THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

CRIMINAL SESSION CASE NO.16/91

(ORIGINAL MJ.773/88)

UGANDA:::::::::::::::::::::::::::::::::::::PROSECUTOR

VERSUS

CHRISTOPHER WANDERA::::::::::::::::::::::::::::ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE C.M. KATO

JUDGMENT

The accused Christopher Wandera is indicted for murder contrary to Section 183 of the Penal Code. The indictment alleges that on or about 6th November, 1988 at Kalul village in the District of Iganga the accused murdered one Matrida Asio. The accused pleaded not guilty to the indictment.

The case for prosecution is basically that on the above mentioned date the accused picked a quarrel with his wife whom he beat with a stick and as a result of that beating she died on that very night. The case for prosecution rests on the evidence of PW1 Swaibu Kabaka who is alleged to have been present when the deceased was being beaten by the accused. Another witness called by the prosecution was D/IP. Waiswa PW2 who went with the doctor who examined the dead body. There was also the evidence of D/IP William Bamuzibire PW3 who recorded the confession from the accused. After the trial within a trial that confession was admitted as having been made voluntarily. The last witness to be called by prosecution was Dr. Muwanguzi (PW4) who testified that on 9th November, 1988 he examined the body of the deceased and found that her death was due to shock and brain injury.

On his part the accused denied having killed his wife. According to his unsworn statement the wife asked for permission from him and he granted that permission to go and visit her parents but later on he learnt that she had died there. Regarding the confession that he had made he complained that it had been obtained from him after he had been beaten by R.C. men and the

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Policemen at Busesa after his arrest.

It is a well established principle of our law that the burden of proving accused's guilt lies on the prosecution throughout and that burden never shifts to the defence except in some rare cases where the statute specifically provides that accused must prove his innocence. It is also the principle of our law that an accused person should not be convicted on the weakness of his defence but on the strength of the case for prosecution: Uganda V Oloya s/o Yovan Omeke (1977) HCB 4 at page 6. Where an accused is indicted for murder as it is in the present case prosecution is enjoined to prove, inter alia, that a human being was killed, that the killing was caused by unlawful means, that the killing was with malice aforethought and finally that the accused participated in that killing: Section 183 of the Penal Code.

Dealing with the first ingredient first, prosecution called the evidence of the doctor who said that he had examined the dead body of Asio which had been identified to him by one John Apunyo. The learned counsel for defence Mr. Okalang objected to that evidence on the ground that the person who identified the body to the doctor was not called to testify and he doubted whether the body which the doctor examined was the same as that of the person who was said to have been assaulted by the accused. With due respect I agree with the learned Counsel's submission to the extent that the law is that where a person dies and the doctor carries out an examination on the body of that person the person identifying the body to the doctor should be called as a witness. That is what was stated in the case of Enoclea Owal V R (1931 - 34) 3 T.T.L.R. 65. In the above quoted case a woman was killed. A doctor carried out a post mortem examination on a body identified by someone who was not called to give evidence at the trial. The doctor did not himself know the woman. There were peculiar injuries on the body about which the doctor gave evidence. It was held that there was a serious lacuna in the evidence but in the peculiar circumstances of the case there was no doubt that the body examined

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by the doctor was that of a woman alleged to have been murdered. The facts of that case are similar to those in the present case. It must also be said that there are peculiar circumstances surrounding the death of the deceased. The husband of the deceased himself in his confession and in court here does not deny the death of his wife although he says that the circumstances in which she died are not the same as those described by prosecution. In these circumstances, I hold that Asio actually died.

On the issue of whether the death was unlawfully caused, the law is that in all cases of homicide unless death has been caused accidentally such death is presumed to have been unlawfully caused: Gizambuzi s/o Wesonga V R (1948) 15 EACA 65. The learned counsel Mr. Okalang adamantly argued that the cause of the deceaed's death was not known as the doctor who examined the body was not sure as to what could have caused her death. The accused in his confession said he had beaten the woman twice, on the ribs and on the arm. These injuries were also found by the doctor. According to his report the death was a result of shock and brain injury. PW1 also said the accused had beaten the deceased once on the arm and PW2 also said he had observed a broken arm on the deceased. It is my view that the deceased must have died as a result of those beatings. I therefore hold that the deceased died not accidentally but her death was unlawfully caused by the beating.

