

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CRIMINAL SESSION CASE NO.0171 OF 2016

UGANDA :: PROSECTON

VERSUS

1. KARUBANGA JULIUS
2. KADUGALA SIMON
3. KUMAKECH GEOFFREY *alias* ODAGA
4. OTIM PAUL :: ACCUSED

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

- [1] The 4 Accused; **Karubanga Julius(A1)**, **Kadugala Simon(A2)**, **Kumakech Geoffrey *alias* Odaga(A3)** and **Otim Paul (A4)** were indicted of the offence of **murder C/ss 188 & 189 PCA**. It is alleged that during the night of 15th/12/2015, at Katugo village in the Masindi district, the 4 accused persons and others at large murdered **Kyamaywa Grace**. The accused persons pleaded not guilty to the charge.
- [2] The prosecution case briefly is that on the morning of 16/12/2015 at around 9:00am, a one **Kabajungu Evas (PW2)** found her deceased mother in law, a one **Kyamaywa Grace** lying down in the corridor inside her house, dead. She made an alarm which attracted other members of the public who gathered around. Police came later and took the body to Masindi hospital for examination.
- [3] According to the investigating officer, **D/Sgt.Obel Andrew(PW4)**, the scene of the crime which comprised the house of the deceased showed that there was a struggle between the assailants and the deceased. The deceased had bruises on the hands, shoulders and her back. Considering the stature of the deceased who was a strong a woman and the rough wall of the room where the deceased was strangled to death, the investigating officer concluded in his mind that the assailants could not have left with no injuries sustained by them.
- [4] It is then that during search for the suspects that **Kadugala(A2)**, who had been found covering his head with a scarf, was arrested by the GISO. Upon his arrest, his face(forehead) was found having human teeth marks upon removal of the scarf. The rest of the accused persons,

Kumakech (A3) and **Otim Paul** (A4) had similar bruises on their bodies and as a result, all were arrested and later charged with the instant offence.

- [5] In their respective sworn defence statements, the accused persons denied the prosecution allegations. They raised alibis. They claim to have been at their respective homes/and or work at the time the alleged murder of the deceased occurred. **Kadugala** (A2) attributed the scar on the side of his forehead to a fall when he was drunk.
- [6] As in all Criminal cases, the prosecution has the burden of proving the case against each of the accused persons beyond reasonable doubt. The burden does not shift to any of the accused persons and the accused can only be convicted on the strength of the prosecution case and not because of the weaknesses in their respective defences; **Ssekitoleko Vs Uganda [1967] E.A 532**.
- [7] For the accused persons to be convicted of murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;
1. Death of a human being occurred
 2. The death was caused by an unlawful act
 3. The death was actuated by Malice aforethought
 4. That it were the accused persons who caused the unlawful death;
- S.188 PCA**.
- [8] As regards the death of the deceased **Kyamanywa Grace**, it was proved by the uncontested Post Mortem Report dated 16/12/2015 (**P.Exh.1**) which established the cause of death to be strangulation and, **A1** stated that he attended her burial. The rest of the accused persons stated that they heard about the death of the deceased. It is therefore not in doubt that the deceased **Kyamanywa Grace** died during the night of 15/12/2015.
- [9] The prosecution has to prove further that the death of the deceased **Kyamanywa Grace** was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or it was authorized by law; (**R Vs Gusambizi S/o Wesonga [1948] 15 EACA 65**). In the instant case, there is nothing to suggest that the death of the deceased fell

under the exceptions. The Post Mortem Report (**P.Exh.1**) instead show that the deceased was strangled. There is no justification whatsoever for the strangulation of the deceased. I find this element duly proved.

- [10] The prosecution is also required to prove that the cause of death was actuated by Malice aforethought. **Section 191 PCA** defines malice aforethought 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. In the instant case, since strangulation suffocates a person to death, it follows that whoever strangled the deceased intended to cause her death and indeed, as per the Post Mortem Report (**P.Exh.1**), the deceased was strangled to death.
- [11] Lastly, the prosecution has to prove that each of the accused persons participated in causing the death of the deceased. There should be credible direct or circumstantial evidence placing each of the accused persons at the scene of the crime as an active participant in the commission of the offence.
- [12] In the instant case, there is no direct evidence placing any of the accused persons at the scene of the crime. Prosecution relied on circumstantial evidence as adduced by the investigating officer **D/Sgt Obel Andrew** (PW4).
- [13] According to (**PW4**), when he visited the scene of crime, he found the body of the deceased in the sitting room of her house. Everything in the house was scattered signifying that there was a struggle between the assailants and the deceased. The deceased had bruises on the hands, shoulders and her back. This was also revealed in the Post Mortem Report of the deceased (**P.Exh.1**). **PW4** suspected that because of this kind of struggle deduced from the circumstances on the ground, i.e the stature of the deceased who was a strong woman and the rough walls of the room, that the assailants could not have left with no injuries.
- [14] **PW4** testified further that **A2** and **A3** had bruises on their face while **A4** had bruises on his back which were recent and the accused persons failed to account for them.
- [15] **A2** in his defence however, accounted for the scratches found on his forehead. He denied that the scratches were of teeth marks of a human being. He attributed the scratches/bruises to a fall when he was drunk.

