THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0046 OF 2006

UGANDA …… PROSECUTOR

VERSUS

MASIKA EDDIE ……. ACCUSED

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

Masika Eddie, herein referred to as the accused was indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence as set out in the indictment were that the accused murdered Mukirane Isaya on the 14th day of May 2003 at Bupompoli village, Harugali Sub - County, Bundibugyo District. The indictment was read out and explained to the accused who denied the offence after stating that she had understood the charge. The Court therefore entered the plea of "Not Guilty"; and as a consequence of which this trial took place.

Murder is an offence comprising four ingredients. The prosecution is under duty to prove each of these ingredients, beyond reasonable doubt, before an accused can be found guilty, and convicted. These ingredients are, namely:-

(i) The death of a human being.

(ii) The said death having been unlawfully caused.

(iii) The death having been caused with malice aforethought.

(iv) The participation of the accused in causing the said death.

In the instant case, the prosecution called three witnesses in a bid to discharge the aforesaid burden of proof. For proof that Mukirane Isaya is dead, the prosecution relied on the testimonies of: –

(i) Estheri Nzyabaki – PW1,
(ii) James Bwambale – PW2, and
(iii) Dr. Twinomujuni Cyprian – PW3.

PW1 a neighbour of the accused, testified that on the 14th day of May 2003, at around 10.00 p.m., she was at her home at Bupompoli village, Harugali Sub County, Bundibugyo District, when the accused summoned her to go over to the accused's home fast, as somebody had died in her (accused's) presence. PW1 continued that she rushed to the home of the accused as requested, and found Mukirane Isaya the husband of the accused dead, and his body lying in his sitting room. This testimony was corroborated by PW2, a neighbour and cousin of the deceased, who responded to the alarm.

Further corroboration came from PW3 who stepped in for one Dr. Sessanga, who had carried out the post mortem examination on a body identified to him as that of Mukirane Isaya. The evidence adduced by the three witnesses above, taken together, establishes conclusively that in fact, Mukirane Isaya is dead; and his dead body was seen by the witnesses, and as well other persons named by them; hence in accordance with the authority of ***Kimweri vs. Republic [1968] E.A. 452***; which held that proof of death may, amongst other means, be by someone who saw the body of the dead person. Hence, the burden to prove the ingredient that Mukirane Isaya is dead, has been positively discharged.

On the ingredient of causation of the death of Mukirane Isaya, the law is that any incident of homicide, unless excused by law, is presumed unlawful. It is however excusable when it is shown either to have been accidental, or was done in defence of person or property; see the cases of ***R. vs. Gusambizi s/o Wesonga (1948) 15 E.A.C.A. 65; Uganda vs. Bosco Okello alias Anyanya, H.C. Crim. Sess. Case No. 143 of 1991 - [1992 - 1993]; Uganda vs. Francis Gayira & Anor. H.C. Crim. Sess. Case No. 470 of 1995 – [1994 - 1995] H.C.B. 16.*** An accused may rebut the presumption of unlawful homicide by showing that the killing falls under any of the excusable circumstances. The standard of proof for such rebuttal is on the balance of probabilities; see the case of ***Festo Shirabu s/o Musungu vs. R (22) E.A.C.A. 454.***

With regard to the death of Mukirane Isaya, causation can be derived from the evidence of the prosecution witnesses, who all testified that the deceased had a stab wound on the left chest. The evidence of PW3 – the doctor, was elaborate that the cause of death was from uncontrolled bleeding arising from the stab wound that had been inflicted onto the second *intercostals space mid clavicular* line, (fractured left side 3rd rib). There is no evidence before Court that the stab wound inflicted on the deceased was done either in self defence or defence of property, or upon provocation, or accidentally; or in execution of any Court sentence of death at all.

Further to this, even if Court believes the accused, the nature of the injury on the deceased still points to an unlawful killing; and in the circumstance then, the presumption that Mukundane Isaya was unlawfully killed stands unrebutted. The defence honourably conceded - as it had done so with regard to the ingredient of fact of death - that in deed there was proof, on the evidence, of the unlawfulness of the cause of death.

Regarding the ingredient of malice aforethought, this is a mental element. Section 191 of the Penal Code Act defines malice aforethought as follows:

"191. Malice aforethought.
Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances-

(a) an intention to cause the death of any person, whether that person is the person killed or not, or

(b) knowledge that the act or omission 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."

