

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT IGANGA**  
**HIGH COURT CRIMINAL SESSION CASE NO 0447 OF 2010**

**UGANDA.....PROSECUTOR**

**VERSUS**

**TERWANE NICHOLAS KAWOGOLO MBAKULO.....ACCUSED**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**JUDGMENT**

The accused, Terwane Nicholas Kawogolo Mbakulo *alias* K, is indicted for murder c/s 188 & 189 of the Penal Code Act. It is alleged that the accused, between the 29<sup>th</sup> day of December 2009 and 30<sup>th</sup> December 2009 at Namulanda village Bukoma sub county in Iganga District, murdered Wawira Njoki *alias* Musoni.

The facts of the case as presented by the prosecution are that in September 2009 the accused and the deceased who were husband and wife respectively, went to Namulanda village, Bukoma sub county, Iganga district to stay with Bamuluka David. This was after the accused had been transferred from Kaseese to Kampala as Security Guard with Group 4 Security. On 28<sup>th</sup> December 2009, the accused went to Kabalagala in Kampala for medical check up of injuries previously sustained in a motor accident, leaving the deceased home. In the evening of 29<sup>th</sup> December 2009 the deceased left home with her young baby and proceeded to Namulanda trading centre. The accused while returning from Kabalagala found the deceased in the trading centre. The accused asked the deceased what she was doing in the trading centre at a late time and slapped her on the cheek as some people watched. The deceased took off fast in the direction of Musiita Road and the accused followed her. The deceased was found dead in Namulanda trading centre the next morning on 30<sup>th</sup> December 2009. The matter was reported to the area Local Council executive and police. The accused was arrested.

Upon arraignment, the accused pleaded not guilty to the charge. Thus, all the ingredients of the offence of murder are in issue. The prosecution bears the burden of proof of all ingredients of the said offence and it remains so throughout the trial. The duty is therefore on the prosecution to discharge the burden of proof. See **Woolmington V DPP [1935] AC 462**. The accused does not bear the burden of proving his innocence. He is presumed innocent until proved guilty, as stipulated in Article 28 of the Constitution.

The standard of proof required in criminal proceedings is that the prosecution must prove the guilt of the accused beyond reasonable doubt. At the conclusion of the trial, any doubt that remains is resolved in the accused person's favour. It is also trite law that the accused should only be convicted on the strength of the prosecution case and not on the weakness of the defence case. See **Sekitoleko V Uganda [1967] EA 531**. It was held in **Miller V Minister of Pensions [1947] ALL E R 462** that beyond reasonable doubt does not mean proof beyond a shadow of doubt or absolute certainty. If the evidence against a person is so strong as to leave only a remote possibility in his/her favour then the case is proved beyond reasonable doubt.

The ingredients of the offence of murder as defined under section 188 of the Penal Code Act are:-

- a) The fact of death, in this case, that Wawira Njoki alias Musoni is dead.
- b) The death was unlawful, in this case, that the death of the said Wawira Njoki alias Musoni, was unlawfully caused.
- c) That the death of the deceased was caused by malice aforethought, in this case, that it was intended that Wawira Njoki alias Musoni should die.
- d) That it was the accused who was responsible for the death of the deceased, in this case, that the accused, Terwane Nicholas Kawogolo Mbakulo, was responsible for the death of Wawira Njoki alias Musoni.

The prosecution called the evidence of PW1 Ndokero Moses, PW2 Mpoya Yahaya, PW3 Kasirye Francis, and PW4 Detective Corporal Ouma Justine.

On his part the accused made a sworn testimony and raised the defence of alibi and total denial.

