

**IN THE HIGH COURT OF UGANDA AT MASAKA****CRIMINAL SESSION CASE NO. 0007 OF 2015****UGANDA V INNOCENT KYARIGABA****BEFORE HON. LADY JUSTICE H. WOLAYO****JUDGMENT**

10 The accused person was indicted with murder c/s 188 and 189 of the Penal Code Act . It is alleged that on 13<sup>th</sup> day of July 2014 at Nyantungo village in Sembabule district murdered Nabigwamu Federisi .

Prosecution was led by Mr. Wamibi Anthony while accused was represented by Mr. Wadhuka Marufu on state brief.

15 Assessors were Muwulya Haruna and Ndinoha Ronald.

Prosecution had a duty to prove beyond reasonable doubt the following ingredients of murder:

1. Death was unlawfully caused.
2. That death was intentional
- 20 3. The accused knew the act will cause death and she didn't care if death occurred.

**Proof of unlawful death**

That the deceased died as a result of an unlawful act was not disputed. PF 48 C reveals that the deceased was examined on 13.7.2014 and the medical officer found that she sustained an open cut on the left side of the face extending to the left ear and lower lip. Cause of death  
25 was recorded as internal bleeding into the brain matter .

PF 48 C was admitted by consent of both counsel and to that extent, it is not disputed that the death was a result of an unlawful act.

**Malice aforethought and participation by accused person.**

In **Uganda v Kadidi Kabagambe [1992-93]HCB 40**, it was held that the prosecution must  
30 prove beyond reasonable doubt that the deceased is dead; that the killing was unlawful ; that it was the accused who killed the deceased with malice aforethought and that the accused has no defence.

In the instant case, the deceased sustained cut wound on the head which shows the intention was to kill her , the head being a vulnerable part of the body which is evidence of intention to cause death .

*Evidence of dying declaration*

According to PW1 Dezi Byaruhanga, on the night of 12.7.2014 at midnight, he was at home some 100 meters from the church, when he heard an alarm from a four year old child called Kemigisha who lived with the deceased . He knew the deceased had slept in the church that night. He run towards the church while making an alarm and found when his mother had been beaten and brain matter was oozing from the ears mixed with blood. The child Kemigisha was at the scene. According to Byaruhanga, he spoke to his mother who was still alive and she said it is her children Muwuda Musimenta and Innocent who were killing her.

The witness looked in the church and came across a broken log used to beat the deceased. It was further his testimony that the deceased had moved to Kigaga trading centre after being chased with a hoe some three weeks prior to the incident and after burning shrines established by the accused person.

While in the trading centre, she alternately slept in the church and her house.

It was suggested in cross examination by the defence that Byaruhanga was not truthful because his police statement is silent about the dying declaration and he makes no mention of what his mother told him that night.

While the practice is that evidence on oath is more reliable than a police statements, the contradiction between the statement to the police that his mother was unconscious when he arrived at the scene and the evidence in court that she spoke to him renders his evidence on the dying declaration of little evidential value.

However, the rest of his evidence on hearing the alarm and the physical state of the deceased and the discovery of the log in the church as well as the burning of the shrines is credible.

The other evidence relied on by the state is that of PW2 Aggrey Ssalongo Nsimire who testified that he was LC defense secretary Kigaga Rwebitakuli and knew the deceased and had in the past mediated between her and her children the accused and Musementa . The two parties disagreed on establishment of shrines in their kibanja and the witness had advised the deceased to leave the kibanja .

It was the testimony of PW2 Nsimire that on the night of 13.7.2013 at midnight he heard an alarm and on responding, he learnt that Federesi had been beaten at the church. It was his  
65 testimony that he spoke to the deceased before she died and she said the accused and  
Musementa, her children were killing her. According to Nsimire, the deceased died along the  
way as she was being taken to hospital.

In cross examination, the defence suggested the witness was unreliable because in his police  
70 statement he did not name the accused as one of the persons named by the deceased in her  
dying declaration.

To the extent that there is a contradiction between the testimony in court and the police  
statement on the content of the dying declaration, the testimony of Nsimire on the  
declaration is unreliable .

