

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CRIMINAL SESSION CASE NO. 18/95

UGANDAPROSECUTION

VERSUS

TANDEMA PHILLIPOACCUSED

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

The accused person Phillippo Tendema, whom I shall hereinafter refer to as the accused, is indicted for murder c/s 183 of PCA. In the indictment it is being alleged that on 31-7-93 at the village of Bufuta in the district of Iganga he murdered one Secilia Achandere. The accused pleaded not guilty to the indictment.

The material facts of the case as established by prosecution are that on that fateful night the accused and the deceased who was his wife together with one Rebecca PW2 went and cultivated for malwa at the home of Dimini which they drank until late in the evening then they moved to the home of the accused, they continued to drink enguli until Rebecca became drunk and she went to bed leaving the accused and the deceased together with another man called Antonio still drinking. When Rebecca woke up in the morning she found Secilia dead and the accused informed her that he had killed her because she had been disturbing him very much. The accused was arrested and when at the police station he made a charge and caution statement to D/inspector Luyiro in which statement he admitted having killed his wife by using his bare hands.

On the other hand the case for defence has been a complete denial of the accused having participated in the killing of the deceased. According to the accused on that day they had been engaged in a drinking spree and he went to sleep when he was drunk but in the morning he found his wife dead. He did not the circumstances under which she met her death.

It is trite law that the burden of proving the accused's guilt is upon prosecution and that burden does not shift to the accused who is not required to prove his innocence except in a

few statutory cases: Woolmington v DPP (1935) AC 462. In a case of murder like the present one prosecution is required to prove beyond reasonable doubt, inter alia, that a human being was killed, that the killing was unlawful, that the killing was with malice aforethought and the accused directly or indirectly participated in that killing.

To prove the first element of this offence prosecution relied on the evidence of PW1 Christopher Tabu, PW2 Rebecca, Dr. Muhanguzi who testified that they saw the dead body of Secilia. although the indictment talks of the deceased as being Secilia Achandere the evidence on record shows that the name of this woman was Secilia Otoda that being the name by which PW2 and the accused knew the deceased who must be the same person as Secilia Achandere. There is no dispute over the death of this unfortunate lady. I find that prosecution has proved beyond reasonable doubt that a human being by the name of Secilia Otoda alias Secilia Achandere is dead.

As far as the second ingredient is concerned i.e. whether or not the death was unlawfully caused, it is the law of this land that death of a human being is presumed to have been unlawfully caused unless it was accidental or it was authorised by law: Gusambizi s/o Wesonga v R (1948) 15 EACA 65. In the instant case the evidence indicates that the deceased did not meet her death accidentally or in a manner authorised by law. It must therefore have been caused unlawfully.

The next question to be considered is whether or not the accused is responsible for the unlawful death of the deceased. It has been the case for prosecution that the accused was responsible for the death of the deceased but the accused in his unsworn statement is quite adamant that he did not cause the death of his wife.

The evidence tending to connect the accused with the death of the deceased is basically circumstantial in a sense that nobody testified as having seen the accused killing the deceased. The law dealing with circumstantial evidence was clearly stated in the case of: Simon Musoke v R (1958) EA 715; that principle of the law simply says that where prosecution case is rounded on circumstantial evidence that circumstantial evidence must show that the accused is guilty and there are no co-existing factors that tend to weaken or destroy the inference of his guilt. The circumstantial evidence relied upon by prosecution is that of Rebecca Okiya (PW2), that of PW9 the policeman who recorded the accused's statement and that of PW2 Christopher Tabu, When PW2 asked the accused why he had

killed his wife the accused told PW2 that he had killed his wife because she had disturbed him very much. In his statement to the police which was admitted by consent of both sides the accused admitted having killed his wife but he had only beaten her with his bare hands. The accused's conduct was that of a person who could not be said to have been innocent because when PW2 asked him what had happened to his wife he simply told her that he had killed the woman because she had been disturbing him very much. There was evidence that when PW2 went to sleep there were 3 people in the house those were Antonio; the accused and the deceased but the accused himself told the court that by the time they went to sleep Antonio had already gone away, leaving in the house only the accused and the deceased. There is one factor which must not be forgotten and that factor is that by the time PW2 went to bed she left the accused quarreling with his wife, this fact is confirmed, by accuse himself in his statement to the police whereby he stated that his wife was insulting him because of another wife. In court here he confirmed that he had a quarrel with his wife and that was what he told the police. The circumstantial evidence available conclusively leads to the inference that the accused person must have been responsible for the death of his wife.

The question that must be answered is whether or not the accused killed his wife with malice aforethought as defined in section 186 of PCA. In the case of: *R v Tubere s/o Ochien* it was stated that in deciding whether or not the accused had malice aforethought the court should consider the weapon used, the part of the body where it was used, the nature of injuries inflicted and the conduct of the accused before and after the incident. In the present case prosecution produced 2 conflicting stories as to how the deceased met her death. The first story is to be found in the doctor's report; in that report the doctor speaks of there being two deep cut wounds one on the neck and one on the skull and he said this was the cause of death. The other part of evidence is contained in the statement of the accused which was tendered as Ex.P3 in that exhibit the accused is saying (he beat his wife with bare hands and he beat her on the head. This makes it uncertain as to what was the actual cause of the deceased's death. The position would have been easier if Ex.P3 did not form part of the prosecution case. It is the law that the court finds it unsafe to base a conviction for murder in a situation like this one since it would be unsafe to say which of the 2 blows caused the death of the deceased: *R v Joseph s/o Byarushengo and another* (1946) 13 EACA 187.

There was evidence from both sides that before this ugly incident the accused was drunk so

he might not have been in a position to form the necessary intention to kill his wife. In the absence of the exact circumstances under which the deceased met her death and in view of the accused's insistence that the deceased had been disturbing him, the possibility of the accused having acted under provocation cannot be ruled out.

In all these circumstances I find that prosecution has not proved beyond reasonable doubt that the accused killed the deceased with .malice aforethought.

I find the accused not guilty of murder, but in full agreement with the opinion of the two gentlemen assessors I find him guilty of manslaughter. The accused is accordingly acquitted of murder but convicted of manslaughter c/s 182 of the Penal Code Act and with section 86 of TID.

C. M. KATO

JUDGE

20-9-1995