

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASAKA
CRIMINAL SESSION CASE NO. 019/2013

UGANDAPROSECUTION

Versus

NAMAKULA ZAAMU..... ACCUSED

BEFORE: HON. JUSTICE DR FLAVIAN ZEIJA

JUDGMENT

The accused, Namakula Zaamu is indicted for murder contrary to sections 188 and 189 of the Penal Code Act. It was stated in the particulars to the charge that Namakula Zaamu, on the 2nd day of October 2012 at Misanvu village, in Kibinge Subcounty in Bukomansimbi District murdered Batenda Juma. The accused denied the charge and was represented by Kalule Frederic while the prosecution was led by M/s Baxter Bakibinga. The prosecution relied on Five witnesses to prove its case.

At the commencement of the hearing, the prosecution and the defence agreed on the following documents

1. Post-mortem report (Police Form 48B) which shows that a one Batenda Juma died. He was examined by Dr Ntuyo Gonzaga at Masaka Regional Referral Hospital on the 3rd day of October 2012. He had external injuries of a cut wound on the Abdomen measuring 7 cm long. The examination was conducted on the 4th of October 2012. The injuries were found to be 2-3 days old and were caused by a blunt object. The Doctor classified the injuries as grievous harm.
2. Police Form 24 where the accused was examined. She was found to have three injuries on the head. She was found to be well oriented, had normal speech and memory.
3. Police Form 3 (Medical examination of the injured person): The accused was examined at Butenga Health Centre. She was found to be having injuries inflicted 2-3

days before examination. The injuries were classified as grievous harm. The accused was found to be a middle aged lady with three dressed wound on her head.

It is alleged in the brief that the deceased Batenda Juma was resident of Misanvu Village, Kibinge Sub County in Bukomansimbi district and married to the accused with whom they had several children. On the 2nd day of October 2012, at around 10:00, the deceased was found lying on the floor with a cut wound on the stomach unable to talk and died shortly thereafter. The accused informed the onlookers who had responded to her alarm that the deceased had hit her with a harmer on the head. These events took place after the accused had asked the husband why he was subdividing the land. At the scene, police recovered a blood stained knife and panga alleged to have been used by the accused and were exhibited at the trial. The deceased's body was examined on police form 48 B and established that he had a cut wound in the superior most part of the epigastrium and the cause of death was due to the damage to the diaphragm and excessive haemorrhages. The accused was examined and found to be in a normal mental state.

In every criminal trial, the burden of proof rests on the prosecution to prove the offence with which the accused person is charged beyond reasonable doubt. The burden remains regardless of the weaknesses in the defence case, save in a few statutory exceptions see ***Sekitoleko v Uganda [1967] EA 531***. Any weakness in the defence or lies told by an accused shall not be relied upon to bolster the prosecution case or be a basis for convicting the accused. Nevertheless, lies in the defence can corroborate the prosecution's evidence. If there is any doubt created by the prosecution's evidence, that doubt must be resolved in favour of the accused and the accused must be acquitted. See also the case ***of Woolmington vs. D.P.P. (1935) A.C. 462 and Oketh, Okale & others vs. Uganda (1965) EA 555***

The offence of Murder has mainly four ingredients which must be proved beyond reasonable doubt in equal measure.

- (a) The death of a Person named in the indictment.
- (b) The death of deceased was caused by an unlawful act or omission
- (c) The act causing the death of that person was accompanied by malice aforethought

(d) That it is the accused who caused the death of that person. This death can be caused by the accused alone or in conspiracy or in common intention with others.

The cases of ***Uganda vs. Harry Musumba (1992) 1 KALR 83 and Kimweni vs. Republic (1968) EA 452*** are instructive on the ingredients of the offence of Murder.

Ingredient (a) and (b): Unlawful Death:

The postmortem report which was admitted in evidence as PE1 show that the deceased died of a cut wound on the superior most part of the Epigatrium. This damaged the diaphragm and impaired his respiration. There was also excessive haemorrhage. The body was identified as that of Batenda Juma who is named in the indictment. It was examined by Dr Ntuyo Gonzaga. The defence and prosecution witnesses also testified that the deceased was buried in their village. The son of the deceased DW2 saw the dead body of the father and attended the burial. It has been a long held position of the law that every homicide is unlawful unless authorised by the law. See the case of ***R. vs. Sharnpal Singh (1962) EA 13 and Uganda vs. Kulabako Night - Crim. Sess. Case No.61/91*** . Whoever cut the abdomen of the deceased Batenda Juma had no claim of legal right to do so. The death was unlawful without any scintilla of legal justification. There is no doubt that the prosecution has proved beyond reasonable doubt that death did occur and the death was unlawful. I so find.

