

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CR-SC-0086 OF 2011

UGANDA.....
PROSECUTOR

VERSUS

NAMAKULA REHEMA & ANOTHER
ACCUSED

BEFORE: HON. LADY JUSTICE MONICA K. MUGENYI

JUDGMENT

Rehema Namakula (A1) and Florence Kyomuhangi (A2), were indicted for the offence of murder c/s 188 and 189 of the Penal Code Act. The prosecution case was that on or about the 25th May 2010, at Kifumbira Zone - Mulago III parish, Kawempe Division in Kampala district, A1 laced the deceased's food with a poisonous black powder that was given to her for that purpose by A2 and others still at large. The prosecution alleged that A1 was promised Ushs. 50,000/= in return for her execution of the alleged act. The prosecution further alleged that the deceased died as a result of the poisonous substance administered to the food she consumed, which poison caused her vomiting, diarrhoea and later death. Both accused persons denied the indictments and pleaded not guilty thereto. They maintained their innocence throughout the trial.

To constitute the offence of murder the following ingredients should be proved:

- a. Fact of death
- b. Death was unlawful
- c. Death was caused with malice aforethought

It is well settled law that the burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution and generally, the defences available to an accused person notwithstanding, that burden does not shift to the accused at any stage of the proceedings. The prosecution is required to prove all the ingredients of the alleged offence, as well as the accused's participation therein beyond reasonable doubt. See **Woolmington vs. DPP (1993) AC 462**, **Okale vs. Republic (1965) EA 55** and **Miller vs. Minister of Pensions [1947] 2 All ER 372 at 373**.

The standard of proof in criminal matters was explicitly clarified in **Miller vs. Minister of Pensions [1947] 2 All ER 372 at 373**, where Lord Denning held as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond (reasonable) doubt does not mean proof beyond the shadow of a doubt.”

It is trite law that in the event of reasonable doubt, such doubt shall be decided in favour of the accused and a verdict of acquittal returned. Further, inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be ignored if they do not affect the main substance of the prosecution's case; save where there is a perception that they were deliberate untruths, in which case they may lead to the rejection of the offending evidence. See **Alfred Tajar vs Uganda EACA Criminal Appeal No. 167 of 1969** and **Sarapio**

Tinkamalirwe vs. Uganda Supr. Court Criminal Appeal No. 27 of 1989.

At the preliminary hearing prior to the trial, the following evidence was agreed to by both parties and duly admitted on the court record as such:

- a. PF24 forms in respect of both accused persons.
- b. Post mortem report.
- c. Analysis report.
- d. Request for post mortem report.

The said documents were admitted on the court record as exhibits P1, P2, P3 and P4 respectively. This evidence established for a fact that the accused persons were female adults of sound mind. Furthermore, it underscored the deceased's death and established that a post mortem performed on the deceased 19 weeks thereafter did not detect any anatomical cause of death. The post mortem did, however, find an abnormal and suspicious black substance in the deceased's oesophagus (food canal). Finally, the admitted evidence did establish that although no toxins (poison) was detected in the body organs sent for laboratory analysis; it would not have been possible to detect poisonous chemicals with a short life span 19 weeks after the death of the deceased.

On the basis of the findings of the post mortem report, I am satisfied that the prosecution has proved the fact of death in this case beyond reasonable doubt.

On the second ingredient of murder - whether or not the deceased's death was unlawful - PW1, the deceased's husband testified that on 22nd May 2010 the deceased had travelled upcountry but prior to her return home that evening he instructed A1 to prepare food for her, and upon eating the said food the deceased experienced vomiting and diarrhoea. The

witness further testified that the deceased vomited food and water laced with a black substance. Both accused persons denied responsibility for the deceased's death. A1 testified that the accused returned home sickly, and often suffered from hypertension and diabetes, and sought to attribute her death to prior ailment or natural causes. A1 also denied preparing food for the deceased, testifying that the deceased had eaten elsewhere before she returned home. A2, on the other hand, simply denied providing any poisonous substance to A1 as alleged by the prosecution.

