

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASAHA

Criminal Session Case No. MASAHA-CR-0100 of 2013

UGANDA.....PROSECUTOR

VERSUS

MUBANGIZI STANLEY.....ACCUSED.

BEFORE HON. JUSTICE MS MARGARET TIBULYA

RULING

The accused is indicted with murder contrary to section 188 and 189 of the Penal Code Act.

Pw1 (**Nalugo Elizabeth-10 years old**) testified that **Kamugisha Hellen (the deceased)** was her mother with whom she was staying with her. One night two men entered their house and demanded for money from the deceased. She gave them the money and the men went out. Pw1's step mother who was outside the house told them to kill the deceased and the men returned, tied the legs and hands of the deceased, put a cloth in her mouth and killed her.

They had removed her from her bed and put her on the floor. They beat Pw1 on the stomach with a stick when she touched her mother, then wrapped her in a mattress. She (Pw1) fell asleep. The assailants had a torch and there was light in the house, but she could not see the men's faces. She

however knew one of them by the name of Stanley, the accused. He used to come to her step mother's home and she used to talk to him. She heard his voice which she knew.

When she woke up in the morning she informed **Pw3 (Wasswa Peter)** and **Pw5 (Ruth Tibasuulwa)** about the attack. They went to the deceased's house and found her body. Pw1 did not name any body as the attacker.

Her further evidence was that she did not tell her father or even Mrs Bukulu to whose home she was taken or the area chairman (**Pw2 Kayondo Muhammed**) that she had seen the accused during the fateful night.

Pw4 (Mucunguzi Nathan) and **Pw6 (Fred Muhangi)** brothers-in-law of the deceased said that the deceased had a land wrangle with one **Nalugave**, her co-wife and wife of the accused. The accused attended the burial of the deceased but went away very early yet he was a family friend. This caused suspicion that he was involved in the murder of the deceased. Moreover **Nalugave** was behaving suspiciously at the funeral. She made incessant calls to the accused and was staying alone all the time. She even approached Pw4 and told him that people were alleging that she was involved in the murder. She was arrested and she is said to have revealed to the police that she had planned with the accused to steal money from the deceased but the accused went ahead and killed her.

At the close of the prosecution case the court had to decide whether the accused should make his defence. An accused will be acquitted inter-alia when a major ingredient of the offence has not been proved.

In a charge of murder, the prosecution has to prove;

- **That the deceased died,**
- **That the killing was unlawful,**
- **That there was malice aforethought, and,**

- That the accused committed the offence.

1. Whether Kamugisha Helen died.

Pw1 (Nalugo Elizabeth), Pw2 (Kayondo Muhammed), Pw3 (Wasswa Peter) Pw4 (Mucunguzi Nathan), Pw5 (Ruth Tibasuulwa) and Pw6 (Fred Muhangi) all testified that the Kamugisha Helen died and was buried. There can be no doubt that she died. This fact was sufficiently proved.

2. WHETHER THEIR KILLING WAS UNLAWFUL.

It is trite law that every homicide is presumed to be unlawful unless circumstances make it excusable, see **R. Vs. Busambiza s/o Wesonga 1948 15 EACA 65** and **Akol Patrick & Others vs Uganda (2006) HCB (vol. 1) 6**. The term ‘homicide’ has been invariably defined as the

killing of a human being by another human being, see **‘Dictionary of Law’, Oxford University press, 7th Edition, 2009, p.264.**

Conversely, what would amount to excusable or justifiable circumstances would include circumstances like self-defense or when authorized by law, (**Uganda vs Aggrey Kiyingi & Others Crim. Sessn. Case No. 30 of 2006**).

Excusable homicide has been defined as ‘**the killing of a human being that results in no criminal liability because it took place by misadventure or an accident not involving gross negligence.**’ On the other hand, *lawful or justifiable homicide* is deemed to occur ‘**when somebody uses reasonable force in preventing a crime or in arresting an offender, in self-defense or defense of others, or in defense of his property, and causes death as a result.**’ See **‘Dictionary of Law’, Oxford University press, 7th Edition, 2009, pp.216, 264.**

There is no indication or suggestion that either of the deceased person’s death was excusable, justifiable or accidental. There is abundant evidence that she was murdered. The condition her

body were found in, **(hands and legs tied, the mouth and private parts stuffed with cloths)**, points to her having been unlawfully killed. I find that the deceased's death was sufficiently proved to have been unlawful.

