THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HELD AT KIBOGA

CRIMINAL SESSION CASE 0233 0F 2022

[Arising from Kiboga CRB 660/2019]

UGANDA **PROSECUTOR**

VERSUS

MANIRAGUHA THEOZENE **ACCUSED**

BEFORE HON JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused was indicted for Murder contrary to sections 188 and 189 of the Penal Code Act. It is alleged by the Prosecution that on 25th November 2019 at Mpundugulu Village, Kyabanja LC1, Kisaala sub-County in Kyankwanzi District, the accused with malice aforethought unlawfully caused the death of Nyiranshuuti Cotilda.

Representation.

Mr. Muhereza Richard prosecuted the case while Mr. Kagarama Alex appeared for the Accused on state brief.

Prosecution evidence.

Musisi Viatoli (PW3) was the Local Council chairperson of Kyabanja village where the accused and the deceased stayed. They had cohabited for six months before the demise of Nyiranshuuti. On 25th November 2019 at 4.00am, a one NSENGA MOSES went to the home of PW3 to tell him that the accused had called him stating "**that Nyiranshuuti had *become a problem"*** and he wanted to be helped.

Nsenga told PW3 that he had gone over and found Nyiranshuti dead with the body lying on the road to their home.PW3 called neighbours and they went to where the body was. They confirmed that she was dead.PW3 saw struggle marks around where the body was, saw freshly broken sticks and the naked body with multiple assault marks had been covered with a piece of cloth.

PW3 arrested the accused and locked him in his kitchen for fear that he would be lynched. Police arrived at 11.30 am with a Surgeon who examined the body. Permission to bury was granted.PW3 told court that the accused and the deceased had been drinking together during the day.

Ntegelekye Annet (PW4) had a home near Turikumwe's bar on the same village. It was her evidence that she learnt of the death of Nyiranshuuti in the morning from PW3.The gist of PW4's evidence was that she had last seen the deceased alive at 9.00pm on 24th November 2019 when she was leaving the bar with the accused. The two were making merry and not quarrelling. PW4 had never heard of any misunderstandings between them.

Prosecution failed to procure the presence of Nsenga Moses as a witness and closed their evidence without him. The accused opted to remain silent.

Submissions.

It was argued for the Prosecution that the death was proved through the evidence of PW3 and PW4, which was corroborated by the Post mortem report on the body of the deceased. The body had multiple haematoma on the limbs, buttocks and occipital area attributed to use of blunt objects on the victim. The cause of death was stated to be increased intracranial pressure following severe assault.

It was argued that the nature of the death pointed to its being unlawful and actuated by malice aforethought given that sensitive parts of the body were attacked by the assailant. Counsel alluded to the evidence of a struggle having taken place and the broken pieces of sticks seen near the body to prove the intention to cause death by the assailant.

Submitting on the alleged participation of the accused, it was argued that circumstantial evidence pointed to his guilt and introduced no other person to the scene of crime. The accused was the last person to be seen with the deceased, and had told Nsenga that the deceased had *"failed him"*. PW3 and other residents saw the naked body with multiple wounds on the roadside.

Counsel for the accused conceded that proof of death and its unlawful nature were proved. It was also not disputed that the death was actuated by malice aforethought. It was however submitted that the evidence of PW3 relating to what he was allegedly told by Nsenga was hearsay and inadmissible since it was not direct evidence. Nsenga should have been called as a witness to testify about what the accused told him.

It was argued that PW4 saw the accused and the deceased happily going home. The seven-hour difference from when PW4 saw them to when the body was seen by Nsenga was not explained. It was further pointed out that there were other possible theories that could explain the death including the evidence of an uncle to the accused who refused to open when the death was announced.

Counsel also pointed out that the absence of the evidence of the scene of crime officer weakened the circumstantial evidence relied on by the Prosecution. I was urged to acquit the accused.

The Law and Analysis of evidence.

Prosecution carries the burden to establish the guilt of the accused and the burden does not shift save in a few statutory exceptions. Even where the accused exercises his right to remain silent as in the instant case, the duty of the Prosecution to prove his guilt remains since he is presumed to be innocent under the Law.

It is also trite law that an accused person is convicted on the strength of the prosecution case and not on the weakness of the defence.

Epuku s/o Achouseu V R [1934] EACA 166; Akol Patrick &Others V Uganda. C A Criminal Appeal No.060 of 2002.

The standard of proof is to the threshold of proof beyond reasonable doubt. The standard does not mean proof beyond a shadow of doubt. It 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.

Miller V Minister of Pensions [1947]2ALL ER 372.

The ingredients the Prosecution is required to prove in a charge of murder are;-

1. That there was death of a human being
2. That the death was unlawful
3. That the death was caused with malice aforethought; and
4. That the accused participated directly or indirectly in causing the death.

The defense Counsel did not contest the fact that death occurred unlawfully and with malice aforethought in this case. The law however requires the trial Court to canvass those ingredients so as to make its own specific findings.

Death of Nyiranshuuti Cotilda.

At the commencement of the trial Prosecution and defense counsel agreed to admit in evidence the Postmortem report resulting from the examination of the body of the deceased. The report revealed that Cotilda had multiple haematoma attributed to use of a blunt object and she died of intracranial pressure.

