

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT IGANGA

HIGH COURT CRIMINAL SESSION CASE NO 0439 OF 2010

UGANDA.....PROSECUTOR

VERSUS

LUWANO HAMZA & ANOTHER.....ACCUSED

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The accused persons, Luwano Hamza, Mukose Ibrahim and others still at large were indicted for murder c/s 188 & 189 of the Penal Code Act. It is alleged that the accused persons, in the night of 17th November 2009 at Kalyowa “A” village in Iganga District, murdered Muyomba Igodi Moses.

The brief facts of the case as presented by the prosecution are that A1 Luwano Hamza was last seen with Muyomba Igodi Moses, the deceased, on 17th November 2009 at about 7.30 pm leaving Nsiima Trading centre. One hour later, the deceased was found dead beside his bicycle in Kalyowa village. The following day on 18th November 2009, police visited the scene of crime. With the help of a police dog A2 Mukose Ibrahim was tracked down by the dog from where the body was lying up to his home where he was arrested. A1 Luwano Hamza was also eventually arrested and detained at Nakabugu police post. The two were then indicted for the murder of Muyomba Igodi Moses.

Upon arraignment, each of the accused persons pleaded not guilty to the charge. Thus, all the ingredients of the offence of murder are in issue.

The burden of proof of a criminal offence rests on the prosecution and remains so throughout the trial. An accused person does not bear the burden to prove his innocence. The Constitution

provides that an accused person is presumed innocent until proved guilty. Therefore an accused should only be convicted on the strength of the prosecution evidence and not on the weakness of his defence even when he appears to be telling lies. See **Kooky Sharma & Anor V Uganda SCCA No. 44 of 2000**, unreported. Hence the duty is on the prosecution to discharge the burden of proof, beyond reasonable doubt.

This standard of proof required is that the prosecution must prove the guilt of the accused persons beyond reasonable doubt and that at the conclusion of the trial of the accused persons, any doubt that remains is resolved in their favour.

The ingredients of the offence of murder are:-

- a) The fact of death, in this case, that Muyomba Igodi Moses is dead.
- b) The death was unlawful, in this case, that the death of the said Muyomba Igodi Moses was unlawfully caused.
- c) That the death of the deceased person was caused by malice aforethought, in this case, that it was intended that Muyomba Igodi Moses should die.
- d) That it was the accused persons who were responsible for the death of the deceased, in this case, that the accused persons were responsible for the death of Muyomba Igodi Moses.

To prove the above ingredients of the offence, the prosecution called five witnesses, namely Mahejo Rajab (PW1); Waisswa Hassan the area Local Council Chairman (PW2); Bumane Allen the deceased's wife (PW3); Detective Sergeant Okia Sam (PW4); and Police Constable Musisi Mutibwa (PW5).

On their part, each of the accused made sworn testimonies before court. Each denied the offence and raised the defence of alibi and total denial. They called no witnesses.

Whether the deceased is dead:

According to the post mortem report, exhibit **P1**, which was admitted in evidence as agreed evidence under section 66 of the Trial on Indictments Act, the body of Muyomba Igodi Moses, an adult male of the apparent age of 34 years, was examined on 18th November 2009. The body of the deceased was identified to Dr. Bamudaziza of Iganga hospital identified to him by one

Katono Eva, as that of Muyomba Igodi Moses. Externally, the body had bruises in the right arm, right wrist, right orbital region, right lower limb, and a dent on the left foot. The cause of death and reason for the same was recorded as severe trauma from the multiple bruises and suffocation by strangling.

It is the evidence of PW1 Mahejo Rajab, PW2 Waisswa Hassan, PW3 Bumane Allen, PW4 Detective Seargent Okia Sam, and PW5 Police Constable Musisi Mutibwa that the deceased, Muyomba Igodi Moses is dead.

The defence did not contest the fact of death of the deceased.

In the circumstances, in agreement with the Assessors, I am satisfied that the fact of death of the deceased, Muyomba Igodi Moses, has been proved by the prosecution beyond reasonable doubt.

Whether the death of the deceased was unlawfully caused:

The law is that all homicide is always presumed to be unlawful unless caused by accident, or in defense of property or person or unless it is authorized by law. See **Gusambizi s/o Wesonga [1948] 12 EACA 65**. The said presumption is rebuttable. The burden is on the accused person to prove that the killing was either accidental or excusable in law. The standard of proof required of the accused is low. It is on the balance of probabilities. See **Festo Shirabu s/o Musungu V R [1955] 22 EACA 454**.

In this case, it is the evidence of PW4, Detective Seargent Okia Sam that point to the circumstances of the violent death of the deceased. According to PW4, the deceased, was found lying dead and the body had external injuries in form of bruises on the wrists and the back, and one of the feet had a dent.

