

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CR-SC-0024 OF 2012

UGANDAPROSECUTOR

VERSUS

KAMUHANDA EMMANUELACCUSED

Before His Lordship Hon. Mr. Justice. Batema N.D.A, Judge

Judgment

Kamuhanda Emmanuel is charged with one count of murder Contrary to Sections 188 and 189 of the Penal Code Act. It was alleged that on the 25th day of May 2011 at Nyakera I village in Kamwenge District the accused murdered BANGIZI DEZIDERIO, his biological father.

PW1 RESTETUTA EKIBAHIRIIRE was the wife of the deceased and mother to accused. She told court that the deceased spent the whole day drinking alcohol. He came home and violently chased away her telling her to leave with her “cats” referring to the children. It was her evidence that her husband was a re- known perpetrator of violence against his family members namely; wife and children.

PW1 told court that she escaped with her children and went to her son called Muhwezi. Muhwezi took her to the chairperson LC1 who in turn took them to police. The police sent them back to the chairperson to solve their domestic matters. She spent the night at the chairperson’s place with her children namely; Atuhaire Sylvia, Helix Mugabe and Sajjakuddembe. The accused son lived elsewhere with his elder brother but in the same village.

The next morning the deceased was found dead in their matrimonial home. He had cut wounds on the head and thigh. His right hand had been cut off. His wife and children were around save for the accused who went missing and never participated in the burial. The family and the whole village suspected the accused because he had boldly opposed his father (deceased) and warned him to stop harassing and assaulting his mother.

The accused was arrested 3 months later from Ibanda. He claimed he was working far from home and did not hear of the death and burial of his father. That was his alibi.

In analyzing the evidence let me start with the alibi.

It is trite law that when an accused person puts up the defence of alibi he does not thereby assume the responsibility of proving it. It is the duty of the prosecution to adduce evidence to destroy the alibi by placing the accused at the scene of crime. In the instant case, the mother of the accused told court that the accused did not live with them. He lived elsewhere with his elder brother although in the same village. This mother, PW1, is the only witness who alleged that the accused was in the village on the fateful day and night. The people accused lived with at his elder brother's home did not testify that he was there that day and night. It is possible he had gone to work in Ibanda and did not hear of the death of his father and therefore did not attend his burial.

Prosecution had a duty to place the accused at the scene of crime [Refer to AKOL PATRICK & OTHERS VS-UGANDA [2006]HCB VOL1 page 6].

However, this doubt is erased by the evidence of the charge and caution statement made by the accused himself before police. He was taken before a D/AIP (PW3) BAMWINE ALOYSIOUS who properly cautioned him before he elected to make a statement confessing to having killed his father. The charge and caution statement was admitted on record without any objection or retraction.

It is evidence worth using against the accused since he voluntarily made the same. (Exhibit Prosecution Exhibit3)

In his charge and caution statement the accused told the police that he had a long standing grudge with his father. That his father, the deceased used to harass and assault him, his mother and sisters. That on this fateful day his father had forced his mother and sisters out of the matrimonial home and they were taking refuge at his home. He confronted his father and they had a bitter exchange. That his father had a Panga and wanted to cut him. He acted in self defence and cut him first. The accused confessed that he cut his father on the neck and he fell down. He then cut him on the back near the buttocks and the arm. He left him for the dead in the

compound. After informing his mother of what he had done he left for Ibanda where he started doing casual labour till his arrest.

In my opinion, the accused made this adverse statement voluntarily. What is so impressive is that it states material particulars that are similar to prosecution evidence. First of all it confirms the evidence of PW1 that accused hated his father and had bodily warned him against beating and routine harassment of his mother and other family members.

Secondly, he confessed to causing injuries just like they are listed in the post mortem report (Prosecution Exhibit 1). He had a cut on the head. Then amputated part of the right hand. These are very close and similar to the injuries he said he caused on the neck and hand. He did not take time to examine where he had actually cut or whether the hand been amputated by his cut. The medical report states that no weapon was recovered at the scene but the likely cause of injuries could have been a sharp object. The accused confessed that he used a panga. I find this evidence very good and consistent placing the accused at the scene of crime. His alibi is completely destroyed.

So, Participation by the accused, a very essential ingredient, is proved beyond reasonable doubt.

I now turn to the other ingredients. The fact of death is not denied. The post mortem report shows that the corpse of Bangizi Deziderio was identified by his son Muhwezi John Bosco. PW1, his wife, also confirmed to court that her husband died and was buried. I take it that nobody disputes this fact. It is proved beyond reasonable doubt.

No lawful excuse has been advanced for Deziderio's death. The accused walked from his home armed with a sharp panga to his father's home. We are told the two lived in the same village. Whatever the distance between, it is the accused who went to confront and attack his father.

Although he claims he acted in self defence there was no weapon found at the scene to suggest that the deceased was armed and /or had attacked the accused. The accused had the time to cool down and take the matter to police just like the mother did but he did not. He cannot be afforded the defence of provocation or self-defence under the Penal Code Act.

I now turn to malice aforethought. The nature of injuries caused were fatal. The accused also aimed at very sensitive parts of the body namely the neck and head. He particularly intended to kill his father. Lastly malice can be inferred from the weapon used.

