THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

H.C.C.S.C. NO.45 OF 1999

UGANDA …….PROSECUTOR

VERSUS

OMODO CHARLES……... ACCUSED

BEFORE THE HON. MR. JUSTICE RUGADYA-ATWOKI

JUDGEMENT

The accused in this case Omodo Charles was indicted on two counts. In the first count, he was indicted for murder contrary to sections 183 and 184 of the penal code act. It was alleged in the particulars of the indictment that the accused, on 23/12/1998, at Agurur village, in Pallisa district murdered Asio Joyce Mary.

In count two, Omodo Charles was indicted for the offence of defilement contrary to section 123(1) of the penal code act. It was alleged in the particulars of the indictment that the accused on 23/12/1998, at Agurur village in Pallisa district had unlawful sexual intercourse with Asio Joyce Mary, a girl below the age of 18 years.

The accused person on arraignment denied each of the offences charged. The prosecution called five witnesses in order to prove the charges. The accused gave an unsworn statement. He did not call any witnesses.

It was the prosecution case that Ongom David, the LC 1 Defence Secretary for the area was at home, at about 4.30 p.m., when one Ateme Stella came and reported to him the death of her child. The suspect was her husband, Omodo Charles the accused herein. He visited the scene, and observed the body of a girl child laying in a cassava garden, some fifty metres from the house of the accused. He observed bruises and marks of cane beating on the body, around the ribs. The body was naked. He went to look for the accused who was not at home then. He found

the accused drinking alcohol at the trading centre, and arrested him. He was accompanied by one Okoyo, a vigilante. They handed in the accused to Gogonyo police post. He later went and reported all this to the LC 1 Chairman of the area, Abwama.

Ongom told court that the dead girl was the daughter of Ateme Stella. But that the accused, the husband of Ateme Stella, was not the girl's father. The accused was staying with his brother Otai, since deceased.

The second prosecution witness was the LC 1 Chairperson of the area, one Abwama. He received a report of the death of the young girl, Asio Joyce Mary from his Defence Secretary, Ongom David. He knew the dead girl to be about 5 years old. She was not a daughter to the accused. She came in that area with her mother, the wife of the accused. Abwama found the body laying in a cassava garden. The time was about 7.00 p.m., and as it was getting dark, he did not see any marks on the dead child's body, save that the dead girl was wearing an ill fitting dress and that the lower part of the body, from the buttocks downwards was naked.

Abwama told court that he saw the accused at his home that day of 23/12/1998. They are neighbours with only 600 metres separating their homes. At the time of the incident, Otai, the brother of the accused was sick in his father's house. The dead girl was brought to baby sit the child whom the accused produced with Ateme Stella. After this incident the woman Ateme Stella went away, but the child remained in the home of the accused.

P/C Ndyabuhaki was stationed at Gogonyo police post on 23/12/1998. The LC 1 defence secretary handed in a suspect, the accused herein on allegations of the murder of a child. He visited the scene where he found the body of a 6 years old girl laying in a cassava garden. He was accompanied by Doctor Kirya who performed a postmortem examination on the body. The body was completely naked from the buttocks downwards.

Doctor Kirya of Pallisa hospital carried out a postmortem examination on the body of Asio Joyce Mary, on 24/12/1998. He found this to be a 6 years old female. The doctor found that the girl had been sexually assaulted. Her private parts were severely torn. Her hymen was freshly raptured. His opinion was that this was as a result of a sexual assault. The deceased girl also sustained bruises on the right thigh. The doctor said that he looked for but did not see any semen, possibly

because by the body had been washed clean. She had a fractured neck. It was the doctor's opinion that the girl was sexually assaulted before her neck was fractured. The neck was twisted and broken. The cause of death was the fracture of the neck.

The doctors' postmortem examination report was admitted in evidence as PE1. On 28/12/1998, the doctor examined the accused person. He found him to be 28 years old, with no signs of any recent injury. His mental state appeared normal. The doctors' medical examination report of the accused on police form 24 was admitted in evidence as PE2.

D/AIP Washington Ailigat was on duty on 28/12/1998, at Pallisa police station. The accused person was brought to him for purposes of recording a statement. After a trial within a trial, I admitted that statement of the accused in evidence as PE 3. that statement.

During the course of the trial, I noted that the contents of the English translation of the statement did not appear to tally what the accused was reported to have said. Acting under the provisions of section 37 of the Trial on Indictments Decree, I summoned the court interpreter in the Ateso language to come and interpret the accused's statement from Ateso to English.

