

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT – 01 – CR – SC – 05 OF 2015**

UGANDA.....PROSECUTOR

VERSUS

SANYU KEDRESS

KYOBUTUNGI LYDIA



.....ACCUSED

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**Judgment**

The accused persons were indicted with the offence of Murder Contrary to **Section 188 and 189** of the Penal Code Act. It is alleged that on 8<sup>th</sup> June 2015 the accused with malice forethought murdered Muheki Violet. The accused denied the offence and raised a defence of alibi. The prosecution brought 4 witnesses to prove its case. The accused persons gave sworn statements and did not call any witnesses.

The burden of proof is on the prosecution to prove all the ingredients of the offences beyond all reasonable doubt. The burden never shifts except in some exceptional cases set down by law. (See: **Woolmington versus DPP [1935] AC 322 & Uganda versus R.O. 973 Lt. Samuel Kasujja & 2 Others Criminal case No. 08/92.**)

The accused person is presumed innocent until proven guilty or otherwise pleads guilty. It is not for the accused to prove his innocence; he only needs to call evidence that may raise doubt of his guilt in the mind of the court. Any doubt in the prosecution case has to be resolved in favour of the accused person.

Even where the accused sets up a defence, they do not thereby assume the burden of proving it. It is up to the prosecution to disprove the defence by adducing evidence to show that nevertheless the offence was committed by the accused person. (See: **Wamalwa & Another versus Republic [1999]2 EA 358 (CAK); Sekitoleko versus Uganda [1967] EA 531 and R versus Johnson [1961]3 ALL ER 969.**)

It is the duty of the court to evaluate both the evidence of the prosecution and that of the defence and determine whether the burden and standard of proof have been discharged by the prosecution.

The state is represented by Ojok Alex Michael, Regional Principal State Attorney – Fort Portal and Counsel Acellam Collins on state brief for the accused.

Prosecution must prove all the ingredients of the Offence of Murder in order to sustain a conviction thereof. In the case of **Uganda versus Bosco Okello [1992-93] HCB 68** , **Uganda versus Muzamiru Bakubye & Anor, High Court Criminal Session No.399/2010**, it was held that Prosecution must prove the following ingredients beyond reasonable doubt;

1. That the deceased is dead;
2. That the death was caused unlawfully;
3. That there was malice aforethought; and
4. That the Accused person directly or indirectly participated in the commission of the alleged Offence. (See: Also, **Uganda versus Kalungi Constance HC Criminal case No. 443/2007** and **Mukombe Moses Bulo versus Uganda SC. Criminal Appeal 12/95**).

#### **Whether the deceased died:**

In the case of **Kooky Sharma & Another versus 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.

In the instant case the prosecution did not produce any medical proof of death of Muheki Violet, however, PW1 and PW2 and PW4 saw the deceased's body. Therefore, the death of the deceased was not in contest.

#### **Whether the death was caused unlawfully:**

All homicides in Uganda are presumed by law to be unlawful except where such deaths are excusable by law itself. Such excuses consist of the following;

1. Death caused accidentally
2. Death occasioned in defence of life or property
3. Death which is carried out in the execution of a lawful sentence
4. Death that is occasioned as a result of extreme and immediate provocation. (See: **Gusambizi Wesonga versus R [1948]15 EACA 65** and **Uganda versus Okello [1992-93] HCB 68**).

In the case of **Wanda Alex and 2 others versus Uganda, Supreme Court, Criminal appeal No.42 of 1995**, it was held that;

*“After the Court has properly considered all the essential elements which constitute the offence of murder, then the killing was unlawful, since it was not accidental or authorized by law.”*

In the instant case it was the evidence of PW1 and PW2 that the deceased was bitten by a snake. The deceased in this case was not killed by the accused but rather by a snake bite as confirmed by PW2 through his testimony and he was told this information by PW1. Though PW1 had also told Court that the deceased had signs of strangulation on her neck, no medical evidence was adduced to prove this allegation. I find that the prosecution was unable to prove this ingredient beyond reasonable doubt against the accused persons.

