THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 0425 OF 2006

UGANDA::PROSECUTOR

VERSUS

KIGENYI ANDREW PAULO::ACCUSED

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

The accused, Kigenyi Andrew Paulo was indicted for murder contrary to sections 188 and 189 of the Penal Code Act. It was stated in the indictment that on the 27th day of December 2004 at Bukuutu village in Kamuli District, the accused murdered Tibenda Betty. The accused pleaded not guilty to the indictment and the prosecution called 5 witnesses to prove its case. The accused gave sworn evidence in his defence.

The facts from which the indictment arose are that the accused and the deceased had previously lived together as her husband and wife. They had two children. Sometime in December 2004 the deceased left the accused and returned to her parents' home in Bukuutu, Bulopa sub-county in Kamuli District. In the night of the 27/12/04 soon after the deceased returned home from her marital home, she and other family members had their super in the kitchen at Sepiriyano Waibi's home; Sipiriyano was the deceased's father. After the meal, the deceased left other family members in the kitchen and retired to the house for the night. She found that the suitcase with her personal effects was missing. The deceased returned to the kitchen and informed the family that she could not

find her suitcase and she was going to look for it outside the house. She made a quick search around the house but could not find it. She returned and informed the family; she added that no other person could have taken the suitcase other than the accused.

The deceased then run towards the accused's parents' home, which was in Nagweni, the next village. The accused's home was also in Nagweni. Her sister, Sepiyoza Nangobi (PW1) and others decided to follow her. When they got to the accused's parent's home, they asked the parents whether they had seen the accused. They explained that the deceased's suitcase had gone missing. The accused's parents informed them that they had not seen him.

The deceased started running back to in Bukuutu. PW1 and PW1 (Anastasia Kafuko followed her. Along the way the accused jumped onto the footpath from behind a mango tree, pounced upon the deceased and began to hack at her with a *panga*. The deceased cried out and PW1 who was a short distance away (10-15 metres) got scared and run and squatted beside a tree stump that was about 35 metres away from the spot where the accused was hacking at her sister.

When she overcame the shock, PW1 made an alarm. Anastansia Kafuko (PW2) the deceased's mother testified that she was following her daughters when they went to Nagweni and on their way back to Bukuutu. She too saw the accused hacking at the deceased and she made an alarm. The accused then run away. PW2 testified that when she got to the deceased, she was still alive and she disclosed that her assailant was Kigenyi Andrew. Residents who responded to the alarm tried to carry the deceased away but realised that she was almost dead or dead. A drum was sounded and more residents responded.

The family stayed at the scene with other residents till morning when a report was made to police. Police came and took the body away. Post mortem examination was done at

Kamuli Hospital. Later that day, the deceased's lost suitcase was found within the vicinity of the scene of the crime together with a pair of black gum boots.

Accused was arrested in Magamaga 2 days later on a tip-off from his uncle, one Kayanga, to Peter Walujo (PW3), the brother of the deceased. On being charged and cautioned, the accused confessed that there was a misunderstanding between him and the deceased, which he had gone to the deceased's parents' home to resolve. He stated that he cut the deceased with a *panga* in self-defence when two men who appeared to be with the deceased attacked him, but did not think he had killed her.

The accused gave evidence on oath in his defence against the indictment contrary to what he stated in the charge and caution statement. He denied making the confession in the charge and caution statement voluntarily and set up an alibi that he had been away from the two villages for two years, since he and the deceased separated. He denied that he was in Bukuutu/Nagweni on the night of the murder and added that he had since the separation got two wives, one in Bulanga and another in Tororo. He claimed to have been in Tororo on the 27/12/04, and that he was arrested in Magamaga when he was coming from visiting his other wife in Bulanga.

In all criminal cases an accused person is presumed innocent until he is proved guilty or pleads guilty; Article 28 (3) (a) of the Constitution of the Republic of Uganda provides for it. The burden of proof rests upon the prosecution, throughout the trial, to prove all ingredients of the charge. The burden does not shift to the accused except in a few statutory cases. This is the long established position of the law since the decision in **Woolmington v. DPP (1935) AC 462** which has been affirmed by courts in Uganda in several cases including **Oketcho Richard v. Uganda, Supreme Court Criminal Appeal No. 26 of 1995** (Supreme Court of Uganda Certified Criminal Judgments 1996 – 2000 at 148). The accused is also to be convicted on the strength of the prosecution case and not on the weakness of his defence (**Israel Epuku s/o Achietu v. R [1934] 1 E.A.C.A. 166**).

