

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT IGANGA

HIGH COURT CRIMINAL SESSION CASE NO 0447 OF 2010

UGANDA.....PROSECUTOR

VERSUS

TWALI YAKUBU.....ACCUSED

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The accused person, Twali Yakubu, is indicted for murder c/s 188 & 189 of the Penal Code Act. It is alleged that the accused, on the 1st day of January 2010 at Bunama village in Iganga District, murdered Muteguya Budala.

The brief facts of the case as presented by the prosecution are that on 31st December 2009, the accused approached the deceased, Muteguya Abdalla, and a one Makubo Eriya to help him harvest his maize. On 1st January 2010 at around 6 am, the deceased, the accused and Makubo Eriya went to the garden to harvest the said maize. In the evening they heaped the maize in one place. It started raining before it could be carried away. The accused later asked the deceased to join him in guarding the maize in the garden at night. After supper the deceased told his family that he was going to guard the said maize. In the morning at around 10 am Makubo Eriya went to the accused person's garden to proceed with harvesting. He found the accused resting on a heap of maize. When he proceeded to the place where they had stopped harvesting, Makubo Eriya found the deceased lying with several deep cut wounds on his head, chest and neck. When he inquired, the deceased revealed that they had a fight and the accused cut him. The deceased died as they were taking him home. The matter was reported to the LC 1 officials who went to the accused person's maize garden where they found him busy harvesting his maize. When asked

about the incident he confessed having assaulted the deceased. The matter was then reported to police who arrested the accused after which he was indicted for the murder of the deceased.

Upon arraignment, the accused 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. The duty is therefore on the prosecution to discharge the burden of proof. The standard of proof required in criminal proceedings is that the prosecution must prove the guilt of the accused beyond reasonable doubt. At the conclusion of the trial, any doubt that remains is resolved in the accused person's favour. An accused does not bear the burden of proving his innocence. Under Article 28 of the Constitution, an accused is presumed innocent until proved guilty. It is also trite law that the accused should only be convicted on the strength of the prosecution case and not on the weakness of his defence. See **Woolmington V DPP [1935] AC 462; Sekitoleko V Uganda [1967] EA 531**. It was however stated in **Miller V Minister of Pensions [1947] 2 ALL E R 372 - 373** that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt or absolute certainty. If the evidence against a person is so strong as to leave only a remote possibility in his favour then the case is proved beyond reasonable doubt.

Section 188 of the Penal Code Act sets out the essential ingredients to be proved in the offence of murder to be the following:-

- a) The fact of death, in this case, that Muteguya Budala is dead.
- b) The death was unlawful, in this case, that the death of the said Muteguya Budala, was unlawfully caused.
- c) That the death of the deceased was caused by malice aforethought, in this case, that it was intended that Muteguya Budala should die.
- d) That it was the accused who was responsible for the death of the deceased, in this case, that the accused, Twali Yakubu, was, responsible for the death of Muteguya Budala.

The prosecution called the evidence of three witnesses, namely Kasadha Sula (PW1); Wamubu Ayubu (PW2); and Mukobe Swali (PW3).

The accused on his part made a sworn testimony and raised the defence of total denial and alibi.

Whether the deceased is dead:

The prosecution evidence on this issue largely rests on the post mortem report, exhibit **P1**, which was admitted as agreed evidence. According to exhibit **P1**, Dr. Bamudaziza of Iganga Hospital examined the body of Muteguya Budala a male of the apparent age of 40 years on 2nd January 2010. The body of the deceased was identified to him by Kasadha Juma of Bunyama Nawusisi as that of Muteguya Budala. The body was found with multiple cuts of varying sizes on the head and face, and with deep multiple bruises. The doctor recorded the cause of death and reason for the same as trauma and haemorrhage from the cuts and bruises.

It was the evidence of PW1 and PW3 that they saw Muteguya Budala dead on 2nd January 2010.

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

I am therefore satisfied that the fact of death of the deceased, Muteguya Budala, has been proved by the prosecution beyond reasonable doubt.

Whether the death of the deceased was unlawfully caused:

The law as established in **R V Gusambizi [1948] 15 EACA 65** is that every homicides is presumed to be unlawful unless caused by accident, or in defense of property or person or is excusable, justified or authorized by law.