The legal position on the legality of death (or lack thereof) is that every homicide is presumed to be unlawful unless circumstances make it excusable. This position was laid down in the case of **R. Vs. Gusambiza s/o Wesonga 1948 15 EACA 65**. The same position was restated in **Akol Patrick & Others vs Uganda (2006) HCB (vol. 1) 6**, (Court of Appeal) where it was held:

“In homicide cases death is always presumed unlawfully caused unless it was accidentally caused in circumstances which make it excusable.”

In **Uganda vs. Aggrey Kiyingi & Others Crim. Session. Case No. 30 of 2006**, excusable circumstances were expounded on to include justifiable circumstances like self defence or when authorised by law.

The term 'homicide' has been invariably defined as the killing of a human being by another human being. Therefore, in the present case the defences of the accused persons notwithstanding, the present murder indictment would *prima facie* place the deceased's death within the category of deaths defined as homicides. It therefore follows that the deceased's death would have been *prima facie* unlawful unless the circumstances surrounding the said death are such as would make it excusable or justifiable.

An evaluation of the prevailing circumstances of the present death is instructive. In the instant case, however, there were no circumstances presented to this court that would make the deceased's death either excusable or justifiable. While A1 contended that the deceased died of natural causes, A2 simply denied any hand in the deceased's death. Neither of the positions advanced by the accused persons in their defence would amount to circumstances that make the present homicide excusable or justifiable within the precincts of the law. I am therefore satisfied that the deceased's death was neither excusable nor justifiable, and do find that the said death was unlawful.

Having established that the deceased's death was unlawful, this court must establish as a fact whether the said death was caused with malice aforethought or, for present purposes, whether or not the accused persons' alleged actions were such as would infer an intention to cause death rather than accidental death. I propose to address this ingredient of murder concurrently with the question of the accused persons' participation in the deceased's death.

To prove the *mens rea* of murder in the present case, the Prosecution sought to rely upon the direct evidence of PW1, PW2, PW3, PW4 and PW5; as well as the documentary evidence contained in Exhibits P2 and P3 (post mortem report and toxicological analysis report). PW1's evidence on this issue was that on Saturday 22nd May 2010, within 30 minutes of eating food cooked and served by A1, the deceased experienced vomiting accompanied by strong pain in her stomach. The food that was served to the deceased was matooke and groundnut sauce. It was his evidence that the deceased initially vomited all the food she had eaten then, when she started taking water, started vomiting watery fluid. He further testified that on Monday 24th May 2010 the deceased was vomiting blood and black substance.

Under cross examination, PW1 testified that the deceased told him that she had not eaten anything before she returned to her home; that she had last eaten in the night of the previous day - 21st May 2010, and that it was the deceased who asked him to instruct A1 to prepare food for her. He further testified that given that the deceased did not eat meat, her sauce was cooked separately from the meat sauce that the rest of the household had eaten. The witness testified that no tests were undertaken on what the deceased vomited.

On the same issue, PW2 told this court that his father (PW1) rung him on 23rd May 2010 and informed him that the deceased had been taken ill and was vomiting a black substance, as well as diarrhoea of the same substance. He further testified that following rumours that the accused persons were seen rejoicing at news of the deceased's death, he initiated investigations into the matter pursuant to which A1 voluntarily admitted being given black powder by A2 with instructions that she should put the same only in groundnut sauce not meat or fish sauce.

PW3 testified to having heard A1 asking a one Mama Faith for 'the rest of her money' but when she (A1) noticed that PW3 was watching her she 'panicked' and changed the topic. She further testified to having observed A1 as having been restless on the day of burial. Under cross examination PW3 stated that given that she had overheard A1 asking for her things the previous day she found her restlessness suspicious. It would appear that it was on the basis of this information which this witness relayed to her husband (PW2) that investigations into the possibility of the deceased's poisoning commenced.

PW4 corroborated the evidence of PW2 and PW3 in so far as he attested to A1's admission to the poisoning of the deceased. He testified that A1 told him that A2 and others still at large gave her a black powder to put in the deceased's groundnut sauce, and promised her Ushs. 50,000/= in return of which they had

paid her Ushs. 5,000/=. PW4's evidence thus explains the 'things' that A1 sought from a one Mama Faith as testified by PW3. This would appear to have been her outstanding payment. The witness further testified that A1 claimed not to have known at the time she administered the black substance to the deceased's food that it was poisonous, but only realised it was poisonous upon seeing the deceased deteriorating in hospital. Under cross examination, PW4 testified that both accused persons declined to record a charge and caution statement upon realising that they were being charged for murder.

