THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KABALE
CRIMINAL SESSION CASE NO. 0097 OF 2017

UGANDA ..... PROSECUTOR

VERSUS

A1 NDYANABO PATRICK
A2 NDAGIJIMANA GIRIVAS..... ACCUSED

BEFORE JANE OKUO J

RULING

Introduction:

The accused, **Ndyanabo Patrick alias Ndyana** and another were indicted with the offense of Murder c/s 188 and 189 of the Penal Code Act, Cap 120. It was alleged by the prosecution that the accused and another on the 20th day of November,2016 at Karuruma village in Kisoro District with malice aforethought un lawfully caused the death of **Ntamuheza Jean**.

The accused denied the offence and a plea of not guilty was entered on 13/12/2021.

Brief facts:

On the 20th of December 2016 the police received a report that a dead body was found in Mashaka's playground. They went to the scene and found the body lying in blood with deep wound on the orbital and occiputal area. Cause of death was established to be excessive bleeding due to head injury. Investigations commenced, leading to the arrest of the accused persons.

At the commencement of the trial, a preliminary hearing was held under which the following pieces of evidence were admitted:

1. PF 48 B on which the deceased on which the deceased's body was examined on 22/11/2016.It had a deep wound on the orbital area, marks of beating on the

body. The cause of death was established to be excessive bleeding due to injuries, especially on the head. The examination was conducted in Kisoro Hospital.

2. Police Form 24 in the light of A1 who was examined on 19/23/2016, his apparent age was 37 years. He had no injuries and was found with a normal mental status.
3. PF 24 in light of A2. He was examined on 17/03/2017 and found to be 35 years old. He had no injuries and was found with a normal mental status.

Representation

Julie Najjunju (State Attorney) appeared for the prosecution while all the accused were represented by **Felix Bakanyebonera** on state brief. The prosecution case was closed after two witnesses testified.

At the closure of the prosecution case, Counsel for the defence made submissions on no case to answer while counsel for the State opted not make a reply and left it to court to determine.

The Law

Section 73(1) of the Trial on Indictments Act provides that:

"when the evidence for the witnesses for the prosecution has been concluded and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is no sufficient evidence that the accused or any of the several accused committed the offense, shall, after hearing the advocates for the prosecution and the defense, record a finding of not guilty"

Conversely, **section 73 (2)** provides that the accused is to be placed on his defense if there is sufficient evidence that he has committed the offense. The "sufficiency of evidence" to be considered at this level has been further elaborated by case law. At this stage the standard of proof required is not beyond a reasonable doubt **(Uganda versus Mulwo Aramadhan** Criminal Case 103/2008. Rather, at the close of the prosecution case, a *prima facie* case should have been established to warrant the accused to be placed on his defense.

A prima facie case has been defined in **Rananlal T Bhatt versus Republic (1957) EA 332** by the East African court of Appeal as one where a reasonable tribunal, properly directing its mind to the law and the evidence would convict the accused person if no evidence or explanation is offered by the defense. A prima facie case is not established

by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence.

In the case of **State Vs Rajhnath, Armoy Chin Shue,Sunil Ramadhan and Rabindranath Dhanpaul. H.C.A No S 104/1997, J. P** Moosali while quoting Lord Parker CJ in **Sanjit Chaittal Vs the State (1985). 39 WLR 925** stated that:

A submission that there is no case to answer may be made and upheld :(a) when there has been no evidence adduced by the prosecution to prove an essential element in the alleged offense and (b) when the evidence adduced by the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Submissions

Counsel for the defense highlighted all the ingredients of the offence of murder and conceded to all except for evidence of participation of the accused. He submitted that the two police officer's evidence was hearsay and materially inconsistent as each gave a different version of events leading to the death of the deceased.

Proof of the elements of the offense:

The ingredients of the offense of murder as set out in section 188 of the Penal Code Act are as follows:

1. That the deceased is dead
2. That the death was caused unlawfully
3. That there was malice aforethought
4. That the accused person directly or indirectly participated in the commission of the offense of murder

Ingredient one:

The fact of death of Ntamuheza Jean has been sufficiently proved by production of the post mortem report admitted during the preliminary hearing as **Prosecution Exhibit 1.** The deceased's body was examined by a medical officer at Kisoro hospital on 22/1/2016 and the cause of death was established. **PW1 No 12222 Ndagijimana Emmanuel** testified that when he went to the scene of crime, he found a dead body lying in blood. I am therefore satisfied that death of Ntamuheza Jean been proved to the required standard.

Ingredient two is whether the death was unlawful.

In R versus **Gusambizi s/o Wesonga** 1948 15 EACA 65 it was held that all homicides are unlawful unless accidental or authorized by law.

