

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT BUSHENYI
BUS-OO-CR-A- 0214-2005
(CRB BUS 370-2004)

UGANDA.....PROSECUTOR

VS

AI. KAKUBI PAUL)
A2. MURAMUZI DAVID).....ACCUSED

BEFORE: THE HON. MR. JUSTICE LAWRENCE GIDUDU

J U D G M E N T

Kakubi Paul and Muramuzi David hereinafter referred to as AI and A2 respectively are indicted with the murder of Ntegyereize Jolly on the night of 13/7/04 contrary to sections 188 and 189 of the Penal Code Act.

The gist of the prosecution case is that on 13/7/04 at about 8.00 p.m. while the deceased was preparing supper in her kitchen in the company of PW3 - Ninsiima and PW7 Ahimbisibwe, she left for the main house with a saucepan to collect some water. Before reaching the main house, she was confronted by two men and she called for help drawing the attention of PW3 and PW7 in the kitchen. When the two checked what was happening, they saw AI and A2. A2 moved to the kitchen and confronted PW7 while PW3 hid in an adjoining room and from there peeped to see A2 struggling with PW7. AI grabbed the deceased. He was armed with a panga. PW3 managed to escape by the back door to the kitchen but as he ran he heard the deceased say "Kakubi you are killing me". After the struggle with A2, PW7 ran to the banana plantation from

where he saw A1 cut the deceased.

The prosecution contends that A1 and A2 killed the deceased because they believed she was a witch in the neighbourhood.

The accused denied the charges and set up an alibi. The defence case is that on 12/7/04, the accused's uncle DW4 lost a daughter. On 13/7/04, the accused and their parents went to attend burial at Omukashenyi village which was about 16 kms away. DW5 and his wife came back home while A1 and A2 stayed overnight at Omukashenyi.

They were surprised in the morning when their father DW5 came to inform them that the deceased had been murdered and that the relatives of the deceased were suspecting A1 and A2. DW3 who is the LC 1 Chairman of Omukashenyi village caused a letter to be written confirming that A1 and A2 were not in Kangole village on the night of 13/7/04. A1, A2 and their father DW5 then went to the sub-county for protection against any possible violence. They were arrested by PW8 who took them to Bushenyi Police Station. A1 and A2 were eventually charged with murder.

The prosecution has the duty to prove the case against the accused beyond reasonable doubt. That duty rests on the prosecution throughout the trial. The accused do not have a duty to prove their innocence.

See Ssekitoleko vs. Uganda [1967] EA 531.

In an indictment for murder, the prosecution must prove the following ingredients beyond reasonable doubt.

1. That death occurred.
2. That death was caused unlawfully.
3. That the death was caused by malice aforethought.

4. That the accused participated in the murder.

See: Uganda vs Pic Ojok [1992-93] HCB 54.

See Uganda vs Kasim Obura & or [1981] HCB.9.

There is no difficulty in resolving the first issue of death. There is ample evidence from PW2, PW3, PW7, PW8, PW9 and DW5 that Jolly Ntengyereize is dead. These prosecution and defence witnesses all saw the dead body of the deceased in her compound.

PW9 who carried out the post mortem and filed a report testified that the deceased had died of injuries that cut through and broke her vertebrae and she bled excessively and died.

The defence did not contest this ingredient. I, therefore, find as a fact that Jolly Ntengyereize is dead.

As to whether her death was unlawful, it is trite law that in homicide cases, death is presumed to be unlawful unless it is proved to be an accident or authorized by law.

See Gusambizi s/o Wesonga vs. Republic (1948) EACA 65.

See also Uganda vs. Okello [1992-93] HCB 68.

In the instant case, Medical evidence as tendered by PW9, reveals that the deceased sustained two deep cuts on the neck breaking the vertebra that constitute the spinal code. The deceased bled to death. The death of the deceased was not an accident nor was it authorized by law. It was a violent death in her home in circumstances that were unlawful.

There was no contest on this issue and I find as a proven fact that the death of the deceased was unlawful.

