

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
CRIMINAL SESSIONS CASE No. 0843 OF 2020

UGANDAPROSECUTOR

VERSUS

AJUPO ESTHER.....ACCUSED

Before Hon. Justice TADEO ASIIMWE

JUDGMENT

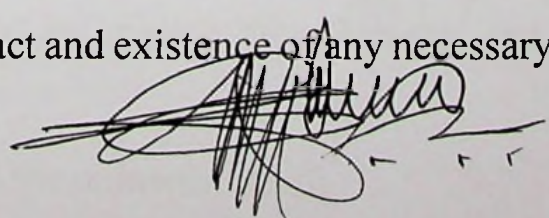
10 The accused was indicted of Murder c/s 188 and 189 of the *Penal Code Act*

It is alleged that the accused person on 25th august 2020 at Kiwatule Central Zone in Kampala District with Malice aforethought unlawfully killed Masembe Ian.

15 On arraignment, the accused pleaded not guilty and the matter proceeded for trial.

It is trite law that whenever there is a plea of not guilty, everything is in issue and prosecution has to prove the whole of their case including the identity of the accused, the nature of the act and existence of any necessary

20 knowledge or intent.



In all criminal cases the prosecution has the burden of proving the case against him beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (see

5 *Ssekitoleko v. Uganda* [1967] EA 531). The accused does not have any obligation to prove his innocence. By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure his conviction.

10 Proof beyond reasonable doubt though does not mean proof beyond a shadow 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).

15 I shall now proceed to deal with ingredients of each offence beginning with murder.

For the accused 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.

20 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.

Whether there was death of a human being

Ordinarily 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 this case, prosecution adduced the post mortem report dated 25th August 2020 which was admitted and marked as PE3. The said postmortem report confirmed that the said Masembe Ian died on the on the 25th day of August 2020. Further, PW1, PW2, PW3 and PW4 testified to this court and stated that they saw the dead body of the deceased which was eventually taken by PW1 for burial. I therefore find that prosecution led sufficient evidence to prove beyond reasonable doubt that indeed Masembe Ian died on the 25th day of August 2020. This element is proved beyond reasonable doubt.

Whether the death 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 (see *R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*).

In this case a postmortem report in respect of Masembe Ian, PE3 revealed that the body of the deceased had Multiple injuries/ wounds (10 in number) on the left chest wall which were 1-2 centimeter long. Further

that the 5th rib was fractured and a number of injuries on the internal organs. The cause of death was stated to be hemorrhagic shock following a sharp force trauma.

The above injuries sustained by the deceased were not accidental or authorized by law and the death was not excusable in the absence of evidence in that regard. Not having found any lawful justification for the acts which caused his death, I find that the prosecution has proved beyond reasonable doubt that Masembe Ian's death was unlawfully caused.

10 **Whether the cause of death was actuated with 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 and injuries sustained.

In this case a knife was exhibited as PE4 and it was used 10 times from the Doctor(PW6) who made a postmortem report in respect of Masembe

Ian (PE3) which revealed that the body of the deceased had multiple injuries due to a sharp force trauma. The nature of the weapon used in inflicting the harm/ injury to the deceased which caused death was lethal though no obligation to prove the same. (see *S. Mungai v. Republic* 5 *[1965] EA 782 at p 787 and Kooky Sharma and another v. Uganda S. C. Criminal Appeal No.44 of 2000*). On the basis of the above evidence I have no doubt that whoever caused the death of Massembe Ian did so with malice aforethought.

This element is proved beyond reasonable doubt.

10 **Whether the accused participated in the commission of crime.**

On this element the learned state attorney submitted that prosecution led sufficient evidence through its witnesses to prove that the accused participated in the commission of the offence beyond reasonable doubt.

15 In response, defense counsel submitted that the evidence on record was purely suggestive of suicide and that the circumstantial evidence of record was too weak to establish the participation of the accused in causing death to the deceased. That prosecution through PW6 failed to prove that the injuries on the deceased's body were inflicted by someone else. They 20 further submitted that the evidence of prosecution witnesses was contradictory and largely hearsay and therefore insufficient to prove that the accused actively participated in the commission of the crime. He finally prayed that court finds the accused person not guilty.

For court to convict an accused of any offence, there should be credible direct or circumstantial evidence placing each of the accused at the scene of the crime as an active participant in the commission of the offence.

- 5 In this case, it is clear that there was no eye witness to the murder of Massembe Ian, prosecution relied on circumstantial evidence to prove their case.

