

THE REPUBLIC OF UGANDA

IN THE HIFG COURT OF UGANDA HOLDEN AT RUKUNGIRI

CRIMINAL CASE NO.0028 OF 2015

UGANDA

PROSECUTOR

VERSUS

BAREKYE SILVER

AHIMBISIBWE VINCENT

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT.

The two accused persons A1, Barekye Silver and A2 Ahimbisibwe Vincent were charged with Murder contrary to Sections 188 and 189 of the Penal Code Act. It is alleged by the Prosecution that on the 3rd June 2014 at Kisharara Cell, Rukungi Municipality in Rukungiri District, the two murdered Ampeire Mercy.

Prosecution relied on the evidence of PW1 Detective Corporal Harerimaana Alex who was the exhibit store keeper at Rukungiri Police Station. The witness received two mobile phone sets and a pair of shoes from the case investigating officer on the 22nd June 2014 and kept the items in the store until they were allowed in evidence as exhibits for the Prosecution. The witness did not know the owners of the phone sets and how they related to the case since he had never worked on the case file at all he told Court.

PW2 Ndyomugenyi Emmanuel is a brother to A1, Barekye Silver brought up by the deceased and A1. His evidence was that on the 9th June 2014, he was approached by Alibindabyamu Suzan, the daughter of the deceased and Lydia Tumwekwase, a sister to the deceased with information that the deceased had left home on the 3rd June 2014 and had since not returned home. PW2 went to Rukungiri Radio for purposes of having the disappearance of the deceased broadcast but was told of an announcement of an identified body that Police had found in the same period.

In the company of Alibindabyamu Suzan and Lydia Tumwekwase, PW2 went to Police where they were shown a pair of shoes recovered from the body of the deceased and were led to Rwakabengo mortuary where they identified the body of Ampeire Mercy who had been killed in a swamp at Rwakasharara.

PW2 told Court that the deceased and A1, had been separated for seven years but had issues regarding A1 marrying another woman and matrimonial property which the Court at Rukungiri had decided in favor of the deceased and that A1 had threatened to harm the deceased after her Court victory. PW2 also told Court that the deceased had refused to endorse the decision taken by A1 to sell his (PW2's) land inherited from their father which had precipitated the disagreements between the two. The witness did not know A2 before until after the Police discovered that he had phone contact with the deceased.

PW3, Abindabyamu Suzan, the daughter of A1 told Court that the deceased left home on the 3rd June 2014 to go to Kateme Health Centre for treatment and did not return. She told Court that A1 would not come to the home they were staying with the deceased but after a few days from the disappearance of the deceased, he talked to her on her teacher's phone asking whether the deceased was at home and when she was expected back which made her suspicious.

PW3 then went and reported the disappearance of her mother to her auntie Lydia Tumwekwase and subsequently to PW2. Her only evidence against A2 was that she had once seen him talking to the deceased before her death.

PW4 Tumwekwase Lydia confirmed the evidence of PW2 and PW4 relating to how they came to find the body at the mortuary. Her evidence against A2 was that he used to work with A1 and that he used to talk with A1 and the deceased on phone hence the suspicion that he was involved in the murder of the deceased with A1. She confirmed the marital dispute and separation of A1 with the deceased and that A1 had threatened the deceased in Court premises after her Court victory. Court further learnt from PW4 that the Court Order for A1 to relocate the woman he was staying with from the matrimonial property and payment of the awarded costs had not been done at the time the deceased was found dead. Judgment in the case was delivered on the 15th June 2011. In cross examination the defence introduced the Police statement made by PW4 on the 10th June 2014 in which she told Police how she had learnt from a one Busingye Annet who was with the deceased on the 3rd June 2014, that two

men unknown to the deceased carried her on a motorcycle, bought her pork and she became unconscious after eating it. PW4 confirmed that it was not the Accused whom Busingye Annet had seen with the deceased on the day she disappeared.

PW5 Detective Corporal Bwambale Salveri played the role of acquiring a Court Order and phone printouts relating to calls received by the deceased. He found that the deceased had received calls from a one Turyasiima Julius and A2 on the day she allegedly disappeared and thus arrested both of them. He could not tell Court why Turyasiima Julius was not arraigned with the Accused. PW5 further told Court that A2 was in the same period communicating with A1 but that evidence could not be shown from the documentary evidence he brought to Court.