According to PW2 Waisswa Hassan, and PW5 Police Constable Musisi Mutibwa, the deceased was found lying on the back facing up. He was on the side of the road in Kalyowa village. Exhibit **P1** corroborates this evidence as it indicates that the body had bruises in the right arm, right wrist, right orbital region, right lower limb, and a dent on the left foot. The cause of death was stated to be severe trauma from the multiple bruises and suffocation by strangling. The bruises are suggestive that the deceased was strangled to death under violent circumstances which caused bruises and a dent on the left foot.

The defense did not contest the fact that the deceased's death was unlawfully caused.

Clearly, from the nature of the injuries, the deceased was assaulted in a violent manner which could not have been lawful, or accidental or justifiable.

In the circumstances, I am in agreement with the Assessors. I find that the prosecution has proved beyond reasonable doubt that the death of the deceased was unlawfully caused.

Whether the death of the deceased was caused with malice afore thought:

Section 191 of the Penal Code Act defines malice aforethought as an intention to cause the death of any person, whether such person is the person actually killed or not, or knowledge that the act or omission causing death will probably cause death, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it might not be caused. In **R V Tubere s/o Ochen [1945] 12 EACA 63**, it was held that malice aforethought, being a state of mind, is difficult to prove by direct evidence. However, malice afore thought can be inferred from the surrounding circumstances like:-

- 1) The nature of the weapon used;
- 2) The manner of use of the said weapon;
- 3) The part of the body affected;
- 4) The nature and extent of the injuries suffered;
- 5) The conduct of the assailants before, during and after the killing of the deceased.

It was the evidence of PW4 that the deceased had external injuries in form of bruises on the wrists and the back, and one of the feet had a dent. This is corroborated by exhibit **P1** that externally, the body had bruises in the right arm, right wrist, right orbital region, right lower limb, and a dent on the left foot.

The defense did not contest the fact that there was malice afore thought in the killing of the deceased.

The assault on the deceased must have been with purpose and venom. He was strangled to death and his body had multiple bruises. The cause of death was severe trauma from the multiple bruises and suffocation by strangling. Strangling implies that the neck, which is a very delicate

and vulnerable part of the body was attacked. There can be no doubt that whoever inflicted these injuries intended that the deceased should die or knew or ought to have known that death was an inevitable consequence in the circumstances.

For the above reasons, I agree with the Assessors. I find that the prosecution has proved beyond reasonable doubt that the death of the deceased was with malice afore thought.

Whether the accused participated in the killing of the deceased:

It is prosecution evidence that A1 Luwano Hamza was with the deceased at 7.30 pm, and that A2 Mukose met the deceased over a cow transaction at around the same time on the day the deceased was killed.

PW1 Mahejo Rajab testified that he saw A1 Luwano Hamza leaving with the deceased. The deceased was found dead shortly after he left with Luwano Hamza, at around 9 pm. PW3 Bumane Allen, the deceased's wife testified that the deceased informed her that he was going to meet A2 Mukose Ibrahim to see a cow. He went to see Mukose and that was the last time she saw her husband alive. The murder was reported to the police, who visited the scene of crime.

According to PW4, Detective Seargent Okia Sam, upon hearing that Mukose was one of the last persons last seen with the deceased, he went to his home which he searched and recovered torn clothes which looked new and were stained with grease. He also recovered a panga which had soil on its tips from under Mukose's bed, and a jacket with U. Shs. 268,000/=. These items were not exhibited but the exhibit list mentioning them was admitted in evidence as exhibits **P4** and **P7** after being identified by PW4 who prepared and signed them. PW4 testified that at the scene, he saw footmarks and tyre marks of a bicycle. He followed the marks with a few people which led him to a bush where it looked like something had been on the grass because it was flat. There was also some soil scooped off with a sharp object. The tyre marks led them back to the path which led them to the point where the body lay and where the tyre marks stopped. When he compared the soil found on the tip of the panga to that of the place where soil had been scooped from, the place where the murder was suspected to have taken place, they looked similar.

PW5 Mutibwa testified that the Police dog he brought, upon picking the suspect's scent, led police to A2 Ibrahim Mukose's home and remained there after bypassing so many other homes.

PW5 Mutibwa testified that the bush where the footmarks and tyre marks led had footmarks of three people. A1 was then arrested on suspicion of involvement in the murder of the deceased.

Both A1 and A2 raised the defence of alibi. Each of the two accused do not deny that they were in the company of the deceased a few hours before his death. The essence of their defence is that they met the deceased when he was alive and left him when he was alive. A1 Luwano Hamza testified that he was approached by the deceased to assist him call Nuru with whom they had a love relationship. A1 called Nuru and they met with the deceased. He left them at around 7.20 pm and went to his home. While at his home he heard a drum of danger and responded to it by going to the scene of crime where he found the deceased dead. He stayed with the sympathizers until the following day. A1 also testified that in October 2009 the deceased had told him that they were not relating well with PW1 Mahejo Rajab and he, A1, suspects that it is PW1 who killed the deceased.

