

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CRIMINAL SESSION CASE NO. 0021 OF 2017**

**UGANDA ----- PROSECUTOR**

5

**VERSUS**

**NANTONGO GRACE HAFUSWA ----- ACCUSED**

**BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

**JUDGMENT**

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The Accused person, Nantongo Grace Hafuswa was indicted for murder C/S 188 and 189 of the Penal Code Act.

It is alleged by the Prosecutor that the Accused person on the 07<sup>th</sup> day of June, 2013, at Kamwokya Church Area Zone, Central Division, in  
15 Kampala District, with malice aforethought, unlawfully killed Bwamulide  
Alvine.

The Accused person denied the charge and a plea of not guilty was entered.

In a bid to prove its case, the prosecution called five witnesses. The  
20 Accused gave her defence but did not call any witness.

At the commencement of hearing Police Form 24 on which the Accused was medically examined, Police form 3 and its attachment on which the deceased's brother was examined as a victim of suspected poisoning, together with the discharge form, and Police Form 48C, the postmortem

report were admitted in evidence as Exhibits P<sub>1</sub>, P<sub>2A</sub>, P<sub>2B</sub> and P<sub>3</sub> respectively, under S.66 of the Trial Indictment Act

Two analysis reports from Directorate of the Government Analytical Laboratory dated 02.04.14 and 17.04.14 respectively were also under  
5 the same provision of the Trial Indictment Act, as Exhibits P<sub>4</sub> and P<sub>5</sub> respectively.

In determining the merits of this case, I bear in mind the established principle of law that *"in order to secure a conviction, the onus is on the prosecution to prove the indictment against the Accused  
10 person beyond all reasonable doubt"*.

Further that *"in all indictments for murder, the standard of proof in such cases is even higher than in ordinary criminal cases"*. – See the case of **Uganda vs. Adomia Zoreka & No.7770 DC Kiwemba Cr. Case No. 103/87**. – Where the case of **A. Abonyo & Another vs. Republic [1962] EA 542**, was relied upon.  
15

Court is also aware that, *"the burden of proof remains throughout on the prosecution and never shifts to the defence, except in a few exceptional cases provided for by the law."*

*The burden remains regardless of the weakness of the defence  
20 case. \_\_ if there is any doubt created by the prosecution evidence, that doubt must be resolved in favor of the Accused person"*. – Refer to the case of **Okoth Okale & Others vs. Uganda [1965] EA 555** cited with approval in the case of **Uganda vs. Namakula Zam Cr. Case No. 019/2013**.

Both the prosecution and the defence agree with the above stated position of the law.

In the present case, the prosecution had to prove beyond reasonable doubt, the following ingredients of the offence, if a conviction was to be returned:-

I) Death of a human being.

II) The death resulted from an unlawful act or omission.

III) The act causing death was with malice aforethought.

IV) The Accused before court is the one who killed the deceased or participated in the killing.

To determine whether the prosecution discharged its burden in respect of each of the ingredients, court has to evaluate the evidence of both the prosecution and defence.

### **Death:**

Counsel for the Prosecution and for the Defence agree on this first ingredient

The death was confirmed by all the prosecution witnesses. Indeed there is a postmortem report- Exhibit P<sub>3</sub>, admitted in evidence as already indicated in this judgment, which also confirms that the deceased Bwamulide Alvine passed away.

This court therefore finds as a fact that, Bwambale Alvine died on 07.06.13.

The first ingredient of the offence was proved beyond reasonable doubt.

The next ingredient to determine is **whether the death was unlawful.**

It has been established by decided cases that *"in all cases of homicide, except where the circumstances make it excusable or*  
5 *where it is sanctioned by the law, death is presumed unlawful".*

– Refer to the case of **Wesonga vs. Republic [1945] 15 EA CA 65** cited with approval in the case of **Uganda vs. Lydia Drarum Atim HCT-OO-CR-SC-0404 of 2010** and **Akol Patrick & Others vs. Uganda [2006] IHCB P.6 CA.**

10 The prosecution in the present case asserts that the death was unlawful.

Their evidence is to the effect that, the deceased died as a result of ingesting poisonous substances that were administered in his food and drink by PW<sub>4</sub> on the instructions of the Accused.

15 It is contended that, PW<sub>4</sub> confessed to have put the said substances in the food and drink of the deceased, when she broke down and cried bitterly after the burial of the deceased.

Counsel for the prosecution submitted that when poison is given to a human being, it is intended to terminate their life. Therefore that the death of the deceased was unlawful.

