

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
CRIMINAL SESSION CASE NO. 100 OF 2011**

UGANDA.....

PROSECUTOR

VERSUS

NAMWANJE SARAH

LUKWAGO JOSEPH.....**ACCUSED**

BEFORE: Hon. Lady Justice Elizabeth Ibanda Nahamya

RULING

Namwanje Sarah (A1) and Lukwago Joseph (A2) herein “Accused” were indicted with the offence of **Murder** contrary to **Sections 188** and **189** of the Penal Code Act Cap. 120

The facts for Prosecution were that during the month of July 2006 the Accused persons, A1 together with A2, while at Kinoni Mityana District, murdered Manjeri Nzamugula by administering poison to her drinks. Prosecution’s case was based upon P. Exh 3 which is the Charge and Caution Statement by A1 recorded on 19/1/2008 by **D/AIP Agii David** at Mityana Police Station. According to the Charge and Caution Statement, A1 admitted that she together with A2 caused the death of Nzamugula Manjeri by administering poison to the deceased’s drinks. It was A1’s Statement that the deceased was against the idea of A2 marrying her daughter. Therefore her death would pave a way for A2 to marry the deceased’s daughter.

Both A1 and A2 denied the offence and a plea of not guilty was entered for each of them respectively. Prosecution was represented by **Elima Doreen,**

State Attorney whereas **Counsel Gumisiriza Francis** was on State Brief for A1 and Counsel **Isaac Jurugo** represented A2.

A total of three witnesses were called for Prosecution. At the end of the Prosecution case, both Defence Counsel elected to make a submission of a no case to answer and filed written Submissions. However, I note that the State Attorney filed her written submissions outside the agreed schedule. Nevertheless I considered her Submissions. This Honourable Court must express its concern about the late filing of submissions after each Party has voluntarily agreed to adhere to the set schedule yet the innovation administered without delay.

Submissions of Counsel.

The Defence Counsel, Mr. Gumisiriza and Mr. Jurugo submitted that Prosecution must prove all ingredients of murder. They further submitted that PW1's evidence fell short of proving death of a human being. The Defence Counsel highlighted PW2's testimony. It was their submission that the Charge and Caution Statement in respect of Namwanje Sarah, A1, is subject to corroboration. Therefore, it cannot be relied upon to prove death of a human being and participation of the Accused persons. Counsel observed further that the complainant, one Fred was never called to testify as a Witness. His testimony would have been relevant to prove the ingredient of death considering that there was no Post Mortem report.

Additionally, Counsel submitted that there is no other independent evidence in support of the fact that poison was administered by **A1** and **A2**. Counsel also contended that the participation of both **A1** and **A2** was not supported by evidence. Therefore, both **A1** and **A2** should be acquitted of the offence of murder.

In reply, State Elima Doreen, for Prosecution submitted that notwithstanding the fact that the Complainant, and the Defence Secretary were not called as witnesses, the charge and Caution Statement proves death of a human being. Additionally, although there was failure on behalf of Prosecution to produce the Post Mortem report, this was not fatal because death can be proved by other means. Counsel invited Court to find that death was unlawfully caused basing on the fact that it was caused by poisoning administered by **A1**. Pertaining to the ingredient of malice aforethought, the State Attorney cited **Section 191 Penal Code Act** and the case of **R vs. Tubere S/o Cohen** which is, according to Prosecution, in tandem with the facts. Counsel also invited Court to have regard to the Charge and Caution Statement where A1 admitted that she administered poison to the deceased which precipitated the death on the following day. Further, poison is lethal in nature, both **A1** and **A2** hatched the plan to kill the deceased which they concluded to finality. Thus the death was caused by malice aforethought. The State Attorney invited Court to find that Prosecution proved all the ingredients of murder.

Therefore, given the circumstances, the issue to be determined is whether Prosecution has provided sufficient evidence against A1 and A2 to require each of them to be called upon to present his/ her defence.

