THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT FORT PORTAL

CRIMINAL SESSION CASE NO.77 OF 1988

UGANDA::PROSECUTOR

VERSUS

KAMUGISHA EVARISTO::ACCUSED

BFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

JUDGMENT

The accused in this case called Evaristo Kamugisha. He together with another person still at large was indicted of murder contrary to section 183 of the Penal Code. The particular being that on the 20th day of January, 1986 at Kyaburyazibwe village the accused together with another person murdered one Tawansi Rwemera. The accused pleaded not guilt to the indictment.

The prosecution in its endeavour to establish its case called in aid the evidence of three witnesses who testified here in court namely PW3, PW4 and PW5. The evidence of PW1 and PW2 was admitted at the preliminary hearing under section 64 of the Trial on Indictment decree, Decree 26 of 1971.

According to the prosecution it was around 4.00 pm after a day's work in the garden PW3 decided to go and rest a bit in her room. Her son Nzaabo and the accused were in former's house which was within the same compound with that of PW3. The deceased was a porter and used to work for PW3 and her husband who was not at home at the material time. According to PW3, she had already paid for the labour provided by the deceased. She had given him some money but she did not tell the court how much. What was however certain was that payment had been made about a month prior to the incident. The crux of the matter was that as she was on her way to the bedroom to go and have a siesta she was followed by the deceased on reaching her

bedroom the deceased got hold of her and threw her on the bed. The deceased also climbed the bed. As if that was not enough the deceased tried to undress her. PW3 did not wait for the deceased to succeed in his endeavour to rape her. PW3 raised an alarm which was answered by the accused and her son called Nzanabo. The two started assaulting the deceased and they also dragged the latter and she pleaded with tem to stop assaulting the deceased but they could not respond. She therefore made an alarm so that people could come and rescue the deceased. She left those people assaulting deceased and reported to PW4. On her return she found the deceased dead still in her house. The accused was under arrest whereas her son Nzaabo had disappeared. She was positive that when she left to go and report the incident she left only the accused and Nzaabo at the scene.

Later PW3 together with the accused person were led to Kihura Gombolola headquarters as suspects and then they were taken to Kyenjojo police station and finally ended up at Fort Portal Police station where he was released. She did not look at the body to observe any injuries on the same.

PW4 heard the alarm to the effect that the accused and Nzaabo had killed a person. He went to answer the alarm. He found the accused and Nzaabo on the way. They were coming from the direction of the alarm. He arrested both the accused end Nzaabo but the latter escaped. On reaching PW3's house he found the body of Rwemera was in the house. It was covered with a trouser from the chest to the head. The accused and PW3 were taken to higher authorities as suspects. That though Nzaabo had ran away on being apprehended the accused never tried to escape nor did he resist the arrest. PW5 went to answer the alarm on that fateful day. On the way he met PW3. She was going to report the incident to her husband. PW3 reported to her that the deceased was dead and had been killed by the accused and Nzaabo. He returned with PW3 to the scene. He found PW4 at the scene. Apart from PW4 and the accused person he did not find anybody at the scene.

As I stated earlier evidence of two witnesses as per summary of evidence was admitted at the preliminary hearing. PW1 examined the accused a year after the incident found him with some laceration on his parietal area of head and also left elbow whereas PW2 went to the scene after hearing an alarm and found PW5, PW4 and the accused at the scene. He found the body at the

scene. He witnessed and the accused being escorted away to the higher authorities. The accused denied the allegations and put up an alibi as defence to the charge.

