

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
HCT-06-CR-SC-0036 OF 2013

UGANDA..... PROSECUTOR

VERSUS

KAYEMBA DAN.....ACCUSED

BEFORE: Hon. Lady Justice Margaret Tibulya.

JUDGMENT

The accused stands charged with murder contrary to sections 188 and 189 of the Penal Code Act. It is alleged that on the 21st day of May 2012 at Kitasa Village he murdered **Nantume Gertrude**.

The prosecution case was that on the 21st of May 2012, the accused went to **Pw2's (Florence Namatovu)** home and told her that he had beaten his wife and that she should go and see her. When **Pw2 (Florence Namatovu)** went there she found when deceased had been beaten and could not even talk. She saw two sticks at the scene, one of which was shattered. She informed the area chairman **Pw1 (Expedito Kavuma)**, who also went to see the victim. He found her in a critical condition. She bore injuries on the buttocks and had swellings on the hands. Pw1 asked the accused why he had beaten the victim to that extent. The accused told him that the victim had taken alcohol. The victim died shortly after.

Pw 3 (D/Sgt Kigaye Nelson) went to the scene with Dr Mudooba. He saw bruises on the body and signs of strangling.

BURDEN AND STANDARD OF PROOF

The prosecution bears the burden of proving the guilt of the accused person, and this, beyond reasonable doubt. The burden does not shift except in a few exceptions. This case does not fall in the exceptions. **Woolmington vs. DPP (1935) AC 462, 481 & 482** which has been quoted with approval in **Tuwamoi vs. Uganda EACA 1967 P.84 at Page 97** and in **Uganda vs. Joseph Tole 1978 HMB P 269**.

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 **Nantume Gertrude** died was not disputed by the defence. In addition, **Pw1 (Expedito Kavuma)** and **Pw2's (Florence Namatovu)** both testified to the fact of death. I am satisfied that **Nantume Gertrude** died.

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 defence or when authorised by law. See **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**

defence or defence of others, or in defence of his property, and causes death as a result.'
See **'Dictionary of Law', Oxford University press, 7th Edition, 2009, pp.216, 264.**

In this case the state maintains that the deceased's death was the result of being assaulted, while the defense maintains that she took alcohol, and died as a result. **Pw2's (Florence Namatovu)** evidence that the accused went to her home and told her that he had beaten his wife and that she should go and see her, and that she went to the accused's home and found when deceased had been beaten and could not even talk was not denied or challenged. Pw2 said that she saw two sticks at the scene, one of which was shattered.

The area chairman **Pw1 (Expedito Kavuma)**, also found her in a critical condition. She bore injuries on the buttocks and had swellings on the hands. **Pw 3 (D/Sgt Kigaye Nelson)** went to the scene with Dr. Mudooba. He saw bruises on the body and signs of strangling. All these are independent witnesses who have no reason to falsely incriminate the accused. I believed their evidence and rejected the accused's version of events. The accused's assertion that the deceased died due to alcohol is against the weight of evidence. I am satisfied that the victim's death was not excusable, justifiable or accidental, and 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 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 pay 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 is that the accused told **Pw2 (Florence Namatovu)** that he thoroughly beat the victim, a fact that was confirmed by Pw1 and 2. There can be no doubt that he intended to kill the victim.

THE PARTICIPATION OF THE ACCUSED

Pw2's evidence that the accused went and told her that he had thoroughly beaten the deceased was not denied. There can be no doubt that the accused murdered that victim. In agreement with the assessors, I find that the prosecution has proved that the accused murdered **Nantume Gertrude**.

I find him guilty of murder and convict him as charged.

Margaret Tibulya

Judge

18th May 2016.

