THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-124 OF 2003

UGANDA ::: PROSECUTOR

VERSUS

TWINOMUGISHA MOSES :::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused Twinomugisha Moses was indicted on the charge of Murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence alleged that the accused on 11th day of February 2002 at Kabashuri cell in the Rukungiri District, murdered Kyoshabire Ruth.

When the indictment was read and explained to the accused, he pleaded not guilty. In doing so, the accused set in dispute all the essential ingredients of the offence of Murder which were to be proved by the prosecution beyond all reasonable doubt.

The essential ingredients of the offence of murder are:-

(1) That there was death of a human being;

(2) That such death was caused unlawfully;

(3) That the death was caused with malice aforethought; and

(4) That the accused participated directly or indirectly in causing the death of the deceased.

The duty of proving the above ingredients lies on the prosecution throughout the trial even where the accused relies on the defence of alibi. An accused does not bear the burden to prove his innocence. The constitution provides that an accused is to be presumed innocent until proved guilty. Therefore an accused should only be convicted on the strength of the prosecution evidence and not on the weakness of his defence even when he appears to be telling lies: See **Kooky Sharma & Another Vs Uganda; Supreme Court Criminal Appeal No. 44 of 2000** (unreported).

To prove the above ingredients the prosecution relied on the following pieces of evidence:

The post mortem examination report of the victim was admitted during the preliminary hearing under section 66 of the Trial on Indictments Act. The prosecution further relied on the evidence of Kyomuhendo Harriet (PW1) and George Kyolimpa (PW4) who were the victim's parents. There was also evidence from James Turinawe (PW2) who was the area Local Council Chairman; Kyomuhendo Hope (PW3) who testified that she met the accused following the deceased; and No.23647 D/Constable Kahangwa (PW5) who investigated this case, visited the scene and drew its sketch plan.

The accused on his part made a sworn defence where he denied the offence and relied on alibi.

As far as the first ingredient is concerned whether Kyoshabire Ruth is dead, the prosecution relied on the evidence of Kyomuhendo Harriet (PW1) and George Kyolimpa (PW4) who were the victim's parents. They testified inter alia that on the fateful day the deceased went to fetch water but never returned

home. They looked for her in vain. The following morning they mounted another search and discovered her dead body. James Turinawe (PW2), the area Local Council Chairman testified that he went to the scene where the body of the deceased was. He testified that the dead body had banana fibre around the neck. No.23647 D/Constable Kahangwa Eliab (PW5) testified that he visited the scene where he found the body of the deceased dumped in a valley near a stream. The body was covered with mud. The above pieces of evidence were corroborated by the post mortem examination report which was admitted and a memorandum filed under section 66 of the Trial on Indictments Act which established the cause of death as subdural haemorrhage due to blunt trauma to right side of the head. There ws therefore overwhelming evidence to prove beyond all reasonable doubt that Ruth Kyoshabire is dead and was buried.

In regard to the second ingredient whether the death of the deceased was caused unlawfully, the law is that all homicide is unlawful unless it is excused by law. It is only excusable if caused by accident or in defence of person or property: See **R Vs**

Gusambizi s/o Wesonga [1948] 12 EACA 65. The above presumption is rebuttable. The burden is on the accused to prove that the killing was either accidental or excusable in law. The standard of proof required of the accused here 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 the post mortem report by Dr Muzoora Michael established that the body of the deceased was found soiled in mud. The deceased had a scar on the angle of the mandible on the right side. Externally the body had abrasions over the mandible. She had blood clots on the right nostrils and the right ear. She had marked subconjuctival haemorrhage in the right ear. Internally the body had intracranial subdural oozing on the right side. The cause of death was right side subdural haemorrhage due to blunt trauma to the right side of the head. Medical evidence ruled out strangulation.

The above evidence was corroborated by the evidence of Kyomuhendo Harriet (PW1) James Turinawe (PW2) George

Kyolimpa (PW4) and D/Constable Kahangwa (PW5). All the above witnesses testified that they saw the dead body and that it had injuries which prompted them to believe it was a police case. There was no evidence to suggest that the deceased died accidentally or under excusable circumstances. Accordingly the presumption that the deceased died unlawfully has not been rebutted. It is therefore my conclusion that the deceased died unlawfully.

The third ingredient is whether the cause of death was with malice aforethought.

Malice aforethought as defined by section 191 of the Penal Code Act means:-

(a) an intention to cause death of any person whether such person is the person actually killed or not; or

(b) knowledge that the act or omission causing death will probably cause death of some person, whether such person is the person actually killed or not although such knowledge

is accompanied by indifference whether death is caused or not or by a wish that it may not be caused.

