

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT IGANGA**

**HIGH COURT CRIMINAL SESSION CASE NO 0047 OF 2010**

**UGANDA.....PROSECUTOR**

**VERSUS**

**ISABIRYE WILSON.....ACCUSED**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**JUDGMENT**

The accused person, Isabirye Wilson, is indicted for murder c/s 188 & 189 of the Penal Code Act. It is alleged that the accused, on the 6<sup>th</sup> day of December 2006 at Bunyiro village in Iganga District murdered Zirona Moses.

The facts of the case as presented by the prosecution are that on 6<sup>th</sup> December 2006 at around 8 am a one Kibumba Muzamiru, a resident of Bunyiro village, Bulamagi sub county in Iganga district had woken up and gone outside the house to wash his face when he saw a person lying face down in a roadside ditch across his home. He called his neighbours with whom he approached the stranger and found that he had been stabbed in the neck and was barely conscious. The LC Chairperson Isabirye Moses identified the stranger as Zirona Moses (deceased), a member of the same village. The deceased was taken to Iganga hospital while a case of assault by unknown people was reported to Iganga police station by the LC Chairperson. The deceased died at Iganga hospital at around 4.30 pm that day. The death was reported to Iganga police station which commenced investigations. It was established that the deceased was last seen by his wife Nziranyakyo Catherine and daughter Mpakibi Joan on 5<sup>th</sup> December 2006 at about 7 pm going to the home of the accused who had invited him to buy coffee. The accused was arrested hence the indictment.

Upon arraignment, the accused pleaded not guilty to the charge. Thus, all the ingredients of the offence of murder are in issue. The prosecution assumes the burden of proof of all ingredients of the said offence. The burden of proof of a criminal offence rests on the prosecution and remains so throughout the trial. An accused person bears no duty to prove his innocence since he is presumed innocent until proved guilty under Article 28(3) of the Constitution. 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. It was held in **Woolmington V DPP [1935] AC 46** that beyond reasonable doubt does not mean proof beyond a shadow of doubt or absolute certainty. If a case against a person is so strong as to leave a remote possibility in his favour, then the case has been proved beyond reasonable doubt

Section 188 of the Penal Code Act lays out the four ingredients of the offence of murder as follows:-

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

### **Whether the deceased is dead:**

The prosecution evidence on this issue largely rests on the postmortem report exhibit **P1** and the evidence of PW1, PW2, PW3 and PW6. According to the post mortem report, Exhibit **P1** which was admitted as agreed evidence, on 6<sup>th</sup> December 2006, Dr. Kakeeto of Iganga Hospital examined the body of Zironda Moses, an adult male of the apparent age of 28 years. The body of the deceased was identified to him by Tom Lukooya as that of Zironda Moses. Externally, the

body had facial cut wounds in the right parotid region on the chin and bruises on the frontal left nostril. The doctor recorded the cause of death and reason for the same as probably asphyxia as a result of interference penetrating injury to the airway.

It was the evidence of Nziranyakyo Catherine PW1, Kibumba Mozamiru PW2, Isabirye Moses PW3 and PW6 Detective Sergeant Hamoga Harriet that Zironda 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, Zironda Moses, has been proved by the prosecution beyond reasonable doubt.

**Whether the death of the deceased was unlawfully caused:**

Death is always presumed to be unlawful unless caused by accident or in defense of property or person or authorized by law. It was held in **Gusambiza s/o Wesonga V R [1948] 15 EACA 65** that every homicide is presumed to be unlawful unless accidental or excusable or authorized by law. The above presumption is rebuttable. The burden is on the accused to prove that the killing was either accidental or excusable in law. The standard of proof required of the accused on this aspect is very low. It is on the balance of probabilities. See **Festo Shirabu s/o Musungu [1955] 22 EACA 454**.

In this case, it is the evidence of PW1 Nziranyakyo Catherine, PW2 Kibumba Muzamiru, and PW3 Isabirye Moses that point to the circumstances of the violent death of the deceased. PW1 Nziranyakyo Catherine testified that when she reached the scene of crime, she saw her husband the deceased in a pool of blood, very weak and very cold. He had three cut wounds, one penetrating on the right side to the right side, the other at the back of the head. The jaw was shaking. PW2 Kibumba Muzamiru testified that the deceased who was by that time in an unconscious state, was swollen around the neck. He had a wound on the back of the head and some wounds on both sides of the jaw. PW3 Isabirye Moses testified that the deceased was in a critical condition and could not talk. He had wounds, one on the back of the head, the other on the neck and blood on the face.