At the conclusion of the case for the Prosecution, Counsel for the Accused submitted that the Prosecution had not adduced substantial evidence to put A2 to his defence and invited Court to find him not guilty and accordingly acquit him. I agreed with the submissions of Counsel and acquitted A2.

In his unsworn evidence, A1, Barekye Silver denied participation in the murder of the deceased. He admitted that they lived in separation but had reconciled after the Court verdict and were carrying out developments together at the time the deceased met her death. He told Court that PW2 and PW3 told Court lies about him under the influence of PW4, a sister to the deceased. DW1 denied ever making a phone call to the unnamed teacher of PW3 asking about when the deceased was expected home.

Counsel opted not to make any submissions.

The Prosecution is under the duty to prove the offence beyond reasonable doubt since Court cannot convict the accused on the weakness of his defence but on the strength of the Prosecution evidence. This is premised on the presumption that the accused is innocent until he either pleads guilty or is proved guilty through the prosecution evidence.

In a Murder charge the Prosecution is required to prove that there was a death of a human being; that the death was unlawful and was caused with malice afore thought by the Accused person either directly or indirectly.

It is not disputed that Mercy Ampeire is dead. The evidence of the postmortem report by Dr.Musiimenta Emmanuel dated 7th June 2014 corroborated by the evidence of PW2, PW3, PW4 and DW1 all confirm her death. This ingredient of the offence was therefore proved beyond doubt.

The cause of death was indicated in the postmortem report as fatal brain damage secondary to deep head injuries and strangulation. The body had multiple deep cut wounds on the head and neck, thigh bruises, vulva and vaginal lacerations. The presumption of the law is that all homicides are unlawful except where death results from an accident or is in execution of a lawful Court Order. There was no suggestion from any of the witnesses that the death of Ampaire Mercy was accidental or authorized by Law. I therefore find it safe to presume that it was an unlawful death.

Malice aforethought in murder cases is derived from the circumstances in which the death occurred. Courts have considered the nature of the weapon used the multiplicity of attacks, the parts of the body attacked, and the conduct of the assailant before and after the offence as factors to determine this element of the offence. Prosecution did not bring any evidence of the case Investigating Officer to inform Court how and where the body was found. On the basis of the postmortem report however, vulnerable parts of the body, the head and neck were attacked and the deceased was strangled to death. Malice aforethought can be implied from the nature of the death the deceased met.

The body of the deceased was discovered by the Prosecution witnesses at Rwakabengo mortuary after six days from the day she left her home. No witness clearly told Court when the deceased met her death. The Accused told Court that he learnt of the death when he was at his place of work with Bright Perez a brother to the deceased and he was arrested soon after the burial. Prosecution evidence was premised on the marital dispute between the Accused and the deceased which culminated into a Court battle won by the deceased. The Accused is alleged to have threatened the deceased after the court verdict. The accused is further alleged to have made a call to PW3 using her teacher's phone which he denied in Court. The teacher whose phone was used was not called as a Prosecution witness. PW4 in her Police statement tendered in evidence for the defence investigated and found that the deceased was with a one Busingye Annet who saw hitching a ride from two men who bought her pork and she fell unconscious thereafter .The same Busingye Annet was not called to

testify as to what she saw and when it occurred if at all it took place. The same allegation by the uncalled potential witness Busingye Annet does not in any way link A2 to the murder of the deceased.

The Law provides that for a Court to convict on circumstantial evidence, inculpatory facts must be inconsistent with the innocence of the Accused and capable of no reasonable hypothesis than the guilt of the accused. The Accused may have had disputes with the deceased but the Prosecution has not brought any iota of evidence that links him to the murder of Ampeire Mercy. Suspicions however strong must be backed by evidence pointing to the participation of the Accused in the commission of the offence to secure a conviction. I have failed to find such evidence against the accused hence the ingredient of participation was not proved.

I therefore find the Accused not guilty of murder and I accordingly acquit him unless he is held on any other lawful charge.

Moses Kazibwe Kawumi

Judge

3rd February 2017.

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