Considering the Prosecution Exhibit 1 the body had a deep wound on the orbital area, marks of beating on the body. PW1 testified that he saw bruises on the deceased's head and the eye was hit on the stone. **PW2 No 28023 D/Sgt Karyamarwaki** also testified that when he visited the scene of crime, he found no pool of blood but only a big stone and some blood stains. He suspected that the deceased had been hit by the stone.

From the facts it is clear that the death was not excusable or justified. It was unlawful. There is no legality whatsoever to the death. It was not accidental. This ingredient was proved.

***Ingredient three is the requirement of malice aforethought*:**

Section 191 of the Penal Code Act provides that malice aforethought can be deduced from facts showing an intention to cause death or knowledge that the act or omission causing death will probably cause death. The case of **R versus Tubere s/o Ochieng 1945 12 EACA 63** further explains that an inference of malice aforethought can be deduced from the nature of the weapon used, the part of the body that was hit or targeted, whether vulnerable or not, the manner in which the weapon was used and the conduct of the accused before, during and after the incident.

In the present case, PEX 1 revealed a deep cut wound on the orbital area and marks of beatings. Evidence of PW 1 was to the effect that the deceased's head and eye were hit with a stone.PW2 said that at the scene they found a big stone and blood stains and suspected the deceased was hit with a stone. The defense has not disputed this element in their submissions. From the facts malice afore thought can be inferred from the nature of injuries being on the head and eye which are delicate body parts.

I accordingly find that there is sufficient evidence to prove that there was malice aforethought.

Last ingredient of whether the accused was the one responsible for the death

For this ingredient to be proved, there should be credible direct or circumstantial evidence placing the accused at the scene of the crime as the perpetrator of the offence. Prosecution in this case called 2 witnesses to prove its case. According to counsel for the defense in his submissions, they gave different versions of the events leading to the

death of the accused. He also attacked the evidence as being hearsay and un corroborated.

I now resolve this element having the submissions of the defense in mind.

PW 1 testified that on the 20/12/2016 he got information from the chairman of Bihuru village that a dead body had been found in Mashaka play ground. That him and other police officers went to the scene of crime. At the scene he met a lady called Nzabalinda and another called Demeteria who told him that the deceased was an employee of Mzee Bavuga's home. That he had been drinking the previous day at Kwizera's place at around 4pm.That he later moved to Catherine's bar where he found a one Kabagyenyi Harriet who was his lover. That A1 Ndyanabo found them there. They later relocated to Kemanzi's bar at 8 pm and Ndyanabo followed them. At the bar the deceased and Ndyanabo started quarreling. When the deceased and Kabagyenyi went to the latter's home, Ndyanabo followed them. They tried chasing him in vain but he forced himself in and started fighting. That after the assault the deceased was taken to Mashaka's play ground where he was found dead the following day.

PW2 on the other hand testified that on 21/11/2016, he received a call from the chairman LC1 of Bihuru village that they had found a dead body in his village at Mashaka playground. That he recorded his statement and with a team of police went to the scene of crime of crime where they found a dead body of a Rwandan National. That PC Maniragaba came up with the names of a Mrs. Kajuga Julius and Mrs. Nzabalinda who informed him that on 20th at around 8 pm they saw Kingyenye alia Nyiranbeba and Kabagyenyi Harriet alias Butoto talking to the deceased on their compound. That the deceased had lost the way to his workplace. That Ndayanabo (A1) and A2 took the deceased to show him the way. The next day the body of the deceased was discovered

As submitted by defense counsel, the two stories are contradictory.

Even then, the two officers were not at the scene and did not witness the incidents they narrated to court. It was the duty of the prosecution to produce the eye witnesses or other witnesses with crucial information connecting the accused to the commission of the offense. This was not done.

In the case of **R V Khelawon [2006] 2 R.C.S.787**, the Supreme court of Canada (per Charron J) held that the essential defining features of hearsay are the following;

1) *the fact that the statement (which is made out of court) is adduced to prove the truth of its contents and 2) the absence of a contemporaneous opportunity to cross examine the declarant.*

Hearsay evidence is generally inadmissible subject to certain exceptions. These are set out under Section 30 of the evidence Act and they do not apply to the present case.

Like counsel for the defence submitted Harriet, Zabalinda and Kigenye plus informants were not called to testify in court and the credibility of their evidence was not tested. The bar owners were also not called in court to testify hence leaving evidence of PW1 and PW2 purely hearsay.

Conclusion:

In light of the foregoing, the prosecution has not adduced sufficient evidence to warrant the accused to be put on his defense. The nature of the evidence is not that upon which any reasonable tribunal would convict in the absence of an explanation from the accused.

I accordingly acquit Ndyanabo Patrick (A1) and Ndagijimana Girivas (A2) of the charges against them and order them to be set free unless held on any other lawful charges.

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Jane Okuo Kajuga

Judge

24.1.2022