Ingredient (c) Malice aforethought

Section 191 of the Penal Code is instructive on this matter. It provides:

191: Malice aforethought.

Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances—

(a) an intention to cause the death of any person, whether such person is the person actually killed or not; or

(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.

Malice aforethought can be determined from the type of weapon used (Is it deadly/lethal?), the gravity of the injuries inflicted on the deceased, the part of the body on which the injuries

were inflicted, and the conduct of the accused, before and or after the commission of the offence. The cases of ***R. vs. Tubere s/o Ochen (1945) 12 EACA 63 and Uganda vs. John Ochieng (1992-3) HCB 80***

It is clear that the injuries on the body of Batenda Juma were inflicted on the most dangerous parts of the Body. The abdomen of the deceased was ripped open by a blunt object and the diaphragm was shattered. A panga and a knife were recovered at the scene and were used in the said acts. These are for all intents and purposes lethal weapons when applied for that purpose though they are domestic tools.

Whoever inflicted the injuries on the deceased as evidenced by the medical report must have done so with malice aforethought. Counsel for the prosecution and defence agreed that whoever killed Batenda Juma did so with Malice aforethought. I find that this ingredient was proved beyond reasonable doubt. In any case, it was not contested.

Ingredient D: The participation of the accused:

1. Evidence from witnesses

The accused and the deceased were alone in their marital home when the deceased was injured. PW1 Twaha Rusiba a resident of the village and chairperson LC 1 told court that on the 2nd day of October 2012, he was at home. A one Edward Matovu came for him saying that the Deceased had attacked his wife. He rushed to the deceased's home and found many people had gathered. He was informed that the accused had been taken to hospital. He informed police accordingly. He saw blood stained clothes but he was informed that the clothes were those used to clean the accused. When the policeman came, they entered the house. They found the deceased lying on the bed on the side. He had a lot of blood on his stomach. They carried him to the behind room. He was still breathing but not talking. He carried him together with secretary for Defence. The policeman advised them to call for a CID officer so that they can transport him to Masaka Hospital. They contributed some money and an ambulance came from Masaka Hospital but died on the way to hospital. PW1 saw some droplets of brood at the entrance but he said he was informed that that was the blood of the accused. There was no evidence of the struggle in the room.

PW2 Turyamureeba Johnson a detective sergeant in charge of Bugasa Police station stated that he was attached to Misanvu in 2012. He was on duty when PW1 and the Defence Secretary came. They informed him that the deceased had injured his wife and he was hiding

inside the house. He arrived at the scene with Semaganda Moses a Special Police Constable. He entered the room where the deceased was lying but he could not talk. He was in clean clothes. His arms were folded on his chest. There was no pool of blood. He had a wound on his stomach. It was a big cut and he was bleeding but still alive. SPC Semaganda showed him a knife that was recovered in the room. It was blood stained with hair on it. He also showed him a panga which was also recovered from the room. There were blood stains on the carpet and floor. The deceased died on his way to hospital because the ambulance delayed to arrive. He went to the clinic where the accused had been admitted. She could not explain to him what happened. Later in the evening, she got information that she had been discharged and people wanted to lynch her. A one Mutebi was mobilising. They rushed her to Bukomansimbi Police station. He interviewed Matovu Edward who was digging near the home of the deceased. He told him that he heard an alarm and when he came close, he saw the accused running out of the house. PW2 was informed that the deceased never used to stay at home and there was suspicion that the accused had lovers.

PW3 SPC Semaganda Moses said that when he arrived at the scene, there were many people. He was told that the deceased was hiding inside the house after killing his wife. He entered the house and found blood in the behind sitting room. He pushed the bedroom door called the deceased but he could not answer. He opened the window, carried the deceased outside. He had a deep cut wound and the intestines were ousing out and blood as well. He recovered a blood stained knife and a panga at the scene after searching the house. He recovered only a broken handle of the hammer. It is not clear where the hammer which the accused alleges to have been used on her was and it was never recovered. He said people at the scene were saying the husband and wife fought. The items recovered at the scene were taken to police.

PW4 who was secretary for defence stated that when he arrived at the scene inside the house with PW3, the accused's arms were folded. Semagganda discovered the knife under the carpet. It was blood stained. It had some hair on it. They also discovered a piece of harmer handle and a panga. He said the police never took his finger prints. There was no evidence of a scuffle in the house.

