

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 0429 OF 2006

UGANDA:.....PROSECUTOR

VERSUS

TAGONSYA MIKA:.....ACCUSED

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

The accused was indicted for murder contrary to section 188 and 189 of the Penal Code Act. It was stated in the indictment that on the 21st day of October 2004 at Buwanuka village in Mayuge District, Tagonsya Mika murdered Benakyo Alima. The accused denied the indictment and the prosecution called 6 witnesses to prove its case against the accused.

The facts on which the indictment was based are that Banakyo Alima, the deceased lived with her son Amini Bakibisemu (PW3) and his sons and daughters in Mpungwe, Buwaya sub-county in Mayuge District. The accused lived with his step-father Kawanguzi in the neighbourhood. On the 21/10/04, Alima's grandsons went to the garden to catch white ants. They found anthills with white ants flying but they could not construct shelters to trap the white ants. The boys called for assistance of their grandmother, the deceased. Alima went to the garden and helped to construct shelters. After constructing a shelter on the second anthill, the deceased asked her grandson, Abu Bakibisemu (PW1)

to go back and check on the first anthill where they had built a shelter. Abu went and found the accused collecting white ants from the shelter. Abu returned to his grandmother and informed her that there was a man (accused) collecting white ants at first anthill. Alima asked Abu to go back and tell the accused to go away. When Abu went back to the anthill, the accused told him not to move near him. Abu was frightened because the accused had a *panga* in his hand. He went back to the second anthill and reported that the accused was defiant and would not go away.

The deceased returned to the first anthill with Abu and asked the accused to stop eating the white ants but the accused was still defiant. When Alima insisted that he go away, the accused pushed her and she fell down. Accused continued to assault her by kicking her in the chest. He later cut a cassava stem and hit the old woman with it on the back. He used the same *panga* to threaten the boys who ran a short distance away but continued watching him assault the deceased.

Abu then asked his younger brother to go home and call their father, Aminsi Bakibisemu (PW3) to come to the deceased's rescue while the accused continued with the assault. Abu and his other brothers made an alarm and Iwumbwe Sulayi (PW2) their brother responded. Other villagers also responded. The accused ran away towards a swamp. When PW2 got to the scene he found the deceased dead. PW2 and other residents began to search for the accused but failed to find him. Police was summoned and D/AIP Lubambo James (PW5) visited the scene of the crime. As they searched for the accused, the body of the deceased was carried back to Aminsi's Home. PW5 summoned a doctor from Mayuge Hospital who carried out a post mortem examination at Aminsi's home on the same day.

Isa Kawanguzi (PW4) who was the LC1 Defence Secretary and stepbrother to the accused arrested the accused later that evening and took him to Mayuge Police Station. Accused was charged with murder and Wafula Richard (PW6) recorded a charge and caution statement by accused.

The case for the defence was briefly that the accused did not assault the deceased but the deceased who was already ill collapsed and died following a quarrel with the accused. The accused denied that the dispute between him and the deceased was about white ants. He also denied that he ran away after he found out that the deceased died.

In all criminal cases an accused person is presumed innocent until he is proved or pleads guilty. This is provided for by Article 28 (3) (a) of the Constitution of the Republic of Uganda. 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, SC. 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**).

In order to sustain an indictment for murder in this case, the prosecution had the burden to prove the following against the accused:

- i. That Benakyo Alima (the deceased) died,
- ii. That the cause of her death was unlawful,
- iii. That the accused caused the death of Benakyo Alima, or participated in causing it, and
- iv. That he caused it with malice aforethought.

Regarding the 1st ingredient, all witnesses called by the prosecution testified that Benakyo Alima died; all of the prosecution witnesses, except PW6 saw the body of the deceased at the scene of the crime. This is supported by the post mortem report, Exh. P1. The

accused also admitted that by the time he left the scene of the crime the deceased was dead. The first ingredient was therefore proved beyond reasonable doubt.

Since the accused did not deny being at the scene of the crime at the material time, the ingredients of unlawful death and participation of the accused were approached concurrently by the defence. As to whether the death was unlawful, the prosecution contended that the death resulted from the accused's assault of the deceased. PW1 testified that he saw the accused assault the deceased by kicking her in the chest and hitting her back with a cassava stem. The accused denied that he assaulted the deceased and claimed she just fell down and died because of previous illness. He admitted that there was an exchange of words between him and the deceased but that it was in low tones.

