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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HOLDEN AT MBARARA

HCT-05-CR-SC-00289-2015

UGANDA

.....

10 **PROSECUTION**

VERSUS

1. MWESIGWA WILLIAM

2. OKWERI MOSES alias KIBANDA

ACCUSED

15

BEFORE: HON LADY JUSTICE IMMACULATE BUSINGYE

BYARUHANGA

JUDGMENT

The accused persons herein **Mwesigwa William (A1) and Okweri Moses alias**
20 **Kibanda(A2) are** indicted for the offence of murder contrary to Sections 188 and
189 of the Penal Code Act. The Prosecution alleged that on the 20th day of January
2015 at Kibutamo village in Ntungamo District murdered Mushaija Joshua.

Representation

The accused were represented by Counsel Barekensi Franco on state brief while
25 the prosecution was led by Keshubi Caroline.

Mwesigwa William (A1) and Okweri Moses alias Kibanda(A2) denied the allegations and in a bid to prove their case, the prosecution lined up five witnesses whom I will hereinafter refer to by their respective names and witness numbers. The witnesses are Alice Kyakunda (Pw1), Musinguzi Patrick (Pw2), Karakwendi
5 Erick(Pw3), No. 40503, Corporal Bainomugisha Edward (Pw4) and No. 36256 Detective Corporal Tahamye Barnet (Pw5).

In turn, Defence Counsel led evidence from two witnesses namely Mwesigwa William (Dw1) and Okweri Moses(Dw2).

At the commencement of the trial, the Prosecution and Counsel for the accused
10 agreed to admit in evidence four police statements. They both agreed to admit in evidence PF48A which was a request for a post mortem report for Mushaija Joshua. The police form was admitted and marked **PE1**. Both Counsel also agreed to admit in evidence PF48C which was the postmortem report in respect of Mushaija Joshua as **PE2**.

15 In addition, both Counsel further agreed to admit in evidence PF24 which was the the medical examination report of Mwesigwa William which was conducted at Itojo Hospital on the 27th January 2015 and the accused was found to be normal. The medical report was admitted and marked **PE3**.

20 Lastly, both Counsel agreed to admit in evidence PF24 which was the medical examination report of Okweri Moses which was conducted at Itojo Hospital on the 27th January 2015 and the accused was found to be normal. The medical report was admitted and marked **PE4**.

Burden and Standard of Proof

25 Since the accused in this case pleaded not guilty, like in all criminal cases, the burden of proof solely rests on the prosecution to prove the offence for which the

accused is charged with beyond reasonable doubt, (*See Woolmington versus DPP (1935) A.C. 462*). It is important to note that, the burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (*See Sekitoleko v. Uganda*
5 *[1967] EA 531*). The accused does not have any obligation to prove his innocence. By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure his conviction.

10 Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (*see Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

15 As per **Sections 188 and 189 of the Penal Code Act**, to constitute the offence of Murder, the prosecution must prove the following ingredients beyond reasonable doubt;

1. Death of a human being;
2. That the death of the deceased was caused unlawfully;
- 20 3. That the death of the deceased was caused with malice aforethought;
4. That the accused participated in causing the death of the deceased.

Evaluation of evidence

Ingredient 1: Death of a human being

It is trite law that death may be proved by production of a post mortem report or
25 evidence of witnesses who state that they knew the deceased and attended the

burial or saw the dead body. (*See Uganda versus Anyao Milton Criminal Session No. 5 of 2017*)

The Prosecution tendered in court a post mortem report which was admitted and marked **PE2**. In the report it stated that a one Mushaija Joshua was killed. This
5 evidence is corroborated by Pw1 who testified that she found her husband lying dead in Hon. Mary Mugenyi's farm.

Defence Counsel did not contest this ingredient and I therefore find that the Prosecution has proved this ingredient beyond reasonable doubt.

Ingredient 2: That the death of the deceased was caused unlawfully.

10 The Prosecution is further required to prove that the deceased's death was caused unlawfully. It is presumed by law that any homicide (the killing of a human being by another) is caused unlawfully unless it was accidental or it was authorized by law (*see R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*).

