

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CRIMINAL CASE NO.0130 OF 2012

UGANDA :::PROSECUTOR

VERSUS

SATURDAY NAFUTALI :::ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused, Saturday Nafutali was indicted for Murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence are that on the 14th October 2012 at Rugarambiro village in Kabale District the accused murdered Prison warder No.10848 Musasizi Benard.

Besigomwe Jasper, a brother to the deceased testified as PW3 and told Court that he learnt of the death on the 15th October 2012. He went to where the dead body was lying on the road side at Muko Kisementi. He saw a wound on the head and traces of blood leading to the home of the accused. A one Molly and Firimoni came to the scene and narrated that they saw the deceased with the accused on the 14th October 2012 based on which information Police started looking for the accused who was arrested from a distance of one mile from his home.

A search was conducted in the home of the accused and a blood stained hammer and a phone charger were recovered from under his bed. According to PW3, the accused and the deceased were friends and he was emphatic about the phone charger being the property of the deceased since he also used to borrow it to charge his phone.

PW4 Nkundeki Firimoni runs a bar in Muko trading center where he saw the accused and the deceased at about 8.00pm on the 13th November 2012. The two shared a drink and the accused insisted that they leave before he closed at 8.30 pm. The deceased had a phone and a charger while at the bar with the accused. Kyarisiima Maureen saw the accused and the deceased when they branched off to her house at about 9.00pm. The deceased proposed to stay at his brother's home but the accused pulled him and urged him to go to his home and

they left together. She also confirmed the recovery of a phone charger and a bloodstained hammer from the home of the accused when the Police came.

Detective Seargent Musungu Celestino testified as PW6. He was the scene of crime officer who visited the scene on the 14th October 2012 and conducted a search in the home of the accused. A phone charger was recovered from under a mattress and a blood stained hammer was recovered from the roof ceiling. PW6 confirmed seeing traces of blood from the scene where the body had been to the home of the accused. He took photographs of the scene as part of the investigations and also blood samples for forensic investigation.

The accused did not deny sitting with the deceased at PW4's bar and sharing drinks but told Court that they did not leave together. The accused told Court that he left the bar at 8.30 pm and went to his kiosk in the trading center where he slept with his wife that night and did not know when and how the deceased left Firimoni's bar. The accused further told Court that he was arrested from his home in the trading center and that the phone charger found in his house was his property.

Prosecution urged Court to convict the accused on the circumstantial evidence of PW4 and PW5 who saw the accused and the deceased together on the 14th October 2012 and the discovery of the blood stained hammer in the home of the accused. It was also argued that the recovery of a phone charger that the deceased had in the bar from the home of the accused negated his alibi that he slept at the kiosk in the trading center.

Counsel for the accused on the other hand pointed out the contradictions in the Prosecution evidence regarding where the hammer was recovered from. While PW3 told Court it was recovered from under a mattress, PW6 told Court it was recovered from the ceiling. Counsel further pointed out that the blood stains on the hammer were not compared with the samples taken by PW6 and neither was any evidence adduced to show that the accused had ever touched it. It was further argued that there were no peculiar features on the claimed phone charger to prove it belonged to the deceased. Court was invited to believe the version of evidence by the accused and acquit him since the Prosecution failed to prove the case beyond reasonable doubt.

The burden to prove all ingredients of the offence beyond reasonable doubt falls on the Prosecution in all save a few statutory offences. Proof beyond reasonable doubt has however

been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour.

Miller v Minister of Pensions {1947} All. E.R 372

In discharging the burden cast upon it by the Law, the Prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, Court considers the strength of the evidence by the Prosecution and not the weakness of the defence raised by the accused person.

The four ingredients that the Prosecution is required to prove in an indictment for murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.

At the commencement of the trial Counsel for the Prosecution and the accused agreed to admit in evidence the postmortem report on the examination of the body of the deceased. Facts agreed as evidence are deemed to be proved under section 66 of the Trial on Indictments Act and this evidence was supplemented by that of PW3 and PW5 who saw the body and attended the burial ceremony. This ingredient of the offence was duly proved by the Prosecution.

