THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0130 OF 2004

UGANDA …… PROSECUTOR

VERSUS

MUGARURA JOHN …….. ACCUSED

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

Mugarura John, herein referred to as the accused, was indicted on three counts for the offence of murder, contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence as set out in the counts of the indictment were as follows: –

Count I - Mugarura John and others still at large on the 16th day of August 2003, at Kahunge Trading Centre, in Kamwenge District, murdered Tindyebwa Furumera alias Kyakwera Florence.

Count II - Mugarura John and others still at large on the 16th day of August 2003, at Kahunge Trading Centre, in Kamwenge District, murdered Kusemererwa Daphine.

Count III - Mugarura John and others still at large on the 16th day of August 2003, at Kahunge Trading Centre, in Kamwenge District, murdered Alinaitwe Godfrey.

The charge in each of the aforesaid counts was read and explained to the accused. His response was that he had understood them; but he denied each of those allegations. The Court thus entered the plea of "Not Guilty" for each of the counts; and therefore a full trial followed. Murder is an offence containing four ingredients, each of which the prosecution has to prove beyond reasonable doubt, if an accused is to be found guilty. These ingredients are, namely:-

(i) The death of a human being.

(ii) The said death was unlawfully caused.

(iii) That death was caused with malice aforethought.

(iv) The accused participated in causing the said death.

In a bid to discharge the burden that lay on it to prove that the accused is guilty as charged, the prosecution called four witnesses. These were:

(i) Mugabe Nebu – PW1, an LC1 official of the area where the alleged crime took place;

(ii) No. 22403 Corporal Wanda Richard – PW2, a police officer who investigated the crime;

(iii) Jiripina Musimenda – PW3, a neighbour of the victims of the alleged crime; and

(iv) Dr. Twebaze Fred Byabagambi – PW4, a medical officer who carried out post mortem examinations on the corpses of the victims of the alleged crime.

For proof that each of the three persons named in the three counts of the indictment are dead, the prosecution relied on the evidence of PW1, PW2, and PW3, all of who claimed to have seen the victims after they had been badly burnt; and also their bodies upon their death. PW4 carried out post mortem examinations on each of the three bodies which were identified to him as those of Kyakwera Florence, Kusemererwa Daphine, and Alinaitwe Godfrey; the persons named in the three counts of the indictment.

The sum of the evidence adduced by the three witnesses above is proof beyond reasonable doubt that the three persons, named in the indictment as having died, are indeed dead. This satisfies the requirements in the case of ***Kimweri vs. Republic [1968] E.A. 452***; which is that death may, amongst other means, be proved by a person who has seen the dead body. The defence conceded that the prosecution had proved, beyond reasonable doubt, the death of the three persons named in the indictment. This settles the matter with regard to the ingredient on death.

On the cause of the several deaths, the presumption in law is always that any homicide is unlawful. In a situation where it is however shown that the homicide was committed under circumstances that was either accidental, or was in defence of person or property, or in execution of a lawful Court order, it is excusable. This proposition of law is well established and restated, amongst others, in ***R. vs. Gusambizi s/o Wesonga (1948) 15 E.A.C.A. 65; Uganda vs. Bosco***

Okello alias Anyanya, H.C. Crim. Sess. Case No. 143 of 1991 - [1992 - 1993] H.C.B. 68; and ***Uganda vs. Francis Gayira & Anor. H.C. Crim. Sess. Case No. 470 of 1995 – [1994 - 1995] H.C.B. 16.***

The presumption of unlawful homicide may therefore be rebutted by showing that the killing is covered under any of the excusable circumstances. The standard of proof for such rebuttal is on the balance of probabilities; see the case of ***Festo Shirabu s/o Musungu vs. R (22) E.A.C.A. 454.*** Therefore, with regard to the matter before me, the circumstance and manner of their burns, leading to almost immediate death of each of the victims, and the dying declaration by one of the victims, strengthens the presumption of unlawful homicide. This issue I will advert to later in this judgment.

As for the issue of malice aforethought, it is an element of the mind. Section 191 of the Penal Code Act defines malice aforethought as follows:

191. Malice aforethought.

Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances

(a) an intention to cause the death of any person, whether that person is the person 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 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."

Hence, except for a situation in which the person causing the death has expressly declared the intention to cause death, malice aforethought can only be established by inference, basing on evidence of the circumstances surrounding the death. The inference can be made basing on such factors as were laid out in the case of ***R. vs. Tubere s/o Ochen (1945) 12 E.A.C.A. 63****;* and which principle has subsequently been re-affirmed in cases, such as ***Uganda vs. Fabian Senzah [1975]H.C.B. 136; Lutwama & Others vs. Uganda, S.C. Crim. Appeal No. 38 of 1989.*** The factors are: –

(i) Whether the weapon used, and which caused the death, was lethal; or not.

