

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT MASAKA**

**CRIMINAL SESSION CASE NO. 0084/2002**

UGANDA:.....PROSECUTION

VERSUS

LUBEGA FRANCIS:.....ACCUSED

**BEFORE: THE HON JUSTICE V.F. MUSOKE-KIBUUKA**

**JUDGMENT**

The accused charged with the offence of Murder contrary to section 183 and 184 of the Penal Code Act. The particulars of the offence as set out in the indictment read that Lubega Francis, on the 16<sup>th</sup> day of April, 2001 at Lusalira “A” village in Ssembabule District, murdered one Irene Kebikali.

The accused pleaded not guilty to the charge of murder. The prosecution had to discharge the burden of proving the case against the accused person beyond any reasonable doubt **R vs. Johnson [1961] 3 All E.R. 969 Sserugo vs Uganda (1978) H.C.B.1**. The prosecution led evidence from six witnesses. The defence consists of evidence given by the accused upon oath.

The summary of the case for the prosecution from the evidence adduced in court was that the accused person and the deceased, Irene Kebikali, were husband and wife. At least they had lived as such for over one and half years. The two had some problems and the deceased showed that she wanted to leave the accused or walk out of their marriage. On 15<sup>th</sup> April 2001, during the night, the accused went to the home of PW3, Kapere George, a brother to the deceased who lived in the same village of Lusalira. The accused complained to PW3 that he had discovered that the deceased had hidden all her clothes from the house, which to him was clear evidence that the deceased planned to leave him. He invited PW3 go to him and his wife to resolve that matter but when PW3 went to the home of the accused the following day, on 15<sup>th</sup> April, 2003 he was told by

the accused that the neighbours had already assisted the accused and the deceased to resolve the matter.

During the following night, that is the night of 16<sup>th</sup> April 2001, at about 3.30 a.m. again the accused went to the home of PW3. He invited PW3 to go to the accused's home very early the following morning. He did not tell PW3 the reason for the invitation when PW3 went to the home of the accused the home of the accused the following morning the accused was not at home. The son of the accused called Muyombya, who was aged 12 years, told PW3 that the accused had during the previous night cut up and killed the deceased and ran away from the home. PW3 saw the deceased lying in her bed with several cut wounds.

PW3 reported the incident to PW4, Kigemuzi Josephat, the LC1 Chairman of Lusalira village. PW4 mobilised neighbours and reported the matter to Mateete Police post. A search for the accused by the residents yielded nothing.

In the morning of 16<sup>th</sup> April 2001, at about 8.00 a.m. the accused reported himself to Kinoni Police Post where PW5, PC Tumwesigye George received him. The accused told both PW5 and PW6, Captain Muranira that he had cut his wife to death and he had ran away from the home to the Police for fear of mob-reaction. He had cut his wife because the wife wanted to leave him and get married elsewhere. The first information recorded by PW5 from the accused to that effect is exhibit P3 on the record.

On 17<sup>th</sup> April 2001, PW1 Doctor Muhumuza Elly, of Ssembabule Health Centre, examined the body of the deceased at Lusalira village. The body was of a young well-nourished African woman. It bore cut wounds on the head, neck, and left arm. The brains had been lacerated and the main vein in the neck had been dissected. The cause of death was stated to be "**excessive bleeding from the cut carotids.**" The post mortem report, written by Dr. Muhumuza on Police Form 48 C, is exhibit P1.

PW2, Dr. Ssekitoleko, of Masaka Hospital examined the accused against Police Form 24, on 16<sup>th</sup> October, 2001. He found no injuries upon him. He was mentally sound. The report is exhibit P2 on the record.

In his evidence, in his own defence, the accused acknowledged that the deceased was his wife and that they lived together. During the night of 16<sup>th</sup> April, 2001, the accused and deceased were in their house with their children. They were sleeping. At about mid-night, the accused heard some people breaking the door of the house. He immediately informed his wife of the impending danger. The accused raised an alarm. But nobody responded. The accused managed to escape from the house and ran into the bush. He hid in the bush till morning when he decided to report to police. He reported to Kinoni police post because it was the nearest police post to his own home. He did so knowing that the police post, which was responsible for the area, was that of Mateete.

In a trial based upon an indictment for the offence of murder contrary to sections 183 and 184 of the Penal Code Act, the prosecution must prove beyond reasonable doubt four essential ingredients of that offence. That is to say:-

- (a) that the deceased named in the indictment is dead;
- (b) that the deceased died of an unlawful act or omission;
- (c) that the act causing death was accompanied by malice aforethought and
- (d) that the accused named in the indictment participated in causing the death of the deceased. ***See Uganda vs Kassim Obura and another (1981) HCB 19.***

The death of a person may be proved by direct or by circumstantial evidence. Where the evidence is circumstantial, it must be such as compels the inference of death and is inconsistent with any theory of the alleged deceased being alive. ***Uganda vs Yoseph Nyabenda [1972] ULR 19***