PW5 testified to the circumstances under which A1 was arrested, stating that when she saw PW2 she tried to flee but fell. He also attested to A1 having made an admission of guilt to poisoning the deceased on the promise of payment of Ushs. 50,000/= thus corroborating the evidence of PW2 and PW4.

On their part, as stated earlier herein, both accused persons denied responsibility for the deceased's death. A1 sought to attribute the deceased's death to an ailment the deceased returned from the village suffering from or the chronic ailments of hypertension and diabetes that she alleged the deceased to have suffered from. She testified that PW1 called a doctor to treat the deceased, and it was upon being given an injection by the said doctor that the deceased begun vomiting. She further denied giving any food to the deceased contending that the deceased ate elsewhere before she returned home. Under cross examination A1 sought to deny that the accused vomited any food or black substance but subsequently conceded that the deceased did vomit food. A2 simply denied giving any poison to A1.

Section 191 of the Penal Code Act provides as follows on malice aforethought:

“Malice aforethought may be established by evidence providing either of the following circumstances:

- (a) **an intention to cause death....**
- (b) **Knowledge that the act ... causing death will probably cause the death of some person, although such act is accompanied by indifference whether death is caused or not ...”**

The courts are cognisant of the difficulty of proving an accused person’s mental disposition and thus agreeable to an inference of such disposition from the circumstances surrounding a homicide. In the case of **R. vs Tubere (1945) 12 EACA 63** such circumstances were enunciated upon to *inter alia* include the conduct of the accused before, during and after the incident.

In the cases of **R v Nedrick [1986] 1 WLR. 1025** and **R v Hancock [1986] 2 WLR 357**, it was the position of the courts that what the judge had to decide, so far as the mental element of murder was concerned, was whether an accused intended to kill; and in order to reach that decision the judge was required to pay regard to all the relevant circumstances, including what the accused said and did. Indeed, in the case of **Nandudu Grace & Another vs. Uganda Crim. Appeal No.4 of 2009** (Supreme Court), their Lordships cited with approval their earlier holding in the case of **Francis Coke vs. Uganda (1992 -93) HCB 43**, where it was held that the existence of malice aforethought was not a question of opinion but one of fact to be determined from all the available evidence.

In **Mureeba & Others vs. Uganda Crim. Appeal No. 13 of 2003** (Supreme Court) it was held:

“Generally, in a criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused.”

In that case, their Lordships also cited with approval the decision in **R. vs Kipkering Arap Koske & Another (1949) 16 EACA**

135, where it was held that ‘**in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of guilt.**’

The Supreme Court has had occasion to discuss the meaning of the term ‘accomplice’ in the case of **Nasolo v Uganda [2003] 1 EA 181 (SCU)** and held:

“In a criminal trial a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial. One of the clearest cases of an accomplice is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after a trial. However, even in absence of such confession or conviction, a court may find, on strength of the evidence before it at the trial that a witness participated in the offence in one degree or another. Clearly, where a witness conspired to commit, or incited the commission of the offence under trial, he would be regard as an accomplice.”

In the present case A1’s conduct was attested to by PW1, PW3 and PW5. PW1 testified that PW1 cooked and served food to the deceased; when the deceased started vomiting, she helped clean up after her, and when the deceased was taken to hospital she accompanied her there. Such conduct does not, in my judgment, portray any malice aforethought. However, PW3 testified that she overheard A1 asking a one Mama Faith for ‘her things’ and the said A1 acted uneasy when she realised that PW3 had overheard her. Further, PW3 testified that on the day of the

deceased's burial she noticed that A1 was restless and overheard her tell her companions that she had no peace. In my view, this conduct would raise some suspicion of possible culpability but would not, in the absence of supporting evidence, be sufficient proof of the *mens rea* for a murder. Be that as it may, PW4's evidence did provide such supporting evidence in so far as it clarified that the 'things' that A1 sought from the said Mama Faith as testified by PW3 entailed her outstanding payment of Ushs. 45,000/=.