The senior medical officer at Itojo Hospital stated that the deceased died due to
15 respiratory failure as a result of a crushed chest (**Exh.PE2**). Pw1 testified that she found her husband lying dead in a nearby farm with a deep cut in his ribs and his testicles had been cut off. Defence Counsel did not contest this ingredient. It is clear from the evidence that the deceased's murder was not authorized by any lawful order and neither was it accidental.

20 I therefore find that the Prosecution has proved this ingredient beyond reasonable doubt.

Ingredient 3: That the death of the deceased was caused with malice aforethought

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice aforethought. According to **Section 191 of the Penal Code Act** malice

aforethought is defined as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. This may
5 be deduced from circumstantial evidence.

In the case of *R v. Tubere s/o Ochen (1945) 12 EACA 63* court set out circumstances which the trial court should consider in deciding whether there was malice aforethought in the killing of a person. *These are: the type of weapon used, the nature of injury or injuries inflicted, the part of the body affected and the*
10 *conduct of the attacker before and after the attack.* Malice aforethought being a mental element is difficult to prove by direct evidence.

Pw1 testified that the deceased had a deep cut in the ribs and his testacles had been cut. The Postmortem report (**PE2**) indicated that the deceased's chest had been crushed hence the respiratory failure. No weapon was not recovered from the scene
15 of the crime however, from the evidence presented in court it, is clear that the assailants intended for Mushaija Joshua to lose his life and in killing him had malice aforethought. I find that the Prosecution has proved this ingredient beyond reasonable doubt.

Ingredient 4: That the accused participated in causing the death of the deceased.

20 Lastly, the Prosecution is required to prove beyond reasonable doubt that it is the accused that caused the unlawful death of the deceased. This done by adducing direct or circumstantial evidence, placing the accused at the scene of the crime as the perpetrator of the offence.

Evidence of the Prosecution

Pw1 testified that on the evening of 20th January 2015, A1 arrived at the deceased's home while naked and panting and his conversation was uncoordinated and claimed people were chasing him. A1 later left the deceased's home however the deceased didn't return home that night.

- 5 Pw1 testified that the following morning the deceased was found lying dead in Hon. Mary Mugenyi's farm. The deceased had been strangled, he had a deep cut in his ribs and his testicles had been cut off. Pw1 (the deceased's wife) told the crowd at the scene of the crime about A1's actions the previous night and that she suspected him.
- 10 The prosecution witnesses testified that when they went to arrest A1, he ran away and jumped into River Kagera and disappeared, the residents hid somewhere and waited for him and when he tried to escape, they arrested him.

On the other hand, Pw4, on request of Pw5 (investigating officer) brought a sniffer dog to the scene of the crime. The sniffer dog preserved the deceased's scent at
15 which point the sniffer dog led Pw4 to Sofia trading Center, to the backyard of the bar where it located a bag that contained two blue trousers. One of the trousers had blood stains. A2 confirmed to the police that the trousers were his at which point he was arrested.

Evidence of the accused

- 20 The accused persons denied all the allegations made against them. A1 testified that the reason he ran to the deceased's home on the night of 20th January 2015 is because Night's drunk sons were chasing him and the deceased's wife asked him to seek refuge in her house. He further testified that he ran away because he thought the same people who were chasing him the night before were the ones
25 chasing him. He also denied jumping into River Kagera.

A2 denied all the allegations and he testified that the blood stained trousers were not his and that he never confirmed to police that they were his.

Defence Counsel's submissions

- 5 Counsel for the accused submitted that the Prosecution led evidence from 5 witnesses whose evidence was very weak and had a lot of gaps including Pw1 who testified that she did not see who killed her husband. Counsel further submitted that Pw2 and Pw3's evidence was hearsay evidence as they only heard about the death of the deceased.
- 10 Counsel also queried Pw4's testimony (the dog handler) who testified during cross examination that dogs could make mistakes and he further submitted that he was not the one who trained the sniffer dog. Counsel argued that the dog evidence was weak in the sense that one could not tell who entered the kitchen. He further submitted that the clothes that were recovered were neither exhibited nor was a
- 15 Government Analytical laboratory report made to prove finger prints of the accused even though the Police Officer (Turyakira Bruce) sent the clothes to Government Analytical Laboratory (GAL) as testified by Pw5.

