

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT MASAKA

UGANDA..... PROSECUTION

VERSUS

TERUMA TANANSI..... ACCUSED

JUDGMENT

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

The prosecution case in the night of 3rd February 2013, **PW1 (Najjuko Leonia)** was in their house with the deceased. **Pw1** was reading and the deceased was knitting a mat. They heard scratching sounds outside the house and they thought that the sounds were being made by pigs. When the sounds continued they retired to bed.

At about midnight one **Luwagga Citizen** who used to live with them knocked at the door and the deceased went to open for him. Two men then forcibly entered and held the deceased, stopping her from raising an alarm. She was thrown in the hind sitting room while Pw1 was thrown in the bed room. Pw1 was covered with cloths. She heard the deceased crying out that; **“My child Tanansi why are you killing me? I have no money. I have only this 1,000/=.”** One of the attackers remained with the deceased while the other was with Pw1, assaulting her and demanding for money. She told him that the deceased did not have money. The assailants then got ground nuts, maize, beans, and a 6 inch mattress. Before they left Pw1 shook herself and one of the attackers commented that they thought she was also dead. He went and started beating her again but the other one told him to leave her and they left after locking her inside the house.

Her further evidence was that during the attack the accused was putting on a brownish jacket which she had been seeing him put on. The following morning they raised an alarm and the neighbors came. Police was called and they came with a police dog.

PW2 (Ben Lusembo) had gone to attend a function with **PW7 (Kaliisa Mbagu)** when he got information that his mother had been murdered. He got home and found police already at the scene. The dead body had a sweater tied around the neck and in one of the hands there was a 1,000/= shilling note.

A police dog which was used went and stopped at Kaliisa's home. Since Pw2 had been with Kaliisa at the wedding he informed the police that it was not possible that he was the culprit. The dog was taken back to the bed room where the dead body was and again started moving and this time it stopped at the accused's home. The accused was at the deceased's home at the time. He was taken to his home, and when he opened his house the dog entered the house and picked a jacket on which there was saliva.

PW3 (Kiyemba Ambrose) and PW4's (Kizito Erias)'s evidence was similar in material particulars to that of **Pw2**, but they added that when the dog went to the accused's home it remained at the door and as soon as the accused was brought from the funeral the dog held him. The accused was asked what the substance on the jacket was and he said that a child had slept on it. Kayemba further said that the deceased had a 1,000/= note in the hand and a pieces of cloths around the neck.

PW6 (No. 18657 D/sgt Kigayi Nelson) a scene of crime officer (**S.O.C.O**) said that the body had a piece of cloth around the mouth and the eyes, and was holding a 1,000/= note in one hand. The deceased had been strangled.

The accused testified that in the night of 2nd/3rd February 2013 he heard an alarm to which he responded. He learnt that the deceased had been murdered. The police dog went and stopped at Kaliisa's home. But people said that Kaliisa could not have murdered the deceased. The dog was taken back to the deceased's house and it then followed the same route it had taken earlier. After about 40 minutes he was arrested. He was taken to his home and he gave the keys to the chairman and he opened. Only the police, the dog and the chairmen entered the house. He does not know whether or not the dog sniffed on the jacket, but it did not come out with anything. A CID officer from Kakuuto brought the accused's jacket from the house saying that it is the one he had been putting on when he murdered the deceased. A police man from Kakuuto asked him

what liquid was on the jacket, and he explained that it could be a child's urine since it used as beddings for the child.

The prosecution bears the burden of proving the guilt of the accused beyond reasonable doubt, see **Sekitoleko v Uganda [1967] EA 531**. The accused is under no obligation to prove his innocence.

The prosecution had to prove the following ingredients beyond reasonable doubt;

- i) That the deceased died,
- ii) That the killing was unlawful,
- iii) That there was malice aforethought,
- iv) That the accused committed the crime.

THE DEATH OF NANTALE MACERINA

The defence didn't dispute the fact of death of **NANTALE MACERINA** since even the accused testified to her death. All state witnesses including Pw 1 (**Najjuko Leonia**), PW2 (**Ben Lusembo**), PW3 (**Kiyemba Ambrose**) testified that **NANTALE MACERINA** died. The first ingredient was sufficiently proved.

WHETHER THE 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 defence or defence 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 there is no indication or suggestion that NANTALE's death was excusable, justifiable or accidental. The evidence that she was just killed was not controverted. The condition in which her body was found, with a swollen face and depression on the forehead, and pieces of cloth tied around her neck, points to her having been unlawfully killed. The accused simply denied responsibility for her death. He did not claim that the death was lawful. I find that the deceased's death was sufficiently proved to have been unlawful.

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).