#### **Whether the deceased is dead:**

According to the post mortem report, Exhibit **P1**, which was admitted as agreed evidence, Dr. Lubega of Iganga Hospital examined the body of Wawira Njoki, an adult female, on 30<sup>th</sup> December 2009. The body of the deceased was identified to him by the LC I of Namulanda as that of Wawira Njoki. Externally, the body had bruises on the left hemuturax and around the neck with a broken rib on the left hand side. The body also had bruises and huge abrasions on the abdomen. The doctor recorded the cause of death and reason for the same as third degree trauma because of the visible bruises and broken rib resulting into probable internal visceral bleeding. The doctor's general observations were that the circumstances point to a probable severe assault and death not at the site of postmortem, but that the body was likely carried to site after death.

It was the evidence of Ndokero Charles PW1, Mpoya Yahaya PW2 and Kasirye Francis PW3 that Wawira Njoki alias Musoni is dead. It was Ndokero Charles a shopkeeper and peasant in Namulanda who after answering an alarm raised by the Accused, saw a dead body he recognized as that of Wawira Njoki alias Musoni, the accused person's wife, whom he had seen alive earlier in the day when she bought sugar from his shop, but who later left in a hurry with her husband.

The deceased's dead body was also recognized by PW2 Mpoya Yahaya who testified that he had also earlier seen the deceased alive when she bought "mandazi" from his shop but had to leave in a hurry with her husband after the latter assaulted her. PW3 Kasirye Francis the Chairman LC II of also testified that he saw the deceased's dead body and identified it as that of Wawira Njoki the Accused person's wife.

The defence did not contest the fact of death of the deceased.

In the circumstances, in agreement with the Assessors, I am satisfied that the fact of death of the deceased, Wawira Njoki Musoni, has been proved by the prosecution beyond reasonable doubt.

**Whether the death of the deceased was unlawfully caused:**

Death is always presumed to be unlawful unless caused by accident, or in defense of property or person, or is excusable, justifiable or authorized by law. See **Gusambizi s/o Wesonga V U [1948] 15 EACA 65**. This presumption is rebuttable. It is the duty of the accused to rebut it by showing that the killing was either accidental or that it was excusable. The standard of proof required of the accused to discharge of that duty is very low. It is only on the balance of probabilities. See **Festo Shirabu s/o Musungu V R [1955] 22 EACA 454**.

In this case, it is the postmortem report exhibit **P1** that point to the circumstances of the violent death of the deceased. Exhibit **P1** indicates that the deceased died as a result of visible bruises and broken fourth rib resulting into probable internal visceral bleeding. The deceased's body had bruises on the left hemuturax and around the neck with a broken rib on the left hand side. The body also had bruises and huge abrasions on the abdomen. The doctor's general observations were that the circumstances point to a probable severe assault and death.

The defense did not contest the fact that the deceased's death was unlawfully caused.

The evidence adduced by the prosecution makes it clear that the deceased was assaulted many times. These acts could not certainly be accidental or excusable or justifiable, let alone be authorized by law.

It is my conclusion, in agreement with the Assessors, that the death of the deceased was unlawful.

**Whether the death of the deceased was caused with malice aforethought:**

Section 191 of the Penal Code Act defines malice aforethought is an intention to cause the death of any person, whether such person is the person actually killed, or knowledge that the act or omission causing death will probably cause death, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused. In **R V Tubere s/o Ochen [1945] 12 EACA 63** it was held that malice aforethought, being a state of

mind, is difficult to prove by direct evidence, but it can be inferred from surrounding circumstances such as:-

- 1) The nature of the weapon used;
- 2) The manner of use of the said weapon;
- 3) The part of the body affected;
- 4) The nature and extent of the injuries suffered;
- 5) The conduct of the assailants before, during and after the killing of the deceased.

In this case, according to the post mortem report, exhibit **P1**, which was admitted as agreed evidence, the deceased's body had bruises on the left hemuturax and around the neck with a broken rib on the left handside. The body also had bruises and huge abrasions on the abdomen. The doctor recorded the cause of death and reason for the same as third degree trauma because of the visible bruises and broken rib resulting into probable internal visceral bleeding. It is evident that the deceased had been severely assaulted. The force of the assault caused internal visceral bleeding. The abdomen is a very sensitive part of the human body. It has other vital organs of the body like liver, lungs and intestines. The rib cage was also a subject of the assault since there was a broken rib, and so was the neck.

