

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

CRIMINAL SESSION CASE NO 26 of 1995

UGANDAPROSECUTION

versus

OMONYA MOSESACCUSED.

BEFORE: THE HONOURABLE MR. JUSTICE F.M.S. EGONDA NTENDE.

RULING

The accused, Omonya Moses, is indicted of the offence of murder contrary to sections 183 and 184 of the Penal Code Act. The particulars of the offence are that the accused with others still at large, on or about the 27th March, 1994 at Bumisanga village in the Mbale District murdered Manywa alias Wandabwa. The accused denied the offence.

The prosecution called five witnesses to prove its case. At the preliminary inquiry evidence of one witness was admitted and the Post mortem report. PW1 was Stephen Wesonga. In answer to an alarm on 1.4.1994 he rushed to the source only to find a dead body that he identified as Manywe, son of Meremu. The deceased was his cousin. On 4.4.1994 he identified the body to the Police Officers and Doctor who came to carry out a Post Mortem. The Post Mortem report dated 4.4.1994 and signed by Dr. Nabende of Bududa hospital was admitted as an exhibit. It reveals that the body of the deceased was well nourished and had no scars or tribal marks. The skin had peeled off. There was a deep cut wound on the right aspect of the neck severing the neck muscle and blood vessels.

The phalanges of the right second and third finger were amputated. The tip of the tongue was severed. In the opinion of the doctor the possible cause of death was severe Haemorrhage. And that a sharp object was used on the body.

PW2 was M. Busisa, the father of the deceased. He stated that on 27.3.1994, the accused together with his son, the deceased, used the witnesses ox plough in the accused's garden. The deceased returned the oxen and ox plough to his father's home, but without the agreed fee of shs 300.00 for using the same. The accused promised to pay the money the following day, a Sunday. On that day at about 7.00 p.m the accused came to the witness's home and called the deceased to collect the money. The deceased went with him and that is the last the witness saw of his son. The deceased did not come back that night. In the morning PW1 went to the accused's home, found Taddeo Masolo, Clement, Petero Emojong, father of the accused and the accused. He asked the accused the whereabouts of his son. The accused and others present replied that he had gone to Kenya. He continued looking for his son elsewhere without success. On 1.4.1994 his daughter Jennifer Nabifo, PW3 raised an alarm and on rushing there, the witness found the dead body of his son in a ditch. A lot of people answered the alarm but the accused did not. R.C Officials came with the police and permission to bury was granted. He had no grudge with the accused except a quarrel once in a while when his cow tampered with the accused's crops.

PW3 was Jennifer Kirande Nabifo, daughter of PW2 and elder sister to the deceased.

She stated that on 27.3.1994 the accused came to their home and asked the deceased to go and collect his money. The deceased went at about 7.00 p.m and he never came back at all. The following day, pw3 went to the accused's home to inquire about the deceased. The accused told her he had paid him the money and maybe he had gone to Kenya. They searched for the deceased at various places until on the 1.4.1994, as she was coming from the well she saw a group of people pouring soil from a basin into a ditch. She approached the place as a foul smell was emanating from there. The four people were Taddeo Masolo, Petero Emojong, Aminsi Munyange and the accused. They ran away and warned her not to say anything lest they would kill.

She approached the ditch. Saw an arm protruding out and she ran home to inform her mother. She told her mother what she had seen and the identity of the four people at the scene. They ran back and her mother made an alarm. People came in answer to the alarm but the accused did not answer the alarm.

In cross examination she admitted that her father was not in good relationship with his neighbours who constantly attacked him with the aim of finishing him. Initially, she stated that she told the people about the four people she found at the scene and one of them, Aminsi Munyange, who was present at the time run away. She then changed, and stated that she feared to mention the names to the Police as Masolo was also present. When her police statement was put to her, she denied ever telling the Police that it was Masolo who removed the soil from the ditch for them to be able to recognise that it was her brother's body in the ditch. Her police statement was admitted in evidence as exhibit D.1.

