THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CASE NO: HCT-00-CR-SC-0097 OF 2002

UGANDA :: PROSECUTOR

VERSUS

KYOTEREKERA MIKE :: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:

The Accused Kyoterekera Mike was indicted for Murder Contrary to Sections 183 and 184 of the Penal Code Act. The particulars on the indictment alleged that between 2nd and 6th May 2002 at Makerere Kavule Zone Kampala District the Accused murdered one Safina Namawejje.

The background of the prosecution case is as follows:- On 2nd May 2002 between 3.00p.m. and 8.00p.m. the Accused was seen lingering around Makerere Kavule Zone near the home of the deceased. The residents of the said zone suspected the Accused of having some unknown design. They accordingly reported the suspicious presence of the Accused to their local leader. The Accused was dressed in a trouser, white T-shirt and a black jacket. At around 8.30 p.m. the Accused was seen at Makerere Kavule stage standing near the deceased. Shortly later the

deceased was heard crying “the man has killed me” The deceased was seen jumping up and down in pain as she was running towards Kalerwe. On the other hand the Accused was seen running toward Bwaise. Rescuers ran to the scene where they recovered an empty container labeled “venus” which contained some acidic substance. The Accused was found to have a burnt face. The deceased was found to have been seriously burnt with the said acidic substance. She was rushed to Mulago Hospital where she later died.

The Accused was saved from mob justice and taken to Kalerwe Police Post and later on rushed to Mulago hospital where he shared the same ward with the victim. The substance in the venus container was taken for scientific analysis and it was found to contain sulphiric acid which was poured on the deceased. Hence the charge.

On arraignment the Accused denied the charge. By that plea, the Accused put in issue all the essential elements in the offence charged to be proved by the prosecution beyond reasonable doubt. An Accused person does not bear the duty to prove his innocence as he is presumed innocent until proved guilty. The above principle was laid down since the decision in ***Woolimington Vs DPP [1935] AC 462***. See also ***Aniseth Vs R [1963] EA 206, 208.***

The above principle was also endorsed in out 1995 Constitution whose Article 28 (3) (a) states that every person charged with a Criminal offence is presumed innocent until proved guilty or has pleaded guilty.

The following are the essential ingredients of the offence of murder which have to be proved beyond reasonable doubt. The are:-

(1) that the victim is dead.

(2) that the death of the victim was caused unlawfully.

(3) that whoever caused the death of the victim had malice aforethought, and

(4) that the Accused participated in causing the death of the deceased.

In an attempt to discharge the above burden cast on it by law, the prosecution adduced the evidence of eight witnesses:

Kanakulya Arthur (PW1), Farouk Namugera (PW2),Robina Kirinya, (PW3), Byaruhanga George (PW4), Ali Lugunda (PW5), Dr Barungi (PW6), D/AIP Asiimwe (PW7) and Dr Kidega (PW8). The prosecution further tendered in evidence six exhibits:

(Exhibit P1); Government analyst Report.

(Exhibit P2); Medical Examination Report.

(Exhibit P3); Exhibit Record Slip.

(Exhibit P4); Venus contrainer.

(Exhibit P5); Sketch plan of scene of crime.

(Exhibit P6); Post mortem examination Report

The defence made unsworn defence and did not call any witness.

In regard to the first ingredient, there was overwhelming evidence that the deceased is indeed dead. Farouk Namugera (PW2) who rescued the victim soon after the attack testified that he took the victim to Mulago Hospital where she was admitted and later died. He testified that he participated in the burial ceremony. Dr Kidaga (PW8) testified that he examined the dead body of the victim Safina Namawejje on 7th May 2002. She had burns on her face, neck, anterior chest and upper arms. He stated that the deceased died out of respiratory failure following initiation inhalation injuries. The defence also conceded that deceased died and was buried. I therefore conclude that the prosecution has proved beyond reasonable doubt that the deceased is dead.

As to whether the deceased's death was unlawfully caused, the law presumes that in homicide cases death is always unlawfully caused unless it was accidental or that it was committed in circumstances which make it excusable. Killing is excusable if committed in self defence, defence of property or defence by another person: See ***R Vs Gusambizi s/o Wesonga [1948] 15 EACA 65***.

The above presumption is rebuttable. The duty to rebut it lies on the Accused. However the standard of proof required to discharge that duty on the Accused is very low. It is on the balance of probabilities: See ***Festo Shirabu s/o Musungu Vs R [1955] 22 EACA 454.***

In the instant case there was completely no evidence of rebuttal. On the contrary there was the evidence of Dr Kidaga (PW8), the Doctor who carried out post mortem examination on the deceased who stated that the deceased had external injuries on to wit burns on the face, neck, anterior chest and upper arms, internally she had pulmonary oedema i.e. excessive fluids in the lungs. He concluded that the cause of death was due to the respiratory failure following initiation inhalation injuries which resulted when a chemical substance was poured on her. The Accused admitted that the death of the deceased was unlawfully caused. He stated that the same substance which was also poured on the victim also splashed on him.

Like the gentleman and lady Assessor I do find that the deceased Safina Namawejje is dead and that her death was unlawfully caused.

The next ingredient is whether the death of the deceased was caused with malice aforethought. Malice aforethought is defined under Section 186 of the Penal Code Act to mean intention to cause death of a person whether such a person is the person actually killed or knowledge that the act or omission causing death will probably cause death of some person, though such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused.

