

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CRIMINAL SESSION CASE NO.0012 OF 2013

UGANDA

PROSECUTOR

VERSUS

TWINIMUHANGI DOMINIC

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused was indicted for Murder contrary to Sections 188 and 189 of the Penal Code Act. Particulars of the offence are that on the 29th day of July 2012 at Kabahangara Cell, Karubanda Ward ,Kabale Municipality the accused murdered his wife Asasira Rose.

Prosecution called eight witnesses to prove its case and the Accused called one witness. The witnesses were Dr.Ariharizira Moses(PW1) Twinebaaha Apollo(PW2) Aryatwijuka Kenneth(PW3) Muteesi Mariam(PW4) Ahimbisibwe Janet(PW5) Mukasa Joseph(PW6) D/Seargent Asiimwe Benson(PW7) and D/Seargent Musungu(PW8).

Dr.Ariharizira (PW1) was a Medical Officer attached to Kabale Hospital on the date the offence was allegedly committed and he told Court that he received a request to examine the body of Asasira Rose from D/AIP Mbonekyirwe Tobias of Kabale Police station on the 29th July 2012.The body was identified to PW1 by Aryatwijuka Arthur(PW3) and the exercise was carried out on the same day but the report was prepared on the 31st July 2012.The findings in the Postmortem report were that the body had multiple cut wounds on the head, strangulation marks around the neck and stab wounds below the right breast that went deep into the thoracic cavity.PW1 attributed the death to bleeding and damage to the lungs or diaphragm caused by a sharp object.

Twinebaaha Apollo (PW2) was the Principal Psychiatric Officer attached to Kabale Hospital who examined the accused on the 30th July 2012. At the time of the examination the accused had a cut wound on the forehead but was found to be mentally sound and a report to the effect was admitted as evidence for the Prosecution.

Aryatwijuka Arthur(PW3) was a brother to the deceased. His evidence was that the deceased used to complain to him that the accused was hostile to her and she was worried about her life. On the 27th July 2012,he learnt of her death in the morning and proceeded to Kabale Police station from where he was told that the accused had handed himself over to Police.PW3 proceeded to the home of the accused but could not enter until Police came. He saw the body lying in a pool of blood in the sitting room and in the bed room. The body was

thereafter taken by Police to Kabale Mortuary for Postmortem and subsequently handed over to the family for burial.

PW4 SPC Muteesi Mariam was on duty at Kabale Police station with PW7 Detective Sergeant Asiimwe Benson on the 29th July 2012. Court heard that at around 7.00am, the accused reported that he had fought with his wife who may have died. PW4 made a report which he forwarded to the Officer in Charge of Investigations after detaining the accused. According to PW4, the accused had a wound on the forehead at the time.

PW7 in his testimony told Court that the report received from the accused was that he had been assaulted by his wife and he recorded a case of assault against Asasira Rose. The accused was bleeding from the forehead at the time and as soon as he recorded the information the accused changed and said the wife was dead. PW7 then directed a Corporal Musinguzi to proceed to the scene and verify the report. Corporal Musinguzi called back confirming that Asasira Rose was dead.

Ahimbisibwe Janet (PW5) a sister to the deceased last talked to her on the 13th July 2012. The deceased told PW5 that the accused was threatening to kill her and that if it happened, she should inform her family members. PW5 told Court that she advised the deceased to report to Police but could not confirm to Court if the advice was heeded to.

On the 29th July 2012 at 7.00am she received information about the death of Asasira Rose and proceeded to her home but could not be allowed into the house until Police arrived. She saw the body with cut and stab wounds lying in the sitting room and confirmed she attended the burial ceremony.

Mukasa Joseph (PW6) rented accommodation on premises owned by the accused and they were neighbours in the same enclosure. He told Court that he came back home on the 28th July 2012 at about 4.00pm and saw the accused with the deceased outside until 7.00pm when they retreated to the house. At 4.00am, PW6 heard a loud alarm and a crying baby which stopped when he moved out to the compound and he returned to his house.

PW6 further told Court that the accused knocked at his door at 6.00am on the 29th July 2012 holding his child and said they had had a fight with the deceased. The accused requested PW6 to help him in taking the deceased to hospital. PW6 went over to their door and saw Asasira Rose lying in a pool of blood but when he turned around, the accused had disappeared. PW6 went to the front of the building where he found the accused's baby and stayed outside with other neighbours. Police men came after a short time asking for the home of the accused and he learnt from them that Asasira Rose was dead and that the accused was at the Police station.