I have paid due regard to the evidence and the submissions of the Defence Counsel. The essential issue for determination is whether Prosecution has proved a *prima facie* case against the A1 and A2. In the East African decision of **Bhatt vs. Republic [1957]1 EA 332** It was held *that the question whether there is a case to answer cannot depend only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the Accused on his defense. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.*

The Prosecution facts as earlier stated that during the month of July 2006, A1 and A2 murdered Manjeri Nzamugula. No Post Mortem report was adduced at the trial nor did Prosecution call any witness to prove the death of Manjeri Nzamugula or how the death occurred. Prosecution called only 2 witnesses. One of the witnesses was **D/AIP Agii David (PW2)**, a Police Officer attached to Luuka District. He also recorded the Charge and Caution Statement. The Defence rejected admissibility of the Statement and I conducted a Trial within trial. PW2 testified that between the year 2002 and 2008, he was attached to Mityana Police Station as the Assistant D/AIP. He also deputized the District CID Officer in Mityana District. It was his testimony that it was about 11:00am on 13th November 2007 while in his office at Mityana Police Station a Woman Constable by the name of Mushinzi took Namwanje Sarah A1, to his office. This was for the purpose of recording a Charge and Caution Statement. PW2 requested Mushinzi to leave him alone with the suspect.

Additionally, PW2 stated that he observed that A1 was in a good mood without any complaint, *to wit*, PW2 offered A1 a seat. A1 was not handcuffed and the person who took A1 to his office was wearing plain clothes and never carried any gun. PW2 testified further that A1 had informed him that she is a Munyarwanda who grew up in Buganda and was therefore conversant with Luganda. Further, PW2 stated that, although he is an Itesot but he spent his childhood in Luwero District, which is a part of Buganda. He is, therefore, well versed in Luganda. He also told Court that he had administered the Caution in *Luganda* language whereas he recorded the statement in English. PW2 told Court that he after recording the Statement, he read it back to the Accused, The accused confirmed it by affixing his thumb print. PW2 countersigned that statement.

On his part, A1 denied having made any statement when called upon to defend himself in a Trial within a Trial. She stated that on the day of her

arrest, she was returning from her bar and was drunk. He regained her senses whilst at the Police station.

The other Prosecution witness was **No. 25681 Sergeant Opii Nicholas** (PW3) a Police Officer residing at *Kiboga* Police Barracks. Specifically, PW3 testified that, in 2007 he was a resident of Kiryokya. He testified that 11th November 2007 at about 10:00am while at Kiryokya Police Post that the Defence Secretary of Kinoni village Mr. Munyasiko went to his office with the complainant, one Peter and A1. He stated further that the Defence Secretary informed him that, while A1 was in her bar, she confessed that she was the one who had poisoned the Complainant's mother. Subsequently, A1 was detained at the Police post. A day after her arrest, she was transferred to Mityana Police Station. It was PW3's testimony that he recorded other witness statements. He owned up to the fact he did not go to the bar where the poison was allegedly administered. PW3 testified that A1 had informed him that she got the poison from Lukwago Joseph, A2. Additionally, during cross examination PW3 testified that the deceased died in 2006 but the murder was only reported in November 2007. PW3 stated in Cross examination that Peter and the Defence Secretary brought A1 to his office. They informed him that the accused had been arrested at her home in Kinani LC 1. but PW3 did not visit the said village during investigations.

There is, therefore, no evidence whatsoever to prove all the ingredients of the offence of murder. Prosecution had the incumbent duty to adduce evidence to prove that indeed Nzamugula Manjeri is dead. It failed to discharge this duty. It is trite law that Court can only rely on a charge and caution statement if it's corroborated by other independent evidence. (See **Festo Androa Asenwa & Another vs. Uganda SCCA No. 01/88**). I am cognizant of the fact that the Prosecution case was primarily based upon the Charge and Caution statement made by A1. However, this was retracted thus necessitating the holding of a Trial within Trial for the purpose of

ascertaining the voluntariness of A1's confession. Although I held that the statement was made voluntarily, the practice is to weigh the evidence in the statement with the oral evidence or other evidence before Court.

In consonance with the case of **Bhatt vs. Republic** *supra*, Prosecution in this case had to prove all the ingredients of the offence of murder to such standard that a reasonable Tribunal, properly directing its mind to the law and the evidence, would convict if no other evidence is adduced.

