

Meanwhile, the men who had remained outside in the car intercepted Nabasa from returning to the bar and tried to strangle him with a wire tied around his neck. The deceased made an alarm while being assaulted with a panga. The men then left Nabasa who ran to a one Tumusiime's bar nearby and alerted other people about the attack on the deceased.

Meanwhile, the deceased's alarm was responded to by her husband and daughter who found her unconscious, and lying in a pool of blood. She had suffered deep cuts on her head, legs and shoulder. The assailants fled the scene in a vehicle which was later established to be Reg. No. UAK 614 M belonging to a one Kacakara. The deceased died on the way to Mbarara Regional Referral Hospital. Her body was subjected to a postmortem examination which shows that the cause of death was neurogenic shock and hemorrhagic shock due to the injuries sustained.

Further investigations revealed that AI (Osherura Owen) hired the aforesaid car from its owner at Kisizi on 22/02/2009 at 9:00 am with the intention of using it the whole day, to travel to Isingiro to visit his father-in-law. He was arrested and made a charge - and -caution statement to Police admitting that he participated in the murder of the deceased. He also implicated others. He stated that the plan to kill the deceased was initiated by Arinaitwe Davis, who said that he believed the deceased was bewitching members of Arinaitwe's family including the wife of AI.

When Arinaitwe was arrested, he too made a charge –and- caution statement implicating AI his brother-in-law, in the murder of the deceased. A3 (Tumwesigye Frank) was also arrested. He admitted to Police that he merely accompanied A1, a certain brown man and another one whom was only referred to as Kyalimpa to the scene of murder. He stated that he witnessed the brown man cutting the woman at the bar with a panga. He denied knowledge of the plan to kill the deceased. The accused were medically examined on 3/3/2009, and found to be mentally normal.

To prove the offence of Murder Contrary to Section 188 and 189 PCA to the required standard, the prosecution must adduce evidence which establishes the following essential ingredients;

- (i) Death of a person;
- (ii) death was unlawfully caused;
- (iii) death was caused with malice aforethought; and
- (iv) the accused participated in the killing.

In the instant case, there is no dispute as to the fact that Sanyu Provia, the deceased died. PF 48B (Postmortem Report) as admitted in evidence as an agreed fact (Exhibit "PI") pursuant to

Section 68 (2) of the Trial on Indictments Act. It clearly shows that the deceased indeed died; and her dead body was examined. PW1 Warren Nabasa, a neighbor to the deceased, also confirmed to court that Sanyu Provia died and he attended her burial. Other witnesses who confirmed the deceased's death include D/SGT Namara Fulugensi, a police officer, who was attached to Isingiro Police Station in February, 2009 and who investigated the case. There is no dispute as to the fact of death. The prosecution's evidence has established the ingredient beyond reasonable doubt.

On whether death was caused unlawfully, the law presumes every homicide to be unlawfully caused unless it is excusable under the law. It is excusable when it is committed in execution of a lawful sentence or it is accidental or in circumstances of self-defence. See ***Uganda vs Kulabako Night Jenniffer H.C. Cr. Session Case No. 61/1991 per Kato J. (as he then was), Uganda Vs Turyasingura Dnis & Ors, HC. Cr. Session Case No. 96/2009 per Bamwine J (as he then was)***. This presumption is a rebuttable one and the accused has the burden to prove one balance of probabilities.

I have not come across any evidence in the instant case to suggest that the death of Sanyu Provia was excusable under the law. Accordingly the presumption that it was caused unlawfully remains unrebutted; and this ingredient too is proved by the prosecution's evidence to the required standard.

Regarding malice aforethought, **Section 191 Penal Code Act** stipulates the circumstances and instances from which malice aforethought can be inferred. Regard has to be had to the nature of injuries, and the manner in which they were inflicted, the part of the body assailed and the weapon used. See also ***Steven Musango & Anor Vs. Uganda, C.A Cr. Appeal No. 52 of 2001, Nanyonjo Harriet & Anor Vs. Uganda, S.C Criminal Appeal No. 24/2007; Joseph Rujumba Vs. Uganda [1992-1993] HCB 36 (SC); Nandudu Grace & Anor. Vs. Uganda, S.C. Criminal Appeal No. 4/2009.***

In the instant case, the body of the deceased was found with deep cut wounds on the head, shoulder and legs according to Exhibit PI (PF 48B). PW1 also described the injuries which the deceased sustained and his description is consistent with the medical findings on PF 48B. At the same time, the wounds were found to be the cause of death by the postmortem examination. The head is a delicate part of the body when; if is assaulted with a weapon such as a panga, would

likely cause death. Although the panga was not exhibited, it was described sufficiently by evidence of witnesses particularly that of PWI, hence believable and its use consistent with the injuries sustained.

In my view, whoever inflicted the wounds on the deceased knew, or had reason to know that death would occur as a result. It occurred; hence it was caused with malice aforethought within the meaning of **Section 191 Penal Code Act**. The prosecution has proved this ingredient beyond reasonable doubt.

The defence contested the ingredient of the accused's participation. In his sworn evidence, A1 set up a defence of alibi that on the fateful day, he was at his home in Rwerere in Rukungiri District and had never gone to Isingiro to the Scene of crime. That he was arrested by Rukungiri Police and taken to Rukungiri Police Station from where he was driven straight to Mbarara court only to be charged with murder. A1 denied ever participating in the murder.

Similarly, A3 also set up a defence of alibi. He testified that he was working as a casual labourer in Ruti-Mbarara and had never gone to Kisizi in Rukungiri District, nor was he arrested from there. Police only found him at Ruti and arrested him as an idler, and brought him to court straight away and charged him with murder. A3 denied ever meeting with A1 before, but that he only found him in court the day he was charged and detained in prison.

