

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MUKONO**

CRIMINAL SESSION CASE NO. 0089 OF 2010

THE REPUBLIC OF UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

DICKSON SEBULIBA :::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The accused **Dickson Sebuliba** was indicted for murder contrary to **Section 188 and 189 of the Penal Code Act**. The particulars of the offence alleged that the accused person on the night of 13th September, 2007 at Nakiwate village, Nabbale Sub-county in Mukono District murdered one **DIMITRIA NAJJUKA**.

The accused was indicted on the basis of the following background facts:

On 13th September, 2007 the deceased Dimintilia Najjuka was murdered in cold blood in her house. In the morning of 14th September, 2007 at about 7.30 a.m. one Ndagire Kasalina went to the deceased's house to check on her and give her breakfast as she had always done. On arrival at the house, she saw that the deceased's house had been broken into and became suspicious. Ndagire then called her neighbour Nanteza and together, they proceeded to the deceased's

house. They called out her name and there was no response. They entered the house and found her dead. Ndagire went and informed Nankayi Grace, the deceased's daughter of her mother's death.

On 22nd September, 2007 at about 14 hours the accused Dickson Sebuliba went to the home of Nankayi Grace and bought Enguli which he sat down to drink. While drinking his Enguli and in the presence of one Byaruhanga Charles and Kainamula Andrea, the accused told Nankayi Grace that:

“Money can do everything and if you are not careful I will kill you the way your mother was killed.”

The accused followed Nankayi while repeating the above words as she was escorting her brothers who had come to visit her. Nankayi proceeded to Ndagire's home and told her what the accused had said. Ndagire advised her to report the matter to the authorities. On the basis of the above facts the accused was arrested and charged accordingly.

When the accused was arraigned he denied the offence. Having pleaded not guilty the burden was cast on the prosecution to prove all the ingredients of the offence beyond reasonable doubt as required by **Article 28 (3) (a) of the Constitution of the Republic of Uganda**: See **Paulo Omale v Uganda**.

The following are the ingredients of the offence of murder:

- (1) That the deceased is dead.
- (2) That the death of the deceased was caused unlawfully.

(3) That the death of the deceased was caused with malice aforethought.

(4) That the accused participated in causing the death of the deceased:

See:

In an attempt to prove this case beyond reasonable doubt, the prosecution relied on the evidence of five witnesses and Post-mortem Examination Report which was admitted under **Section 66 of the Trial on Indictment Act**.

The accused on his part made a sworn defence of total denial and Alibi.

As far as death of Dimintiria Najjuka is concerned, Kasalina Ndagire testified that on 13/9/2007 she woke up very early to milk her cow. After tying her cow she realised that the house of the deceased who was her neighbour was wide open and had been broken into.

She informed her daughter Edirisa and other neighbours and they proceeded to the home of the deceased and confirmed that it had been broken into. They feared to tamper with the scene and so did not enter the house. They sent for the daughter of the deceased one Nankayi (Pw₂) who entered the house and found the deceased dead. Nankayi Grace Pw₂ testified that she was informed of the death of her mother by one Kikomeko. She rushed to the home of the deceased and confirmed that she had been killed. The Police came and ordered the body to be taken to Kayunga Hospital for post-mortem examination. After post-mortem the body was brought back for burial. The Post-mortem Examination Report was admitted in evidence under **Section 66 of the Trial on Indictment Act**. The defence did not contest the death of the deceased. It is

therefore my conclusion that there was overwhelming evidence to prove beyond reasonable doubt that the deceased is dead.

As to whether the death of the deceased was caused by unlawful means, the presumption is that homicide is always presumed to be unlawful unless it is accidental or excusable. The case in point is **R v Wesonga [1948] 15 EACA 65**.

In that case the Appellant was convicted of the murder of Kezekiya. Kezekiya was living adulterously with a woman who by custom was inherited by the Appellant's father from his late brother. Kezekiya was cohabitating with the woman in the house which was also by custom inherited by the Appellant's father. The appellant's father complained to the authorities against those affairs. He was advised to catch the two by night. When the Appellant and his father went to the house to catch the couple, the Appellant's father was killed by the deceased. Seeing what happened to his father, the Appellant slew the deceased.

At his trial, the Appellant admitted killing the deceased but pleaded provocation. That his father was killed by the deceased in his presence and that this amounted to provocation. It was argued that the killing of the Appellant's father by the deceased was not an unlawful act to amount to provocation. The appellant was convicted.

On appeal it was held that homicide unless accidental is always unlawful except in circumstances which make it excusable. That if the deceased had not been killed and stood his trial for causing the death of Wesonga, the prosecution might have proved that he exceeded his right of self defence.

The presumption that the homicide is unlawful can be rebutted by evidence that the killing was either accidental or that it was committed in circumstance which make it excusable if caused in self defence and defence of property or person.

The accused may rebut the above presumption. However the standard to rebut the above presumption is lower than beyond reasonable doubt. It is on the balance of probabilities.

