

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CRIMINAL SESSION CASE NO.090 OF 2014

UGANDA :::::::::::::::::::::::::::::::::::::::PROSECUTOR

VERSUS

BAHATI MUKASA PETER ::::::::::::::::::::::::::::::ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

Bahati Mukasa Peter, the accused was indicted for murder contrary to Sections 188 and 189 of the Penal Code Act, It is alleged by the Prosecution that on the 24th day of February 2013 at Nyakaranga Village, Kiyembe Parish, Ruhija sub-county in Kabale District, the accused murdered Mugabirwe Bosco.

Under Section 66 of the Trial on Indictments Act, the Prosecution and Defence Counsel agreed to admit in evidence a Postmortem report on the body of the deceased and a medical form relating to the examination of the accused. Four witnesses were called by the Prosecution and the accused gave a sworn testimony but called no witnesses.

PW3 Katushabe Sylvia was the first Prosecution witness who told Court that the deceased returned home at about 8.00pm and they had supper. They slept in the same room with the deceased but towards 12.00 midnight she woke up to see the accused cutting her with a Panga. The witness was cut on the arm; palm and leg .The accused then cut the deceased on the head and arms.

The deceased forced the door open and ran out towards the front of their house while raising an alarm. The accused chased him while PW3 and her children ran to a neighbour's home. PW3 lost consciousness and only regained her senses while in hospital after a few days. The deceased died that same day and was buried when PW3 was still in hospital.

It was the evidence of Katushabe Sylvia that the accused had a torch while assaulting them and that there was bright moonlight through four holes in the roof of their bedroom.

PW4 Kigambirohi Edward and another resident called Veneranda heard the deceased making an alarm calling for the Chairman's help stating that someone was killing him. It was at about 11.00pm. PW4 and Veneranda ran and informed the Village Chairman who moved with them in the direction of the alarm. They found the deceased on the ground with injuries on the head, eyes and arms. The deceased told them that the accused had attacked and cut them. They found PW3 injured at the neighbor's home. The victims were carried to Kiyebe Health Center but the deceased passed on after about two hours.

Court heard from PW4 that the accused and the deceased had been friends but fell apart when the accused started accusing the deceased of having an affair with his wife and a report had been made to the Village Chairman. In cross examination PW4 described the deceased as putting on underclothes the colour of which he could not tell Court because it was dark.

PW5 Bifabusha Kalaveri was the chairman woken up by PW4 and Veneranda on the 23rd February 2013. He told Court that he went with Veneranda, PW4 and a one Tindiwegi to where the alarm had been made. They found the accused injured and he told them that the Accused had attacked him and his wife Katushabe. PW5 mobilized residents to take the deceased to hospital while he went to check on PW3. At the neighbour's home, PW3 told him it was the accused who had attacked them and she later lost consciousness.

The witness and other residents could not find the accused at his known home. They found his two children locked inside his rented house and in rage residents destroyed his known home. In cross examination, PW5 denied knowledge of any dispute between the accused and the deceased as alleged by PW4. On further questioning, PW5 told Court that the deceased repeated the accusation against the accused five times while PW3 said it was the accused who attacked them one time before she collapsed.

PW6 D.AIP Sebahire George was detailed to go to the scene of crime after Kabale Police received a report of the murder on the 24th February 2013. He proceeded to the village and saw the body in the sitting room. In the course of investigations he saw blood in the bedroom and at the spot the deceased had collapsed about 60 meters from his house. The accused was arrested by Police at Mulore on the 26th February 2013.

The accused in his defence denied murdering the deceased who was his friend and wondered why all the Prosecution witnesses told lies about him. His evidence was that on the 24th

February 2013 he was sleeping at home when he heard people outside saying that they will kill him. He told Court that he woke up and decided to walk to the sub county headquarters at Mulore but lost his way in Bwindi forest and arrived there on the 26th February 2013.

It was submitted for the Prosecution that the accused was a friend to the family of the deceased well known to PW3 who identified him well since there was moonlight and torch light. The dying declaration made by the deceased it was argued corroborated the evidence of PW3 regarding the identification of the accused as the assailant. This was heard by among others PW4 and PW5 yet both victims had fled in different directions and could not have conspired to frame the accused as the assailant.

Prosecution Counsel attacked the accused for locking children in the house and invited Court to make an inference that it pointed to conduct of a guilty person. Counsel further invited Court to disbelieve the averment that the accused got lost in a forest for two days since the accused was not a stranger in the area who could not find his way to his intended destination for two days.

Counsel for the accused on the other hand attacked PW3's evidence relating to the identification of the accused as alleged. It was argued that the torch light shone in the faces of the victims and the moonlight through the holes in the roof was not sufficient to properly identify the assailant. The Prosecution's failure to interrogate witnesses about the size of the holes in the roof ,the quality of the light ,the time the attack took and the contradictory evidence from PW4 and PW5 as to whether it was a bright or dark night were pointed out by Counsel. Court was invited to consider a possibility of mistaken identity.

Contradictions in the evidence relating to whether the accused had a misunderstanding with the deceased were pointed out. It was submitted that the inference to be drawn is that the accused lacked the motive for the murder attributed to him. Court was invited to believe his alibi as he had to flee the village from the same people who had destroyed his house.

The burden to prove all ingredients of the offence beyond reasonable doubt is cast on the Prosecution and this does not shift to the accused except in very few statutory offences. It is also the position of the Law that Court can only convict on the strength of the evidence by the Prosecution and not on the weakness of the evidence adduced by the accused. The accused put up an alibi as his defense and the Law does not require him to prove it. The Prosecution

has the duty to produce sufficient evidence to place the accused at the scene of crime as the assailant in order to secure a conviction.

