THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO

HCT-03-CR-SC-0111 OF 2010

UGANDA :: PROSECUTOR

VERSUS

MUBIRU JAMES :: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The accused James Mubiru was the biological father of the deceased. He was indicted for murder contrary to **Section 188 and 189 of the Penal Code Act.** The particulars of the offence alleged that the accused on the 24th day of May 2007 at Nakulabye village, Nabbale Sub-county in Mukono murdered Sebatta Besweri.

The background facts of the case can be summarized as follows:-

On that the deceased and other children were outside preparing food for lunch. The accused got the deceased and took him inside the house. When lunch was ready one Sekinarwa Moses Pw_1 was sent to call the deceased for lunch. He found the accused lying on the bed with the deceased who was a boy of 8 years. The accused told Sekinarwa that the child was asleep and that he should first leave him to rest. After that the accused left the house and went away. Sekinarwa went back to the house to wake the child so that he could eat but discovered that the deceased was not responding. He realized that the child had cotton wool fixed in his noses and ears and a piece of cotton tied on the fore

head. He later found that the deceased was dead. He reported the incident to his sister Sana Christine Pw_2. She rushed to report to their Youth Secretary, a one Mayanja.

Mayanja ordered them to make an alarm which gathered people at the scene. The Police Officers from Nagalama Police Station were informed by the area Local Council Chairman Mr. Ntegge Julius. D/Stg. Rusoke Mohamed Pw_3 from the station visited the scene and found the body of the deceased lying on the back facing up. Some foam was coming from his mouth. The body was smelling poison. Upon checking he recovered the Finnegan poison behind the bath shelter. He took the body of the deceased for post mortem examination. Later on he took the accused for Charge and Caution Statement where he admitted the offence. The accused was later charged accordingly.

When the accused was arraigned before court he denied the offence totally. It was therefore the duty of the prosecution to prove the essential ingredients of the offence of murder beyond reasonable doubt. As far as the law in this country is concerned the cardinal principle is that a person charged with a criminal offence is presumed innocent until proved guilty. This position was established since the decision in **Sekitoleko v Uganda 1965.**

Furthermore **Article 28 (3) of the Constitution of the Republic of Uganda** states clearly that every accused person shall be presumed innocent until proved guilty. It accordingly flows guilty. Flowing from the above authority and the Constitution, i.e. follows accordingly that an accused does not bear the burden of proving his innocence. An accused need not do more than denial if he opts to challenge the allegations against him, some reasonable doubt about his guilt. It is in fact not obligatory for him to give any evidence. Thus even doubt arising solely from prosecution evidence itself is sufficient to free the accused from the

yoke of the charges even without uttering a word: See **Section of the Trial on Indictment Act.**

In conclusion therefore any meaningful conviction should only be secured only on the strength of the prosecution case and not the weakness of the defence.

The essential elements of the offence of murder are the following:-

(1) That the deceased died.
(2) That Death of the deceased was caused unlawfully.
(3) That the accused participated in casing the death of the deceased: See **Uganda v Okello 1992 – 1993 HCB 8.**

In an attempt to prove the above ingredients the prosecution relied on the evidence of four witnesses: Sekinarwa Moses Pw_1 and Sana Christine Pw_2 who were at the scene, D/Sgt. Rusoke Mohamed Pw_3 who rushed to the scene and investigated the case. He recovered the poison which was used for killing the deceased. He also took the deceased for post mortem examination before taking the accused before D/IP Sendi Mohammed Pw_4 who took the Charge and Caution Statement of the accused where the accused was said to have admitted killing the deceased by poisoning.

The accused on his part made a sworn defence of total denial and alibi. He stated that on the material date he left the deceased at home while he went to dig in his garden 1 ½ miles away. When he returned home at around 1.00 p.m. he found people gathered at his home. They told him about the death of the deceased and wondered why he could go to dig leaving a dead body at home. They bombarded him with questions and did not leave him to understand what had taken place. He denied having pesticides that material day.

As far as the death of the deceased is concerned, there is overwhelming evidence to prove that Sebatta Besweri is dead. Sekinarwa Moses Pw_1 testified that when he was sent to call the deceased to eat he realized that he was not reacting to his message. Later he realized that the deceased was dead and a piece of cloth had been tied on his face. Cotton wool was fixed in the nose and on the ears. He reported the matter to his sister Sina Christine Pw_2 who confirmed in her testimony that when Sekinarwa Moses Pw_1 informed her of what he had seen, she entered the house and found the deceased dead. A piece of cloth had been tied on his face and there was cotton wool on the nose and ears. He reported the matter to his sister Sina Christine Pw_2 who confirmed in her testimony that when Sekinarwa Moses Pw_1 informed her of what he had seen, she entered the house and found the deceased dead. A piece of cloth had been tied on his face and there was cotton wool on the nose and ears. She rushed to their Youth Secretary who ordered them to make alarms calling the local community. People gathered at the scene. Nagalama Police were informed and D/Sgt. Rusoke Mohamed Pw_3 visited the scene and saw the dead body which he took for post mortem examination report although the report was not tendered in evidence as the Doctor who did it was not summoned. Notwithstanding post mortem report, there was overwhelming evidence that the deceased died. The defence did not challenge the state on the fact that Besweri Sebatta died and was buried. The said ingredient was therefore proved to the required standard.

