

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KASESE
HCT – 01 – CR – CS – 0054 OF 2014

UGANDAPROSECUTOR

VERSUS

KUMBUKIRWA MOSES.....ACCUSED

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

Judgment

The accused was indicted with murder Contrary to **Sections 188 and 189** of the Penal Code Act. It is alleged that the accused on 22nd January 2014 at Kathasenda Village, Mukunyu Sub-County, Kasese District murdered Biira Joy.

The accused denied committing the offence.

The prosecution produced five witnesses in a bid to prove its case and the accused called one witness.

Kwesiga Michael State Attorney appeared for the State and Counsel Edgar Tukahaabwa for the accused on State Brief.

Burden of proof:

In order to consider the culpability of the Accused persons, certain several principles of the law are considered. The Accused persons are presumed innocent until the contrary is proved. **(See: Article 28 (3) (a) of the Constitution of the Republic of Uganda 1995 as amended.)** Therefore, the Prosecution bears the burden to prove not only the fact that the offence was committed but that it was committed by the Accused persons or that the Accused persons participated in the commission of the alleged Offence. It is therefore relevant to place the Accused persons at the scene of crime.

Section 101 (2) of the Evidence Act provides that;

“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

It is further provided under **Section 103** of the Evidence Act that;

“The burden of proof as to any particular fact lies on that person who wishes the Court to believe its existence, unless it is provided by law that the proof of that fact lie on any particular person.”

Standard of proof:

Regarding the standard of proof, the Prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt. (*See: Woolmington versus DPP [1935] AC 462*). However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the Accused, it should be resolved in the favour of the Accused persons. Therefore, the Accused persons must not be convicted because they have put a weak defence but rather that Prosecution case strongly incriminates them and that there is no other reasonable hypothesis than the fact that the Accused persons committed the alleged crime.

The standard of proof is beyond reasonable doubt as discussed in the case of *Miller versus Minister of Pensions (1947) 2 .All .ER 372 at 373*; wherein **Lord Denning** stated as follows;

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice”.

Similarly, in *Uganda versus Dick Ojok (1992-93) HCB 54*: it was held that in all criminal cases, the duty of proving the guilt of the Accused always lies on the Prosecution and that duty does not shift to the Accused except in a few statutory cases and the standard by which the Prosecution must prove the guilt of the Accused is beyond reasonable doubt.

With respect to the nature of evidence required, the Accused persons can only be convicted on the basis of evidence adduced before Court, such evidence must be credible and not tainted by any lies or hearsay, and otherwise it will be rejected by the Court for being false.

Prosecution must prove all the ingredients of the Offence of Murder in order to sustain a conviction thereof. In the case of *Uganda versus Bosco Okello [1992-93] HCB 68* , *Uganda versus Muzamiru Bakubye & Anor High Court Criminal Session No.399/2010*, where it was held that Prosecution must prove the following ingredients beyond reasonable doubt:-

1. That the deceased is dead;
2. That the death was caused unlawfully;
3. That there was malice aforethought;
4. That the Accused person directly or indirectly participated in the commission of the alleged Offence.

That the deceased is dead:

The prosecution witnesses all told Court that the deceased person died and they saw the dead body. The prosecution also produced medical evidence to prove that there was death through the Post Mortem Report marked PE2. This ingredient was therefore proved sufficiently.

That the death was caused unlawfully;

In the instant case the deceased persons died due to haemorrhage and asphyxia due to trauma to the head and strangulation. There is no doubt that the death of the deceased persons was unlawful.

That there was malice aforethought;

Malice aforethought is defined under **Section 191** of the Penal Code Act to mean;

“An intention to cause death of any person, whether such person is the one actually killed or not.

Knowledge that the act or omission causing death will probably cause death of a person, whether that person is the one killed or not, though such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may be caused.”

Malice aforethought is therefore a mental element of the offence of murder which in many cases is difficult to prove by direct evidence. However, it can be inferred from the surrounding circumstances of the offence as was held in **R versus Tubere (1945) 12 E.A.C.A 63, Akol Patrick & Others versus Uganda (2006) H.C.B (Vol.1)6 and Uganda versus Aggrey Kiyinji & Others Kampala High Court Criminal Session Case No.30 of 2006;**

The circumstances are:-

1. The weapon used, whether lethal or not.
2. The part of the body targeted (whether vulnerable or not);
3. The manner in which the weapon was used (whether repeatedly or not); and
4. The conduct of the assailant before, during and after the attack.