3. MALICE AFORETHOUGHT

Section 191 of the Penal Code Act provides that **“Malice aforethought may be established by evidence proving either of the following circumstances:**

- (a) an intention to cause the death of any person ...**
- (b) knowledge that the act or omission causing death will probably cause the death of some person, although such act is accompanied by indifference whether death is caused or not ...”**

Malice aforethought in murder trials can be ascertained from the weapon used, (*whether it is a lethal weapon or not*); the manner in which it is used, (*whether it is used repeatedly or the number of injuries inflicted*); the part of the body that is targeted or injured, (*whether or not it is a vulnerable part*), and the conduct of the accused before, during and after the incident, (*whether there was impunity*). See **R. vs Tubere (1945) 12 EACA 63**, **Akol Patrick & Others vs. Uganda** (supra) and **Uganda vs. Aggrey Kiyingi & Others** (supra).

According to Pw2 (**Kayondo Muhammed**) the body showed that the deceased had been hit on the forehead, and pieces of clothes had been inserted in her private parts and the anus. The head is a vulnerable part of the body which if targeted by an assailant, imputes malicious intent on his part. In **Nanyonjo Harriet & Another vs. Uganda Criminal Appeal No. 24 of 2002** (SC) it was 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 the death, and if the accused foresaw death as a natural consequence of the act.”**

What a trial judge has to decide, so far as the mental element of murder is concerned is whether the accused intended to kill. In order to reach that decision the judge is required to have regard to all the relevant circumstances, including what the accused said and did, see **R v Nedrick (1986)**

1 WLR 1025 and **R v Hancock [1986] 2 WLR 357**. The existence of malice aforethought is not a question of opinion but one of fact to be determined from all the available evidence, see **Nandudu Grace & Another vs. Uganda Crim. Appeal No.4 of 2009** (SC) and **Francis Coke vs. Uganda (1992 -93) HCB 43**.

The evidence that the deceased was hit on the head sufficiently show that the assailant had the intention to kill her. Malice aforethought was sufficiently proved.

4. WHETHER THE ACCUSED PARTICIPATED IN THE COMMISSION OF THE OFFENCES.

The only evidence in this regard is that of Pw1 (**Nalugo Elizabeth**) that the assailants had a torch and there was light in the house, but that she could not see their faces. She however knew one of them by the name of Stanley, the accused. Stanley used to go to her step mother's home and she used to talk to him. She knew his voice. She heard him speak.

Pw1's evidence is that she did not recognize any of the attackers. Her evidence that she knew the accused's voice must be viewed with caution since she did not tell the court what the accused said. Moreover, it appears that she did not tell any of the people she interacted with soon after the murder of her mother that she knew the killer. The possibility that she was coached to testify in the way she did cannot be ruled out.

Pw4 (Mucunguzi Nathan) and **Pw6 (Fred Muhangi)** testified that the accused was arrested on the basis of the following evidence;

- There was a land wrangle between one **Nalugave** the accused's lover and the deceased.
- The accused attended the burial of the deceased but went away very early yet he was a family friend who was expected to have stayed longer.
- **Nalugave** was behaving suspiciously at the funeral. She made incessant calls to the accused and was staying alone all the time.
- She even approached Pw4 and told him that people were alleging that she was involved in the murder.
- She was arrested and she is said to have revealed to the police that she had planned with the accused to steal money from the deceased but the accused went ahead and killed her.

Other than the allegation that **Nalugave** told the police that the accused was that murderer, the rest of the evidence is clearly mere suspicion. Suspicion however strong cannot amount to evidence. **Nalugave** was not brought to tell court the basis for her conclusion. In any event were it true that she told the police that she was involved in the matter in the way that is described by the witnesses, she should have been charged with the accused.

As things stand, there is no evidence connecting the accused to the murder. There is therefore no basis for requiring the accused to make his defense. I accordingly acquit him of the charge of murder. He be discharged forthwith.

Margaret Tibulya

Judge

19thMay 2016