigula & 416 Ors Vs the Attorney General that though the death sentence is constitutional it is not mandatory and that an accused person convicted of murder or other offence where there is the prescription of the mandatory death sentence must be given an opportunity to mitigate for the court to exercise its discretion.

In the instant having carefully listened to the representation by the RSA and the mitigation on behalf of the accused, exercising my discretion I find this a proper case in which the death sentence should apply.

Jamila Zubeda you are sentenced to suffer death on count 1 for the murder of Sumusa Alia Faiza c/ss 188 & 189 of the penal code Act. The sentence on count 2 and 3 are deferred.

A.KANIA

JUDGE

8/4/2008

**8/4/2008**

Mr. Anguzu – RSA

Mr. Madira – for the accused

Ms Andezu – Court/clerk

Mr. Abe – English/Lugbara interpreter

The accused in Court.

**COURT:** Judgment read in open Court.

A.KANIA

JUDGE

8/4/2008