20 The prosecution relied on Exhibit P<sub>3</sub> the postmortem report; Exhibit P<sub>4</sub> and P<sub>5</sub> respectively. These two are reports from the Directorate of the Government Analytical Laboratory. Exhibit P<sub>4</sub> was in respect of the results from the vomitus of the deceased brother collected at home and at Mulago hospital while Exhibit P<sub>5</sub> was the results of the toxicological

analysis of the piece of liver, hair, finger nails and \_\_\_ vertebrae bones of the deceased.

Exhibit P<sub>2A</sub> and P<sub>2B</sub> were also in respect of Bwambale Elvis. The digamous was indicted as organo phosphate poisoning. The patient was  
5 treated and discharged pending toxicological examination.

Counsel for the defence submitted that the cause of death was not known and natural causes could not be ruled out. He referred to the postmortem report Exhibit P<sub>3</sub>, Exhibit P<sub>4</sub> and Exhibit P<sub>5</sub> to support his submissions.

10 All the Exhibits referred to in the case were admitted in evidence by consent of both Counsel.

Exhibit P<sub>2A</sub> and P<sub>2B</sub> was in respect of Bwambale Elvis, and this is admitted by the prosecution, although the names indicated here are of the deceased. The victim was treated and discharged pending  
15 toxicological examination.

Exhibit P<sub>3</sub> is the postmortem report in respect of the deceased. It indicates that the autopsy was performed on the head, trunk, limbs viscera and body infirmity. The body was mummified and the internal organs were decomposed. But no \_ cause of death was seen. The  
20 postmortem was done after the body had been buried and exhumed.

Samples of the kidney, piece of the liver, scalp with hair, 2 \_\_\_ vertebrae bones and two finger nails of the index and middle fingers were removed and taken for toxicological examination.

The report after the toxicological examination is Exhibit P<sub>5</sub>. It shows that both the Phosphrine test for organo phosphorous poison and fujiwara's test for organo chlorinated poisons were negative.

5 The report further indicates that although gas chromatography mass-spectrometry analysis was done, **"no toxic organ compound of forensic relevance was detected in the liver sample submitted for analysis"**.

Exhibit P<sub>4</sub> was the report concerning the vomitus of the deceased's brother collected at home and at Mulago Hospital.

10 When the vomitus was examined, the phosphine test of the organo phosphorous poison was negative, and so was the fujiwara's test for organo chlorinated compound.

15 However that, a bio pesticide was detected in the vomitus. According to the report, the pesticide is used to prevent the sprouting of potatoes during storage.

The observation made was that, exposure to the compound may cause headache, nausea, vomiting, diarrhea, excessive sweating, convulsions and death.

20 The vomitus referred to, although indicated on the report as that from the deceased, was for the deceased's brother Elvis. This is discerned from the evidence of PW<sub>2</sub> which is to the effect that Elvis was the one taken to Mulago Hospital.

This is confirmed by the evidence of PW<sub>3</sub> the mother of the deceased to the effect that the deceased was taken to a clinic at Kamwokya Caring

Community Hospital. There, they were told that the child had a bacterial infection and they were given antibiotics.

Eventually when the deceased was taken to hospital on 07.06.13 and he passed away before they were admitted.

- 5 Without any toxic organ compound being found in the body parts of the deceased, I am constrained to agree with Counsel for the Accused that the cause of death remains unknown. There is therefore doubt as to whether the death was unlawful.

10 Although PW<sub>4</sub> in her evidence stated that the deceased died of poison, her evidence is not supported by the findings of the toxicological report after analysis of the body parts.

**Malice aforethought:**

Under S.191 of the Penal Code Act, malice aforethought is deemed to be established where:-

- 15 a) There was an intention to cause the death of any person, whether such person is the one killed or not.
- b) Knowledge that the act or omission will probably cause the death of such person. Whether such person is the person actually killed or not, although such knowledge is accompanied by indifference
- 20 whether death is caused or not, or by wish that it may be caused.

It was the submission of Counsel for the prosecution that, the death of the deceased was caused with malice aforethought, considering the circumstances surrounding the death.

That is, the deceased ate the food that had been administered with a poisonous substance. She asserted that this is confirmed by Exhibits P<sub>4</sub> and P<sub>5</sub> the reports from the analytical laboratory which indicate that the contents of the substance once administered would cause vomiting, diarrhea, sweating etc, all signs that were present in the deceased before he died.

Further that, no one administers poison unless they intend to kill the person to whom it is administered.