Malice aforethought refers to the mental demeanour of the assailant to cause death. The act or omission must be proved to have intended to result in death.

The circumstances of the deceased's death are that she was cut by a sharp panga that broke her bones in the neck. The spinal code was broken leading to excessive bleeding resulting in death. Medical evidence by PW9 is that a sharp panga must have been used to cause injuries on the neck and spinal code.

A panga is a very dangerous weapon and the neck is a very vulnerable part of the body. The use of a panga to inflict injuries on the neck with sufficient force to break the vertebra is sufficient to impute malice aforethought as an intention is to cause death.

I, therefore, find that malice aforethought has been proved in the instant case.

See Uganda vs Turomwe [1978] HCB 16.

The major and contested issue for consideration in this case is whether the accused participated in committing murder. On the issue of participation, Mr. Onencan, the learned State Attorney who appeared for the state submitted that the prosecution evidence was both direct and circumstantial. It was direct in that PW3 and PW7 positively identified A1 and A2 as the assailants. They had known them before as their neighbours and saw them with the aid of moonlight and fire in the kitchen. PW3 also heard the voice of A2.

Further, that circumstantial evidence was also available in that by the following morning, the households of the accused had been deserted or vacated. There were no people and no animals or chicken like a normal homestead would be: He also submitted that the evidence by the prosecution clearly brought out the motive for killing the deceased. The accused had a belief that the deceased was a witch who had to be got rid of. PW2 was elaborate on the theory of motive.

Mr. Katembeko and Mr. Tumwesigye learned counsel for the two accused made a joint submission in which they amplified the alibi set up by the accused contending that though they had no duty to prove it by law, they had gone an extra mile in calling evidence of DW3, DW4, and DW5 to prove that they were not in Kangore village on the material night that the deceased was murdered. It was submitted for the accused that the letter "D2" written by Omukashenyi LC 1 Committee clearly accounted for their alibi and they should be acquitted. The defence also drew the attention of court to the inconsistencies between the Police statement of PW3 and his testimony in court regarding whether it was A1 or A2 whose voice PW3 heard and whether it was A1 or A2 who assaulted PW7. Further, that PW7 testified about the accused being armed with knives while PW3 testified about pangas.

It is trite law that an accused who sets up an alibi does not have a duty to prove it. The burden of proving his guilt remains throughout on the prosecution.

See Ssekitoleko vs. Uganda [1967] EA 531 See

Ntale vs Uganda [1969] EA 365

See also Festo A Aserua vs Uganda Supreme Court Criminal Appeal No. 1 of 1998 (unreported). The prosecution relied on the evidence of the two eye witnesses PW3 and PW7 and the circumstantial evidence of PW4 and PW6 to negative the alibi. It was the prosecution case that since PW3 and PW7 had seen the two accused, then the alibi is false. Further that since PW4 and PW6 had seen the accused going in the direction of their home in the evening, then the possibility is that they were in Kangore village by the early night (8.00 p.m.) when the deceased was attacked and killed. It was submitted for the state that the letter which the accused tendered that was written by DW3 and his Omukashenyi LC Committee was part of the pre-arranged plan to cover up for

their participation in the crime. That they had planned this murder earlier is gathered from the evidence of PW2 who testified about the bitterness of AI that the deceased was a witch and the testimony of PW5 was that DW5 who is the father of both accused had two days prior to the deceased's death engaged PW5's brother in a plan to monitor the deceased so that she may be killed for being a witch.

The evidence of PW2 in some way taken together with the evidence of DW5, PW4 and PW6 shows that the accused persons must have been to Buhweju on the 13th July 2004.

What is in dispute is whether they stayed there the whole day and night till the morning of 14/7/04.

While DW4 and DW3 state that the accused never left Omukashenyi the whole of 13th July 2004, PW3 and PW7 testified they saw these neighbours of theirs attack them and kill the deceased. PW4 and PW6 say they saw the accused at about 4.00 p.m. and 7.00 p.m. respectively heading towards their home in Kangore.

The question is could the accused be in Omukashenyi and Kangore at the same time? Of course not and both assessors believed the alibi and advised me to acquit.