PW5 who was a detective sergeant Sebwato James said that he recorded a plain statement from the accused. The rest of the aspects like visiting the scene of crime were done by Misanvu Police Post. He only received a file from there as well as exhibits. The accused stated that she returned from Kampala that night before the incident happened. She never had

issues with the husband until in the morning. When she was going to weed the beans after the children had gone to school, she discovered that part of the plot had been subdivided. She left what she was doing and went back home to ask the husband why he had subdivided the plot. The deceased replied that the part that had been parcelled up was for his heir. The deceased cautioned her that she would not be able to finish the year. She went back to weed the beans as the deceased was standing near the part that had been subdivided. After the weeding, she got home and showered. As she was smearing lotion on her body, she heard a bang on her head. She took off and went shouting for help. She realised that the husband had a hammer when he hit her on the head. She informed him that she left the husband at home without any problem. He said there were exhibits, a panga with blood stains, a blunt knife also with blood stains and some hair and a broken piece of hammer handle. He exhibited these in court. After his investigations, he discovered that what brought problems was land. It was when the accused discovered that the land had been subdivided that the problems started because at night they had no problems. The accused did not disclose to him the person who was mentioned by the deceased as heir. The husband had two different families. It is only the deceased and the accused that were at home. He concluded that it was the land dispute that caused the deceased's death.

In her defence, the accused stated that the deceased husband had summoned her to go to Kampala and take care of the daughter who had given birth. The deceased came to Misanvu to remain with the family as the accused was in Kampala. She returned from Kampala after one week and reached home at night. They had dinner and there was no problem. In the morning at around 8:00am, she went to the garden to weed beans. She saw the husband demarcating land. She asked him why he was putting boundary marks. He replied that he was demarcating land for his heir. After digging she went home and showered. When she was seated inside the house smearing herself, the husband struck her with a harmer on the head. She made an alarm and that is when she stopped understanding. She regained her senses in the clinic at Buyoga in the afternoon at 2:00pm. She was later told that Mrs Nelson had taken her to hospital. From the clinic, she arrived home and was told that her husband had died. She said there was no any other person at home. She was at home with the husband alone.

DW2 the son to the accused testified that his father was staying with him in Kampala during the holy month of Ramadan and he kept talking about his eventual death. He said that he was not going to finish that year alive. He said he did not take him seriously until he was told that

he had died. However, a close look at his testimony shows that he was not truthful in his testimony. He would think through his answers and he would first look at the mother before giving answers. He also told a deliberate lie. One of the most outstanding is when court asked him whether there was blood inside the house and, he said he never entered the house. Yet the dead body was inside the house before burial. Where did he stay after the burial? He could not answer that. It was also apparent from his evidence that he never attempted to visit the mother in prison for the 6 months she was in prison. He also did not know the names of his step brothers and said he had seen them once in his lifetime when they came for burial.

2. Submissions:

Counsel for the applicant argued that the accused was placed at the scene of the crime. She was within metres from where the accused was found bleeding. He said that DW3 stated that she was gardening when she heard an alarm and rushed instant to the home. Counsel's contention was that the accused decided to edit her memory before court saying that she lost consciousness. When you read her statement, she stated that when she was hit, she rushed outside the house and met her rescuers outside the house. By the time she left the house, she was in her full memory. He argued that lies provide collaboration to circumstantial evidence. He referred to the **Supreme Court in Birembo Sebastian & another Vs Uganda; Civil Appeal No. 20 of 2001.**

He further argued that this case was hinged on circumstantial evidence. This is a situation where two people are at home, the accused confronts the deceased and asks him to explain why the land had been subdivided. The response by the deceased that "do you want my heir to inherit blood only" is a loaded statement. Although the accused tried to add that he told her that the heir was her son, why would the deceased need to emphasise that? He also argued that DW2 the alleged heir did not know the names of his step brothers. It is the land that was the crux of the matter. He also argued that DW3 who was a neighbour who rushed at the scene did not see any other person at the scene. He concluded that the truth of the matter is that there was a conflict in the family over land and by the time the accused made an alarm she had already finished off the deceased. The deceased never talked until he breathed his last. All that was done by the family to try to cover up the truth. He also referred to the evidence of PW1 and PW3 that discovered the knife at the scene of the crime. The knife was discovered under the carpet. There was also a shirt that had blood stains and a panga. He argued that there is no way the accused could have cut himself and then hide the knife under the carpet. He was under a lot of pain. He concluded that there was only one conclusion that whoever put that knife under the carpet was responsible for that vicious attack. People who

came to the scene found there only one person the accused. He concluded that this circumstantial evidence was the best evidence. He referred to the case of ***Republic Vs Thomas Gibert Kyoths Ndeley Crim. Case No 55 of 2006 high court of Kenya.***

He also argued that when the accused and her son were confronted with the evidence of the step children, they became uncomfortable. DW2 did not know the step brothers yet he was supposed to be the heir for both his brothers and step brothers. The family tried to present a rosy picture of a good relationship but there were simmering tensions that resulted into the death of the deceased. He concluded that the circumstantial evidence has no any other explanation other than the guilt of the accused. This evidence was compounded by the lies of the defence. DW2 claimed not to have entered the house!