Since the accused pleaded not guilty to the indictment, the prosecution had to prove all the four ingredients that constitute the offence of murder against him beyond reasonable doubt. Prosecution therefore had to prove that:

i) A human being (Betty Tibenda) died,
ii) Her death was caused unlawfully,
iii) Death must have been caused with malice aforethought,
iv) The accused must have been the person responsible for the death or he participated in causing death of the deceased.

There is overwhelming evidence that Tibenda died and was buried. The defence did not contest this fact. PW1 testified that the deceased died after she was assaulted and that she saw her body at the scene of the crime and later attended her burial. PW2 and PW3 also saw the dead body of the deceased and attended her burial. A post mortem report was produced to show the cause of her death as and admitted as Exh. P1. I therefore find that the prosecution proved the first ingredient beyond reasonable doubt.

Regarding the second ingredient, it is the presumption that all homicides are unlawful except where they occur in the due process of law or where they are caused by accident. Article 22 of the Constitution of Uganda guarantees the right to life and it provides that a person is not to be deprived of life except in execution of a sentence passed by a court of competent jurisdiction in respect of a criminal offence after the highest appellate court has confirmed the conviction and sentence. This case does not fall in any of the two categories above. It was also the evidence of the prosecution that the deceased was assaulted before her death and that the death was a result of the assault. According to the laws of Uganda, assault is a criminal offence and thus unlawful. The defence also conceded that the deceased's death was unlawful. I therefore find that the prosecution proved this second ingredient beyond reasonable doubt.

I shall next consider whether the accused participated in causing or actually caused the death of the deceased. In order to prove this, the prosecution relied on the evidence of PW1, PW2, PW3 and PW4. PW1 testified that she was following the deceased from the accused's parent's home in Nagweni when the accused jumped onto the footpath from behind a mango tree, pounced onto the deceased and started hacking at her with a panga. She testified that she run back in fright and squatted beside a *mugaire* tree stump and continued to watch the accused hack at the deceased. PW1 testified that there was *very, very* bright moonlight that night which enabled her to see what was happening. PW1's evidence was not shaken in cross-examination.

On the other hand, the accused in his defence stated on oath that he was not at the scene of the crime. He averred that on the fateful day he was away in Tororo with his other wife. That by the time the deceased was murdered he had long separated from her and that he lived with two other wives in Tororo and Bulanga. He also testified that he had not been to Nagweni for two years, not even to call on his parents who lived in the same village. He denied making the confession in the charge and caution statement and averred that it was coerced out of him by use of force and intimidation.

Ms Monica Birungi for the accused challenged the evidence of PW1 in her submission. She contended that the witness identified the accused in difficult circumstances. Counsel contended that during cross-examination, the witness stated that the place where the accused met the deceased was surrounded by shrubs and that she hid behind a tree trunk. .Further that PW1 had gotten so frightened when she saw the assailant cut the deceased she run back a distance of 50 metres and hid behind a tree trunk. Ms Birungi contented that because the moon was shining, the mango tree and the shrubs must have cast shadows making it difficult to identify any person in the circumstances. She further submitted that due to fear, PW1 could have made a mistake about the deceased's assailant. Ms Birungi relied on the principles of identification as re-stated in **U v. George Wilson Simbwa SC Criminal Appeal No 37 of 1995.** Following **Abdalla Bin Wendo v. R [1953] EACA 166; Roria v. R [1967] EA 583** and **Abdalla Nabulere & Others v.**

Uganda [1977] HCB 72; the Court of Appeal in **U v. George Wilson Simbwa** (supra) re-stated the law on single identifying witnesses as follows:

> *"Briefly the law is that although identification of an accused person can be proved by the testimony of a single witness this does not lessen the need for testing with the greatest care the evidence of such a witness regarding identification, especially when conditions favouring correct identification are difficult. Circumstances to be taken into account include the presence and nature of light; the accused person is known to the witness before the incident or not; the time and the opportunity the witness had to see the accused; the distance between them. Where conditions are unfavourable for correct identification, what is needed is other evidence pointing to guilt from which it can be reasonably concluded that the evidence of identification can safely be accepted as free from possibility of error. The true test is not whether the evidence of such a witness is reliable. A witness may be reliable and yet there is still the risk of an honest mistake particularly in identification. The true test … briefly is whether the evidence can be accepted as free from the possibility of error."*

In order to establish whether the witness properly identified the accused in difficult circumstances therefore, courts must examine the presence and nature of light; whether the accused person was known to the witness before the incident or not; the time and the opportunity the witness had to see the accused; and the distance between them. The evidence given by PW1 (verbatim) is as follows:

> *"When I saw that he was cutting Betty I run away and squatted by a trunk of a tree; I stayed beside it. I was shocked. I was about 10-15 metres behind Betty when she encountered the accused. The accused did not say anything when he started cutting her with a panga. I saw him very well. I was able to see the accused because there was very, very bright moonlight. The accused emerged from behind a mango tree and descended upon Betty. When I ran away I ran to a trunk that was as far as that house. (Court – about 35 metres away). I run backwards to where we were coming from. Accused was wearing a black sweater and black trousers. I had known the*

accused for two years before the incident. The accused continued to cut the deceased for about 30 minutes"

On cross-examination PW1 stated that she was about 20 metres away from the deceased when she encountered the accused; that when she hid behind the trunk of the *mugaire* tree she was about 35 metres away. That though the path had shrubs it was a common footpath that was used by many people. There is a slight contradiction in the evidence of PW1 on examination in chief and on cross examination in that while she said she went and squatted beside the *mugaire* tree in examination in chief, in cross examination she said she hid behind the trunk. I find that this is a contradiction that can be ignored because the witness had already seen the accused when she retreated. And when she retreated she did not go very far away, she may have continued observing the events as they unfolded before her, depending on how thick the trunk of the tree was. Further evidence is that when she made an alarm, the accused ran away. She again saw him ran away after the alarm.

PW1's evidence is strengthened by the fact that she had known the accused for two years before the incident as her brother-in-law. This of course would have created familiarity between her and the accused. She also gave the approximate period of time within which she observed the incident as 30 minutes. Although the witness insisted it was 30 minutes, it is doubtful that the actual period of time was 30 minutes. It is the view of the court that this may have been exaggerated. However, to the witness, the fact that she could not do anything, being immobilised by fear, the best description that she could give to the time that may have seemed like a very long time to her was 30 minutes. This is supported by the nature of injuries that the assailant inflicted upon the deceased that were recorded in the post mortem report as follows:

"Extensive cut wounds/ laceration occiput 16 x 8 cm and 3 cm deep, associated with fracture penetrating into the brain (3 planes). Deep cut wound middle neck posteriorly 8 cm wide, 14 cm deep, cut wound rt.

shoulder 16 cm x 8 cm by 4cm deep with joint exposed, left amputated off completely through ulna and radius bones, distal end, Cut Left Biceps 16 cm. long 3 cm wide, cut wound Left shoulder 8 cm long x 5 cm wide and 4 cm deep. Laceration Left hand 14 cm x 6 cm direction of cut posteo -interior, ring finger chopped off, right hand amputated off at the level of metacarpals, radial aspect … , ulna aspect distally."

The evidence of PW1 appears credible because one would need a considerable period of time to hack at another human being in the manner described in the post mortem report. And comparing the findings in the post mortem report to PW1's testimony she explained that the assailant cut the deceased's fingers off, the wrist, and the shoulder, and 2 times on the back of the head. This is consistent with the description of injuries in the post mortem report. To PW1 it may have appeared like the assailant was hacking at her sister in slow motion – the injuries seem like the accused worked with very deliberate actions in order to amputate fingers, a hand and a shoulder. The nature of the injuries and the approximation of time by of PW1 convinced me that the time that the accused spent hacking at the deceased was considerably long, enough to give PW1 ample opportunity to identify the assailant.