Detective Sergeant Musungu (PW8) visited the scene of crime with D/AIP Mbonekyirwe Tobias after the accused had reported himself to Police. PW8 who was the Scene of Crime Officer took photographs of the body, the general out lay of the premises and drew a sketch map of the surroundings. PW8 recovered a blood stained knife, pieces of a broken wooden

stool and a blood stained mosquito net from the scene of crime which he labeled and referred to the Government Analytical Laboratory for forensic investigations.

PW8 identified and Court admitted as exhibits the photographs, the sketch map, exhibit slip and Police Form 17(a) that was used to refer the items to the Laboratory but the actual items were not availed by the Prosecution. D/AIP Mbonekyirwe Tobias who partly investigated the case was not produced as a Prosecution witness as Court was told he was a convict in another case and was at Luzira Prison.

In his opening statement at the commencement of the trial, Counsel for the accused hinted that he was considering proceeding under Sections 45-49 of the Trial On Indictments Act but this approach was not adopted.

In his unsworn statement from the dock, the accused told Court that a one Aloysious Monday failed to take his land documents to the Department of Surveys at Entebbe. In June or July 2012 the accused raised a complaint with the Kabale District Chief Administrative Officer who summoned Aloysious Monday. On an identified date Aloysious Monday threatened to kill the accused if he lost his job on account of the complaint raised to the Chief Administrative Officer. The accused told Court that he reported the threats to Kabale Police and statements were recorded from his daughter and himself.

The accused further told Court that on the 28th July 2012 he went to Kampala and while there he got a call about his case against Aloysious Monday from D/AIP Mbonekyirwe Tobias urging him to report to Kabale Police by 8.00am on the 29th July 2012. The accused boarded a bus and arrived at Kabale Police Station at 7.30 am but was arrested and told he killed his wife. The accused alleged that he was told to pay 3,000,000/= which he declined to do but was subsequently charged with the murder case.

Agaba Martin (DW2) is a son of the accused who told Court that he was at School on the 26th July 2012 when he broke his spectacles. That he travelled to Kampala on the 27th July 2012 at 11.00am using a Gateway Bus and met the accused at the Kisenyi Bus terminal at 5.00pm. DW2 and the accused slept at Nabingo and planned to go to Mengo Hospital early on 28th July 2012. They went with the accused to the hospital in the morning but did not see any Optician. The accused told DW2 to go back to Nabingo since he had nothing to do in town.

DW2 told Court that between 4.00pm and 5.00pm, the accused came to Nabingo for his travelling bag saying he had to urgently travel back to Kabale. DW2 stayed at Nabingo until the 31st July 2012 when he saw an Optician at Mulago hospital. He did not travel to Kabale with the accused.

Prosecution invited Court to convict on the basis of the adduced circumstantial evidence claiming the accused had been placed at the scene of crime by the evidence of PW6. Counsel for the accused on the other hand submitted that the evidence by the Prosecution was so weak to sustain a conviction. Counsel submitted that death was not proved since no proper autopsy was carried out, there was no death certificate presented and nobody identified the dead body to PW1 before his alleged autopsy.

Counsel further argued that the failure to produce the items recovered from the scene of crime by PW8 should be adversely construed against the Prosecution. D/AIP Mbonekyirwe who was the Investigating Officer was not called as a witness and Counsel urged Court to make an inference that his evidence was adverse to the Prosecution hence he was deliberately not called as a witness. Contradictions in the evidence of especially PW6 and his Police statement were pointed out by Counsel who invited me to disbelieve his testimony.

The Prosecution carries the burden to prove all ingredients of the offence beyond reasonable doubt and this burden does not shift to the accused except where there is a specific statutory provision to the contrary. The standard of proof required is that of beyond reasonable doubt. It has been stated that this does not mean absolute certainty but the standard is met when there is a high degree of probability that the accused in fact committed the offence.

Miller V Minister of Pensions [1947]2 All.E.R 372; Uganda v Hussein Hassan Agade Criminal Session Case No.1/2010

The accused does not have any legal obligation to prove his innocence but can only be convicted on the strength of the prosecution evidence. The accused raises an alibi as his defence. Prosecution is required to adduce evidence destroying the alibi by putting him at the scene of crime as the perpetrator since he has no obligation of proving it.

Sekitoleko V Uganda [1967]EA 531; Okoth Okale & Anor V R(1965)EA 555

The Prosecution is required to prove that Asasira Rose is dead; that her death was unlawful and caused with malice aforethought. It is also a requirement to prove that it is the accused who directly or indirectly caused her death.

Prosecution led the evidence of PW1 who carried out a Postmortem on the body of the deceased. PW3 and PW5 confirmed that they saw the body at the home of the accused and PW8 told Court that he witnessed the Postmortem exercise carried out by PW1. The defence argued that since there was lack of clarity as to who identified the body to PW1, Prosecution failed to prove that Asasira Rose is dead. DW2 also told Court he did not believe that Asasira Rose died because he did not attend the burial ceremony.

