

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBALA**  
**HCT - 04 - CR - SC - 50 – 2013**

**UGANDA ::: PROSECUTOR**

**VERSUS**

**MUWEREZA ABDALLAH::: ACCUSED**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**J U D G M E N T:**

The accused stands indicted with murder contrary to Sections 188 and 189 of the Penal Code Act. The particulars of the charge are that on 27<sup>th</sup> April 2012, the accused, and others still at large, murdered Ausi Mbogo Katabi in Mbale district.

The brief facts of the Prosecution case, as brought out by evidence, are thus:

The accused and PW1, Muduwa Dausi lived as husband and wife for about 8 years and had a child together. Two years prior to the incident of April 2012, the two separated because the accused did not take any steps to marry her. She then replaced him with the deceased who showed promise of marrying her.

On 27<sup>th</sup> April 2012, his body was found after a visit to PW1. The post mortem examination revealed that the cause of death was hemorrhagic shock with multiple organ failure caused by multiple cut wounds on the head and neck.

The Police, suspecting this was a love- triangle gone wrong, arrested the accused and charged him with the murder of the deceased. He denied the charge.

Accordingly, the burden of proving all the ingredients of the offence charged lay on the prosecution, which ingredients had to be proved beyond reasonable doubt; **Sekitoleko V Uganda [1967] EA 531.**

The ingredients to be proved in an offence of murder are:

1. That the deceased is dead
2. That the death was caused unlawfully;
3. That there was malice aforethought; and
4. That the accused person participated in the commission of the offence.

It is not in dispute that Ausi Mbogo Katabi died. On 28<sup>th</sup> April 2012, Dr Marembwe Martin carried out a post mortem, Exhibit P2, on the deceased's body which was identified by Bakali Katabi PW3. PW1 and PW2 Rebecca Muzaki also testified that the deceased had died. The death was not contested by the defence. This ingredient has therefore been proved.

As to the death being caused unlawfully, it has not been shown that the death of Ausi Mbogo falls in the category of excusable homicides, that is, it was not sanctioned by law nor was it accidental. Therefore Prosecution has proved that the death was unlawful.

With regard to malice aforethought, this can be defined as the intentional taking of a human being's life. This intention may be inferred from the circumstances surrounding the offence; **R V Tubere S/O Ochen (1945) 2 EACA.** In the instant case, Exhibit P2 indicated that the deceased had deep cut wounds in the cheek extending to the nape, deep wounds on the fore arm and calf area and multiple cuts on the scapula with the cause of death as hemorrhagic shock with multiple organ failure caused by multiple cut wounds on the head and neck. Who ever inflicted these injuries must have intended death.

Accordingly, malice aforethought can be inferred from the nature and extent of injuries inflicted on the head and neck of the deceased which were vulnerable parts of the body. I therefore find that this ingredient has been proved as well.

Participation of the accused person was the only ingredient that was contested. From the evidence it is apparent that none of the prosecution witnesses saw the accused killing the deceased. The prosecution case thus evolves around circumstantial evidence. It is trite that for

the court to base a conviction on circumstantial evidence it must be satisfied that the inculpatory facts irresistibly point to the accused and to no one else as the person who committed the offence alleged and must be incapable of any explanation upon any other reasonable hypothesis than the guilt of the accused; **Musoke V R (1958) EA 715, Uganda V Waibi (1978) HCB 218.**

For the accused to have participated in the murder of the deceased person it must have been shown by the Prosecution that on the night of 27<sup>th</sup> of April 2012 when the deceased was killed the accused was in Mbale specifically at Bellodian Indian Quarters and that while there the accused caused the death of the deceased. The Prosecution called witnesses to show that the accused was in Mbale on the night of 26<sup>th</sup> April and on the night of 27<sup>th</sup> April. PW5 Kayenza Shamim the land lady to PW1 told court that at the same time in April she was told by PW1 that her boyfriend and father to her son had come and indeed she introduced the accused to her as he was leaving allegedly for Kampala. They had a bag and seemed to be travelling.

PW1 came back and told her that her boyfriend had gone back to Kampala. She further told court that on the night of 26<sup>th</sup> she had heard people making noise outside PW1's door and that subsequently one of them knocked on her door. She found there the defense secretary and a police officer PW6 and the accused. She said that the accused had brought these two to help him because PW1 was fond of bringing men in the house. That the husband of PW5 then advised the accused and other visitors who were around to leave.

Giving evidence on the same matter PW6 Massa Tefero a police officer said that on the 26<sup>th</sup> April at 11:00pm while on patrol with one Philip Wanziri the Defence Secretary of Kiduda zone; they came across somebody standing outside the house of PW1. That the man told them that he was there because his wife PW1 was in the habit of bringing other men in the house. That they pushed the door and found a man and a woman with PW1. PW1 came and explained that those were her visitors but none was her boyfriend. They called the landlord and heard him calling the accused as Abdallah. They told all the other people to go away and PW1 remained in the house.

