

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

CRIMINAL SESSION CASE NO. 45 OF 2011

5

**UGANDA.....
.....PROSECUTOR**

VERSUS

10

**NABANJI JOEL alias YOWERI.....
ACCUSED**

BEFORE: THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

15

JUDGMENT

20 NABANJI JOEL alias YOWERI, the accused before court was indicted for
Murder c/s 188 & 189 of the Penal Code Act.

The prosecution case is that between 31.03.10 and 02.04.10 at
Bugwanala village, Waibuga sub-county, Iganga District, the accused
25 murdered Kayabya Dawson.

The accused denied the charge claiming that by the time his uncle the
deceased passed away, he had already left the village to go back to his
home in Matugga where he used to stay.

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To prove its case, the prosecution called 6 witnesses. At the
preliminary hearing, the defence and prosecution agreed on 2
documents that were admitted in evidence as Exhibit P1 and Exhibit P2
respectively, under Section 66 T.I.A.

Exhibit P1 is the post mortem report of the deceased. While Exhibit P2 is the medical examination report of the accused person.

- 5 In determining this case, I bear in mind the provisions of the law and the principles laid down in decided cases that ***“the burden of proof is upon the prosecution to prove the guilt of the accused person beyond all reasonable doubt. The burden never shifts save in a few exceptional cases provided for by law”***. Refer to the case of
- 10 **Woolmington Vs. D.P.P. (1935) AC 462** followed in the case of **Miller Vs. Minister of Pensions [1947]2 ALL E.R. 372** and many other cases like **Luboga Vs. Uganda [1967] E.A. 440**.

The same position is provided for under Section 101 of the Evidence Act
15 to the effect that the person who alleges must prove.

Both the prosecution and the defence agree that the above is the correct position of the law.

20 The ingredients that must be proved in a murder case if a conviction is to be returned are the following:

- (1) Death of a human being.
- (2) Death was unlawful.
- (3) The death was caused with malice aforethought.
- 25 (4) The accused caused the death of the deceased.

To prove the ingredient of death, the prosecution relied upon the evidence of PW1 the Doctor who carried out the post mortem on the deceased - Exhibit P1. And the evidence of PW2 Twolisoni Mika LC.1

chairperson of the village where the deceased lived and who is also a cousin of the accused.

5 Exhibit P1 the post mortem report was made by Dr. Bamudaziza on 02.04.10. The body was identified by one Mukesi Vico as that of the deceased. The Doctor found the cause of death to be haemorrhage from deep cut wounds on the scalp and possibly injury to the brain.

10 PW2 went to the home of deceased upon learning of his death, saw the body with the said cut wounds and reported to police.

15 There is no doubt that Kayabya Dawson is dead. The defence does not dispute the death. I accordingly find that the first ingredient was proved to the required standard.

As to whether the death was unlawful: The presumption of the law is that all homicides are unlawful unless they are accidental or excusable by the law.

20 Death is excusable if the circumstances justify it for example if it occurs in defence of the person or property or if it is authorized by law - See **Gusambizi Wesonga Vs. R. (1948)15 EACA 65 and Uganda Vs. Okello [1992-93] HCB 68.**

25 Without any evidence to show that the killing of the deceased occurred under justifiable circumstances or was accidental, court accepts the prosecution evidence and finds that the killing was unlawful. The defence too agrees that the killing of the deceased was unlawful.

The next ingredient to determine is whether the killing of the deceased was with malice aforethought.

5 The law deems malice aforethought to be established under the following circumstances:

(1) An intention to cause death of any person, whether such person is the one actually killed or not, or

10 (2) Knowledge that the act or omission will probably cause the death of some person. **Section 191 of the Penal Code Act and Bukonya & Others Vs. Uganda [1972]1 E.A 549 (CAK) and Mugao and Another Vs. Republic [1972]1 E.A 543 (CAN)**

To determine whether the prosecution has proved malice aforethought, the court can take into account the surrounding circumstances of each case. The circumstances include the nature of the wounds inflicted, the part of the body where the injuries were inflicted the type of weapon used, the manner in which the weapon used. Whether repeatedly or not and the conduct of the accused before, during and after the injuries were inflicted – Refer to **R. Vs. Tubere (1945)12 EACA 63.**

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In the present case prosecution witnesses PW1- the Doctor, PW2 LC.1 chairperson and PW4 D/CPL. Ouma Justin who visited the scene of crime with other police officers all saw the deceased's body with multiple cut wounds on the head. The wounds are indicative of an intention to cause death as the head is a vulnerable part of the body. It was repeatedly struck. Whoever assaulted the deceased must have known that the injuries would cause death and must have intended to kill the deceased. The weapon used though not recovered must have been a sharp one capable of causing death.

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From those circumstances, malice aforethought was proved beyond reasonable doubt.