It was not disputed that D/Seargent Musungu(PW8) and D/AIP Mbonekyirwe visited the scene of crime and photographs of the dead body were introduced in evidence. PW8 told Court that he personally witnessed PW1 carrying out the postmortem and PW3 together with PW5 attended the burial ceremony. This in the opinion of this Court is sufficient proof that Asasira Rose is dead and was buried contrary to the assertions of Counsel for the Accused.

Counsel correctly criticized PW1 for not opening the body to establish the actual cause of death with certainty. This does not erase the fact that death occurred and PW1 who had practiced medicine and carried out postmortem procedures for 10 years at the time had the necessary training and skills to confirm the fact of death and its probable cause. Pathologists are not spread all over this Country and Courts have accepted Postmortem reports prepared by qualified Doctors who have the competence to advise court on the cause of death.

Criminal Case No.0125/2015 Uganda V Akena &Ors.

Prosecution is required to prove that the death of Asasira Rose was caused by an unlawful act. The Law presumes any homicide to be unlawful unless it is excusable or accidental. There was no suggestion by Counsel for the accused that Asasira Rose died as a result of an accident or that her death was sanctioned under the Law. These would be the factors raised to negative the presumption of the death being unlawful.

Proof of the unlawful nature of the death however lies in the external injuries on the body reported by PW1 in the Postmortem report. The body had strangulation marks on the neck, multiple cuts on the head and a stab wound below the breast. These are injuries not consistent with an accidental or sanctioned death. I find the present case distinguishable from **Uganda V Akena &Ors (supra)** cited by Counsel for the accused.

The Post mortem in the cited case was purportedly carried out by a male Comprehensive nurse on a body found floating on water. The trial Judge correctly observed that the nurse lacked the necessary qualifications and skills to carry out the exercise hence his findings were rejected by Court.PW1 despite not having carried out a full autopsy has the training and skills to correctly advise Court as he did. It is the finding of this Court that the death was unlawfully caused and this element of the offence was proved by the Prosecution.

It is a requirement for the Prosecution to prove that the unlawful act was activated with malice aforethought. Malice aforethought is the intention to cause the death of a human being. It is an element of the mind that can be discerned from the circumstances surrounding the particular death. Courts tend to consider factors like the nature of the weapon used, the parts of the body attacked and the conduct of the assailant before and after the attack to establish malice aforethought.

All the Prosecution witnesses did not testify about observing anybody commit the offence in this case hence the conduct of whoever is the perpetrator can only be discerned from the state in which the dead body was found. Strangulation marks on the neck, head injuries and a deep stab below the breast were inflicted on sensitive parts of the body. Even in the absence of the murder weapon the parts of the body attacked show that the assailant intended to cause death. It is the finding of this Court that malice aforethought was proved by the Prosecution.

The Prosecution did not lead any direct evidence to prove that the accused caused the death of Asasira Rose and the case is strictly premised on circumstantial evidence. Circumstantial evidence may be the best evidence to prove a fact but for any conviction to be based on it, the exculpatory facts must be incompatible with the innocence of the accused and incapable of no other explanation than that of guilt.

Simon Musoke V R[1958]EA 715; CA Criminal .Appeal No.11/1997 Yowana Serwadda V Uganda.

PW3 and PW5 who were siblings to the deceased told Court that the accused was hostile to the deceased and she was scared that he would kill her and this was last communicated to PW5 on the 13th July 2012.

Court heard the unchallenged evidence of Mukasa Joseph (PW6) who said he last saw the accused and deceased together at 7.00pm on the 28th July 2012 as they entered their house. This piece of evidence was not at all challenged by Counsel for the accused in the vigorous cross examination that PW6 was subjected to regarding the events of the 29th July 2012. It was held by the Supreme Court that;

” that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to it being assailed as inherently incredible or possibly untrue.”

Supreme Court Criminal Appeal No.5/1990 James Sewabiri&Anor V Uganda; Kayibanda V Uganda [1976]HCB 253.

The accused told Court that he was at Kampala on the 28th July 2012 together with DW2. It is incumbent upon this Court to evaluate both versions of evidence relating to where the accused could have been before making any inference as to the credibility of the alibi raised.

Bogere Moses V Uganda Supreme Court Criminal Appeal No.1/1997.

DW2 told Court that he left Kabale by the 11.00 am Gateway Bus that reached Kampala at 5.00pm on the 27th July 2012 and was welcomed by the accused. The accused and DW2 left Nabingo for Mengo hospital on the 28th July 2012 in the morning and the accused returned to pick his travelling bag between 4.00pm and 5.00pm to return to Kabale. The narrative by DW2 discredits the evidence by the accused that he travelled to Kampala on the 28th July 2012.