PW6 also told court that it was the only time he saw the person they had found outside and that it was night time therefore he could not remember him properly. Since it was night time and he could not see him properly it now only leaves the evidence of PW5 for scrutiny.

PW5 also told court that the following day 27<sup>th</sup> she did not see PW1 return home. She went to bed at midnight, her husband was not around and when she woke up at 2:00am to say her prayers she heard someone at PW1's door who seemed to closing it and on peeping through the window she saw a tall man putting on a striped shirt going out.

According to her it was Abudallah. If this was Abudallah then indeed he was present on 27<sup>th</sup> April 2012 the night of the murder. The accused denied, he told court that he left Mbale on the 26<sup>th</sup> for Kaberamaido where he had gone to buy charcoal for his mother's stock of trade. That he did not return to Mbale but merely passed to Kampala on the 28<sup>th</sup> of April 2012 having left Kaberamaido at 4:00am. In this he was supported by DW1 Zaina Nabosa his mother who said that on the 26<sup>th</sup> he escorted the accused person to the bus stage in Namunsi where then he got transport and went to Kaberamaido. DW2 Ekunyu Raymond testified that the accused person stayed at his home in Kaberamaido on 26<sup>th</sup> and left on 28<sup>th</sup> at 5:00am. By this testimony the accused set up an alibi which without being dislodged the Prosecution would have failed in establishing the guilt of the accused. Since we are dealing with circumstantial evidence, the evidence of PW5 must be totally reliable and must together with other evidence show that the accused was the one who committed the crime he is charged with.

First of all the evidence of PW5 is difficult to believe in several particulars. First of all during cross examination she told court that her court yard was so big that she observed the accused being escorted from it for forty five minutes. I find this difficult to believe because a walk of forty five minutes would take you through two to three kilometers at a slow pace. PW5 did not give me the impression of a resident owning or in possession of a three kilometer stretch of estate. Neither did the Prosecution lead evidence to show that such expanse of compound existed.

The other thing that would necessitate corroboration of PW5's evidence arose from the evidence of PW6 who described the circumstances at the home of PW5 and PW1. He said he could not remember the accused person because it was night and dark. PW6 therefore described the factors which would hamper positive identification which existed at the home of PW5.

There is nothing on record to suggest that they were different factors the following day on 27<sup>th</sup> April 2012. The Prosecution did not call evidence to show that the lighting that had been there on

26<sup>th</sup> had improved on 27<sup>th</sup>. PW5 did not say that she talked to the accused on 26<sup>th</sup>. PW5 told court that PW6 went away with the accused but if even after walking with the accused PW6 could not identify him it means the conditions were indeed not favourable for positive identification.

Furthermore, when PW5 says she saw a man at 2:00am get out of the house she says he simply went away. The Prosecution does not tell court for how long she observed that man. Another piece of evidence that suggests that PW5 did not seem to be sure of whom she had seen leaving the house of PW1 at 2:00 am is when on the 28<sup>th</sup> April 2012 after looking for Mubarak the brother to PW1 she told him that;

“Someone entered Dausi’s house but I had not seen her.”

After which they began to look for PW1. This panic that followed the failure to find PW1 could only have been caused because she did not know the person who had entered PW1’s house. The foregoing factors seriously weaken the identification of the person who visited PW1’s house on both the 26<sup>th</sup> but especially the 27<sup>th</sup>, the night deceased was murdered. PW3 told court that PW1 had told him that she had observed the accused person cutting the deceased to death and that she had said this in the presence of the police. But PW1 a Prosecution witness denied and said she was not there when the deceased was being killed. Even the police whom PW3 alleged was present when she uttered those words did not tell court that she had said she saw the accused kill the deceased.

These contradictions which go to the root of the matter, the unsatisfactory identification of the accused and the fact that there is not a scintilla of evidence which places the accused at the scene of crime or even in its vicinity leaves the Prosecution case wanting in proof beyond reasonable doubt which is a requirement to prove a murder case such as this one.

The accused’s alibi therefore remains undisturbed. The fact that he sent for the collection of his girlfriend does not in any way suggest that he had committed a crime because PW1 herself told court that he was still in love with her.

The circumstances as got from the evidence of the Prosecution leave co-existing circumstances that would weaken or destroy the inference of guilt which perforates the Prosecution’s case based on circumstantial evidence.

Both the gentlemen assessors have advised me to find the accused not guilty . For the reasons I have given herein above I find that the prosecuitor has failed to prove the case of murder to the required standard of beyond reasonable doubt and find the accused not guilty as charged and accordingly acquit him of murder.

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**David K. Wangutusi**

**JUDGE**

**Date: 13<sup>th</sup> January 2017**