(ii) Whether the part of the body of the victim, targeted by the assailant was vulnerable; or not.

(iii) Whether the injury was inflicted in a manner that discloses it was intended to cause grave damage or injury, or not; as for example where the injury was inflicted repeatedly.

(iv) Whether the conduct of the accused before, during, and after the attack, points to guilt; or not.

The evidence on record is that the victims' residence – cum shop – was on fire; causing the serious burns that resulted in their death. If, in the instant case, it is established that indeed petrol was the cause of this inferno, as suggested in the dying declaration of one of the victims; and as well the evidence of PW3, then on the authority of ***Uganda vs Turwomwe [1978] H.C.B. 16,*** it would be appropriate to draw the inference of malice aforethought.

However, this Court will have to look at the entire circumstance surrounding the tragic fire before reaching a final conclusion on whether or not malice aforethought was behind it. The witnesses in this case do not provide direct evidence as to the source of the said fire. All that the Court has to go by is the dying declaration of the eldest victim stating that the accused had threatened to harm her with petrol as reprisal for her having declined to continue with their love affair; and the discovery, by PW3, of a basin reportedly smelling of petrol, within the vicinity of the scene of the incident. PW1 testified that when they were lifting the victim Kyakwera to take her to hospital, Kyakwera made the following declaration:-

> *"Although I am dying, it is Mugarura who has killed me; because for the last two days he has been threatening me that even if I have rejected him, petrol will not fail."*

PW3 corroborated the testimony of PW1 regarding the said statement made by Kyakwera. In law this statement, made by the victim just before her death, amounts to a dying declaration. A dying declaration is admissible as evidence as decided in numerous cases. ***In Uganda vs. Tomasi Omukono & Others - H.C. Crim. Session Case No. 9 of 1977; [1977] H.C.B. 61,*** the Court pointed out that a dying declaration is evidence of the weakest kind since it can not be subjected to cross examination.

In the case of ***Tindigwihura Mbahe vs. Uganda S.C. Crim. Appeal No. 9 of 1987***, the Court summed up the law on dying declaration, as follows:-

> *"…evidence of dying declaration must be received with caution because the test of cross examination may be wholly wanting; and the particulars of the violence may have occurred under circumstances of confusion and surprise; the deceased may have stated his inference from facts concerning which he may have omitted important particulars, for not having his attention called to them*
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> ….
>
> *It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross examination, unless there is satisfactory corroboration: see* ***Okethi Okale & Others vs. Republic [1965] E.A. 555, and Tomasi Omukono & Another vs. Uganda, CAU (1978) Judgments part I****."*

The dying declaration in the instant case is based not on evidence of identification by the victim, but rather derivative evidence from belief or inference grounded on an alleged threat made by the accused, much earlier, to harm the victim for turning down his advances. The evidence intended to implicate the accused as having participated in the crime charged is, therefore, entirely circumstantial.

The law with regard to how Courts should approach circumstantial evidence is now settled; see for instance, the leading case of ***Simon Musoke vs. R. [1975] E.A. 715;*** and ***Sharma & Kumar vs. Uganda; S.C. Crim. Appeal No. 44 of 2000.*** In ***Byaruhanga Fodori vs. Uganda, S.C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12*** at p. 14, the Supreme Court of Uganda spelt out the position as follows:-

> *"It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no*

other co-existing circumstances, which weaken or destroy the inference of guilt. (See ***S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480****).”*

In the ***Tindigwihura Mbahe*** case, above, the Court pointed out that circumstantial evidence must be treated with caution, and narrowly examined, because evidence of this kind can easily be fabricated. Therefore, before drawing an inference of guilt therefrom, there is compelling need to ensure that there are no other co-existing circumstances which would weaken or altogether destroy that inference**.** The evidence as to the source of the fire that wreaked havoc that night is rather wanting.

The evidence adduced by the prosecution witnesses is to the effect that the victims were being burnt from inside the house. PW3 who first responded to the alarm was told by the child who called her, not that the house was burning but rather that her mother was burning in the house. One of the rescuers went inside and found one of the children lying on a foam mattress which had got burnt together with the bed sheets. Each of the victims was burnt either on the stomach or the lower abdomen. When Kyakwera was urged to come out of the house to safety, she emerged from the house when she was in flames.

From the evidence of PW4 who carried out the post mortem examination, death of the victims was not from fumes but burns. It is therefore apparent that the intensity of the fire was inside the house, and not on the outside. The victim Kyakwera, owner of the burnt house was known to have utilised a portion of the house that got burnt as a bar where she sold a variety of drinks ranging from soft drinks to local potent liquor, and Waragi.

