

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0014 OF 2013

UGANDA

PROSECUTOR

VERSUS

DRASIKU CIRILO ANANIA

ACCUSED

Before Hon. Justice Stephen Mubiru

RULING

The accused in this case is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 11th day of January 2012 at Owayi village in Yumbe District, he murdered Onziru Madalena. The accused pleaded not guilty to the indictment. In a bid to prove the indictment against the accused, the prosecution called a total of eight witnesses and closed its case.

At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence (see section 73 (2) of *The Trial on Indictments Act*). Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (See *Wabiro alias Musa v R [1960] E.A. 184 and Kadiri Kyanju and Others v Uganda [1974] HCB 215*).

A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v R. [1957] EA 332*). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was

decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] *ALL E.R 448* and also applied in *Uganda v Alfred Ateu* [1974] *HCB 179*, as follows:-

- a) When there has been no evidence to prove an essential ingredient in the alleged offence,
or
- b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

It was the submission of the learned State Attorney prosecuting the case, Ms. Faidha Jamilar, that sufficient evidence had been adduced establishing a *prima facie* case against the accused such as would require him to be put to his defence since it is not the conduct of an innocent person to run away and not attend the funeral of one's wife like the accused did in this case. On his part, defence counsel submitted there was no *prima facie* case since the prosecution had not led evidence to establish that the accused had run away following the death of his wife and in the alternative, there was a justification for his failure to attend the funeral since there was evidence to show that the relatives of the deceased were a threat to him.

At this stage, I have to determine whether the prosecution has led sufficient evidence capable of proving each of the ingredients of the offence of murder, if the accused chose not to say anything in his defence, and whether such evidence has not been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it. For the accused to be required to defend himself, the prosecution must have led evidence of such a quality or standard on each of the following essential ingredients;

1. That death of a human being occurred.

2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

Regarding the element of proof of death of a human being, death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body of the deceased. In this case, the prosecution adduced evidence of a post mortem report prepared by PW2 (Dr. Tabu Geoffrey) which was admitted at the commencement of the trial as Exhibit P.E.2. It is dated 12th January 2012. This is a witness who saw the body of the deceased and conducted an autopsy at the scene of the crime. The body was identified to him as that of Onziru Magdalena by PW3 (Matua Isaac). PW3 is the younger brother of the deceased who knew her very well before her death and they both lived on the same village. He saw the body of her dead elder sister and attended the funeral. Both PW4 (Marita Tideru) and PW5 (Kalisto Sila) knew the deceased before her death as the wife of the accused with whom they lived on the same village. Both of them saw the body and attended the funeral. This evidence was not discredited as a result of cross examination, neither is it manifestly unreliable that no reasonable court could safely convict on it. I am therefore satisfied that the prosecution led sufficient evidence regarding this element capable of supporting a finding that Onziru Madalena is dead, if the accused chose not to say anything in his defence.

The second ingredient requires the prosecution to prove that the death was caused unlawfully. Death of a human being is a homicide if the dead person was once alive and is now dead because of the act of another human being. Among the witnesses who testified, PW5 (Kalisto Sila) was the last person to see the deceased alive. He last saw her alive on 10th January 2012 on her way from Kubala Market. The next time she saw her was on 12th January 2012, dead in a bush near her home in circumstances that suggested she had been killed.

The law is that any homicide is presumed to have been caused unlawfully unless it was accidental or otherwise legally justified (see *Gusambizi s/o Wesonga v R. (1948) 15 E.A.C.A 63*). In the instant case, the admitted evidence of PW2 (Dr. Tabu Geoffrey) who conducted the autopsy established the cause of death to have been asphyxiation due to probable strangulation (evidenced by swelling odema of the anterior neck) and sub-cranial hemorrhage (evidenced by a

depression over the frontal skull with a bruise). In his view, the injury was caused by a blunt injury. These findings are contained in his report, Exhibit P.E.2 dated 12th January 2012. There is no eyewitness account of how those injuries were inflicted. There being no evidence to suggest that they were self inflicted or that they were caused in a justifiable or excusable manner and since this evidence is not manifestly unreliable that no reasonable court could safely convict on it, it is capable of proving that the death of Onziru Madalena was an unlawful homicide. I am therefore satisfied that the prosecution led sufficient evidence regarding this element capable of supporting a finding that the death of Onziru Madalena was caused unlawfully, if the accused chose not to say anything in his defence.

