

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0047 OF 2014

UGANDA **PROSECUTOR**

VERSUS

OLWORTH POLKARKO **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is charged with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 15th day of August 2012 at Pavur village in Zombo District murdered one Tereza Wanitho.

The prosecution case is that the deceased was a mentally deranged person who was under the delusion that the accused's maize garden belonged to her. She would from time to time weed the garden and harvest maize from it. The accused complained to the relatives of the deceased and threatened that he would kill her for destroying his crops if they did not restrain her. On 15th August 2012, it was noticed that the deceased was missing. The accused went to the relatives of the deceased and to her house to ascertain her whereabouts. It was suggested that a search be conducted in his garden to find out whether she was there but no one acted on the suggestion. The following day a search was mounted and her body was eventually discovered on 17th August 2012, hidden in a banana plantation near the maize garden of the accused. There were signs indicating that she had been killed from the garden of the accused and the body dragged for about forty metres to the location where it was found. Her blood smeared clothes were found together with a blood smeared short hoe, buried in the soil about four feet from where the body was discovered. The body had visible external injuries indicative of a homicide. On being alerted that he was a key suspect in the murder, the accused went and reported himself to a nearby police post for his personal safety. At his trial, he denied having killed the deceased and stated that on the day she is suspected to have been killed, he was digging in another of his gardens.

At the conclusion of the trial the State Attorney Mr. Emmanuel Pirimba submitted that the accused should be convicted since the prosecution had proved all the ingredients of the offence beyond reasonable doubt. Defence counsel on state brief Mr. Samuel Ondoma, conceding to the fact that death had been proved, that it was caused unlawfully and with malice aforethought, submitted that the prosecution had failed to prove it is the accused that is responsible for the death. The evidence is circumstantial and only raises suspicion against the accused but is incapable of sustaining a conviction. In their joint opinion, the assessors advised the court to acquit the accused since the prosecution had failed to prove beyond reasonable doubt that he had killed the deceased.

In this case, the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused can only be convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v. Uganda* [1967] EA 531). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove the ingredients of the offence beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused are innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

For the accused to be convicted of murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. 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.

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. The prosecution adduced in evidence, the post mortem report prepared by P.W.2 Mr. Onen Emmanuel a Medical Officer of Pakada Health Centre III, which was admitted during the preliminary hearing and

marked as exhibit P.Ex.2 dated 17th August 2012. The body was identified to him by a one Openji James as that of Wanitho Tereza. This is supported by the testimony of P.W.4 Justina Amondi, a sister of the deceased, who saw the body at the scene. P.W.5 Openji James, a nephew of the deceased, is the one who discovered the body concealed in a banana plantation and he also attended the funeral. P.W.6 D/AIP Okello Godfrey, the investigating officer too saw the body at the scene, and arranged for its post mortem examination. In his defence, the accused said he did not see the body but was told it had been found. D.W.2 Lenga William, testified that he too saw the body at the scene in the banana plantation. Having considered all the available evidence relating to this element, in agreement with the opinion of the assessors, I find that it has been proved beyond reasonable doubt that Tereza Wanitho is dead.

It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or it was authorized by law. P.W.2 who conducted the autopsy established the cause of death as “severe head injury and damage to major blood vessel of the neck leading to severe bleeding.” Exhibit P.Ex.2 dated 17th August 2012 contains the details of his other findings which include a “deep cut wound and cracked in parietal bone. Damage to major blood vessel of the neck. Multiple cut wounds on the head and neck. The part most affected was the head and the neck. She was well built with cut marks on the body and a banana fibre was pushed in the vagina. Sharp object likely to have been used upon the body.” P.W.4 who saw the body described the injuries as including a banana fibre pushed in her private parts. A deep cut wound on the head. Two teeth had fallen out. The throat was stabbed with a knife. P.W.5 who discovered the body concealed in a banana plantation observed a deep cut wound on the back of the head. Another on the left side of the forehead. Two upper teeth were missing. A deep stab wound on the neck. A stick wrapped with banana fibre had been inserted in her private parts. Part of the private parts had been cut off. P.W.6 observed a cut wound at the back of the neck. Another on the left side of the head. Two stab wounds in the neck and the throat. A slit on the upper lip. She had lost two teeth and a wrapped banana fibre pushed into her vagina. There were drag marks from the garden of the accused to the spot where the body was found a distance of about forty metres. A small hoe tainted with blood was discovered buried four metres from the body. A blood stained blouse and *kitenge* wrapper was discovered in the same hole. In his defence, the accused stated that he did not see the body and hence the

injuries. D.W.2 witnessed recovery of the bloodstained clothes of the deceased at the scene. Defence Counsel did not contest this element. From the available evidence, I find that it has been proved that Tereza Wanitho's death was a homicide and since there is evidence suggesting any lawful justification for the acts which caused her death, in agreement with the joint opinion of the assessors I find that it has been proved beyond reasonable doubt that Tereza Wanitho's death was unlawfully caused.

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 assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. Malice aforethought is a mental element that is difficult to prove by direct evidence. Courts usually consider weapon used (in this a bloodstained hoe was recovered) and the manner it was applied (multiple fatal injuries inflicted) and the part of the body of the victim that was targeted (the neck and head). The ferocity with which the weapon was used can be determined from the impact (a major blood vessel in the neck was damaged and a cracked parietal bone). P.W.2 who conducted the autopsy established the cause of death as "severe head injury and damage to major blood vessel of the neck leading to severe bleeding." The accused did not offer any evidence on this element. Defence Counsel did not contest this element. There is no direct evidence of intention but on basis of the available circumstantial evidence of the injuries, it can be readily inferred that whoever caused those injuries intended to cause death or knew that they would probably cause death. For that reason, in agreement with the joint opinion of the assessors, I find that it has been proved beyond reasonable doubt that Tereza Wanitho's death was caused with malice aforethought.

For the accused to be convicted of the offence, there should be credible direct or circumstantial evidence placing him at the scene of the crime as an active participant in the commission of the offence. The accused denied any participation. He only learnt about the death after the body was discovered. There is a contradiction though as to the source of that information as between his wife and D.W.2, Lenga William. However, weaknesses in the defence can only be used to

corroborate an otherwise strong prosecution case. They cannot be used to fill in gaps in the prosecution case.

To counteract his defence, the prosecution relies entirely on circumstantial evidence, woven together by the following strands; the accused bore a grudge against the deceased for repeatedly destroying his crops. He threatened to kill the deceased if her relatives did not restrain her. The day she went missing, the accused went around asking about her whereabouts, suggesting that a search should be made of his garden. He himself never went to search in the garden. In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

I have considered the circumstantial evidence against the accused and found that it raises a strong suspicion against him. I am not satisfied though that it irresistibly points to his guilt. The evidence does not entirely rule out the possibility that the deceased could have died at the hands of another person. His conduct of reporting himself to the police upon discovery of the body is plausible in light of the numerous incidents of mob justice that have occurred in situations of this kind. Therefore, in agreement with the joint opinion of the assessors, I find that the prosecution has failed to prove beyond reasonable doubt that the accused committed the offence with which he is indicted. Consequently, he is found not guilty and is hereby acquitted of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. He should be set free forthwith unless he is being held for other lawful reason.

Dated at Arua this 8th day of February, 2017.

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Stephen Mubiru
Judge.