In this case the post mortem report exhibit **P1** indicates that the deceased had multiple cuts of varying sizes on the head and face, with deep multiple bruises on the body. The doctor recorded the cause of death and reason for the same as trauma and haemorrhage from the cuts and bruises. PW1 testified that when they saw the deceased he was in bad shape. He had a big wound on the forehead which was bleeding profusely. He was bleeding on the right hand which also had a wound. The third wound was on the right ribs which were also bleeding. The other side of the ribs had a swelling but was not bleeding. The deceased died as they were taking him to his home. PW3 also testified that he saw the swollen part on the shoulder and in the face of the deceased.

The defense contested the fact that the deceased's death was unlawfully caused.

It is very clear from the above pieces of evidence that the death of the deceased was neither natural nor excusable. The deceased died after being assaulted. The nature of the injuries he sustained could not draw any other inference than that the deceased died a violent death. This was certainly not accidental, excusable or authorized by law. It was an unlawful death.

Thus it my finding that the deceased's death was unlawfully caused.

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

Malice aforethought is defined under section 191 of the Penal Code Act as an intention to cause the death of any person, whether such person is the person actually killed, or knowledge that the act or omission causing death will probably cause the death of some person, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused. Generally, malice afore thought can be inferred from any of the following:-

- 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. See **R V Tubere s/o Ochen [1945] 12 EACA 63.**

According to exhibit **P1**, the body was found with multiple cuts of varying sizes on the head and face, and deep multiple bruises. The doctor recorded the cause of death and reason for the same as trauma and haemorrhage from the cuts and bruises. PW1 also testified that he saw the injuries.

The defense contested the fact that malice afore thought could be inferred from the circumstances of this case.

It is evident that the deceased had been severely assaulted. The force of the assault caused trauma and haemorrhage which led to his death. It is evident that the part of the body attacked, especially the head and face are very delicate and vulnerable parts of a human body. The weapon used must have been very sharp and therefore lethal, considering the nature of the cuts which caused trauma and haemorrhage. The weapon must have been used consistently since there were multiple cuts which caused severe injuries. The assailant must have in the circumstances

intended to cause death or must have had knowledge that death was a probable consequence of his or her acts.

It is therefore my finding that the death of the deceased was caused with malice aforethought. The prosecution has proved this ingredient beyond reasonable doubt.

Whether the accused participated in the killing of the deceased:

The Prosecution case is based on the evidence of PW1 who testified that the deceased told him and a one Faisal plus others that on the night of 1st January 2010 he was going to guard the accused person's maize with the accused. PW1 went to the accused person's maize garden early morning on 2nd January 2010 where he found the deceased with injuries. The accused was seated near him. He had a stick and a panga beside him. The accused told PW1 that the deceased was a thief and he assaulted him because he was stealing his maize. As PW1 and Faisal were taking the deceased he told them he was dying but it was Twali Yakubu the accused who assaulted him. PW3 testified that when he found the accused in his garden the accused told him that he assaulted the deceased who was stealing his maize. PW2 testified that the accused told him when he found him in his garden that he assaulted a person who was stealing his maize. It is the prosecution evidence that the accused remained in his garden harvesting maize despite knowing that the deceased had died. It is the contention of the prosecution that there is circumstantial evidence which when put together points and leads one to conclude that it is the accused who assaulted the deceased leading to his death.

On his part, the accused testified that on 1st January 2010 he was in his garden harvesting maize with eight other people who included the deceased. However work could not be completed because of rain and all of them sheltered from the rain in the house of Mugwere. When the rain subsided they went back to the garden but harvesting could not go on as the garden was flooded. So they dispersed. The following day at around 8 am, at Bunama trading centre, while on his way to his garden, he got information that one of his workers Budala Muteguya failed to reach home and was at Nawansisi. He asked where he was and was told that his children had carried him home. He rode his bicycle to his home and found him lying down covered half way with a jacket. He talked to the sisters of the deceased but he did not talk to the deceased or touch him. He then rode his bicycle to his garden because he had other workers who were working. After

some time Iduma Kasadha came to his garden and they talked about taking the patient to the Doctor. While still in the garden he heard an alarm and as he prepared to go and respond relatives of the deceased passed by saying, ***“our brother got stuck here, maybe it is the rich man who assaulted him”***. The accused testified that that is the reason he did not go to the deceased’s place. He was arrested by the Police on the same day at 5 pm.