PW2 testified that the morning after the fire, he found burnt jerry cans smelling of enguli (local potent gin). He testified further that no expert was taken to establish possible cause of the fire, or where the fire could have started from. The mattresses the victims were lying on were burnt. It is in the circumstances quite reasonable to accept the strong possibility that the fire was actually most unfortunately started off accidentally.

The basin, allegedly smelling of petrol, which PW3 discovered by chance behind the burnt house in the morning after the fire, would amount to evidence of petrol being a possible source of the fire. But this, even when considered in the light of the dying declaration by Kyakwera, is not sufficient to establish that petrol was the cause of the fire, leave alone it’s pinning the accused

down as the person behind the fire. Many people converged at the scene of the inferno that night in response to the alarm sounded; and there is no knowing who might have come with such a basin.

The basin was handed over to the police officer PW2, but was not tendered in evidence. The proper thing the police ought to have done was to subject this basin to finger print examination so as to establish whether the prints of the accused were on the basin or not; and also determine whether the substance, whose smell the witnesses alleged was that of petrol, was indeed petrol; or not. This would have served either to strengthen the circumstantial evidence by ridding the case of the fear of possible fabrication which circumstantial evidence is capable of; or it would have narrowed down or cleared the suspicion that was labelled on the accused.

An attempt was made to infer guilt of the accused from his failure to respond to the alarm that night despite the fact that his home was within proximity of the tragic inferno. This, it was argued, was conduct pointing to his guilt. The accused testified on oath that in fact he responded to the alarm, and was amongst the people who helped put the victims on the motor car to be taken to hospital. I must accept the evidence of the prosecution witnesses and reject that of the accused with regard to his presence at the scene of the event.

Nonetheless, the failure by the accused to respond to the alarm can be explained in a number of ways. He might genuinely not have heard the alarm; depending on the state he was in that night. Even if it were established that he had heard the alarm, and yet had not responded, it would at most expose him to suspicion; but would not, without more, suffice to pin him down as the villain responsible for the culpable act complained of. PW1 who arrested the accused that night had, himself, to be woken up as he had not heard the night's alarm; and otherwise might have learnt of the incident the following morning.

The dying declaration here is not based on identification, but on suspicion arising from an earlier threat by the accused to harm the maker of the declaration with the very substance thought to have been used to cause the fatal injuries. On the authority of ***Tindigwihura Mbahe*** cited above, and unlike with a declaration based on identification, it does not suffice, without other supporting evidence, to establish the guilt of the accused.

This Court can never know what might have come out had the persons to whom the dying declaration was made pursued the matter further with the maker of the declaration and obtained better particulars; or what other information would have emerged, had the deceased survived and was subjected to cross examination. I did warn the assessors that for cases such as this, grounded exclusively on circumstantial evidence, before conviction can be justified, the Court must narrowly examine the evidence on record, and establish that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of guilt.

Further, the Court must also satisfy itself that there are no co-existing circumstances of the case that would weaken or altogether destroy the inference of guilt. All in all, I am unable to find that the prosecution has gotten rid of the possibility of the alternative theory regarding the source of the fire which wreaked havoc that fateful night, and took the lives of the three family members. There are thus co – existing circumstances alongside the one alleged in the indictment as the cause of the fire.

I can only, here, repeat the words of the Supreme Court of Uganda in the case of ***Kazibwe Kassim vs Uganda, S. C. Crim. Appeal No. 1 of 2003; [2005] 1 U.L.S.R. 1*** at 5; where the Court stated that:-

> *"In the instant case, like the case of **R. vs. Israeli – Epuku s/o Achietu (1934)1 E.A.C.A. 166,** we are of the opinion that the evidence did not reach the standard of proof requisite for cases based entirely on circumstantial evidence. We are unable to hold that the evidence contains any facts which, taken alone amounts to proof of guilt… Although there was suspicion, there was no prosecution evidence on record from which the Court could draw an inference that the accused caused the death of the deceased to justify the verdict of manslaughter."*

I have no doubt in my mind, and am in agreement with the lady and gentleman assessors, that the prosecution evidence falls short of meeting the standard and test set for proof of guilt in cases such as this. In the premises therefore, I do acquit the accused on each of the counts of the offence as charged. Hence, unless he is being held for any other lawful purpose, he must be released forthwith.

Chigamoy Owiny – Dollo

RESIDENT JUDGE, FORT PORTAL

03 – 10 – 2008

Ann Kabajungu for the State.

Cosma Kateeba holding brief for Mr. Rukanyangira for the accused.

Accused in Court for judgment.

Irumba Atwoki – Court Clerk

Judgment delivered in open Court.

Chigamoy Owiny – Dollo

Judge.

03/10/2008