THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CR-SC-0003-2009

UGANDA…… PROSECUTOR

VERSUS

A.1 WAMBWA JOHN

A.2 TANGUNI HENRY…….. ACCUSED

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

Wambwa John and Tanguni Henry are jointly indicted for the murder of Nambobi Agatha. Prosecution alleges that the two accused persons with others still at large, on 21st day of August 2008 at Bukoyi village in Manafwa District, murdered Nambobi Agatha.

Each of the accused persons pleaded not guilty to the indictment. Therefore prosecution had the duty to adduce evidence to prove the ingredients of murder as required by the law. The accused persons were represented by Mr. Madaba on State brief. The State was represented by Ms. Catherine Namakoye, the Resident State Attorney Mbale. The assessors were Wananda Nathan and Claudia Chepsania.

Prosecution called a total of 6 witnesses.

During the preliminary hearing sanctioned under S.66 of the Trial on Indictment Act (TIA) medical evidence comprised in PF.3 and PF.48 B were admitted uncontested. PF.3 is in respect of examination of the deceased before she died which was conducted at Magale Health Centre by a Health Officer on 21.8.2008. The deceased had complained of assault. The findings after check up were that the deceased had blunt injuries on the chest, back, neck and lower abdomen. The injuries were suspected to be from the assault and were classified as harm. This evidence was

admitted and PF.3 was exhibited as P.1 and comprises PW.1. The second document admitted is the postmortem report on PF.48B which was made by Dr. Rubanza a Police Surgeon at Mbale. It was made on 27/9/2002 in the presence of Mwasame Moses. The Doctor found that the deceased sustained internal injuries with a tear on the splinic norch, swelling and hemorrhage on the left kidney, clots of blood in the abdomen.

The cause of death was severe anemia due to silent internal bleeding from the spleen and left kidney. The body had a blunt trauma which was enlarging over a period of at least one month. PF.48B was admitted in evidence as Exh.P.II and it comprises PW.2.

PW.3 was Mahafu Patrick in-law to the deceased. He testified that the deceased died in September 2008. While sleeping on 21.8.208 at around 3:00 a.m his younger brother called Fred Sakare went and called him. He told PW.3 that there was a problem in the village because Agatha Nambobi had been badly beaten.

PW.3 went to the deceased's home whom he found badly beaten. She was lying on the floor and was in bad condition. She was crying in the names of Tanguni and Wambwa, Wambalwa and Namukyaka. PW.3 observed that she was bleeding from her private parts.

PW.3 further testified that he suggested getting the deceased fast aid until the next day. She was carried to a clinic called Bukoko. That the Clinical Officer advised them to get PF.3 since the patient had been badly beaten and it would enable them go to Magale Hospital. The deceased was treated at Magale and she improved slightly. While in hospital she recorded her statement. The deceased was discharged but on reaching home her condition worsened and she was carried to Mbale Hospital by PW.3's brother. That she spent only one night and died.

PW.3 said the accused persons are neighbours in that they live in a neighbouring village. He did not find the two accused persons at the scene.

PW.4 was Fred Sakali an in-law to the deceased. He testified that on 21.8.2008 while in his house, he heard somebody being beaten and crying. It was around 2:00a.m. The person cried that "Mulamu I am being killed. Wambwa, Khauka and Tanguni are killing me." There was bright moonlight that night. PW.4 raised an alarm together with Mukyalule Moses. From where they

stood 20 metres from the deceased's home. That he saw Wambwa, Tanguni and Khauka ran away. That he properly saw what was happening. PW.4 further testified that during the assault, he saw Tanguni kicking the deceased while Wambwa was standing at a nearby corridor. One Mburwa was near the fence and Namukaga was near a tree. While running away, he heard the attacker say they had finished her. PW.4 went and woke up Mahafu Patrick and explained what had happened. The matter was reported to the LC.I Chairman who advised that the deceased be given fast aid. She was taken to the clinic. At the clinic, they were advised to get PF.3

Finally PW.4 testified that the deceased was first discharged from the clinic but soon after her condition deteriorated and she was taken to Mbale where she died from. PW.4 made a statement which was recorded by a policeman.

PW.5 Kolida Nabakani was mother-in-law to the deceased. On the day in question she was in her house. She heard an alarm made by Sakali. She ran to the scene where she found Agatha, the deceased crying that Tanguni had killed her. Wambwa had killed her. Namucaka had killed her. She was lying on the ground and could not walk. At the scene, PW.5 found Sakali and Mucupule. The deceased was taken to hospital and PW.5 remained at home looking after the baby.