Counsel for the Accused argued on the other hand that, although all prosecution witnesses contend that the deceased died of poison, and the alleged weapon was the pesticide Diisoprophylthelene, the postmortem report shows no toxic substances in the body.

That malice aforethought can be determined from the type of weapon used (is it deadly or lethal).... The conduct of the Accused, before and after the commission of the offence, among other things.

He relied upon the case of **Uganda vs. John Ochieng [1992-93] HCB 80**, cited with approval in the case of **Uganda vs. Namakula Zamu (Supra)**.

Counsel insisted that *"the existence of malice aforethought was not a question of opinion but one of fact to be determined from all the available evidence"* – the case of **Nandudu Grace & Another vs. Uganda Cr. App. No 04/2009 S.C**, where the case of **Francis Coke vs. Uganda [1992-93] HCB 43** was cited with approval, was relied upon by Counsel to support his submission.



He added that the conduct of the Accused in the present case after hearing of the death of the victim was not at all suspicious. That she willfully complied with the police and did not make any objections when she was arrested.

5 It has been established by decided cases that *“in deciding whether or not the prosecution has discharged its burden, the court looks at the surrounding circumstances in each particular case that among other things, the nature of the weapon used”*. – See the cases earlier referred to by Counsel for the Accused.

10 In the present case, the prosecution asserted that the deceased died of poison, administered in circumstances already referred to. But as already found in this judgment, no toxic substances were found in the body of the deceased by the postmortem or the toxicological examination of the liver.

15 Left in doubt as to what could have been the cause of death of the deceased; we are left with the opinion of the prosecution witness, yet as submitted by Counsel for the Accused, *“malice aforethought is not a matter of opinion”*. The doubt has to be resolved in favor of the Accused person.

20 What remains for court to decide is **whether the accused participated or was responsible for causing the death of the deceased**.

Counsel for the prosecution submitted that the evidence of PW<sub>4</sub> that her mother (Accused) gave her water in a Ruwenzori bottle which she added  
25 to the drinking water so that they could love her more and that eth

Accused also gave her medicine in a bottle but she lied because she feared her mother would be harmed, \_ to the fact that whatever PW<sub>4</sub> did was in pursuant of the interests of the Accused person.

5 That this was confirmed when the same witness told court that she told lies to police, because she wanted to save he mother.

Counsel stated that, in all PW<sub>4</sub>'s statements at police and in her evidence, she was very consistent about what her mother gave her and what caused the death of the deceased.

10 While acknowledging that made some contradictions in the prosecution evidence, Counsel prayed court to treat the contradictions as minor and intended, for the obvious reasons that the Accused is the mother of PW<sub>4</sub>.

15 It was also pointed out that PW<sub>5</sub> evidence shows that the bottle with the substance was taken for analysis and the reports confirmed the presence of poison. That according to that witness the substance originated from the Accused person, who took advantage of the age of PW<sub>4</sub> at that time and asked her to administer it for wrong reasons.

20 Further that the same witness led the interview of PW<sub>4</sub> who confirmed to police that she administered the substance that her mother gave her into the food the deceased ate before he died.

Counsel argued that, although she is mindful of the principle that **“the prosecution case will not stand because of the weakness of the Accused’s defence”**, court should take into account the contradictions in the defence of the Accused.

That is the Accused's claim that her daughter PW<sub>4</sub> was being mistreated by her Step Mother and had wounds on her ears as a result of the continued harassment and beating. But that PW<sub>4</sub> had told court that apart from the Step mother making fun of her that the Accused had  
5 abandoned her there was nothing else done to her in form of mistreatment.

Also that, the Accused's claim that her daughter lied because she was protecting her should be treated with the \_\_\_ it deserves, considering that PW<sub>4</sub> is the biological daughter of the Accused. Therefore that  
10 PW<sub>4</sub>'s evidence should be evaluation keenly and treated with the highest caution.

Insisting that the inconsistencies in the prosecution case should be treated as minor and not fatal to the prosecution case – Counsel cited the case of **Alfred Tajar** concluding that the prosecution evidence  
15 points to the guilt of the Accused person and she should be convicted as charged.

Counsel for the Accused stated that, the prosecution case hinges on the alleged stay of PW<sub>4</sub>, who is alleged to have administered the poisonous substance in the deceased food.

20 However that the Accused person was never placed at the scene of crime, by the prosecution. There is no direct evidence linking her to the deceased during his life time, the night before he fell sick or any where before or after the burial.

He argued that, all the evidence is circumstantial and falls short of  
25 implicating the Accused person.