Pw1 (NNAJJUKO LEONIA) testifying about how the deceased met her death said that two men forcibly entered their house and assaulted them. She heard the deceased crying out that, **"my child Tanansi why are you killing me? I have no money. I have only this one thousand shillings."** Her further evidence was that after the deceased was killed she was thrown in the bed room where she was. She had heard her breathing with difficulty. When she saw the body there

were pieces of cloth around the neck, the face was swollen and had a depression on the forehead.

Pw2 (**Ben Lusembo**) and Pw3 (**Kiyemba Ambrose**) also saw the piece of cloth (**a sweater according to Pw2**) around the neck of the deceased.

The head and neck which were targeted are vulnerable parts 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 assailants are said to have repeatedly assaulted the victims and when they realized that Pw1 still alive, one of them commented that he thought that she was dead too, then started beating her again. That comment by the assailants is a clear indicator of the intention to kill the deceased.

I find that the prosecution has proved beyond reasonable doubt that **NANTALE MACERINA's** death was procured with malice aforethought.

WHETHER THE ACCUSED PARTICIPATED IN THE COMMISSION OF THE OFFENCES.

The state sought to rely on three pieces of evidence;

1. The dying declaration that **“My child Tanansi why are you killing me. I don’t have money. I have only this one thousand shillings.”**
2. Identification evidence of Pw1 (**Najjuko Leonia**).
3. The fact that a police dog led the police to the accused’s home and recovered a jacket which bore saliva like substances on it.

THE DYING DECLARATION.

S. 30 (a) of the **Evidence Act** provides that statements, written or verbal, of relevant facts made by a person who is dead... are themselves relevant facts... when the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person’s death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question...

The case of **MIBULO EDWARD Vs UGANDA CRIMINAL APPEAL NO.17 OF 1995** is the *locus-classicus* on the issue at hand. I will only quote the part of the decision that is relevant to the discourse.

“The law regarding dying declaration was restated by the Supreme Court recently in the case of Tindigwihura Mbahe v. Uganda Cr. App. NO. 9 of 1987. Briefly the law is that evidence of dying declaration must be received with caution because the test of cross examination may be wholly wanting; and particulars of violence may have occurred under circumstances of confusion and surprise, the deceased may have stated his inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Particular caution must be exercised when an attack takes place in the darkness when identification of the assailant is usually more difficult than in daylight.

The fact that the deceased told different persons that the appellant was the assailant is no guarantee of accuracy. It is not a rule of law that in order to support conviction, there must

be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is generally speaking very unsafe to base conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subjected to cross examination unless there is satisfactory corroboration”

In this case the evidence is that the identification was done at night, under the following circumstances;

- The deceased knew the accused as a village mate, and she used to buy charcoal from him, this could form a sound basis for an adverse finding against the accused.
- But other than Pw1's evidence that the deceased had been knitting a mat and she had been reading when they heard scratching sounds outside the house and that they retired to bed, no evidence was led about the quality of lighting at the critical moment. It would be unsafe to assume that after the deceased and Pw1 retired to bed, the light they had been using when knitting and reading was still on. The possibility that they had switched off the lights was not ruled out. The deceased could have been mistaken as to the identity of the attacker. This is the only reason I found it unsafe to convict the accused on the basis of the dying declaration.

IDENTIFICATION EVIDENCE OF PW1 (NAJJUKO LEONIA).

PW1 who was in the same house with the deceased testified that she identified the accused as one of the thugs who attacked them that night. She said that at that time, he was putting on a brownish jacket. The jacket that was recovered from the accused's house was however not brought to court to give the witness a chance to identify it. This fact adversely affected her evidence.

Most important though is that there was no evidence as to the identification conditions at the critical moment. Moreover, Pw1 said that the assailants threw her in the bed room and threw cloths on her. She was not asked how she managed to identify the accused under those conditions. These gaps in the state evidence again render it unsafe to ground a conviction on her uncorroborated evidence.

THE FACT THAT A POLICE DOG LED THE POLICE TO THE ACCUSED'S HOME AND RECOVERED A JACKET WHICH BORE SALIVA LIKE SUBSTANCES ON IT.

There were a number of gaps in the state case in this regard as well. First of all the jacket that is said to have been recovered from the accused's house and which should have been put to PW1 who said she saw the accused putting it on during the fateful night was not brought to court. Moreover there is indication that some forensic tests were done on jacket. The results of those tests were not given in evidence. In addition, the dog handler of a police dog which acted in ways which were suggestive of a link between the accused and the fatal events did not give evidence.

With the gaps I have labored to highlight I find that there is no credible evidence linking the accused to the offence. In agreement with the lady and gentleman assessors I acquit the accused of the offence of murder. He should be discharged forthwith.

Margaret Tibulya

Judge.

12th May 2016.