Malice aforethought is therefore a mental element of the offence of murder which is difficult to prove by direct evidence. But it is now established that malice aforethought can be inferred from the surrounding circumstances of the offence such as the weapon used, the part of the body on which such weapon was applied, the nature of injuries inflicted and the conduct of the assailant before and after the attack. The use of a lethal weapon like a spear, a panga or a knife or a gun on a vulnerable part of the body of the victim readily attracts inference that the assailant had the necessary malice aforethought: See ***R Vs Tubere s/o Ochen [1945] 12 EACA 63***.

In that case, the Appellant was convicted of murder. It was proved that he had seriously assaulted the deceased with a heavy walking stick, causing severe injuries from which the deceased died shortly afterwards. The Appellant himself did not deny the use of the stick.

On appeal, Sir Sheridan CJ (as he then was) said:

> "With regard to the use of a stick in cases of homicide, this Court has not attempted to lay down any hard and fast rule. It has a duty to perform in considering the weapon used, the manner in which it is used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the use of say, a spear or a knife than from the use of a stick; that is not to say that the Court takes a lenient view where a stick is used. Every case has of course to be judged on its own facts".

It is therefore trite law that Courts do not lay down a hard and fast rule as to which weapon is a killer weapon. Each case has to be judged on its own facts to decide whether malice aforethought has been established.

In the instant case the victim was said to have been attacked by using sulphiric acid. According to the testimony of Mr Lugundo, sulphiric acid is a corrosive substance which can lead to death. Dr Kidaga (PW8) who examined the deceased testified that as a result of the chemical substance poured on the victim 50% of her body surface was burnt. There were burns on the face, neck, anterior chest and the upper arms leading to pulmonary oedema which caused a respiratory failure. So a corrosive substance was poured on the deceased at close range, thereby affecting 50% of body including her head and chest. Those are very vulnerable parts of the body. Whoever used such a lethal weapon on the vulnerable parts of the body which caused extensive injuries on the deceased must have intended to kill her. Malice aforethought could also flow from the conduct of the attacker before and after the attack. In this case the assailant was said to have trailed the deceased from 3.00p.m. up to 8.30 p.m. when the attack took place. After the incident he was seen fleeing in the opposite direction after fait accompli. In those circumstances, I cannot resist the view that the killing of the deceased was premeditated. In agreement with both Assessors and the defence I do find that the prosecution has also proved beyond reasonable doubt that whoever killed the deceased had the necessary malice aforethought.

The last and only contested ingredient is whether it was the Accused who caused the death of the deceased. The prosecution contended that it was Accused who had caused the death of the deceased. That contention rested mainly on the evidence of PW1, PW2, PW3 and PW4 who testified that they so saw the Accused at the scene. In ***Abdalla Nubulere and others Vs Uganda [1979] HCB 77*** the defunct Court of Appeal for Uganda held that:

> ***"Where the case against the Accused depends wholly or substantially on the correctness of one or more identifications of the Accused, which the defence disputes, the Judge should warn himself and the Assessors of the special need for caution before convicting Accused in reliance on the correct identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances the identification came to be made, particularly the length of time, the distance, the light, familiarity of the witness with the Accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identify is reduced, but the poorer the quality the greater the danger".***

In the instant case PW2 testified that he saw the Accused trailing the deceased from 3.00p.m. until 8.30p.m. when he was seen attacking the victim. He stated that after taking the victim to Hospital he came back and found the Accused arrested by people who wanted to mob him. He identified him as the person he had cited at their village. PW3 and PW4 testified that they saw a person who attacked the victim as he was running towards Bwaise. In all, the evidence was that the Accused was arrested because he was found to have been burnt by same substance.

The Accused in unsworn defence stated that he was also a victim of circumstances that the same substance was also poured on him. From the evidence of the prosecution witnesses I cannot resist the impression that the Accused was properly identified at the scene. I do find the prosecution did establish that the Accuse had been trailing the victim between 3.00p.m. to 8.30p.m. He was seen at the stage near the victim. There was ample light. After the incident he was seen running towards Bwaise while the victim took to the direction of Kalerwe. While the victim was crying for help the Accused never cried although it turned out that he had also suffered terrible burns himself on the face (exhibit P2).

The Accused was arrested and identified by PW2 soon after the attack apparently after the same substance had blinded him up and he would not go far. In addition the Accused was the only man seen standing next to the victim at the time of the incident when the victim was heard crying “The man has killed me”. All those circumstances point irresistibly that it was the Accused who attacked the victim with the lethal substance which also spilled on his face. I cannot therefore believe the defence raised by the Accused that whoever attacked the victim also aimed at him. That was a mere second thought to wriggle him out of this problem. By divine intervention, the Accused branded himself at the scene of crime possibly because the victim might have put her hands to ward off the attack thereby splashing the same substance on his face. For the above reasons I do agree with both Assessors that the prosecution has proved all the essential ingredients of the offence of murder. I therefore find the Accused guilty as charged and he is convicted accordingly.

RUBBY AWERI OPIO

JUDGE

23/6/2003.

26//6/2003:-

Court as before.

Judgment read in open Court.

SENTENCE:-

There is only one sentence in respect of murder. It is death. The Accused is sentenced to suffer death after all due process of the law is followed.

RUBBY AWERI OPIO

JUDGE

23/6/2003.