Counsel submitted that the accused pleaded alibi on account that A1 was attacked while on his way home. Counsel argued that there was no criminal that could

20 present himself in the home of the deceased to get solace from there after the incident. Counsel also argued that no witness was brought to prove that A2 had ever been seen wearing the blood stained clothes.

In conclusion, Counsel submitted that the prosecution failed to connect all the accused with the offence of murder and prayed that they be acquitted.

Prosecution submissions

In reply, Ms. Keshubi Caroline for the Prosecution submitted that the Prosecution case was purely reliant on circumstantial evidence and she relied on **Musoke versus R (1958) EA 715 at 718.**

5 Counsel relayed Pw1's testimony and submitted she wondered if the neighbours of Pw1 waylaid A1 on his way home and wanted to kill him because of money, then why didn't they kill him when they found him at Pw1's home. Counsel argued that A1's testimony was a mere afterthought in order to defeat justice.

Counsel submitted that A1's actions of swimming into River Kagera upon seeing
10 LDU's, Pw2 and Pw3, were not action of an innocent person since no one was chasing him.

On the issue of the sniffer dog, Counsel submitted that the sniffer dog tracked the trousers that had fresh blood stains and the people in the crowd informed the police that the clothes belonged to A2, a fact that A2 admitted while at police.

15 Counsel submitted that court should take into account the fact that the clothes were recovered over five years ago and they went missing in the store room as the store keepers have been changing. Counsel invited Court to treat the clothes not being exhibited as a minor issue and not to use it to defeat the ends of justice.

Counsel submitted that the accused denied knowing other and that they only met in
20 prison. However, she noted that A1 testified that on the fateful night he was in Sofia T/C while A2 testified that he had been a resident of Sofia T/C for a long time. Counsel inferred that the accused had a common intention of killing the deceased. She referred to **Section 20 of the Penal Code Act and the case of Andrea Abonyo & ors versus R (1972) EA 542.**

In conclusion, Counsel submitted that the Prosecution had proved its case beyond reasonable doubt and prayed for Court to find the accused guilty and convict them accordingly.

5 **Decision of Court**

From the evidence of the prosecution witnesses, it is clear that none of them witnessed the killing of the deceased. It follows then that prosecution evidence relied solely on circumstantial evidence. In the case of **Nankwanga Fauza & Ors Vrs Uganda CSC No. 243/2015**, Lady Justice Eva Luswata followed the decision
10 of the Supreme Court of Nigeria sitting at **Abuja in Tajudeen Iliyasu versus The State SC 241/2013** which considered that evidence in great detail. It was held that circumstantial evidence; - *“... is evidence of surrounding circumstances which by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics...., this is so for in their aggregate content, such circumstances lead
15 cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person, caused the death of the deceased person. Simply put, it meant that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence.*

*She went ahead to say that however, the court cautioned that “... such
20 circumstantial evidence must point to only one conclusion, namely that the offence had been committed and that it was the accused person who committed it.*

In the instant case A1’s actions of randomly running into Pw1’s home on the fateful night while naked and asking for milk, coupled with running from Pw2 and Pw3 as they approached his home and diving into River Kagera were unclear but

they do not point the participation of A1 in murdering the deceased. It is mere suspicion.

A1 testified that people were chasing him and that is why he sought refuge in the deceased's home.

5 I am guided by the precedent in **Uganda Versus Yowana Baptist Kabandize (1982) HCB 93**, the Honorable Court held that the “*conduct of the accused immediately after the death of the deceased of running away from the scene of crime and of being in a restless mood in the swamp clearly showed a guilty mind*”. Further in **Remigious Kiwanuka v. Uganda; S. C. Crim. Appeal No. 41**
10 **of 1995 (Unreported)**, the Supreme Court held that the disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence. This is because such sudden disappearance from the area is incompatible with
15 innocent conduct of such a person. In the instant case, disappearance from the area of crime was not corroborated by other evidence pointing to the guilt of A1. To this end, I find that these circumstances pointed to the guilt of A1 and I find that the Prosecution has proved beyond reasonable doubt that A1 participated in the killing of Mushaija Joshua.