In the instant case, the prosecution adduced direct evidence from PW1 Doctor Muhumuza and the post mortem report, exhibit P1 prepared by Doctor Muhumuza. The prosecution also adduced the evidence of PW3, Kapere George, the brother of the deceased. There is the evidence of PW4, Kigemuzi Josephat, the LC1 Chairperson of Lusalira village and lastly there is the evidence of PW5 and PW6, both Police officers from Kinoni Police Post who upon receipt of the first information given to them by the accused himself, travelled to the scene of crime where they found the body of a woman cut to death and lying in her bed. PW3, Kapere George, was a brother to the deceased, Irene Kebikali. He identified the body to PW1, Doctor Muhumuza, as

that of his sister, Irene Kebikali. PW4, Kigemuzi Josephat, was the LC1 Chairperson of Lusalira village. He knew the deceased very well. He saw her dead body on 16<sup>th</sup> April 2001, lying in bed. He participated in the deceased's burial.

The defence was itself expressly conceded to both the first and second ingredients of the offence of murder in this case as proved beyond any reasonable doubt by the evidence adduced by the prosecution.

In those circumstances, this court is satisfied that the prosecution has proved that Irene Kebikali, the deceased person named in the indictment, in this case, is dead.

The second essential ingredient relates to the cause of death of Irene Kebikali. The evidence of PW1, Doctor Muhumuza is that Irene Kebikali died of excessive bleeding as a result of cut wounds which severed the main veins in the neck. The other prosecution witness saw and testified to the death of Irene Kebikali as not being from natural causes but resulting from cut wounds inflicted upon her ...she slept. The deceased's death amounted to a homicide.

Every homicide is unlawful unless it is authorized or excusable by law **R. vs. Sharmal Singh [1962] E.A. 13**. In the instant case, I am satisfied that the cutting of Irene Kebikali with a panga led to her death was neither authorized by law nor was it excusable. Indeed, as the defence does itself concede, the evidence adduced by the prosecution proves beyond any reasonable doubt, that Irene Kebikali died of an unlawful act of cutting her several times with a panga.

I will now analyze the evidence in relation to the third essential ingredient of the offence of murder. That is, that the unlawful act causing death was accompanied by malice aforethought.

Malice aforethought is defined by sections 186 of the Penal Code Act, in the following words:-

**“Malice aforethought shall be established by evidence proving either of the following circumstances:**

**(a) an intention to cause the death of any person whether such person is the person actually killed or not; or**

**(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the 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”.**

In considering the issue of malice aforethought the Court has to consider the following tests.

- (a) the type of the weapon used
- (b) the nature of the injuries inflicted
- (c) the part of the body affected
- (d) the conduct of the attack before and after the attack.

**See Tubere vs R. (1945) 12 EACA 63Rujumba vs Uganda (1991-93) HCB 36**

In the instant case, although Doctor Muhumuza did not see the weapon used and none was subsequently recovered, he was of the opinion that a sharp object was used to inflict the injuries he found on the body of the deceased. The injuries were very serious injuries indeed. The brain tissue had been located and spread over the bed. Very vital blood vessels in the neck were severed leading to excessive blood and instant death.

The neck and head are probably the most vulnerable part of the human external anatomy. Any one cutting one's neck or head with a sharp object must, certainly, be intending to kill or at least he or she must know that such action will result into the death of the person affected.

I have no doubt, therefore, that whoever cut Irene Kebikali with a sharp object on the head and neck and inflicted such serious injuries on those very vulnerable parts of her body had the intention of killing her. At the very least, he or she must have known that such action result into death of Irene Kebikali.

I therefore find that the evidence adduced by the prosecution, in this case proves beyond any reasonable doubt that the unlawful act of cutting Irene Kebikali with a sharp object was accompanied with malice aforethought or the intention to kill her.

The last essential ingredient of the offence of murder states to the participation of the accused person the killing of Irene Kebikali.

Apart from the first information given to PW5 and PW6 at Kinoni Police Post by the accused himself, which first information was admitted in evidence as exhibit P3, the rest of the

prosecution's evidence against the accused is circumstantial. I will deal with the first information first.

Learned Counsel for the defence Mr. Kamugunda in his final submissions, has submitted that the admission contained in the first information amounts to a confession and since it was made while in Police custody and to a junior officer, it is not admissible into evidence against the accused person. With due respect to Learned Counsel for the defence, I do not agree with that submission. When the application to tender exhibit P3 into evidence was made during the trial, the defence raised no objection to the application thus even if exhibit P3 amounted to a confession, the defence would not be permitted to challenge it during the defence or final submissions. It would be too late to do so at that stage. **Abasi Kanyike vs Uganda (1993) III KALR 76.**

I am indeed, aware of the duty of the Court to ensure a fair trial for both sides of the case. In the instant case Court did not intervene into the application to tender exhibit P3 into evidence for two good reasons.