Therefore, except where an assailant expressly declares the intention to cause the death of a person, the prosecution can only establish the existence of malice aforethought through evidence of the circumstances surrounding the case. An inference as to the unlawful causation of death can in such circumstances be derived from such factors as were laid out in the case of ***R vs Tubere s/o Ochen (1945) 12 E.A.C.A. 63****;* and which principle has been restated in a host of other cases,

such as ***Uganda vs. Fabian Senzah [1975] H.C.B. 136; Lutwama & Others vs. Uganda, S.C. Crim. Appeal No. 38 of 1989.*** These factors are:-

(i) Whether the weapon used, and which caused the death, was lethal; or not.

(ii) Whether the part of the body of the victim, targeted by the assailant was vulnerable; or not.

(iii) Whether the injury was inflicted in a manner that manifests the intention to cause grave damage or injury (as for example where the injury was inflicted repeatedly); or not.

(iii) Whether the conduct of the accused before, during, and after the attack points to guilt; or not.

The evidence on record attest to the fact that it was a knife used to inflict the fatal injury which was close to the heart, a vital organ, and a very vulnerable part of the body; and thus caused uncontrolled bleeding. On the authority of ***Uganda vs Turwomwe [1978] H.C.B. 16,*** malice aforethought must be inferred in the instant case since a dangerous weapon was used, and applied in the manner brought out by the evidence. This ingredient, learned counsel for the accused also agreed, was as well proved beyond reasonable doubt by the prosecution.

It is the ingredient on participation of the accused that the defence contested seriously and emphatically during the trial. PW1 testified that the accused was in a panic when she called the accused to witness the death of her husband; and that she threatened to kill herself for fear that she could be blamed for that death. She also stated that the couple had a troubled marriage, and were notorious for frequent quarrels and fights; and further that the accused had much earlier, confessed to having inflicted, with a panga, the head-wound her husband had in 2002. She further testified that the accused had on several occasions expressed to her that she would one day kill her husband.

PW2 testified that when he asked the accused to explain how the accused had died, the accused just kept mum; he then arrested the accused because she and the deceased had been the only persons in that home. PW2 also stated that the knife found bloodstained near the dead body was the type locally made and used for peeling matooke; and found in virtually every home. The medical report, interpreted and explained by PW3, pointed out that he deceased had clean feet,

with no evidence of any soil around; suggesting therefore that the deceased had not travelled that night.

Against all this is the unsworn testimony of the accused, which was that on that fateful night, she had woken up from sleep to find voices coming from outside the house. Her husband was exchanging words with someone whose voice she could not identify. The other person was saying:- *"Haven't you heard what I told you?"* And to this her husband's reply was: *"What have I done to you?"*

Then she heard her husband cry out thus: – *"I have died!"*

The accused further stated that she got up, went out and found her husband lying on the veranda; and she then called people who came and witnessed this, but instead they arrested her leading to her standing trial. From evidence on record, there is no eye witness to the incident that led to this fatal consequence. The evidence adduced by the prosecution witnesses in this regard was all circumstantial. Where, as is the case here, the accused denies having killed the deceased, it is not incumbent on her to explain how the deceased died; the onus remains on the prosecution to prove its case against the accused; see ***Kazibwe Kassim vs. Uganda, S.C. Crim. Appeal No. 1 of 2003 – [2005] 1 ULSR 1.***

And because the evidence regarding the identity of the assailant of the deceased Mukundane Isaya, is wholly circumstantial, before conviction based on it can be justified, the Court must establish that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of guilt; and further, that there are no co-existing circumstances that would negative the inference of guilt. There is an almost endless number of authorities affirming this legal position; some of which are: the leading case of ***Simon Musoke vs. R. [1975] E.A. 715;*** *and* ***Sharma & Kumar vs. Uganda; S.C. Crim. Appeal No. 44 of 2000.***

In ***Byaruhanga Fodori vs. Uganda, S.C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12*** at p. 14, the Supreme Court of Uganda spelt out that:-

> *"It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are*

incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

The Court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See ***S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480****)."*

