

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CRIMINAL SESSIONS CASE No. 0057 OF 2017**

**UGANDA** ..... **PROSECUTOR**  
**VERSUS**  
**DRAGA NICKSON** ..... **ACCUSED**  
**Before Hon. Justice Stephen Mubiru**

**RULING**

The accused in this case is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 29<sup>th</sup> day of December 2013 at Nyamadri village in Arua District, murdered Ayikoru Winny Rose. The accused pleaded not guilty to the indictment. In a bid to prove the indictment against the accused, evidence of one witness was admitted during the preliminary hearing, the prosecution called three additional witness then closed its case.

At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence (see section 73 (2) of *The Trial on Indictments Act*). Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (See *Wabiro alias Musa v. R [1960] E.A. 184 and Kadiri Kyanju and Others v. Uganda [1974] HCB 215*).

A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v. R. [1957] EA 332*). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable

doubt since such a determination can only be made after hearing both the prosecution and the defence.

There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] *ALL E.R 448* and also applied in *Uganda v. Alfred Ateu* [1974] *HCB 179*, as follows:-

- a) When there has been no evidence to prove an essential ingredient in the alleged offence, or
- b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

It was the submission of the learned defence counsel, Mr. Okello Oyarmoi that although the other elements of the offence were established by the evidence led by the prosecution, they had failed to adduce sufficient evidence in relation to the identification of the accused as the perpetrator of the offence and had therefore failed to establish a *prima facie* case against him. Consequently, he argued that the accused should be acquitted. He submitted that circumstantial evidence must be so tight as to eliminate any other suspect and must point to the guilt of the accused. In the instant case, the evidence is not so tight. It shows that the accused lived at two homes and could leave any at any time he wanted. There exists a reasonable hypothesis that following a quarrel with the deceased, the accused decided to go away. In his absence something happened to the deceased. There is no scintilla of evidence to require the accused to be put to his defence. The case should be dismissed.

On her part, the Senior Resident State Attorney prosecuting the case, Ms. Harriet Adubango submitted that the prosecution had made out a case to answer. There is enough circumstantial evidence. On the fateful day PW1 and PW2 heard the accused expressing anger at the way the deceased was mistreating his brother and had promised to deal with her. It is not by coincidence that the same night the deceased died mysteriously and the accused disappeared later to be arrested after 12 days in Kubala. That is not mere suspicion. In making the utterances and then disappearing, the accused engaged in conduct that is not a mere coincidence

At this stage, I have to determine whether the prosecution has led sufficient evidence capable of proving each of the ingredients of the offence of Murder, if the accused chose not to say anything in his defence, and whether such evidence has not been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it. For the accused to be required to defend himself, the prosecution must have led evidence of such a quality or standard on each of the following essential ingredients;

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. There is the post mortem report dated 30<sup>th</sup> December 2013 prepared by P.W.1 Dr. Sewanyana Yasin at the Yumbe Hospital Mortuary, which was admitted during the preliminary hearing and marked as exhibit P.Ex.1. The body was identified to him by a Adroa Jimmy, as that of Winny Ayikoru Agnes. PW3 Inziku Gabriel testified that he knew the deceased and attended her burial. P.W.4 No. 29911 Cpl Almika Luka Ejoi went to the scene and found the body lying in the hut. I therefore find that the prosecution has led sufficient evidence capable of supporting a finding that, Winny Ayikoru Agnes, if the accused chose not to say anything in his defence.

The second ingredient requires evidence that the death was unlawfully caused. It is the law that any homicide is presumed to have been caused unlawfully unless it was accidental or it was authorized by law. P.W.1 who conducted the autopsy established the cause of death as "Hypoxia, possibly following a strangulation. (R/O poisoning)." His other observations as stated in exhibit P.Ex.1 dated 30<sup>th</sup> December 2013 are that the body had "dried blood in the mouth and nose. There is gross reddening of the left eyeball (sub-conjunctival hemorrhage.)" P .W.4 No. 29911 Cpl Almika Luka Ejoi too described the appearance of the body at the scene as having blood oozing out of the mouth and nose. These injuries are consistent with a homicide rather than a suicide. I therefore find that the prosecution led sufficient evidence capable of supporting a finding that, Winny Ayikoru Agnes ' death was unlawfully caused, if the accused chose not to say anything in his defence.

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 circumstantial. The evidence led by the prosecution suggests that the deceased was strangled. Any person who strangles another clearly has the knowledge that the act will probably cause the death of the victim. I therefore find that the prosecution led sufficient evidence capable of supporting a finding that, Winny Ayikoru Agnes' death was caused with malice aforethought, if the accused chose not to say anything in his defence.

Lastly, there should be credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence. In the instant case, the only evidence adduced is circumstantial comprising the following strands; the accused at the time ordinarily oscillated between two homes including that of the husband to the deceased. The day before the death of the deceased, the accused had branched off to the home of P.W.2 Ajidru Lucy where she overheard the accused complain to her husband, PW3 Inziku Gabriel, that the deceased was generally mean and had made it a habit to assault her husband. PW3 confirmed that he had had such a conversation with the accused. The following day the deceased was found dead and the husband of the deceased, who was the initial suspect, implicated the accused as the only person with whom the family had a grudge. The accused was not around to participate in the burial arrangements and at the burial. He was arrested on 11<sup>th</sup> January 2014 at his maternal home in Kubala.

In the circumstances, there is no direct evidence implicating or showing that the accused participated in committing the offence. It is all circumstantial. It is settled law that 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 find that if the accused considering the multiple reasonable hypotheses that can be raised in light of the weak circumstantial evidence adduced in this case, if the accused chose to remain silent, this court would not have evidence sufficient to convict him for the murder of the victim. I therefore find that no prima facie case has been made out requiring the accused to be put on his defence. I accordingly, find the accused not guilty and hereby acquit him of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. He should be set free forthwith unless he is lawfully held on other charges.

Dated at Arua this 4<sup>th</sup> day of August, 2017.

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Stephen Mubiru  
Judge.  
4<sup>th</sup> August, 2017