Court of Appeal Election Petition No.9/2002 Masiko Winniefred V Babihuga.

How could the accused who travelled to Kampala on 28th July 2012 have met DW2 at Kisenyi Bus Park at 5.00pm on the 27th July 2012? The contradiction in the evidence of the accused and that of DW2 is a major one and goes to the root of the defence of alibi raised. PW4 and PW7 saw the accused with a bleeding wound on the forehead on the 29th July 2012 at 7.00am. The evidence of the wound seen by PW4 and PW7 corroborates the statement attributed to the accused that he had fought with the deceased. The wound on the forehead was also confirmed by PW2, Twinebaaha Apollo who examined the accused on the 30th July 2012.

The evidence of PW4 and PW7 further corroborates that of PW6 to the effect that the accused disappeared from him in the morning and he learnt from a Police man who came to the scene that he was already at the Police station. I am more inclined to believe the evidence of PW6 that the accused slept at home with the deceased on the 28th July 2012 and reported an assault at Police on the 29th July 2012. The evidence by PW6, PW4 and PW7 sufficiently discredits the alibi raised by the accused and places him at the scene of crime as the assailant who caused the death of Asasira Rose.

Counsel for the accused raised contradictions in the evidence of PW6 relating to when he knew that Asasira Rose was dead in view of his evidence in Court to the effect that he learnt

of it from a Police Officer who came to the scene. I did not find the contradictions in the Police statement and in the Oral testimony so grave and intended to mislead Court. I ignored them as they did not go to the root of the Prosecution evidence.

Alfred Tajar V Uganda Criminal Appeal No.167/ 1969.(EACA)

Counsel for the accused invited Court to make an adverse inference from the failure to produce the items recovered from the crime scene as exhibits. It was contended by the PW8 that they had been sent to the Government Laboratory but not returned and a slip to the effect was admitted in evidence. I wish to note that exhibiting the slip does not amount to the findings of the Laboratory which would probably have forensically linked the accused to the scene of crime to bolster the circumstantial evidence. Failure to produce an exhibit in Court does not mean that the Prosecution has failed to discharge its overall burden.

Uganda V Katushabe [1988-90]HCB 57

I will make no negative inference from this failure by the Prosecution in view of the evidence of PW6, PW4 and PW7. I choose to adopt the reasoning in **Supreme Court Criminal Appeal No.70/2004 Mbaziira Siragi V Uganda** to the effect that investigation shortcomings should not prejudice the justice of the case.

Counsel for the accused argued that PW4 and PW7 recorded a confession from the accused yet they were not mandated to. I do not agree. The gist of the evidence by PW4 and PW7 was that they participated in detaining the accused as the arresting officers. PW7 emphatically told Court that it was after recording an assault case that the accused remarked that his wife could be dead. I do not find merit in the contention by Counsel in view of what the accused is said to have told the two Police Officers. A mere statement to the effect that the accused had fought with his wife who may be dead does not amount to a confession in terms of Section 24(1) of the Evidence Act.

In Twinamatsiko V Uganda [1997]HCB 1 it was held that;

“A confession within the meaning of Section 24(1) of the Evidence Act means a statement which admits in terms either an offence or substantially all the facts which constitute an offence.”

It was finally argued that the failure to call D/AIP Mbonekyirwe the lead investigator should be adversely construed against the Prosecution. It was contended that what he was to give as evidence was what PW8 D/sergent Musungu told Court. I agree with the reasoning of Counsel for the accused that it is good practice to produce investigators in Court as was held in **Bogere Moses V Uganda(supra)**.

In **Alfred Bumbo & Ors V Uganda Supreme Court Criminal Appeal No.28/1994** it was however held that;

“ While it is desirable that the evidence of a Police Investigating Officer and of arrest of an accused person by the Police should always be given ,where necessary, we think that where

other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not as a rule be fatal to the conviction of the accused. All must depend on the circumstances of each case whether Police evidence is essential, in addition, to prove the charges.”

The evidence in this case was circumstantial. The accused took himself to Police. The uncalled witness directed PW1 to examine the body and his report was admitted in evidence and the recovered items were sent to the Laboratory by PW8 and not the uncalled witness. I am in agreement with the Prosecution that dispensing with his evidence was not fatal to their case.

All in all, I find the circumstantial evidence by the Prosecution capable of no other explanation than that of the guilt of the accused in this case. I find the accused guilty of Murder contrary to Sections 188 and 189 of the Penal Code Act. I accordingly convict him.

Moses Kazibwe Kawumi

Judge

11th September 2017.