

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT IGANGA**

CRIMINAL SESSION CASE NO. 449/2015

UGANDAPROSECUTOR

VERSUS

- 1. KANENE PAULO**
- 2. MUSA MUSA ZAKARIA**
- 3. KALOGO JAMES.....ACCUSED**

RULING

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

The six accused persons were on an unspecified date indicted with the offence of murder contrary to sections 188 and 189 of the Penal Code Act. Cap. 120 LOU.

It was stated in the indictment that the accused persons and others still at large on 24/06/2014 at Buluya II Village in Kaliro District, murdered Kudha Beatrice. Counsel Wasajja Robert led the prosecution while the accused was represented by Mr. Ngobi Balidawa

The prosecution case borne out of the evidence adduced is that, in or around 24/6/14 at about 7.30pm, Kaudha Beatrice the daughter of Stephen Muledhu was reported missing. She had last been seen in the home of one Moses Musalirwe. Under the leadership of one Kulaba Muzamiru, the chairperson of Nakaswa Village, a search was mounted in the home of A1 Kanene who was later arrested by police. The following day, acting on a tip off that A2 Kalogo had information regarding Kaudha's disappearance, he was pursued and arrested by Kulaba and others and handed over to police.

On 28/6/14, the deceased's body was found behind the house of A2 Musa Musa Zakaliya. The body was mutilated with several body parts removed. A police dog followed a scent trail to the home of A2 who was then also arrested. The body was taken for post mortem examination and subsequently buried.

The prosecution presented two witnesses before closing their case. Counsel Wassajja for the state opted not to make any submissions on a case to answer. On the other hand, counsel Ngobi submitted on a no case to answer and invited the court to acquit all three accused persons.

According to section 73 (1) of Trial on Indictments Act (TIA), upon the prosecution closing their case, the court is mandated to determine whether they have presented evidence sufficient to put the accused on their defence. The decision of the Court should take into consideration the type of evidence adduced on each statutory ingredient of murder to wit:

1. That death of a human being occurred
2. That the death was unlawful
3. That the killer caused the death with malice aforethought
4. That the accused is responsible

The prosecution need not at this point prove the case beyond reasonable doubt. Instead, it is expected that by the close of its case, the prosecution has made out a *prima facie* case, one on the face of it, is convincing enough to require that the accused persons be put on their defence. See for example, **Rananlal T. Bhati Vrs R (1957) EA** followed in **Uganda Vrs Kivumbi & Ors Crim. Case No. 20/2011**. Short of that, the charge must be dismissed and the accused persons entitled to a complete discharged from the indictment.

Therefore, in order for the court to dismiss the charge at the close of the prosecution case, I must be satisfied that: -

- a) There has been no evidence to prove an essential element of the alleged offence, or
- b) The evidence adduced by the prosecution has been so discredited as a result of cross examination or, is so manifestly unreliable, that no reasonable tribunal could safely convict on it.

See **A Guide to Criminal Procedure in Uganda. B. J. Odoki, 3rd Edition at page 120.**

PW1 Kulaba Muzamiru the chairperson LC1 of Nakaswa Village, Nansololo Sub County in Kaliro District, testified that he knew the accused persons well, but only A3 Kalogo was resident in his village, the other two being residents of Buluya II a neighboring village. He stated that on 24/6/14 at about 7.30pm, he responded to the sound of the danger drum. While on his way, he met the defence secretary one Nsaigha Bosco who informed him that the drum was being sounded because the deceased was missing and a search had been mounted for her. PW1 then spearheaded the search which took him up to the house of A1 Kanene Paulo, who resisted a search of his home which PW1 concluded was suspicious behavior. He accordingly apprehended A1 who was subsequently handled over to police.

PW1 continued that the following day, he was informed by one Koowa Fred that A3 Kalogo had said that if he was treated properly, he had information about the whereabouts of the deceased. Acting on that tip off, he mobilized about twenty people and proceeded to Kalogo's house and when the latter saw them, he took to his heels. He was pursued, arrested and handed over to police. That he himself talked to A3 Kalogo about the deceased and he responded that he was not aware of anything.