Further that, the evidence of the prosecution was rendered inadequate when PW4 told court that she was forced to tell lies about the alleged administering of poison in order to save her mother from certain death.

5 That the case hinges on PW<sub>4</sub> having told PW<sub>1</sub>, PW<sub>2</sub>, PW<sub>3</sub> and PW<sub>5</sub> that the Accused is the one who gave her poison to administer in the deceased's food. However, in her evidence before court, PW4 did not pin her mother, instead her evidence contradicted the prosecution case, hereby leaving it hanging in space.

10 That the prosecution could have impeached the credibility of PW<sub>4</sub> under S.154 of the Evidence Act by declaring her a hostile witness and subjecting her to cross examination to test the validity of her testimony, but this was not done.

By leaving the evidence as it is, Counsel argued, it raises doubt as to the participation of the Accused person.

15 Court was urged to take judicial notice of the required standard of proof that is "**beyond reasonable doubt**". Adding that, the testimony of PW<sub>4</sub> raises not only reasonable doubt but proves that the prosecution case is unfounded and malicious.

20 It is therefore not surprising that, both the postmortem report Exhibit P<sub>3</sub> and Exhibit P<sub>5</sub> the toxicological report, the only independent reports — the deceased have no connection or support to the prosecution case.

Commenting about the evidence of PW<sub>5</sub> Janyari Rolland, Counsel for the Accused stated that it also fell short of pointing out that the investigations never picked finger prints of the Accused to match with  
25 those on the Recovered substance alleged to have been from her.

Counsel relied on the case of **Mureeba & Others vs. Uganda SCCA 13/03** where it was held that *"for circumstantial evidence to sustain a conviction, the evidence must point irresistibly to the guilt of the accused person"*.

5 Adding that PW<sub>4</sub> - a child of tender years who understood the duty of telling the truth could not have lied to court.

Concurring with the authority of **Alfred Tajar**, relied upon by the prosecution, Counsel pointed out that it's to the effect that *"all inconsistencies and contradictions should be resolved in favor*  
10 *of the accused person"*.

Counsel also argued that at no point in her evidence did PW<sub>4</sub> admit having administered the poison. She admits having lied in her statement to police and in her narrative to PW<sub>1</sub>, PW<sub>2</sub> and PW<sub>3</sub>. And that the contradiction created cannot be resolved in favor of the State  
15 but of the Accused person.

S.10 of the Evidence Act was cited for the provision that "facts not otherwise relevant are relevant if they are:-

- a) Inconsistent with any fact in issue or relevant fact.
- b) If by themselves or in connection with other facts make the existence  
20 or non-existence of any fact in issue or relevant fact highly probable or improbable.

Counsel then asserted that the evidence of PW<sub>4</sub> leaves a lot of doubt in all minds as to whether the Accused actually committed the murder.

PW<sub>4</sub>'s testimony is inconsistent with and contradictory to the statements and testimonies of all the prosecution witness, yet she was the corner stone of the prosecution case.

5 Stating that the further ingredient had not been proved to the required standard, Counsel prayed that the Accused be acquitted. He cited in support the case of **Paulo Omale vs. Uganda Cr. App. No. 06/77 (CAU)** which was relied upon in the case of **Uganda vs. Lydia Draru alias Atim (Supra)** where it was held that *"the onus is on the prosecution to prove that the accused person with malice*  
10 *aforethought killed the deceased. If that onus is not executed, an accused person is entitled to be acquitted even though the court is not satisfied that his story is true, so long as the court is of the view that his stay might reasonably be true"*.

15 It was then prayed that the Accused be acquitted of murder and set free.

In rejoinder, Counsel for the prosecution argued that **"circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which by intensified examination is**  
20 **capable of proving a prosecution with the accuracy of mathematical"**. That the evidence of the prosecution points to the following circumstantial evidence against the Accused:-

- I. Accused often meeting secretly with PW<sub>4</sub>.
- II. The gradual infiltration of PW<sub>4</sub>s mind that she was not loved by  
25 her father (PW<sub>2</sub>) and her Step Mother (PW<sub>3</sub>).

III. Accused's conduct of secretly giving money and other substances to PW<sub>4</sub> to be administered in food and drinking water.

IV. The presence of the accused person at the church near the deceased's home on 05.06.13 at 7pm.

5 That it cannot be a coincidence, Counsel argued, that the death occurred \_\_ 2 days later.

Court was urged to find that evidence sufficient to place the Accused at the scene of crime and the commission of the crime therefore.

