THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CR-SC-005/1999

UGANDA …….PROSECUTOR

VERSUS

FRANCIS KULOBA AND OTHERS…… ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE D.N. MANIRAGUHA

JUDGEMENT

The three accused persons are indicted for murder c/ss 183 and 184 of the Penal Code Act, and the particulars allege that "FRANCIS KULOBA, WAMONO JACOB, MUKWANA ESAU and others still at large, on the night of 23rd day of January, 1998, at Tsali Tsali village, in the Mbale District, murdered LOYCE NAFUNGO"

Briefly the background to this case is that in the night of 23rd January, 1998 the deceased was in her house when she was kidnapped from there by unknown persons who went and murdered her. After that the body was dumped in a nearby forest where it was discovered two days later after a search had been mounted. The three accused persons are relatives and neighbours of the deceased.

As the search was being mounted some blood was spotted where the murderers had passed with the deceased and following the said discovery of the blood these three accused persons were arrested and taken to police as the prime suspects, hence this charge.

When the accused persons were arraigned before court all pleaded not guilty to the charge and thus put each ingredient in issue.

See; *R—vs- Sims (1946) 1 K.B 351*

Thus the prosecution has to prove all the ingredients of the offence which includes the nature of the act and the existence of any guilty knowledge and intent.

The prosecution now bears the burden of proving murder beyond reasonable doubt. This is a burden which never shifts from the prosecution as the accused person has no duty to prove his innocence. *Woolmington -vs- D.P.P [1935] A.C 462 Serugo -vs- Uganda [1978] H.C.B 1.* What is meant by 'beyond reasonable doubt' and to what degree and cogency the standard of proof is was laid down in the case of *Miller -vs- Minister of Pensions [1947] 2 All E. R 372*

In an effort to discharge its burden the prosecution led the evidence of six witnesses to establish the ingredients of murder which are;

(a) That there was a death of the deceased;
(b) That the death was unlawfully caused.
(c) That whoever did so did it with malice aforethought, and
(d) That the accused persons participated in the murder.

See: *Uganda -vs- Owere & anor Cr. Sess. Case NO 53 of 1994 (unreported) and Kassim Obura & anor -vs- Uganda [1981] H.C.B 9.*

At the close of the prosecution case Mr. Mudangha, learned counsel for the defence made no submission on no case to answer and left it to court. The court ruled that there was a prima fade case established and put the three accused persons on the defence. The accused persons opted to make no defence and call no witnesses under S. 71 (2) Trial indictment Decree whereof the learned State attorney was called upon to sum up the case of the prosecution and learned counsel for the defence made his submissions accordingly.

The issue to decide now is whether or not the charge against the three accused persons has been proved beyond reasonable doubt.

The burden of proof on the prosecution is not made any lighter even in the present circumstances because at the stage of a prima facie case the court is not concerned with whether the charge has been proved beyond reasonable doubt as this can only be done at the conclusion of the trial on full consideration of the evidence on record. As was dealt with in the case of *Ali Fadhul -vs-*

Uganda Cr. App. No 30 of 1989 (unreported) and more recently in *Semambo C and Fred Musisi Semakula vs Uganda Cr. App No 76 of 1998 (unreported)* the onus of proof beyond reasonable doubt is on the prosecution, and at the close of its case the prosecution need not have proved the case beyond reasonable doubt, but must have established a prima facie case.

The Court of Appeal went further to state that "A prima facie case means a case sufficient to call for an answer from the accused person". At that stage the prosecution evidence may be sufficient to establish a fact or facts in absence of evidence to the contrary, but is not conclusive. All the court has to decide at the close of the prosecution case is whether a case has been made out against the accused just sufficiently to require him or her to make his or her defence.

It may be a strong case or it may be a weak one. At that stage of the proceedings the court is not required to decide whether the evidence, if believed, proves that the accused is guilty of the offence charged.

Quoting from *Waibiro alias Musa -vs- R [1960] E.A 184 at P. 185* that once a Judge decides that there is a case to answer "It by no means follows that the court will convict upon it." Needless to say, in this country the judge is also the jury.

Thus at this stage the court has to analyse the evidence adduced to find out whether or not it proves the case against the accused persons beyond reasonable doubt.

Turning to the ingredients of murder, the prosecution has adduced enough evidence to establish the first three ingredients of the offence beyond reasonable doubt.

First on death of the deceased Loyce Nafungo, there is the evidence of P.W.2 Wanzama Titus, son of the deceased who saw her dead and he attended her burial. This is supported by the evidence of P.W.3 Wambi Neriko who gave similar testimony. P.W.4 NO 25990 D/CPL Eryongitai who visited the scene confirms this, and P.W.5 Doctor Charles Bernard Byakika who performed a post mortem examination on the body. So the deceased is dead.

On whether the death was unlawfully caused, it is the presumption of our law that every homicide is unlawful unless it is accidental or is done in justifiable circumstances. *Gusambizi Wesonqa -vs- R (1948) 15 E.A.C.A .65.*

In the present case the deceased was either kidnapped from her house and strangled or killed in her house and carried away. There is no evidence to suggest that she was killed in any justifiable circumstances. The bulk of evidence suggests otherwise. Medical evidence shows there was torture, strangulation and breaking of the neck. In these circumstances clearly the death was unlawful. That ingredient has been established as was even conceded by learned counsel for the defence.