It was also the testimony of PW1 that on 28/6/14, one Bonyo Dassani found the deceased's body along a path about 500 metres behind A2 Zakaliya's house with some body parts cut off. That the body parts were later found. A2 Zakaliya was thereby also arrested. PW1 then admitted in cross examination that he did not witness the murder of Kaudha and was shown the deceased's body by Bonyo. He also admitted that neither him nor the police ever searched Kanene's or Zakaliya's houses and nothing was found in their respective houses or on the deceased's body to connect either of the three accused persons to the deceased or her murder.

In his estimation, the deceased's body was dumped where it was found on 28/6/14. That, A1 and A2 were arrested on 26/6/14 and A2 on 28/6/14, two days later.

PW2: DT INSPECTOR WAISWA MILTON JAMES testified that he first came to know the accused persons on 27/6/14 after their arrest in connection to the disappearance of the deceased. On **28/6/14**, after receiving the relevant file and upon receiving information that the deceased's body had been discovered, together with other police officers including a dog handler, he proceeded to the scene which was a maize garden within Buluya Trading Centre. He found and viewed the body, took photographs and drew a sketch plan. That the dog handler was given an opportunity to handle the dog which marched straight into the home of A2 Musa Zakaliya who was then arrested as a suspect in connection of the murder. He then carried the deceased's body to Iganga Hospital where a post mortem was carried out.

He later commenced investigations and the three accused persons who were by then in custody, recorded charge and caution statements denying participation in the crime. His inquiries revealed that A1 was arrested because he resisted a search of his house and he was also suspected to be a witch doctor. That A3 was arrested because he bragged of his knowledge of the deceased's whereabouts, yet, A2 was arrested by the police dog and was also known to own a shrine in which he carried out activities of witchcraft.

In cross examination, PW2 admitted that much of his investigations were dependent on what he was told by various witnesses. He did not participate in the arrest, did not obtain any search warrant or participate in any searches. He also conceded that upon advise as the investigating officer, no exhibits were recovered from the three accused persons. He admitted he interrogated Musalirwa as one of the suspects at whose house the deceased was last seen, but could not recall the information he obtained from him.

My decision

There was sufficient evidence to support some but not all the ingredients of murder, to the required degree at this point in the trial.

It was an agreed fact that Kaudha Beatrice is now deceased. Indeed, both PW1 and PW2 viewed the deceased's body. The body was submitted for a post mortem and the report confirmed that the body of Kaudha Beatrice of the apparent age of five and a half years was examined on 28/6/14. The report and photographs of the body were admitted without contest as PEX1 and 2. The sketch plan which was also admitted without contest as PEx 3, confirmed the scene at which the body was discovered. It was indeed proved that Kaudha Beatrice, a human was dead.

There was also sufficient evidence to prove that the deceased's death was unlawful and caused with malice afore thought. She disappeared from her home on 24/6/14 and her body was found four days later mutilated and discarded in a maize plantation. The injuries on her body were serious and could not have been self-inflicted. There would be no doubt that her death was unlawful.

Similarly, sufficient evidence was presented to prove that the death was caused with malice aforethought. Both PW1 and 2 observed that the body was severely mutilated and the tongue, part of a hand and leg and the private parts were missing. PW1 claimed those parts were eventually discovered, but those were not exhibited. None the less, the post mortem recorded deep penetrating pierce wounds all over the body. Both lower arms and the lower leg were amputated and the foot was missing. The cause of death was determined to be severe trauma and hemorrhage leading to tissue damage, shock and eventually death.

The above is evidence of a horrific death. The assailant or assailants targeted the entire body and even removed parts of it. The photographs exhibited clearly depicted those injuries, none of which were contested. There was a clear intention to kill, which succeeded.

The main contest was in regard to the three accused person's participation. Counsel Balidawa made a lengthy submission which I carefully perused but will not repeat here. Suffice to say, he termed the two witnesses as manifestly unreliable and attacked their evidence which he deemed to be hearsay, unreliable and contradictory. He concluded that the accused had no case to answer to the prosecution case and prayed for their acquittal.

It was not in contention that there was no witness to the deceased's murder and the prosecution's case was purely circumstantial. It needed to be strong and reliable to lead to the unequivocal inference that the accused persons participated in this offence. Unfortunately, this was not the case.

