

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-SC-051 -2006

UGANDA.....PROSECUTOR

VS

TWESIGYE FRED.....ACCUSED

BEFORE: THE HON. MR. JUSTICE LAWRENCE GIDUDU

J U D G M E N T

Twesigye Fred, hereinafter referred to as the accused is indicted with murder contrary to sections 188 and 189 of the Penal Code Act.

He denied the charges hence this trial.

The prosecution case is that on 11/3/03 at about 9.00 p.m., Nakabugo (PW3) who was wife to the accused, was in the kitchen preparing supper when she heard a sound like a gun shot. She got out to ask the accused who had been conversing with the deceased what the sound was but the accused told her to continue with her cooking. Shortly, she heard the same sound and decided to go into the house to see what it was all about. That is when she saw the deceased, Byarugaba, lying down while the accused held an axe. The deceased was facing down and convulsing.

PW3 asked the accused if he had killed a person.

PW3 ran out but since she was pregnant, she could not go far before the

accused caught up with her as she fell down. The accused picked her up and returned her to the home and sat her down.

Meantime, the accused dragged the body out of the house and threw it in a pit and leveled it with soil. The deceased was struggling for breath as the accused filled the pit. The accused warned her not tell any one lest she faces the same fate.

Her relationship with the accused changed from that day in that the accused became hostile and held her prisoner in the home. He did not allow her to move about as before.

One and half years later (October 2004) PW3 left the accused's home when she felt very insecure after the accused's repeated threats to kill her and her three children.

Before PW3 left, she gave her contact where she could be contacted promising to give information about the disappearance of Byarugaba (deceased).

Eventually, the deceased's brother contacted PW3 and with the help of the police, PW3 led them to the spot near the verandah of the accused's house where the body of Byarugaba or his skeleton still dressed in clothes which Mugisha (PW4) identified as his was exhumed.

The accused was arrested upon a report by Asimwe (PW2) who had got a tip off that the accused was the one who had killed Byarugaba. He was arrested before PW3 was brought to help with investigations.

Dr. Sendi Bwogi (PW1) who was present when the body was exhumed made a post mortem report in which he described the body as of an adult African male. It was a skeleton in a wide pit. It was clothed in a red jacket, red under-wear and blue jeans that had faded due to soil conditions.

The body/skeleton had a fracture on the left temporal parietal bone which was crushed.

The cause of death was neurogenic shock from brain laceration due to the fracture on the head.

The same doctor observed that the fracture must have been caused by a sharp but hard object and death must have been instant.

The accused having denied the charges contended in his sworn defence that he had been away in Lukaya-Masaka vending fish for over one year when he returned to the village on 25/10/04. He had left the deceased in the village when he went to Masaka. On 8/11/04, he was arrested on his way home.

He contends that the charges were brought in bad faith since PW3 who was his wife had defrauded him of 2,000,000/= which he had given her to keep and she had rang him to pick the money only to be arrested. Further, that the deceased and PW4 who were both his step brothers used to discriminate against him that he was not of their clan and they used to envy him since he had been given a bigger portion of land by their late grand- father.

Once an accused denies the charges, the prosecution has a duty to prove all the essential elements of the offence against the accused beyond reasonable doubt. The accused has no duty to prove his innocence.

See *Sekitoleko vs Uganda* [1967] EA 531

Uganda vs Dusman Sabuni [1981] HCB 1

On an indictment for murder, the prosecution has a duty to prove the following ingredients beyond reasonable doubt.

- (i) That the deceased is dead.
- (ii) That the death was unlawful.
- (iii) That whoever caused that death did so with malice aforethought.
- (iv) That the accused participated.

See Uganda vs Kassim Obura & Another 9811 HCB 9.

To prove death, the prosecution submitted that since 11/3/03, the deceased had never been seen alive until November 2004 when PW3 led the police to exhume his body from a spot near the accused's house. PW2, PW3, PW4, PW5 all saw the body which PW1 confirmed was a body of an adult male African.

PW4 and PW3 identified the jacket as the one that the deceased last wore on that day.

The defence contested the fact of death on grounds that the body could not be identified since it had decomposed and was skeleton. That the body was beyond recognition and that PW3

cleared the issue of identification when in Re-examination she said "I am the one who showed the doctor (PW1) that this was the body of Byarugaba".

The photographs of the skeleton were exhibited as "P2" and the red jacket and sandals which PW4 identified as his, having been worn by the deceased on the fateful day, were exhibited as "P7" and "P6" respectively. PW1 in exhibit "P1" which was admitted by consent states that the body that was exhumed in his presence was of a human being i.e. a male African adult. Indeed, as the lady and gentleman assessors observed in their opinion which I accept, PW3 led the police to the spot where the body was exhumed. She had marked it by the fact that a banana plant had been planted above it. There was no guesswork. On the basis of medical evidence by PW1 and the evidence of eye witnesses, I find as a fact that a body was found dead when exhumed from the pit. And on the basis of exhibits like the red jacket and tyre sandals which were identified and testified to by PW3 and PW4, I hold that the body that was exhumed was properly identified as belonging to Byarugaba Henry - the deceased. This ingredient has been proved beyond reasonable doubt.