Precise1y that was the case for both the prosecution and the defence but as I directed the assessors the burden of proof in criminal cases rests solely with the prosecution to prove the guilt of the accused person beyond reasonable doubt. I directed the assessors further that this burden does not shift except in a few exceptions this case not being one of them. See .**Woolmington vs. DPP (1935) AC 462, 481 & 482.**

Phipson on evidence eleventh Edition at page 44 Paragraph 98 on heading **The Evidential Burden in Criminal cases** had this to say:

"In criminal cases the prosecution discharges their evidential burden by adducing sufficient evidence to raise a prima facie case against the accused. If no evidence is called for the defence the tribunal of fact must decide whether the prosecution has succeeded in discharging its legal burden by proving its case beyond reasonable doubt. In the absence of any defence evidence, the chances that the prosecution has so far succeeded are greater. Hence the accused may be said to be under an evidential burden if the prosecution has established a prima facie case. Discharge of evidential burden by the defence is at prerequisite to an acquittal. The accused is entitled to be acquitted if at the end of and on the whole of the case there is reasonable doubt created by the evidence given by either the prosecution or the prisoner. No matter what the charge, the principle that the prosecution must prove the guilt of the prisoner part of the common law of England and no attempt to a whittle it down can be entertained. ***Woolmington vs. DPP supra."***

The author of the passage just quoted above was referring to the evidential burden of proof in criminal cases as is indeed applied in English court. He quoted with approval the decision in **Woolminton v DPP as per Lord Sinkley at page 481 – 82.** The same decision has to say the least been quoted with approval by our courts in very many instances See **Paulo Omala vs. Uganda criminal Appeal No. 6 of 1977 Reported Vol 1 1978 Judgment of the court of Appeal for Uganda May/August 1978, Okale VR 1965 EA Page 555 Tiwamo vs. Uganda EACA 1967 P.84 at Page 97 Uganda vs. Josephtole 1978 HMB P.269.**

It is an authority to the instant case. With the burden of proof resting on the prosecution to prove its case beyond reasonable doubt the prosecution had to adduce evidence to prove that the accused person together with another person caused the death of the deceased with malice aforethought as defined under **section 186 of the Penal Code Lokoya vs. Uganda (1968) EACA P.332 at page 334**. Also See **Uganda vs. Peter Kato and 3 others (1976) HCB P. 204 at p. 206** And since the accused was indicted together with another person the prosecution has further to prove that the accused had a common intention with Nzooba to prosecute an unlawful purpose in conjunction with one another as provided under section 22 of the Penal Code Act.

In the instant case the evidence adduced by the prosecution to prove the charge was both direct and circumstantial. It was direct in the sense that the sole eyewitness PW3 witnessed both the accused and one Nzaabo assault the deceased in her bedroom who had attempted to rape her but left the deceased being beaten and went to report to PW4 and on her return she found the deceased having passed away. PW3 did not look at the body in order to observe any injuries sustained by the deceased which might have caused the death of the deceased. And according to the testimonies of the rest of the prosecution witnesses PW4 and PW5 they too never looked at the body in order to observe any injuries on the body. PW4 found the body covered with a trouser from the chest up to the head and for PW5 he never entered the house where the body was but stood at the door way until the parish chief came.

As could be deduced from the testimonies of PW3, PW4 & PW5 the use the cause of death was not established. There was no postmortem report to show that the deceased died as a result of being boxed with fists on the buttocks as PW3 wanted this court to believe. It had been held that malice aforethought is readily proved where a lethal weapon has been used in assaulting the deceased on the delicate part of his See **Tubere s/o Ochan vs. R. (1945) 2EACA P.63.**

In the instant case no weapon was used in assaulting the deceased and it could not be said that the buttocks were a vulnerb1e part of deceased’s body am of the view that the failure by the prosecution to have the body medically examined was indeed a great omission since the prosecution had failed to etab1iah the cause of death.

As I stated earlier the evidence adduced in order to prove indictment was both direct and circumstantial. It was said to be circumstantial because PW4 when he came to answer the alarm he heard the maker of the alarm PW3 pronouncing the accused and Nzaabo as the people who had killed the deceased. And on his way to the scene PW4 met the accused who he arrested but his friend Nzaabo escaped. At the scene he saw the body of the deceased but never observed any injuries on it. For PW3 when she returned to the scene she found the deceased dead.

In Simon Musoke .V. R 1958 P. 715 it was hold that incase depending exclusively upon circumstantial evidence the court must before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

The above case is distinguishable from the instant case in that the present the evidence is not exclusively circumstantial. The evidence was both direct and circumstantial. **Taylor on evidence 11th edition at Page 79 Para 69 on** circumstantial evidence stated that the circumstances must be such as to produce moral certainty to the exclusion of a very reasonable doubt. The incriminating facts must be inconsistent with any other rational conclusion.