Mr. Sserwanga for the accused drew the attention of court to the post mortem report, which showed that the deceased died of sudden death following sudden shock and heart failure. He pointed out that the doctor who did the examination observed that the deceased was in the age bracket that usually gets high blood pressure and heart disease. Counsel for the accused added that the body was reported to have been clear and smart which was not consistent with assault with cassava sticks as testified to by PW1. Further that the evidence given by PW3 Aminsi Bakibisemu contradicted the expert evidence in the post mortem report because PW3 testified that the deceased had bruises on the legs and a depression in the chest. He asserted that the zeal with which PW3 testified indicated that he could have influenced PW1 to give evidence against the accused in court. Mr Sserwanga submitted that these contradictions in the evidence adduced by the prosecution created doubt about the cause of death of the deceased.

It was however the submission of the prosecution that the heart failure was a result of the shock which was occasioned to the deceased when she was kicked in the chest by the accused. Going back to the post mortem report, the cause of death and reasons for it were recorded as *“sudden death following sudden shock in a heart failure patient leading to*

complete heart block and death.” The general observations were as noted by counsel for the accused – deceased was of the age that usually gets high blood pressure and heart diseases. Superficially the body had swollen feet and abdomen - liver, which the doctor attributed to heart failure. Given the reasons for the cause of death, it is clear that the deceased who was a heart failure patient died from *sudden shock*.

The evidence of PW1 clearly showed that the deceased was assaulted on the day she died. Even a healthy human subjected to an assault would suffer from a certain degree of shock. Assault is unlawful and it is provided for and proscribed in the Penal Code Act. I therefore find that the prosecution proved the second ingredient beyond reasonable doubt.

Regarding the participation of the accused, the prosecution again relied on the evidence of PW1, Abu Bakibisemu who testified that he saw the accused assault the deceased. Abu testified that when the deceased approached the accused and insisted that he stop collecting white ants from their shelter, the accused pushed her and she fell on her side. The accused then proceeded to step on the accused in the chest. PW1 emphasised the number of times that the accused stepped on the deceased’s chest as three times. PW1’s testimony was not shaken in cross-examination.

The accused in his defence denied that he assaulted the deceased and testified that there was a quarrel in which they spoke to each other in low tones. His evidence differed from all other witnesses because he told court that the argument between him and the deceased was about destroying the deceased’s maize garden and not white ants as the witnesses for the prosecution testified. He insisted that he did not go near the deceased and that he spoke to her respectfully referring to her as “*grandmother*.”

Further evidence that would corroborate that of PW1 was given by PW2, PW3 and PW5. Iwumbwe Sulaiman (PW2) testified that he responded to the alarm of children who had gone to collect white ants. When he got to the scene of the crime he found the children Abu, Nantale Munawala and Babirye Aisha crying. When he asked them what happened

to the deceased, they responded that a man from Kawangzi's home had beaten the deceased to death. He asked them to direct him to where he had gone and they showed him the direction accused had taken. He followed it and found accused and one Kibwika Siraje along the path to the sell. No sooner had he reached them than the accused ran away. PW2 gave chase but the accused disappeared. PW2 went and reported the incident to the local administration police.

Aminsi Bakibisemu's (PW3) testimony was that he was summoned to go to the scene of the crime by his son Hassan Waiswa because a man was assaulting his grandmother. When asked who the man was, Waiswa responded that it was a man from Kawanguzi's place who was with Kibwika. PW3 proceeded to the scene of the crime and on the way he met Ismail Bakibisemu crying. Ismail informed PW3 that a man from Kawanguzi's home called Tagonsya had beaten up his grandmother and she was dead.

Detective Lubambo James who was PW5 informed court that after he had taken statements he returned to Mayuge Police Station where he interrogated the suspect. He testified that the accused informed him that the whole incident began with a conflict over white ants to which the deceased had denied the accused access. It resulted in an assault where, the accused revealed, that he kicked the deceased in the chest once. PW5's testimony was not shaken in cross-examination.

Further cross-examination PW5 revealed that in his investigations at the scene of crime he sought to know what led to the death of the deceased. He interrogated some children who had been at the scene when the deceased died. These, he said, were grandsons of the deceased and they informed him that it was the accused who assaulted the old woman.