That leads me to the issue as to whether or not the deceased was killed with malice aforethought as defined under section 186 of the Penal Code. Under this section malice aforethought is defined as causing death of somebody intentionally or knowledge by the killer that his act or ommission will probably result in the death of a human being. In deciding whether or not the killer had malice aforethought the Court must examine the surrounding circumstances of each case. Matters such as the weapon used, the number of injuries inflicted and the part of the body where such injuries were inflicted and the conduct of the accused before and after the killing must be taken into account: Tubere s/o Ochen V R (1945) 12 EACA 63. In this case

PW1 said the stick used was about one inch in diameter and about one yard long. This same witness also told the Court that the accused was not violent at the time he beat the deceased but that when he asked him to stop beating her he stopped and put down the stick and they started conversing together in a friendly way. There is also evidence of this same witness and the accused's own confession to the effect that the deceased was beaten because she had been found with a man called Kasegera. It is also on record that the accused beat the deceased on the arm. In my opinion these facts do not suggest that the accused when beating the deceased intended to kill her in view of the parts of the body where he beat her and the mood in which he was and also the size of the stick which he used. It will not be unreasonable to infer from these facts that the accused might have intended only to punish the deceased for her mischief. The doctor's evidence on this point is not helpful for prosecution as he clearly said when under cross examination that he was not very sure as to the cause of the deceased's death since he had not opened the body due to lack of facilities. His conclusion that this woman must have died of closed head injury was reached at by observing blood oozing from the ears and the eyes of the deceased were red. Under all these circumstances I would say prosecution has miserably failed to prove beyond reasonable doubt the element of malice aforethought.

I now come to the most pertinent question which is whether the accused was responsible for the death of his wife. The evidence connecting this man with the death of his wife is purely circumstantial since nobody witnessed the killing of the deceased by the accused. This court has time and again stated that the Court should view this type of evidence with caution and before basing any conviction on such evidence the Court must be satisfied that facts conclusively do point to the guilt of the accused person and not any other person and that there are no co-existing factors which tend to weaken or destroy such evidence: Francis X. Kayemba V Uganda (1983) HCB 30,

Musoke V R (1958) EA 715, and Uganda V John Kakooza and Fred Kayazi (1983) HCB 19 at page 20.

Prosecution called the evidence of S. Kabaka PW1 who said he heard the accused beat the deceased and when he talked to the deceased she showed him the arm which the accused had beaten. In his confession the accused also says he actually beat the deceased on the arm and on the ribs. The learned counsel for the defence Mr. Okalang urgued that the circumstances under which the body of the deceased came to be at the home of her parents were not explained and that something could have happened between the time PW1 saw the deceased with the accused and the time she died at her parent's home. That argument, with due respect is not supported by evidence. I however do agree with the argument of the learned defence counsel to the effect that as a matter of practice a retracted confession and circumstantial evidence require corroboration and that neither can corroborate the other. In this case, however, the evidence of PW2 and that of the doctor (PW4) sufficiently corroborates that of PW1 and the confession to the effect that the accused's hand was injured. The accused in his confession says he beat the deceased on the hand, PW1 said the same, PW2 and PW4 confirmed what the accused and PW1 stated.

After careful consideration of the accused's confession and the evidence of PW1 I am satisfied beyond reasonable doubt that the accused did participate in the beating of the deceased. The accused's story that his wife went to her parents when she was well and his defence of libi cannot be sustained.

In final conclusion and in full agreement with the gentleman assessor I find that prosecution has failed to prove the case of murder against the accused. I find him not guilty of that offence and I do acquit him of murder but find him guilty of a lesser cognate offence of manslaughter contrary to section 182 of the Penal Code. Accused is accordingly convicted of manslaughter.

At this stage I would like to point out that this case was completed in the presence of one assessor; the second assessor Mr. Lilyalingi having lost his mother during the course of the hearing of this case and had to go and attend to the problems caused by death of his late mother.

C.M. KATO
JUDGE

1.8.1991

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