As to whether death of Besweri Sebatta was unlawful, the general presumption in law is that every homicide is presumed unlawful unless caused by accident, defence of person or property or when authorized by law or caused by act of God. See: **R V Gusambizi S/O Wesunga (1948) 15 EACA 65.**

Although the above presumption was rebuttable by the accused on the balance of probabilities See: **Shirabu S/O Musungu v R (1955) 22 EACA 454,** the current position appears to have changed by the Court of Appeal decision in **Paulo Omale v Uganda; Criminal Appeal No. 6 of 1999 (Unreported)** where it held thus:

> **"It is for the prosecution to prove beyond reasonable doubt that the prisoner with malice aforethought killed the deceased. It is not for the prisoner to prove accident or self defence and he is entitled to be acquitted even though the Court is satisfied that his story is true, so long as the Court is of the view that his story might reasonably be true."**

In the instant case death was said to have been caused by poisoning. The deceased had been well and when he was called inside by the accused he was later found dead. A piece of cloth was found tied on his face and cotton wool was found on his ears and nose and he was smelling poison. According to D/Sgt. Rusoke Pw_3 the mouth of the deceased was smelling poison. He stated that he recovered Finnegan poison behind the bath shelter. According to Moses Sekinarwa Pw_1 and Christine Sana Pw_2 the killer poison was recovered behind the bath shelter. From the above pieces of evidence, it is overwhelmingly clear that the deceased could not have died a normal death. His death was a master piece by someone and was therefore unlawful.

The third ingredient is whether death of the deceased was with malice aforethought. Malice aforethought is defined under **Section 191 of the Penal Code** to mean:

"(1) An intention to cause death of a person whether such a person is the one actually killed or not; or

(2) Knowledge that the act or mission causing death will probably cause the 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 trite law that malice aforethought cannot be established by direct evidence as it involves state of mind. However it may flow from the circumstances surrounding the killing like:

(1) The type of weapon used whether lethal or not.

(2) The nature of the injuries inflicted upon the deceased (whether fatal or not).

(3) The conduct of the accused before and after the attack (whether with impurity).

In the instant case the deceased was said to have died of poisoning. The killer poison was recovered from behind the bath shelter (although it was not exhibited). That was not so fatal. I consider that a forceful error. There was more than enough evidence to prove that poison had been administered on the victim. The body was smelling of poison according to D/Sgt. Rusoke Mohamed who was a very experienced Police Investigator. The mouth was full of foams. I do believe his testimony on poisoning. I am so convinced that poison was involved by the fact that it did not take long before the deceased died according to the testimony of Moses Sekinarwa Pw_1 and Sina Christine Pw_2. That would

go to prove the lethal nature of poison. Therefore in agreement with both assessors I do conclude that the person who killed the deceased by poison and strangulation did have the necessary malice aforethought.

Participation of the accused:

Both Moses Sekinarwa Pw_1 and Sina Christine Pw_2 testified inter alia that the accused person called the deceased in the house and spent some time with him.

After preparing food Sekinarwa Moses Pw_1 was sent to summon the deceased to come and eat, he found the accused and the deceased lying on the bed. The accused assured Sekinarwa that the deceased was still sleeping and should be picked for lunch later.

Sekinarwa left and went back where he was sitting with Sina Pw_2. Later the accused was seen leaving the house with a sack under his arm. Moses Sekinarwa Pw_1 then went back to resummon the deceased for lunch but found him unresponsive. He went and informed Sina Christine Pw_2. The two later realized that the deceased was lying dead. His face was wrapped with a piece of cloth and his ears and nose had been stuffed with cotton wool. They ran and informed their Youth Secretary. Subsequently the Police were notified.

According to Pw_1 and Pw_2 the accused disappeared from home only to return the following day.

D/Sgt. Rusoke Mohamed Pw_3 testified that he was the investigating officer. He stated that one Ntegge Julius who was the local area Chairman reported a murder case of the deceased who was said to have been killed by his own father. He visited the scene and found the body of the deceased lying on its back facing

up. Some foams were coming from his mouth. The accused had taken off according to the information from the scene. The following day he was informed by the Chairman that the accused had gone back home from where he was hiding. He went back and arrested the accused and later took him before D/IP Sendi Edmond Pw_4 who recorded his Charge and Caution Statement where the accused admitted killing the deceased using Finnegan which he convinced the deceased to take for tea.