PW4 was Paulina Mukite, the Wife to PW2, mother to PW3 and the deceased. On the 27.3.1994, the accused came to their borne at about 4.00 p.m. and asked the deceased to go to his home at about 7.00 p.m. and collect his money. The deceased went as instructed and thereafter he was never seen alive again. The following day she went to the accused's home to inquire and the accused told PW4 that probably the boy had gone to Kenya. She searched for the deceased at various places in vain. On the 1.4.1994 at about 4.00 p.m, PW3 raised an alarm and PW4 answered it. PW3 told PW4 of the people she saw and their warning not to reveal their identities. PW3 told PW4 that at the scene she had identified Petero Emojong, Taddeo Masolo, Aminsi Munyange and the accused. Many people answered the alarm including these four people. They came armed with pangas and sticks. The matter was eventually reported to R.Cs and the police. The four people were hostile to the R.Cs.

In cross examination she stated that the four people answered the alarm but as enemies. Masolo came to the scene with that big stick of his. He was not called by PW4 to assist in removing the soil from the body. It is Yosefu Musungu who came and removed the soil. Masolo was on bad terms with the witness home. When this incident happened the first people suspected were Masolo and the accused's family. She admitted making a statement to the Police on 2.7.1996 but that she did not tell the Police of the report she had received from PW3 about the person (and

their identity) PW3 saw pouring soil in the ditch just prior to the discovery of the deceased's body. She claimed that she was afraid of death.

PW5 was Scovia Mutonyi, the wife of the accused, at least at the time this incident occurred. She willingly even if she was advised by court that she was not compellable. She stated that she had been married to the accused for about two years prior to the 27.3.1994. On that day she was at home with her husband and father in Law, Peter Emojong. Her husband returned from the garden at about 5.00 P.M. and stayed home for the rest of the evening. The deceased came to their home at about 7.00 p.m. and stated that he had been chased by his father because he had lost a rope. He wanted the accused to give him some money to buy the rope before he returned home. The accused said he did not have money. And the deceased declined to return home for fear of his father. She served all of them supper and they after, she made a bed for the deceased in the sitting room and she and her husband went to sleep in their bedroom. Sometime later she heard the front door open and the deceased went out. Shortly after he came back and upon inquiry he said he had gone for a short call.

PW5 woke up in the night. Her husband was not beside her in bed. She got worried. But in a short while he returned to bed. She inquired where he had been. He responded by beating her, asserting she had no right to ask where he had been. She took the matter simply and they slept. In the morning, they woke up. Her husband got out of bed first. She followed. The deceased was not in the sitting room though the mat where he had slept was there. After two days the family of the deceased started looking for the deceased. They came to the witnesses' home, found her in the company of Petero Emojong, her father in law. Upon inquiry, the father in law replied that the boy may have gone to Kenya. After sometime, PW3 raised an alarm. She had found the body of the deceased. PW5 and her husband answered the alarm but he returned home to breastfeed her child. Her husband was arrested the following day.

She did not know who reported her husband to the Police. And that was the close of the case for the prosecution.

Learned Counsel for the accused Mr. Obel Mayanja submitted that the prosecution had failed to present a prima facie case that would require the accused to be put to his defence. It was not in

dispute that the deceased was dead as a result of an unlawful act with malice aforethought. But as to who had killed him, there was no evidence. The only link between the accused and the deceased's death was that the deceased was in the accused's company the evening prior to his disappearance. He attacked the evidence of PW3 and PW4 as unreliable. It differed so much from their police statements that it was unlikely to be truthful. PW2 and PW3 contradicted PW4 and PW5 on whether the accused had answered the alarm. PW3 and PW4 never reported to the Police that the accused had been at the scene where the body was discovered shortly before such discovery, covering the body with soil in the company of three others.

Learned Resident Senior State Attorney Mr. Bamugemereire submitted that the prosecution had established a prima facie case against the accused. He submitted that there was overwhelming circumstantial evidence to point to the guilt of the accused. Six pointers in evidence were referred to in this regard.

- 1) Accused was in the company of the deceased on the evening of 27.3.194
- 2) At the time of departure from his home the deceased said he was to the accused' home;
- 3) The response of the accused to his wife when she asked him in the night where he had been i.e. the beating of PW5;
- 4) The disappearance of the deceased from the house of the accused;
- 5) The deceased is subsequently unheard of.
- 6) The testimony of PW3 to the effect that she saw four people including the accused pouring soil into the ditch where the body of the deceased was discovered. These four people run away seeing her and warned her not to reveal their identities.

The learned Resident Senior State Attorney also referred to the deceased of Ojede s/o Odyek v R 1962 E.A 494 and submitted that the court should be careful in evaluating the testimony of PW3 and PW4 without placing undue regard to their police statements.