Circumstantial evidence; - “.... is evidence of surrounding circumstances which by undersigned coincidence, is capable of proving a proposition
10 with the accuracy of mathematics...., this is so for in their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person, caused the death of the deceased person. Simply put, it meant that there are circumstances which are accepted so as to make a complete and
15 unbroken chain of evidence.... such circumstantial evidence must point to only one conclusion, namely that the offence had been committed and that it was the accused person who committed it. **Tajudeen Iliyasu versus The State SC 241/2013**

Further. before conviction based on circumstantial evidence can be
20 justified, the Court must establish that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of guilt; and further, that there are no co-existing circumstances that would negative the inference

of guilt. see **Simon Musoke vs. R. [1975] E.A. 715; and Sharma & Kumar vs. Uganda; S.C. Crim. Appeal No. 44 of 2000.**

In this case, Pw1, the father of the deceased testified to this court and
5 stated that on the fateful morning, he was given a call and told that his son
Ian has found dead in the house and that when police did investigations,
they found that they that at the time his son met his death, there was a lady
they found in the house.

PW2 Edward Kiggwe testified that she knew both the accused and the
10 deceased as persons who were renting in the neighborhood. That on the
fateful morning a one Naluggwa called him at around 5 and told him that
she has been hearing people fighting in Ian Masembe's home. That they
moved to the house where they met the accused saying that the deceased
had killed himself.

15 PW3, the land lord of the deceased testified that on the fateful morning he
heard people knock on his gate and they told him that his tenants were
killing each other. That when he moved to the scene, he found the
deceased dead and the accused told him that she had a misunderstanding
20 with the deceased and they fought.

Pw4 the investigating officer testified that he was allocated the file of Ian
Masembe and that he proceeded to the mortuary where he found the
deceased whose body was stabbed 10 times in the chest. That he

interrogated some of the witnesses at the scene like PW2 who told him that on the fateful night they heard a quarrel in Ian Masembe's house at around 3:00am. That after 3 hours she heard a voice of a dying person and she made an alarm which woke up the neighbors. That she proceeded to
5 Ian Masembe's house where she found the accused at the gate trying to run away while on phone. And that she found the deceased inside the house lying in the pool of blood.

Further PW8 a one slivia Kamasiko testified that that on the fateful night she heard a voice of a groaning person in the deceased's house at around
10 3;30 am and that she moved to the scene with a man whose name she can't remember and a one Nalugwa Mariam. That they found the accused outside the deceased's house making a phone call. That they asked her twice what the problem was and she said there was no problem until they insisted for the third time, she then revealed that the deceased had killed
15 himself.

On the other hand, the accused gave sworn evidence and testified that she knew the deceased Ian Masembe as her boyfriend. That on the 24th, august,2020 he went to visit him and the said Ian Masembe told her that he had tested HIV positive. That the following day in the evening they
20 stayed together and were in the living room up to 4;00am when the deceased got up switched off the light of the kitchen. That he entered the bathroom and came out immediately. That when he entered the bathroom again she heard him cry in a loud voice. That she rushed to the bathroom

where she found him pointing a knife on his chest and blood was dripping. That the deceased ordered her to leave him alone and shut the door. That she went back to the leaving room and failed to get the door key which she later found in his pocket and that when she opened the door she found
5 people outside and told them what had happened but was taken to hospital.

From the evidence on record, it is not in dispute that the accused was at the scene of crime arising from her evidence that she visited the deceased's home on 24th august 2020 at 6;00pm and stayed there until
10 25/08/2020 and witnessed the deceased's death.

It is also borne out of evidence that the deceased met his death at around 4:00am and the accused who was in the house with him made no alarm, called no neighbor for help and concealed the information of death until neighbors walked to her. The accused's explanation is that the deceased
15 stabbed himself in his chest and that she tried to make an alarm but the deceased's voice in groan was louder than hers. That the deceased told her to leave him alone and closed the bathroom door. That she returned to the seating room leaving the deceased to stab himself.

This conduct of the accused of watching or hearing the accused stab
20 himself in a single bedroom house without making an alarm or informing neighbors after the alleged self-stabbing but instead moved to go and seat in the seating room is very questionable. Further, the accused informed neighbors when asked in the morning that nothing was wrong while the

accused lay dead in the house is another questionable explanation. The reasons she gave for such behavior was very unreasonable in the circumstance of this case. A reasonable person would have naturally panicked and called for help from the neighbors or at least told the truth
5 when asked in the morning but instead waited for the neighbors to come to her an hour after the death of the deceased.

