THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 0424 OF 2006

UGANDA:: PROSECUTOR

VERSUS

LOTUKEI RICHARD:: ACCUSED

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

The accused was indicted for murder contrary to sections 188 and 189 of the Penal Code Act. It was stated in the indictment that on the 20th day of May 2003 at Masese III village in Jinja Distirct, Lotukei Richard alias Lijja murdered Moru Maria. The accused pleaded not guilty to the indictment and the prosecution called 5 witnesses to prove its case. The accused gave sworn evidence in answer to the indictment.

The prosecution case was briefly that on the 20/05/03, the deceased (Maria Moru) and her husband the accused had a fight at their home. The two had rented rooms/a room at the tenements of PW3 Bruhane Ejiet. Ejiet lived with, among others, Anna Asio (PW4), his sister. PW3 and PW4 testified that on the material day there was a fight between the accused and the deceased. PW3 saw them fight and proceeded to report to John Mweru (PW1) the Local Council (LC) 1 Chairman of Masese III village. PW4 testified that she heard the deceased cry out but she could not go out to see what was happening to her

because she was unwell. However, she knew it was the deceased's cry because the deceased and the accused were in the habit of fighting almost every day.

It was the evidence of PW1 that the fight was not reported to him, but PW3 asserted that he reported though PW1 did not respond immediately. PW1 came to the scene of the crime after the deceased had died. The evidence of PW1 was that the last time he saw the accused in Masese was on the evening of 20/05/03 as he was walking through the trading centre. He did not see again from that day till he saw him court when he was summoned to testify in this case. PW1 testified that when he got to the scene of the crime, where he saw the body of the deceased, he was informed that there had been a fight between the accused and the deceased and that the accused disappeared after the fight.

Nambafu Bernard (PW2) was the investigating officer for the case. He testified that he went to the scene of the crime the following day – 21/05/03 and found the naked body of the deceased lying in the doorway of a house. PW1 was informed that accused and the deceased had shared the house and lived as husband and wife. PW1 also testified about the injuries of the deceased on the head and bruises on the face. He also found 2 sticks at the scene which he recovered and took back to the police station. He drew a sketch plan showing where he found the body lying in a pool of blood and the sticks, and a point in the compound where there was more blood.

The evidence of Dr. Katende (PW5) was that on the 21/05/03 he was requested to carry out a post mortem examination on the body of the deceased. He testified that he carried out a post mortem examination on 23/05/03. He found that the deceased had died of a head injury due to an assault. He did not name the weapons that were likely to have been used in the report but on cross-examination he stated that the deceased could have been hit with a back of a hoe, a stone or an axe. He stated that he concluded that the death resulted from an assault because it was stated in the request for post mortem examination.

The case for the defence was that the accused and the deceased had separated earlier because their child died and the deceased was no longer happy with the accused. That the deceased left him and rented a house of her own. Accused also set up an alibi that at the time of the death he had left Masese and migrated to Naksongola where he was employed as a cattle keeper. He claimed he only came to know about the deceased's death when he was arrested and told that he was being charged for killing her. He felt bad because he was accused of killing her.

The burden of proving the guilt of an accused person lies on the prosecution all thorugh the trial; it never shifts onto the accused except in a few statutory cases. The prosecution is required to prove the indictment against the accused beyond reasonable doubt. Where any doubt exists, it should be resolved in favour of the accused **(U v. Dic Ojok [1992-1993] HCB, 54).**

In cases of murder like this one, the prosecution is required to prove all the ingredients that constitute the offence beyond reasonable doubt. The prosecution therefore had to prove that Maria Moru died, that her death was caused unlawfully and with malice aforethought, and that the accused directly caused her death or participated in causing it.

Regarding the first ingredient, the prosecution relied on the evidence of PW1, Mweru John, Bruhane Ejiet (PW3) and Anna Asio (PW4). Prosecution also produced a post mortem report (Exh. P3) which stated the cause of death. The defence did not contest that death occurred. The first ingredient was therefore proved beyond reasonable doubt.

