

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT RUKUNGIRI
CRIMINAL CASE NO.020 OF 2016

UGANDA

PROSECUTOR

VERSUS

TUMWEBAZE OLIVER

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

Tumwebaze Oliver was charged with murder contrary to sections 188 and 189 of the Penal Code Act. The case for the Prosecution is that on the 4th March 2016 at Kibale cell in Rukungiri Municipality, the accused murdered Byaruhanga Fransisco.

The Prosecution and defense counsel agreed to the admission in evidence of the Postmortem report on the body of the deceased and the report on the examination of the accused. She was found to be an adult of sound mind.

Three witnesses Turyahabwe Sylvia (PW1), Detective Seargent Turamy Frank (PW2) and Butami Patrick (PW3) were called by the Prosecution while the accused did not call any witnesses.

PW1 is a sister to the deceased with a home in the same compound. Her evidence was that on the 4th March 2016 at about 10.00pm, she heard the accused calling her. She rushed to the house shared by the accused and the deceased and found the accused lighting a wick lamp. She saw the deceased sitting on the floor with a bleeding right arm tied with a piece of cloth. She asked the deceased what had happened and his response was *“my wife has killed me”*.

The witness told Court that she then ran to call her father PW3 and her brother who urgently came over but as they were preparing to take the victim to hospital, he died. The area Local Councilor and a Crime preventer were called and the accused was arrested after she narrated to them that she had hit the deceased with a plate on the bleeding arm. PW1 confirmed in cross examination that the deceased and the accused enjoyed a good relationship in their three

year childless marriage and the deceased had gone to work that day without any complaint about his right arm.

PW3 the father of the deceased and PW1 confirmed being called to the home of the deceased and that he found him with a bleeding right arm. The accused told him that she had hit the deceased with a plate on the right arm and he saw broken pieces of chinaware scattered in the room. The witness confirmed that he had never heard the couple quarreling and did not know of any disagreement between them.

PW2 recorded a Charge and Caution statement from the accused on the 5th March 2016 which was admitted in evidence without objection from the defense counsel. In the statement, the accused narrated that the deceased returned home drunk on the 4th March 2016 and she gave him supper after which he went to bed. The accused inquired from him why he had not taken his Anti Retro Virus drugs (ARV's) but the deceased insisted he had taken them.

The deceased then got annoyed, picked a hoe and the accused armed herself with a plate which she threw at him and injured his arm before pushing him to the wall whereupon he fell and sustained injuries on the head. The accused then ran out to call PW1. She further stated that she did not intend to kill the deceased.

In her defense, the accused restated the contents of the Charge and Caution statement with some variation. She told Court that when she insisted on the deceased taking his drugs, he slapped her whereupon she left the house and went outside. She later returned and sat in the sitting room but the deceased came from the bedroom and picked a hoe to hit her. The accused dodged and the deceased fell on a table on which was a plate which cut his right arm.

The arm had earlier been injured and stitched she narrated to Court. The accused tied the arm with a piece of cloth to stop the bleeding and then ran to call the neighbors. She admitted in cross examination that she was not happy with the drinking and refusal to take drugs by the deceased hence the subsequent fracas.

Counsel for the accused urged Court to acquit the accused on the grounds that only the fact of death was proved but not the other ingredients that constitute the offence of murder. He further submitted that there were no eye witnesses to what happened between the accused and the deceased. It was further argued that the good relationship between the accused and the deceased defeats any allegation of malice aforethought and Court was invited to acquit.

The Prosecution on the other hand argued that the death of Byaruhanga Fransisco was neither accidental nor a result of self defense by the accused which made it unlawful. It was further submitted that Court should infer malice aforethought from the broken china plate which had been used offensively as the murder weapon. Regarding the ingredient of participation, Prosecution argued that the admission to the hitting of the deceased with a plate by the accused to PW3 corroborated the dying declaration by the deceased to PW1. This was sufficient evidence of participation in the commission of the offence it was submitted.

It is settled Law that the Prosecution carries the burden to prove all ingredients of the offence to the required standard and the accused is under no duty to prove her innocence. Conviction of the accused must be based on the strength of the Prosecution evidence and not on the weakness of the defense raised by the accused.

The four ingredients that constitute the offence of murder to be proved by the Prosecution are that there was death of a human being; the death was as a result of an unlawful act and caused with malice aforethought; and that the accused person directly or indirectly participated in causing the death.

The only uncontested ingredient of the offence was that the death of Byaruhanga Fransisco occurred on the 4th March 2016. Proof of all other ingredients can only be derived from circumstantial evidence since nobody witnessed what happened in the house shared by the accused and the deceased. The dying declaration made by the deceased to PW1 is also a piece of evidence to be analyzed in the context of the circumstantial evidence since it is admissible and not hearsay evidence much as it cannot be verified in cross examination.

(See; HC Crim. Case No. 56/1991 Uganda Vs John Ochieng[1992—1993]HCB 80; Oketh Okale Vs R(1965)EA 55;Crim.Case No.80/2014 Uganda Vs Baryaijuka Mathias)

The accused made a Charge and Caution statement which she did not substantially vary in her evidence before Court. Whereas she stated that she armed herself with the china plate which she threw at the deceased in the statement, she told Court on oath that the deceased fell and the plate on the table cut his arm. The latter piece of evidence suggests that the death was as a result of an accident in which she had no hand as she just dodged the deceased who intended to hit her with a hoe.

The narration in Court by the accused does not support her own answer to PW3 whom she told that she had hit the deceased with a plate. This was not contested in cross examination and fully corroborates the version in the charge and caution statement voluntarily made by the accused. The accused told Court in cross examination that she had been so angered by the deceased returning home drunk, his refusal to take his medication and the subsequent assault on her.

In my analysis the state of anger in which the accused was led to the decision to arm herself with the plate which she threw at the deceased when he made an attempt to attack her with a hoe. It was an accidental fall on the table and plate. I find the sequence of events narrated to PW2 in the Charge and Caution statement more credible. This sufficiently proves the ingredients of the unlawful nature of the death and the participation of the accused contrary to the submissions by defense Counsel. The same version of evidence supports the assertion in the dying declaration made to PW1 by the deceased.

The position of the Law is that it is unsafe to base a conviction on a dying declaration which has not been satisfactorily corroborated. I find corroboration of the dying declaration in the unchallenged evidence of PW1 and the narration by the accused to PW3 to the effect that she hit the deceased on the arm with a plate.

I have failed to find the supporting evidence of the intention to cause death in the circumstances of this case. I am in agreement with the submissions of the Prosecution that the plate in question was offensively used as a murder weapon. I however do not agree that the part of the body targeted and the subsequent conduct of the accused connect with the desired fulfillment of any malicious intent on the part of the accused.

The arm was attacked and not any other sensitive part of the body. The accused administered the first aid in her means to save the life of the deceased and ran to call for help from his relatives. These in my view are not actions by a person who intended to cause death. I thus find that malice aforethought which is an ingredient of the offence of murder was not proved.

The circumstantial evidence in this case sufficiently points to the guilt of the accused for a conviction of manslaughter. Contrary to the advice of the assessors i find the accused guilty of manslaughter contrary to section 187 of the Penal Code Act and I accordingly convict her.

Moses Kazibwe Kawumi

Judge

8th May 2017.