The evidence of PW2, PW3 and PW5 corroborates that of PW1. The accused admitted that the deceased found him at the scene of the crime with a child, most probably PW1. PW4 gave a similar story to the accused's defence, which is not surprising because though he was the Secretary for defence and he arrested the accused, he was the accused's stepbrother. The defence of the accused that he did not hit or push the deceased

appears to have been a lie. I therefore find that the prosecution proved the participation of the accused in causing the deceased's death beyond reasonable doubt.

The final ingredient that had to be proved was malice aforethought. Malice aforethought is a state of mind. It cannot be proved by direct evidence but it may be inferred from circumstances such as the weapon used to kill, the part of the body of the deceased targeted and the conduct of the accused before, during and after the death of the deceased (**R v. Tubere [1945] 12 EACA 63**). In this case the prosecution relied on evidence about the part of the body of the deceased that was targeted. PW1 testified that the accused kicked the deceased in the chest and that he did so three times after the deceased had fallen down resulting from a push. It was further submitted that the heart is a vulnerable part of the body and in this case, the deceased appears to have had a weak heart. The post mortem report shows that she had signs of a heart failure patient. This made her heart even more vulnerable.

In order to establish whether malicious intent was formed by the accused, the events as they unfolded need to be examined. The accused pushed the deceased who fell down after only one push. After she fell down, the deceased, an old woman of approximately 82 years according to the post mortem report, posed no threat whatsoever to the life of the accused. She was in fact powerless to stop him from collecting the white ants that were in dispute between the two. However, according to PW1 the accused went ahead and stepped on or kicked her in the chest three times. It can be inferred from this additional conduct of the accused that he had formed a malicious intent to either cause the deceased grievous harm or to kill her altogether.

S.191 (b) of the Penal Code Act provides that malice aforethought shall be deemed to be established by evidence proving knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused. The accused's action of kicking the

deceased in the chest, where the heart is found, was likely to cause death or grievous harm to the deceased. Any adult would know that a violent kick to an old person might result into serious injury because of already existing infirmities due to old age.

According to s.191 (b) PCA, it is not necessary to prove that the accused had knowledge that the act or omission would cause death. Even if the act was executed with indifference and it resulted in death, malice aforethought would still be inferred. It does not matter that in the circumstances of this case the deceased had an underlying ailment as is indicated in the post mortem report. The law in such cases is that the court considers the proximate cause of death (the kick which led to shock) and not the underlying illness (heart failure) that could have caused the death of the deceased in the future.

The prosecution also relied on further evidence that the accused run away from the scene of the crime after the deceased collapsed and died. PW1 testified that when he and his brothers sounded an alarm, the accused run away towards a swamp and efforts to find him were futile until he was arrested later in the evening. PW2 testified that when he arrived at the scene of the crime, his younger brother told him what had happened and showed him where accused had run to. PW2 gave chase and found the accused with his friend Kibwika. As soon as the accused saw PW2 he fled.

PW4 also testified that the accused disappeared immediately after the incident. As Secretary for Defence of the area, he organized a search and the search party looked for the accused in three villages in vain. PW4 later arrested the accused from his brother Kibwika's home several hours after the incident. He had to bind him in ropes to take him to the Police Station. PW5 the investigating officer also testified that when he got to the scene of the crime he was informed that the accused was on the run and a drum was being sounded for his arrest. Mr. Mooli Albert for the prosecution submitted that guilt and therefore malice aforethought should be inferred from the accused's actions.

The accused denied that he run away after the incident. He testified that he was at home after the incident and was idle all that time between around 3.00 p.m. when the incident occurred and 6.00 p.m. when he was arrested. He denied that he run away and hid after the incident. He claimed he was arrested from his stepfather's house where he had been seating after the incident. The accused's defence is contrary to the testimony of both PW2 and PW4 who informed court that during the search that was mounted for the accused, one of the places that they looked was his stepfather's home but they did not find the accused. The accused's defence that he was all along at home from the time that the incident occurred until his arrest was therefore a lie.

I find that the accused had formed a malicious intent when he kicked the accused in the chest. His behaviour after the incident was an indicator of guilt. Malice aforethought was by these two facts established. As a result, the prosecution proved this final ingredient of the offence beyond reasonable doubt.

The assessors in this case gave a joint opinion in which they advised me to convict the accused and I agree with them. Since the prosecution proved all the ingredients of the offence the accused is hereby convicted of murder as indicted.

Irene Mulyagonja Kakooza

JUDGE

18/08/08