THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0028 OF 2005; HELD AT KYENJOJO

UGANDA …….... PROSECUTOR

VERSUS

KATESIGWA PATRICK …….. ACCUSED

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

JUDGMENT

Katesigwa Patrick, herein referred to as the accused was indicted for the offence of murder in contravention of sections 188 and 189 of the Penal Code Act. The allegations set out in the particulars of the offence, were that on the 20th day of April 2004, at Rugando village, Kikoda Parish, Kihura Sub – County, in Kyenjojo District, the accused murdered Kagoro Francis. The accused's response to the indictment, when it was read out and explained to him was that he had understood; but he denied it. A plea of "Not Guilty" accordingly entered.

Four ingredients constitute the offence of murder. These are:-

(i) Death of a person.
(ii) That death unlawfully caused.
(iii) There was malice aforethought in causing the said death.
(iv) The participation of the accused in causing the said death.

The prosecution had the duty to strictly prove, beyond reasonable doubt, each of the ingredients listed above, before Court could find the accused guilty and convict him. This being a capital offence, the standard of proof demanded, as was stated in ***Andrea Obonyo & Others vs. R.***

[1962] E.A. 542; at p. 550, citing a passage from the judgment of DENNING, L.J. (as he then was), in ***Bater v. Bater [1950] 2 All E.R. 458***, and which was also followed in ***Hornal v. Neuberger Products Ltd. [1956] 3 All E.R. 970,*** and, by the Court of Appeal in ***Henry H. Ilanga v. M. Manyoka [1961] E.A. 705 (C.A.)*** – has to be high and with the type of clarity that meets the gravity of the offence charged.

A preliminary inquiry I conducted at the commencement of the trial, in accordance with the provisions of section 66 of the Trial on Indictments Act, resulted in the following agreed facts being admitted in evidence. These were that: Kagoro Francis died; and Dr. Waiswa Musa Kasadha carried out a post mortem examination on the body, on the 21st April 2004. His findings were that: the clothes on the deceased were bloodstained, and there were extensive cut wounds all over the neck and chest; and the cause of death was haemorrhagic shock from severe bleeding as a result of the cut wounds extending to the right carotid sheath in the neck; and the weapon used was likely to have been a panga. The post mortem report was exhibited as CE1.

The prosecution thereafter adduced evidence from seven witnesses in its bid to discharge the burden of proof that lay on it. The witnesses were:

(i) No. 23058 Bwambale Jasmine Jockonus – PW1; a police officer who investigated the crime, and arrested the accused.
(ii) No 32872 Bamwesigye Laban – PW2; a police officer who co-investigated the crime and, together with PW1, arrested the accused.
(iii) Dr. Waiswa Musa Kasadha – PW3; the medical doctor who carried out the post mortem whose report was admitted as part of the agreed facts.
(iv) Byaruhanga Peter – PW4; a trader and village mate of the accused.
Kaboha Wilson – PW5; neighbour to the deceased.
(v) Margaret Kabatalesa – PW6; daughter to the deceased and formerly wife to the accused.
(vi) Kabasinguzi Pellusi – PW7; former employer of the accused.

The death of Kagoro Francis was proved by the direct evidence from all the prosecution witnesses and the accused himself; who all saw the dead body. The post mortem report also established that death. Accordingly then, the requirements set in ***Kimweri vs. Republic [1968]***

E.A. 452; that proof of death may be established by the evidence of eye witnesses to the corpse is satisfied. The defence conceded that this ingredient was proved.

Whenever there is any incident of homicide, the presumption is that it was unlawful. This presumption is however open to rebuttal by the accused by adducing evidence showing that the homicide was committed under any excusable circumstances. These are: either that the death was accidentally caused, or that it took place in defence of person or property, or that there had been provocation, or that it was committed in the execution of a lawful order; (See ***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; Uganda vs. Francis Gayira & Anor. H.C. Crim. Sess. Case No. 470 of 1995, [1994 - 1995] H.C.B. 16).***

Unlike for proof of the murder charged, the standard of proof for a rebuttal as was laid down in ***Festo Shirabu s/o Musungu vs. R (22) E.A.C.A. 454,*** is only on a balance of probabilities. As was manifest from the post mortem report referred to above, the deceased had extensive cut wounds all over the neck and chest. The injuries inflicted on the deceased were certainly severe. The other prosecution witnesses who saw the body attested to the severity of the injuries. There was a trail of blood from his house leading to the place where his body was discovered.

