THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT TORORO

CRIMINAL SESSION CASE NO. 1/92

UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: PROSECUTION

VERSUS

EZEDIO TEBERI :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: THE HON. MR. JUSTICE C.M. KATO

JUDGMENT

The accused person Ezedio Teberi, whom I shall hereinafter refer to as the accused, is indicted for murder of his wife one Goreti Akello. The indictment alleges that on or about 27th September 1990 at Marachi village in the District of Tororo the accused murdered the deceased. The accused pleaded not guilty to the indictment.

The substance of the evidence as led by prosecution is that sometime between 27th and 28th of September, 1990 the accused had a quarrel with his late wife. After the quarrel the deceased was later on found hanging on a wire in the house were the two were living as husband and wife. The accused was later on arrested and charged with murder. The accused on his part in his unsworn statement says that on the fateful day he had a quarrel with his wife but they were separated by PW4. When they retired to their house the deceased continued to harass him. While he was asleep she committed suicide by hanging and when he tried to rescue her it was too late

It is an established principle of our law that the duty to prove the guilt of an accused person rests on prosecution. The prosecution must prove its case beyond reasonable doubt. An accused person has no duty of proving his innocence: Okath Okale v Republic 1965 EA 555 at 559. In a case of murder like the one now under consideration prosecution must prove beyond reasonable doubt that a human being was killed, that the killing was with malice aforethought as defined under section 186 of the Penal Code Act and that the accused took part in the killing.

It is not in dispute that a lady by the name of Goreti Akello is dead. What is in dispute is whether or not she was unlawfully killed. It was stated in the case of: Gusambizi s/o Wesonga v R [1948] 15 EACA 65 that in all cases of homicide death is said to be unlawfully caused unless it is shown that it was accidentally caused or that it was authorised by law. In the case now before this court, it is the prosecution case that the deceased's death was unlawfully caused. But the defence is of the view that the deceased took away her own life, in other words her death was not unlawfully caused. According to the evidence of PW3 the police officer who visited the scene of crime and that of the doctor who also visited the scene of crime, the deceased was found with her feet touching the ground. According to the evidence of PW4 after she had separated the deceased from the accused she heard a voice of a person crying inside the room where the deceased and the accused were and later on when she peeped through their door she saw the accused trying to push the body of the deceased upwards. The accused does not deny this piece of evidence His story being that he was pushing the deceased upwards in order to assist her from strangling herself but it was too late.

It is my considered opinion that the deceased did not commit suicide as it is being alleged by the accused. In my view by the time the deceased was being pushed up by the accused she was already dead. She must therefore have been killed by that time. It is unfortunate that the doctor's report on this point is inconclusive as it does not sufficiently state whether or not the deceased had already died when the body was made to hang.

It is my finding that the death of Goreti Akello was caused by an unlawful act and the theory put up by the defence that she might have committed suicide is totally rejected.

That leads me to the issue of who killed this unfortunate woman. It must pointed out here that the whole prosecution case in relation to accused connection with this case is based on circumstantial evidence in the sense that nobody saw the accused strangling the deceased. The authorities on circumstantial are not very few, they include such cases as Shubadin Merali and another v Uganda [1963] EA 647 at page 650, Simon Musoke v R [1958] EA 715, Teper v R [1952] AC 480 at page 489 and v Uganda [1967] EA 328 at page 331. In all these cases the law governing this sort of evidence was clearly spelt out, in the case of Musoke v R (Supra) for example it was clearly pointed out that in a case pending exclusively upon circumstantial evidence, the court must before upon conviction of an accused person, find that the inculpatory facts ore incompatible with the innocence of the .accused incapable of

any explanation upon any other reasonable hypothesis than that of guilt. In Tumuheirwe's case (supra) quoting the case of Teper (Supra) it was observed that circumstantial evidence should be narrowly examined as this type of evidence nay be easily fabricated

In the present case the case for prosecution is essentially based on the circumstantial evidence of Florence Akiteng PW4 who testified that moments before the deceased met her death, she had seen the accused quarreling with the deceased she separated them and they went inside their house where she heard a voice crying for help, after sometime she heard the voice of the accused announcing that the neighbours should assist him because his wife had had an accident. Her other part of evidence to the effect that she had seen the accused trying to push the deceased up also points to the something amiss was going on in the accused's house.

The other circumstantial evidence upon which the prosecution rested its case is that of Juma PW1 who testified that on that evening the accused had been quarrelling with his wife and later he was seen attempting to set his own house on fire which was a strange conduct on the part of the accused.

I have already rejected accused's story that the deceased committed suicide. Considering the evidence available particularly that of PW1 and PV4 and the accused's own statement that on that day he had a quarrel with the deceased and considering the fact that there were only two people in that house .namely the deceased and the accused; it is reasonable to draw an inference, (after excluding the possibility of suicide) that the only person who could have killed the deceased was the present accused. I therefore hold that the present accused was responsible for the death of the deceased Akello Goreti.

The next point to be considered is whether or not deceased was killed with malice aforethought as defined in section 186 of the penal Code Act. It was held in the case of: Lokoya v Uganda [1968] EA 332 at page 334 that the prosecution had a burden of proving malice aforethought. In deciding whether or not malice aforethought has been established by prosecution the court is usually by certain factors such as the nature of injury caused, the part of the body where such injury has been inflicted, the nature of weapon used in inflicting such injury:
Tubere s/o Ocheni v R [1945] 12 EACA 53. In the present case the exact circumstances under which the deceased met her death are not clearly known. It is very rare to come across such cases where husband's murder their wives, but in this case we have heard evidence that the

accused had a serious quarrel which resulted in fighting before the deceased met her death, there has been also a statement by the accused to the effect that after they had been separated the decease continued to harass him and that he was tipsy on that day. These facts clearly point to the possibility of the accused having fought in self defence in which during might have used excessive force which was out of proportion. It is also most likely that he might have fought under provocation by the deceased. It is probable that the accused lacked the necessary capacity to form the required malice aforethought because of the drink he had had. The position being what it is I find that the existing facts effectively negate the existence of malice aforethought.

In all those circumstances I find that the accused unlawfully killed the decease but without the necessary malice aforethought. I therefore find him not guilty of murder and acquit him of that offence but find him guilty of manslaughter under section 182 of the Penal Code Act and I do convict him of that offence: Uganda v Abudalla Babi High Court Criminal Session case no. 24/93(unreported) and Lokoya v Uganda [1968] EA followed.

I have not followed the advice of the two gentlemen assessors who had advised me to convict the accused of murder because they did not seem to have addressed their minds to the issues of provocation, intoxication and self defence.

C.M. KATO
JUDGE
3/5/94