

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**HCT-00-CR-SC- 021 OF 2013**

**UGANDA .....PROSECUTOR**

**VERSUS**

**GERALD MUGENYI KIIZA..... ACCUSED**

**BEFORE: Hon Lady Justice Monica K. Mugenyi**

**JUDGMENT**

The accused person, Gerald Mugenyi alias Kiiza, was indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The brief facts of the case are that on or about the 2<sup>nd</sup> June 2012 at Mugongo Zone A – Kyengeru, Wakiso District, the accused person and others still at large intentionally caused the death of a one Hamida Nazziwa. The accused person denied the indictment levied against him. At the trial he exercised his right to remain silent; neither did he call any evidence in his defence.

The prosecution called two (2) witnesses in support of its case against the accused person – the widower of the deceased (PW1) and the LC Defence Secretary of the locality in which the deceased was murdered (PW2). PW1 attested to the disappearance of his wife after they returned home from an evening out and the subsequent discovery of her naked body. PW1 further testified that a week after his wife’s burial he was informed by the police that the perpetrator of his wife’s alleged murder had been arrested and there were people that had seen him commit the said offence. However, none of these eye witnesses was produced in court. PW2, the only other witness called by the prosecution, testified that he was told by a one Herbert Nsereko (a Crime Preventer) that he (Nsereko) had seen the deceased standing with 3 men including the accused person on the night she was allegedly murdered. It was also PW2’s

evidence that upon the accused person's arrest he asked for forgiveness stating that he acted in anger and offered the witness money.

It is well settled law that the burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution and generally, the defences available to an accused person notwithstanding, that burden does not shift to the accused at any stage of the proceedings. The prosecution is required to prove all the ingredients of the alleged offence, as well as the accused's participation therein beyond reasonable doubt. See **Woolmington vs. DPP (1993) AC 462** and **Okale vs. Republic (1965) EA 55**.

The standard of proof in a criminal trial does not entail proof to absolute certainty or proof beyond the shadow of a doubt. See **Miller vs. Minister of Pensions [1947] 2 All ER 372 at 373**. The standard that must be met by the prosecution's evidence is that no other reasonable or logical explanation can be derived from the facts except that the accused committed the crime, thereby rebutting such accused person's presumption of innocence. If a trial judge has no doubt as to the accused's guilt, or if his/ her only doubts are *unreasonable* doubts, then the prosecution has discharged its burden of proof. It does not mean that no doubt exists as to the accused's guilt; it only means that faced with the evidence adduced by the prosecution there is no *reasonable* doubt as to the accused person's guilt.

It is trite law that in the event of reasonable doubt, such doubt shall be decided in favour of the accused and a verdict of acquittal returned. Further, inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be ignored if they do not affect the main substance of the prosecution's case; save where there is a perception that they were deliberate untruths. See **Alfred Tajar vs Uganda EACA Criminal Appeal No. 167 of 1969** and **Sarapio Tinkamalirwe vs. Uganda Supr. Court Criminal Appeal No. 27 of 1989**.

In a murder trial, such as the present case, the prosecution is required to prove the ingredients of murder, as well as the participation of the accused persons beyond reasonable doubt. The ingredients of murder include first, the fact or incidence of death; secondly, that the death was

unlawful, and finally, that the death was caused with malice aforethought. See **Uganda vs. Kassim Obura (1981) HCB 9.**

In the present case both prosecution witnesses attested to the deceased's death. Her body was identified by her husband, PW1, who further testified that the deceased was duly buried. PW2 also attested to having seen the deceased's body. This court finds no reason to disbelieve this evidence. Therefore the fact of death stands proven beyond reasonable doubt.

As to the question of whether or not the deceased's death was unlawful, the only evidence I find on record that could shed light on this issue is PW1's oral evidence. The witness testified that the deceased's naked body was found behind some shop, lying face downwards and covered with her clothes. He further testified that given that the body was naked he thought she might have been raped and thereafter strangled to death. There was no further proof of the cause of the deceased's death save for this observation.

The legal position on the legality of death (or lack thereof) is that every homicide is presumed to be unlawful unless circumstances make it excusable. See **R. Vs. Gusambiza s/o Wesonga 1948 15 EACA 65.** The same position was restated in **Akol Patrick & Others vs Uganda (2006) HCB (vol. 1) 6,** (Court of Appeal) where it was held:

**“In homicide cases death is always presumed unlawfully caused unless it was accidentally caused in circumstances which make it excusable.”**

In **Uganda vs Aggrey Kiyingi & Others Crim. Sessn. Case No. 30 of 2006,** excusable circumstances were expounded upon to include justifiable circumstances like self defence or when authorised by law.

The term 'homicide' has been invariably defined as the killing of a human being by another human being. See **'Dictionary of Law', Oxford University press, 7<sup>th</sup> Edition, 2009, p.264.**

In the present case there is no proof whether by medical evidence or otherwise that the deceased's death was a homicide; neither is there any evidence that negates its having been a result of natural causes. Her death cannot be presumed to have been a homicide, unnatural and thus unlawful in the absence of evidence to that effect. I therefore find that this ingredient of

murder has not been proved to the required standard. Having so held, it would follow that the outstanding ingredient of malice aforethought is rendered redundant.

Before I take leave of this case I shall briefly comment on this court's earlier finding of a *prima facie* case in respect of this trial. All that is required of courts in determining the existence of a *prima facie* case is the presence of such evidence as when taken literally or on the face of it would entitle a reasonable tribunal, properly directing its mind on the law and evidence, to convict an accused person. However, having put the accused to his defence and given his option to remain silent, this court was obliged to and did evaluate the evidence on record against the standard of proof applicable to a full criminal trial. The applicable standard is proof beyond reasonable doubt. Against that standard, this court finds that the prosecution evidence on record does not prove the offence of murder beyond reasonable doubt.

I would, therefore, acquit the accused of the offence of murder contrary to sections 188 and 189 of the Penal Code Act.

**Monica K. Mugenyi**

**Judge**

22. 04. 2013