Whether the deceased's death is unlawful the position of the law is that in cases of homicide, death is presumed to be unlawful unless it is authorized by law or is excusable.

See *Gusambizi s/o Wesonga vs R. (1948) 15 EACA 65.*

Mr. Arinaitwe, the learned State Attorney submitted medical that evidence by PW1 was that the skull of the deceased had a compressed fracture and the deceased died of neurogenic shock. Further that PW3 who was wife of

the accused and who was at the scene heard a sound and when she went into the house, she saw the deceased lying on the floor in pain while the accused wielded an axe. That the deceased died a violent death.

The learned defence counsel contended that those who exhumed the body must have cracked the skull as they dug it out of the pit. The pit into which the deceased was thrown had been caused by excavation of soil for mudding a house. It was not a grave in the proper sense. This fact alone points to criminal disposal of the deceased by his assailant. PW4 who participated in exhuming the body was not challenged as to whether the cracked skull was caused by a hoe as they dug it up.

On the basis of medical evidence and eye witnesses particularly PW3 who saw the deceased before he died and later saw him lying in a pool of blood on the floor and eventually saw the deceased being dragged and dumped in a pit, I have no difficulty finding that the deceased was murdered and his death was unlawful.

Regarding malice aforethought, the intention to cause death can be inferred from the nature of weapons used, the vulnerable parts of the body targeted for injury or prior threats to cause death and the conduct of the accused before and after.

See *Uganda vs Okello* [1992-93] HCB 68 and

Uganda vs John Ochieng [1992-93] 80

On this issue, the prosecution submitted that accused had lied to PW2 and PW4 that the deceased had been killed by Wembley Operatives in Kampala and even received Shs. 5,000/= as condolences from PW2.

Further that the disposal of the body in a pit close to his house and leveling it with soil and planting a banana plant on it was to destroy evidence. This conduct showed the accused had the intention to cause death. The defence contended that since death had not been proved, it was futile to find that there was malice aforethought.

Medical evidence shows that there was a crack on the head/skull which formed a compression of the skull and PW1 observed that death was instant on the basis of this injury and PW3 who was an eye witness at the scene testified that she heard two sounds which were like a gun shot and on the second occasion, she saw the accused wielding an axe as the deceased lay convulsing on the floor in a pool of blood.

The blow on the deceased's head was so hard that it produced a sound that drew the attention of PW3 who was cooking in the kitchen. The assailant intended to cause death. The head is the central processing unit for the entire body and an injury inflicted with such force on the brain shows that the assailant intended to cause death. This ingredient has been proved beyond reasonable doubt.

The state contends that the accused was responsible for the death of Byarugaba Henry.

The sole eye witness was PW3 who was wife to the accused. She gave a very long testimony in court. The state submits that her clear testimony placed the accused at the scene of the crime and that the hostile character of the accused after this act was because he was being haunted by the crime he committed.

The defence raised an alibi and the accused denied knowledge of the whereabouts of the deceased since he had left him in the village more

than a year and half before his (accused's) arrest.

Of course, an accused who sets up an alibi has no duty to prove it and it still remains the duty of the prosecution to rebut the alibi and place the accused at the scene of crime.

See Sekitoleko vs Uganda [1967] EA 531 and
Uganda vs Dusman Sabuni [1981] HCB 1.

Perhaps I should observe that this case took long to get reported to the police because according to PW3 who was the sole eye witness, the accused took control of information flow.

The deceased usually visited the village and would stay in PW4's home. He had a banana plantation which was under the care of the accused. The deceased would occasionally come to the village and ask the accused to give him money which he would have got from the sale of bananas from the deceased's plantation. The deceased would always grumble that the deceased was giving him less money and they would quarrel sometimes leading

to insults that the accused is benefiting from bananas yet he belongs to a different clan.

On the fateful day, PW3 contends that the accused had asked the deceased to pick his money. Indeed the deceased turned up at the accused's house and even PW3 gave him some groundnuts. Moments later, PW3 hears a sound like a gun shot and when she attempts to find out the accused told her to go ahead with the cooking. Shortly, another sound goes off and PW3 became anxious to know only to find the deceased dying on the floor while the accused was welding an axe. She asked the accused if he had killed a person and instantly ran out towards the home of her mother-in-law to report but she fell and the accused caught up with her and took her back to the scene. She saw the accused drag the deceased and throw him in a pit and started dumping soil to level the pit. She saw him clear the house of the blood and the tyre sandals which he dumped in the same pit. The following day, he got his young brother to help in leveling the area. When PW4 asked him about the whereabouts of the deceased, the accused said he had gone back.

The accused then subsequently imposed a tight regime at his home where he did not allow PW3 to leave or meet people for fear of revealing what she saw. He even used to lock the bedroom so that PW3 would not access to clothes for going out or visiting. He stopped his shopping trips to Kampala and kept watch over PW3's movements.