10 Commenting about the inconsistencies in PW<sub>4</sub>'s evidence, Counsel stated that, they are between the statements made at police after the occurrence of the crime in absence of her mother and the evidence in court given in presence of her mother.

15 She argued that, the witness when she made the statement at police was at the tender innocent age of 11 years and therefore her mind was still fresh and uncorrupted at that time. But that by the time of her testimony, she was of the advanced age of 14 years. Therefore that, her testimony regarding her mother should be treated with the highest degree of caution, because of the biological relationship between them.

20 It was reiterated that the accused be convicted on the evidence adduced by the prosecution.

I have given the evidence of both the prosecution and the defence, plus the submissions of both Counsel, the best consideration it can in the circumstances. And I find that I am more persuaded by the submissions of Counsel for the accused.

The case of the prosecution that the accused participated in the death of the deceased is mainly based on the accounts of Pw<sub>4</sub> Shelina Nakawungu, who is said to have received the *“poisonous substance”* that she allegedly administered in the food and water taken by the deceased and his brother. Pw<sub>1</sub>, Pw<sub>2</sub>, Pw<sub>3</sub> and Pw<sub>5</sub> all stated that Pw<sub>4</sub> broke down after the burial of the deceased and made the said confession.

The participation of the accused person is accordingly mainly based on circumstantial evidence and hearsay evidence.

Decided cases have established that *“in a case depending exclusively upon circumstantial evidence, the Court must find before deciding upon conviction that inculpatory facts were incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of guilt and also before drawing the inference of guilt the Court must be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt.”* **Simoni Musoke V R [1958] EA 715 t**

*“...for circumstantial evidence to sustain a conviction, the circumstances must point irresistibly to the guilt of the accused person”.* – **Mureeba and Others Vs Uganda (Supra)**

In the present case, Pw<sub>4</sub> retracted her so called confession. She did not at all admit in her evidence that she administered poison or that the accused asked her to administer it. When asked if her mother had ever given her anything, she replied that she had only ever given her Shs. 5000/- She admitted having lied in in the earlier statements made to the



other prosecution witnesses, to save her mother because they had threatened to kill her.

*“As a rule, a retracted confession calls for great caution before it is accepted and before founding a conviction upon it. The court must be fully satisfied, in all the circumstances of the case, that the confession is true. Usually the court will act upon a retracted or repudiated confession when it is corroborated in some material particulars by some independent evidence accepted by the court. However, corroboration is not necessary in law. The court may act on a confession alone if it is fully satisfied that it is true after considering all material points and surrounding circumstances.”*

**Tuwamoi Vs. Uganda 1967 E.A. 84.**

The evidence of the prosecution regarding the cause of death could have corroborated the evidence of Pw4, but as already pointed out in this judgment, that evidence can also not be relied upon. First of all, there are grave contradictions in the evidence as regards the cause of death. According to the evidence of Pw3 the deceased was rushed to a clinic at Kamwokya, where he was diagnosed with *“a bacterial infection”* and given antibiotics. When he did not improve, he was rushed to Nsambya Hospital where he was pronounced dead upon arrival. The possibility of a natural cause of death cannot therefore be ruled out.

The body was given to them for burial and the deceased was buried the next day without a postmortem being done. When the body was exhumed, no *“anatomical”* cause of death was found.

Body parts were taken from the body and analyzed at the Government Analytical Laboratory, but as already stated herein; the toxicological report indicates that *"No toxic organic compound of forensic value was detected in the deceased's liver."*

5 The pesticide said to have been found in the vomitus, was from the vomitus of the deceased's brother and if that is what had led to the death of the deceased, then it would have been found in his body parts.

When all the circumstances of the case are taken into consideration, there is no independent evidence that the deceased died as a result of  
10 ingesting poison; raising doubt as to whether the accused ever actually prompted PW4 to administer anything into the food of her siblings.

Without any evidence adduced by the prosecution connecting the accused person to what caused the death of the deceased, I find that the guilt of the accused person has not been proved to the required  
15 standard.

It is trite law that *"if there is any doubt created by the prosecution's evidence, the doubt must be resolved in favour of the accused person."* – **Uganda Vs Namakula Zam (supra)**

For all those reasons, I disagree with the opinion of the assessors that  
20 the accused should be found guilty. The accused is hereby acquitted of murder and should be set free forthwith unless otherwise held on other legal charges.

**FLAVIA SENOGA ANGLIN  
JUDGE**

25 **28.02.18**