The third ingredient required is that the unlawful killing of the deceased was caused with malice aforethought. Malice aforethought is defined by section 191 of the *Penal Code Act* as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person. The question is whether whoever inflicted those injuries on the deceased intended to cause death or knew that they would probably cause death. Malice aforethought is a mental element that is difficult to prove by direct evidence. Courts usually consider the weapon used, the manner in which it was used, and the part of the body of the victim that was targeted (see *R v Tubere s/o Ochen (1945) 12 E.A.C.A. 63*. If the weapon used to inflict the injuries from which the deceased died are lethal or deadly weapons, or if the injuries are fatal or life threatening and inflicted on vital or vulnerable parts of the body malice aforethought will readily be inferred (see *Uganda v Manuela Awacango and Another H.C. Criminal Session Case No 16 of 2006*).

The weapon used to inflict the head injury (the sub-cranial hemorrhage evidenced by a depression over the frontal skull with a bruise) was never recovered nor exhibited in court but PW2 (Dr. Tabu Geoffrey) opined that it was a blunt object. Any object of that nature to have caused a fracture of the skull must have been applied with considerable force. Any person who, uses a blunt object to inflict considerable force to the head capable of fracturing the skull, must foresee that death is a probable consequence of his or her act. So does one who applies such force to the neck as is capable of resulting in asphyxiation. Both actions targeted vulnerable parts of the body. Each of them is capable of supporting an inference of malice aforethought. This evidence is not manifestly unreliable that no reasonable court could safely convict on it, it is

capable of proving that the death of Onziru Madalena was caused with malice aforethought. I am therefore satisfied that the prosecution led sufficient evidence regarding this element capable of supporting a finding that the death of Onziru Madalena was caused with malice aforethought, if the accused chose not to say anything in his defence.

The last ingredient requires proof that it is the accused who committed the unlawful act which led to the death of the deceased. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime. There is no eyewitness account of how the deceased met her death. PW3 (Matua Isaac), PW4 (Marita Tideru) and PW5 (Kalisto Sila) saw her body all received information regarding her death after 10.00 am on 12th January 2012 following an alarm raised by the first wife of the accused, a one Marita. PW5 was the first person to arrive at the scene in response to the alarm. When two witnesses went to the home of the deceased, they found her body lying in the bush, at a distance of about thirty to fifty metres away from her house. None of them knew how she died, when she died or why she was dead. At this point, the prosecution case rests entirely on circumstantial evidence. The only incriminating piece of circumstantial evidence against the accused is that none of the three witnesses found him at the scene or at his home when the body was discovered, he did not attend the funeral of his wife which took place the following day and according to PW6 (No 29911 Cpl Alemiga Luka Ejoi) he was arrested four days later on 16th January 2012 at a village in Yivu Sub-county, Maracha District.

The law on circumstantial evidence is that such evidence must always be narrowly examined because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore necessary before drawing the inference of guilt of the accused from circumstantial evidence, to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (See *Teper v R* [1952] A.C 480 at p 489 and *Simoni Musoke v R* [1958] E.A 715). For circumstantial evidence to sustain a conviction, it must point irresistibly to the guilt of the accused. In *R v Kipkering Arap Koske and Another* (1949) 16 EACA 135 it was stated that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than that of the guilt of the accused. In *Bogere Charles v Uganda*, S. C. Crim. Appeal No.

10 of 1998, the Supreme Court clarified further that “the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt.”

The question then is whether the circumstantial evidence adduced by the prosecution in this case, bearing in mind that the accused has not been heard yet, is incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than that of his guilt or whether it points irresistibly to the guilt of the accused and there are no co-existing circumstances which would weaken or destroy that inference. If the answer to either question is in the affirmative, then it would be evidence capable of supporting a finding that he caused the death of Onziru Madalena if he chose not to say anything in his defence. If the answer to either question is negative, then the evidence is incapable of supporting such a finding in which case the prosecution will have failed to establish a *prima facie* case against him. Disappearance of an accused person from the area of a crime soon after the incident is a highly incriminating piece of circumstantial evidence. Many times courts have taken this factor into account in support of a conviction. For example in *Remegious Kiwanuka v Uganda; S. C. Crim. Appeal No. 41 of 1995*, it was held that the disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence. This is because sudden disappearance from the area is incompatible with the innocence of such a person.

In another case, *Uganda v Magezi Gad, H.C. Cr. Session Case No. 108 of 2007*, the accused, who was a guest at the home of the deceased, was found by a witness in conversation with another man, as soon as he the witness informed them that the deceased is dead, the accused got up and ran away. The trial court posed the question why a visitor would run away upon being told that the host is dead unless the visitor is aware of the circumstances of that death. To the court, running away is not conduct of an innocent person.