- [16] This court took the opportunity to observe the scar in court. The scar had however healed and court could not ascertain by use of an ordinary eye and the scar shape appearance whether it was caused by human teeth bite or not. 2ndly, **P.F24** report (**P.Exh.2**) upon which **A2** was medically examined, there is no finding that the bruise found on the right side of the face was of a human teeth bite.
- [17] As regards **A3**, whereas he did not account for the scratches, **P.F 24** upon which he was medically examined, there is no suggestion from the report (**P.Exh.2**) linking them to the deceased. No D.N.A analysis was done on the finger nails of the deceased for any foreign human particles or particles that could be scraped from the rough walls of the room where the alleged struggle took place for comparison with those from the accused person. Besides, there is no evidence that upon arrest, **A3** was found with such scratches or bruises on his face. It was just a mere statement from **PW4** but without any evidence of its support.
- [18] As regards **A4**, there are no scratches or bruises that were observed by the medical officer who examined him as per **P.F 24 (P.Exh.2)**. Besides, there is no evidence that upon arrest, he was found with the alleged scratches or bruises on any part of his body.
- [19] For **A1**, according to **PW4**, the deceased had reported cases of threats from **A1** to the area L.CI chairperson and 2ndly, that at one time before her demise, the deceased was rescued by a one **Richard Mpairwe** upon an attack by **A1**. However, no witnesses in the names of the area L.CI chairperson confirmed what **PW4** told court. **Kiiza Godfrey** (**PW3**) instead alluded to a fight between **Mpairwe** (a step son to the deceased) with the deceased and not the said **Mpairwe** rescuing the deceased from the attack by **A1**. **PW3's** evidence actually supported the version of **A1** regarding the fight between the said **Mpairwe** with the deceased. **Mpairwe** had a spear when he was found fighting with the deceased.
- [20] Lastly, **PW4** referred to a land wrangle and **A1** being denied of the use of the deceased's husband's motorcycle as the motive by **A1** to kill the deceased. That **Kyamanywa Solomon** (**PW1**) as the only surviving uncle of **A1**, had entrusted the family land to the deceased who had at the same time influenced him (**PW1**) to deprive **A1** of use of his (**PW1**) motorcycle in his movements. **A1** however denied the foregoing prosecution claims as stated by **PW4**, i.e, land wrangle with the deceased, any threats to harm the deceased or that **PW1** bought a motorcycle which used to help them in their movements.

- [21] Besides, when **Kyamanywa Solomon** (PW1) testified; he never alluded to any such land wrangle arising from his entrusting of the family land to his 3rd wife, the deceased or depriving **A1** from using his motorcycle at the instance of or influence by the deceased. It is apparent that **PW4's** evidence was based purely on hearsay.
- [22] In short, this is a case where prosecution is relying solely on circumstantial evidence.
“It is trite law that where the prosecution case depends solely on circumstantial evidence, the court must before deciding upon a conviction find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis. The court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt”; **Byaruhanga Fodori Vs Uganda, S.C.C.A No.18/2002.**
- [23] In the instant case, the prosecution evidence did not rule out the possibility of a one **Mpairwe Richard**, (step son to the deceased) who at one time was found with a spear threatening to kill the deceased as the one behind her murder. The fresh bruises that were found on the face of **A2** could have been caused by a fall when he was drunk as he defended himself.
- [24] Lastly, since in this case the accused persons had besides raised the defence of alibi, the burden was on the prosecution to disprove it and place them at the scene of the crime; **Androa Asenua & Anor Vs Uganda, S.C.Crim. Appeal No. 1/1998.** In this case, the prosecution failed to discharge this onus.
- [25] In the final result, in agreement with the lady and Gentleman assessors, I find that the prosecution evidence did not beyond reasonable doubt link the accused persons to the murder of the deceased, **Kyamanywa Grace**. Each of the accused persons is found not guilty of the offence is acquitted and discharged forthwith unless they are being held on other lawful charges.

Signed, dated and delivered at Masindi this 7th day of **October, 2022.**

Byaruhanga Jesse Ruyema
JUDGE.