

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA, AT FORT PORTAL
SESSION CASE NO. 0148/2011

UGANDA:.....PROSECUTION

Versus

BIGIRWA ZAKARIA:..... ACCUSED

BEFORE HON. MR. JUSTICE MIKE J. CHIBITA

JUDGMENT

The accused, Zakaria Bigirwa, is charged with the murder of Brian Tusiime, a child of about 12 years. It is alleged that on or about 20th July, 2010 at Kanyamakere village, Busoro, Kabarole District, the accused murdered the deceased through poisoning.

The accused is therefore charged with murder contrary to sections 188 & 189 of the Penal Code Act. There are four essential ingredients to be proved in a case of murder, namely that;

- Death of the deceased happened.
- The death was unnatural and unlawful
- There was malice aforethought
- That the accused person participated in the offence.

The burden of proof in murder cases is always upon the prosecution and does not shift at all. The standard of proof is proof beyond reasonable doubt.

The first three ingredients have been agreed to by the parties and Police Form 48 (PE 1) tendered as evidence. The fourth ingredient about the participation of the accused person is what prosecution set out to prove in this case.

Prosecution was represented at the trial by learned Senior State Attorney, Collins Acellam.

Learned Counsel Victor Businge represented the accused person.

To prove its case prosecution produced 7 witnesses as follows:

PW 1: DR. PARIYO BONANE

He carried out the Post mortem and though he did not testify physically the two Counsel agreed on him as a witness on the basis of his post mortem report which was admitted in evidence as an exhibit.

PW 2: JOHN TWESIGE, 49 YEARS, DEFENCE SECRETARY KANYAMAKERE, MWIBALE, BUSORO, KABAROLE DISTRICT

He stated that he knew the accused as a village mate. That on the 20th July, 2010 while at home when Resty Bigirwa the wife of Zakaria the accused person came and asked for his assistance. That he rushed and found the child on the veranda struggling, he asked the child what had happened. The child said that his father had given him poison.

He then rushed the child to Hospital where he spent about two hours. He left the child still talking. He told the accused what the child had told him but he denied and saying he could not kill his own child.

He then went to Kitumba Police Post and they proceeded to arrest the accused person.

The testimony of PW 2 was corroborated in all material particulars by PW 3.

PW 3: JOSEPH ALIGANYIRA, 32 YEARS, TEA PLUCKER, NYAMAKERE, BUSORO, KABAROLE DISTRICT

He stated that he knew the accused person Zakaria Bigirwa as a village mate. That on 20th July, 2010, while bypassing from his home to the trading Centre he found a child lying down in a corner of his father's house crying.

The child was called Brian son of Zakaria. He was crying calling me:-

“Aliganyira help me. Araali has poisoned me, sound an alarm so they can arrest Araali.”

He further told court that the deceased told everybody who was present that he had been poisoned; “Araali has poisoned me.”

Araali is Zakaria, the accused, the witness concluded.

PW 4: YUSTA BUSINGE, 40 YEARS, PEASANT, KANYAMAKERE, MARRIED TO JOSEPH BUSINGE

She stated that she knew the accused person Zakaria Bigirwa as a neighbor and relative. We are near each other.

In May he came to their home at about 8.00 pm and asked the husband if they had animal poison. We had monkey poison which we had used to kill monkeys. We gave some to the accused in the presence of our children.

He told us that he was going to use it to kill monkeys. I don't know if he ever used it to kill the monkeys. He had had the poison for one month when it was returned though it was less than had been given.

PW 5: RESTETUTA TIBAHWINURA, 43 YEARS, BUSINESSWOMAN, KANYAMEKERE, WIFE OF ZAKARIA BIGIRWA

The witness is the wife of accused person with whom they got married in 1996. They have five children with him. He has four other children. She knew Tusiime Brian.

Brian was staying with them since the age of 3 years, she testified. On the fateful day he made a mistake and went to the neighbour's shop and bought samosas.

The witness had no problem with Brian when he stayed with them. He had some problems with the father arising from indiscipline. He always tried to correct him and she would counsel him to be patient with him. He had a problem of stealing money, she went on.

The accused person had a problem with the mother of the child. The accused person had denied that he was the father of the child. They even went to the authorities to solve the problem. As the sitting wife she accepted to look after the child.