However, Omukashenyi was said to be 5 kilometres from Kangore by PW2 and PW8 who investigated and visited both the scene of the murder and Omukashenyi before arresting the accused stated that Omukashenyi is about 4 miles from Kangore by short cut but it is 6 miles by long route and it takes 30 minutes by vehicle while it takes 1 hour by bicycle and 1 Vi hours by foot. When PW8 received a call from the O.C. CID Bushenyi to get a Doctor and proceed to

Kangore to have the post mortem of a murder victim examined, he proceeded that morning of 14/7/04 with Dr. Frank Mugabe (PW9) and while at Kangore, he got information at the scene that the accused were suspects and had deserted their homes despite being immediate neighbours. He recorded the statements of PW3 and PW7 who were in the kitchen with the deceased and the two said they saw A1 and A2 at the scene and that the two killed the deceased because they believed she was a witch. While still at the scene, PW8 was informed by the LC III Chairman Katende that DW5 and his sons A1 and A2 were at Kyangyenyi Sub-county fearing to be killed by the relatives of the deceased. He proceeded to Kyangyenyi Sub-county and re-arrested DW5 and A1 who had been put in the cells. He then went to Omukashenyi village and recorded statements from people who said that A1 was at Omukashenyi that night. He then got information that A1 and A2 had been seen on a bicycle going to Kangore from Buhweju (Omukashenyi) side that evening. He went and recorded these statements too.

From that rather lengthy testimony unlike my assessors, I find that it was possible and indeed both accused persons were in Omukashenyi during the day, returned to Kangore during the evening and went back to Omukashenyi in the night of 13th July 2004. They were in both places at different times of day and night.

I shall pause here for a moment and establish whether the accused were at the scene of the murder at the material time.

The prosecution pursued 3 leads of evidence in that regard. The first lead was the direct evidence of PW3 and PW7. These two witnesses testified that they saw A1 attack the deceased with a panga (PW7 said a knife) while A2 attacked PW7 and even injured his wrist with the panga (PW7 said a knife). The defence

contested this evidence submitting that PW3 told the police that PW7 was attacked by A1 while in court he testified that it is A2 who attacked PW7. The defence tendered PW3's police statement to that effect. In the same police statement, however, PW3 is recorded as telling the police that the deceased cried that "Kakubi and David you have killed me".

Case law regarding discrepancies is that minor discrepancies might be explained away by the inordinate delay before the accused persons were brought to trial but grave inconsistencies unless satisfactorily explained would usually, but not necessarily, result in the evidence of a witness being rejected.

See *Uganda vs Adwofu Bikamukire and Another* [1972] HCB 144.

See also *Uganda vs Dusman Sabuni* [1981] HCB 1.

The lady and gentleman assessors advised me that these two witnesses (PW3 and PW7) were so young and lacked the courage to see the accused correctly.

With respect to the two assessors, the testimony of PW3 in court did not show that he was the type who would not appreciate facts. When cross-examined he said as regards that issue that "I told the policeman that it is A2 who entered the kitchen and the statement says it is A1 who entered the kitchen which is not true?"

He explained further that the policeman who recorded it did not read it back to him and that he did not name the accused to Bateyo because he was scared. He further explained that the statement of 14/7/2004 was a question and answer by the police who had visited the scene while the additional statement made at Bushenyi Police Station in December 2004 was a story he was asked to narrate about what happened. These are in my view clear and satisfactory explanations about the discrepancy. They do not point to deliberate lies because both A1 and A2 are said to have been at the scene and were seen by both PW3 and PW7. There would be no justification to reject the evidence of PW3 and PW7 regarding identification, moreover, the issue of PW3 and PW7 being young does not arise during the trial. At the trial they were not of tender years and their evidence does not require corroboration. What is important is for this court to

find the witness truthful which I hereby do for the reasons I have given above. The accused were neighbours known to PW3 and PW7. PW3 heard A2 speak. There was enough time for observation.

See *Nabulere & Ors vs. Uganda* [1979] HCB 77.