In **Ug vs Okello joseph & another Soroti HCCS N0.100/2012**, I held that

75 *‘the variance between the police statements of the two witnesses and their testimonies  
in court is a matter that cannot be brushed under the carpet.’*

Therefore the testimonies of Byaruhanga and Ssalongo Aggrey Nsimire on the dying  
declaration naming the accused will be disregarded for being unreliable.

The other witness who testified on the dying declaration is Tusingirwe Daniel PW3 LC1  
80 Chairman of a neighbouring village of Nantungu in Rwebitakui sub county. According to  
Tusingwire, he received a call that Fedelis had been attacked and on responding to the alarm,  
he found when she was still alive. He spoke to her and she told him her own children  
Innocent and Musementa were the assailants. In cross examination he referred to the name  
Mawuda . It became clear from testimonies of witnesses that Musementa was also called  
85 Mawuda or Donosio.

In t **Uganda vs Benedict Kibwami (1972) ULR 28;** it was held that it was not a rule of law  
that in order to support a conviction, there had to be corroboration of a dying declaration and  
there might be circumstances which show that the deceased could not have been mistaken in  
his identification of the accused. But it was generally speaking very unsafe to base a  
90 conviction solely on a dying declaration of a deceased person made in the absence of the  
accused and not subject to cross examination unless there was satisfactory corroboration.

I have found that that the testimonies of Byaruhanga and Ssalongo Aggrey Nsimire on the dying declaration pinning the accused person are unreliable because of the contradictions between court testimony and police statements made immediately after the murder on  
95 13.7.2013.

This leaves only the testimony of Tusingirwe unchallenged on the dying declaration naming the accused as one of the assailants.

This means there must be other independent evidence placing the accused at the scene of crime.

100 *Circumstantial evidence*

According to PW4 Joan Birungi, daughter of the accused person, on 12.7.2013 she was asleep in the house with her mother the accused person when at about 10 p.m, Mawuda aslo known as Musementa called out to her mother from outside to bring ‘our things so we do our things’ . According to Birungi, her mother got hold of pounding stick and a knife and passed  
105 them to Mawuda through sitting room window. It was Birungi’s testimony that there was moonlight when the accused opened the window and Muwuda was her uncle.

Her evidence was that the pair thought she was asleep but she overheard the conversation.

According to Birungi, her mother then left with Mawuda . Later she heard an alarm that Fede had been killed after which her mother returned alone .

110 In cross examination, Birungi testified that after her mother returned home , a second alarm sounded and her mother asked her if she had heard the alarm, thereafter, the accused left to respond to the alarm .

Birungi also responded to the alarm and found the deceased oozing blood form the ears but she was still alive. According to Birungi, there were many people and when they asked her  
115 who had beaten her, she named Innocent and Mawuda.

Birungi also saw the pounding stick which they used at home earlier in the day and which had been used to beat the deceased.

Birungi’s testimony on the dying declaration corroborates Tusingwire in as far as she heard the deceased name the accused as one of two assailants. The second one being Mawuda alias  
120 Musementa.

It is the same Mawuda who came to the home of the accused the night of the murder ,and who was handed a pounding stick found at the scene which was used to assault the deceased. This pounding stick was handed to PW5 AIP Twaha Kabagambe . He described it as broken and stained with blood. It was his testimony that he exhibited the stick at Rwabitakuli police station but he failed to track it when he was coming to testify.

#### *Evidence of past threats*

Birungi corroborated other witnesses ( Byruhanga, Nsimire, Tusingwire) with respect to the conflict between the accused and the deceased over the accused person's shrines which the deceased had earlier burnt and also that the accused had chased the deceased from the garden threatening to do something.

Tusingwire further corroborated the testimony of Byaruhanga PW1 and Ssalongo Aggrey PW2 with respect to the conflict between the accused and her mother the deceased. It was his testimony that the accused had returned form Entebbe after she had deserted Christianity while the deceased was a staunch Christian and when the deceased burnt the shrines and related stuff of the accused person, bad blood developed between the two forcing the deceased to flee to the trading centre for refuge. According to Tusingwire, the murder took place less than a month after the conflict erupted.

#### *Analysis of all evidence*

I found Birungi a credible witness. Her testimony constitutes clearly brings out circumstantial evidence of malice aforethought on the part of the accused who not only supplied Musementa with the weapon but who also accompanied him to perform the evil deed only to return after the deed and then pretend to be a responder by returning to the scene.