In the instant case in connection with the circumstantial evidence the circumstances do not produce moral certainty to the exclusion of every reasonable doubt that the deceased died at the hands of the accused and Nzaabo. PW3 went out and on her return found deceased dead. Before her return anything could have happened. She testified that the deceased was being-assaulted on the buttock when she left. No medical evidence was adduced to show that such an assault could have caused the death of the deceased. The incriminating facts are not inconsistent with any other rational conclusions. It is possible that the deceased was assaulted to death by Nzaabo and others. I say so because it is not known which blow and on what part of the body which caused the death of the deceased.

This brings me to another point to be considered in this judgment. Since the indictment accused the accused another person to have murdered the deceased the prosecution has to prove common intention as provided for under section 22 of the penal Code.

It is trite law that where a number of persons jointly beat another person causing his death and it is not possible to establish which blow actively caused death none of the persons take part in the beating may be convicted of Murder unless it is proved that the accused had a common intention with others to kill or to cause grievous harm to the deceased. see **Dyasi Mugenyi and others vs. Uganda (1965) EACA at P. 670.**

In the instant case the accused and another were indicted of assaulting the deceased to death. It is not possible to establish which blow actually caused the death of the deceased. There is no evidence to show that the 2 had a common intention to kill the deceased. And as I said earlier the cause of death was not established. There was no direct or circumstantial evidence to show that the assault of the deceased on the buttocks by both Nzaabo and the accused caused the death of the deceased. There was no postmortem report to that effect.

The accused throughout in his unsworn statement denied participating in killing of the deceased. He conceded that he branched up to the scene when looking for sorghum for brewing native beer and found both PW3 and her son Nzaabo wrapping up a dead body which was bleeding from the nose and ears. He found the deceased already dead and when an alarm was made those who came to answer the alarm arrested him thinking he was one of the people who had killed the deceased Nzaabo having fled. The accused stated that he found the deceased already dead and in fact put up an alibi as defence that he was not present when the deceased met his death. That PW3 was neither his mother nor his wife and no point in assaulting the deceased to death.

It is trite law that an accused who puts forward an alibi as an answer to the criminal charge he does not thereby assume the burden of proving the defence, but the burden of proving his guilt remains throughout on the prosecution See ***R* vs. Johnson [1961] *3* AER P.969, R vs. Lobbel [1957] I AER P. 734, R vs. Thomas Finch 1916 12 CR App 77 14 Digest (Repl) 667, 668, 6742- 6753, Sekitoleko vs. Uganda [1967] EA 531.**

I am of the view that the prosecution failed to adduce evidence to disapprove and or destroyed the alibi. PW3 in her evidence testified that she went away to make an alarm and to report the incident to PW4. I watched the demeanor of this witness in the dock and I formed the opinion that she told some half truth to the court. I do not believe her where she testified that she never

looked at the body of Rwemera at all in order to observe injuries sustained on it. She must have looked at the body. Equally I did not believe her where she testified that the deceased was assaulted on the buttocks alone by the accused and her son using fists and that she never participated in the killing or beating of the deceased. It is inconceivable that after she had made the alarm which was answered to among other by his son Nzaabo and the accused PW3 could have remained idle without hitting at this intruder at all who attempted to rape her.

PW3 was an accomplice and her testimony required some kind of corroboration. I say that she was an accomplice because of what I have just stated above and I am further strengthened in this finding by her own testimony and in that of PW4 and PW5 that the accused and Sauda PW3 were arrested as suspects in the murder of Rwemera and were first led to Kihura Sub county Headquarters and then to Kyenjojo police Station and finally to Fort Portal Police station where the said Sauda PW3 was released.

In **R v Ndaria s/o Karuki and others (1945) 12 EACA P.84** it as held that:-

"The first duty of court is to decide whether an accomplice is a credible witness. If the court after hearing all the evidence feels that, it can not believe the accomplice it must reject his evidence, and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail If however the court regard the accomplice a credible witness, it must then look for some independent evidence which affects the accused by connecting or rendering to connect him with the crime. It need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in very case the court should record in its judgment whether or not it regards the accomplice as worthy of believe."