5 The last ingredient to determine is whether it is the accused person who killed the deceased.

10 None of the prosecution witnesses ever saw the assailant of the deceased. He was found dead in his bed apparently after a few days had gone by. The accused was not in the village then and was arrested after he reported to Kawempe Police station seeking police escort to return to the village to bury the deceased.

15 The case against the accused is accordingly purely circumstantial. The prosecution witnesses testified that the deceased was an uncle of the accused person. The deceased used to pay the accused's school fees.

20 According to PW3 a cousin of the accused, the deceased lived with his wife and several children. However, there is also evidence to the effect that the accused lived with the deceased.

PW3 further said that in October 2009, the deceased failed to pay school fees and the accused demanded that he sells his land, which the deceased declined to do.

25 Eventually that, the deceased raised Shs.270,000/- and the accused returned to school. In March 2010, that the accused informed PW3 that he had given the deceased Shs.4,000,000/- in the presence of about 3 other people, but did not say what the money had been for.

PW3 heard of the death of the deceased on 02.04.10. By then the accused was not in the village.

5 PW3 DC Bumba Moses recorded a statement from the accused after he reported himself to Kawempe Police station. Among the things accused told him was that he was suspected of having killed the deceased; because on the date he was killed, the accused had sold his cow for Shs.270,000/-. Also that he had a good relationship with the deceased's sons who had problems with their father. And that the
10 deceased had failed to return to accused Shs.4,000,000/- he had given him.

The accused also told him of the anonymous calls he received warning him not to return to the village lest he also be killed, and asked for
15 police escort to return to the village and bury his uncle. He denied killing the deceased.

DC Ouma Justine PW4 visited the scene of crime with other Police officers. He stated that he was informed by both the mother and the
20 sister of the deceased that accused lived with the deceased in the same house. The deceased was last seen alive on 31.03.10 with the accused person.

On 01.04.10, the accused was seen selling the deceased's two cows to
25 Mutwalibu PW6. The accused was not seen again until he handed himself over to Kawempe Police on 07.04.10. He was handed over to PW4 on 08.04.10 and taken to Iganga. That while accused admitted staying with the deceased and leaving on 01.04.10, he denied selling the cows. The exact date of death of the deceased was not
30 ascertained. It was between 31.03.2010 - 02.04.2010.

PW5 Elivaida Nairuba daughter of the deceased told court that, the deceased called her in April, 2010 around Easter time and told her he was in danger of being killed by the accused person, because of the money accused was demanding from him.

Thereafter, she says, her Telephone went off for 3 days. When it got back on she heard of the death of her father and suspected that accused had killed him. She insisted that accused and deceased lived in the same house but had a good relationship. The deceased had paid the accused's school fees until he finished school. She denied that deceased had misunderstandings with his sons.

PW6 Mutwalibu Maganda bought a calf and a cow from the accused on a date he cannot recall, although at first he said it was on 01.04.2010. He went with accused and a boda boda cyclist one Isabirye Grace to Bugwanala village to get the cows. At the home they went to they found an old woman and another woman with a child. The two women assured him that the cows belonged to the accused. They agreed on a purchase price of Shs.470,000/-, which he paid.

Decided cases have established that ***“circumstantial evidence is often the best evidence. It is the evidence of surrounding circumstances which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial”***. - Thiaka Vs. Republic [2006]2 EA 326 (CAK).

However, it is trite law that, ***“to find a conviction exclusively upon circumstantial evidence the inculpatory facts must be***

incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.” - Charo Vs. Republic [2007]1 EA 43 (CAK).

5 In his defence, the accused totally denied killing the deceased, who he said had brought him up. He told court that he was in Bugwanala on 29.03.10, when he went to his grandmother’s which is about 200 metres away from the deceased’s home. The deceased was with accused grandmother and other people. They discussed the proposed
10 introduction of the accused’s girl friend/wife and accused gave the deceased Shs.4,000,000/- in the presence of other people.

The next morning the deceased gave the accused a cow and calf as contribution to the introduction. This was in the presence of relatives.
15 The accused then went to Bulanga with a boda boda cyclist named Grace to find a buyer. The two returned to the village with the buyer (PW6). The buyer paid Shs.270,000/- and accused gave money to his grandmother on advice of the deceased. He then left the village at about 11am and went to Bugembe where he spent the night.

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By indicating that he left the village when the deceased was still alive, the accused raised an alibi. He added that on 31.03.10 he left for Kampala with his girl friend, after withdrawing money from a Micro Finance Bank. Thereafter, he passed by his uncle’s home at Makindye
25 to inform him of the pending introduction and then left for Matugga where he used to stay.

The accused said that, he learnt of the death of the deceased on a date he could not recall, upon which he reported to police and asked for
30 escort back to the village but was detained instead.