The defense did not contest the fact that the killing of the deceased was with malice afore thought.

The evidence adduced by the prosecution leaves no doubt that the person who inflicted the injuries on the deceased intended that she should die or knew or ought to have known that her death was an inevitable consequence in the circumstances. After the gruesome killing the assailant(s) proceeded to move the body from the scene of crime to the place where it was eventually found by the residents.

In the premises, in agreement with the Assessors, I find that the prosecution has proved beyond reasonable doubt that the death of the deceased was with malice aforethought or intentional.

**Whether the accused participated in the killing of the deceased:**

This is the main issue for this court to determine as the defense contested the accused person's participation in the killing of the deceased.

For the prosecution, it was the evidence of PW1 Charles Ndokero that on 29<sup>th</sup> December 2009 he saw the deceased walking away in a hurry followed by the accused. It was the evidence of PW2 Mpoya Yahaya that the Accused slapped the deceased when the two were in his shop immediately after which the deceased left very fast and the accused followed her. She had a child with her and was wearing canvas shoes. The assault took place in the shop of PW2 Mpoya Yahaya. There was a lantern light in the shop of PW2. PW1 testified that he heard an alarm very

early the following day at around 5 am, and on answering the alarm he found the accused at the trading centre carrying his child. His wife was dead beside him. PW3 Kasirye Francis, LC 2 Chairman and Parish Councillor testified that the accused had recently settled in Namulanda with his wife around October or November 2009 and they were staying with Bamuluka David, a co accused who has since passed away. PW3 testified that upon receiving the report about the deceased's death from PW2 he went to the scene where he found the deceased's dead body. It was dressed in a blouse and a skirt.

PW4 testified that when he received a report of the murder from PW2 the LC 1 Chairman he went to the scene with DIP Charles Nyongesa. The body had bruises around the neck, stomach and other parts, the type sustained after a fight or a struggle. The dead body had wet clothes soiled with mud but the deceased's child who was beside the body was dressed in dry clothes. The body was also soiled and barefooted. It had rained the night before. When Bamuluka took PW4 to his home where the accused and his wife used to sleep, in the sitting room, PW4 saw everything was scattered. He recovered grey canvas shoes covered with wet soil. From Bamuluka's room PW4 recovered dark blue trousers covered with wet soil, a white checked shirt also with wet soil, and black gum boots with very wet soil. PW4 also recovered a black shirt covered with wet soil at the entrance of the sitting room where the accused and his wife used to sleep. The recovered items were listed in an exhibit list which was identified by PW4 and admitted in evidence as exhibit **P3**. PW4 saw bicycle tyre marks at the doorway which they followed. The tyre marks led to the trading centre of Namulanda. The tyre marks stopped about 200 metres away, before reaching the trading centre, at a cassava garden that was not weeded. The PW4 saw footmarks of men's ordinary shoes of about two people going inside the cassava garden. The other footmarks were of gum boots. On placing the gum boots he had recovered from the house in the marks, they fitted. The bicycle tyre marks led them to where the body of the deceased lay. PW4 noticed that the soil on the gum boots was similar to one in the cassava garden. The boots also had sandy soil similar to the soil at Bamuluka's home. PW4 got the soil samples from the foot mark and the gum boot itself. PW4 saw an anthill where it looked like they had placed a person there. From that place there were the same marks of gum boots and ordinary men's shoes again leading back to the road. PW2 led PW4 to the accused who when asked what had happened, explained to PW1 that his wife the deceased had disappeared with the baby the previous evening and that he had spent the whole of that night looking for her, only to find her dead at Namulanda trading centre the following day at 5 am. PW4 then arrested the accused.