### **Whether there was malice aforethought:**

**Section 191** of the Penal Code Act lays out circumstances under which malice aforethought is deemed to be established. These are:

1. An intention to cause the death of any person, whether such person is the one actually killed or not.
2. Knowledge that the act or omission will probably cause death of same person, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused. **(See: R versus Tubere (1945)2 EACA 63; Mugao & Another versus Republic [1972]1 EA 543 (CAN) and Bukenya & Others versus Uganda [1972]1 EA 549 (CAK).**

I find that the prosecution did not prove this ingredient to the satisfaction of this Court since the accused died from a snake bite other than being killed by the accused persons. Therefore, there was no malice aforethought involved in this case.

### **Whether the Accused person directly or indirectly participated in the commission of the alleged Offence:**

An accused person who raises an alibi does not assume the burden of proving it. It is up to the prosecution to adduce evidence placing the accused person at the scene of the crime, showing that nonetheless, the offence was committed by the accused person. **(See: Sekitoleko versus Uganda [1968] EA 531.)**

PW1's statement in Court was inconsistent with what he told Police, and this creates great room for doubt. That he met 4 people as he was looking or his wife but never mentioned the same at Police.

PW2 could not confirm to Court that he saw the snake bite on the deceased's body but only told Court that PW1 is the one that told him that the deceased had been bitten by a snake. That it was dark at the time and PW2 did not notice any injuries on the deceased's body at the time. He basically gave hearsay evidence in regard to the cause of the death of the deceased.

PW3 the alleged eye witness was a 6 year old who was found not in possession of sufficient intellect to testify in Court. Even though PW3 had testified, Court had to be extremely cautious while taking the evidence of a single identifying witness if it is not corroborated.

PW4, the detective that visited the scene of crime gave evidence contrary to that of PW1 and PW2. He mentioned that the house of the accused persons was found disturbed, and that there were signs of violence on the deceased's neck yet he never went ahead and indulged medical personnel to determine the cause of death. No exhibits were tendered in Court; no weapon was recovered, no medical evidence or eye witnesses were produced by the prosecution.

PW4 also told Court that there was no disturbance of the vegetation at the scene of crime.

Furthermore, the investigating officer (if any) never came to testify in Court.

It should be noted that a drum was sounded at PW1's home after the death of his wife and the accused persons did respond to the drum only to be accused of killing the deceased. The accused out of prudence went to the Police Post of the area and reported the fact that they were being accused of murder which they had not committed. The crowd in the village had turned violent and there would have been an incidence of mob justice if the accused had not gone to Police. The accused were instead detained at the Police post yet they had gone for protection for fear of being lynched.

I find that the Prosecution failed to put the accused persons at the scene of crime. Given the fact that even A2 in her defence told Court that when she was returning from taking her sick child to his father, she met PW1 with his children, she greeted him and he did not respond. She also expressed her concern to A1 over the fact that she met PW1 with his children without their mother. This to me is not conduct of a guilty person but rather one who is innocent.

**Grudge**

PW1 and PW2 told Court that the accused persons and PW1 had a grudge over land. That the accused persons also had a grudge with the deceased over clusters of matooke that were once taken by the deceased. However, the accused averred that if it were the case why would they take revenge on the deceased and not their brother with whom they had land issues. They denied ever having a grudge with the deceased and A1 told Court that they even used to share food with the deceased. That even on the fateful day the deceased's children had eaten from A1's home.

I find that the prosecution did not prove the offence of murder beyond reasonable doubt against the accused persons. The evidence on record is insufficient to have the accused convicted of the same. There were a number of inconsistencies in the evidence of the prosecution witnesses. I am also in agreement with the assessors that the accused should be acquitted for lack of evidence on the charge of murder against them. They are acquitted and set free.

Right of appeal explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**18/11/2016**

**Delivered in open Court in the presence of;**

1. Counsel on State Brief – Acellam Collins

2. Prosecutor – Ojok Alex Michael – Regional Principal State Attorney
3. Court Clerk – James
4. Assessors

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**18/11/2016**