After her interpretation, both Counsel declined to ask the witness any questions or to cross examine her, when invited to do so. In the charge and caution statement, the accused said the following,

> "It is true I killed Asio Joyce Mary. I did this by beating her up to death, because I feared that she would talk what I did to her. It has been read to me and I have understood and it is the truth."

That was the prosecution evidence.

The accused in his defence denied the offence. In his unsworn statement he said that on the material day, he left home early in the morning for work as a brick maker. He remained on this task till afternoon at 3.00 p.m., when he left for his home. He went by the home of one Otonyi where he had lunch. He proceeded to Okallo's home to collect a debt. He did not see Okallo till 4.00 p.m., and he received shs. 2500/=. He waited to buy fish from Okallo's father but when it

transpired that he had no fish, the accused went to the trading centre to wait for other fishmongers. While there he was arrested by the defence secretary of the area, over the death of a child.

On 28/12/1998, he was taken before an Assistant Inspector of Police to record a statement. He told court that while there, he was severely beaten by four Police Officers and made to sign a confession statement. Later that day, he was taken to hospital for examination. He did not know how the child died. He could not have killed his own child. That was the defence case.

The accused pleaded not guilty to the charge. The burden to prove a charge against an accused rests on the prosecution. The burden is on the prosecution to prove each and every ingredient of the offence beyond reasonable doubt. This burden does not shift during the trial, except in a few statutory offences, of which neither murder nor defilement is not one. Woolmington vs. The DPP [1935- AC 465, Ojepan Ignatius vs. Uganda (SC) Cr. App. No. 25 of 1995, (unreported). The accused should not be convicted on the weakness of his defence, but on the strength of the prosecution case. Oloya vs. Uganda [1977] HCB 4.

In a charge for murder, the prosecution must prove beyond reasonable doubt that;

1) death occurred;
2) the death was unlawful;
3) there was malice aforethought; and
4) the death was caused by the accused.

It is the law that in order to secure a conviction in a charge of defilement, three ingredients must be proved beyond reasonable doubt. First that an act of sexual intercourse, which means penetration of the female sex organ by the male sex organ, occurred. Second that the female was below the age of 18 years, and lastly that the person charged with the offence is the male person who committed the sexual intercourse. Kibale Ishma vs. Uganda Cr. App. No. 21 of 1998, (SC), (unreported).

I will start with the second count of defilement. The ingredient of age of the girl, Asio Joyce Mary being below 18 years was not contested by the defence. Doctor Kirya examined the girl the

day after the incident and gave her age as 6 years. The LC1 chairperson who knew the girl put her age at 6 years old. The Police Officer Ndyabuhaki who visited the scene and saw the body of the girl put her age at 6 years. There was no evidence contrary to this. The defence secretary put the age of the girl even lower at 5 years. I am satisfied that the prosecution proved the ingredient of age beyond reasonable doubt.

The second ingredient of the offence of defilement is the act of sexual intercourse. It is to be noted that the victim of the offence in this case is dead. The evidence in respect of this ingredient was from the testimony of the doctor. He examined the body of the victim and found that the girls' private parts were severely torn as was her hymen which was freshly raptured. He opined that the girl was sexually assaulted. He looked for but did not see any semen. His opinion was that this was possibly due to the fact that the body had been washed clean by the time of the examination.

It is the practice of this court to look for corroborative evidence in sexual offences. During the summing up, I warned the assessors of the need to look for corroboration. The court however can still convict even in the absence of corroboration if, after such warning, it is satisfied that the evidence is nothing but truthful. Chilla and Another Vs. Rep, [1967] E.A. 722, and Jackson Kitutu vs Uganda [1976 HCB 8.

Corroboration has been defined by the Supreme Court in the Kibale Ishma case (supra) to mean independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed, but also that the accused committed it.

In the instant case, there was no evidence of corroboration of the doctors' testimony. The confession statement did not say anything regarding sexual intercourse. Both assessors were of the opinion that this ingredient was not proved by the prosecution beyond reasonable doubt. I also agree and I so find and hold.

The last ingredient in the offence of defilement was the participation of the accused. The prosecution sought to rely on the confession statement. This statement did not in any way allude to the act of sexual intercourse. It made reference to, "what I did to her." It is not certain that this

was in reference to the act of sexual intercourse. This is only presumed. This remark could well have been in reference to something else. There was no other evidence to connect the accused with this offence. In those circumstances, a doubt was created as to the participation of the accused in the alleged act of sexual intercourse.

