

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT RUKUNGIRI**

HCT-05-CR-SC-0060-2003

UGANDAPROSECUTOR

VS

A1. KAJUNGU EMMANUEL)

A2. KASHAIJA SIMON)ACCUSED

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

Initially this case had two accused persons, A. 1 Kajungu Emmanuel and A.2 Kashaija Simon. The two were jointly charged with two counts. Count I was of murder while count 2 was of rape. At the close of the prosecution case A.2 was found to have no case to answer on both counts and was accordingly acquitted. That left A. 1 as the sole accused.

The prosecution called 8 witnesses in support of the case. PW1 was D/C Ainebye Wilson, PW2 was D/C Kahangwa Eriab, PW3 was Fulgensio Rwemishambi, PW4 was Peace Rwamwehare, PW5 was Twinamatsiko Livingstone, PW6 was Bandonda Augustine, PW7 was Kaijanazo Erinora while PW8 was Fred Kamugisha. Medical evidence contained in the post mortem report was agreed upon and admitted as exhibit P.1.

Accused made a sworn statement in his defence. He called no witnesses.

Briefly the prosecution case is that on 7th January 2002 the deceased started her journey to Kampala. She went to the stage at Kisiizi to wait for transport at about 9 am. At the stage she was in the company of Kajungu Emmanuel, Kashaija Simon and one Kahika, who was never arrested. The three men, too, were looking for transport to Kampala. Apparently there was no transport to Kampala available that day. They left their baggage at a certain shop that evening

and decided to go away to look for accommodation for the night. Kajungu and the deceased retired to premises that served as an eating house and kitchen. There Kajungu raped the deceased and strangled her. Eventually the deceased died at Kisiizi Hospital. Kajungu and Kashaija were later arrested in Kampala and charged with murder and rape.

In his defence A. 1 denies involvement. His alibi is that at the material time he was in Kampala.

The onus of proving the case against an accused person beyond reasonable doubt is on the prosecution. See Okethi Okale vs. R [1965] EA 555. In the first count (of murder) the prosecution must prove the following ingredients:

- (i) that the deceased is dead,
- (ii) that the killing was unlawful,
- (iii) that the killing was with malice aforethought,
- (iv) that the accused perpetrated the crime.

In the second count (of rape) the prosecution must prove the following ingredients:

- (i) that there was penetration,
- (ii) that the victim did not give her consent, and
- (iii) that the accused committed the offence.

I shall deal with the count of murder before going to that of rape.

As for the first ingredient in murder, PW2, PW3, PW4, PW7 and PW8 testified that the deceased died. The post mortem report was agreed and admitted in evidence. It is to the effect that deceased died. That Owomugisha died is not disputed by the defence either. I find that the first ingredient is proved beyond reasonable doubt.

It is the presumption of the law that every killing of a person is unlawful except where such killing is accidental or is excusable by law. The case of Gusambizi s/o Wesonga vs. R (1949) 15 EACA 63 is instructive. Where this presumption is not rebutted it is considered proved. In this case no rebuttal exists and it is my finding that this ingredient has been proved beyond reasonable doubt.

The third ingredient prosecution must prove is that there was malice aforethought. No direct evidence is available to show how the deceased came to be strangled which eventually led to her death. For indeed the post mortem report shows the cause of death to have been suffocation as a result of a strangulated neck. It shows that there were scratch marks on the body. Malice aforethought can be gathered from the number of injuries inflicted, the part of the body where injury is inflicted, the nature of weapon used and the conduct of the killer before and after the attack. See *Uganda vs. Ochieng [1993- 1993] HCB 80.* Whoever inflicted the injuries apparent on the body must have intended to bring about the death of the deceased because strangulation has dire consequences on the victim. I am satisfied this ingredient too has been proved beyond reasonable doubt.

Finally the prosecution must prove that accused perpetrated the crime. Accused in his defence testified that he had left Kisiizi for Kampala early on the morning of 7th January 2002 in a double-cabin vehicle. He stated in cross-examination that he had reached Kampala at 6 p.m. that day. It was his evidence that he had not seen the deceased and that the deceased was not known to him. Certainly if accused's itinerary was as stated by him he could not have been at Kisiizi to attack the deceased on the night of 7th/8th January 2002.