Perhaps it is convenient at this stage to state that the Learned Resident Senior State Attorney appears to have got hold of three matters in the evidence and turned them into six pointers without justification. There are two or possibly only three matters in all these six pointers. These are:—

- 1) The deceased was last seen in the home of the accused;
- 2) The testimony of Pw3 that she saw the accused and three others pouring soil in ditch from which a foul smell was emanating. And when she approached they ran away, threatening her with death, if she revealed the incident/encounter.

And perhaps the third is the—response of the accused to PW5's inquiry that night. A simple question resulted in beating. In spite of which both slept in the same bed immediately thereafter. This may be suspicious but it is difficult to read any more into it. It does not, even when it is taken in conjunction with the foregoing two matters, irresistibly lead to the conclusion that the accused participated in the killing of the deceased. For it is not clear whether the deceased was or was no longer sleeping in the sitting room at the time.

As pointed out by Learned Counsel for the accused PW3's testimony that he saw the accused and three others pouring soil in the ditch where she discovered the body just before the discovery is beset by a number of problems. In the first place, PW3's testimony is contradicted by her police statement. In her Police statement her story was radically different from her testimony. She never mentioned that the accused called the deceased from their home or that the deceased left their home going to the accused's home. The reason given for leaving home was that their father had backed at them. And not that he was going to collect money from the accused's place. She did not mention in her statement that she went to the home of the deceased to inquire about the whereabouts of her brother. She does not mention seeing any person at all when she found the place with the foul smell. In her statement she stated:—

“.....We reached; mother tried but could see only one side. She run back and called Masolo who came and removed soil and saw that it was my real brother who had was killed and buried in the valley, from there we made an alarm....”

In her testimony she denied making this portion of the statement, she stated that it is Stephen Wesonga who removed the soil.

In her police statement she stated that her father was on bad terms with her neighbours who accused him of refusing the rain to fall. She suspected these neighbours to have killed his brother for this reason.

She contradicted herself in her testimony when she initially said she told the police about this group of four whom she saw. One, Aminsi Munyange, was present and he ran away. Immediately thereafter she stated that she feared to tell the police because Masolo was present and she feared for her life, in an apparent attempt to explain why in her police statement she failed to disclose her alleged encounter with the group of four.

In her testimony she stated that the accused never answered or joined in the people answering the alarm. This was contradicted by the testimony of PW4 and PW5 who said that the accused answered the alarm.

Like PW3, PW4's testimony in court was radically different from her police statement. Her police statement was in many respects in agreement with the Police statement of PW3. It appears to me that PW2, PW3 and PW4 appear to have agreed on an outline of their testimony in court to fix the accused with the guilt over the offence charged. I am inclined to this conclusion because of the joint departure of PW3 and PW4 from their police statements and the attempt in their testimony to build a story upon the testimony of PW5, a niece of PW4, that the deceased spent a night in the home of the accused. I am satisfied at this stage that in light of the major and many contradictions and inconsistencies in the testimony in the testimony of PW3 and PW4 that the so called citing of the group of four by PW3 and the alleged group's threat and warning to PW3 is false and amounts to a deceitful attempt to build up a case against the accused.

I believe the testimony of PW5, especially the fact that the deceased came to their home that evening, spent night and disappeared till his body was recovered. At this stage this is the only known link in the evidence in this case between the accused and the deceased and if the accused person chose, at this stage, to keep quiet, this piece of evidence would not irresistibly point to the accused as the person who caused or participated in the unlawful killing of the deceased. It may

well raise a lot of suspicion since the deceased was last seen in the accused's home. Even when it is taken together with the suspicious response of the accused to his wife inquiry unspecified period, this would not suffice to put the accused to his defence for the murder of deceased.

Accordingly I find that the prosecution has not made out a prima facie case against the accused. I find the accused not guilty of the offence of murder and acquit him. I order his immediate Liberation unless held on some lawful charge.

sgd. F.M.S. EGONDA NTENDE

JUDGE

5/7/1996

5.7.1996

10.08 A.M.

PRESENT:

Omonya Moses	accused.
Mayanja	Counsel for accused.
Bamugemereire	R.S.SA.
Eyamu	Court Clerks
Wafula	Lumasaba/English interpreter.
Masaba	Assessor
Weyao	Assessor

Ruling dated and delivered in open court.

sgd. F.M.S. EGONDA NTENDE

JUDGE

5/7/1996