A2 Mukose Ibrahim testified that he met the deceased between 5 pm and 6 pm. He parted with the deceased and went back to his home, prepared supper for his children since his wife was away, and went to bed until 7 am the following day. He got the news about the deceased's death from his sister in law who had spent a night in Kalyowa hospital nursing a sick child. He picked a boda boda and went to the scene of crime where he was arrested.

It is clear from the above evidence that the Prosecution case is mainly based on circumstantial evidence. It was held in **Kooky Sharma & Kumar V Uganda SCCA No. 44 of 2000** that in a case based exclusively on circumstantial evidence a 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 other than that of guilt. It is also necessary, before drawing the inference of the accused person's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. For circumstantial evidence to form the basis for a conviction, the circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It was held in **Janet Mureeba & 2 Others V Uganda COA Criminal Appeal No. 56 of 2000** that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics.

In this case, PW1 saw Hamza Luwano leaving with the deceased at 7.30 pm on the fateful day of 17th November 2009. Luwano did not contest this fact. The deceased was found dead at around 9 pm shortly after he left with Luwano Hamza. In defence A1 said that the deceased sent him to call Nuru which he did, and that he left the deceased with Nuru.

The circumstantial evidence adduced by the prosecution in this case includes the evidence that the two accused were the last people to be with the deceased, which is corroborated by the evidence of both A1 and A2 that they were with the deceased between 6 pm and 7.30 pm. The evidence of PW1 is that he saw A1 leaving with the deceased at 7.30 pm, which was shortly before the deceased was seen dead at 9 pm. The time in between when A1 was seen with the deceased and when the deceased was found dead is too short for it to be possible as A1 testified that he called Nuru and then was able to go back and sleep before he heard the alarm. A1 in his defence implicated PW1 as having a motive to murder the deceased. He testified that the deceased had told him that they don't relate well with PW1 because of a girl. The defence Counsel stretched it further by submitting that the fact that PW1 was not tortured at police, which is uncharacteristic of police, was further motivation for him to lie to court.

The motive alleged by A1 against PW1 was not substantiated or corroborated by any other independent evidence. A1 testified that he called Nuru and left him with the deceased. Nuru was not called as a witness but she recorded a statement with the police which was admitted in evidence as exhibit **P8**. In that statement she denied that she met the accused or that the deceased sent anybody to collect her. The submissions of defence Counsel on why PW1 was not tortured were attempts to give evidence from the bar, and I did not take them seriously. The question is why would A1 go to the extent of raising the Nuru story and implicating a motive on the part of PW1 to murder the deceased if it were not to divert attention from his participation in the crime?

The law is that in a case where an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove his guilt. However, if, upon proved facts, two inferences may be drawn about the accused person's conduct or state of mind, his untruthfulness is a factor which court can properly take into account as strengthening the inference of guilt. The strength it adds depends on all the circumstances and especially on whether there are reasons other than guilt that might account for the untruthfulness. In my opinion A1's untruthfulness points to his state of mind of attempting to

claim he was not involved in the murder of the deceased. This strengthens the inference of guilt on his part which avails further corroborative evidence on the circumstantial evidence adduced.

In that regard I will not agree with the Assessors that his act of staying with others throughout the night at the scene of crime renders him innocent. I looked at all circumstances and especially on the untruthfulness of his testimony and why he would lie about his whereabouts at the time the murder was committed. This coupled with the evidence that he was the last person to be seen with the deceased, and the other circumstantial evidence pointing out that two people were involved in the murder of the deceased incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than that of guilt. I find that there are no other co-existing circumstances which would weaken or destroy that inference.

As for A2 Mukose Ibrahim, PW3, the deceased's wife, testified that the deceased informed her that he was going to meet A2 to see a cow. Mukose did not deny that he met the deceased over a transaction concerning a cow. The evidence which implicates A2 Mukose is that of PW4 that he recovered torn clothes which looked new and stained with grease and the panga with soil at the tip plus a jacket and U.Shs 268,000/= from Mukose's home. Exhibits **P4** and **P7** lists the said items to be the items that were recovered from Mukose's home. The items were themselves not exhibited in court but PW4 was able to give direct evidence of his having recovered the items and listed them as evidenced by exhibits **P4** and **P7**. When PW4 followed the bicycle tyre marks with a few people they led him to a bush where it looked like something had been on the grass because it was flat. There was also some soil scooped off with a sharp object. When he compared the soil to that found on the tip of the panga recovered from Mukose's home, they looked similar. The evidence of PW5 that the Police dog he brought, upon picking the suspect's scent, led police to A2 Ibrahim Mukose's home and remained there after bypassing so many other homes avails corroborative evidence that incriminates A2. The dog did not only stop at Mukose's home, it finally sat at the doorway of Mukose's home. When PW5 gave it more words of command to track the scent further, it refused and instead went to a down position. He explained in cross examination that the dog picked the scent of A2 from near the dead body up to the home of A2. This piece of evidence strongly corroborates the evidence of all the other prosecution witnesses implicating A2 as having participated in the killing of the deceased.