The post mortem report exhibit **P1** indicated that the deceased died as a result of asphyxia as a result of interference penetrating injury to the airway. The same exhibit states that the body of Zironda Moses had facial cut wounds in the parotid region, chin and sub mental region.

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

The adduced evidence reveals that the deceased was assaulted in the head, face and neck area. The attack on the deceased could in the circumstances certainly not be excusable or justifiable or lawful.

In the circumstances, in agreement with the Assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that the death of the deceased was with violence, and that the killing was unlawful.

**Whether the death of the deceased was caused with malice aforethought:**

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 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 may not be caused. In **R V Tubere s/o Ochen [1945] 12 EACA 63** it was held that malice aforethought, being a mental state, is difficult to prove by direct evidence, but can be inferred from surrounding circumstances, including 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.

PW1, PW2 and PW3 testified that they saw the deceased with injuries on his neck, back of head, and jaw. This is corroborated by exhibit **P1** which stated that the deceased's body had facial cut wounds in the parotid region, chin and sub mental region. The doctor recorded the cause of death

and reason for the same as probably asphyxia as a result of interference penetrating injury to the airway.

The defense did not contest the fact that death of the deceased was caused with malice aforethought.

The parts of the body attacked, namely, the head, face and neck are very sensitive parts of the human body. Clearly, whoever assaulted the deceased must have done so with intention that he should die, or with knowledge that death was a probable consequence.

Thus, in agreement with the Assessors, I find that the prosecution has proved beyond reasonable doubt that the death of the deceased was with malice aforethought.

**Whether the accused participated in the killing of the deceased:**

For the prosecution PW1 testified that the deceased went to meet the accused on 5<sup>th</sup> December 2006 with a weighing scale, bicycle and polythene bag over a coffee deal. The deceased never came back alive. PW1, PW2 and PW3 testified that they saw the deceased on 6<sup>th</sup> December 2006 at 7 am at the culvert. He had injuries on his neck, back of the head and jaw. His bicycle, weighing scale, which items he had gone with at the accused person's place were still with him. It was the prosecution case that the accused was the last person to be seen with the deceased before he died. PW3 and PW6 testified that upon search of the accused person's house, they recovered a small axe, two hoes, a green cloth and other items as evidenced by exhibits **P3** and **P4** which were all stained with blood. PW4 and PW6 testified that the blood stained hoes and cloth together with a sample of blood obtained by PW6 from the deceased was submitted to the Government Analyst for analysis. PW4 testified that he subjected the exhibits to two different tests, namely ABO and DNA. The ABO test showed that the blood of the deceased was AB as that found in the exhibits. The DNA test showed that the blood stains on the exhibits matched that of the deceased, and that it was three billion times more likely that the deceased was the donor of the blood stains on the exhibits found in the accused person's house. PW7 testified that the accused confessed that he assaulted the deceased in exhibit **P8**, a charge and caution statement, where the accused confessed that he assaulted the deceased on the head and neck with a small club and took him to the road side. PW5 testified that the accused reported to him at police with blood stains on his clothes.

On his part, the accused testified that he met the deceased along the way and they agreed that he goes to his home and buy coffee. The deceased went to the accused person's home and bought 10 kilograms of coffee and left at around 11 am. The accused denied ever going to the deceased's home. He testified that the following day at around 7.30 am as he opened his window, he saw people running past his home. He followed them and found the deceased unconscious, and he left in 20 minutes. He was arrested at around 2.30 pm. He testified that some of the exhibits, like the two big hoes belonged to him but the others did not. He maintained that the blood stains in his garage were of a goat. He denied ever killing the deceased or telling police that he hit Zironda when the latter came to his home, or admitting to police that he had assaulted someone who is dying or that they should detain him. It was his testimony that he did not read through the charge and caution statement exhibited. He also told court that the statement he made had a stain of his blood because he was tortured at police.

It is clear from the prosecution evidence that the prosecution case is based exclusively on circumstantial evidence. In **Janet Mureeba & 2 Others V Uganda Court of Appeal Criminal Appeal No. 86 of 2000** it was held that circumstantial evidence is evidence of surrounding circumstances which by intensified 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 onus remains on the prosecution throughout and never shifts to the accused.

