

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT LUWEERO CHIEF
MAGISTRATE’S COURT
CRIMINAL SESSION CASE NO. 393 OF 2014
(ARISING FROM THE CHIEF MAGISTRATE COURT OF NAKASONGOLA CASE
NO.34 OF 2012)

UGANDA :: PROSECUTION
VERSUS
AYO LEO :: ACCUSED

JUDGMENT BY HON .MR. JUSTICE JOSEPH MURANGIRA

1. INTRODUCTION

1.1. REPRESENTATION

The prosecution is represented by MS Kasana Hanifa, State Attorney in the Directorate of Public Prosecution`s office at Luweero District. And whereas the accused is represented by Mr. Walyemera Daniel from G. Baguma & Co. Advocates for the accused on state brief.

1.2. Assessors in this case are;

- (i). Mr. Kiwalabye Issah
- (ii). Mr. Herbert Masaba

2. Facts of the case

On 19th October, 2012 at Zengebe Mayinja village in the Nakasongola District, the accused Ayo Leo with Malice aforethought unlawfully killed Yaawe Robert.

3. Indictment

The accused was indicted with murder contrary to Section 188 and 189 of the Penal Code Act, Cap 120 Laws of Uganda.

4. The ingredients of the charged offence of murder are;

- (i) The person named in the indictment is dead
- (ii) The death of the deceased was unlawfully caused
- (iii) The death was caused with malice aforethought.

(iv) Participation of the accused in killing Yaawe Robert.

5. Burden of proof:

In all criminal cases except in a few statutory offences, the prosecution bears the burden to prove all the above named ingredients of murder against the accused beyond reasonable doubt. The standard of proof is proof beyond reasonable doubt. This burden of proof does not shift to the accused to prove himself innocent. If there is any doubt created in the prosecution case, that doubt must be resolved in favor of the accused person. See the case of **Woolmington Vs DPP [1935] AC 462** See also Article 28 of the Constitution of the Republic of Uganda, 1995.

6. Witnesses for the parties

6.1 The Prosecution witnesses

In order to prove its case, the prosecution called the following witnesses.

- (i) Mr. Peter Kakooza, Uncle to the deceased, PW1
- (ii) Mr. Ssekamate Wilson Kunobe, Zengebe LC1 Chairperson, PW2

6.2 In defence, the accused opted to keep quiet and called no witnesses.

7. Resolution of the case by Court.

7.1 At the close of the defence case, both counsel opted not to make submissions in this case. The 2(two) gentlemen assessors in their joint opinion found that the prosecution proved the first three ingredients of the offence of murder but failed to prove the participation of the accused in the killing of Yaawe Robert. They advised me to acquit the accused person of murder.

7.2 Before analyzing and evaluating the prosecution evidence on court record, allow me to evaluate how this case was prosecuted.

On 10-3-2016, plea was taken and the accused pleaded Not Guilty to the charge of Murder. On 22/3/2016 the parties under Section 66 (i) of the Trial on Indictment Act Cap 23, Laws of Uganda allowed by consent in evidence for the prosecution PF 48C, the post mortem report in respect of the deceased, Yaawe Robert EXH P1, and PF 24A on which the accused was examined EXH P2. On that same date the prosecution adduced evidence from two (2) prosecution witnesses. The same witnesses were seriously cross examined by counsel for the accused, Mr. Daniel Walyemera.

On 6th April, 2016, counsel for the prosecution addressed court that the eye witness was not able to attend court on that date. That they were in direct communication with her.

On 11th April 2016 counsel for the state, when the case came up for further hearing, addressed court that the eye prosecution witness turned hostile during her interview with him. She thus requested for adjournment to enable her to consult the DPP on the matter. The request for adjournment was granted to her.

On 19th April, 2016, when the matter came up again for hearing, counsel for the prosecution informed court that their office clerk is still on her way with the files from the DPP's office, Kampala. She requested for another adjournment of the case. The court granted her last adjournment to 22/4/2016 awaiting the DPP'S opinion on the matter.

On 22/4/2016, when the case came up for hearing, counsel for the prosecution Ms. Kasana Hanifah State Attorney, told court that the case was submitted to the DPP for his advice. That they were advised by the DPP to close the prosecution case. She therefore closed the prosecution case.

7.3 On the first ingredient; the death of Yaawe Robert.

PW1 and PW2 gave evidence that Yaawe Robert died on 19th October 2012 and was buried. This evidence was corroborated by PF 48B, the post mortem report which confirmed the death of the deceased. This evidence was never challenged by the defence in cross examination. I am therefore in agreement with the assessors that the prosecution proved this 1st ingredient.

On the 2nd ingredient: death was caused unlawfully

In his defence, the accused opted to keep quiet. On the question of whether the death was caused un-lawfully is a question of law. Article 22 (i) of the Constitution of the Republic of Uganda, 1995 guarantees protection to right of life. To this regard, no person shall be deprived of his or

her life except as provided by the law or a sentence of death confirmed by the Supreme Court of Uganda. Again in the case of Wanda Alex and 2 Others Vs 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 premises, therefore, considering the prosecution evidence on court record, I agree with the assessors that the death of the deceased was unlawfully caused.

On the third ingredient: The death was caused with malice aforethought.