As to whether the death was caused unlawfully, the legal presumption is that all homicides are unlawful except where death is caused by accident or in execution of a lawful sentence. (See Article 22, Constitution of Republic of Uganda and **U v. Gayira and another [1994-1995] HCB at 16.**) PW3 and PW4 testified that the deceased was assaulted on the night that she died and that this resulted in her death. The post mortem

report described the possible cause of death as head injury due to assault. Since assault is an offence, and the defence did not contest the fact that the deceased was assaulted, I find that the prosecution also proved the second ingredient of the indictment beyond reasonable doubt.

With regard to malice aforethought, s. 191 of the PCA provides that malice aforethought is established when it is proved that there was an intention to cause death of a person, whether the death occurs or not. It may also be proved where there is knowledge that an act or omission causing death will probably cause death of some person whether such person is actually killed or not. It does not matter that the knowledge is accompanied by indifference, whether death is caused or not, or by a wish that death may not be caused. Malice aforethought is therefore a state of mind. It has been held that it can be inferred from the part of the body targeted, the weapon used and the behaviour of the accused before, during or after the death in issue.

The evidence adduced by the prosecution was that death in this case could be inferred from the nature of the injury that was sustained by the accused. The deceased was hit on the head. The evidence of PW1, PW3 and PW5 showed that the deceased died of an injury on the head. The post mortem report and evidence of PW5 showed that the deceased died of an open head injury – "an injury to the brain that led to the rest of the vital centres of the body stopping". According to PW5 the likely weapon used to cause the injury was a hoe, stone or an axe. The defence did not contest that malice aforethought was proved. I therefore find that malice aforethought was proved beyond reasonable doubt.

It must then be considered whether the accused caused the death of the deceased or participated in causing it. In order to prove this, the prosecution relied solely on the evidence of PW3 and PW4. PW3 testified that on the night in question, he saw the accused and the deceased fight in the compound in front of the house in which they lived

as his tenants. He explained that the accused was very violent towards the deceased. Seeing there was a fight, PW3 went to the LC1, John Mweru to report. The chairman did not respond in time. When PW3 returned to the deceased's home, he found when the deceased was dead. The accused had already run away but PW3 looked at the body, which was lying in the sitting room, and it had a wound on the head.

In cross-examination PW3 stated that when he returned and found the deceased dead he was informed by the accused's other neighbours that the accused had killed his wife. PW3 also explained that there had been complaints that the accused was a violent man fond of fighting. PW3 observed the fight from a distance of about 100 metres and it was at 9.00 p.m. at night. He affirmed that by the time he left to go and report to the LC 1 Chairman, the accused and his wife were still fighting and they were near the entrance to their house. When he returned, the accused had disappeared and the body of the deceased was lying at the entrance of the house.

Mr. Wagira, counsel for the accused submitted that the evidence of a single identifying witness should only be accepted with caution since there was no other evidence that corroborated it. He drew court's attention to the fact that PW3 had poor eyesight; he failed to identify the accused in court from the witness stand and had to move close to him to do so.

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."

The circumstances to be taken into account to determine whether a witness could have properly identified the accused 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.

In the instant case, PW3 gave the evidence that he saw the accused and his wife fighting. The accused and his wife had been his tenants for a period of one month. The circumstances in which the witness identified the accused were clearly difficult. It was 9.00 p.m. at night. The witness did not tell court what source of light he used to identify the accused. However he was sure it was the accused and his wife fighting and he went to report the matter to the LC1 Chairman as a responsible landlord.

PW3 testified that when he saw the fight, the accused was very violent. That many people answered the alarms made by the deceased and watched the fight. The accused had in the presence of PW3 and others gone to a bush nearby and got sticks with which he used to assault the deceased. The sticks were found next to the body of the deceased. PW1 testified that the sticks were about 1-½ inches in width and that when he saw them

beside the body of the deceased they had blood on them. PW2 recovered the sticks and took them back with him to the police post though they were not produced in evidence.