The other circumstantial evidence which implicates the two accused is found in the testimony of PW5 that the bush where the footmarks and tyre marks led had footmarks of three people. This means there were two people who participated in the murder with the footmarks of the deceased being the third person.

Having narrowly examined the above circumstantial evidence with great caution, I find that there is overwhelming incriminating evidence pointing to the two accused persons as the last people to be seen with the deceased, to have participated in the murder of the deceased. When all the bits of circumstantial evidence are put together it all leads to the conclusion that Luwano Hamza who was with the deceased at 7.30 pm, and Mukose Ibrahim who met the deceased over a cow transaction, participated in the murder of the deceased from one place and dumped his body in another place by the roadside in Kalyowa village.

This overwhelming circumstantial evidence implicating the two accused has the effect of placing the two accused at the scene of crime circumstantially on the night of 17th November 2009 when the deceased was killed. This of necessity destroys the respective alibis they raised in their defence. The general principle of law to a defense of an alibi is that an accused who puts forward an alibi as an answer to a criminal charge, does not thereby assume the burden of proving the defence. The burden of proving his guilt by disproving or destroying the alibi remains on the prosecution throughout. The general rule is that the prosecution must stand or fail by the evidence they have given. Where the prosecution adduces evidence showing that an accused person was at the scene of crime and an accused person denies it but also adduces evidence showing that he was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted.

The defence alluded to a number of inconsistencies in the prosecution evidence and insists they are so grave as to discredit the prosecution evidence. These include the evidence of PW2 that they recovered slippers at the second scene of crime but all the other prosecution witnesses did not talk about slippers. I have given due consideration to this contention. In my opinion this contradiction is minor and has nothing to do with the substance or main root of the case, nor is it a deliberate falsehood. The atmosphere at a scene of crime is that not every person who is there will notice each and every detail. Memories even lapse with time. In this case the offence was committed in 2009 and witnesses are giving evidence in 2012. The defence also contended the

exhibiting of a search certificate and exhibit list as exhibits **P4** and **P7** are of no evidential value unless accompanied by the items themselves as exhibits. I have carefully addressed this matter. It was PW4 who searched the house of A2 and who prepared a search certificate in respect of the recovered items. He himself identified the search certificate and the exhibits list as a result of which they were admitted in evidence exhibits **P4** and **P7** after he identified them in court under oath as the documents he had prepared. He however told court that he handed over the items to Corporal Hamega. As to why the exhibits were not produced in court is another issue which should not be exploited to discredit the evidence of PW4. PW4 directly testified to court having recovered the items and preparing the exhibit list exhibits **P4** and **P7** tendered in court. Their being not traced does not mean that the witness lied about the recovery of the exhibits. I find that this omission is not fatal to the prosecution evidence as there is available other independent evidence that has been adduced pointing to the accused persons' participation in the killing of the deceased.

In that regard I do not agree with the Defence Counsel and the Assessor's that the evidence of PW4 should be dishonoured on that account. The defence also discredited the evidence of PW3 that the deceased had a telephone conversation with A2 Mukose about the cow deal, contending that she could not have heard the conversation since she was in the kitchen and the deceased was in the main house, and that, moreover, no printouts regarding the same were exhibited in court. It is my opinion however that this contention is baseless since A2 himself corroborated the evidence of PW3 that on that day he met the deceased over a cow deal. The Assessors also based their joint opinion on exhibits **P1** and **P2** which indicate that the accused were normal to exonerate them reasoning that it means they did not struggle. With respect, the word "normal" in the said exhibits referred to their mental state, not on whether they struggled or not. I therefore, on that point, disagree with the Assessors and Defence Counsel for I find no reason to disbelieve PW3.

On the whole, I find that the prosecution evidence has been truthful and reliable and amply corroborated. I find the respective defences of alibi raised by the two accused as deliberate untruthfulness to confuse court.

I have no doubt that the prosecution has proved the ingredients of the offence of murder against the two accused beyond reasonable doubt. I differ from the joint opinion of the Assessors for reasons given above.

I accordingly convict each of them of the offence of murder as indicted.

PERCY NIGHT TUHAISE

JUDGE.

05/07/2012