

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0405 OF 2015

UGANDA **PROSECUTOR**

5 **VERSUS**

WANYAMA STEVEN **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused in this case were jointly indicted with one count of Murder c/s 188 and 189 of the
10 *Penal Code Act*. It is alleged that the accused on the 24th day of November, 2014 at Ngando
village in Nakaseke District murdered one Nakato Patience.

The facts as narrated by the prosecution witnesses are briefly that the victim was a six year old
girl in primary one. On the fateful day, she left her parents' home for school but she never
15 returned home. Her mother, P.W.1 Zainabu Mutesi, upon realising that her daughter was missing,
alerted her step-father, and together they mounted a search for the girl. They did not find her at
school and were unable to find her anywhere else on the village. They had retired to bed when
deep in the night they were called out by the L.C.1 Chairman of the village, P.W.3 Lukwago
Richard, to help in identifying the body of a child which had been found in a coffee plantation.
20 Upon getting there, they positively identified the body as that of the daughter. She appeared to
have been defiled before she was eventually strangled to death.

The accused was suspected as the murderer because on the day the child went missing, he had
uncharacteristically gone away before lunch and never returned for the afternoon work shift; the
25 body of the deceased was found within a relatively short distance to his hut; when the body was
discovered, drums were sounded and nearly everyone on the village responded except the
accused and another man both of whom lived in the closest proximity of the spot where the body

was found; the accused only emerged the following morning and appeared to be on his way to work oblivious to the previous night's events; he was arrested at the scene yet in his defence he claimed to have been arrested at his home; while at the scene, his demeanour exhibited uneasiness. In his defence, the accused set up an alibi and denied having committed the offence.

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The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See *Ssekitoleko v. Uganda* [1967] EA 531). Proof beyond reasonable doubt though does not mean proof beyond a shadow
10 of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

For the accused to be convicted of murder, the prosecution must prove each of the following
15 essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

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This standard of proof of "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined
25 judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see *Clarence Victor, Petitioner 92-8894 v. Nebraska*, 511 U.S. 1 (1994); *Rex v. Summers*, (1952) 36 Cr App R 14; *Rex v. Kritz*, (1949) 33 Cr App R 169, [1950] 1 KB 82 and *R. v. Hepworth*, *R. v. Feamley*, [1955] 2 All E.R. 918).

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Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence. Proof which is so convincing that persons would not hesitate to rely and
5 act on it in making the most important decisions in their own lives. Beyond reasonable doubt is proof that leaves the court firmly convinced the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real
10 possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

15 Death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. In the instant case there is no post mortem report. The prosecution relies on the testimony of P.W.1 Zainabu Mutesi, the mother of the deceased, who saw the body at the scene after it was found and attended her funeral. P.W.2 Ngabo Moses, a step-father of the deceased, who too saw her body at
20 the scene after it was found and attended her funeral. P.W.3 Lukwago Richard, the L.C.1 Chairman, too saw her body at the scene after it was found, alerted the parents and later reported to the police. P.W.4 No. 23236 D/Cpl Mutalemwa Justus, the arresting officer too saw the body at the scene, and arranged for its post mortem examination. In his defence, the accused did not offer any evidence regarding this element. Having considered the evidence as a whole, and in
25 agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Nakato Patience died on 24th November, 2014.

The prosecution had to prove further that the death of Nakato Patience was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to have been
30 caused unlawfully unless it was accidental or it was authorized by law (see *R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*). In the instant case there is no post mortem report. The

prosecution instead relies on the testimony of P.W.1 Zainabu Mutesi, the mother of the deceased, who on examining the body saw nail marks on the neck, waist, abdomen and blood stains on the thighs. P.W.4 No. 23236 D/Cpl Mutalemwa Justus too on examining the body saw signs of strangulation around the neck and was present when the body was undressed for the post mortem examination and he saw signs of defilement. I have considered the available evidence and undertaken a credibility and common sense and ordinary experience evaluation of the evidence and the witnesses. It appears to me that based on the nature of the anomalies observed on the body of the deceased, this was not an accidental death but a homicide effected by way of strangulation. Therefore in agreement with the joint opinion of the assessors, I find that the prosecution has proved that this death was a homicide. Not having found any lawful justification for the assault that inflicted the fatal injury, I find that the prosecution has proved beyond reasonable doubt Nakato Patience's death was unlawfully caused.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice aforethought. Malice aforethought is defined by section 191 of the *Penal Code Act* as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. This may be deduced from circumstantial evidence (see *R v. Tubere s/o Ochen (1945) 12 EACA 63*).