When an accused person sets up the defence of alibi, he/she does not assume the duty to prove it. The onus lies on the prosecution who must bring evidence in rebuttal to destroy the alibi and place the accused at the scene of crime. See **Francis Sekitoleko Vs. Uganda MB 68/69; Ausi S/o Okulu Vs. Uganda, MB 113/68 per Udo Udoma CJ (R.I.P.)**. If the alibi raises reasonable doubt as to the guilt of the accused, it is sufficient to secure his/her acquittal. See **Mohammed Mukasa & Anor Vs. Uganda S.C. Criminal Appeal No. 27 of 1995; quoting with approval Leonard Aniseth Vs. R (1963) AE 206; R.V Johnson [1961]3 ALL ER; and Sentale Vs. Uganda [1968] E.A 365**.

I am also alive to the position of the law that alibi ought to be put forward at the earliest possible time to give prosecution the chance to adduce evidence to test it. See **Yofusa Kyobe Semalogo Vs. Uganda MB 3/67**.

In the instant case, both accused put up alibi in their sworn evidence at the stage of their defence. The prosecution, therefore, had no opportunity to adduce evidence specifically to rebut or test the

alibi. The above notwithstanding, the prosecution adduced evidence of the accused's confession statement in which A1 admitted to killing the deceased; and implicated A3 for complicity in the murder.

The confession statement which was admitted as Exhibit "PIB" after conducting a "trial within a trial" clearly shows that AI participated in the killing of Sanyu Provia. It states in clear detail that AI in consort with Davis Arinaitwe his brother in-law on the fateful day hired a vehicle of one Kacakara alias Akamparira Alex (PW5). They travelled from Kisizi in Rukungiri District to Isingiro to a bar owned by the deceased at Kibwera Trading Centre. On the way at Rushare Trading Centre, A1 bought a panga, and kept it as and Davis told one Kyalimpa of their plan to kill the deceased. They found Sanyu in her bar at night with another man (PW1), whom they tied with a wire around the neck, but he managed to ran away. Then Davis, Kyalimpa and Frank (A3) entered the bar and pulled out the woman (deceased) and started cutting her. Thereafter all the accused entered the car and drove back at a place called Mwizi, where they threw the panga in the bush. On 26/02/2009, while at Kisizi Trading Centre, Police found A1 and arrested him in connection with the murder.

For his part, A3 states the same as A1 in his charge – and - caution statement to police (Exhibit "P6") but attempts to exculpate himself that he only escorted AI and other people whom he witnessed cutting to death the deceased. A3 claims he never knew about the plan to kill the deceased, but that he only saw AI and other cutting to death a woman at Kibwera Trading Centre in Isingiro. Strangely, A3 during trial denied ever knowing A1 before the incident or ever going to Isingiro on the fateful day. A3 was according to his statement (Exhibit "P6") promised Shs. 100,000= for his role in the "mission" by A1, who also warned him never to reveal anything of what had happened.

A3's statement squarely places him at the scene of crime - his denials notwithstanding. He was not an innocent by-stander as he claims in his statement, but actually an active participant who helped to pull the deceased out of her home/bar, and she met her death in his presence. He was promised money by A1 for his role in the murder and also to buy his silence. He stated this much himself. Therefore, his claims about being arrested from Ruti - Mbarara as an idler are nothing but a pack of lies.

The Assessors, after considering the evidence and the points of law on which I had directed them, were unanimous that the accused are guilty of the offence of murder as charged. They

advised me to convict them, and I cannot agree more. The prosecution has proved its case beyond reasonable doubt. The accused persons are both found guilty of ***Murder contrary to Section 188 and 189 Penal Code Act***, and accordingly convicted.

BASHAIJA K. ANDREW

J U D G E

26/04/2012

Mt. Ojok Michael (Principal State Attorney):- We have no previous records. They are considered as first offenders. They have been on remand for three years. They have been convicted of a very serious offence whose maximum sentence is death penalty. The offence is rampant. Court needs to curtail this. Human life is sacrosanct. The deceased was doing her business in her bar and was brutally killed in inhumane circumstances. The sentence should reflect the seriousness of the offence.

Mr. Kabagambe for the Convicts (Allocutus):- The convicts are first offenders and have been on remand for three years. Court has the discretion. The sentence should be to allow them serve and go back home and serve society. They are young and can be useful to the country we pray for lenient sentence.

Convict (A 1) (Allocutus):- I do not know about the offence. I have a lot of dependants. I pray for a lenient sentence. I pray for one- year imprisonment.

Convict (A3) (Allocutus):- I do not know about the offence. I am sick with kidney illness. I pray for leniency to go and get treatment. I pray for about one year imprisonment.

BASHAIJA K. ANDREW

J U D G E

26/04/2012

SENTENCE AND REASONS.

Although the convicts are presumed to be first offenders, since no record of any of their previous convictions is available, they committed a heinous crime of murder.

Both convicts participated in killing a person on suspicion that she was bewitching their family and relatives. A belief in witchcraft could be genuine but mistaken, and should not be an excuse for killing another person. The convicts deserve a sentence that will not only be deterrent to them, but also to send a message to those who believe like them that witch-hunting and witch-killing, witch-banishing has no place in our society. No one has a right to take the life of another in such an unlawful manner under the pretext of killing a witch.

I have taken into account the period the convicts have spent on remand in arriving at the sentence. All factors taken into account in light of the circumstances of this case, I sentence the convicts as follows:-

Convict (A1) is sentenced to TWENTY-FIVE years' imprisonment.

Convict (A2) is sentenced to TWENTY-FIVE years' imprisonment

BASHAIJA K. ANDREW

J U D G E

26/04/2012

Court:- Right of appeal explained.

BASHAIJA K. ANDREW

J U D G E

26/04/2012