It is clear from the adduced evidence that the prosecution case is based exclusively on circumstantial evidence. In **Janet Mureeba & 2 Others V Uganda Court of Appeal Criminal Appeal No. 56 of 2000**, it was held that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensive examination is capable of proving a proposition with the accuracy of mathematics.

This type of evidence must be narrowly examined, because evidence of this type may be fabricated to cast suspicion on an accused person. It is necessary before drawing an inference of guilt from this type of evidence to be sure that there are no other co existing circumstances which could weaken or destroy the inference. Once that has been done, circumstantial evidence is very often the best evidence. Witnesses can tell lies. Circumstances cannot. The burden remains on the prosecution throughout and never shifts to the accused.

I must therefore narrowly examine the circumstantial evidence on record before I make any inference of guilt on the part of the accused. I also did caution the Assessors to do likewise before they returned their opinion to court.

The witnesses in this case do not provide direct evidence as to seeing the accused assault the deceased. Court therefore has to go by the evidence of PW1 regarding what the deceased told him as they were taking him home from the accused person’s maize garden shortly before he died; the evidence of PW1, PW2 and PW3 regarding what the accused told them when they approached him in his maize garden; and the conduct of the accused.

PW1 testified that as they were taking the deceased from the accused person’s garden, he uttered the following words:-

“My friend Yakubu Twali is the one who assaulted me.”

This is evidence of an oral dying declaration. A dying declaration is admissible as evidence. Section 30 of the evidence Act provides as follows:-

“Statements written or verbal, of relevant facts made by a person who is dead...are themselves relevant facts in the following cases-

- a) When the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person’s death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question.*
- b)*”

In **Uganda V Tomasi Omukono & Others [1977] HCB 61** Court pointed out that a dying declaration is evidence of the weakest kind since it cannot be subjected to cross examination. In **Tindigwihura Mbahe V Uganda SCCA 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 concerning which he may have omitted important particulars, for not having his attention called to them...

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.”

Since it is very unsafe to base a conviction solely on the dying declaration of a deceased person, this court treats with caution, and indeed warned the Assessors of the same, the dying

declaration in the instant case. In that regard, though it is not a rule of law that this type of evidence be corroborated, it is only prudent for this court, in the circumstances of this case where there is no direct evidence, to look for other corroborative evidence to ascertain the truth.

The dying declaration in this case is based on evidence of identification by the victim who is now the deceased. It is important therefore, even before addressing the issue of whether there is corroborative evidence, to ascertain whether the identification evidence of the dying declaration is such as would not leave a possibility of mistaken identity. It is the evidence of PW1 that the deceased had left their home the night before to guard the accused person's maize with the accused. The following morning PW1 found the accused seated next to the deceased who had the injuries indicated in exhibit **P1**. If the deceased's dying declaration is addressed within the context of PW1's evidence, it implies that the deceased knew the accused. This factor is not disputed by the accused who testified on oath that the deceased was among the eight workers who had helped him harvest maize on 1st January 2010. The accused also testified that the deceased had been a good friend. It is apparent from the evidence on record that the two were from the same village under one Local Council Chairman. That would therefore mean that the deceased knew the accused very well. The question of mistaken identity would therefore not arise considering the prosecution evidence that even after the assault, the two were still found together by PW1. This would imply that the deceased, in addition to knowing the accused very well, had opportunity to observe him for long even after the assault.

PW1, PW2 and PW3 all told court that the accused intimated to them that he had assaulted the deceased because he was stealing his maize. PW1 told court that when he went to the garden with his brother Kasadha Faisal after their uncle Eriasa Makubo had told them about their uncle's (the deceased) bad condition, they found the deceased lying down, and the accused was also there. When PW1 asked the accused what had happened to his friend, the accused told him that the deceased is a thief who was stealing his maize. He also told them he assaulted the deceased because he was stealing his maize. The evidence of PW1 was corroborated by PW2 and PW3. PW2 the LC Chairman of the area told court that after being told about the deceased's death, he went to the accused person's garden where he found him harvesting maize. He called the accused and asked him about the deceased's death. He said he is not the one who killed Abdalla but that he remembers fighting somebody he did not know who had come to steal his

maize. PW3, the area Defence Secretary testified that he went to the accused person's garden with PW1 the LC1 Chairman and Juma Kasadha. When he asked the accused what the problem was the accused said he saw very many people at night and he came with his stick and started assaulting the people who were stealing his maize. The accused told him that if Abdalla is the person he fought then he was the one who was stealing his maize.