Regarding the issue as to whether there was sufficient light to identify the accused, the supposition by counsel for the accused that the shrubs and trees could have cast shadows was answered by the evidence of Detective Corporal Steven Bogere (PW5). He informed court that he went to the scene of the crime guided by PW3, Peter Walujo. His testimony on this issue was that he found the body lying in a potato garden in a pool of blood. PW5 drew a sketch plan, which was admitted as Exh. P10, and was cross-examined about the features that he included in it. He stated that there was a bush at the scene of the crime but not a big forest. Further that there was grass and short trees. On re-examination he stated that the trees were not included in the sketch plan because they were a bit far off from where the body of the deceased was found. In my view, this would remove the possibility of obstruction by shadows from the trees at the scene of crime. I therefore

believe that PW1 was able to see what was happening in the potato garden without interference of shrubs or trees, or shadows from them with the aid of the *very, very* bright moonlight, as she stated.

In the event that any doubt has been cast on the evidence of PW1 by the defence submission, it is important to note that her evidence does not stand-alone. PW2 who was following PW1 along the footpath also testified that she saw the accused at the scene of the crime before he made his escape. PW2's evidence was that when she joined the two girls "at the place where the alarm was coming from," she found when the accused was still hacking at the deceased. She too raised an alarm saying, *"Come and help, there is someone killing a person."* The accused then ran away. On cross-examination PW2 affirmed that she had no problems with her sight. She added that she was able to talk to the deceased before died. On clarification by court PW2 stated that she found when the deceased was still alive and that she asked to be taken to hospital. Deceased also informed PW2 that, *"Andrew is the person who has killed me."*

The information given by the deceased just before her death raised the issue as to whether the above quoted statement of the deceased amounted to be a dying declaration and further, whether this court could rely on it to convict. Ms Birungi for the accused submitted that a dying declaration should be corroborated by other evidence before court can rely on it to convict. She relied on the case of **U v. Thomas Omukene & others [1977] HCB at 61,** where it was held that before accepting a dying declaration, it should be established that the maker had the opportunity to identify his attackers. And that besides that such evidence is of the weakest kind because it cannot be tested by cross-examination.

The law on dying declarations was also re-stated in the case of **U v. George Wilson Simbwa (supra)** where the Court of Appeal of Uganda following the East African Court of Appeal in **Okethi & others v. Republic [1965] EA 555,** held

> *"It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration … But it is generally speaking unsafe to base a conviction solely on the dying declaration of the deceased person, made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration."*

In the instant case, the identification of the accused did not only depend on the dying declaration but also on the evidence of PW1 who witnessed the attack on the deceased. In addition, PW2 did not only base her assertion on the deceased's dying declaration that it was Kigenyi that killed her; she testified that she also saw the accused as he hacked at the deceased. It was only after she made an alarm that he fled. PW2 was the mother-in-law of the accused and also familiar with him. The identification of the assailant by the deceased only served to confirm what PW2 had seen with her own eyes. I am convinced that the dying declaration disclosed by PW2 was a true identification of the accused as the deceased's assailant. The deceased had been married to the accused for some time. They had two children between them. It was therefore possible for her to identify him in the circumstances.

In the event that there is need for further corroboration of the evidence of PW1 and PW2 who were both relatives of the deceased and who may have been zealous wanting to secure a conviction, further evidence is that the accused made a confession to PW4, Detective AIP Babu Bernard who recorded a charge and caution statement from him at Jinja Central Police Station. The statement was admitted in evidence as Exh P3 without contest since the accused looked at the statement and informed his advocate that he signed the statement. However, in his evidence the accused denied that he made the statement voluntarily. He claimed he was tortured into signing a document that had already been made by police officers who threatened to kill him if he did not admit that he murdered his wife. Unfortunately, there was no trial within the trial before the statement was admitted because counsel for the accused led court to believe that the

accused had admitted that he made it voluntarily. The confession shall therefore be treated as a retracted or repudiated confession.