Thirdly that there was malice aforethought, S. 186 of the Penal Code gives the circumstances under which it is deemed to have been established. Case law has laid down guidelines on this. See:- *Uganda -vs- Turwomwe [1978] H.C.B 15 and R -vs- Tubere (1945) 12 E.A.C.A .63*

Considering the evidence brought by the prosecution the evidence brought by the prosecution especially the doctor's which inter alia established that there were multiple bruises on the head, trunk, lower limbs, ruptured spleen, and a broken neck all this shows that the act was accompanied with malice aforethought, so that ingredient has been established.

Lastly, on the participation of the accused persons there has been no direct evidence connecting any of the accused persons with the offence. What we have is solely circumstantial evidence.

The law on circumstantial evidence is that:-

> (1) In a case depending exclusively upon circumstantial evidence, the court must before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and are incapable of explanation upon any other reasonable hypothesis than that of guilt - *Simon Musoke -vs- R [1958] E.A 715 (C.A) at P. 78.*
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> (2) It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which

would weaken or destroy the inference *Teper -vs- R [1952] A.C at P.489 (followed) in Simoni Musoke's case (supra).*

(3) The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt- *Taylor on Evidence 11 Edition P.74.*

Looking at the evidence against Mukwana Esau (A3) it has been conceded by learned counsel for the State, and in my opinion rightly so, that no evidence has been adduced against him. I have also looked through the whole evidence and found no scintilla of evidence against Mukwana Esau. In fact he was the one who went to police on 24th January, 1998 to report that his aunt Nafungo Loyce had been kidnapped the previous night and her whereabouts were yet unknown. In these circumstances the said Mukwana Esau clearly deserves an acquittal as there is no iota of evidence tending in the least to connect him with the offence.

As regards these two others, it is the submission of learned Resident State Attorney that Francis Kuloba (Al) and Wamono Jacob (A2) contrived a plot to murder Nafungo Loyce and did execute the unlawful act.

The circumstantial evidence is that of P.W.4 NO. 25990 D/CPL Eryongitai who visited the scene on 26th January, 1998. He stated that he found traces of blood at the home of Kuloba and Wamono and saw footmarks from the home of the deceased to that of Kuloba and Wamono.

He then scooped the blood from Kuloba's home (near the door) and followed the blood traces up to a cliff where they found the body. He also got blood from the scene where the body was found and both samples were sent to the Government Chemist for testing.

P.W.I Mr. Ali Lugudo the Government Chemist testified as to how he carried out various tests and came to the conclusion that the two samples were of the same human being.

Considering this evidence with that of P.W.2 Wanzama Titus he said that blood was found at the home of Francis Kuloba and Wamono Jacob. He said the police took both samples. But this is contradicted by P.W.4 who took the samples who says he took only from Kuloba's. Then P.W.6

Makayi James who is the L.C.I Chairman of the area gave a different story. Noteworthy is that he was equally related to the deceased who was the sister of Kuloba.

He said that the blood was scooped on the way near the houses of the accused persons because that path passes near the accused persons' houses. The distance from the path to the houses was demonstrated in court and estimated to be about thirty metres from the homes of Al and A2. That the blood was not found in the doorway to the Muzeyi's house (Al).

Looking at this evidence first it is doubtful whether the blood was found in front of Al's house or on the path thirty metres away. P.W.4 does not say that the traces of blood he followed led from Al's and A2's houses, but only found there traces of blood. It is noted that the accused persons had for those two days been going to the deceased's home hence any foot-marks between the two homes were expected. It is not even established that they were made the night of murder or that they were of the accused persons. The accused persons were arrested by vigilantes on 25.1.98 because the relatives of the deceased had threatened to do havoc. The witness (P.W.4) does not say why these relatives wanted to do havoc and against who. The accused are also relatives of the deceased.

On 26.1.98 when P.W.4 visited the scene the accused persons had been arrested and taken away. So the scene was visited in their absence. Even that alone could mean that anybody who had killed the deceased could have planted traces of blood in their homes.

From the evidence of the prosecution the deceased and the accused were close relatives and had been living together harmoniously.

The evidence on where the traces of blood were found is contradictory. They are said to have been on the path, which passes near the accused's houses. Since the deceased's house was near theirs the killers must have followed that path after killing her hence the blood. It is doubtful that the accused persons had they been responsible could have killed her in their homes and for those days not remove the traces of blood from their homes. Again how could she have been killed in those two houses, and yet the traces of blood follow the path?

I found P.W.6 a truthful witness and his evidence more credible suggesting that those who killed her passed along the path with her and not in the homes of the accused. These traces of blood do not sufficiently connect any of the accused persons with the offence.

I find that the circumstantial evidence is totally insufficient to sustain a conviction for murder.

In agreement with the lady and gentleman assessors the three accused persons deserve an acquittal.

The prosecution has failed to prove the charge against the accused persons. I therefore find them not guilty and acquit Francis Kuloba, Wamono Jacob and Mukwana Esau of Murder c/ss 183 and 184 of the Penal Code Act. They shall be set at liberty forthwith unless otherwise legally held on other charges.

D.N. MANIRAGUHA

JUDGE

30.3.2001