I find that the evidence of PW1, PW2 and PW3 regarding what the accused told them, that is, that he assaulted the deceased who was stealing his maize corroborates the deceased's dying declaration that **"My friend Yakubu Twali is the one who assaulted me."** Though the accused denied assaulting the deceased, he gave no good reason as to why the three prosecution witnesses, including PW2, the LC 1 Chairman whom he said he trusted, would lie against him. He proved no motive on their part to lie against him. I find it difficult therefore to disbelieve the prosecution evidence.

It also came out clearly from all the prosecution witnesses, and from the accused person himself, that the accused remained in his garden harvesting maize despite knowing that the deceased had died. The accused had in his testimony referred to the deceased as his very good friend. It is also both the defence and the prosecution evidence that the deceased had been one of the eight workers who were assisting the accused to harvest his maize. The prosecution argued that the accused person's conduct of remaining in his garden harvesting maize despite knowing that the deceased had died was conduct pointing to his guilt. The accused however testified on oath that as he prepared to go and respond relatives of the deceased passed by saying, **"our brother got stuck here, maybe it is the rich man who assaulted him"**. The accused testified that that is the reason he did not go to the deceased's place.

It defeats all understanding that the accused who claims to have gone to the deceased's home and advised his family members about taking the deceased for treatment, and to have talked with Kasadha Idhuma about giving them money for the deceased's treatment, could refuse to call at the bereaved people's home on learning about his death. Yet in his testimony he told court that he was all the time monitoring what was going on at the deceased's home. The nagging questions are, if the accused was not the assailant then why did he not call at the home of his former worker on learning about his death? The accused in his evidence even referred to the

deceased as a friend. Is his testimony that what he heard the deceased's relatives saying is what prevented him from calling at his home on learning about his death plausible?

I have carefully examined the testimony given to court by the accused. Though the accused denied ever seeing PW1 and PW3 on 2nd January 2010, it was evident during cross examination that he had actually seen both of them that day. The accused told court during his examination in chief that that he never saw PW1 or PW2 on 2nd January 2010. At one point he also stated that he never left his garden on that day of 2nd January 2010. He testified that on that day between 8 am and 5 pm the people who went to his garden were PW3 and Idhuma Kasadha. This again does not fit in properly with his other evidence that on that day of 2nd January 2010 he went to the deceased's home at around 9.30 am before proceeding to his garden.

In cross examination he stated that PW1 and three other people passed by his garden between 10.30 and 11.00 am on their way to the deceased's place saying that that is the place where their person got stuck. From his testimony this was said after the deceased had already died. He also agreed during cross examination that PW2 came to his garden with the police. In re examination he again changed and said he never met PW1 between 7 am and 8 am on 2nd July 2010. This contradicted what he said in examination in chief that he never saw PW1 or PW2 on 2nd January 2010. In re examination the accused again contradicted himself when he testified that he saw PW2 in his garden after the police had arrested him and he was already on the vehicle. I find the accused person's testimony to be untruthful and full of loopholes and contradictions.

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 whether there are reasons other than guilt that might account for the untruthfulness. The untruthfulness which I find in the testimony of the accused would make me inclined to reflect his state of mind as that of a guilty person who is trying to hide the truth of what actually transpired on the night his worker was murdered. This would strengthen an inference of guilt on his part.

The defence alluded to inconsistencies and contradictions in the prosecution evidence and contended that it is major which should result in such evidence being rejected by court. The defence Counsel highlighted a number of inconsistencies which I will consider below. The prosecution argued that the contradictions and inconsistencies were minor and that they should be ignored by court.