PW.6 was No.29 115 PC. Wamayi Patrick. He testified that while at Lwakhaka Police Station on 28.8.2008 he was in MCB office. He was given an assault file to handle. The complainant was Mahafu complaining of an assault case against his sister-in-law Nambobi Agatha. The suspects were Tanguni, Wambulwa, Namukyaka and Wambwa. He did inquiries. PW.6 went to Magale Hospital where the deceased was admitted. He found she was being supported. She could talk but only slowly. PW.6 questioned and wrote her statement. He issued PF.3. He arrested two of the suspects i.e. Wambwa and Wambulwa. Wambulwa is not on trial. By the time Tanguni A.2 was arrested PW.6 had been transferred. The witness however never interviewed the suspects.

PW.7 was Muchupule Moses brother to the deceased. He testified that she was beaten to death by people he did not know. That night in August 2008 he heard an alarm. He went out of the house suspecting that it was cattle thieves. When he went to the scene, he found the deceased beaten and lying down. Sakaali Fred was at the scene. Sakaali told him that the deceased was beaten by Tanguni and Wambwa. He then helped to take the deceased to hospital.

In his defence, DW.1 Wambwa John denied taking part in this crime. That on 21.8.2008 he never left his home in Bukoye village $1^{1}/_{2}$ kms away from the scene. That he only saw policemen who arrested him and took him to the O/C Lwakhaha whereat he was told that he assaulted a certain woman. He was surprised. He denied the accusation and made a statement to that effect.

DW.2 Tanguni Henry also denied committing the offence. He testified that on 21.8.2008 he was at his home. He was arrested in December 2008. That the deceased was a step sister. He did not know where she was married. He denied ever beating the deceased because he had taken 8 years without seeing her.

In her final submissions, Ms. Namakoye Catherine said prosecution has proved all the ingredients of the offence of murder beyond any reasonable doubt. On the other hand Mr. Madaba learned counsel for the accused submitted that prosecution failed to prove beyond any reasonable doubt participation of the accused persons and malice aforethought.

In all criminal trials, the burden of proof lies on the prosecution except where legislation provides otherwise. Never does that burden shift to the defence. The standard of proof is beyond any reasonable doubt.

R. V. MAZABIA BIN MUKOMI (1941) 8 EACA 85
WOOLMINGTON V. D.P.P [1935] AC 462
OKOTH OKALE V. R. [1965] E.A 555, 559

In a trial for murder like in the instant case, prosecution must prove to the required standard the following ingredients:

1. That a human being was killed
2. That the killing was unlawful
3. That the killing was with malice aforethought.
4. That the accused persons participated in killing that human being.

I will deal with each ingredient separately starting with the first one.

In his submission, Mr. Madaba learned counsel for the defence said he did not contest this ingredient. Prosecution relied on the testimonies of PW.3, PW.4, PW.5 and PW.7 to prove that indeed Nambobi Agatha was dead. Prosecution also relied on the postmortem Report Exh.P.2 where the medical doctor confirmed the death. I am therefore satisfied that Agatha Nambobi, a human being is dead. This ingredient has been proved beyond any reasonable doubt.

The second ingredient is whether the death of Nambobi Agatha was unlawful.

As was held in the case of ***R v. Gusambiza s/o Wesonga (1948) 15 EACA 65,*** in all cases of homicide like the instant one, unless circumstances made it excusable, the death is presumed to be unlawful. In this case Mr. Madaba learned counsel for both accuseds conceded that the circumstances of Agatha Nambobi's death were unlawful. On the other hand Ms. Namakoye Catherine the learned Resident State Attorney submitted that the death in question was not accidental or authorized. It was therefore unlawfully caused. I entirely agree with both counsel. Prosecution has proved beyond any reasonable doubt that the said death was unlawful.

The third ingredient I will consider is whether the accused persons participated in killing of the deceased.

In her submission, the learned State Attorney said prosecution relied on the evidence of PW.4 Sakaali as the only identifying witness and urged this court to believe his evidence because it was consistent. That the witness had no reason to tell lies. That PW.4 was a neighbor to the two accused persons and he knew them very well. That there was no reason for mistaken identity. That even if it was at night there was bright moonlight. That PW.4 was corroborated by PW.3, PW.5 and PW.7. That even if these three did not witness the beating, they were told by PW.4 at the scene that he saw the attackers. They, PW.3 and PW.5 talked to the deceased and she told them it was Wambwa and Tanguni who assaulted her. That identification was proved beyond reasonable doubt.

