

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

HOLDEN AT KYANGWALI

CRIMINAL CASE NO. 0244 OF 2023

UGANDA PROSECUTOR

VERSUS

1. WAMANI DENIS

2. KUSEMERERWA MILDRED ACCUSED

Before: Hon. Justice Byaruhanga Jesse Rugyema

Judgment

- [1] The 2 Accused persons; **Wamani Denis** (A1) and **Kusemererwa Mildred** (A2) are indicted of Murder contrary to **Ss 188 and 189 PCA**. It is alleged that on the 29th day of June, 2023 at Kiswaza village, Kikuube District, with malice aforethought, the 2 Accused persons caused the death of **Kesafari Brian**. The 2 Accused persons pleaded not guilty to the offence.
- [2] The prosecution case is that during the night of 29th June, 2023, **Komuhindo Rose** (Pw1) and **Bigabwenkya Lawrence** (Pw2) who are neighbours to the 2 Accused persons. The 2 Accused persons are husband and wife. **Pw1** and **Pw2** heard the deceased **Kesafari Brian** screaming "Wamani Wamani don't kill me" etc: The screaming took long.

- [3] Pw2 in particular heard objects hitting the walls which signified to him that **Wamani** (A1) and deceased were fighting. He then heard A1's wife, **Kusemererwa** (A2) yell and caution them i.e. A1 and the deceased who were fighting, not to break her things in the bar.
- [4] On the morning of the following day, the body of the deceased was found dumped and lying at the Trading Centre. The deceased was identified as a one **Gideon's worker** who used to graze his goats.
- [5] The above information was relayed to Police which eventually arrested both the Accused persons and charged them with the instant offence. The postmortem conducted on the body of the deceased established the cause of death as being due to spinal cord injury/fracture caused by a blunt object. The body sustained deep fractures of the neck bones.
- [6] In exercise of his rights of defence, the 2 Accused persons opted to keep guilt in their defence.
- [7] The prosecution was conducted by **Ms. Becky Seera** of the office of the Director of Public Prosecution while the defence was led by **Ms. Dorothy Mushabe** on state brief.
- [8] As in all criminal cases, it is the duty of the prosecution to prove each and every ingredient of the offence beyond reasonable doubt, **Woolmington Vs. DPP [1935] A.C. 462** and **Richard Oketcho Vs. Uganda S.C.C.A. No. 26/1975**. It is also the position of the law that a conviction of an accused can only be secured upon the strength of the prosecution case and not on the

weakness of the defence, **R. Vs. Israil Epuku s/o Achietu (1934)**
1 EACA 166 at 168.

[9] In a case of murder, the ingredients of the offence the prosecution is required to prove beyond reasonable doubt are:

1. *Death of a human being named in the indictment.*
2. *That the death was unlawfully caused.*
3. *That the death was caused with malice aforethought.*
4. *That the Accused person directly or indirectly participated in causing the death of the deceased.*

(a) Death of a human being

[10] In the instant case, there is no dispute that the deceased **Kesafari Brian** is dead. The postmortem report admitted in evidence in the preliminary hearing under **S.66 TIA** confirmed the death of the deceased and cause of death as due to "limited neurological supply to the respiratory muscles as well as inner to the heart. A blunt object was used to inflict deep fractures to the neck bones/spinal cord.

[11] The prosecution witness **Bigabwenkya Lawrence** (Pw2) rushed to the scene where the body of the deceased was lying and also confirmed his death.

[12] The totality of the above confirm that indeed the deceased **Kesafari Brian** died as alleged. In the premises, I find and hold that the prosecution has proved the first ingredient of the offence beyond reasonable doubt.

(b) That death was unlawfully caused

- [13] It is now settled law that all homicides (an act of a person killing a human being) are presumed to be unlawfully caused unless caused by accident or an act of God or in defence of a person or property or are authorized by the law, see **R. Vs. Gusambuzi Wesonga (1948) 15 EACA 65**.
- [14] In the present case, as per the postmortem report (P.Exh.1), the body of the deceased was found to have deep fractures of the neck caused by a blunt object. **Bigabwenkya Lawrence** (Pw2), a neighbour to the Accused heard **A1** fighting with the deceased thus ruling out natural causes as the cause of the death of the deceased.
- [15] In the premises, without further elaboration and in view of the postmortem report (P.Exh.1), I find and hold that the deceased was killed, It is a homicide case, there is no suggestion of a natural cause of death, an exception of homicide. I find that the prosecution has proved the second ingredient of the offence to the required standard.