Counsel for the accused on the other hand argued that the prosecution miserably failed to prove that the accused participated in the Murder of the deceased. He reiterated the story of the accused that when she was hit, she fell and became unconscious. She made an alarm and was rescued by among others DW3. DW3 testified that she found the accused in a pool of blood, and assisted her to the clinic. The accused testified that she never went to the bedroom. There was no evidence led to prove that the accused ever entered in the bedroom. He also argued that the charges against the accused are based on circumstantial evidence. He referred to the case of ***Musoke Vs R, (1958) E.A. 715.*** HE said that before a judge can convict based on circumstantial evidence, he must establish that the exculpatory facts were incompatible with the innocence of the accused and incapable of any other explanation upon any other reasonable hypothesis than that of the guilt of the accused. He argued that there was no evidence that the weapons recovered at the scene were ever used by the accused. He stated that expert evidence would have helped to unravel this puzzle and he relied on s. 33 and 34 of the Evidence Act. He said that oral evidence must be direct and referred to S. 59 of the Evidence Act. There was no direct evidence adduced. He argued that the accused gave her evidence on oath and tried to explain what happened. There were minor contradictions especially the time the accused had spent with the deceased in marriage. He said there were coexisting circumstances that weaken the prosecution's evidence. The fact that the deceased was talking about his eminent death and DW1 and DW2 testified to that effect, this weakens the circumstantial evidence.

Court's Decision

Motive

In a criminal prosecution, save for a few exceptions like Libel if a defence of Fair Comment or qualified privilege is raised, motive is always an important aspect of criminal prosecution. This is grounded on the fact that a person in his normal state of mind cannot commit a crime without a reason or motive. *See John Wanda V Uganda (Criminal Appeal No. 37 of 1998)*

The existence of a motive makes it more likely that the accused would commit a crime. In this case, there was a simmering conflict relating to subdivision of the land, parceling out a portion for the heir. While the accused tried to convince court that the deceased told her that the heir was her son, it is not true because she did not mention this at the police station in her statement when her memory was still fresh. It should be noted that in many of the African cultures, a heir is the eldest son unless the son is a rogue. The eldest son in this case was for the first wife of the deceased. The deceased had another wife who had two sons older than the accused's. I'm convinced that this was the motivation that led to the accused to commit this heinous crime to protect the interests of her sons. It should be noted that there was no problem on that fateful day until the accused asked the husband why he was subdividing the land. It did not take more than two hours after that confrontation on the subdivision of land before the deceased was killed.

Mood of the accused after the crime of Murder

The mood of the accused after the crime can also provide a lead as to whether he/she committed the crime or not, since it involves loss of life. In this case, the accused was unbothered by the fact that her husband had died. I refer to the words of the Doctor who examined the mental state of the accused after committing this crime. Upon examination of the accused, the doctor observed in police Form 3A and I quote:

“The accused was in a normal mood without any signs of grieving the deceased husband”.

Clearly, a person who had lost a loving husband would be in a grieving mood. In the case of the accused, she found it important not to grieve. In my view, the doctor's opinion is a pointer to the bigger problem that greets an ordinary eye.

Circumstantial Evidence

This case squarely lies on circumstantial evidence. There was no prosecution witness who saw the accused commit the crime. Circumstantial evidence can be good evidence to support

a conviction. In the case of ***Kyeyune Joseph v Uganda (Criminal Appeal No. 48 of 2000)*** [2003], the supreme court observed regarding circumstantial evidence:

"In a case depending exclusively upon circumstantial evidence, the court must before deciding upon a conviction be satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. See Simon Musoke v R (1958) EA 715. In the English case of Teper v R (1952) AC 489 which was followed in Simon Musoke (supra), the court stated that before drawing the inference of the accused's guilt from circumstantial evidence, court had to be sure that there are no co-existing circumstances that would weaken that inference."