In reply Mr. Madaba submitted that prosecution called only one identifying witness PW.4. That in view of that, court should consider that the offence was at 2:00a.m. The witness was asleep and there was no light or electricity in the area. Conditions were difficult for correct identification. Further that PW.4 had never interacted with the accused persons. He had only seen

them on the village. That the witness never implicated the accused in his statement. Neither did he say that he witnessed what each of the attackers was doing.

Mr. Madaba further stated that in such circumstances, the evidence has to be cautiously received to avoid mistaken identity. Learned defence counsel further stated that the accused person's defence of Alibi has not been disproved by prosecution evidence.

Principles governing reception of identification evidence of a single witness or identification evidence generally have been repeatedly laid down by this court and higher courts of the land. The standard of finding if an accused person was clearly identified was laid down in ***R V. TURNBULL & ORS (1976) 3 ALL E.R. 553*** and these are

a) How long did the witness have the accused under observation?
b) At what distance?
c) Was the observation impeded in anyway by presence of other people or any obstacle?
d) Had the witness ever seen the accused before?
e) How often?
f) If only occasionally had he any special reason for remembering the accused?
g) And where the quality of identification evidence is poor, there is need to look for other evidence which supports the correctness of identification.

In ***FRANK NDAHEBE V. UGANDA CR. APP. 2 OF 1993 SC,*** the Supreme Court justices observed that:

> "…….*in a case resting entirely on identification, the court has a duty to satisfy itself that in the circumstances of the case it is safe to act on such evidence, which must be free from mistake or error on the part of the identifying witness or witnesses. The evidence of such witnesses must be tested as to its truthfulness and any possibility of a mistake or error excluded. Where conditions for correct identification are favourable such task will be easier. But where conditions are difficult it would be unsafe to convict in the absence of some evidence connecting the accused with the offence."*

Relating the above legal propositions to the case before me I am inclined to agree with the submission by the learned Resident State Attorney that the evidence of the only identifying witness PW.4 Sakali was consistent and I did not find any reason that would compel him to tell lies. PW.4 was a neighbor to the accused persons. He knows the two accused persons very well. He heard someone being beaten. The person cried that “mulamu I am being killed. Wambwa, Khauka and Tanguni are killing me.” PW.4’s house was not more than *50* metres away. He got out of the house and moved closer to the scene, 20 metres away. He saw Wambwa, Tanguni and Khauka ran away aided by a bright moonlight. PW.4 saw whatever happened. He saw Tanguni A.2 kicking the deceased. Wambwa was standing at a nearby corridor. He also saw other people he knew; Mburwa was near the fence while Namukaga was near a tree. When the attackers were running away PW.4 heard them say they “had finished her.”

PW.4’s testimony was corroborated by the testimonies of PW.3, PW.5 and PW.7. When they arrived at the scene PW.3 and PW.5 talked to the deceased. She told them that it was Wambwa A.1 and Tanguni A.2 who assaulted her. The deceased knew these people. The accused did not deny this. According to defence counsel, the testimony of PW.4 is a pack of lies because he did not put in his statement that he saw what each of the attackers was doing. On this matter I agree with the learned State Attorney that if a police statement and testimony in court were to be compared, the testimony of a witness in court which is tested in cross-examination should carry more weight. I do not subscribe to the idea that a police statement should override what a witness testifies in open court under oath and cross-examination. Many of our witnesses are peasants with no or minimal education who need somebody informal and a friendly atmosphere to make a coherent statement. If such a witness leaves out anything in the statement it should not be used to discredit his/her testimony in court, because of that omission.

After warning myself of the dangers of acting on the testimony of a single identifying witness in such circumstances, just as I warned the assessors and following the guidelines in R v. Tumbull and ***FRANK NDAHEBE V. UGANDA*** (Supra) I am satisfied that prosecution has adduced cogent evidence that both accused persons were properly identified by PW.4 and the deceased. Both accused have been proved beyond reasonable doubt to have participated in the attack on the deceased. They beat and caused her injuries that led to her death. Both accused persons put up a

defence of alibi each. They each said they were at their respective homes. According to defence counsel this defence was not disproved by the prosecution.

Having held that each of the each of the accused persons were positively identified, their respective defences of Alibi must fail. Prosecution has managed to put both at the scene of crime.

The fourth ingredient I have to consider is whether malice aforethought has been proved by the prosecution. According to the learned Resident State Attorney whoever killed Nambobi Agatha did it with malice aforethought in view of the medical evidence admitted and the injuries outlined. Learned counsel for the defence submitted that this ingredient has not been proved beyond any reasonable doubt. That the injuries suffered by the deceased was described as Harm and not grievous harm. That the state did not reveal what weapons were used and how the victim was assaulted. That since the death occurred after one month then other circumstances could have caused the death other than assault.

