

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

CRIMINAL SESSION CASE NO. 280 OF 2014

5

UGANDA.....PROSECUTOR

VERSUS

10 **BYANSI PETER.....ACCUSED**

JUDGMENT

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

15 The accused person **BYANSI PETER** was on an unspecified date indicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act Cap. 120 LOU. It was stated that on the 28th day of October 2013, at Kirindi Zone, Kaliro Town Council, Kaliro District, he murdered NABIRYE MARIAM

20 The accused made a sworn statement to deny the charge and presented no witness. The prosecution on the other hand, presented four witnesses to prove the charge.

Mr. Wassajja Robert represented the State, while Mr. Ngobi Balidawa Moses represented the accused on a state brief.

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Brief facts

30 The prosecution's case born out of the evidence at trial, is briefly that, on an unspecified date, the accused was seen by one Kadicha Amuli (PWI) walking with one Mukisa and Nabirye Edith Mariam (hereinafter referred to as the deceased) along Iganga Road. The accused was identified when he stopped to purchase chapatti. The deceased's body was on 29/10/13 discovered dumped

at Busandha Village, Bukoma Sub County in Luuka District on a roadside, next to a maize plantation. The cause of death was confirmed to be suffocation as a result of strangulation.

5 It was suspected that the deceased may have been killed in Kaliro District and her body moved and dumped in Busandha in Luka District. Photographs of the body were taken at the instance of the police, and the body submitted to the Iganga Hospital where a postmortem was carried out. Since the body was still unidentified or claimed, the deceased was first buried in the hospital cemetery. Eventually, her family was identified and they retrieved the body which was buried in Wololo in Butembe. Following a tip of by villagers, the accused was arrested. He was
10 interrogated by police and admitted that he had moved with the deceased person up to one Baliruno's home. That she became weak the following day and later died.

The accused person denied the charge. He stated that he was 15years old at the time of his arrest. That by then he had been living with his parents in Bukirindi Zone but had at the material time
15 gone to visit his paternal aunt Betu Bintu in Budini Village in Kaliro District. He denied knowledge of Mukisa but admitted knowing Paulo Baliruno as a brother and that he visited him often for that reason. He denied knowledge of the deceased or having been in Bukirindi Zone on the day or night she was allegedly murdered.

20 State counsel filed written submissions on 27/2/19 and defence counsel made his response orally on 28/2/19. Both shall be taken into consideration in this judgment.

The law

On a charge of murder, the prosecution has the burden to prove the following elements beyond
25 reasonable doubt: -

- i. The deceased, a human being, is dead.
- ii. That the death was unlawful.
- iii. The death was carried out with malice aforethought.
- iv. The accused person participated in the commission of the offence or, is responsible
30 for the death.

It is incumbent upon the prosecution to prove all four elements of the charge to the required standard which according to the authority of **Woolmington vs. DPP [1935] AC 462 and Sekitoleko vs. Uganda [1967] EA 53**, should erase all reasonable doubt of the commission of the crime with malicious intent. The onus is on the prosecution to prove the charge and throughout the trial, that onus does not shift. Accordingly, a conviction will be based not on the weakness of the defence presented, but on the strength of the prosecution's case.

The record indicates that the charge was for murder contrary to Sections 188 and 189 of the Penal Code Act. The particulars of the offence were narrated as follows:-

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PARTICULARS OF OFFENCE

BYANSI PETER and another still at large, on the 28th day of October 2013 at Kirindi Zone, Kaliro Town Council, Kaliro District murdered **NABIRYE EDITH MARIAM**.

15 It is to that charge that the accused entered a plea of not guilty on 9/1/19.

I noted some serious omissions in the indictment. Firstly it was not dated which contravenes the provisions of the Section 27 of the Trial on Indictment Act (TID). I would have chosen to treat that omission as one that does not go to the root of the indictment. However, there was a more serious omission.

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According to Section 22 TID,

“Every indictment shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.

25 Emphasis of this Court.

That Section should be read together with Section 25(c) T/D which emphasizes that particulars of any offence required by law, shall be mentioned in the indictment. The offence of murder is created under Section 188 of the Penal Code Act. Therein death must be caused with malice aforethought.

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The presence of a malicious intent is a mandatory ingredient to prove murder. It must appear prominently in the particulars of the charge. That important ingredient would differentiate a charge of murder from that of manslaughter under Section 187 of the Penal Code Act.

5 In my view, the charge is incurably defective and cannot be amended. In any case, it would be too late in the day to allow any amendment because all evidence has been called and the accused would have no chance to make a fresh plea to an amended indictment. In any case, the evidence disclosed in the summary provided at the point the accused was committed for trial, disclosed a charge of murder and not manslaughter. The prosecution was at the inception of the trial given
10 an opportunity to amend the indictment and chose not to do so. An amendment at this point would be seriously prejudicial to the accused and would fall under the exception given in Section 50(2) TIA.

There is sufficient authority to support my view.

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In the case of **Makindia Vrs R (1966) EA 425**, the particulars of the offence in a charge of obtaining money by false pretense did not state that the accused person had obtained the money with intent to defraud. The East African Court of Appeal held the charge did not disclose any offence at law and such defect was incurably fatal. In the earlier decision of **Buchanan Vrs
20 State 97 Miss 839, 53 So. 399, 400** which is persuasive on this Court, it was held that the omission of the word “malice” from a murder indictment is fatal

I would accordingly find that the charge of murder in this case is incurably defective and the accused should have never been called to plead to it. Only a fresh indictment would have saved
25 this grave omission.

That said, I keenly followed the proceedings and digested the evidence. Even in the absence of a defective charge, I was not satisfied that the prosecution had proved their case against this accused person to the level required for a criminal trial.

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I would thus move to strike out the indictment as being incurably defective. The entire proceedings attendant to the indictment are equally null. The Court cannot determine the fate of the accused on a defective indictment or trial.

The accused is accordingly fully discharged of the indictment and I order for his immediate release unless he be held on any other lawful charges.

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EVA K. LUSWATA

JUDGE

26/03/2019

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