THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT PALLISA

HCT-04-CR-SC-95 OF 2013

UGANDA :: PROSECUTOR
VERSUS
MUGODA THOMAS *Alias* MUKIBI ::::::::::::::::::: ACCUSED

BEFORE: HON. JUSTICE HENRY I. KAWESA

JUDGMENT

The accused is indicted of murder.

It is alleged that **Mugoda Thomas** on the night of 24th -25th February 2012 at Kasanja village, Pallisa district, murdered **Kayendeke Marita**.

The accused denied the charge.

The prosecution has the burden to prove beyond reasonable doubt that:

1. There was death

2. The death was unlawful.

3. The death was with malice aforethought.

4. Accused participated in the murder (was the culprit)

The evidence on record for the prosecution was through PE1 (Postmortem report), PE2 (PF24) PE3 (Hospital report). These were all admitted facts. Witnesses for the prosecution were;

PW1- Kadondi Efulansi, PW2 John Nolwe, PW3- Wandwasi Twaha, PW4- Detective Corporal Baluka Susan, and **PW5- Kengo Francis**.

In defence **DW1- Mugoda Thomas** gave sworn evidence.

Briefly, the evidence from the prosecution was as follows;

PW1- Kadondi Efulansi stated that on 24th February 2012 accused went to their home at 12:00 midnight and collected her mum (now deceased). As she left this witness cautioned her regarding the dangers of moving at night. From that time she did not come back, having been found dead the next morning.

PW2- John Nolwe said that on 24th February 2012 at 1:00am, the accused went to his home and collected him on grounds that he had a sick visitor and needed assistance. When he went to the accused's home, he found there the deceased whom accused identified as the alleged "sick visitor". She was in **Mukibi** (accused's) home in the bed, covered properly.

The deceased could not wake up and due to her condition, they decided together to take her to the hospital. When cross-examined he confirmed that by the time they took her to hospital she was already dead. He further stated that the deceased had no known terminal sickness.

PW3- Wandwasi Twaha said that on 25th February 2012, he got information that the deceased (**Kayendeke**) was sick in hospital. He went to hospital to follow her up. At the hospital he found her already dead. The doctor informed him that the person who took her to hospital did so when she was already dead. When the hospital staff explained the stature of the person, he knew it was **Mukiibi** (accused). He therefore informed Kanginima police. Police went there but accused was not there. Police informed the DPC. Accused had disappeared. The postmortem was conducted. It revealed death by strangulation.

The witness stated that he observed the body it was bruised at the neck, and it was wiggling. They went to accused's home and one of the houses had been set on fire. Deceased was burred on 26th February 2012. Witness is the LC1 of Kasaja, Kakoro Pallisa District.

PW4- Detective Corporal Baluka, stated that upon receiving information of the death of **Kayendeke** (deceased) police visited the scene . Information was obtained that deceased was taken to hospital dead. While **Doctor Rubanza** carried out the Postmortem, they went for inquiries at accused's place. They found his house locked and another small house burning. Accused was not there. Police asked the public to let him report himself to police. He later went to police, and was charged.

PW5- Kengo Francis did not testify as his report had been admitted as PE3.

In defence accused **MUGODA THOMAS** gave sworn testimony. He briefly stated that while at home at 9:30pm, he heard a cry in the bedroom. He left the sitting room where he was drinking from and went to check in the bedroom.

He found deceased kneeling by the bedside. She could not talk. He lifted her and put her on the bed. She was breathing slowly. He went and collected **Nolwe John** with whom arrangements were made to take her to hospital. On arrival at the hospital the nurses pronounced her dead.

In the morning around 5:00am, the nurses asked him to remove the corpse; he informed them he needed protection. He went to report to police at Kanginima. He remained at **Kopia**'s place till 6:00pm same day. He went to Pallisa police to report the next Sunday morning. He was detained and charged. He alleged that the death was attributed to people with whom he had many cases and who had grudges against him.

With that evidence, I now proceed to examine the ingredients under the issues below;

1. Whether there was death.

The evidence on record through PW1, PW2, and PW3, sufficiently shows that **Keyendeke** died on 22nd February 2012, and was buried on 26th February 2012. There is corroboration in PE1- the postmortem report. There is therefore proof beyond doubt that there was death.