I will proceed to narrowly examine the circumstantial evidence in this case, and I did warn the Assessors to do the same. According to the evidence of PW1, the accused was the last person to be seen with the deceased. The accused person's evidence is that he met the deceased along the way and they agreed that he goes to his home and buy coffee. The deceased went to the accused person's home and bought 10 kilograms of coffee and left at around 11 am.

There is overwhelming evidence that after the death of the deceased all fingers pointed at the accused person though he denied being the last person to be with the deceased. The evidence of PW1, PW2, PW3 which the accused does not deny, is that the deceased was found lying unconscious on 6<sup>th</sup> December 2006. The items he went with at the accused person's place, that is, his bicycle, weighing scale and polythene bag, were still with him. It was the evidence of PW3 and PW6 that upon search of the accused person's house, they recovered a green cloth, a small hoe, two long hoes, and a knife, all stained with blood. These were admitted in evidence as exhibit **P4**. The accused admitted the long hoes were his. The evidence of PW4 and PW6 is that the blood stained hoes and cloth and the deceased's sample of blood were submitted to the Government Analyst (PW4) for analysis. They were subjected to two different tests. The ABO test showed that the blood of the deceased was AB, the same as that on the exhibits. The DNA test showed that the blood on the exhibit matched that of the deceased. PW4 found that it was three billion more likely that the deceased was the donor of the blood on the exhibits found in the accused person's house. This scientific evidence discredits the defence evidence that the blood found in his house and on the exhibits was blood of a goat.

PW5 gave evidence that the accused reported to him at police with bloodstains. The accused denied having reported to police, but told court that he was just passing by the police when he was arrested. The evidence of PW7 David Ottii is that the accused confessed that he assaulted the deceased in his charge and caution statement that was admitted in evidence as exhibit **P8**. He also repudiated this statement and testified that he did not read through it when he signed it. The law is that repudiation does not demand corroboration. Courts have however, insisted as a matter of prudence that the court must look for corroboration of a repudiated statement. Corroboration implies independent evidence which implicates a person accused of a crime by connecting him with it. It is evidence which confirms in some material particular not only that the crime has been committed, but also that the accused committed it.

However, the circumstantial evidence as analysed above is a form of independent evidence which has been proved in this case that corroborates the accused person's repudiated statement. This evidence confirms in some material particular not only that the crime has been committed, but also that the accused committed it.

I find the accused person's evidence to be untruthful in the face of the overwhelming circumstantial evidence against him. The law is that in a case where an accused gives untruthful evidence is no different from one who 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.

The defence alluded to contradictions in the prosecution evidence contending that they were major to the case and that the said evidence should not be believed. PW1 who told court that the deceased was found at Bubogo, yet PW2 and PW3 testified that he was found at Buniiro. PW3 testified that nothing was recovered from the deceased's body, yet PW6 Hamega Harriet told court that she recovered a sample of blood from the deceased.

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 but minor inconsistencies will not have that effect unless they point to deliberate untruthfulness. 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 evidence as a whole. If he or she has been found to be truthful in one part of his evidence, then, in the absence of a reasonable explanation, the remainder of his evidence should be accepted only with grave caution.

The evidence of PW1 and PW4 corroborate the evidence of PW3 that a blood sample was obtained from the deceased. The evidence of PW4 and PW5 reveal that the blood was shed in the accused person's garage. The accused himself admitted the deceased came to his home to buy coffee. The scientific evidence in exhibit **P8** confirms the blood on the exhibits recovered from the accused person's house was that of the deceased. In effect the prosecution evidence, considered as a whole, point to the guilt of the accused. The inconsistencies alluded to by the defence are minor and do not affect the main substance of the prosecution case. On the authority of **Kalulu Isingoma V Uganda Court of Appeal Criminal Appeal No. 23 of 2002** this court



can ignore such minor inconsistencies. I have also taken care to find out if any prosecution witness has been shown to have a motive to tell lies against the accused person. The accused has not proved any motive for them to lie. I found them to be truthful witnesses.

In the premises, after carefully examining the circumstantial evidence in this case, I find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused.

In agreement with the Assessors, I am satisfied that the prosecution has discharged the burden of proof, on all the ingredients of the offence of murder, beyond reasonable doubt. I find the accused guilty of murder as charged and I convict him accordingly.

**PERCY NIGHT TUHAISE**

**JUDGE.**

**05/07/2012.**