According to **ARCHIBOLD CRIMINAL PLADING EVIDENCE AND PRACTICE 36th Edition P.428,**

> *"Malice in common acceptation means ill will against a person but in its legal sense it means a wrongful act done internationally without just cause or excuse."*

Under S. 191 of the Penal Code Act, malice aforethought may be proved by direct evidence or may be inferred from evidence of the circumstances under which the deceased died. In the instant case I am not satisfied that the death of Agatha Nambobi was caused with malice aforethought. The medical evidence comprised in the evidence of PW. 1 and PW.2 is not enough to prove malice aforethought. The deceased was treated by a doctor in PW. I before she died. In Exh. P.I the deceased was found to have sustained blunt injuries on the chest, back, lower abdomen and the neck as a result of an assault. The injuries were classified as Harm. The postmortem report on PF.48B Exh.P.2 (PW.2) made by Dr. Rubanza the police surgeon Mbale indicates that the deceased sustained internal injuries with a tear on the splinic norch, swelling on and haemorrhage on the left kidney, clots of blood in the abdomen. The cause of death was severe anemia due to silent bleeding. The body had a blunt trauma which was enlarging over a period of at least a month.

When deciding whether death was caused with malice aforethought court has to look at the weapon used, the nature and number of injuries inflicted and the part of the body injured.

In the instant case, prosecution did not adduce evidence stating how the victim was assaulted, or what weapons were used. The injuries sustained by the deceased was described as Harm and not grievous Harm. Although the deceased died of injuries inflicted on her by the accused persons the circumstances under which the injuries were caused did not amount to malice aforethought. This was a mere village attack the motive of which was not borne out in evidence. Although the death was unlawful, it did not amount to murder. Malice aforethought has not been proved by the prosecution beyond any reasonable doubt.

The last aspect of this case that I have to consider is whether the accused persons had a common intention to execute this crime. Under S.20 of the Penal Code Act, when two or more persons form a common intention to prosecute an unlawful purpose with one another and in the process an offence is committed of such a nature that it was a probable consequence of the common purpose, each of the perpetrators will be deemed to have committed that offence.

Common intention can be deduced from the failure of any of the accused to disassociate from the entire offence. ***UGANDA V. JUMA BARUMA MASUDI ISABIRYE (1992) KALR 71.*** According to PW.4 he saw Tanguni assaulting the deceased. In the meantime Wambwa was about 5 metres away looking at what was going on. He did not attempt to defend the deceased nor report the incident to authorities. After the assault, the accused ran away saying they had finished her. This piece of evidence establishes beyond doubt that A.1 and A.2 has a common intention to cause the death of the deceased unlawfully.

In their unanimous opinion the lady and gentleman assessors advised me to convict each of the accused for murder of the deceased. They say all the ingredients of the offence were proved to their satisfaction. I agree with the assessors except on the ingredient of malice aforethought. The evidence by prosecution did not in my view prove this ingredient beyond any reasonable doubt. Consequently I will find each of the accused persons guilty of a lessor offence of manslaughter c/ss 187 (1) and 90 of the Penal Code Act. Under S.87 of the Trial on Indictments Act.

A.1 Wambwa John is convicted for Manslaughter c/ss 187 (1) and 190 of the Penal Code Act.
A.2 Tanguni Henry is convicted for Manslaughter c/ss 187 (1) and 190 of the Penal Code Act.

Musota Stephen

JUDGE

11.5.2010

11.5.2010
Accuseds produced.
Namakoye Resident State Attorney.
Madaba on State brief.
Wanale Interpreter.
Assessors in Court.

Resident State Attorney: Case for judgment
Court: Judgment delivered.

Sentence and Reasons

The convicts are each first offenders. Although convicted of a lessor offence of Manslaughter, it is still a serious offence because an innocent life was lost over unclear circumstances. I will consider the respective submissions by the learned Resident State Attorney and learned counsel for the defence. I will also consider that the convicts have been on remand for a relatively short time. The mitigating and aggravating circumstances will be considered. Above all I will consider that the objects of reform are deterrence, prevention, reformation and retribution. I am of the view that each of the convict has prospects of reform since they appear remorseful and they committed the offence without malice aforethought. A.1 is sentenced to 8 years imprisonment.

A.2 is sentenced to 8 years imprisonment.

Right of appeal explained.