From the evidence, we have a scenario where by two people are in the house, one allegedly assaults the other with a harmer after a confrontation about a subdivision of land, she becomes unconscious upon making an alarm and the other is found almost dead with his stomach slit, a blood stained knife hidden under the carpet and a blood stained Panga in the room. The deceased is in clean clothes, there is no pool of blood but some little blood coming out of his slit stomach, his hands folded on his chest. This narrative cannot be explained away by the innocence of the accused.

It has been a long held principle of law that when the prosecution evidence is credible, the lies told by the accused provide good corroboration for the prosecution evidence. See ***Kutegana Stephen V. Uganda Cr. App. No. 60 of 1999***. I need to point out from the onset the following lies/contradictions that were told by the accused in court Vis-a –vis what she told police.

1. She stated in court that she was hit on the head by the accused when she was seated smearing herself with a lotion. In her statement to police, she said she was bending while smearing herself when the deceased hit her.
2. She told court that when she was hit the second time, she fell on the floor and made an alarm. That is when she stopped understanding and became unconscious. In her

statement to police, she stated that when she was hit by the deceased, she run out of the house making an alarm which attracted neighbours. The first person to come to her aid was Kaguma her immediate neighbour and Mrs Kasozi. She could still remember all this when she made her statement. I wonder how a person who is unconscious could still remember the person who came to her rescue first and the one who followed.

3. She stated during cross examination that by the time she got married to the deceased, his first wife had left. She left two children in Bulayi Village. In her statement to police, she said her husband has another wife with two children and she stays in Bulayi.
4. In her statement to police, she stated that she had been married to the deceased for 30 years while in her statement; she stated she was married for 20 years. She said she married him when she was 15 and she was 41 years old but on calculating, it was established that she was 11 years if we were to go by what she stated in court.
5. Time of subdivision of the plot. In her testimony, she said she saw the husband subdividing land when she was weeding the beans. In her statement to police, she stated that when she went to the garden she saw land demarcated already

DW2 was also a consummate liar. He attempted to lie to court that he never entered the house when he came for the burial of his father and he does know whether there was blood in the house or not. Yet the body was inside the house. He was not a reliable witness as he would think through his answers before giving them. Another lie he told is that he did not know the names of his step brothers.

The prosecution produced credible witnesses who testified that there was no any other person that could have killed the deceased inside the house. I have already stated their testimonies above. There was only the accused and the deceased in that house. The argument by counsel for the accused that the accused could have taken his life is unbelievable. He could not have cut his stomach open and then attempt to hide the knife under the carpet. Who cleaned the blood from the house? A person whose stomach was slit and the diaphragm damaged is using a lot of blood! Who changed his clothes? Could he mop his blood from the house in such pain? It is my conclusion that by the time the accused made an alarm, she had already finished killing her husband and tried to put her house in order. It is also inconceivable that the deceased could have used the Panga on himself.

In the result, it is my finding that the accused killed her husband Batenda Juma, with Malice aforethought given the weapons used to kill him and the part of the body that she targeted.

In *Nanyonjo Harriet and anor v Uganda SC Criminal Appeal No. 24 of 2002*, the Supreme Court held that

For a court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act that caused death and if the accused foresaw death as a natural consequence of the act.

By the time the accused picked the weapons to kill the husband, she should have foreseen the consequences of her actions. It is inconceivable that the weapons used were within her easy reach. She must have looked for them. The accused had the option of running away from her attacker without doing what she did. The act of attempting to hide the knife under the carpet after the event also presents a sinister motive that was not accidental, but premeditated. No wonder the residents wanted to lynch her when she returned from the clinic and she was rescued by police who arrested her (see PW2 evidence). They were convinced that she had murdered her husband. Her son DW2 did not visit her at police as well as in prison for a period of 6 months. He was also convinced that she killed his father. The mere fact that she was not grieving for the husband's death as the doctor observed also presented a clear indication that this was a deliberate act. I reject the argument that because the weapons were not subjected to forensic examination, the accused did not use them. Expert evidence is only advisory and persuasive. Clearly, there was a fight between the accused and the deceased but the deceased was no match for the accused given his advanced age and the age difference. The accused attempted to develop convenient amnesia to prevent court from accessing the truth. The fact that the accused's son did not visit her for 6 months when she was in jail is also telling. It is a pointer to the belief he had that the mother had killed his father. I am mindful of the fact that I have to depend on the strength of the prosecution's case and not the weakness of the defence.

Consequently, I find the prosecution has proved the offence of murder against the accused. The circumstantial evidence points to the guilt of the accused. The accused is therefore convicted of Murder as charged. I did not agree with the assessors' opinion that they found the defence witnesses truthful. I have already pointed out the lies that the accused presented in this court.

Dr. Flavian Zeija

Judge

15/12/2016