In the instant case 1 have found that PW3 was not a credible witness since I have found that she told some lies to the court as explained above and I need not repeat myself here therefore no amount corroborative evidence could rectify the situation. If however I am mistaken that she was a credible witness then her uncorroborated evidence should be held to be untrustworthy for three reasons namely:-

(i) She is likely to have sworn falsely to shift the blame from herself.

(ii) As participant in the crime she was an immoral person who, was likely to disregard the sanctity of the oath.

(iii) And finally she might have given evidence under expectation of an implied promise of pardon and was therefore likely to favour the prosecution See **R .V. Asumani Lagoni s/o Muza 10 EACA 42.**

The learned State Attorney when addressing the court submitted first that the deceased died at the hands of the accused person and Nzaabo and was thus exonerating PW3 and that PW4 on answering the alarm found no person at the scene. He further submitted that the lack of a postmortem report was duly explained because there was nobody to carry out the postmortem on the deceased's body and also because the police men who visited the scene came from Kyenjojo police station.

With respect to the learned State Attorney evidence is lacking to show that the accused died at the hands of the accused and Nzaabo alone. The accused did raise an alibi as a defence to the criminal charge of murder. The said alibi was never destroyed by the prosecution by placing the accused at the scene. Accused stated that he found the deceased being wrapped by Nzaabo and his mother PW3 and the deceased was already dead. And even if the alibi was disproved which is denied the prosecution failed to prove that the accused had a common intention with Nzaabo in committing the crime and the cause of death remains unknown. This brings me to the next point that the absence of the postmortem report was explained. I disagree with the learned State Attorney. The failure of the prosecution carry out the postmortem report on the body was not satisfactorily explained. The fact that there was no doctor at Kyenjojo and also that the scene was visited by local policemen from Kyenjojo Police Station as not sufficient cause for not examining the body since in cases of homicide police men are known to visit the scene with doctor(s) who carry out postmortem where the body may be. Failure to carryout the postmortem was a great omission since the cause of death remains a mystery.

The learned counsel representing the accused submitted that the boys were defending PW3 who as going to be raped and as such when they hit the deceased who subsequently died they were entitled to an acquittal as per section 17 of the Penal Code. If on the other hand they might have used excessive force in defending the old woman PW3 they could be convicted of lesser charge

of Manslaughter. The learned counsel further intimidated that they were provoked and as such the charge of Murder could be reduced to that of Manslaughter contrary to section 182 of the penal Code and they could thereby be convicted accordingly. The gentlemen assessors held the view that the accused was provoked and advised me to convict him of the lesser offence of Manslaughter.

With respect to the learned defense counsel the defence of defending ones properly or person so as to make the killing lawful homicide is not applicable in the instant case since I have not found that the deceased died at the hands of the accused and Nzaabo because of what I have stated above. Similarly it cannot be said that the accused was provoked as provided under S. 188 of the Penal Code since it has not been proved that the deceased died at the hands of the 2 people alone by assaulting the deceased on the buttocks with fists. No medical evidence to show that such assault could cause death. The prosecution has so far proved that the deceased Rwemera died on the date of the incident and after a day on the orders of the police who visited the scene he was buried. But the prosecution has failed to establish the cause of his death and who were responsible for the same and whether there was any malice aforethought. If there was any crime committed by the accused was to box the deceased on the buttocks with his fist but even this was disputed because of the alibi which was never destroyed by the prosecution. The end result is that the prosecution has failed to prove beyond reasonable doubt that the accused murdered one Rwemera and thereby contravened the provisions of section 183 of the penal Code. In the premises I reject the unanimous opinion of the gentlemen assessors that the accused be convicted of the lesser cognate offence of manslaughter contrary to section 182 of the Penal Code Act. I find the accused person not guilty of the offence of Murder contrary to section 183 of the Penal Code and I acquit him accordingly and unless the accused is being held of any other charges I order for his immediate release.

I.MUKANZA

JUDGE

8/11/90