2. **Whether the death was unlawful**.

In ***UGANDA V OKELLO (1992-93) HCB 68*** and in law it is presumed that all homicides are unlawful, unless excused. The evidence on record as above, and especially the Doctor's report under PE1 showed that the deceased died of Asphixia due to manual strangulation of the neck, leading to fracture of the neck borne. The death was not excusable.

According to ***Uganda V Okello*** (Supra) the onus to show that such death was accidental or excusable is on the accused. Accused never raised that defence, and there is no such evidence. The death is accordingly found to have been unlawful.

3. **Whether the death was with malice aforethought**.

In the case of ***Uganda V Okello*** **(Supra**) it was held that; "Malice aforethought is a mental element but is now established that it can be proved from the surrounding circumstances, e.g. the weapon used, part of the body and nature of injuries. Also similar observation were held in ***Uganda V Kassim Obura and another 1981 HCB 9*.**

In the Court of Appeal case of ***Chesakit Matayo V Uganda Criminal Appeal 95/2004,-*** it was held:

> "*that in considering the factors that constitute malice aforethought, the part of the body injured, type of weapon used, extent of bodily injuries and conduct of accused must be considered*.
>
> *The fact that the appellant aimed at the heart and truck of the 1st and 2nd victims respectively, the use of a gun which is a deadly weapon, and the fact that the appellant ran away to Kenya were evident signs of the existence of malice aforethought*".

In the case before me the assailant aimed at the neck, which is a vulnerable part of the body. The assailant abandoned the victim unconscious. All the above point to existence of malice aforethought. I find that this ingredient was proved.

4. Whether the accused person participated in the killing or was the culprit.

The evidence in this case is wholly circumstantial. I warned the assessors, and myself of the dangers of convicting on such evidence.

I explained to the assessors the need to test this type of evidence for cogency, truthfulness and reliability. I also pointed out the importance of corroboration in this type of evidence. The evidence must be incapable of any other explanation save that accused is guilty.

This was the gist of the holding in ***MASANJA OMARI MLEWA V R (1979) LRTN 14*** that:

> "*Circumstantial evidence can be sufficient to establish the offence of murder and it is no derogation of evidence to say that it is circumstantial. Before conviction on purely circumstantial evidence the Court must be*

satisfied that the inculpatory facts are incompatible with the innocence of the accused and lead irresistibly to the inference of his guilt".

Analyzing the evidence on record, the prosecution has laid before court evidence of PW1, who saw accused collect the deceased from her home on the fateful day. This evidence is not challenged under the test of the rules stated in ***Abdul Nabulere & 2 Ors V Uganda [1979] HCB 77,*** on grounds of mistaken identity. The fact is that PW1 was a daughter of the deceased, she knew the accused very well, and told court that deceased and accused were lovers, so the accused was the only man who habitually collected the deceased from her home. This fact was corroborated by PW2 and PW3who all confirmed that the two were friends. The accused himself did not deny this fact of friendship though he denied the fact that he went over to collect the deceased as alleged. The requirement of ***Nabulere***'s case (Supra) is that a single identifying witness should be tested for correctness. The Supreme Court in ***Bogere Moses and Kamba Robert V Uganda Criminal Appeal N0. 1 of 1997***, held quoting ***Nabulere*** (Supra) that:

"*Where the case against an accused depends wholly or substantiality on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness, with the accused. All these factors go to the quality of the identification evidence. if the quality is good, the danger of mistaken identity is reduced but the poorer the quality the greater the danger….. When the quality is good for <u>example</u> when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, Court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution.…*"

The evidence of PW1 falls in that category of evidence.

Having cautioned myself and the assessors, I went on to weigh this evidence against the tests in the case of ***Nabulere*** (Supra) and ***Bogere*** (Supra). I find that PW1is reliable witness.

She was well known to both the accused and the deceased. On the alleged date, she is shown by evidence to have escorted the deceased.

PW1 saw her mum (deceased) open the door. She followed her, she asked her where she was going, and she saw accused standing outside in the courtyard. There was moon light. She confirmed during cross-examination that she moved close to the accused and saw him.

The distance between them was approximately 3 meters. She spent approximately 3 minutes asking accused why he had called her mum (deceased).