The law on inconsistencies and contradictions is that only grave inconsistencies that are not explained satisfactorily that will usually result in the evidence of a witness being rejected. Minor inconsistencies will not have that effect unless they point to deliberate untruthfulness. See **Alfred Tajar V Uganda EACA Criminal Appeal No. 197/ 1969**. A contradiction is minor if it does not go to the root of the case and where the witness never intended to lie. It is legitimate for the court to find that a witness has been substantially truthful even though he or she lied in some particular respect. The veracity of a witness must be assessed on his or her evidence as a whole. If he has been found to be untruthful in one part of his or her evidence then, in the absence of a reasonable explanation, the remainder of his or her evidence should be accepted only with grave caution.

I have considered the testimony of PW1 that the first policeman who came wanted the residents gathered to escort them to the garden but they refused. Yet PW3 testified that about 60 residents wanted to go to the accused person's garden but the Chairman PW2 refused them to do so. In my opinion this contradiction is minor. It does not go to the substance of the case. It merely evolves around why the residents never went to the accused person's garden. It does not also point to any deliberate untruthfulness on the part of the witnesses. I will therefore ignore it. I have also considered the testimony of PW2 the LC 1 Chairman that while at police he and Kasadha Sula were not sure of who had killed the deceased but were only suspecting the deceased. I compared this with the testimony of PW1 that the deceased had told him it was the accused who had assaulted him. I have considered the testimony of PW3 that they went to the garden and asked the accused what had happened and when he explained they were convinced. I take this not to be a contradictory statement as against the prosecution evidence as a whole since the witness was telling court of the impression he got at that time.

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 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.

I have carefully examined the testimony given to court by the accused. Though the accused denied ever seeing PW1 and PW2 on 2nd January 2010, it was evident during cross examination that the accused saw both PW1 and PW2 on that day. This raises questions as to why the accused would lie at one point that he never saw the said witnesses on that day and then correct it to a specific time during re examination after realizing the contradiction as he was cross examined. Having carefully examined the evidence of PW1, PW2 and PW3, it is my conclusion that there is ample evidence, circumstantial in nature which points to the guilt of the accused, specifically that he assaulted the deceased which led to his death. This evidence is in form of the deceased's dying declaration that ***"My friend Yakubu Twali is the one who assaulted me."*** This dying declaration is corroborated by the evidence of PW1, PW2 and PW3 who independently told court that the accused told them that he had assaulted the deceased because he was stealing his maize. Though the accused denied saying anything to that effect to the said witnesses, he did not give credible explanation as to why all the three witnesses told lies against him. This evidence was hardly discredited during cross examination. The conduct of the accused in not going to the deceased's place when he heard the news of his death yet he was in the vicinity and was the deceased's friend and "employer" also strengthen the inference of his guilt. I do not accept his explanation in his evidence which was full of lies and contradictions. This conduct on the part of the accused is incompatible with his innocence, which further corroborates the dying declaration that the accused is the one who assaulted the deceased who died from the injuries caused by the assault. The Assessors in their opinion talked about the accused contributing money for the treatment of the deceased but the evidence of the accused is that he talked about telling Idhuma Kasadha to come so that they take the deceased to hospital, and when Kasadha came there they talked about it. He did not state that he contributed money to treat the deceased.

I have narrowly examined the circumstantial evidence in this case. This circumstantial evidence includes the deceased's dying declaration that it is that it is the accused who assaulted him. The dying declaration is corroborated by the evidence of three prosecution witnesses that the accused

told them that he assaulted the deceased. This is further corroborated by the conduct of the accused of not calling at the deceased home on learning about his death when he was a friend, and giving contradictory evidence under oath in court. I am satisfied that there are no other co existing circumstances which could weaken or destroy the inference of guilt on the accused. From this evidence, after carefully examining it, I do find an inference of guilt that the accused assaulted the deceased which caused his death.

I would disagree with the Assessors who relied on the statement of PW2 that the deceased had no injury to declare the accused not guilty. PW2 in his testimony indicated that he never looked at the dead body which he found covered. So he was not the witness to rely on in as far as establishing the injuries on the deceased's body was concerned. In any case exhibit **P1** and the evidence f PW1 and PW3 on the said injuries was clear.

In this respect, for the foregoing reasons, I differ from the Assessors' opinion. I find that the prosecution has proved all the ingredients of the offence against the accused beyond reasonable doubt. I accordingly convict the accused as indicted.

PERCY NIGHT TUHAISE

JUDGE.

04/07/2012.