

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KASESE
HCT – 01 – CR – CS – 0215 OF 2014

UGANDAPROSECUTOR

VERSUS

KWIKIRIZA ABERTACCUSED

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 and others still at large on 8th July 2014 at Kikorongo trading Centre, Kasese District murdered PTE Kawalina Vicent.

The accused denied committing the offence.

The prosecution produced five witnesses in a bid to prove its case and the accused did not call any witnesses.

Anna Kiiza Resident Senior State Attorney appeared for the State and Counsel Accellam Collins 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. The prosecution also produced medical evidence to prove that there was death through the Post Mortem Report marked PE1. This ingredient was therefore proved sufficiently.

That the death was caused unlawfully;

In the instant case the deceased person died due to massive bleeding due to stab wounds on his chest that ruptured his lungs. 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 stab wounds on his chest and ruptured lungs that were caused by a dangerous weapon to wit a knife. It is clear from the circumstances of the death of the deceased that 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:

In the instant case, there was no eye witness and prosecution relied on circumstantial evidence. PW1, PW2, PW3, PW4 and PW5 never saw the accused person kill the deceased. PW1 confirmed that the deceased died of massive bleeding from the chest cavity caused by stab wounds caused by a sharp edged weapon such as a knife leading to death. This was corroborated by the evidence of PW5 who was the Investigating Officer who took photographs of the deceased and drew the sketch plan.

PW2 contradicted herself during cross-examination on the description of the knife he brought to the accused person. In examination in-chief he mentioned that he saw the body of the deceased and in cross-examination he said that he was told by his sister.

PW2 further said that it was the first time the accused sent him to his house to pick the knife and in cross-examination he said that he knew the accused's house very well.

Finally, that he had never seen the accused person quarrel with the deceased therefore could not tell whether they had a grudge before or not.

PW2 also stated that the accused used to roast muchomo and this was clearly stated by DW1 and PW3 and that means that he used to use a knife to do his business of cutting meat. Apart from bringing the knife PW2 never saw the accused kill the deceased.

PW3 told Court that she did not know how the accused was killed but knew that the accused was killed and was told by a certain UPDF Soldier.

PW3 further said that one day the deceased uttered information that Bakonzo are likely to attack Banyankole and as the accused was coming near the deceased, the deceased chased him and the accused said that, he will do something to him.

During cross-examination she again contradicted herself by saying that it was the deceased who threatened the accused.

PW4 was very inconsistent. The only thing she stated well was, knowing the deceased.

PW5 saw the body, took photos and draw a sketch plan. The Police dog lost sight, described the state of the body and what he saw corroborated what PW1 stated. The first Investigation Officer who carried out the investigation was not brought to Court.

Further, PW5 stated that he recorded some statements of some witnesses and himself recorded his statement. However, during cross-examination what he told Court was completely different from his statement.

The only evidence that would have helped the accused was where he was arrested from. From the testimony of DW1 he stated that he had two homes, one at the trading Centre of Kikorongo and another one at Rubirizi where he was arrested from. According to DW1 he was arrested at his home at Rubirizi and he was not in hiding as alleged. Indeed DW1 was consistent and unshaken in his testimony.

The contradictions and inconsistency in the prosecution evidence were major and these should be resolved in favour of the accused person. The prosecution failed to place the accused person at the scene of crime and therefore, this ingredient was not sufficiently proved.

I therefore, agree with the opinion of the assessors and find that the accused person was not the one who murdered the deceased. This ingredient was not proved beyond a shadow of doubt. I accordingly, find the accused person not guilty and he is acquitted and set free unless liable to be held in custody on other charges.

Right of appeal explained.

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OYUKO. ANTHONY OJOK
JUDGE
10/03/2017