On her part, the gist of A1's evidence was that the deceased died of an ailment that she had contracted prior to returning home and/ or she ate elsewhere before returning home. This evidence was in direct contrast with that of PW1 who testified quite categorically that his wife left home on the morning of 22nd May 2010; returned the same day and told him that she had not eaten anything since the previous night. Further, under cross examination A1 sought to deny that the accused vomited any food or black substance as had been testified by PW1, but subsequently conceded that the deceased did vomit food. PW1's evidence that the deceased vomited some black substance was corroborated by the findings of the post mortem report which reported an abnormal black substance in the deceased's oesophagus (food canal).

This court found PW1's evidence credible and cogent with no contradiction even under cross examination. In contrast, A1 contradicted herself numerous times during her testimony; did concede under cross examination that PW1 was a truthful witness and only sought to impugn the part of his evidence about what the deceased vomited, but subsequently conceded that PW1 was largely truthful even on that issue. The inconsistencies in A1's evidence included her testimony on what the deceased vomited; her averment on the circumstances under which the

news of the deceased's death was relayed to PW1; and her contention that the plain statement she made was recorded by numerous people which averment she subsequently contradicted by conceding that it was, after all, in only 1 person's handwriting. While the circumstances under which the news of the deceased's death was relayed may be deemed to be a minor contradiction that could be ignored; the 2 other incidences of inconsistency on A1's part are major and do go to the root of this case. The prosecution case is hinged on a plain statement that A1 made admitting to the present offence which statement she subsequently declined to translate into a charge and caution statement. Similarly, a contradiction on what the deceased vomited would go to the root of a case like this premised on murder by food poisoning. Therefore flagrant inconsistencies on such critical issues are viewed with extreme disdain by this court. In view of A1's untruthful demeanour as observed by this court, I find that the numerous inconsistencies in her evidence represented afterthoughts and deliberate untruths that were intended to mislead this court.

The question is why would an accused person peddle such untruths before a court of law? In my view peddling of untruths in evidence would point to the culpability of such an accused person who seeks to avert the course of justice. I therefore reject the offending pieces of A1's evidence and accept PW1's evidence that the deceased ate food prepared by A1 and thereupon experienced vomiting of food, water and a black substance, a fact that was supported by independent medical evidence. With regard to the plain statement attested to by PW4, which statement A1 sought to deny, I did find corroboration of PW4's evidence by that of PW3 as highlighted earlier in this judgment. At the time PW3 overheard A1 talking to her accomplices the witness (PW3) did not know what 'things' were in reference. The circumstantial evidence stipulated in PW4's testimony supports

and clarifies PW3's averment. In my judgment, the net effect of the circumstantial evidence of PW3 and PW4 on the question of A1 having been hired to administer the black substance to the deceased's food is incompatible with the innocence of A1 and incapable of explanation on any other reasonable hypothesis than that of A1's guilt. I am therefore satisfied that A1 made the admissions stipulated in PW4's oral evidence. Her attempted denial of the same was not credible and would appear to have been an afterthought. I therefore find that A1 did administer a black powder to the deceased's food and that the said substance had been given to her by A2 and others still at large on the promise of Ushs. 50,000/= of which a part payment of Ushs. 5,000/= had been made to A1.

The question then is whether or not the black powder administered to the deceased's food was the cause of her death so as to prove the *mens rea* of murder.

The Post Mortem report (Exh. P2) found no anatomical cause of death and the Analysis Report (Exh. P3) did not detect toxins or poison in the deceased's body organs that were sent for toxicological analysis. The latter report, however, provided possible reasons for the non-detection of toxins in the deceased's body organs. An expert witness called by court (the doctor that performed the post mortem) clarified that the finding in the post mortem report that no anatomical cause of death was seen meant that no cause of death that could be detected by the naked eye or on the deceased's physical body (anatomy) was seen. He further clarified that the black substance observed in the deceased's oesophagus was not a normal finding hence prompting him to send selected body organs for laboratory analysis to determine whether or not there were toxins (poisonous substance) therein. The doctor testified that having found the black substance in the oesophagus he could not rule

out poisoning as the cause of death. He further opined that the passage of time, as well as the formalin used to treat the body was bound to affect the findings of the analysis.

