

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

HCT-05-CR-SC-01 83-2003

UGANDAPROSECUTOR

VS

MURARI MICHAELACCUSED

BEFORE: THE HON. MR. JUSTICE P K MUGAMBA

JUDGMENT

Murari Michael is charged with murder, contrary to sections 188 and 189 of the Penal Code Act. The prosecution case is supported by six witnesses. P.C. Turyamureeba Duncan is PW1, Justine Nanyange Tumwesigye is PW2, Dr. Ssendi Bwogi is PW3, Eric Kasajja is PW4, D/C Emong Moses is PW5 while Kavuma Charles is PW6.

For the defence accused himself testified as DW1. Bateyo Jonathan as DW2, George Stephen Omini as DW3, Tigawalana Jowali as DW4 and Nankunda Prossy as DW5.

The prosecution case in brief is that accused and deceased, who were man and wife, shared a home at Kakoba Central, Kakoba Division within Mbarara Municipality. On the night of 25th December 2002 the spouses were in their house when accused set it on fire. As a result of the fire the deceased sustained burns and was admitted to Mbarara University Teaching Hospital. She died there ten days later. Prior to the incident accused had vowed to kill someone. Accused had been seen holding a panga and had told the deceased to be ready to say farewell to the world. Accused had left the locality and gone to Kampala and later to Kiboga, where he was eventually arrested. He did not visit the deceased while she was in hospital. Neither was he present at her burial.

The prosecution has a duty to prove the case against the accused person beyond reasonable doubt. See *Sekitoleko vs. Uganda* [1967] EA 531. It is not the duty of the accused person to prove his innocence. Where the indictment is for murder the prosecution must prove the following ingredients:

- i. that the deceased died,
- ii. that the killing of the deceased was unlawful,
- iii. that there was malice aforethought, and
- iv. that accused perpetrated the offence.

PW2, PW3 and PW4 gave evidence which shows that Allen Murari died. Even the defence does not dispute Allen Murari died. I am satisfied this ingredient has been proved beyond reasonable doubt by the prosecution.

No prosecution witness however directly testifies to what happened on the night in issue concerning how the house came to burn and the deceased sustaining the injuries she did. PW2 testified that the deceased had told her what transpired on the night in issue. At the time of narrating her story the deceased lay in hospital with painful injuries. According to the narrative relations had not been good between the spouses earlier in the day. Accused had returned in the company of DW2 at between 8.00 p.m. and 9.00 p.m. DW2 had remained outside the house but accused had vowed that he would kill a person. Accused had later entered the house and found the deceased in the children's room. Accused had gone to the room with a panga and told the deceased to say farewell to the world. The deceased had then locked herself in the room. Later the deceased had smelled paraffin before she saw it spread into her room. Accused had lit a match and fire had started. The deceased had struggled hard to leave her room and escape from the house. In the process she had sustained the burns she did. According to PW2 this story was related to her on 30th December 2002 when there were signs the condition of the deceased was improving.

PW4 in his evidence said the deceased had told him on 28 December 2002 that accused was the person who had started the fire which burnt her. The deceased had earlier arrived at the couples' house in the company of a boda-boda operator with whom he was in conversation. When PW4 learnt of this he went in the company of PW2 and reported the matter to Police. The evidence of

PW2 and PW4 will be admissible in evidence if the declarant later died, the trial is for murder and the statement relates to the cause of her death. The declarant should also have been under a settled hopeless expectation of death and had she been alive she could have been a competent witness. See **Cross on Evidence**, 6 Edition page 576 by Butterworth. In the instant case all the tests necessary are easily apparent save for 'settled hopeless expectation of death'. From the evidence of PW3 the deceased had 40% burns. According to PW2 and PW4 she was in an emergency room surrounded by life sustaining gadgets. There is no evidence she was not in extremis I am satisfied what she told PW2 and PW4 qualifies as a dying declaration. While it is not a rule of law that in order to support a conviction, there has to be corroboration of a dying declaration and there might be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused, generally speaking it is unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration. See **Uganda vs. Benedicto Kibwami alias Ben** [1972] II ULR 28. The Supreme Court in **Tindigwihura Mbahe vs. Uganda** Cr. Appeal No. 9 of 1987 (unreported) had this to say:

‘.....evidence of dying declaration must be received with caution because the test of cross-examination may be wholly wanting; and have occurred under circumstances of confusion and surprise; the deceased may have stated this inference from facts concerning which he may have omitted important particulars for not having his attention called to them. Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is usually more difficult than in daylight. The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case. It is not guarantee of accuracy. It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration ‘. (Emphasis is added).

The prosecution ought to prove that the killing of the deceased was unlawful. It is the presumption of the law that every killing of a human being is unlawful save where it results from

an accident or is excusable by law. See *Gusambizi Wesonga v R* (1948) 15 EACA 63. The presumption that the killing was unlawful can be rebutted by the defence. I have so far related to what detail PW2 said she was given by the deceased concerning how fire started. PW4 also stated what he was told by the deceased. According to the defence accused testified that when he arrived home he found the deceased sleeping in the children's room. The children were not there. Deceased had told accused she had lost her key to their bedroom. Accused had gone and slept in the main bedroom without the deceased following him there. Later on accused was called by the deceased to go and assist her as her clothes were inexplicably burning. Accused had gone to the room where the deceased was but his attempt to put out the fire proved futile. I have considered the evidence of the prosecution which is derived from a dying declaration. I have considered also the version of the accused which says the fire started in the room where the deceased was and find no independent evidence supporting what was contained in the dying declaration as to the cause of the fire. The prosecution has not therefore proved beyond any reasonable doubt that the killing of the deceased was unlawful.