I find that the evidence of PW3 can be relied upon to put the accused at the scene of the crime. PW3 must have watched the fight for a considerable period of time and saw how the events unfolded up to the time that he left the scene of the crime to go and make a report to the LC1 Chairman. He had known the accused as his tenant for a period of one month. The insufficiency of light notwithstanding, the length of time that PW3 and others spent watching the fight appears to have been sufficient to enable him to identify the accused.

In the event that there is doubt about the testimony of PW3 court must consider other evidence relating to the identification of the accused that night. PW4 testified that the accused and the deceased were tenants who lived in her brother PW3's house. She testified that on the night that the deceased died, she was ill and in her house nearby. She heard the deceased crying and concluded that she and the accused were fighting again. She informed court that the accused and the deceased were in the habit of fighting. They fought almost every night. The following morning she woke up to the news that the deceased was dead and she saw the body in the house that had been rented by the accused. The accused had fled the area. She concluded that it was the accused that killed the deceased during the fight.

Mr. Wagira Moses, counsel for the accused challenged the evidence of PW4. He contended that the evidence of PW4 could not be used to infer that the cry that the deceased made that night was because she was being assaulted. Further that PW4 could not tell with certainty that the assault to the deceased was by the accused because in her testimony she never mentioned that the deceased was complaining about assault or that her husband was assaulting her. Mr. Niyonzima for the accused submitted in reply that the conclusion that was made by PW4 was justifiable and could be believed because of

the past conduct of the accused towards the deceased. I find that the past conduct of a couple fighting almost everyday may lead to neighbours learning the general pattern of the fights and to identifying their voices during a fight. The evidence of PW4 was therefore credible, based on the past conduct of couple.

Counsel for the accused challenged the fact that the fight between the accused and the deceased took place before many people. He wondered why these neighbours did not rescue the deceased because the accused was not armed. His contention was that it was inconceivable that a fatal fight could have gone on and not been stopped by neighbours.

It is clear from the evidence adduced by the prosecution that after watching the fight for some time, PW3 left the scene and went to report the matter to the LC1 Chairman, PW1. However, PW1 did not respond in time, and PW3 returned to the scene alone; he found the deceased dead. The LC1 Chairman who denied that any report was made to him of the fight arrived at the scene of the crime after the deceased had been killed.

The behaviour of the neighbours and the Chairman LC1 was not very strange. PW4 testified that the accused and the deceased were in the habit of fighting. Incidents like the one that occurred in this case are taken lightly by neighbours; even relatives often take fights between spouses lightly. Authorities like the LC and police have the same attitudes about violence between spouses. In many instances, the authorities respond only when the assault has been extremely violent and the victim has been maimed or killed. The fact that the neighbours and authorities did not respond appropriately to the fight cannot therefore be used to cast doubt on the prosecution evidence.

Mr. Wagira also contended that doubt had been created in the evidence adduced by the prosecution because the sticks that were alleged to have been used by the accused to assault the deceased were not produced in evidence. The sticks were also not examined to establish whether the blood on them was that of the deceased. Further that the evidence

given by PW5, Dr. Katende was that the injury that resulted in the death of the deceased was to the head and that the likely weapon that was used to inflict it was the back of a hoe, a stone or an axe. Mr. Wagira concluded that it could not be inferred from the evidence adduced by the prosecution that the death of the deceased was caused by the accused if he only used sticks to assault the deceased.

In reply, Mr. Niyonzima submitted that since PW5 ruled out the possibility of the sticks having caused the injury, there might have been another weapon used to cause it. PW2, the investigating officer who went to the scene of the crime and drew the sketch plan admitted that he did not enter the house because the body was at the entrance. Admittedly the investigations of the police in this matter left gaps in the evidence produced by the prosecution. This is evident from the fact that the sticks though recovered from the scene of the crime were not tendered in evidence. However, the lapse on the part of the police cannot be held against the prosecution and it cannot be used for the benefit of the accused.