Neither of the two witnesses presented had firsthand information of the accused's participation. PW1 was told by one Musaida of the deceased's disappearance. Since Musaida was never called to testify, this would be hearsay evidence. Stephen Muledhu, the deceased's father was also not called to give the specifics of his child's disappearance. In fact, PW1 did not explain why his search ended up at A1's residence in the first place. In my view the utterances by; A1 to contest the search, that "*nobody should step into my home*" or that "*Nobody should step here apart from the cultural leaders or police*" were reasonable. He was unarmed and mobbed by a group of people and preferred that cultural leaders and the police, both institutions of authority, law and order, be present during the search. I would not regard that as suspicious behavior. In any case, no search was ever conducted in his home.

Likewise, the information that A3 expressed of knowing the whereabouts of the deceased, was at the best, hearsay evidence as well. It was one Koowa who related that information to A1 and in fact, PW1 mentioned that Koowa himself had only heard undisclosed people saying that A3 had uttered that statement. Koowa was never called to testify. PW1 admitted that when he interrogated A3 about the disappearance of Kaudha he did not admit participation and responded that "*I am just seeing a number of people, I do not know anything, what is the problem?*"

Further, the evidence with respect to the discovery of the deceased's body did not implicate any of the three accused to the required standard. The body was allegedly discovered by one Bonyo Dassan 50 meters behind the house of A3 on land belonging to his father one Wilberforce Kyalahansi. Neither Bonyo nor Kyalahansi were called as witnesses. Nothing was found on the body to link any of the accused's persons to the offence. PW1 suspected that the deceased was killed elsewhere and her body only dumped at the spot where it was found. There was no evidence to support that hypothesis and how such a conclusion would point to any of the accused person's participation.

Both prosecution witnesses mentioned that the spot where the body was discovered was surrounded by several homesteads and plantations. PW1 mentioned the names of some of the owners of those properties which were clearly marked on the sketch plan. That evidence would further cloud the inference of the accused's participation. It was not enough to simply state that A1 and A3 were prime suspects since they were known as witchdoctors with shrines. Since their homes were never searched, and no evidence was adduced to prove their participation, it would be too farfetched to implicate them.

The investigations carried out by PW2 were quite unsatisfactory. His testimony in chief is that he did not witness the arrest of any of the accused persons and he admitted that he secured no search warrants for their residences. His evidence with regard to the involvement of the police dog was at variance with that of PW1. He mentioned that the police dog was engaged by its handler, and it marched straight to the home of A2 which led to his arrest. PW1 who claimed to have been present at the time, mentioned only that the dog did its work after which they were all asked to return to their homes. The dog handler was never called to verify that evidence and it was not explained why only A2 was arrested or even whether he was the only one person in the homestead the dog allegedly went to.

Generally, PW2's evidence in cross examination regarding A2's arrest was in sharp contrast with his earlier testimony that he was not present at the arrest of all three accused persons and came to know about the case on 27/6/14 after they were arrested. Further, although PW2 had

information that the deceased was last seen in the home of one Musalirwe of Nawaikoke village, and he interrogated him, he could not recall what he picked up from that interview or why Musalirwe was never considered a suspect. Again, Bonyo who allegedly found the body, was also not called as a witness or ever treated as a suspect

Further, PW2 admitted that all three accused persons recorded statements denying participation in killing the deceased. Although he admitted that much of what he relied on to build the case was information from witnesses from the two villages where the accused persons resided, he took no trouble to talk to any person of authority in either village. Even then, he proceeded to forward the file to the Resident State Attorney.

I would accordingly agree with counsel Ngobi's submission that the prosecution evidence with regard to the accused persons' participation was weak, worthless and substantially discredited. Also his observation that the indictment was defective was also valid. The wording omitted to mention that the killing was unlawful and caused with malice aforethought. It would depict a charge of manslaughter which is a different charge from that of murder. This alone should have halted the prosecution.

I would conclude therefore that, no *prima facie* case was made out against all three accused persons. They are not obligated to answer to the charge of murder and I thereby find all three of them not guilty within the meaning of Section 73(1) of TIA. They are accordingly discharged and should be released forthwith unless they be faced with any other lawful charge.

I so order.

EVA K. LUSWATA

JUDGE

06/05/2018