

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
HCT-06-CR-SC-0091 OF 2013

UGANDA..... PROSECUTOR

VERSUS

NYANDWI FRANSWA

MUSONERA VANSITINI

KUBWIMANA ROSE alias KWAGARA.....ACCUSED

BEFORE: Hon. Lady Justice Margaret Tibulya

RULING

The accused stand jointly charged with murder contrary to sections 188 and 189 of the Penal Code Act. It is alleged that they murdered **NGARUKIYE EVARISTO**.

A1 and 2 with another went (**Pw1**) **Mpaka Abdul's** home and informed him that the deceased had been killed at night. **Pw1** rung the G.I.S.O and the police came with a police dog. The dog went to the dead body, then went to where **A1 (NYANDWI)** was living. From **A1's** house the police recovered a blood stained axe and clothes said to belong to the deceased which were in a polythene bag. They also recovered a polythene bag containing Rwandese currency from **A1's** pit latrine. The deceased's phone was also recovered in a hole under a jack fruit tree at **A1's** home. A pant which was identified by the residents as belonging to the deceased, the deceased's suitcase and new trouser were all recovered from **A1's** house yet the deceased was not living with him at the time of his death.

From A2's home blood stained bricks and a pounding stick were recovered. A3, wife to A2 was found sweeping her compound very early morning, yet their kitchen where blood stained bricks were got had been burnt down that night.

Four days before the murder **Nyina Sikubwabo Anastasia (Pw7)** had given the deceased Uganda shillings 20,000/= in exchange for three notes of Rwandese francs in A1's presence.

Those three notes were recovered from A1'S house. The blood stained items (**an axe, a trouser, panga, two un-burnt bricks, a pounding stick and a blue under-pant**) were forwarded by **Pw8 (Turyakira Michael)** to the government analytical laboratory for comparing the blood on those exhibits with that of the deceased and the accused persons and to confirm whether the under-pant belonged to the deceased.

According to the report (**P.i.d 1**) the analysis could not be done because the DNA profiles had been heavily mixed beyond possible comparison.

At the close of the prosecution case the court has to determine whether the state has made out a prima facie case to warrant the accused to make his defense. A prima facie case is not made out, inter-alia when a major ingredient of the offence had not been proven.

In a charge of murder the state had to prove;

- 1. The death of a human being,**
- 2. That the death was unlawful,**
- 3. There was malice aforethought,**
- 4. The participation of the accused.**

THE DEATH OF A HUMAN BEING

The fact that **NGARUKIYE EVARISTO** died was not disputed by the defense. All the state witnesses testified that he died. I find that this ingredient was sufficiently proved.

THAT THE DEATH 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 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.

In the present case no evidence was adduced before this court as would suggest that the deceased’s death was excusable, justifiable or accidental. On the contrary the evidence is that he was violently killed. I am therefore satisfied that the deceased’s death was unlawful.

MALICE AFORETHOUGHT

Section 191 of the Penal Code Act provides that “**Malice aforethought may be established by evidence providing 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, that is, whether it is a lethal weapon or not; the manner in which it is used, that is, whether it is used repeatedly or the number of injuries inflicted; the part of the body that is targeted or injured, that is, whether or not it is a vulnerable part, and the conduct of the accused before, during and after the incident, that is, 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).

In the present case the post mortem report (Exhibit P1), indicates that the victim died of extensive bleeding from the head and chest injury and from multiple bilateral rib fractures and neck injuries. There can be no doubt that whoever caused those injuries intended to kill the victim. I therefore find that the prosecution has proved beyond reasonable doubt that the deceased's death was procured with malice aforethought.

THE PARTICIPATION OF THE ACCUSED

The evidence against the accused is that some items including an axe, a panga, two bricks, money, a pair of trousers, a pounding stick which bore what was thought to have been blood were recovered from the homes of the accused persons. A phone believed to have belonged to the deceased was also recovered from near the house of A1.

Some of these items were submitted for laboratory analysis but according to the laboratory report (**P i D 1**) the analysis could not be done because the DNA profiles had been heavily mixed beyond possible comparison.

That being the case there is no evidence linking the recovered items to the murder. There is no evidence to show that the accused or any of them murdered the deceased, and no basis for requiring any of them to make his/her defense. I accordingly acquit each of them of the offence of murder. They should be discharged henceforth.

Margaret Tibulya

Judge

20thMay 2016.