It is trite that where a doubt is created in the prosecution evidence regarding an essential element of the offence charged, such doubt must be resolved in favour of the accused.

The lady and gentleman assessor found this ingredient not to have been proved by the prosecution beyond reasonable doubt. I also agree. I therefore find that the participation of the accused in the act of sexual intercourse was not proved beyond reasonable doubt.

In those circumstances, in I find the accused person not guilty of the offence of defilement contrary to section 123(1) of the Penal Code Act, and acquit him of that charge accordingly.

I now turn to the count of murder. The ingredient of death was not contested by the defence. Ongom David the defence secretary of the area, Abwama the LC 1 Chairperson of the area, P/C Ndyabuhaki the investigating police officer, and even the accused himself all testified to the effect that Asio Joyce Mary is dead. Exhibit PE 1 the postmortem examination report was to the effect that Asio Joyce Mary is dead. I therefore find that the prosecution proved the death beyond reasonable doubt.

The death must be proved to have been unlawful. This ingredient was not contested by the defence. The position of the law is well settled by the East African Court of Appeal decision in the case of Gusambizi Wesonga And Others vs. R. (1948) 15 EACA 63. It was there held that “a homicide unless accidental, will always be unlawful except if it is committed in circumstances which make it excusable. According to the doctor who performed the postmortem examination, the deceased died from a fractured neck, which was twisted and broken. There was indication that the neck was twisted till it broke, fractured. It was this fracture of the neck which caused the death of Asio Joyce Mary. This was not an accident, nor was it in any way justifiable. It was certainly unlawful. I therefore find that the ingredient of the unlawful death of the deceased was proved by the prosecution beyond reasonable doubt.

The prosecution had to prove beyond reasonable doubt that the death was caused with malice aforethought. This is a state of mind which is hardly ever proved by direct evidence. The court has set down the circumstances which ought to be considered before deciding whether or not malice aforethought has been made out. Tubere vs. R. (1945) 12 EACA 63. The court must consider the type of weapon used, the nature of the injuries inflicted, the part of the body affected; whether vulnerable or not, and the conduct of the accused before, during, and after the attack. Uganda vs. Turwomwe (1978) HCB 182.

Doctor Kirya in his report exhibit PE 1 stated that the deceased had bruises on the right thigh, her private parts were severely torn, and that her neck was twisted till it fractured. This was uncontroverted evidence.

The twisting of the neck of a human being to the point of breaking it does not leave the slightest doubt in my mind that whoever did it did so with malice aforethought. I therefore find that the prosecution proved beyond reasonable doubt that the death of Asia Joyce Mary was with malice aforethought.

The last ingredient in the offence of murder is the participation of the accused in the death. The prosecution relied entirely on the confession statement of the accused. The statement which was admitted in evidence as PE 3 was translated from Ateso into English by the court interpreter, after noting some discrepancies in the translation by the court interpreter, after noting some discrepancies in the translation by the Police Officer who recorded it. The accused said the following, “it is true I killed Asio Joyce Mary. I did it by beating her because I feared she would talk what I did to her.”

The postmortem medical examination report which was admitted in evidence was clear on the cause of death. This was from the fractured neck. In his testimony in court, the doctor was specifically asked, and he denied seeing, any other marks on the body of Asio Joyce Mary. He did not see any signs of any beating. There was no other evidence direct or circumstantial, to link the accused with the offence apart from this statement.

For a statement to amount to a confession it must admit in terms the offence, or at any rate substantially the facts which constitute the offence. Swami vs King Emperor [1939] 1 ALL. ER

396. In other words a statement is not a confession unless it is sufficient by itself to justify conviction of the person making it of the offence with which he is tried. Anyangu Vs. Republic [1968] E.A 239, which was cited with approval in P.C. Mulwana and, Another vs Uganda SC CR App No. 3 of 1992.

In Tuwamoi Vs. Uganda [1967] E.A. 84, the Court of Appeal for East Africa held that if the court is satisfied that the statement is properly admissible and so admits it, then when the court is arriving at its judgement, it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted.

When an accused person denies or retracts the confession statement at the trial, and it is the only evidence against him, the court must decide whether the accused has correctly related to what happened or whether the statement establishes his guilt with that degree of certainty required in a criminal case. Uganda vs John Nkusi and Another [1976] HCB 81, and Tuwamoi vs. Uganda (supra). The court in the Tuwamoi decision gave guidance when dealing with a retracted confession. It said,

> "the present rule then as applied in East Africa in regard to a retracted corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true."