Malice aforethought being a mental element is difficult to prove by direct evidence. Courts usually consider first; the nature of the weapon used. In this case none was used. In situations where no weapon is used, for a court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act that caused the death and whether the accused foresaw death as a natural consequence of the act. The court should consider; (i) whether the relevant consequence which must be proved (death), was a natural consequence of the voluntary act of another and (ii) whether the perpetrator foresaw that it would be a natural consequence of his or her act, and if so, then it is proper for court to draw the inference that the perpetrator intended that consequence (see *R v. Moloney [1985] 1 All ER 1025; Nanyonjo Harriet and another v. Uganda S.C. Cr. Appeal No.24 of 2002*). Having determined that death was caused by strangulation, anyone who applies a degree of force or pressure to the neck of

another so as to cause death must foresee that death would be a natural consequence of his or her act. Therefore in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that Nakato Patience's death was caused with malice aforethought.

5 Lastly, there should be credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence. Section 19 (1) (b) and (c) of the *Penal Code Act*, lists persons who are deemed to have taken part in committing an offence and to be guilty of the offence and who may as a consequence be charged with actually committing it. This includes every person who does or omits to do any act for the purpose of
10 enabling or aiding another person to commit the offence and every person who aids or abets another person in committing the offence.

The prosecution evidence against the accused intended to establish his participation in the commission of the offence is entirely circumstantial. In a case depending exclusively upon
15 circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure
20 that there are no other co-existing circumstances which would weaken or destroy the inference (see *Shubadin Merali and another v. Uganda* [1963] EA 647; *Simon Musoke v. R* [1958] EA 715; *Teper v. R* [1952] AC 480 and *Onyango v. Uganda* [1967] EA 328 at page 331).

The circumstantial evidence against the accused is that;- the accused was at the home of P.W.1
25 Zainabu Mutesi, the mother of the deceased, when he uncharacteristically went away before lunch and never returned for the afternoon work shift; the body of the deceased was found within a relatively short distance to the hut of the accused; when the body was discovered, distress drums were sounded and nearly everyone on the village responded except the accused and another man both of whom lived in the closest proximity of the spot where the body was found;
30 the accused only emerged the following morning and appeared to be on his way to work oblivious to the previous night's events; he was arrested at the scene yet in his defence he

claimed to have been arrested at his home; while at the scene, his demeanour exhibited uneasiness; while aboard the police pick-up, he admitted having committed the offence and pleaded to be forgiven, to the wrath of the mob and causing P.W.1 to faint.

5 First, regarding the alleged confession, a confession is defined as a voluntary statement made by a person charged with the commission of an offence communicated to another person wherein he acknowledges himself to be guilty of the offence charged, and discloses the circumstances of the act or the share and participation which he had in it (see *Black's Law Dictionary*, 6th Centennial Edition (1891—1991)). A statement is not a confession unless it is sufficient by itself to justify
10 conviction of the person making it of the offence with which he is charged (see *P.C. Mulawa Ben and another v. Uganda, S. C. Criminal Appeal No. 3 of 1993* and *Twinamatsiko Eric v. Uganda, C. A Criminal Appeal No. 2 of 1997*). The statement made by the accused while on the pick-up would constitute a confession. However, under section 23 (1) of *The Evidence Act*, no confession made by any person while he or she is in the custody of a police officer can be proved
15 against any such person unless it is made in the immediate presence of a police officer of or above the rank of assistant inspector or a magistrate. For that reason this confession is irrelevant.

What is left of the circumstantial evidence considered as a whole, creates a strong suspicion against the accused but falls short of establishing proof beyond reasonable doubt. The evidence
20 does not establish that he had any participation that substantially contributed to, or had a substantial effect on the consummation of the crime. He cannot be deemed to have committed or taken part in committing an offence and thus to be guilty of the offence within the meaning of section 19 (1) (b) and (c) of the *Penal Code Act*, simply because he did not respond to the distress drums, and was not at home the whole night when the body was found since he was not
25 the only one. That his demeanour at the scene exhibited uneasiness is too subjective an assessment to be relied on by court. The description of the location where the body was found placed it amidst two other dwellings. These co-existing circumstances weaken or destroy the inference of guilt. Therefore in disagreement with the joint opinion of the assessors I find that the prosecution has not proved this element beyond reasonable doubt and accordingly I find the
30 accused not guilty and acquit him of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. He should be set free forthwith unless he is being held for other lawful reason.

Dated at Luwero this 7th day of February, 2018.

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Stephen Mubiru

Judge.

7th February, 2018.