Canine evidence

20 Pw4 testified that, on the request of Pw5 (investigating officer), he brought a sniffer dog to the scene of the crime. The sniffer dog preserved the deceased's scent at which point the sniffer dog led Pw4 to Sofia trading Center, to the backyard of the bar where it located a bag that contained two blue trousers. One of the trousers had the deceased's blood stains. Pw5 testified that A2 confirmed to the
25 police that the trousers were his at which point he was arrested.

I must warn myself about sniffer dog evidence as in the past it has been held for a judicial officer to cautiously admit a dog's evidence as it might be treated as hearsay evidence. Much as sniffer dogs have played an important role in police investigations for decades with their keen sense of smell being noticed and utilized, a lot of caution has been taken before relying on their evidence. But one fact which is clear is that, such evidence when admitted must be corroborated by some other evidence which gives strength to the canine evidence as presented through its handler or trainer. The Prosecution must provide answers to the above questions in the affirmative before admission of police dog evidence. In the case of **Uganda versus Muheirwe Chris & Ors, Mbarara HCT – 05 – CR – CV – 0011 – 2012**, Justice Duncan Gaswaga considered many cases where sniffer dogs were used and some justices described it as hearsay evidence and therefore not admissible while others held that additional evidence explaining the faculty by which these dogs are able to follow the scent of one human being, rejecting the scent of all others would suffice. In the end His Lordship came up with the following propositions as principles that may govern the considerations for the exclusion or admissibility of and weight to be attached to tracker (sniffer) dog evidence.

1. *The evidence must be treated with utmost care (caution) by court and given the fullest sort of explanation by the prosecution.*
2. *There must be material before the court establishing the experience and qualification of the dog handler.*
3. *The reputation, skill and training of the tracker dog require to be proved the court (of course by the handler/trainer who is familiar with the dog's characteristics of the dog).*
4. *The circumstances relating to the actual training must be demonstrated.*

5. *Preservation of the scene is crucial. And the trail must have not become stale.*

6. *The dog handler must not try to explore the inner workings of the criminal's mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behavior of the dog and give an expert opinion as to the interferences which might properly be drawn from a particular action by the dog.*

Counsel for the accused prayed that this Honorable should not rely on Pw4's testimony as he was not the one who had trained the sniffer dog. In the instant case, Pw4 testified that he has been in the Canine unit for 10 years and he has a certificate in dog handling and care which was acquired from the Police Training School in Nsambya in 2010. Pw4 further testified that he did not personally train tiger (the sniffer dog) but he knew who had trained it as Sergeant Muhwezi. He further testified that Tiger was trained to track criminals and in the course of its work it used to track the strongest scent. He further testified that a sniffer dog cannot track the wrong person who led one to the wrong place for as long as it realizes the scent.

In the instant case, Pw4 testified that Tiger tracked the scent of the trousers that had the deceased's fresh blood to Muhebwa's kitchen about 1 km from the scene of the crime to Sofia Trading Center.

The prosecution tried to corroborate this evidence by relying on A2's Police statement marked **PE5 which was signed by him upon being read back to him on the 26th January 2015.** A2 admitted that the trousers that had the deceased's fresh blood stains were his. However, it should be noted that the evidence of the trousers tracked by the sniffer dog was not tendered in evidence and this broke the chain of the prosecution evidence. According to the case of **Engonu Cornelius**

versus Uganda Court of Appeal Criminal Appeal No. 518 of 2015 exhibits nit
tendered in court cannot be relied upon to convict the accused even if they are
described by the prosecution witnesses. The Court stated at page 10 as follows: -

5 **“Those items not exhibited were not evidence and not only the
assessors but the court should not have had regard to the same”**

I find this evidence against A2 not compelling and as such I find that A2 was not
placed at the scene of the crime. In the final result I find that the Prosecution has
failed to profits case beyond reasonable doubt. I am not in agreement with the
assessors because the circumstantial evidence produce by the prosecution was too
10 remote to connect the accused to the crime of murder. The items recovered with
the aid of the sniffer dog were not tendered in evidence. The accused persons were
not placed at the scene of crime in the murder of Mushaija Joshua and as such I do
not find them guilty and I acquit them of the offence of murder contrary to
Sections 188 and 189 of the Penal Code Act.

15 Dated at High Court holden at Mbarara this 17th day of December, 2020.

Immaculate Busingye Byaruhanga

Judge.

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