

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASAKA
CRIMINAL SESSION CASE NO. 070/2014

UGANDAPROSECUTION

Versus

Burimwezi Simoi }
Kiiza Andrew }
Kagoro Matia.... }..... ACCUSED

BEFORE: HON. JUSTICE DR FLAVIAN ZEJJA

JUDGMENT

The accused, Burimwezi Simon, Kiiza Andrew and Kagoro Matia are indicted on two counts of Rape C/S 123 and 124 of the Penal Code Act and murder contrary to sections 188 and 189 of the Penal Code Act. It was stated in the particulars to the charge that Burimwezi Simon, Kiiza Andrew and Kagoro Matia, on the 26th and 27th of December 2013 at Kakuuto Trading Centre, had unlawful canal knowledge of Kamasazi Joyce without her consent and subsequently Murdered her. The accused denied the charge and A1 was represented by Nyanzi Mathias on private brief while A2 and A3 were represented by Nansubuga Margaret on state brief . The prosecution was led by Joanita Tumwikirize.

Joyce Kamasazi now deceased was a resident of Kakuuto- Kasagazi Zone Rakai Distriuct. It is alleged that in December 2013, the deceased was the Administrator to the estate of her late brother Burimwezi Simon Kisande a former employee of the East African Comunity. The late Burimwezi Simon Kisande was entitled to retirement benefits which the deceased had claimed for.

The retirement benefits created a rift between the deceased and the son of late Burimwezi Simon Kisande known as Burimwezi Simon (A1). A1 kept issuing death threats to the deceased who was his aunt and guardian as he demanded for retirement benefits. A1 went on to apply for Letters of Administration by giving false information to the office of the Administrator General. The fraud was discovered and the process halted.

On the 26th day of December 2013, the deceased was in the company of her manfriend Ngobya Matia Alias Hajji and the two lovers drunk beers in one Bosco's bar. At around 10:30 pm. Hajji escorted the deceased home where they both shared dinner. Thereafter, they went to drink again. As Hajji and the deceased walked home from Ssemiyigo's bar, a motor vehicle belonging to A1 which was being driven by A1 and A3 Kagoro Matia drove past them a couple of times. Hajji and the deceased parted company each heading to their respective homes at about 11:45 PM.

At about midnight, one Nalongo Namagembe Monica heard an alarm from a Lady calling for help. Nalongo called one Ssemiyingo with whom they moved and proceeded to the location where the alarm came from.

At the scene of the crime, they found there A2 Kiiza Andrew whom they tasked about what he was doing at the scene but he kept silent. Nalongo and Ssemiyingo Telephoned D/C Kingani who came to the scene and arrested A2. They tried to look for the lady who made the alarm that night to no avail. They recovered a pair of gum boots and a stick at the scene. The following morning, the body of the deceased was discovered in the plantation. The deceased's dress had been yanked up to the abdomen which was indicative of forceful sexual assault and she was breeding from the mouth. The recovered gumboots were identified by a one Kaweesi Benedicto as belonging to A1 having cleaned A1's car a day before the fateful day.

The post-mortem report showed that the body had multiple bruises in the neck, both hands and around the thighs. There was also semen flowing out of the Vagina. The cause of death was due to strangulation leading to a cardiovascular arrest. The accused were arrested and charged and subsequently indicted.

At the close of the prosecution's case, I discharged A2 and A3 from the charges. I indicated that I would give my reasons in the final Judgement. The reasons why I acquitted A2 is that all the evidence pointed to the fact that he was found walking around the area where the alleged murder took place but PW2 who heard the alarm and informed police stated to this court that A2 was drunk and staggering. He was simply in the wrong place at the wrong time.

A3 was arrested because he had tried to help A1 to acquire letters of Administration. That is the reason he was arrested according to PW1. This reason was also given by police. I found this reason absurd! To accuse someone of murder which is an offence that carried a death

sentence, one needs to have cogent evidence linking the accused to the Murder not mere suspicion.

Turning to the gist of the accusations against A1, the state produced 10 witnesses while the defence produced 2 witnesses..

Burden of Proof

In every criminal trial, the burden of proof rests on the prosecution to prove the offence with which the accused person is charged beyond reasonable doubt. The burden remains regardless of the weaknesses in the defence case, save in a few statutory exceptions see *Sekitoleko v Uganda [1967] EA 531*. Any weakness in the defence or lies told by an accused shall not be relied upon to bolster the prosecution case or be a basis for convicting the accused. Nevertheless, lies in the defence can corroborate the prosecution's evidence. If there is any doubt created by the prosecution's evidence, that doubt must be resolved in favour of the accused and the accused must be acquitted. See also the case *of Woolmington vs. D.P.P. (1935) A.C. 462 and Oketh, Okale & others vs. Uganda (1965) EA 555*

The offence of Murder has mainly four ingredients which must be proved beyond reasonable doubt.

- (a) The death of a Person named in the indictment.
- (b) The death of deceased was caused by an unlawful act or omission
- (c) The act causing the death of that person was accompanied by malice aforethought
- (d) That it is the accused who caused the death of that person. This death can be caused by the accused alone or in conspiracy or in common intention with others.