As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by Law. The deceased in this case was found with a depression on the head and there was bleeding from the nose and ears. There was an unsubstantiated suggestion by Counsel for the accused that the deceased could have fallen off a cliff. This was not backed by any supporting evidence hence i find it safe to presume that the death was unlawful.

Malice aforethought is the intention to cause death. It is an element of the mind which can only be inferred from the circumstances in which the death occurred. Courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack.

All the prosecution witnesses did not testify to witnessing the attack on the deceased and there is no certainty as to what was used as the murder weapon. What however is clear from

the postmortem report is that the head was attacked as evidenced by the depression which implies a lot of force was used using whatever object was employed. Given the presumed force used on such a sensitive part of the body, it can safely be inferred that death was the desired outcome of whoever the assailant was.

There was no direct evidence linking the accused to the crime. It is the position of the law that for court to base a conviction on circumstantial evidence it must irresistibly point to the guilt of the accused with no co-existing circumstances which would weaken or destroy that inference.

Sekitoleko vs Uganda {1967} EA 531; Aniseth V R [1963]EA 206

PW4 Nkundeki Firimoni told Court that the accused left his bar together with the deceased though he could not tell what happened thereafter. PW5 Maureen Kyasimire saw the two men at her home and they left together. She told Court in cross examination that she first heard them talk before she went outside and even heard the accused urging the deceased not to sleep at his brother's house and they proceeded to their respective homes. The two witnesses were not challenged in their evidence about the deceased leaving with the accused from the bar and from the home of PW5. The only inference to draw from this unchallenged evidence is that it is true.

I observed both PW4 and PW5 when giving evidence in Court and I was more persuaded by their truthfulness and consistency in stating what they saw as opposed to the version by the accused that he spent the night at his kiosk with his wife.

The accused and the deceased were neighbors whose houses were separated by about sixty meters and used the same road to their respective homes. PW3 and PW5 were not challenged when they testified about traces of blood from where the body was to the home of the accused. PW6 too saw the traces of blood but could not exhibit the photo he took which in the opinion of this Court does not negative the unchallenged evidence of PW4 and PW5. The deceased had a depression on the head and blood was oozing from the nose and ears.

PW3 told Court and was emphatic in cross examination that the charger recovered from the home of the accused is the property of the deceased while PW4 told Court that the deceased had a charger and a phone in the bar. This evidence corroborates the evidence of PW5 who

last saw the deceased and the accused together otherwise how could the charger have found its way to the home of the accused when the two parted at the bar?

The accused denied seeing the deceased with a charger and a phone playing music contrary to the evidence of PW4. Further and contrary to the evidence of PW3, PW5 and PW6 he told Court that he was arrested from his home. I did not believe this version of evidence because at the time the Police came and a search was conducted, the accused was not at home as confirmed by PW3 and PW6.

Counsel for the accused raised arguments about the hammer and the fact that the results of the blood samples taken by PW6 were not tendered in evidence. PW6 conceded that the results would have bolstered the Prosecution case but they were never returned from the Government Laboratory. It is however worth noting that failure to produce an exhibit in Court does not necessarily mean that the Prosecution failed to discharge its overall burden.

Uganda v Katushabe [1988—1990] HCB 59

I have carefully evaluated the alibi evidence adduced by the accused and the prosecution evidence notably that of PW4 who saw the accused leaving with the deceased, the evidence of PW5 who saw them together after leaving PW4’s bar and that of PW3, PW4 and PW6 relating to the phone charger attributed to the deceased. The recovery of the blood stained hammer and a charger from the home of the accused squarely links him to the crime and discredits his alibi as there is no explanation as to how he could have got it if he had stayed at his kiosk for the night as he told Court.

Matete V Uganda Supreme Court Crim. Appeal No.53 of 2001

It is my finding that the circumstantial evidence surrounding the death of Musasizi Bernard points to the guilt of the accused. I find him guilty of murder contrary to sections 188 and 189 of the Penal Code Act and I accordingly convict him.

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Moses Kazibwe Kawumi

Judge

11th August 2017.