Further, the medical report suggested that the deceased had 10 deep stubs wounds on his chest that penetrated deeply in the chest cavity and the heart. Although the doctor PW6 confirmed to court that one can stab
10 himself to death, it is practically impossible that a man can stand self-inflicted pain of 10 deep stabs with as much force that would penetrate internal organs. A single stab or two would be reasonable.

Besides the accused person in her evidence confirmed that the deceased was sick, weak and stayed laying on the Sofa from 6:00PM up to 4:00 am
15 when the incident occurred. One wonders where an already sick and weak person gets the energy and persistence of stabbing himself 10 times too hard to crack his rib and still gathers energy to stand up and close the bathroom door with blood oozing out of his body.

In addition, although PW2 did not hear people fighting in the deceased's
20 house, she testified that a one Nalugwa heard people fighting in the deceased's house and told him. That he decided to move to the scene and indeed found the deceased dead in a pool of blood and the accused intimated that the deceased had killed himself. The evidence of pw2 as

regard a fight was corroborated by the evidence of pw3 the land lord of the deceased who testified that on the fateful morning he heard people knock on his gate and they told him that his tenants were killing each other. That when he moved to the scene, he found the deceased dead and the accused on the scene who told him that she had a misunderstanding with the deceased and they fought.

Further PW8 a one Silvia Kamasiko confirmed that on the fateful night she heard a voice of a groaning person in the deceased's house at around 3;30 am and that she moved to the scene with a man whose name she can't remember and a one Nalugwa Mariam. That they found the accused outside the deceased's house making a phone call. That they asked her what the problem was and she said there was no problem until they insisted and she revealed that the deceased had killed himself. Ideally this evidence is consistent of a fight between the deceased and the accused. It definitely explains the cause of death better rather than the version of the accused that makes no hypothetical or practical sense. It is not coincidental that when voices of fighting persons are heard in the neighborhood, is when one of the occupants of the house decides to kill himself under impossible circumstances.

I am convinced beyond reasonable doubt the circumstances surrounding the commission of the offence are incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of guilt. The alleged co-existing circumstances of possible suicide are

baseless, practicably impossible and do not negative the inference of the accused's guilt in the circumstances.

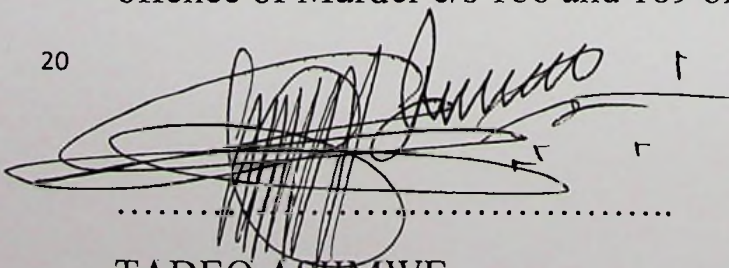
The inconsistencies pointed out by the defense counsel in regard to when and who recovered HIV results on the scene of crime are minor since it is
5 immaterial whether the quarrel between the victim and the deceased resulted from HIV results or not.

Further it is also immaterial that the accused had no blood stains on her body. For a person that died at 4:00am and neighbors came at 5:00 Am, the accused had all the time to clean herself up if she needed to.

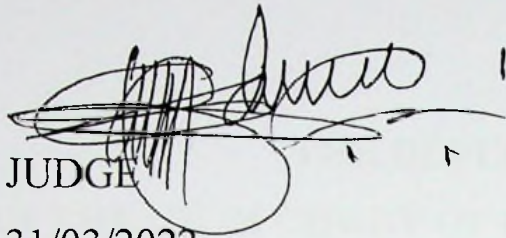
10 Defense also pointed out the issue of PE4 not having the DNA of the accused. However, the investigations that were done on PE4 as per PW7 revealed that the blood of the deceased was on the knife. There was no investigation on the DNA of the accused a defense wants court to believe. I therefore find that prosecution led sufficient evidence to prove
15 participation of the accused in the commission of the offence.

In the final result, in agreement with the assessor's opinion, I find that the prosecution has proved all the ingredients of the offence as against the accused. she is therefore found guilty and consequently convicted of the offence of Murder c/s 188 and 189 of the Penal Code Act.

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A handwritten signature in black ink, appearing to read 'Tadeo Asimwe', is written over a horizontal dotted line. The signature is stylized with loops and flourishes.

TADEO ASIMWE


JUDGE
31/03/2022