When an accused person raises the defence of alibi, like accused has done here, he has no duty to prove it. The prosecution bears the responsibility of adducing evidence to disprove and destroy the alibi. Such evidence should tend to place accused at the scene of crime. See *Uganda vs. Phostin Kvobwengve [1988 — 1990] HCB 49, PW7* the mother of the deceased testified that on the morning of 7th January 2002 she had accompanied the deceased, on her way to Kampala, up to Rwakaraba. She had left the deceased in the company of Kajungu, Kashaija and Kahika. The evidence of PW3 was that he had seen the deceased going to wait for transport. He said the deceased had been walking about 10 metres behind accused. It was the evidence of PW4 that she had seen the deceased on the material day in the company of accused and others for several hours at the bus stage. The stage was 15 metres away from the premises where she worked. PW4 testified also that she had seen accused and deceased in company finally at about 5 p.m. It was her evidence she had seen the deceased, accused and companions of the accused having five bags at the stage. Next day PW4 had recognized the five bags as those she had seen with the group. The bags were then in a shop in her neighbourhood. She had seen and collected

those bags next day on 8th January 2004 and handed over three out of the five bags to accused and Kahika at their request. According to both PW4 and PW3 the remaining two bags belonged to the deceased. PW3 took them with him to the deceased at Kisiizi Hospital. If accused was already in Kampala as he claims in his defence it is not possible he could have been the one who together with Kahika collected the three bags and a radio cassette. Yet PW3 and PW4 are emphatic they did see Kajungu and he was one of the two men who took the three bags and a radio cassette. While PW4 did not know Kajungu well before PW3 knew him well and encouraged PW4 to hand over the three bags to him and another man. I have no doubt accused was well identified by PW3 and PW4 on 8th January 2002 as the person who had kept company with the deceased the previous day. I reject his story that he was then in Kampala as a fabrication. He was identified in Kisiizi. When PW4 asked accused whether he knew what had happened to the deceased, he showed lack of concern and kept quiet; a sign of guilt.

There is also the testimony of PW5 and PW6 who come from the same village as the accused and who, like him, had employment in Kampala. They both testified that accused had admitted to them that he had kept company with the deceased on the material night but that he had abandoned her when she started vomiting and soiling herself.

Finally I find it apt to consider further the baggage. According to PW3 and PW4 the two L) bags of the deceased were together with the three bags and radio cassette of the accused and company. I find this evidence of the fact that they were together at the time they retired, to go and look for accommodation. This again rules out the possibility of deceased not being known to accused or that accused had earlier left for Kampala.

I am satisfied the prosecution has disproved the alibi. I am also satisfied this ingredient also has been proved beyond reasonable doubt.

The assessors in their considered opinion advised me to find accused guilty of murder. For the reasons I have given I agree with the opinion. I find accused guilty as charged and convict him accordingly.

There is yet another charge to consider, rape. It was not possible for the deceased to testify as to what happened to her. However the post mortem report shows that there were dead sperms in the

deceased's vagina. The report further shows that there were scratches and bruises in the thighs and private parts of the deceased. Sexual intercourse is said to have taken place however slight the penetration. From the evidence available I do not find evidence of penetration. I find this ingredient not proved by the prosecution. Mere presence of dead sperms does not show the sperms were those of accused or that they entered the vagina through penetration.

The second ingredient concerns consent. There is no direct evidence to show whether or not the deceased consented to sexual intercourse. The post mortem report shows that the deceased's neck was twisted and strangulated. It shows also that there were scratches and bruises in the thighs and private parts of the deceased. While it is possible there was lack of consent, I do not find the prosecution has proved lack of consent in the context of sexual intercourse.

Finally the role played by the accused in the offence must be considered. The offence occurred on the night of 7th/8th January 2002. When considering the first charge his alibi was found disproved. I would have gone on to consider whether accused committed the offence but such consideration would be rendered moot by my finding regarding whether or not there was penetration and whether or not there was consent.

In the result as I find no evidence of sexual intercourse I find accused not guilty of the charge of rape. The assessors in their opinion advised me to convict the accused as charged. For the reasons given above I differ with that opinion. I find accused not guilty on the second count and acquit him.

P.K. Mugamba

Judge

13th August 2004

13th August 2004

Accused in court

Ms Ahimbisibwe for accused

Mr. Twinomuhwezi State Attorney

Mr. Rutaro court clerk/interpreter

Court

Judgment read in open court.

P.K. Mugamba
Judge

SENTENCE

There is only one punishment provided by law for persons convicted of murder. I sentence the convict to suffer death in the manner authorized by law.

P.K. Mugamba
Judge

Court

Right of appeal explained.

P.K. Mugamba
Judge