It is now well established that malice aforethought being a mental element of the offence of murder is difficult to prove by direct evidence. however, malice aforethought can be inferred from the surrounding circumstances of the offence such as:-

(a) the nature of the weapon used (*whether lethal or not*);
(b) the part of the body targeted (*whether vulnerable or not*);
(c) the manner in which the weapon was used (*whether repeatedly or not*);
(d) the conduct of the accused before, during and after the attach (whether with impunity or not);

See: **R Vs Tubere s/o Ochen [1945] 12 EACA 63.**

In the above case, the appellant was convicted for murder after assaulting the deceased seriously with a 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 observed:

> ***"With regard to the use of a stick in cases of homicide, this court has not attempted to lay down a 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 take a lenient view where a stick is used. Every case has of course to be judged on its own facts."***

In the instant case the deceased was said to have injuries around the mandible and the nose. She was said to have died due to the right side subdural haemorrhage due to blunt trauma to the right

side of the head. Applying the principles in the case of **Tubere s/o Ochen** (supra) I find it difficult to infer malice aforethought from the nature of injuries established above, the nature of the weapon, the part of the body targeted, the manner in which the weapon was used together with the conduct of the assailant.

For the above reasons I find that this ingredient has not been proved beyond all reasonable doubt.

This leads me to the last ingredient whether it was the accused who directly or indirectly participated in causing the death of the deceased. The prosecution contended that it was the accused who had killed the deceased. The accused on his part made a sworn defence in which he relied on total denial and alibi.

Evidence implicating the accused was from Kyomuhendo Harriet (PW1) who testified that on the fateful day she saw the accused passing her home together with her younger brother called Alex and they followed the direction which the deceased took. After the death of the deceased the accused disappeared from their

village. James Turinawe (PW2) testified that the mother of the victim told him that she was suspecting the accused because he was the last person seen coming from where the deceased had gone. On 14/2/2002 a certain kid reported to them that the killer of the deceased who was the accused had been nabbed sleeping in the bush. The accused was later arrested by children. The accused admitted before him of killing the deceased. Kyomuhendo Hope (PW3) testified that on the fateful day of 11/2/2002 she met the deceased at 6.00p.m. going to fetch water. Immediately later she met the accused following the deceased at a distance of 30 metres. After walking further, she found Alex Niwagaba who was the brother to the accused. Later she learnt of the death of the deceased. After that the accused who was her neighbour disappeared from home and she never saw him again.

The accused relied on the defence of total denial and alibi. He testified that he was arrested while grazing his grandmother's cows where he was staying. He denied ever going with his

younger brother to pick potatoes as alleged by prosecution witnesses.

It is clear from the above evidence that the prosecution case is based exclusively on circumstantial evidence. In the case of **Kooky Sharma & Kumar Vs Uganda; Supreme Court Criminal Appeal No. 44 of 2000** the Supreme Court relied on the case of **Simon Musoke Vs R [1958] EA 715** *and held that in a case depending exclusively upon circumstantial evidence, a court must, before deciding on a conviction find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of guilt.*

According to the evidence of PW1 and PW3 the accused was the last person seen following the deceased before she was found dead. PW1, PW2 and PW3 testified that after the death of the deceased the accused who was their neighbour disappeared from the village and was arrested from the bush on a tip off from children who got him sleeping. From the above pieces of

evidence it cannot be true that the accused was arrested as he was looking after his grandmother's cattle.

It is apparent that after the death of the deceased all fingers pointed at the accused because he was the last person seen following the deceased. That forced him to go into hiding until the children smoked him out. That conduct of disappearance from home and hiding in that bush was not conduct of an innocent person. That conduct clearly corroborated the circumstantial evidence that it was the accused who had participated in causing the death of the deceased.

The defence of total denial and alibi of the accused were therefore merely meant to confuse the court. After his arrest the accused admitted before the local council chairman (PW2) that he was responsible for the death of the deceased. For the above reasons I do conclude that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused.

At the end of the summing up one assessor was not able to deliver her opinion on allegation that she was sick. Several adjournments were made to enable her attend court without success. It was apparent that she had lost interest in the exercise may be because she had other expectations. The remaining assessor advised me to convict the accused as charged. After finding that the prosecution had failed to prove beyond reasonable doubt the ingredient of malice aforethought I do find the accused guilty of manslaughter and convict him accordingly.

RUBBY AWERI OPIO

JUDGE

13/9/2005.

15/9/2005:-

Accused present.

Twinomuhwezi for the state.

Ndimbirwe present for the accused.

Judgment read in open court.

Twinomuhwezi:-

The convict in June he was brought to Rukungiri on charges of defilement but while there he escaped from lawful custody. He was charged with escape brought to court and convicted to six (6) months imprisonment before the Chief Magistrate. The convict is therefore second offender.

This is a very serious offence which entails life imprisonment. The conduct of the convict led to the death of an innocent young girl. The convict has been on remand since March 2002 up-to-date. We pray for a deterrent sentence.

Ndimbirwe:-

The first conviction was not in line with the present offence. The convict has been on remand since 2002. Let that be considered into account. He did not intend to kill. We pray for leniency.

SENTENCE:-

This is a very serious offence, which entails maximum life imprisonment. The convict killed an innocent young lady under unclear circumstances. The life is a sacrilege. No one had the right to deprive another of it. I do take note that he is second offender. However this court should also consider the age of the convict. He was 18 years old at the time of the offence. So he was still young.

It is not in the interest of justice to convict such a young man to a long custodial sentence. It will nor reform him. The convict should be given a chance to reform and live a useful citizen.

For the above reasons the convict is sentenced to seven (7) years imprisonment. The sentence takes consideration that he has been in custody since 2002.

Right of appeal explained.

RUBBY AWERI OPIO

JUDGE

15/9/2005.