In other words the law is still that the general burden of proof still remains on the prosecution to prove its case beyond reasonable doubt. The above position was put beyond doubt by the Court of Appeal in **Paulo Omale v Uganda; Court of Appeal Criminal appeal No. 6 of 1997.**

In the instant case the evidence on record showed that the deceased did not die of natural causes and that her death was not justified in law. The evidence of Kasalina Ndagire Pw₁ and Grace Nankayi Pw₂ were to the effect that the house of the deceased had been broken into. A stick used for breaking the same was found lying in the house. The fact that her house was broken into before her death points to an unlawful act by some assailants. The post-mortem Report further fortifies the fact that the death of the deceased was unlawful. The Report established that she died of Asphyxia (suffocation) secondary to strangling. From the above pieces of evidence I am left with no reasonable doubt that the death of Dimintiria Najjuka was not natural and her death was not justified by law. The death was caused unlawfully by her assailants.

The next ingredient is that the killer acted with malice aforethought in causing the death of the deceased.

Malice aforethought is defined under **Section 191 of the Penal Code** as follows:-

- “(1) An intention to cause death of a person whether such a person is the one actually killed or not, or
- (2) 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.”

Malice aforethought is therefore a mental element of the offence of murder. As such it is difficult to prove by any direct evidence. However, it is now established that malice aforethought can be inferred from the surrounding circumstances of the offence. This includes the type of weapon used, the part of the body on which such weapon was targeted, the nature of the injuries implicated and the conduct of the assailant before, during and after the offence. The use of a lethal weapon like a panga, or a spear, or a knife or a gun on vulnerable part of the body of the victim readily attracts inference that the assailant had the necessary malice aforethought: See **R v Tubere S/O Ochen (1945) 12 EACA 63**.

In that case the Appellant was convicted of murder. It was proved that he had seriously assaulted the deceased with a heavy walking stick, causing severe injuries from which the deceased died shortly afterwards. The Appellant himself did not deny the use of the stick.

On appeal **Sir Sheridan CJ** (as he then was) said:

“With regard to the use of a stick in cases of homicide, this Court has not attempted to lay down any hard and fast rule. It has a duty to perform in considering the weapon used, the manner in which it is used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an offence of malice will flow more readily from the use of say, a spear or a knife than from the use of a stick; that is not to say that the Court takes a lenient view where a stick is used. Every case has of course to be judged on its own facts.”

In the instant case the house of the deceased was broken into by her assailants. The post-mortem Report revealed that the deceased was found lying prostrate and facing upwards. Her post-mortem indicated that she fought for her life and protection of her private parts. The deceased had bruises on both sides of the neck with abrasions on both sides of the tracheal region. There was also retraction of neck muscles, abrasions on both hands and the hands were flexed. The body had a grinning mask appearance. The cause of death was asphyxia (suffocation) secondary to strangling. The fact that there was strangulation clearly points to an intention to kill. The assailant targeted the neck which is a very vulnerable part of the body and any assault targeted at this part of the body denotes an intention to kill or knowledge that such act would cause death of the victim. It is therefore my conclusion that whoever broke into the house of the deceased and strangled her did have the necessary malice aforethought.

The last and most crucial ingredient is the participation of the accused in the offence.

The evidence implicating the accused was to the effect that nine days after the death of the deceased on 22nd September, 2007. The accused went to the home of Nankayi Grace Pw₂ who was daughter of the deceased, at 2.00 p.m. It was raining and he branched off to shelter from the rain. While inside the house the accused ordered for waragi (Enguli) for Shs.200/= which was served to him by Prose Nakamya Pw₃. Before taking the Enguli, the accused bluntly boasted about the killing of Dimintiria and warned Grace Nankayi that he would kill her the way they had killed her mother. That the accused uttered those words in the presence of Prose Nakamya Pw₂, Charles Byaruhanga Pw₄ and Kanamula Andrew Pw₅. When Grace Nankayi confronted the accused whether he meant his words the accused pointed at her and stated that:

“Take care we are going to kill you the way we killed your mother.”

During those utterances the accused was flashing money around saying:

“Money can do everything. For us we are enjoying our millions. If you are not careful I will kill you the way your mother was killed.”

The accused made a sworn defence of total denial and Alibi. He stated that he never uttered those words that he never would kill Nankayi Grace the way they had killed her mother. He testified that on the date in question, he took waragi at 11.00 a.m. at the home of one Byekwaso yellow. Later on he branched to Nankayi’s home to take shelter because it was raining. He concluded that he was arrested for nothing. After his arrest Nankayi demanded Shillings one million to have him released.

It must be noted that the alleged utterances of the accused constitutes facts surrounding the Commission of the offence. It could therefore be categorised as

circumstantial evidence. The law with regard to circumstantial evidence has now been put beyond doubt. Where evidence is circumstantial, it must be such that it produces moral certainty beyond reasonable doubt that it was the accused person who committed the crime. Circumstantial evidence must point irresistibly to the accused person as the one who committed the offence for which he is charged: See

In the instant case the accused was said to have been drinking Enguli from 11.00 a.m. It is a scientific fact that Alcohol impairs human reasoning. There is no moral certainty that he altered those words he really meant any harm. There is greater colour of probability to the inference that he must have been drunk and clumsy in his conduct. This is because he was said to have been drinking right from 11.00 a.m. No accused person can brag of killing anybody in broad day light unless he or she is mentally sick. The fact that he was flashing money and was not sufficient to prove that he was responsible for killing the deceased. All in all the evidence against the accused did not point irresistibly that he was the one who had killed the deceased. It is therefore my conclusion that the prosecution failed to prove the case beyond reasonable doubt. He is accordingly acquitted.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

8/7/2010

9/11/2010

Accused present.

Mr. Masede for the State.

Mr. Seryazi for the accused.

Judgment read in Court.

**HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE**

9/11/2012