The ingredients to be proved by the Prosecution are that there was a death of a human being; that the death was unlawful; caused with malice aforethought and that it was the accused who directly or indirectly participated in causing the death of the deceased.

Evidence of death was through the admission in evidence of the Postmortem report on the examination of the body of the deceased. This was done on the 24th February 2013. It was the finding of the examining Doctor that the body had multiple cuts and a deep cut on the scalp. The cause of death was stated to be over bleeding. PW5 identified the body to the Doctor and all witnesses confirmed the death. This ingredient of the offence was hence satisfactorily proved.

As to whether the death was unlawful, the Law presumes every homicide to be unlawful unless it is a result of an accident or one authorized by Law. The Postmortem report admitted in evidence indicates the cause of death as over bleeding from the cuts sustained by the deceased. This was not accidental or authorized by Law and since no alternative suggestion was made by the defense, I find it safe to presume that the death was unlawful.

The multiple injuries sustained by the deceased on the head and other parts of the body denote the intention to cause death by whoever attacked him. It has been held that the nature of the weapon used, the parts of the body attacked, consistency of the attacks and the conduct of the attacker before, during and after the attack are some of the factors considered to infer malice aforethought.

In considering the alleged participation of the accused, it is imperative to note that PW3 is the single identifying witness who claimed to have identified him during the attack. Section 133 of the Evidence Act provides that no particular number of witnesses is needed to prove any fact and a conviction can be based on the evidence of a single identifying witness provided Court warns itself of the danger of basing a conviction on such evidence alone.

Crim. Appeal No.25/1997 Christopher Byagonza V Uganda

The offence was committed at night and in the small bedroom shared by PW3 and the deceased. According to PW3 only two beds could fit in the room. The sources of light were

the moonlight filtering in through the holes in the roof and torch light. PW3 told Court that she woke up from sleep to notice the accused cutting her before he descended on the deceased. The torch was pointed at the victims as he cut them and she admitted that she was frightened and she stood under clothes hanging in the room as the deceased fidgeted to open the door to run for safety as the accused chased him. Admittedly the conditions described by PW3 were not very conducive and could lead to mistaken identity.

Abdallah Nabulere v Uganda [1979] HCB 76

It is however not disputed that PW3 knew the accused very well since he was a family friend. The bedroom in which the attack took place was small and the attacker had to come near the victims given that a panga was used. The assailant had a torch which he shined at the deceased and this enabled PW3 to notice that he was cut on the head. PW3 stood and hid under hanging clothes but was able to observe the deceased open the door and the assailant chasing him before she ran out with the children. Given that there was torch and moon light and the fact that PW3 was in an environment she was used to combine to reduce any possibility of a mistaken identity as to who the assailant was in this case. The accused was well known to PW3. It is my finding that despite the atmosphere of fear prevailing then, PW3 ably identified the accused as the assailant.

The deceased mentioned the accused as the assailant five times before his death and further mentioned the way in which the injuries were sustained. PW4 and PW5 heard the dying declaration stated in the following words;

“I am Boss s/o Rukiika. Bahati s/o Bagira cut me. He also cut my wife Katushabe.”

PW3 mentioned the assailant to PW5 before she passed out.

The Black’s Law Dictionary, 6th Edition defines a Dying Declaration as;

‘a statement made by a person who believes he is about to die in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them.’

The statements made by the deceased amount to a dying declaration as defined. I am alive to the need for satisfactory corroboration of a dying declaration with other independent evidence before basing a conviction on it.

Uganda Vs Ochieng [1992-93] HCB 86; Tomasi Okwamungu v Uganda Crim. Appeal No.0038/2014; Omukono V Uganda [1979] HCB 52

I find this corroboration in the evidence of PW3 who saw the accused attacking them and narrated the same to PW5 before being carried to hospital. The same narrative was made by the deceased to PW4 and PW5 yet there had been no time for both victims to discuss the attack on them. They all ran in different directions and the only inference to be made from this is that they each individually identified the accused as the assailant.

The accused put up an alibi to the effect that he was at his rented home when he heard and later saw a big group about to invade him hence the decision to go and report to the sub-county but got lost in the forest. PW5 told Court that he is an uncle to the accused who is born in the area as a son of Bagira. This supports the contention by the Prosecution that the accused could not have lost his way for two days in an area he knew well as a resident. The only inference is that he ran into hiding after committing the crime and learning that residents had known him to be the assailant.

PW6 the case investigating officer emphatically told Court that the Police at Mulore arrested the accused on the 26th February 2013 which evidence was not at all challenged. I find this version of evidence relating to how the accused was arrested more credible than the version by the accused that he voluntarily handed himself over to them after finding his way from the forest.

It was submitted that the contradiction in the Prosecution evidence as to whether there existed a grudge between the accused and the deceased pointed to a lack of motive for the accused to commit the crime. I am in agreement with the submission by the Prosecution that there is no requirement to prove motive in our Laws and the Prosecution had no burden to prove what motivated the accused to commit the offence.

I have found the evidence of PW3 credible as the single identifying witness. The evidence of PW3, PW4 and PW5 satisfactorily corroborates the dying declaration made by the deceased.

I find the accused guilty of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act. I convict him accordingly.

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MOSES KAZIBWE KAWUMI

JUDGE

31ST JULY 2017.