The principle established by decided cases is that ***“an accused person has no duty to prove his alibi. It is up to the defence to negate the defence.”*** The case of **Kiarie Vs. Republic [1976-85]1 EA 213 (CAK) and Kibale Vs. Uganda [1999]1 EA 148 (SCU)** support this principle.

In such circumstances therefore ***“Court has a duty to evaluate the evidence presented to support the alibi together with that of the prosecution and give reasons why one and not the other version is accepted”*** - Refer to **Nyanzi Vs. Uganda [1999]1 EA 228 (SCU) and Kutegana Vs. Uganda [2011]2 EA 425 (SCU)**.

Counsel for the State submitted that the defence of the accused person should be found to be lies on the grounds that, the prosecution had given circumstantial evidence that indicated accused was guilty of the crime. The accused on the other hand lived with the deceased and his conduct before and after the death of the deceased was not of an innocent person. It was pointed out that among many things, the accused could not state the registration number of the vehicle he went in to the village, failed to call his fiancé to appear and testify or state the account number at the Micro Finance where he allegedly withdrew the money to go to Kampala. That in essence, his defence was just a desperate attempt to escape prosecution.

The defence on the other hand disputed the submissions of the prosecution contending that the evidence against the accused was grossly unreliable. PW2 could not recall the date accused went back to the village or how long he stayed there. Neither was the witness aware that accused planning an Introduction.

The allegation that accused was demanding Shs.4,000,000/- from the deceased was never substantiated as accused had already completed school and was working.

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PW2 further stated that whenever he was in the village, the accused stayed with Mzee Mika; thus confirming accused's claim that he never used to sleep at the deceased's house and would only visit him during the day.

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Counsel argued that, it was expected for the accused to know the deceased's house as the deceased was the one who had educated him and accused used to visit him.

15 Further that none of the prosecution witnesses corroborated the claim that accused was demanding Shs.4,000,000/- from the deceased.

The issue of the accused running away because of NAADS funds is not in the statement of the accused recorded by PW3. PW3 only confirmed that the accused told him of anonymous calls and requested for police escort to enable him return to the village.

The evidence of PW5 about the alleged call from the deceased telling her that the accused wanted to kill him was not corroborated by any other evidence. it was said to have been a single call but the prosecution never produced any print outs to show that such a call had been made. Such prints were necessary to confirm that the call had indeed been made - **Uganda Vs. Aggrey Kiyingi & 2 Others Criminal case 0030/06.**

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PW6 testified that when he bought the cows from the accused, there were adults present who confirmed that the cows were for the accused person. This lent credence to the accused's claim that the deceased gave him a cow and calf as a contribution to the accused's Introduction.

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There were discrepancies in the prosecution evidence that were not explained. PW2 and PW4 contradicted each other. While PW2 said accused did not live with the deceased PW4 said he lived with the deceased.

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PW2 claimed that deceased had failed to pay accused's school fees, yet there is evidence that accused had finished school and was working.

It was claimed the Shs.270,000/- was for school fees yet accused
15 claimed it was from the sale of the cows.

PW2 stated deceased was last seen alive on 31.03.10 with the accused yet PW6 said accused was in the village on 01.04.10 selling the cows. Later he denies having bought the cows on the same date claiming he
20 could not recall the date he bought the cows.

The unexplained discrepancies left gaps in the prosecution case. Considering the accused's alibi which he had no duty to prove under the law, there ought to have been other independent evidence connecting
25 the accused to the murder.

Without such other evidence, I find that his alibi was not disproved.

Failure of the accused to call the fiancé was explained by her
30 disappearance and his not knowing her whereabouts due to the period

spent on remand. It was not up to the accused to prove his innocence but for prosecution to prove his guilt.

5 The accused reported to police requesting for escort back to the village, raising doubt as to whether he would have done so if he was guilty of the heinous act.

10 These are circumstances in the present case that destroy the inference of accused's guilt. The possibility of someone else having killed the deceased and trying to cast suspicion on the accused cannot be ruled out. The police never checked to verify if the alleged telephone calls warning accused not to return to the village had been made.

15 Without any other evidence connecting to the accused to the offence, I find that the prosecution failed to prove the participation of the accused in the offence. In disagreement with the Assessors, I find the accused not guilty as charged and he is hereby acquitted of murder. He should be set free forthwith unless otherwise held on other legal charges.

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Flavia Senoga Anglin

JUDGE

02.10.13

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02/10/13:

Accused before court

Katami Lydia for state present

30 Ngobi Balidawa holding brief for Bwenene Victoria for accused present

Both Assessors present

Counsel for State: Matter is for Judgment.

- 5 Court: Judgment delivered in open court.
Accused acquitted of Murder and should be set free
forthwith unless otherwise held on other legal charges.

10 **Flavia Senoga Anglin**
JUDGE
02.10.13