The accused made a defence of total denial and alibi. Contending inter alia that on the material date he left the deceased at home very healthy in the company of Sekinarwa Pw_1, Christine Sina Pw_2 and other children. When he returned from digging he was shocked to find people gathered at his home where he was told that the deceased was dead and they were up questioning why he could go to dig leaving a dead body at home.

The above pieces of evidence show that there was no direct evidence implicating the accused. The evidence was circumstantial. The law with regard to circumstantial evidence has ever since been put beyond doubt. In **Tumuhairwe v Uganda (1967) EA 328**, the defunct. East Africa Court of Appeal had this to say.

> **"It should be observed that there is nothing derogatory in referring to evidence against the accused as circumstantial. Indeed circumstantial evidence in criminal case is very often the best evidence in establishing the commission of a crime as in the present case."**

In **DPP v Kilbourne {1973} A. C. 727** the Court held:

"Circumstantial evidence works cumulatively in Geometrical progression eliminating other possibilities. It is like a rope comprising cords. One strand of the cord might be insufficient to sustain the weight, but there stranded together may be quite of sufficient strength."

Lastly in **EXALL (1866) 4F & F 922 at 929** it was held that in circumstantial evidence there may be a combination of circumstances none of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt than human affair can require or admit of.

It is also trite law that to base a conviction solely on circumstantial evidence, the inculpating. Facts produced by that evidence must be incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than the guilt of the accused: See **Simon Musoke v R {1958} EA 715.**

The above decision was followed in **Uganda v Leo Mubyozita & 2 Others (1972) 2ULR 3.**

The exculpatory facts produced by the circumstantial evidence in the instant case are:

(1) The accused was the last person seen with the deceased alive.

According to the evidence of Moses Sekinarwa Pw_1 and Sina Christine Pw_2 the accused summoned the deceased inside. When they went to call the deceased for lunch they found him dead. In the meantime the accused disappeared from home. When he returned home the following day he admitted killing the

deceased by poisoning. The above evidence was corroborated by the evidence of D/Sgt. Rusoke Mohamed Pw_3 who confirmed that.

(2) The fact that the accused disappeared from the scene after the incident. This was the evidence of Pw_1 and Pw_2.

After the incident the accused disappeared from home and only returned the following day where he admitted killing the deceased and stated that after all let people do anything they wanted to do on him. Such conduct of disappearing from the scene was not that of an innocent person. By his admission it confirmed that he was not an innocent person.

(3) Another important evidence against the accused was his confession to the offence before D/IP Sendi Edmond Pw_4.

In the Charge and Caution Statement he admitted killing his son with tea laced with poison because he was tired of the world and that he was suffering because his mother had failed to show him his father. The accused however contested the charge and Caution saying that he had not made it and did not thumb print it because he was capable of writing and reading. After a trial within a trial it was established that the accused had made the Charge and Caution Statement and had done it voluntarily. It is trite law that Court can rely on Charge and Caution Statement if it is established that it was voluntarily made and truthful.

I have looked at the charge and Caution Statement. It was made in great detail as to how and why the accused had killed the deceased. Those details could only be known to the accused and I believe them to be true.

Tying all the above evidence I find that there was overwhelming evidence to establish participation of the accused in this offence. His defence of total denial and alibi were the biggest shun in history o criminal trial. It was the accused alone who was responsible for the death of Besweri Sebata. As agreed unanimously by both assessors I find the accused guilty as charged and he is convicted accordingly.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

28/10/2010

29/10/2010

Accused present.
Masinde for the State.
Mr. Senkumba for the accused.

Judgment read in Open Court.

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Masinde: I have no record of previous conviction. However I pray for a deterrent sentence because he killed a young innocent boy and deprived him of his life. As a father he had a duty to protect the son. The death was caused by prison.

Senkumba: He has been in remand for 4 years. He is remorseful. He is stressed. That I pray that Court be lenient to him. He appears not to be upright. I also believe he can reform. I so pray.

Allocotus: I have nothing to say in mitigation. I pray for leniency.

Court: The accused has been found guilty of murdering his own son. The offence of murder does not now afford mandatory death sentence. The accused poisoned his own son. I do agree the accused is suffering from stress. He needs to be rehabilitated. I am told the prison service has counselling units. He

should be subjected to counselling. The accused has been in custody for 4 years. That period shall be considered in this sentence. Considering the situation of the accused I feel and he is sentenced to eight years imprisonment.

Rights of Appeal explained.

HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE
29/10/2010