Malice aforethought is the intention to bring about the death of someone even if that person is not the one killed. See **section 191 of the Penal Code Act**. According to the dying declaration accused had told someone (DW2) that he would kill a person, accused had brandished a panga in front of the deceased, accused had told the deceased to be ready to leave this life by telling her to say farewell to the world and by pouring paraffin and lighting a match to start the fire. Accused on his part testified that the cause of the fire was uncertain. He had been called to the room where the deceased was sleeping and there he had found the fire already in progress. It was his evidence he assisted the deceased exit the house while he tried to extinguish the fire. I have considered prosecution evidence with caution, noting as I do that there is no independent evidence to support it. I have taken the version of the accused regarding events of that night in perspective. I have considered for example the testimonies of DW2, DW3 and DW4 regarding the whereabouts of DW2 that evening. He was at the residence of DW3 until the time of the fire and could not have possibly gone to accused's house with accused as alleged in the dying declaration. DW2 could not have been in the vicinity of accused's house at the time alleged to be addressed by accused regarding his intent to kill a person. Furthermore, if accused started the fire as alleged, it is not probable he would have let accused exit the house let alone assist his quarry

make her escape. This ingredient also has not been proved by the prosecution beyond reasonable doubt.

I have already referred to the dying declaration and its allegation that accused participated in the crime. It is not denied that accused was with deceased in the house' at the material time. Sadly for prosecution evidence there is no independent evidence in support of the allegation that accused was responsible for starting the fire. The version of events from the side of the accused has already been stated elsewhere in this judgment. He denied involvement. He stated that his attention was drawn to, the fire by the deceased. It was his evidence he tried to put out the fire but failed. He had remained in the house when the deceased made her escape with his aid. DW2 had assisted him get out of the house and this piece of evidence is corroborated by DW2. DW2, DW3 and DW4 testified that the deceased had left the house and gone outside to look for transport. It was DW2's evidence the deceased had informed him that accused was still inside the house and that it was at that point DW2 went behind the house and assisted accused escape by breaking through the rear of the house. DW3 had provided transport to hospital for the deceased. It was the evidence of DW3 that he was at the front of the house and did not know where accused was. DW4 also testified that he remained at the front of the house. It was the evidence of DW4 that the deceased had said she had been burnt by fire but did not disclose then what had caused the fire. Several people had answered the alarm when the deceased came outside the house but there is no evidence of the deceased telling any of them what had caused the fire. If it was the accused who had caused the fire that had burnt her was that not the time for the deceased to disclose the identity of the person who had caused the fire? Surely the deceased would have straight away told anyone who was present that accused was not only in the house but was the person who had caused the misery. The prosecution called to aid cases where it has been held that the conduct of the accused in running away and hiding points to guilt. *Uganda vs. Kabandize* [1982] HCB 93, *Franswa Kizza vs. Uganda* [1983] HCB 12 and *Uganda vs. Simon Onen* [1991] HCB 7 were cited for the purpose. In the case of *Kabandize* accused had made an admission that he had committed the offence in addition to being seen with the lethal weapon which was used in stabbing the deceased. The fact of running away and hiding was additional. In *Franswa Kizza* the incident occurred in an open place and there was ample evidence to support the claim. There was basis therefore for the presumption that the escape of the appellant was a

pointer to a guilty mind. In Simon Onen accused admitted to participating in the crime. Court found his running away additional evidence of a guilty mind. This case however is distinguishable. Not only does accused deny involvement but evidence of his participation derives from a dying declaration which is not reliable. Accused explained the reason he acted in a way which appears odd but not necessarily criminal.

It was the evidence of accused he was not aware the deceased was burnt by the fire. DW2 in his evidence said he was able to tell the deceased had got burnt only after he had touched her hair. Accused testified he had thought the deceased had spent a night in the neighbourhood at the home of DW3. Those who had answered the alarm at his home had advised him to go away from the scene and rest. He had first gone to the shop of DW2 and later to PW6's home, where he spent the night. Next morning at 6.00 Am., he had visited the scene in the company of PW6. When he was on the way to check on the deceased at the hospital he was warned by a boda-boda operator against proceeding there because relatives of the deceased suspected he was responsible for starting the fire and had vowed to deal with him. When he visited his sister, DW5, she gave a similar story and advised him to go away because relatives of the deceased and Police were looking for him. DW5 had advised accused that he could return after tempers of the relatives of the deceased had cooled down. It was the evidence of accused that he had a wound on his leg at the time and he feared being arrested when his leg needed proper care and treatment. He testified further that that was the reason he had gone to the family farm at Kiboga where he was eventually arrested. The conduct of the accused might appear bizarre and cock-eyed but it adds no value to allegation of his being a participant in the alleged offence.

I must relate to the evidence of PW5 who testified that he recorded a statement from the deceased on 30th December 2002. A document was received as Exhibit P.4 supposedly recorded on 30th December 2002. However that document was allegedly a reproduction of the original one of 30th December 2002. The original document was not produced before court nor was an explanation given regarding the whereabouts of it. I find that Exhibit of no value for the resolution of this case. Even if I were wrong in reaching this conclusion, the contents of the document are a rehearsal of what PW2 said in her testimony and similarly there would be need for some independent supporting evidence of the allegations before I could convict on such.

All in all I do not find evidence of accused's participation in the crime.

The assessors in their joint opinion advised me to acquit accused of the charge. For the reasons I have given in the course of this judgment I agree with their advice. Accused is found not guilty of the charge and is acquitted.

P.K. Mugamba

Judge

23 June 2006