The deceased then definitely died in the hands of some person; and the nature of the injuries found on him excludes any of the possible excusable circumstances listed above. The ingredient of unlawful causation was therefore successfully disposed of by the prosecution, beyond any reasonable doubt; and as conceded by the defence, to their satisfaction.

With regard to whether or not the unlawful causation of the death in issue was executed with malice aforethought, it is in the Penal Code Act that malice aforethought is clearly defined 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."

It is only in instances where an accused is proved to have expressly made known his or her intention to deliberately commit homicide or to do something which to his or her knowledge would result in death, that it can be said there is direct evidence of the existence of malice aforethought. Otherwise in many of the cases of homicide, malice aforethought has to be inferred from a number of factors and surrounding circumstance.

It is the duty of the trial Court to closely examine the circumstance under which the incident leading to the death took place; before drawing the inference that malice aforethought existed at the time of doing the harm to the deceased. This is necessary to help resolve whether or not any of the excusable factors named above are available to the accused; or whether to the contrary, the perpetrator was conscious or had the knowledge that his or her action could probably result in death.

That knowledge which would prove the existence of malice aforethought, as was pointed out in the combined appeal in ***R. v. Sharmal Singh s/o Pritam Singh; & Sharmal Singh s/o Pritam Singh v. R. [1962] E.A. 13,*** the Privy Council, applying the principle laid down in ***D.P.P. v. Smith [1961] A.C. 290,*** is what a reasonable man would have, of the possible consequences of his or her acts or omissions.

The Privy Council's holding at p. 16 – which has been imported in the definition of malice aforethought in our Penal Code Act – is that the existence of malice aforethought is to be considered as proved when there is:

'knowledge that the act or omission causing the death will probably cause the death of or grievous harm to another person."

In ***R. vs. Tubere s/o Ochen (1945) 12 E.A.C.A. 63***, the Court conceded the impossibility of laying down a hard and fast rule for determining that in a case malice aforethought exists; but nevertheless it pointed out that a number of factors which can help Court to make the necessary inference; and that these factors include: the weapon used to inflict injury, the manner or force with which the weapon was used, and the part of the body targeted in inflicting injury. The Court remarked that:

"it will be obvious that ordinarily an inference of malice will flow more readily from the use of say, a spear or knife than from the use of a stick; that is not to say that the Court take a lenient view where a stick is used. Every case has of course to be judged on its own facts."

Subsequent cases such as ***Uganda vs. Fabian Senzah [1975] H.C.B. 136; Lutwama & Others vs. Uganda, S.C. Crim. Appeal No. 38 of 1989; Uganda vs. John Ochieng [1992 – 1993] H.C.B. 80, Uganda vs Turwomwe [1978] H.C.B.16,*** followed the principle laid down above, and further enhanced the application of the factors as follows: whether the weapon used is ordinarily deadly or lethal, or vulnerable parts of the victim were targeted, and whether injuries were intended to cause grave damage; and equally whether the conduct of the accused before, during, and after the attack points to guilt or not.

In ***Siduwa Were v. Uganda [1964] E.A. 596,*** where the medical evidence had opened up the possibility of an equally persuasive co-existing circumstance that could explain the death; and that alternative circumstance was as consistent with either accident or manslaughter, as it was with murder; the Court, following the decision in ***Sharmpal Singh*** *(supra)* stressed that the onus of proof of malice aforethought was high. Therefore in the circumstance of rival possible explanation for the cause of death, it would be wrong to hold that malice aforethought had been established.

In the case before me now, the injuries were believed to have been occasioned by a panga. The neck region which the assailant targeted and subjected to numerous strikes is, by any account, an extremely vulnerable part of the body. The viciousness of the assault as manifested by the deep cuts discernible on the corpse was further manifestation of the intention of the assailant to achieve death; or was done with the awareness that it would most probably cause death. There could be no reasonable doubt in my mind, on the strength of the authorities cited above, to dissuade me from reaching the conclusion that malice aforethought was a strong component of the considerations that gave rise to the deed that resulted in the death of Kagoro Francis.