In **Kooky Sherma & Another v. Uganda, SC Criminal Appeal No 44 of 2000 (unreported),** the Supreme Court was faced with a similar situation when evidence was adduced that the deceased had died as a result of electric shocks that were administered by her husband before her death. However, evidence had also been adduced that on the night in question, there was a power outage at the scene of the crime and surrounding areas. The defence contended that death by electric shocks was not feasible and preferred other evidence that had been adduced that the deceased committed suicide because there were also traces of poison found in vital organs of her body. The court referred to the reasoning of the East African Court of Appeal in **S. Mungai v. Republic** (1965) EA 782 at page 787 where it was held that there was no burden on the prosecution to prove the nature of the weapon used in inflicting the harm which caused death nor was there an obligation to prove how the instrument was obtained or applied in inflicting the harm. The same reasoning can safely be applied to the instant case.

The evidence adduced by the prosecution was also challenged because the sketch plan that was drawn by PW2 showed two spots with blood, one in the compound and another at the entrance where the body of the deceased was found lying in a pool of blood. The sketch did not show a trail of blood from the point in the compound to the place in the house where the deceased's body was found. Mr. Wagira for the accused proposed that this fact led to the inference that the accused could have been killed elsewhere and carried carefully to the house in order to implicate the accused of her murder.

This court has already observed that there were gaps left in the investigation carried out by the police in this case. The fact that a trail of blood was not shown on the sketch plan could have been one such omission. It also one that the prosecution cannot be held liable for and it cannot be used in favour of the accused to acquit him. There is other evidence that there was a fight between the accused and the deceased on the night that the deceased died. Other circumstantial evidence led by the prosecution clearly showed that the deceased died after the fight. The evidence of PW3 is reliable on this. He left the scene of the crime when the accused and deceased were still fighting. He returned when the deceased was dead in their house. There is not other plausible inference that can be drawn from this than that the deceased died due to injuries in the fight without other independent evidence adduced by the defence.

Further evidence that leads to inference of the guilt of the accused is that he ran away from Masese after the incident in which the deceased was killed. Although counsel for the accused submitted that no evidence had been led by the prosecution to prove that he accused was in Masese on the day that the deceased was killed, PW1 testified that he last saw him in Masese on the 20/05/2003 when he was walking in Masese Trading Centre. PW1, PW3 and PW4 told court that they did not see him again after until they saw him in court when they came to testify about the death of the deceased.

The accused gave evidence on oath in his defence. He testified that he and the accused had separated long before her death and each gone their separate ways. This was contrary to the evidence of PW1, PW3 and PW4. He also stated that the separation resulted from the death of their child; deceased was no longer happy with the accused so she went away and rented a house of her own. This was contrary to the evidence of PW3 and PW4 who both asserted that when accused came to rent a house, he came with a wife – the deceased. Accused also set up an *alibi* that at the time of the death he had left Masese and migrated to Naksongola where he was employed as a cattle keeper. This was contrary to the evidence of PW1 who stated that he saw the accused in Masese trading centre on the day that he fought with the deceased.

The accused also testified that he did not know of the death of the deceased until he was arrested and charged for it. Accused could tell court when he left Walukuba to move to Masese in 2002, but he was unable to tell court when he left Masese for Nakasongola which was at a later time because he was uneducated and illiterate. The failure to tell when he left Masese was therefore not sufficiently explained in order to convince court that accused actually left before death of the deceased for valid reasons.

Under our criminal justice system, an accused can only be convicted on the basis of evidence adduced by the prosecution but not because of the weakness of his defence. However, in some cases it has been held that the accused's untruthfulness is a factor that can be taken into account to strengthen the inference of guilt **(Uganda v. Wasajja, [1975] HCB, 78**). I find that the evidence of the accused was unreliable and contained several lies. The accused was placed at the scene of the crime by the evidence adduced by the prosecution. There is not other explanation about the accused's death other than the fight that she had with him just before she died. I therefore have no doubt that the accused was responsible for the death of the deceased. The fourth ingredient has therefore also been proved beyond reasonable doubt.

The assessors gave a joint opinion and they advised that the accused should be convicted of murder. I am in agreement with them. Since the prosecution proved all the four ingredients of murder, the accused is hereby convicted of murder as indicted.

Irene Mulyagonja Kakooza
JUDGE
22/08/08