The statement was to the effect that the accused was invited to the deceased's parent's home to settle certain differences between him and the deceased. However, the differences were not settled and the couple agreed to settle them the following day. The accused stated that the incident that resulted into his arrest occurred when the deceased was seeing him off after their meeting. The accused suspected that the deceased was in company of some two men who had collaborated with her and wanted to kill him. He therefore used a *panga*, which he had secretly carried with him from the deceased's home, to cut the deceased. He stated that he did not think he had inflicted enough injury to kill her. The accused also stated that after he had assaulted the deceased, he did not return to his home because he was afraid he would be arrested. Accused thus fled to Mukono and stayed in Mukono till the 29/12/04 when he was arrested at Magamaga while he was on the way to a burial in Ivukula.

The law relating to retracted/repudiated statements was reviewed by the Supreme Court in **Matovu Musa Kassim v. Uganda, SC Criminal Appeal No, 27 of 2002** where the accused had retracted a confession that he made immediately after arrest because he alleged it was not made voluntarily. It was held, affirming the decision in **Tuwamoi v. Uganda [1967] EA 84** that:

> "A *trial court should accept any confession which has been retracted or repudiated with caution and must, before founding a conviction on such a confession, be fully satisfied in all circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is satisfied after considering*

all the material points and surrounding circumstances that the confession cannot but be true."

The contents of the confession are similar to testimony given against the accused in several important particulars. The first is that he used a panga to assault the deceased. Secondly, similar to the testimony of PW3 Peter Walujo who coordinated the arrest of the accused, the accused stated that he had fled to Mukono and he was arrested in Magamaga. These two similarities would lead one to conclude that the confession to the crime was true. In conclusion, the confession can be used to corroborate the evidence of PW1 and PW2. The accused's behaviour after the incident also creates the impression that he was guilty of the offence. He ran away from Nagweni and went to Mukono. PW3 was informed of this by one of the accused's relatives, Kayanga.

Regarding the accused's defence that he had long separated from the deceased and resided in Tororo with another wife, when he was cross-examined about his residence in Tororo, the accused was unable to describe any physical features near it. Accused also denied knowledge of one Kayanga early on in cross-examination, but he later admitted knowing him as one of his uncles. In his testimony, the accused tried to disassociate himself from the said Kayanga because he was the person who disclosed to PW3, Walujo that the accused was hiding in Mukono.

The assessors in this case were informed of the dangers of convicting an accused person on the basis of evidence of identification in difficult circumstance, dying declarations and retracted statements, and the important principles of law that have been established by the courts about them in cases where they have occurred. Having done that, I find that the accused was squarely placed at the scene of the crime by PW1, PW2 and his own confession in the charge and caution statement. His defence was therefore a pack of lies. The prosecution therefore proved the third ingredient of the indictment beyond reasonable doubt.

What remains to be determined is whether the accused caused the deceased's death with malice aforethought. It has long been established that malice aforethought cannot be proved by direct evidence but can be inferred from various factors such as the weapon used by the accused (whether capable of causing death or not); the part of the deceased's body targeted (whether it is vulnerable of not) and the behaviour of the accused before, during or after commission of the offence, (**R v. Tubere [1945] 12 EACA 63** and s. 191 Penal Code Act).

The prosecution in this case relied on the evidence relating to the weapon used and the injuries inflicted to the deceased to prove that there was malice aforethought. The injuries were horrendous as has already been shown above. Accused amputated the deceased's fingers, hand and shoulder. He also cut her two times on the head. The post mortem report showed that an open head injury and severe bleeding from multiple deep cut wounds all over the body caused her death. The injuries were clearly in very vulnerable parts of the body and the intensity with which the accused cut the deceased's body appeared to be with such venom that he could have had no other intention but to ensure her death.

Regarding the weapon used, PW1 and PW2 testified that it was a panga. The post mortem report confirmed this. The accused in the charge and caution statement also confessed that he used a panga, which he had secretly carried away with him from the deceased's home, to cut her. By this evidence, there is no doubt that malice aforethought was also proved against the accused beyond reasonable doubt.

Both assessors in this case advised me to convict the accused of murder because there was also no doubt in their minds that the prosecution had proved all the ingredients of the indictment beyond reasonable doubt. I agree with them and I accordingly convict the accused with murder as indicted.

Irene Mulyagonja Kakooza

JUDGE

20/08/08