Regarding the participation of the accused in causing the death for which he has stood trial, the evidence seeking to link him with the offence is exclusively circumstantial. It is now trite law; and there is a huge corpus of authorities that have laid down the principle, and reiterated how Courts confronted with evidence which is wholly circumstantial must approach it.

The Supreme Court of Uganda spelt out in ***Byaruhanga Fodori vs Uganda, S. C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12*** at p. 14 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****)."*

It was further stated in the case of ***Tindigwihura Mbahe vs Uganda S.C. Crim Appeal No. 9 of 1987***, that circumstantial evidence has to be treated with caution, and narrowly examined, owing to the fact that such evidence is fraught with the danger of being fabricated. There is therefore need, before drawing an inference of the accused's guilt from circumstantial evidence, to ensure that there are no other co-existing circumstances which would weaken or altogether destroy that inference**.** There is therefore, in the light of the authorities above, compelling need to critically examine this circumstance before reaching a conclusion.

Apart from one prosecution witness who heard the deceased cry, and rushed there with others only to find the deceased already dead, there is no direct evidence from any source as to the identity of the person who perpetrated this vile deed. PW1 testified that the wife of the accused, who was a daughter of the deceased, told him from the scene of the crime that she suspected the accused to have caused the death; and because of this, he arrested the accused. This woman – PW7 –reiterated in her testimony in Court her suspicion of the accused. However, she stated that she arrived at the scene five days after her father's burial; and when the accused had already been arrested.

This witness gave evidence of the bad blood that existed between her father and the accused; with the latter threatening violence against her father, including the threat to kill him. She testified that a couple of days before the incident, the accused had threatened her with dire consequences if she did not deliver his child back to him. This time he did not make any reference to her father, with whom he always quarrelled whenever he beat her and her father admonished him for doing so. These quarrels and the alleged threats uttered by the accused do not by themselves alone, amount to much, in the absence of some evidence linking the accused to the assault on the deceased.

It is in the alleged borrowing of a panga by the accused from PW6 – his neighbour and former employer – which the prosecution sought to link the accused with the murder. The reason given to her by the accused for taking the panga was to cut firewood. The following day, she found the panga abandoned at her compound; and because of the death of the deceased, the police came and took the panga away. I believe this witness that indeed the accused borrowed the panga in issue from her that evening of the murder. However, given that the panga was not recovered from the scene of the crime, and in the absence of any direct linkage with the assault on the deceased, it is possible that the accused could very well have used the panga strictly for the purpose he had borrowed it.

The act of returning the panga, and leaving it in the compound of PW7 in her absence, could be the basis of holding the accused with suspicion; but could equally be explained away as an innocent act of a neighbour and employee who saw no harm in doing so. Therefore, the rule regarding evidence which is exclusively circumstantial; namely that the inculpatory facts therein must not be open to any other reasonable hypothesis save that of guilt of the accused; and that

there must be no co–existing circumstance that would negate the inference of guilt, is not satisfied. It would not be safe to infer that the accused was responsible for the inflicting of the injuries that resulted in the death of his father in law. There is simply no nexus between his activities and the death in issue.

Since the relationship between the deceased and his sister in law and neighbour over land dispute was bad – and this sister in law had in fact refused to respond to the alarm and summons made to her by one of the witnesses to rush to the home of the deceased – it is not unreasonable to infer that she was also capable of causing harm to him. Three witnesses, contrary to the allegation by the police witness attested to the presence of the accused at the home of the deceased where many mourners had gathered. In fact the accused is reported by one of the witnesses to have expressed concern as to how the witness could have allowed such a thing to happen to the deceased.

The indiscriminate denial by the accused of all the witnesses was a stupid lie; but an accused is not to be convicted on account of his lies however outrageous; unless such lies or false alibi strengthen a strong prosecution case. This, unfortunately, as seen above is not the case here. The prosecution has not presented any cogent evidence which the conduct, or flimsy defence, of the accused could give weight to. In the result therefore, I am unable to agree with the opinion expressed by the lady and gentleman assessors; and instead find that the prosecution has failed to prove beyond reasonable doubt, that the accused murdered Kagoro Francis as alleged in the indictment. I therefore acquit him of the charge of murder for which he has been indicted.

Chigamoy Owiny – Dollo
JUDGE
05 – 06 – 2009