Lastly, in *Lulu v Uganda, C.A Crim. Appeal No. 214 of 2009*, a witness had seen the appellant running away from his brother’s house and she had managed to identify him by the clothes he was wearing. There was other circumstantial evidence pointing to the accused’s participation in the offence which corroborated the evidence of that witness who claimed to have seen the appellant running away from the scene of crime on the morning of 30th January 2007 when the body of the deceased was discovered and people gathered at the home. The appellant himself stated that he came back home that morning at about 9.00 am and had to flee for his life since the

deceased's relatives were beating people. This evidence corroborated the evidence of PW1 that she saw the appellant running away at the same time. To the court, running away was not conduct of an innocent person.

I have examined a string of authorities which have considered running away from the scene of crime as a piece of incriminating circumstantial evidence. There are two common threads running across these decisions. The first one is that such evidence is not relied on in isolation but rather as corroboration of other evidence. In addition to the three cases cited above, I have considered; *Uganda vs. Kabandize [1982] HCB 93* where the accused had made an admission that he had committed the offence in addition to being seen with the lethal weapon which was used in stabbing the deceased. The fact of running away and hiding was additional. In *Franswa Kizza v Uganda [1983] HCB 12*, the incident occurred in an open place and there was ample evidence to support the claim that the accused committed the offence. There was basis therefore for the presumption that the escape of the appellant was a pointer to a guilty mind. In *Uganda v Simon Onen [1991] HCB 7*, the accused admitted having participated in the crime. Court found his running away additional evidence of a guilty mind.

Unlike all of the decisions I have cited above where disappearance from the scene of crime was used as a corroborative incriminating element of other evidence against the accused, in the case before, it is the only incriminating fact standing on its own. I have not found a case where a conviction was sustained on that account alone. Secondly, in all the cases I have cited above, there was a witness who actually saw the accused running away from the scene. In the case before me, no one saw the accused running away from the scene. The evidence of PW5 (Kalisto Sila) was that the accused and the deceased, who was his second wife, had lived alone in that home since the death of their only child. This witness in particular only speculated that the absence of the accused from the scene and from the funeral was because he had killed his wife. However, none of the witnesses who testified in court had seen the accused in or around that home at or during the time the deceased is thought to have died. There was evidence of the investigating officer PW7 (D/Cpl Amabwa Phillian) to the effect that during his investigations a one Yoana revealed to him that he had been drinking alcohol together with the couple at their home and that a one Drabile joined them later. That the two had departed at nightfall leaving the couple behind still drinking alcohol. Yoana and Drabile mentioned by this police officer as the

sources of this information were not called as witnesses. His testimony therefore is inadmissible by virtue of section 59 (a) of the *Evidence Act* which requires that oral evidence must, in all cases whatever, be direct such that if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it. Evidence of this police officer who never saw the accused and the deceased together has to be disregarded for that reason.

This leaves only the testimony of PW5 (Kalisto Sila) as the person who last saw the accused at a place closest to the scene of crime between the time the deceased was last seen alive, 10th January 2012 and the time her body was discovered, 12th January 2012. He last saw the accused 6.30 pm on 11th January 2012 at Ozivu Trading Centre, located about four kilometers away from the home of the accused. Unlike all of the decisions I have cited before where the accused was actually seen by a witness running away from the scene, in the case before, the closest the accused was placed near the scene during the crucial time when the murder is suspected to have taken place is a distance of approximately four kilometers away. There is no basis therefore for court to make a finding that the accused disappeared from the scene in absence of evidence placing him at the scene. Neither is there a ground for stating that he went into hiding.

Even assuming that the accused had gone into hiding, is this a fact which irresistibly points to his guilt and cannot be explained on any other reasonable hypothesis? One of the explanations that was suggested by PW7 (D/Cpl Amabwa Phillian) was that the accused was suspected to have murdered his wife and his life was in danger because at the scene the relatives of the deceased were wild. In that case, hiding to escape the wrath of the family of the deceased does not necessarily lead to an irresistible inference of guilt. Many times innocent people falsely suspected to be criminals have fallen victim of mob justice. That aside, it is trite law that mere suspicion is not enough to enable Court to convict a person of criminal offence (See *Israili Epuku s/o Achientu (1934) 1 EACA 161 at page 168*). The evidence at the close of the prosecution case succeeded in raising suspicion against the accused but fell short of the standard.

Having evaluated the evidence, I have formed the opinion that if the accused chose to remain silent, this court would not have evidence sufficient to hold him responsible for the unlawful act that resulted in the injuries that caused the death of the deceased. I therefore find that no prima facie case has been made out requiring the accused to be put on his defence. I accordingly, find

the accused not guilty and hereby acquit him. He should be set free forthwith unless he is lawfully held on other charges.

Dated at Arua this 18th day of August, 2016.

Stephen Mubiru

Judge.