In addition to this, in the case of ***Tindigwihura Mbahe vs. Uganda S.C. Crim. Appeal No. 9 of 1987***, Court issued a warning that circumstantial evidence must be treated with caution, and narrowly examined, because evidence of this kind can easily be fabricated. Therefore, before drawing an inference of the accused's guilt from circumstantial evidence, there is compelling need to ensure that there are no other co-existing circumstances which would weaken or altogether destroy that inference**.**

The evidence on record is that the deceased was, upon the report of the accused, found dead in his house; and the accused was the only other person in the house that night. PW1 purported to assert that she knew that the knife believed to have been used in the unlawful killing belonged to the accused. In cross examination however, this assertion did not stand as she and PW2 conceded that the knife in issue, locally made, was indistinguishable from many other such knives which, in any case, were virtually found in every home.

The panicky conduct of the accused, and the reason she gave for such behaviour was not unreasonable in the circumstance of this case. In fact her arrest by PW2 that very night, and the subsequent indictment and trial, greatly vindicated her expressed fears. The history of their stormy marriage, including her reported threat to kill her husband one day, only pointed to the possibility of the accused being responsible for killing her husband. This was however not sufficient to place the case in the category where the death in issue can not be explained through any other hypotheses, except that of guilt of the accused.

The medical report which suggested that the deceased had not travelled that night was circumstantial evidence; and, without more, insufficient to pin the accused down as the killer of her husband. In any case there is some confusion whether the deceased died at the veranda of the house or inside. The post mortem report and the accused refer to the deceased lying at the veranda; whereas the other prosecution witnesses testify to having seen the body in the house that

fateful night. The corpse could have been interfered with and moved from wherever the deceased had fallen to another position.

The deceased's trousers were folded halfway. This could have been done after his death. Anything might have been done to the body of the deceased, including washing the feet. Finally on this, it is quite disturbing that at the place where the body of the accused was found by the prosecution witnesses, there was no drop of blood on the floor; yet there was blood stain on the shirt of the deceased, and on the knife lying by the body, and the nature of the injury could only have led to 'uncontrollable bleeding'.

If indeed the deceased had been struck and fallen in the sitting room or veranda of his house, could the bleeding that was manifested by the shirt and knife, not have left a mark on the floor? I find that it is not unreasonable to infer that the stabbing, by whoever, might not have taken place in the house, contrary to the suggestion by the prosecution. In the ***Kazibwe Kassim*** case (supra), the Supreme Court, after evaluating the evidence on record, held as follows:-

> *"In the instant case, like the case of* ***R v Israili – Epuku s/o Achietu (1934) E.A.C.A. 166,*** *we are of the opinion that the evidence did not reach the standard of proof requisite for cases based entirely on circumstantial evidence. We are unable to hold that the evidence contains any facts which, taken alone amounts to proof of guilt.*
>
> *The cumulative effect of the circumstances said to tell against the appellant is not such as to satisfy us that he must have been connected with the death of the deceased. Although there was suspicion, there was no prosecution evidence on record from which the Court could draw an inference that the appellant caused the death of the deceased to justify the verdict of manslaughter."*

I find the instant case, one such case where the prosecution has gone no further than creating some suspicion on the accused as being the killer of her husband. This however falls far short of satisfying the stringent test pre-requisite to a conviction of an accused in such circumstance. I therefore find it unsafe to convict the accused basing on the evidence on record. In any case the accused put up a reasonable hypothesis, and co-existing circumstance regarding how her husband might have met his death. There was no prosecution evidence to negative this hypothesis to enable Court reject the defence case.

In the premise then, I am left with no other alternative, but to resolve the doubts manifest in this case in favour of the accused. I am therefore in agreement with the gentleman assessor, but unable to agree with the lady assessor for the reasons laid out above. I find that the prosecution has failed to establish, beyond reasonable doubt, that the accused is guilty of the death of her husband, Mukirane Isaya, as alleged in the indictment. I am under duty to acquit and also discharge her as I hereby do. Unless being held for any lawful cause, she must be set free forthwith.

Chigamoy Owiny – Dollo
RESIDENT JUDGE, FORT PORTAL
26 – 09 – 2008

Ann Kabajungu, for the State.
Accused in court; counsel for the accused absent.
Irumba Atwoki – Clerk of Court.

Judgment delivered in open Court.

Chigamoy Owiny – Dollo
Judge.
26/09/2008