The next morning on 20th July the father told him that he was taking him back. The witness told him to leave the child since he had not been well looked after. At about 8.00 am she left the deceased with the other children. When she returned home she did not find the accused person home.

She found the children crying, while the deceased was sleeping on his stomach in the compound. She asked him what was wrong. He told her that Araali left after giving him poison. He told her that he forced him to eat the remaining millet.

Seeing the condition she immediately got up and went to the home of John Twesige whom she found with the wife and they came back together. Many other people like Aliganyira and others came and joined the vigil.

The deceased was given some milk and he vomited the food that he had eaten, the millet. There and then Defence LC and the V Chairman called Alitona, put him on a boda boda and was taken by Twesige.

There was poison at home, monkey poison. It was brought by the accused person who when asked about it he kept quiet.

PW 6: JUSTUS OCHOM, SENIOR GOVERNMENT ANALYST

He stated that he received the stomach, kidney and liver of a human being. He testified that he subjected the organs to analysis and found enough volumes of poison in the liver and kidney to cause death to a human being.

PW 7: D/IP VICTOR CHEMOWO, 33 YEARS, NTOROKO POLICE STATION, NTOROKO DISTRICT

The witness testified as follows:-

“In August, 2010 I was attached to Fort Portal Police Station. I know the accused person, who was charged with murder of his son. He is called Bigirwa Zakaria. I participated in re arresting him from Mpanga boda boda stage.

I also took exhibits to government analyst in Kampala. They were suspected to contain poison. I got the exhibits from the Medical Officer of Buhinga Hospital.

I filled PF 17A and then took them to government analyst. This is PF 17A which I used to deliver the exhibits. It is reference CRB 1487 of 2010 Fort Portal Station dated 28th July, 2010.

Name of accused: Zakaria Bigirwa.

Name of deceased: Brian Tusiime

Exhibit A; Stomach; Exhibit B Liver; Exhibit C kidney

The request was to ascertain whether exhibits had any poison. The exhibits were received on 29th July, 2010 and a stamp was affixed. My particulars appear on the PF 17A No 35002 D/Constable as I then was.”

The accused person denied committing the offence and called two witnesses to testify on his behalf.

DW 1: ZAKARIA BIGIRWA, 35 YEARS, BODA BODA RIDER, KANYAMAKERE, IBALE, BUSORO, KABAROLE DISTRICT

(Demeanor of witness: seems nervous, speaking softly and almost inaudibly)

He testified as follows:-

“I know Brian Tusiime as my son, he died. He was staying at my home but when the step mother, Reste Tibahwinura, PW 5, started disturbing him and not caring for him, I went and told my parent about it. I took him to my grandmother Margaret for her to look after him.

He then started going to school at a school I don't know. 19th July, 2010 I left town and found Brian having come to visit. We slept and the next morning and went back to town. At about 1.00 pm the phone rang and Twesige asked me to return home.

When I reached home I found the child badly off at home. I asked my wife and she said she didn't know what had happened. At home I found Twesige, his wives and my wife. I asked the child who told me that after lunch he started feeling bad and vomiting.

I got the child and took him to Hospital.”

DW 2: ANNET MBABAZI, 30 YEARS, (I DON'T KNOW MY AGE) KIBIMBA, WEST DIVISION, FORT PORTAL MUNICIPALITY, CLEANER.

“I know the accused person, I saw him in Hospital in a year and month I don't remember. He had brought a child while I was nursing my own child. I saw two men and one woman lifting a child.”

DW 3: MARGARET KAKULILAMU, 50 YEARS, KITUMBA, BUSORO, BURAHYA, KABAROLE DISTRICT (wordy, seems unreliable, unsettled

“I work at a tree nursery near Agip Kampala road. I know the accused person, he is my nephew, Brian was my grandson, he died. While at my workplace then I saw Zakaria stop with a motor cycle carrying a child.

He called me while teary and I asked him what the matter was and then he narrated the story to me. He asked me to follow him and I did until the child was admitted. He was with the Defence Secretary.”

Two witnesses have testified that they arrived at the scene and found the deceased still alive. This was the evidence of PW 2 John Twesige and PW 3 Joseph Aliganyira.