On his part, the accused testified that on the day in question between 5 pm of 29<sup>th</sup> and 7 am of 30<sup>th</sup> December 2009 he came from Kampala. From Kabalagala he went to Bamuluka's home in Namulanda village, Bukova, Kiyunga district. He reached Namulanda at 8.45 pm. He met a group of people who included the deceased, his wife, in Namulanda trading centre. Bamuluka and his wife then disappeared. He slept in the centre because it was raining. Towards morning, as he walked towards Namulanda trading centre, at around 6. 45 am, he met some men who

included Ndokero PW1 around the deadbody of his wife with her child beside. That he was shocked to see his wife dead and he raised an alarm. That he reported to Bukova Police post and remained there with his child. He denied killing his wife. He set up the defence of alibi.

It is clear from the above evidence that the prosecution case is based exclusively on circumstantial evidence. In **Janet Mureeba V Uganda Court of Appeal Criminal Appeal No. 56 of 2010** it was held that circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics.

This type of evidence must be narrowly examined, because evidence of this type may be fabricated to cast suspicion on the accused person. It is necessary, before drawing an inference of guilt from this type of evidence to be sure that there are no other co existing circumstances that could weaken or destroy the inference. Once that is done, circumstantial evidence is very often the best evidence. Witnesses can tell lies. Circumstances cannot. In a case depending exclusively on circumstantial evidence, a 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 hypothesis than that of guilt. Also see **Mbazira Siragi & Anor V Uganda [2007] HCB Vol. 19 (Supreme Court)**.

Thus, I will proceed to narrowly examine the circumstantial evidence in this case. According to the evidence of PW1 and PW2 the accused was the last person to be seen with the deceased before she was found dead. PW2 testified that on 29<sup>th</sup> December 2009 the accused found his wife the deceased at Namulanda trading centre and slapped her asking what she was doing. PW1 and PW2 testified that the deceased left the trading centre very fast and the accused followed her. The accused did not deny that he went to the trading centre or that the deceased wore canvas shoes which he said he bought for her. The evidence of PW3 and PW4 is overwhelming that the accused had recently settled in Namulanda with his wife and they were putting up at Bamuluka's place. The recovered items, particularly the canvas shoes the deceased had been putting on before her death were recovered from the living room where the deceased and the accused used to sleep, in Bamuluka's living room. One of the canvas shoes were identified in court by PW2. The pair of canvas shoes was also listed as item number 5 of the list of exhibits admitted in evidence as exhibit **P3**. The accused in his sworn testimony before court also admitted that the shoes belonged to the deceased, his late wife and that he is the one who had bought them for her. The recovery of the shoes from the room where the deceased and her husband the accused were said to have been using as their bedroom in Bamuluka's home also corroborates the prosecution evidence that the deceased at the trading centre had no shoes on, yet she had been seen with them the previous day when she went to buy items from the trading centre. The other incriminating piece of evidence is the fact that the items recovered from Bamuluka's home where the deceased and the accused used to live had wet soil and mud similar to that found in the cassava garden where the bicycle tyre marks led while some was similar to that found at Bamuluka's home.