In summary, in arriving at a conclusion as to whether malice aforethought has been established, the court must consider the weapon used, the manner in which it was used and the part of the body injured.

In the instant case the deceased was found with blood coming from her nose, and the post mortem Report indicated that the deceased died of excessive bleeding and strangulation. It is clear from the circumstances of the death of the deceased the offence was committed with malice aforethought. I find that this ingredient was sufficiently proved by the prosecution.

That the Accused person directly or indirectly participated in the commission of the alleged Offence:

PW1 and PW3 told Court that the accused had been sexually interested in deceased and PW1 encouraged the deceased (her daughter) to reject him. The accused on the fateful day had been to the deceased's home asking whether she had received any money and was whispering to her suspiciously. As per the PW1, PW3 and PW5's evidence the accused and a one Olive were working together to get the deceased in relationship with the accused. Olive on the fateful day also came to the deceased's home and asked her to come and see her at her home which PW1 did not permit.

The post mortem report indicated that the deceased had vaginal bruises which mean that she must have had sexual intercourse before her death. The dead body was also found with the dress around the waist.

It was the evidence of the prosecution witnesses that the deceased was found near Olive's home with a blood trail leading from her home to the place where the body was dumped near her latrine.

Though no direct evidence by an eyewitness was adduced, there was overwhelming circumstantial evidence proving that the accused had a hand in the death of the deceased as he was known to have had interest in the deceased and was known to be her boyfriend.

In the case of **Aharikukundira versus Uganda, CACA No. 104 of 2009**, it was stated that;

“Circumstantial evidence can stand on its own so long as the Court subjects it to close scrutiny to determine that the inculpatory facts against the appellant are incompatible with her innocence. This is the principle stated in the case of Kazibwe Kassim versus Uganda SCCA No. 1 of 2003 following many other decisions. The Supreme Court stated as follows:-

“In our view, although the prosecution case wholly depended on circumstantial evidence, we think that in order for the Court of Appeal to act on such evidence, the inculpatory facts against the appellant must be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

Further that:

In a recent decision of this Court in the case of **Kitosi Abu and another versus Uganda Criminal Appeal No. 154 of 2010** this Court had this to say:-

*“In respect of circumstantial evidence this Court knows of no principle that invariably before basing a conviction on circumstantial evidence there must be corroboration. In fact this Court of Appeal has in the recent case of **Hon. Akbar Hussein Godi versus Uganda (Criminal Appeal No. 62 of 2011 (unreported)** made a reinstatement of the principle that when properly handled, circumstantial evidence may be the best evidence to prove a proposition. This Court stated as follows in Godi's case:-
“Thus the Appellant was convicted on circumstantial evidence. We appreciate this evidence to be in the nature of a series of circumstances leading to the inference or conclusion of guilt when direct evidence is not available. It is evidence which although not directly establishing*

the existence of the facts required to be proved, is admissible as making the facts in issue probable by reason of its connection with or in relation to them. It is evidence, at times regarded to be of a higher probative value than direct evidence, which may be perjured or mistaken. A Kenyan Court has noted that:-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of providing a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. (See: High Court of Kenya at Nairobi Criminal Case No. 55 of 2006: Republic versus Thomas Gilbert Chocmo Ndeley.)

Though a decision of the High Court of Kenya, we find the enunciation of the principle as regards the application of circumstantial evidence in the words of the above quotation very appropriate and as representing the position of the Law on circumstantial evidence even in Uganda.”

The accused raised a defence of alibi and brought a witness who could not confirm the whereabouts of the accused on the night of the incident. However, the prosecution was able to link the accused to the commission of the offence through circumstantial evidence.

I agree with the assessors’ opinion and find the accused guilty of the offence of murder contrary to Sections 188 and 189 of the Penal Code. He is hereby convicted as indicted.

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OYUKO. ANTHONY OJOK

JUDGE

03/04/2014

State: There is no record of previous acts, carries maximum sentence of death. Pray for a deterrent sentence.

Edgar T: The convict has been on remand for 3 years and 2 months, he is a family man and father of 5 children. He is also a young man. I pray for 15 years.

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OYUKO. ANTHONY OJOK

JUDGE

03/04/2014

Court: The convict is sentenced to 40 years imprisonment.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

03/04/2014