In my view the above conditions were very favourable for proper identification and rule out any possibility of mistaken identity.

The above evidence when considered alongside the rest of the prosecution evidence led through PW1, PW2, PW3 and PW4, and the defence led by the accused corroborates very well.

It is noted from accused's own defence that on that day he was expecting to be with the deceased, and when she did not appear, he sent **Namugwere** with ground nuts to give her and tell her "to come and we organize". That was after they did some work for him at 5:00pm. Then at 9:30pm; he heard the cry in the bedroom where after he discovered that it was the deceased kneeling by the bedside. He left her on the bed them went to call PW2 **Nolwe John** at 9:30pm.

It has to be noted that whereas accused says it was at 9:30pm, PW2 **John Nolwe** testified that accused collected him at 1:00am. This fits in well with PW1 who said her mum (deceased) left the home with the (accused) at 12:00 midnight.

It is therefore this court's finding that when accused realized that the deceased was assaulted it was not at 9:30pm but around 1:00am. Who was the assailant? The accused claims it could have been his enemies who used the backdoor, gained entry and then strangled the deceased.

That argument according to the Resident State Attorney is not tenable to her for reasons that if it was true that his life was threatened why then could he live a behind door open, which led to his bedroom?

I do not find justification in that defence. I however find a nexus between the defence case and prosecution case so much that it is hard to believe that when accused saw the deceased strangled as he claims , he failed to make an alarm , but instead went to PW2, Claiming he had a sick person in the house.

He did not reveal the fact that an assailant had attacked her. All he said was " she is sick, let's take her to hospital." That kind of lax behavior where somebody has entered your house unnoticed and ends up strangled is strange!

How could the accused explain his behavior of failing to alarm? How can he explain the fact that the deceased came into the house stealthily yet he himself says he had sent for her?

There is more plausible evidence from the prosecution to establish through PW1, that the accused is the one who went and collected the deceased from her house.

There is evidence through PW2 that accused is the one who was with the deceased when she got strangled. The accused also claims so, though says he only heard her cry out.

Through PW2- it is established that by the time PW.2 got to the scene, the deceased was already incapable of getting up and was actually dead. Evidence from PW3 shows that the accused disappeared. PW4 also confirms that accused disappeared and showed up later.

All circumstances of this case heavily point at the fact that the accused person knows more about the circumstances of this death, than he has explained in his defence.

In the Supreme Court case of ***Nakisige Kyazike v. Uganda Criminal Appeal N0. 15 of 2009*** The court considered the effect of accused's conduct during and after the action of death, and noted as follows*;*

> *"In cases of homicide the intention and/or knowledge of accused person at the time of committing the offence is rarely proved by direct evidence. More often than not the Court finds it necessary to deduce the intention or knowledge from*

the circumstances surrounding the killing, including the mode of killing, the weapon used and the part of the body assaulted or injured…"

The Supreme Court then took into account the accused's defence that "*she burnt the victim in order to discipline him, later she cooled off the fire, and even participated in taking the victim to hospital*."

The Supreme Court then set aside the conviction for murder and replaced it with one of manslaughter. The above facts and circumstances are distinguishable from the case before me, in that in this case, though the accused participated in taking the deceased to hospital, he did not offer sufficient explanation for the death. He only denied the same. Should he therefore be found without mensrea? I find that the chain of causation is not broken at all by the evidence on record. The evidence by PW1 placed the deceased in the accused's hands; the next time we hear of her is when accused goes to PW2 to report that she is sick. When PW2 goes there he finds her incapacitated and says in cross-examination that she was "already dead".

The evidence from PW3 and PE3 shows that the deceased reached the hospital "dead". The behavior of the accused as described by PW3 and PW4, of running away is not consistent with innocence. His defence merely amounts to a denial. The facts of this case are therefore distinguishable from the facts under the Supreme Court case of ***Nakisige Kyazze*** **(Supra).** The case is therefore not applicable to the case before me.

In the final result, I find that the Prosecution's evidence is sufficient to prove beyond all reasonable doubt that the accused person is the culprit who committed this murder.

The assessors in their joint opinion advised this Court to convict the accused as charged. I do agree. I find that the accused person is guilty of murder as charged. He is convicted of the same. I so find.

Henry I. Kawesa

JUDGE

28.07.2016