The second lead pursued by the prosecution is circumstantial evidence. The prosecution's case in this regard is that Al and his brother Saverino approached PW2 who is brother in law to the deceased and complained that the deceased is a bad person who should sell her land and leave the village on her own. PW2 suggested that they call a meeting to discuss the matter but Al refused saying he had no time to waste in meetings and were going to kill her. That was on 10/7/2004 and the deceased was killed on 13/7/2004. Further, on 11/7/2004 at about

11. 00 a.m. PW5 found DW5 who is the father of both Al and A2 asking PW5's brother, Erias Birondwa to monitor the movements of the deceased and find a way of murdering her. PW5 confronted Birondwa if he had joined murder squads but he scoffed at her that the deceased deserved death since she was a witch. Two days after the deceased is murdered.

The law regarding circumstantial evidence is that, it is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. However, circumstantial evidence must be approached with caution because it may be fabricated to cast suspicion on another and it is necessary before drawing the inference of the accused's guilt to be sure that there are no other existing circumstances which would weaken or destroy the inference.

See *Tumuheirwe vs Uganda* [1967] EA 328 which cited with approval *Teoer vs R* (1952) AC. 489.

The third lead is the prosecution evidence is that the accused had the motive to murder the deceased because they felt aggrieved that she was a witch who was bewitching the accused's relatives. PW2 and PW3 testified about the complaint by A1 that the deceased was a witch. The law on this issue is that while motive is irrelevant in a criminal prosecution it was always useful since a person in his normal faculties would not commit a crime without reason or motive. The existence of a motive makes it more likely that the accused did commit the offence charged.

See *Tinkamalirwa & Ors vs Uganda* [1988-90] HCB 5 at p.7.

Of course the accused denied being in the deceased's home at the material time and denied murdering her. They denied ever having a grudge with the deceased and denied knowing her as a witch. They denied ever complaining to PW2 about the witchcraft of the deceased. Yet PW8 the investigating officer testified that A1 and A2 were suspected because they had been accusing the deceased of being a witch and that they had warned her about it.

It is clear in this case that the accused were not on terms with the deceased. It appears abundantly from the evidence on record that the family of the accused persons were aggrieved and held strong suspicion that the deceased was a witch. When I analyze the three pieces of evidence i.e. The direct evidence of PW3 and PW7, the circumstantial evidence regarding a complaint to PW2 by A1 and his brother, the plan by DW5 whom he asked for the co-operation of PW5's brother, the desertion of the homes of the accused on the morning of 14/7/04 with all their animals save for a dog, the abduction and beating of PW7 by

Mwesigye and Tumuhairwe both brothers of the accused and leaving him in the forest for dead two years ago (while A1 and A2 were in prison), the allegations of witchcraft as complained to PW2 and heard by PW5 and PW8 and when I weigh this evidence against the accused's denials and alibi, I find that the murder of Jolly Ntengyereize on the night of 13th July 2004 did not come as a surprise.

There was a carefully drawn out plan on how to execute it with prearranged plans about how to handle the aftermath. The death of DW4's daughter and her burial on 13th July 2004 provided a perfect timing for the sinister plan to deal away with the alleged witch - the deceased. Apart from the direct evidence of PW3 and PW7 which I accept, I find ample circumstantial evidence to connect the accused to the crime. Three days after complaining to PW2, the deceased is murdered. A1 had vowed to do so and refused to buy the idea of holding a meeting with Katabarwa heir to the family of the deceased. Two days after PW5 had found DW5 hatching a plan to kill the deceased, she is murdered. Then the morning after the murder, the homes of A1 and A2 plus their father DW5 who were the next neighbours are deserted in pre-planned style. When DW5 goes to DW4's village at Omukashenyi where A1 and A2 had whiled away on beer at the funeral, a letter is written and was actually given to the accused and their father DW5 as a form of defence and the accused and their father went to Kyangyenyi Sub-county with their letter while their other families scattered amongst relatives.