It is well settled law that the onus is on the prosecution to prove that an accused person with malice aforethought killed the deceased and such accused person is entitled to be acquitted even though the court is not satisfied that his story is true, so long as the court is of the view that his story might reasonably be true. See **Paulo Omale vs Uganda Criminal Appeal No. 6 of 1977** (Court of Appeal).

In the case of **Nanyonjo Harriet & Another vs. Uganda Criminal Appeal No. 24 of 2002** (Supreme Court) it was held:

“For a court to infer that an accused killed with malice aforethought it must consider if death was a natural consequence of the act that caused the death, and if the accused foresaw death as a natural consequence of the act.” (*emphasis mine*)

With regard to accomplice evidence, it is trite law that such evidence is deemed to be untrustworthy and unreliable *inter alia* because an accomplice is likely to swear falsely in order to shift guilt from himself or, being a participant in crime and consequently an immoral person, is likely to disregard the sanctity of an oath. See **Uganda v Kato Kajubi Godfrey Cr.Appeal No.39 Of 2010** and **Sarkar on Evidence, 14th Ed, 1993 at p.1924.**

In the present case, owing to the passage of time and the treatment of the body with formalin, the medical evidence adduced by the prosecution was not conclusive on whether or not the black substance found in the deceased’s oesophagus was toxic or poisonous. Be that as it may, the expert witness called by court clearly testified that he found the presence of the black

substance in the deceased's food canal abnormal and stated that he could not rule out poisoning as the deceased's cause of death. The toxicological analysis report also highlighted the reasons why its findings were not conclusive, attributing this to passage of time and a formalin-treated body that rendered analysis of some tissues ineffective.

In my judgment, faced with medical evidence that whilst not conclusive did unearth an abnormal finding of black substance in the deceased's food canal; the circumstantial evidence on record would be instructive on this issue. PW1 testified quite categorically that 30 minutes after the deceased ate food prepared by A1 she experienced vomiting and diarrhoea. According to the same witness the deceased initially vomited food, and later vomited watery fluid and black substance. The said food has been established by this court to have been laced with a black powder. PW1 testified that the deceased had not eaten anything else since the previous night (21st May 2010). As stated earlier herein, PW3 attested to suspicious behaviour by A1, which evidence was corroborated by PW4's evidence. PW4 testified that A1 told him that at the time she administered the black substance to the deceased's food she did not know that it was poisonous, but only realised it was poisonous upon seeing the deceased deteriorating in hospital. This piece of evidence would support PW3's evidence of having observed A1's restlessness on the day of the deceased's burial.

In my view, with recourse to the totality of the prosecution evidence it is reasonable to conclude that the black substance administered to the deceased's food by A1 did cause the deceased's vomiting and subsequent death. Having found that A2 and others still at large provided A1 with the black substance in issue, and on the basis of the definition of an accomplice as stated in **Nasolo v Uganda** (supra), I am satisfied that A2 incited

the commission of the offence under trial and duly regard her as an accomplice.

The question then is whether A1 administered the said powder knowing that it would probably cause the deceased's death or indeed whether or not A2 provided the same powder to A1 for the purpose knowing that it would probably cause death. This begs the question whether or not the 2 accused persons foresaw the deceased's death as a natural consequence of their respective actions. See **Nanyonjo Harriet & Another vs. Uganda** (supra).

In my judgment, no evidence was adduced by the prosecution that would answer the foregoing questions in the affirmative. According to PW4's evidence, A1 told him that she did not know that the black powder was poisonous at the time she administered it to the deceased's food. With regard to A2, no evidence whatsoever was adduced by the prosecution to prove that she did know that the powder she supplied to A1 was capable of causing death. I cannot rule out the possibility that the accused persons thought the powder could cause any other result other than death. Particularly so given their low levels of literacy. I therefore find that the prosecution has not proved to the required standard that either of the accused persons acted as they did with malice aforethought.

For that reason, I do hereby depart from the joint opinion of the gentlemen assessors and acquit A1 and A2 of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. I do however find both accused persons guilty of the offence of manslaughter contrary to sections 187(1) and 190 of the Penal Code Act and hereby convict them of the said offence.

Monica K. Mugenyi
Judge

4th April, 2012