The first reason is that it appeared to this Court that when the accused gave the first information to PW5, he was not under Police custody. He just walked into the charge room and gave the information in front of the counter. He was not under arrest. The accused himself stated, in cross-examination that he was not arrested until very late that morning. He remained squatting at the verandah of the Police Post when PW5 and PW6 left the Police Post and went to Lusalira to verify the information which he had given to them and now contained in exhibit P3. In those circumstances I do not consider Exh P3 to fall under the ambit of the provision section 23,24 and 25 of the Evidence Act, Cap6 (Law of Uganda, 2000 revised Edition)

The second reason is that I find exhibit P3 to be regulated by the provisions of **Section 29 of the Evidence Act, Cap 6.** The provision reads:

**“29 Information leading to discovery of facts** notwithstanding section 23 and 24, when any fact is proved to as discovered in consequence of information received from a person accused of the offence, so much of information, **whether it amounts to a confession or not, as relates directly to the fact thereby discovered, may be proved.**”

In the instant case, the accused gave information to PW5 and PW6 that he had cut his wife to death and had gone to the Police Post avoid mob reaction against him. PW5 and PW6 went to Lusailira village to verify that information. They discovered cut and lying in a bed in the accused's house. They also discovered that the body was that of the accused's wife called Irene Kebikali. The information leading to the discovery of those facts which constitute the evidence of those witnesses appears to me to fall under the provisions of section 29 of the Evidence Act without subjecting it to the process of a trial within a trial as required under sections 23 of the Evidence Act.

As noted above, apart from the evidence of PW5 and PW6 and exhibit P3, the rest of the prosecution's evidence against the accused is circumstantial evidence.

Circumstantial evidence must always be narrowly examined, if only because evidence of that kind may be fabricated to cast suspicion on another person.

It is also necessary before drawing any inference of accused's guilt from circumstantial evidence for the Court to be certain that there are no co-existing circumstances or facts, which would weaken or destroy the inference of guilt. **See Teper U.S.R. (1952) AS 480 and Simon Musoke – vs Regina [1958] E.A. 715**

For the Court to act upon circumstantial evidence, it must be such as creates moral certainty as to the guilt of the accused. It must not be capable of any explanation upon any other hypothesis other than the guilt of the accused person. **R. vs. Bukari S/C Abdullah (1949) 16 E.A.C.A 84.**

On the other hand, it has been said that circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a position with the accuracy of mathematics. It is no derogation to say that it is circumstantial.

Motive is not relevant in a criminal trial. But the evidence of PW3 shows that the accused had a motive. The same evidence shows that the accused went to the home of PW3 at about 3.00 a.m. on 16<sup>th</sup> April, 2001, and invited PW3 to go very early in the morning to the home, of the accused. The accused did not tell PW3 why he was required at the home. That piece of circumstantial evidence cannot be explained upon any other hypothesis except the hypothesis that the accused

had by then already cut his wife, to death and was inviting PW3 to go very early and deal with the consequences of the death. By then the accused had already ran away from the home.

The accused says in his defence, that he was sleeping in the same bedroom with the deceased and when attackers he ran away. There is no evidence that the door or any part of the house was broken. There is no evidence that any property was stolen from the house. The body of the deceased was found lying in bed in an orderly manner and covered with a blanket. The work was one of a careful killer who took his time before leaving the house. That piece of circumstantial evidence points only to the accused as the killer.

The fact that he ran away from the home and never returned until he reported to police at 8.00 p.m. and he never contacted any of his neighbours in also circumstantial evidence pointing solely to his guilt.

The evidence that when he reported to the police at Kinoni, he reported killing his wife and not the fact that attackers had invaded his home the previous night is additional circumstantial evidence pointing to him solely as the killer of the deceased.

The neat way in which he was dressed when the accused appeared at the Police Post at Kinoni, with a shirt, trousers and a coat with shoes and socks, clearly shows that he had left his house the previous night not in a hurry by way of running away from attackers, but in a well prepared departure after realizing that what he had done to his wife would cause him problems.

The above evidence in every view clearly proves, beyond any reasonable doubt, that it was the accused who cut Irene Kebikali to death during the mourning of 16<sup>th</sup> April 2001 and I so find.

The two gentleman assessors Mr. Kateregga and Mr. Kiggundu Henry have each given me the opinion to the effect that the prosecution has proved its case beyond any reasonable doubt and that I convict the accused as charged.

I find no reason for disagreement with them. And I convict Lubega Francis of the offence of murder contrary to section 183 of the Penal Code Act.



**V.F. MUSOKE-KIBUUKA**

**JUDGE**

**12/1/2004**

Accused in Court

Court as before

Court: Judgment read and signed.

Court: Sentence: there is unfortunately, only one punishment provided by law for any person convicted of the offence of murder contrary to section 183 and 184 of the Penal Code Act.

I accordingly, sentence you to suffer death in a manner provided by law.

**V.F. MUSOKE-KIBUUKA**

**JUDGE**

**12/1/2004**

Court: Right of Appeal explained.

**V.F. MUSOKE-KIBUUKA**

**JUDGE**

**12/1/2004**