The cases of *Uganda vs. Harry Musumba (1992) 1 KALR 83 and Kimweni vs. Republic (1968) EA 452* are instructive on the ingredients of the offence of Murder.

Ingredient (a)

The post-mortem report which was admitted in evidence as PE4 show that the deceased died of a strangulation leading to cardiovascular arrest as well as fracture of the neck bones (C3). The head was decapitated. The prosecution witnesses (PW1) who is a son to the deceased also testified that the deceased was seen dead and he attended the burial.

It is my considered view that this ingredient was proved beyond reasonable doubt.

Ingredient (b): Unlawful Death

It has been a long held position of the law that every homicide is unlawful unless authorised by the law. See the case of ***R. vs. Sharmal Singh (1962) EA 13 and Uganda vs. Kulabako Night - Crim. Sess. Case No.61/91*** . Whoever strangled the deceased Joyce Kamasazi had no claim of legal right to do so. The death was unlawful without any scintilla of legal justification. There is no doubt that the prosecution has proved beyond reasonable doubt that the death was unlawful. I so find.

Ingredient (c) Malice aforethought

Section 191 of the Penal Code is instructive on this matter. It provides:

191: Malice aforethought.

Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances—

(a) an intention to cause the death of any person, whether such person is the person actually killed or not; or

(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.

Malice aforethought can be determined from the type of weapon used (Is it deadly/lethal?), the gravity of the injuries inflicted on the deceased, the part of the body on which the injuries were inflicted, and the conduct of the accused, before and or after the commission of the offence. The cases of ***R. vs. Tubere s/o Ochen (1945) 12 EACA 63 and Uganda vs. John Ochieng (1992-3) HCB 80***

It is clear that the injuries on the body of Kamasazi Joyce were inflicted on the most dangerous parts of the Body. The neck of the deceased was strangled. The bones on the neck were Broken.

Whoever inflicted the injuries on the deceased as evidenced by the medical report must have done so with malice aforethought.

I find that this ingredient was proved beyond reasonable doubt.

Ingredient D: The participation of the accused:

Motive

In a criminal prosecution, save for a few exceptions like Libel if a defence of Fair Comment or qualified privilege is raised, motive is always an important aspect of criminal prosecution. This is grounded on the fact that a person in his normal state of mind cannot commit a crime without a reason or motive. *See John Wanda V Uganda (Criminal Appeal No. 37 of 1998)*

The existence of a motive makes it more likely that the accused would commit a crime. In this case, there was a simmering conflict relating to terminal benefits and the administration of the estate of A1's father.

However, in order for motive to be relevant, it must be backed by other circumstantial evidence that links the accused to a crime. In this case, the evidence available was the evidence of a threat allegedly made by A1 to the deceased arising from failure by the deceased to hand over terminal benefits to A1.

Threat

Evidence of a threat was considered by the Court of Appeal for East Africa in the case of *Waihi and Anor Vs Uganda(1968) E.A. 278*. Spry J held at page 280 thus:

Evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of Murder, but its probative value varies greatly and may be very small or even amount to nothing. Regard must be had to the manner in which it a threat is uttered, whether it is spoken bitterly or impulsively in sudden anger or jokingly, and the reason for the threat, if given and the length of time between the threat and the killing are also material. Being admissible and being evidence tending to connect the accused person with the offence charged, a prior threat is we think capable of corroborating a confession.

The evidence I have from the prosecution witnesses shows that the threat was first made in 2010 and the deceased reported to police according to the evidence of PW1. The murder took place in 2013 December. These are three years apart. I think this period is too long for someone to be convicted on such threat without any other cogent evidence. All the prosecution witnesses did not place the accused at the scene of the crime. There is doubt in

my mind as to who carried out this murder and how this murder was carried. The deceased was first raped. It is doubtful that A1 would have raped his Aunt, the disagreements notwithstanding. If A1 hired people to commit the crime, there was no circumstantial or direct evidence to confirm this. This was the worst investigated case by police. While they collected samples of exhibits for forensic examination, nothing came out of this. There was no forensic report to link any of the accused to the offence. The circumstances of the night also as narrated by the Boyfriend to the deceased who was with the deceased up to the time shortly before her death shows that the deceased could not have been under surveillance by her assailants. If so, since the deceased and Hajji went to her home for dinner late at night, they would have given up because they could not have been sure that she would come out of her home that late. It is not even clear whether the person responsible to this murder is not Hajji himself who was with the deceased the whole night. He was also initially a suspect but was released under unclear circumstances. The evidence of the investigative officer (PW10) is indicative of this fact. In fact, PW10 was not sure how Hajji was released. Police seems to have been engaged in the game of guesswork.

Consequently, and in agreement with assessors, I find the prosecution has not proved the offence of murder against the accused. The accused is therefore acquitted of Murder and rape as indicted.

Dr. Flavian Zeija

Judge

30/5/2017