All the Prosecution witnesses confirmed the death. This ingredient of the offence was proved beyond reasonable doubt by the Prosecution.

See: Abasi Kanyike V Uganda SCCA No.23/1999

Death being unlawful

The law presumes every homicide to be unlawful save where death is a result of an accident or is authorized by law. The postmortem report indicates that the deceased died of the intracranial pressure secondary to the assault with a blunt object. There was no suggestion that the death was as a result of an accident. I therefore find it safe to presume that the death was unlawful. This ingredient of the offence was proved beyond reasonable doubt by the prosecution.

See. Gusambizi s/o Wesonga V R (1948) 15 EACA 65

Malice aforethought

Malice aforethought is a state of the mind, which can rarely be proved by direct evidence. Courts deduce or make inference of the intention to cause death from circumstances surrounding the killing. Factors like the nature of the weapon used, the parts of the body attacked, the frequency of the attacks and the conduct of the accused before, during and after the attack are considered.

Courts are required to determine if death was a natural consequence of the act or series of acts that caused the death and if the accused saw it as a natural consequence of the act in making the inference of malice aforethought.

The deceased was assaulted on sensitive parts of the body and the resultant internal bleeding caused her death. The multiple violence marks on the body signify consistent attacks to cause maximum injury with an intention to cause death. I discount the alleged act of seeking help from Nsenga as one mitigating the exhibited malice aforethought.

It was help sought after the event and indeed Nsenga found Nyiranshuuti dead. This ingredient of the offense was proved beyond reasonable doubt.

See: Tubere s/o Ochen v R (1945)12 EACA 63.

Participation.

It was correctly argued by the Prosecution that no one saw the accused committing the offence he is charged with and hence the case is purely based on circumstantial evidence. In **Amisi Dhatemwa alias Waibi V Uganda.SC Criminal Appeal No.023 of 1977,** Ssekandi J (as he then was) stated that;

"it is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving facts in issue quite accurately; it is no derogation of evidence to say it is circumstantial."

It is however, settled law that circumstantial evidence must always be narrowly examined because evidence of this kind may be fabricated to cast suspicion on another. For the court to base a conviction on circumstantial evidence therefore, it must irresistibly point to the guilt of

the accused and capable of no other co-existing circumstances, which would weaken or destroy the inference.

Simon Musoke V R (1958) EA 715; Lule Festo V Uganda.CA Criminal Appeal No.214 of 2009.

The accused was the last person seen with the deceased as they walked from a bar by PW4.This evidence was not rebutted by the defense. The ***"last seen doctrine"*** which enjoys global application creates a rebuttable presumption to the effect that the person last seen with a deceased person bears full responsibility for his or her death.

Jagenda John V Uganda.CA Criminal Appeal No.001/2011; Uganda v Nakanwagi Fauza &Others. HC Criminal Session Case No.243/2015.

PW3 and PW4 told court that the accused failed to explain to the village mates what had befallen the deceased with whom they had last been seen together. The deceased had multiple marks of violence on her body. The opportunity to explain what had befallen the couple on the way home was not exploited by the accused. The silence was not consistent with innocence in whatever transpired.

There was also the undisputed evidence of a struggle and broken sticks where the naked body was found by PW3.The sketch plan which was admitted in evidence by consent of Counsel under Section 66 of the Trial on Indictment Act was also quiet telling.

The sketch plan shows the spot where the struggle took place, the spot at which the sticks used to assault the deceased were broken from, the spot at which at which the deceased abandoned her sandals and where she was undressed. The evidence of the sketch plan mitigated what Counsel for the accused referred to as the failure to get the evidence of a scene of crime officer.

The medical examination report on the accused carried out on 27th November 2019 also shows that he had wounds on the neck and the cheek. The unexplained wounds akin to what were found on the body of the deceased irresistibly place the two in the circumstances that caused the latter's death. This strengthens the circumstantial evidence pointing to the guilt of the accused.

Counsel for the accused rubbished the evidence of PW3 relating to what Nsenga told him as what he heard from the accused as hearsay and inadmissible. **Section 59 (b) of the Evidence Act** provides;-

"Oral evidence must be direct if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it."

PW3 heard about the death of Nyiranshuuti from Nsenga who did not appear in court as a witness. Nsenga referred to the accused as having stated that the ***"deceased had failed him"*** and only saw the body when he was walking to their home. The meaning of the statement was not explained to court by Counsel for the accused.

Nsenga only reported the death after he had seen the body, which PW3 also saw before arresting the accused. Prosecution did not argue that the accused confessed to the commission of the offense to Nsenga so as to bring the hearsay argument in context. The argument was misplaced in the view of the court.

The argument about the uncle to the accused refusing to open his door when the death was announced is without other evidence far-fetched to be a theory to co-exist with the guilt of the accused given the last seen doctrine enumerated here in above.

All considered it is the finding of the court that the circumstantial evidence led by the Prosecution irresistibly points to the guilt of the accused. The evidence admits no other co-existing circumstances to

weaken that inference. For the reasons enumerated above, I respectfully depart from the opinion of the two assessors who advised me to acquit the accused.

I find the accused guilty of the murder of Nyiranshuuti Cotilda contrary to sections 188 and 189 of the Penal Code Act. I accordingly convict him.

Moses Kazibwe Kawumi

Judge

4th July 2023