From PW3's testimony, both the accused and PW3 were haunted by the deceased's death and their relationship deteriorated until PW3 sold one of the goats in the home and ran away with her children. She went to Kampala (Wakiso) but left a telephone contact that became

the key to unlocking this gruesome murder.

It was PW3's evidence that the spot where the deceased was dumped was clear because the accused had planted a banana plant on it and when she planted beans, she avoided planting over the pit for easy future identification something which always angered the accused.

When she was contacted, she led the police to the exact spot and when they dug it, the body of the deceased was recovered. The pit was just next to the accused's house. The accused contended that he was framed up by PW3 because she had failed to account for the 2,000,000/= which he had given her to keep and that PW2 and PW4 had grudges with him pertaining to the large chunk of land he had got from their grandfather.

PW4 conceded that the accused and the deceased would often quarrel over land and proceeds from the banana plantation and that their late mother had told the deceased in the presence of the accused that the accused had a different father.

It was the defence submission that because of these grudges, PW3, PW2 and PW4 had a motive to tell lies.

With respect, I should observe that on the contrary the grudge that existed between these brothers especially when the others used to taunt the accused that he belonged to a different clan yet he was reaping from their bananas could and indeed it reveals that the accused got fed up and decided to do what he did. While motive is irrelevant in a criminal prosecution, it becomes useful

since a person in his normal faculties would not commit a crime without a reason or motive.

Tukamahirwa & Another vs Uganda [1988-90] HCB 5 at P.7 followed.

The account of what happened as given by PW3 who was wife of the accused was so detailed. She grieved throughout her testimony because of the trauma of re-telling the sad story. She was not only present that day, but stayed in the home for a further one year and a half living with the accused who was now a hostile and violent man. Her observation and experience on that day leave the accused's alibi worthless. PW3 placed the accused at the scene of the crime which is their home that they shared even after the murder.

PW3 stated that she informed the police who asked for money to arrest the accused but she had no money. She informed Mrs. Batara about it and wanted to leave the home since the accused had warned her that he would kill her and bury her in a latrine. Evidence of the accused's abnormal and hostile conduct bolsters the prosecution case that the accused had a guilty mind and was always haunted by the fact that his wife (PW3) was an eye witness. The conduct of the accused by which he was in a restless mind clearly showed a guilty mind.

See Yowana Batista Kabandize [1982] HCB 93.

When PW3 led the police to the accused's house, she took them straight to a spot where the body of the deceased was exhumed. This was one month after she had left that home. She was so exact that the rest of her testimony though sad is believable. She was not motivated by the grudge of money because why would the body of the accused's brother be in a pit near to his home? The pit had been dug to get soil to mud the house

and the accused leveled it after throwing it in his brother who he had killed.

In total agreement with the lady and gentleman assessors I find that the evidence of PW3 is truthful and completely destroys the accused's alibi and allegations of a frame up. On the contrary, I find that the accused had motive to murder the deceased to shut him up from taunting him about being an outsider in the home and also to have full control of the banana plantation that he was already taking charge of.

The conduct of the accused in diverting the curiosity of PW2 and PW4 who wanted to find out where the deceased had gone corroborates the evidence of PW3. His claim to PW2 that the deceased had been killed by Wembley Operatives and that any attempt to find the body may land them into problems were intended to cover up the murder.

For the reasons I have endeavored to give above, I find in agreement with the two assessors that the prosecution has proved the charge of murder against the accused beyond reasonable doubt.

Accordingly, I find the accused guilty of murder contrary to sections 188 and 189 of the Penal Code Act and I convict him.

Lawrence Gidudu
J u d g e
31/3/2009

31/3/2009 Accused present Pros -

Arinaitwe

Dhabangi holding brief for Ngaruye

Ngabirano - translator

Court: Judgment read in open court.

Lawrence Gidudu
J u d g e
31/3/2009

Allocutus:

Pros:

The convict is first offender and does not look repentant. He murdered his young brother. The maximum sentence is death. While death sentence is not mandatory, in the present case the facts call for a maximum sentence, a death sentence would send a strong message to further murderers.

Convict:

I pray for lenience. PW3 abandoned my children with my mother and they got burnt recently. They are in Mbarara Hospital.

I was beaten by the police so I am seriously in need of an operation on the testicles. I did not commit the offence. I ask for lenience.

Dhabanqi:

While a death sentence sounds most fitting like in this case, more murders are still committed in the world. The sentence should rehabilitate the convict but the death sentence does not. The maximum sentence should not be imposed.

Court:

I have listened to both submission and considered all prayers for the maximum sentence and those of lenience.

Frankly, this case presents the most gruesome murders and callousness on the part of the convict.

The manner in which the deceased was killed and brutally disposed of showed how cruel the accused could be.

The testimony of PW3 who was the convict's wife leaves me with no room to exercise leniency in this case.

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

J u d g e

31/3/2009

Court: R/A explained to the accused 14 days.

Lawrence Gidudu

J u d g e

31/3/2009