He used a very sharp Panga. With one cut, the hand was amputated! He then disappeared from the village in a suspicious manner after causing his father's death. Indeed when he was hard pressed in cross-examination, he conceded that his mother told court the truth. He had killed his father because he was a perpetrator of domestic violence in their home.

I want to agree with the gentlemen assessors that prosecution has proved its case beyond reasonable doubt. I find the accused guilty of murder Contrary to Sections 188 & 189 of the Penal Code Act and convict him accordingly.

Signed: Batema N.D.A
Judge
13/02/14

13/02/14

Accused present

Sarah Bivanju for state

Businge Victor for accused

Kobugabe in Rutooro/English

Both Assessors present in open court.

Signed: Batema N.D.A
Judge

STATE:

The convict does not have any past criminal record. He is now aged 41 years. He has spent 3 years on remand.

Accused killed an elderly man who expected a lot of trust and protection from the son. Instead he killed him with premeditation.

The brutality he exhibited is self evident.

The injuries were so fatal. Accused pleaded not guilty.

He is not remorseful.

As per sentencing guideline, I pray that he receives a long custodial sentence of not less than 45 years imprisonment.

Signed: Batema N.D.A

Judge

REPLY BY BUSINGE

In mitigation, since the convict is a first offender aged 41 years, he deserves mercy. He said he had a family to look after. The deceased was a violent man. He habitually beat the accused and his mother and he referred to the deceased as “a cat”.

We pray that you consider this and put accused to at least below 20 years imprisonment. I so pray.

Signed: Batema N.D.A

Judge

SENTENCE

I have had 2 weeks considering this judgment and sentence. The murder arose from accumulated anger in domestic violence. It is high time courts considered this as a strong partial defence to homicides just like other defences such as provocation. When family members are subjected to constant domestic violence, they develop hatred and contempt for the perpetrator of the violence. The deceased was such a perpetrator of domestic violence. He invited this hatred upon himself.

Because our courts have not been treating domestic violence as a serious crime, the violent members of the family, mainly MEN, have been getting away with it.

Fortunately, now domestic violence has been criminalized under the Domestic Violence Act of 2010. **The gendered power relations in domestic violence can no longer be ignored in our principles of criminal law and in criminology in general.** Domestic violence which was

formerly condoned as a right of the heads of families is now condemned under the Domestic violence Act, 2010. By necessary implication the sections of the Penal Code Act that used to protect and exclude violent spouses from prosecution must be amended or repealed. Section 193, in general, and more so subsection (2) of section 193 in particular defining what amounts to provocation in a domestic relation can no longer hold. This provision looks gender-neutral but is in fact gender-blind protecting violent husbands. **It promotes domestic violence against family members considered to be under the immediate care of the perpetrator of the violence. In our communities, it is men who are often, and sometimes automatically, still treated as heads of the home and the women and children they live with as subordinates under their immediate care. The wrong assumption under the Penal code Act is that no subordinate is supposed to get annoyed with and react violently to any abuse by the master of the home. I find that unlawful and unconstitutional.**

Research has shown that domestic violence directed at the accused and his immediate family members over time accumulates anger. The abused victims of domestic violence often store away their anger in painful silence until one day when they decide that enough is enough. That is when they act out of the blue. One single last act by the perpetrator of domestic violence or his verbal exchange or his mere sight may spark off provocation sending the annoyed person into action with fatal results. One need not act in the heat of passion in domestic matters because the gendered power inequalities in a home may not always favour a quick reaction or reply to the one in power and control. Circumstances and good family teaching often dictate otherwise.

The defence of Provocation as defined under the Penal Code Act must be amended in light of the new law (DVA) and the constitutional guarantees of gender equality (Article 33) and Freedom from torture, cruel or inhuman and degrading treatment or punishment (Articles 31,33 and 24 of the Constitution of the Republic of Uganda) . I am a Gender and Human Rights consultant and I know that the law makers are reluctant to amend the laws governing domestic relations. The courts of law should take it as their duty to harmonise the old law on provocation with the Domestic violence act and construe the penal code provisions with such modifications as to bring it in conformity with the 1995 constitution. This is legal and constitutional under article 274(2) of the Constitution. **I am now setting a precedent by considering accumulated anger arising**

from repeated acts of domestic violence, and more so when they are committed with impunity, as a partial defence to murder in a domestic setting. It is also, in my opinion, a very serious mitigating factor for sentences in homicides and other crimes committed in a domestic sphere.

The family members in this particular case were reluctant to confront the deceased. He committed domestic violence against the mother of the accused and his siblings with impunity several times. To the mother, his wife, it had become normal wear and tear of the marriage! It is only the accused who came out boldly to oppose his father and warn him against his acts. His accumulated anger is understandable and excusable to a certain extent.

I know the accused will live and die with the curse of having his father's blood on his head and hands until he meets his God for final Judgment. I Sentence him to 2 years imprisonment in the circumstances. He shall serve his sentence at Mubuku prison Farm.

Signed: Batema N.D.A

Judge

13/02/14

Right of Appeal Explained.

Signed: Batema N.D.A

Judge

13/02/14.