During the summing up I warned the assessors as I warned myself of the need to treat the evidence of confession with caution especially where there was no corroborative evidence, but court could convict even in the absence of such corroboration if it is satisfied that the confession cannot be but true.

In the case before me the statement was to the effect that accused beat the child, and that yes the child died as a result there from. That cannot be said to be a confession to murder. The postmortem report says that the death was caused by the fractured neck. The statement does not anywhere mention strangling or twisting of the neck. It talks only of beating. Surprisingly there were no marks of beating on the body according to the doctor who examined it, and whose business it was to look for and report any such marks. I say this because one of the witnesses

claims to have seen cane marks on the body. I would prefer the evidence of the expert, the doctor.

The accused in his defence denied the offence. He denied the confession statement. He said that he was away from home all day, working as a brick maker. He delayed at the trading centre waiting for fish mongers, in order to buy fish. While there he was arrested by the defence secretary for the alleged killing of his child.

The defence secretary said that when he received the report of death, he went to look for the accused. He found him in the trading centre drinking alcohol. He was not in hiding as was intimated. The testimony of the defence secretary would tend to agree with that of the accused.

Abwana the LC 1 Chairperson said that he saw the accused at his home the day in question. He did not say what time that was. All that we get is that the accused was at his home at a certain point in time that day. Whether this was in the morning before the accused left for work as he claimed is not clear. In any case was it not only in order that he would be at his own home.

Duffus P., in Bernardo Mugaya Vs. Uganda EACA Cr. App. No. 20 of 1971, said that,

“the judge when finally determining his verdict, examines all the evidence, the circumstances of the case, the particulars of the alleged offence and how the confession was made or obtained and then finally decides whether taking all the various factors into consideration, the confession of guilt was true and sufficient to maintain a verdict of guilty. In his consideration the judge must always, of course, bear in mind the rule that the onus of proof is on the prosecution and the appellant has not got to establish his innocence.”

The accused’s defence was alibi. The accused, when he sets up an alibi as a defence, he or she does not thereby assume any responsibility of proving the alibi. The prosecution is under a duty to negative the alibi by evidence. Kibale Ishma vs Uganda (supra). The prosecution must produce evidence which places the accused squarely at the scene of crime. Bogere Moses & another vs. Uganda Cr. App. No 1 of 1997, (SC) (unreported).

On a consideration of all the circumstances I was not satisfied that the accused was placed squarely at the scene of crime by the prosecution evidence. The accused's alibi was not broken. The ingredient of the participation of the accused in the offence was not proved beyond reasonable doubt.

The lady and gentleman assessors advised me to find the accused person guilty of the offence of murder. For the grave reservations I had on the confession statement, and the absence of any evidence in corroboration, I felt that it would be unsafe to convict the accused on the basis of that statement alone. I am for those reasons unable to follow their advice.

In the event therefore, I find the accused person not guilty of the offence of murder, contrary to sections 183 and 184 of the Penal Code Act, and I acquit him of that charge accordingly. He is to be set free and at liberty forthwith unless he is held on other lawful charges.

Before I take leave of this matter, I want to comment on the recording and translation of statements from suspects by Police Officers. The case of Festo Asenua and Another Vs. Uganda SC. Cr. App. No. 1 of 1998 is very instructive in this matter. It directs the Police to follow the instructions set down by the Chief Justice on recording of extra judicial statements in circular dated 2/3/1973. In these instructions, the statement of a suspect must be taken down in a language which he understands. A translated copy in the English language is then prepared by the interpreter or the Officer who recorded the statement if he knows the language of the accused. That means that the person doing the interpretation puts in the English version strictly only that which is contained in the vernacular copy which the suspect will have signed.

He must not smuggle into the statement anything extra. To do so makes the English version not a statement of the accused. That appears to have been the case here. That practice is to be condemned. It is not only highly unprofessional for a Police Officer to do so, but it could amount to a crime. In this instance, I will give the Officer the benefit of doubt that he was failed by the language. A statement so recorded will not only be highly suspect, but its evidential value will be greatly minimised.

Until the rules are put in place by the appropriate authorities, the Police must strictly adhere to the Chief Justice's instructions referred to above when recording statements from suspects.

RUGADYA ATWOKI

JUDGE

19/07/01