They both stated that the deceased was crying that Araali had poisoned him. This evidence was uncontroverted. The evidence of PW 5 Restetuta Tibahwinura was to the effect that she left the deceased and the other children at home with the accused person. She left the deceased looking normal and not complaining of any malaise.

The dying declaration was therefore consistent with what had happened. The accused person procured poison from the husband of PW 4 with the aim of furthering his evil scheme. The story of poison was corroborated by PW 5 who stated that she was asked when her husband would return the poison to the husband of PW 4.

The story of poison was uncontroverted. In fact the accused person never addressed himself to the poison during his testimony. This is understandable because how could he when he had no monkeys to poison. Yet when the poison was returned, according to PW 4, it was less than when it was given to the accused person.

Where did the rest of the poison go then? Evidence shows that it was the accused person who procured it from his neighbours, he did not tell his wife PW 5 about it, it was his secret and when he returned the poison it was less than what had been given to him.

What did he do with the rest of the poison that was not returned? He did not acknowledge the poison in his testimony to court. Therefore the available evidence on that subject is from the dying declaration of the deceased.

He stated, according to PW 2 and PW 3, that Araali, his father, had poisoned him. The deceased was old enough to know that Araali was his father. He was old enough to know when his father gave him poison. Poison must be unpleasant to taste. Poison must corrode the stomach after it has been ingested.

When the deceased therefore declared that his father had given him poison he must have suspected, smelt it and felt its effect in his digestive system. Why else would a small child allege something so grave against his own father?

To corroborate all this was the evidence of PW 6, Justus Ochom, the Senior Government Analyst who analyzed the exhibits of the deceased person's organ. According to him the deceased person's stomach and kidney were found to contain poison levels high enough to cause death.

Fathers are usually their small boys' heroes. By the time a child accuses his hero of poisoning him, it must either be the truth or there must be something gravely wrong. Evidence adduced shows that the accused person poisoned the deceased, his son.

The accused person therefore formed the motive to eliminate his son, with whom they had a strained relationship. He procured poison from the neighbours, waited for an opportune moment and administered it to his son.

Having failed to manage his family, the accused person reverted to the most despicable and cowardly option of dealing with conflict resolution in his family; murder.

In agreement with the assessors, I find that prosecution has proved its case against the accused person beyond reasonable doubt. I accordingly convict him of murder contrary to sections 188 and 189 of the Penal Code Act.

Dated at Fort Portal this 5th day of December, 2012

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MIKE J. CHIBITA

ALLOCUTUS

STATE: I have no previous criminal record and should be treated as a first offender. He has been on remand for about one year and six months. Murder is a very serious offence which carries the maximum death penalty. The circumstances of this case are aggravated by the fact that deceased was a young boy, a son to the convict and he had a problem with the boy.

The problem he had was the conduct of the boy. It was his responsibility to correct him. For him to take matters into his own hand and kill his own son cannot be accepted by society.

I pray for a deterrent and punitive sentence, we pray for an appropriate sentence.

DEFENCE: Every human being deserves a place in society otherwise some would have been buried long ago. The convict is still youthful, convict is a first offender. He has been on remand for one year and six months. He is a bread winner and should be allowed to go look after his children and educate them.

It is our prayer that court exercises leniency.

I therefore pray for a reasonable sentence.

COURT: I have listened to the pleas for mercy from the defence and I have also heard that the convict is a first offender. I have decided to exercise leniency and not mete out the maximum sentence.

Prosecution has however submitted that this particular offence was an affront to society and in that the convict decided to eliminate his own son.

I have considered the convict's age and the plight of his surviving children and decided to be extremely lenient.

I therefore sentence the convict to 14 YEARS' IMPRISONMENT. He has a right to appeal against conviction and sentence.

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JUSTICE MIKE J. CHIBITA

.....
DATE

SENTENCE READ AND DELIVERED IN PRESENCE OF:-

1. **DEFENCE COUNSEL:** VICTOR BUSINGE
2. **PRINCIPAL STATE ATTORNEY:** COLLINS ACELLAM
3. **ACCUSED:** ZAKARIA BIGIRWA
4. **COURT CLERK/INTERPRETER:** HERBERT MWESIGWA

RIGHT OF APPEAL EXPLAINED

BY:

MIKE J. CHIBITA
JUDGE