In murder cases, Prosecution has to prove the following ingredients that is;

- a) Death of a human being
- b) Death was caused unlawfully
- c) It was caused by malice aforethought; and
- d) The Accused is responsible.

I have already stated at the beginning of this Ruling that Prosecution did not call any witness who saw the deceased's body or participated in the burial apart from the Statement of A1 where she confessed that she killed the deceased. It is trite law that death may be proved by evidence of witnesses who state that they attended the burial or saw the dead body. In the case of **Kooky Sharma & Another vs. Uganda Supreme Court Criminal Appeal No. 44 of 2000**, it was held that the fact and cause of death can be established even in the absence of medical evidence, the witnesses can be relied on to establish it. However, in accordance with the facts neither the Post mortem report nor any of the eye witness was called as witnesses.

I agree with the submission of the Defence Counsel that since Prosecution has failed to prove the death of a human being. Court cannot make a determination on whether the death was unlawfully caused. Besides, proof that death was unlawfully caused is a condition precedent.

According to Prosecution, the death of the deceased was due to poison that was administered by A1 and A2. However, I find that this claim has no legal basis. I hold that Prosecution did not prove that the deceased is dead. In the circumstances, I find no good reason to delve into whether other ingredients had been proven.

It is a cardinal principle of criminal law that an accused person should be properly identified and placed at the scene of crime. He/she must be shown to have committed or participated in the commission of the offence and not merely suspected to have committed the offence.

In the matter before me, Prosecution solely depended upon the charge and caution statement made by the accused but which he is contesting. I am alive to the fact that a retracted confession is weak evidence which has to be corroborated by independent evidence. If the Court is inclined to rely on such evidence, the Court must give good reasons why it has done so, Usually it would suffice if Court find the witness truthful. In the case of *Sewankambo Francis & 2 ors v. Uganda, S.C.C.A. No. 33/01*, the Supreme Court while considering the position of law pertaining to retracted confession held that *"the trial Judge does not even need to look for corroboration and can legally convict on the uncorroborated repudiated/retracted confessions provided that he is satisfied that in all the circumstances, the confession is true.* This point was stated in the authoritative case of **Tuwamoi -vs.- Uganda (1967) EA, 84, at 91** which is still good law."

In the current case, I have only PW2's evidence to rely upon and it would be very unfair to believe PW2's evidence without any other testimonial to compare with it and I the face of opposition from the accused. In my considered opinion, Prosecution has not adduce sufficient circumstantial evidence to connect the Accused persons with the offence. I must observe that although there is no restriction about the number of witnesses Prosecution must call, it must present cogent evidence. Additionally, the entire case mentions A1 and A2 but A2's role in the commission of the offence was not amply demonstrated. All the persons mentioned who could have added to the credibility of the 2 oral witnesses were not called to testify. Hence, whatever, PW2 and PW3 claim was told to them , in absence of the testimony of the people who told

them, is considered to be hearsay. Prosecution had 8 good years to investigate this matter and locate the appropriate witnesses.

Therefore, from the foregoing, I find that , pursuant to S. 73(2) of the T.I.A., Prosecution has not provided sufficient evidence thereby failing to present a *prima facie* case against A1 and A2 to warrant putting each of the accused persons in this case to his/ her own defence.

For the foregoing reasons,

1) I Acquit you Sarah Namwanje (A1) of the charge of murder c/s 188 & 189 of the P.C.A. You are free to go and unless there are other charges preferred against you.

Signed -----

Lady Justice Elizabeth Ibanda - Nahamya

Date:

2) I hereby acquit you, Joseph Lukwago of the charge of murder c/s 188 & 189 of the P.C.A. You are free to go and unless there are other charges preferred against you.

Signed -----

Lady Justice Elizabeth Ibanda - Nahamya

Date:

1. Both A1 and A2 are acquitted of the offence of Murder.
2. That A1 and A2 should unless if held on other charges be set free.

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HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA.

JUDGE.

26th MARCH, 2014