This circumstantial evidence discredits the accused's alibi that he slept in the centre due to rain. An Accused who puts forward an alibi as an answer to a charge does not assume the burden of proving that answer. The general rule is that the prosecution must stand or fail by the evidence they have given. The circumstantial evidence adduced by the prosecution strongly and convincingly puts the accused at the scene of crime in Bamuluka's home. There is ample evidence that that is where they used to stay with his wife the deceased though the accused denied it in his testimony. The accused person's defence is tainted with so many inconsistencies that it is difficult to believe. It is highly unlikely that he slept in the trading centre given the overwhelming prosecution evidence that he and the deceased his wife were living with Bamuluka. I did not also believe his evidence that he found PW1 Ndokiro Charles and the others at the scene of crime. The accused testified that he raised an alarm which PW1 answered and he told PW1 that his wife had been murdered. In his testimony he told court that he found people gathered at the scene of crime and then he raised an alarm. If he found people already gathered there why would he have to raise an alarm, given that the purpose of an alarm is to get people to respond to danger? If he did not sleep at Bamuluka's place where did he get their child from deceased? If he was a visitor at Bamuluka's place and actually slept there, why would he lie that he never slept there that night? The accused denied that Bamuluka was his uncle, a fact he had admitted in the statements he made to police which were admitted in evidence as exhibits **P5**. He disowned portions of this statement in his testimony but the other independent evidence pins him down. I find the sworn testimony of the accused to be untruthful and deliberately so. Even his demeanour in the dock was hostile to the prosecution Counsel and he had to be prompted to order by not only court but also his Counsel.

The law is that in a case where an accused person gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove his guilt. However, if, upon proved facts two inferences may be drawn about the accused person's conduct or state of mind, his or her untruthfulness is a factor which can properly take into account as strengthening the inference of guilt. The strength it adds depends on all the circumstances and especially on whether there are reasons other than guilt that might account for the untruthfulness. Lies told by the accused can be used to corroborate other evidence implicating him. See **Juma V Republic Criminal Appeal of East Africa No. 1 of 1973**.

The accused appears to implicate the prosecution witnesses especially the Police Officers that they were with him in Kibuli Police Training School and they were telling lies about him. He also disowned the statements he had made to police, exhibits **P4** and **P5**, that what they recorded is not what he told them. Other than making the allegations, the accused did not prove any motive against the prosecution witnesses. I have no reason therefore to disregard their evidence, more so when the said evidence is corroborated by other independent evidence.

The defence alluded to inconsistencies in the prosecution evidence, contending that they are grave and that the evidence should be rejected. It is noted that PW2 Yahaya testified that by the time he arrived at the scene Bamuluka David had already been arrested. Yet PW4 Corporal

Ouma testified that he effected arrest much later after visiting the scene of crime and conducting a search at Balumuka's home. PW3 Francis Ndokero testified that apart from the dead body he did not see anything at the scene. Yet the other prosecution witnesses testified that there was a baby near the body. PW4 testified that he went to Balumuka's place with the Chairman LC1 but the said Chairman denied this.

The law is that only grave inconsistencies that are not explained satisfactorily that will usually result in the evidence of a witness being rejected. Minor inconsistencies will not have that effect unless they point to deliberate untruthfulness.

The inconsistencies in the prosecution evidence are minor in that they do not go to the substance of the case. In my view, these contradictions are not grave in that they do not go to the gist of the case. They could be due to lapse of the witnesses' memory due to lapse of time. I do not regard them as falsehoods as to discredit the concerned witnesses' evidence. They hardly discredit the strong circumstantial evidence that point to the guilt of the accused, nor do they have the effect of raising a doubt in court's mind about the accused person's guilt. This court will therefore ignore them.

It is my conclusion that the defences of total denial and alibi raised by the accused were merely meant to confuse the court. The prosecution evidence aspects of which are corroborated by the defence evidence point to a very strong inference that Bamuluka and the accused participated in the killing of the deceased. Circumstantially the accused has been placed at the scene of crime and his alibi is consequently rendered to be a falsehood. It is highly probable that the deceased was killed in Bamuluka's house but the body was merely taken to the trading centre. This is further corroborated by the findings in exhibit **P1** where the doctor observed that the circumstances point to a probable severe assault and death not at the site of postmortem, but that the body was likely carried to site after death.

In that regard, for the reasons given, I would agree with the Assessors that all the ingredients of the offence of murder against the accused have been proved by the prosecution against the accused beyond reasonable doubt.

I accordingly convict him of the offence of murder as indicted.

**PERCY NIGHT TUHAISE**

**JUDGE.**

**04/07/2012.**