To determine whether the death was caused with malice aforethought has been set out in a number of cases. In the case of **Wanda Alex and 2 Others Vs Uganda (supra)**, it was held that;

“Malice aforethought could be inferred from the surrounding circumstances such as the weapon used and part of the body on which it was used.”

Again in Section 191 of the Penal Code Act malice aforethought is defined as; “Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances;

- (a) An intention to cause death of any person whether such person is the person actually killed or not, or
- (b) Knowledge that the acts or omissions causing will probably cause the death of some person, whether such person is that one actually killed or not; although such knowledge is accompanied by indifference whether death is caused or not, by a wish that it may be caused.”

From the evidence on court record, no explanation is given as to whether death was caused with malice aforethought or not. However, I have looked at the post mortem report and according to that report;

- (i) External injuries; ‘stabbed wound on the left side chest penetrating to the heart size, 2 by 2 inches depth-up to the heart.’
- (ii) Internal injuries; “heart penetrated by sharp object.”
- (iii) Cause of death and reasons for same, “severe hemorrhage following rupture of the heart.”

From the evidence on record, the weapon used to kill the deceased was never exhibited in court. However, the part of the body on which a sharp object was used was the heart. Wherefore, considering the two authorities cited above, the post mortem report and the advice of the assessors; I find that the third ingredient of murder was proved by the prosecution.

On the fourth ingredient of the charged offence, the participation of the accused in the killing of the deceased, Yaawe Robert.

From my analysis of the prosecution evidence of this case, herein above in this Judgment, counsel for the state got difficulties in prosecuting this case. She sought assistance from the DPP which was in vain. She was advised to close the case for the prosecution at such a premature stage, to say the least.

In his evidence, Peter Kakooza PW1, the uncle of the deceased stated, “From the police investigations I am sure that the accused Ayo Leo, is the one who killed my son.”

His evidence is vital in as far as narrating the incidents after the death of the deceased. The prosecution should have called the police investigating officer and the police arresting officer and those police officers who recorded statements from the accused to fill up the gap created by PW1 in the prosecution case, such police officers were never brought to court by the DPP to give evidence against the accused.

Further, PW2 Ssekamate Wilson Kunobe the LC1 chairperson of Zengebe village, Zengebe Parish, Wampanga s/c in Nakasongola District gave evidence on how he got the report from one Nambooze Stella who was sent by Nalukwago Ruth, that someone had died at her home in the compound. The prosecution should have called Nambooze Stella and Nalukwago Ruth to testify

in this case. The prosecution`s failure to call such witnesses to come to court to testify in this case left a big gap un-covered in the prosecution case.

PW2, further stated in his evidence that he went with the police to Sarah Awori`s home upon getting information that Yaawe Robert had spent a night at Sarah Awori`s place. That Sarah Awori was the deceased`s girl friend whom the latter had snatched from the accused. At this point, Sarah Awori would have been called by the prosecution as a witness. Through their investigations, the police established from Nakakooza Ruth, a girl who was aged 9 -10 years old at the time of the incident whom he said;

“On 20/10/2012 the following day, police O/C CID Aleperi from Rwampanga police post came and told me that Nakakooza Ruth was saying that it was Ayo Leo who killed Yaawe Robert...”

PW2 further stated in his evidence that he went with the said police officer to cornerstone primary school where Nakakooza Ruth was studying from. That Nakakooza Ruth was interviewed in his presence and that she said that;

“Ayo Leo came and asked Awori to open the door and that Sarah Awori refused. Then the accused Ayo Leo pushed the door. That then Awori opened the door and stood in the doorway. Ayo Leo then pushed her away and went straight to Yaawe Robert who was asleep in the bed. They started fighting; pulled him to the door way and that immediately outside there were two (2) men who assisted the accused to beat Yaawe Robert. That the deceased became powerless and fell down. That then they pulled the deceased to where he was found lying dead.”

It was very important to call Nakakooza Ruth to come to court and testify. This girl besides Sarah Awori among others was a direct witness. PW2 gave evidence on what happened immediately after the death of the deceased. PW1`s and PW2`s evidence needed to be corroborated by other independent witnesses. The prosecution`s failure to call its vital witnesses to come and testify in this case created a very big gap in the prosecution case. This is a case that the DPP should have entered a Nolle Prosequi; so as to give himself more time to organize his

case. In the result therefore, I am in agreement with the gentle men assessors that the prosecution failed to totally prove the 4th ingredient of the offence charged.

8. Conclusion:

In closing and in consideration of my analysis of the law, how this case was prosecuted, I am of the considered view that this case was poorly prosecuted by the state. This is a case, in my view, where the prosecution should have secured a conviction against the accused. However, and for the aforestated notwithstanding, I hold that the prosecution failed to prove this charge of murder against the accused beyond reasonable doubt. Accordingly, therefore, the accused, Ayo Leo stands acquitted of the offence of Murder Contrary to Section 188 and 189 of the Penal code Act.

Dated at Luweero this 10th day of May, 2016

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JOSEPH MURANGIRA

JUDGE

10/05/2016

10/05/2016

Ms. Kasana Hanifah for the State

The case is for Judgment and we are ready.

Mr. Walyemera Danniell for the accused on state brief is absent

The accused is in court

The 2 assessors are in Court

Mr. Nekusa Amos the clerk is in Court

Court: Judgment is delivered to the parties.

Right of Appeal is explained to the parties.

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JOSEPH MURANGIRA

JUDGE

10/05/2016