(c) Whether the death was caused with malice aforethought

- [16] Malice aforethought is defined under **S.191 PCA** as an intention to cause death of any person or knowledge that some act or omission causing death will probably cause death of a person, whether that person is the one killed or not. 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 (for example whether repeatedly or not)*
- (d) *The conduct of the assailant before, during and after the offence*

See: R.V. Tubere s/o Ochen [1954] EACA 63

[17] In the present case, no murder weapon was recovered and nobody witnessed the murder of the deceased. The postmortem report (P.Exh.1) however is to the effect that a blunt object was used to inflict the fatal blows to the deceased. The deceased's body had a deep fracture on the neck/spinal cord. The neck/spinal cord is one of the vulnerable parts of a human body. It supports the body, the head part and the respiratory muscles of the body. The conclusion of this Court is that whoever inflicted the fatal blow intended the deceased to die or had knowledge that the act will probably cause death of a person.

[18] In the premise, I find that the prosecution has proved the third ingredient of malice aforethought beyond reasonable doubt.

(d) Whether the Accused persons directly or indirectly participated in the murder of the deceased

[19] This is the most important ingredient of the offence in the circumstances of this case where there is no eye witness to the murder. The available evidence is of 2 neighbours to the Accused, **Komuhimbo Rose** (Pw1) and **Bigabwenkya Lawrence** (Pw2). On the night of the commission of the offence, both witnesses heard the deceased scream; *"Wamani Wamani don't kill me"*. Pw3 in particular heard the Accused scream *"Wamani don't kill me. I have done nothing. If there is anything that has gone wrong take me to*

the Chairman and we settle the issue". Pw2 heard objects hitting the walls which signified to him that the Accused and the deceased were fighting.

- [20] In law, the above referred to "screams" of the deceased in anticipation his death made towards his death or immediately before his death amounted to "dying declarations". **S.30 of the Evidence Act** governs the admission of dying declaration made by a person who is dead as to the cause of death. As guided by the authority of **Tindigwihura Vs. Uganda Criminal Appeal No. 9 of 1987**, **Oyee George Vs. Uganda Criminal Appeal No 159 of 2003 (C.A)** which quoted **Jasinga Akum Vs. R [1954] 21 at p.334**, repetition to different witnesses is not a guarantee of the accuracy of a dying declaration as it may amount to mere consistency on the part of the deceased. In practice such evidence requires corroboration though a Court may convict on the uncorroborated evidence of a dying declaration, if circumstances exist that show that the deceased was not mistaken, see **Mibulo Edward Vs. Uganda S.C.Crim. Appeal No. 17 of 1995**. This Court accordingly warns itself of the dangers of acting on the sole evidence of the dying declarations of the deceased lest the witnesses may be mistaken.
- [21] In the instant case, it is regrettable that the investigating officer in this case did not testify to confirm that indeed the 2 prosecution witnesses who heard the Accused scream the name of A1 as the assailant relayed what they heard to police. I still however, find that the failure to have the investigating officer testify is not fatal to the prosecution case. The 2 Accused persons

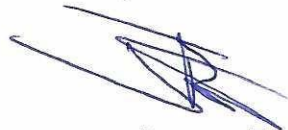
did not give their version of the story to rebut what the 2 witnesses told Court as regards what they heard since they both opted to keep quiet as their form of defence. It is however noted that it is Pw2's report to police that led to their arrest of the Accused persons.

- [22] In this case, whereas **Pw1** did not know the deceased and **A1**, she heard the deceased name **A1**, her neighbor as the assailant. As regards **Pw2**, he knew both **A1** as a neighbor and the deceased as a worker of a one **Gideon**. It cannot surely be said that the 2 prosecution witnesses were mistaken or that they harboured anything sinister against **A1**. Pw1 heard properly the name of **A1** being mentioned by the deceased as the assailant whereas **Pw2** also heard the name of **A1** being mentioned by the deceased as the assailant and knew both the deceased and the assailant who were fighting on the eve of the deceased's death.
- [23] In the premises, I find the evidence of the 2 prosecution witnesses whose evidence the defence did not offer any challenge credible and as a result, I conclude that there was no mistake as regards the dying declaration and this Court is entitled to find **A1** guilty of the offence on the sole basis of the deceased's dying declaration.
- [24] As regards **A2**, whereas **S.20 PCA** provides that when 2 or more persons forming a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed, under the doctrine of common intention, both are liable for a conviction. In this case, there is no evidence that **A2** formed a common intention to

commit murder or that she had power to disassociate herself from the acts of her husband, **A1** and she did not. She appear to had also been helpless as regards what was taking place in the circumstances that she had to even caution the deceased and her husband, **A1** who were fighting from breaking her items.

- [25] In the circumstances, I partially agree with the unanimous opinion of the honorable Assessors that as regards **A2**, there is no evidence incriminating her but the available dying declaration implicates **A1** whom I have found guilty and therefore convict him accordingly of the offence of murder.

Dated at Hoima this 23rd day of **January, 2024**.



Byaruganga Jesse Ruggyema
Judge