The accused is positively placed at the scene of crime by her conduct in the night of 12.7.2013.

The fact that Mawuda was positively named by the deceased in her dying declaration as attested to by PW3 Tusingwire and PW4 Birungi means he was the assailant but who planned and acted together with the accused . The evidence of threats issued in the near past by the accused towards the deceased is further proof of malice aforethought.

150 The accused person in her sworn evidence corroborates Birungi's testimony that she was in the same house with her on the night of 12.7.2013. Although she testified that the issue of burning the shrines was over five years ago, I disbelieved her because prosecution witnesses Tusingiwire PW3 , Birungi PW4 and Nsimire PW2 all testified that the shrines were burnt approximately a month before the murder.

155 With respect to her witness Musementa, DW2 , he testified that it was him who killed the deceased and that the accused had nothing to do with it. Although he admitted to picking the pounding stick from the home of the accused that night, he claimed she was not at home and no one was at home. Musementa admitted picking the pounding stick at about 9 to 10 p.m, the same time PW5 Birungi Joan mentioned she saw Musementa at their home with the  
160 accused which affirms Birungi's testimony.

As an accomplice in the crime, I disbelieve his testimony as he unsuccessfully attempts to exonerate the accused, his older sister when the accused admitted to being at home that night with Birungi . I got the impression that the accused was under the influence of his older sister whom he looked up to as wealthy and who according to Musementa, had a mental  
165 illness that necessitated the shrines in the first place.

I disbelieve Musementa's evidence that the deceased left her home for the town because of fear of robbers. The deceased left her ancestral home to run away from the accused and Musementa who were threatening her life.

I find that the motive of the murder by the accused was the burning of the shrines, a fact  
170 confirmed by Musementa who said accused was not happy with the burning of the shrines. While Musementa had his own motive and that is, the decision by the deceased to allocate his kibanja to his elder brother Byaruhanga.

The two acted together to execute the evil deed. In **Uganda v Sebaganda s/o Miruho [1977] HCB 7**, it was held that where there is common intention, it is immaterial who inflicts the  
175 injuries as long as the parties are carrying out a common purpose and one is responsible for the acts of the other and each is deemed to have committed the actual offence.

I find that prosecution has proved beyond reasonable doubt that the accused person aided and abetted in the murder of the deceased because she was placed at the scene of crime by the dying declaration attested to by Tusingiwire PW3 and Birungi ; she supplied the weapon

180 a pounding stick; she accompanied Mawuda on the night of the killing; and she had issued earlier threats to the deceased following the conflict over shrines .

By handing Mawuda the weapon that was later found at the scene and that was used to kill the deceased, and by accompanying Mawuda who pleaded guilty to the murder, the accused person aided and abetted in the killing of the deceased. Under section 19(1) (c ) of the penal  
185 code, a person who aids and abets another in the commission of a crime is as guilty of it as the one who actually performs the deed .

I agree with the gentlemen assessor Ndinoha Ronald that the state has proved its case beyond reasonable doubt and accused person is convicted as indicted.

**DATED AT MASAKA THIS 24<sup>TH</sup> DAY OF MAY 2017.**

190

**HON. LADY JUSTICE H. WOLAYO**

#### **MITIGATION**

State: I pray the court considers that this is a vice that is rampant, victim was a mother to the  
195 accused. Court should consider the impact the vice brought to the family as it is divided, the beastly manner of the murder. I pray for a punitive sentence.

Wadhuka: convict is a first time offender, convict had a mental problem at the time of the offence.

Accused: I plead for leniency.

200 Court: adjourned for sentence later in the day.

**2:45pm**

Appearance as before.

#### **SENTENCE.**

Patricide is unacceptable because it is the accused's mother who brought her into the world  
205 and brought her up. This case brought rift in the family that may never heal. The brutal manner in which the deceased was killed is an aggravating factor. The accused is a young

woman aged 40 years is a mitigation factor. Appropriate sentence is 40 years. As the accused has been on remand since August 2014, she is sentenced to 37 years imprisonment.

210 **Hon. Lady Justice H.Wolayo.**