For the reasons I have endeavoured to give above, I find that the alibi of the accused in regard to the time when the murder occurred to be false. The prosecution evidence of PW4 and PW6 who saw the accused retire from Buhweju late evening destroys the alibi. While PW3 and PW7 placed the

accused at the scene.

The letter by the LC 1 was valid only for the fact that the accused had been at Omukashenyi during day for burial of DW4's daughter and returned there in the night to stay at the vigil till the morning of 14/7/04 after they had accomplished their mission. The burial and vigil just provided the opportunity for the accused to plead an alibi after they had murdered the deceased.

The circumstantial evidence on record is incapable of any other explanation other than the guilt of the accused.

They had arranged to minimize damage to their property and family members and deserted their homes before the death of Jolly Ntengyereize could be avenged by emotionally charged relatives. They got themselves and their families and property out of harms way. Although from the evidence of PW3 and PW7 it is clear that A1 is the one who inflicted the fatal blows to finish or kill the deceased. The fact that A2 was equally around and present at the scene to prosecute a common intention i.e. to kill the deceased, I find that common intention existed and is proven on the evidence.

See *Uganda vs Sebaqanda* [1977] HCB 7.

A2 was present at the scene, participated in warding off any assistance that PW7 would render in answer to the deceased's alarm and consented to the transaction by being armed. He is a full participant.

See *Geresomu Bihuqanwa vs Uganda* [1986] HCB 1.

Upon the consideration of the evidence I find that the prosecution has proved beyond reasonable doubt that the accused murdered Jolly Ntengyereize on 13/7/04. I find the alibi false in regard to the time when Jolly Ntengyereize was murdered. The lady and gentleman assessor did not appreciate that this matter

had a history to it, the relevant motive and that it was planned to happen with the burial and funeral in DW4's home providing the necessary opportunity and cover after the murder. I respectfully, disagree with both assessors.

I find both accused guilty of murder contrary to sections 188 and 189 of the Penal Code Act and I convict each of them accordingly.

Lawrence Gidudu

J u d g e

20/10/2008

Accused present

Tumwesigye for A2 and holding brief for Mr. Katembeko for A1.

Onencan Prosecutor (RSA)

Baryabijuma for interpretation English into Runyankore.

Judgment read and delivered in open court.

Lawrence Gidudu

J u d g e

20/10/2008

Allocutus

Pros:

I do not have previous record of the accused. The first convict has been on remand for 4 years while the second has been on remand for 3 years and 10 months. The two convicts are young people. The offence committed is a serious one. This was a well planned murder. It was inhuman, cruel and brutal. The convicts made a mistake to take the law in their hands and they did it in a ruthless manner.

Tumwesigye: I pray for lenience.

A1: I want to consult our advocate before we say anything.

Court: Granted. They consult their advocate

Lawrence Gidudu
J u d g e
20/10/2008

A1:

I have five children. 2 in secondary and 2 are in primary school. Even my wife is in court. I have been in prison long enough to learn how to live better in society.

I accept the decision of this court.

A2:

I agree with courts findings. I was a builder and student. I was the last born of Karyeija and I was the one who was looking after him.

Reasons and Sentence

The accused are stated to be first offenders. They pray for lenience to go and look after their families.

The State prays for the maximum sentence of death. The ground for this prayer is that the accused pre-arranged to murder the deceased. Their reasons that she was a witch would have been settled by the local leaders.

I have given considerable thought about the submissions by the state and the prayers by the convicts for lenience. Jolly Ntengyereize was murdered without being given a chance to defend herself against the allegations of witchcraft. Her life was terminated at once forever. I have no basis for imposing a lesser sentence since all opportunity existed for discussing this matter either in a family or village meeting between these neighbours. I am appreciative of the accused's remorsefulness but I am inclined to impose a sentence that equals the crime that was committed.

Accordingly I sentence each of the accused persons to suffer death in a manner prescribed by law.

Lawrence Gidudu **J u d g e**
20/10/2008

Court:

Each of the accused person has an automatic Right to appeal to the Court of Appeal within 14 days from the date hereof.

Lawrence Gidudu
J u d g e
20/10/2008