THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 203/96

UGANDA : PROSECUTION

VERSUS

FRED WANUME GODFREY GALANDI KITIMBO : : : : : : : : : ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE S. G. ENGWAU

R U L I N G

In the 1st count the accused, Kitimbo Wanume Fred was charged with murder c/ss 183 and 184 of the Penal Code Act. The allegation in that count is that the accused and others still at large on or about 9.1.95, at Block 5/54, Walukuba East Housing Estate in the Jinja District, murdered Sarah Kauma. In the 2nd count however, Kitimbo Wanume Fred was charged with attempted murder c/s 197(1) of the Penal Code Act. In this count the particulars of the offence were that Kitimbo and others still at large on or about 9.1.95 at Block 5/54, Walukaba East Housing Estate attempted to unlawfully cause the death of Kalako Livingstone.

The accused pleaded not guilty to both counts and as such put every ingredient thereto in issue. The prosecution was therefore to prove each and every element of the offences: R. v. Sims (1946)1 KB 531. It was also the tack for the prosecution to prove each ingredient beyond reasonable doubt: Woolmington v. DPP (1935)AC 462.

In the offence of murder, the following ingredients inter alia exist:-

(a) THAT, there was death of the person named on the indictment;

(b) THAT, death was unlawfully caused;

(c) THAT, death was caused with malice aforethought; and

(d) THAT, it was the accused and nobody else who murdered the deceased.

In the offence of an attempted murder, it is incumbent upon the prosecution to establish beyond reasonable doubt that there was an attempt into somebody's life and that the attempt was unlawfully to cause the death of another. In order to encounter the task put on the shoulder of the prosecution, prosecution adduced the evidence of 4 witnesses to prove all the ingredients existing in the above counts.

It is not in dispute that Sarah Kauma actually died. Medical evidence of Dr. Joseph Katende PW1 was that on 10.1.95 he carried out a post mortem examination on a female body identified to him by one Vicent Bagaga a brother-in-law, as that of Sarah Kauma. In his post mortem report the deceased had laceration on the right side of the face. She had a fractured skull and destruction of the brain tissues. The doctor put the cause of death to be head injury due to fire arm. Medical report was tendered in court and marked as Exh.P1.

Evidence of PW2 was that Sarah Kauma was his wife. On the night of 9.1.95 at around 11.00pm the witness entered the bedroom where the late Sarah Kauma was with a child. He was immediately followed by 2 thugs one of whom was armed with a gun. At the material time an electric light was in the sitting room and another electric bulb light was in the bed room. On looking at the strangers, the witness claimed to have recognised them because they were his niehbours at Makoka village. He identified one thug as Mategeo Lukuyukuyu s/o Sosi Balyeku and the other as Kitimbo Wanume s/o Mawerere.

The witness went on to say that as the deceased was trying to identify the assailants; it was the reason at that time why she was shot and died instantly. PW3 the brother of PW2 also confirmed the death of Sarah Kauma, his sister-in-law. The witness testified that on the fateful night he heard 2 gun shots at around 11.00pm. After sometime the witness heard an alarm being raised by PW2. On reaching the scene he found Sarah Kauma dead with a gun shot wound on the head through the right eye.

The police investigating officer, PW4 on 10.1.95 said he visited the scene of crime at Walukuba Estate. In the sitting room he found a dead body of a woman which was identified to him by PW3 as that of Sarah Kauma. All in all the prosecution has adduced an overwhelming evidence proving beyond reasonable doubt that Sarah Kauma whose name is on the indictment is actually dead.

On the issue of whether the death of Sarah Kauma was unlawfully caused in homocide cases, death is presumed to have been caused by unlawful act or mission unless it is shown that it was caused by accident or in circumstances which make it excusable. The principle was laid in the case of: R. v. Gusambizi Wesonga (1948)15 EACA 65. In the instant case the evidence is that Sarah Kauma was shot on the head through the right eye and she died instantly. In those circumstances, Sarah Kauma's death was unlawfully caused and the prosecution has proved that essential element beyond reasonable doubt.

Malice aforethought is a mental element which is often quite difficult but not impossible to prove. In: R. v. Tubere (1945)12 EACA 63 it was held inter alia that in deciding whether malice aforethought has been established or not, court is to look at the surrounding circumstances of the particular case, that is the conduct of the accused immediately before and immediately after the incident, the nature of injury inflicted, the weapon used and the manner it was used. In the instant case an eye witness PW2 testified to the effect that Sarah Kauma was shot dead on the head by use of a gun. Medical evidence of PW1 and that of PW3 and PW4 who visited the scene corroborated the evidence of PW2.

The gun allegedly used in causing Sarah Kauma's death falls within the meaning and definition of "deadly weapon" under the provisions of section 273(2) of the Penal Code Act.

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It was capable of being fired and indeed it was fired and the result was death occurred. It was shot at close range according to the evidence of PW2 as an eye witness and the target was the head through the right eye which was a vulnerable part of the body. In those circumstances who ever shot Sarah Kauma with that gun had necessary intention of killing and indeed killed her. In my humble view, the prosecution has again proved the ingredient of malice aforethought beyond reasonable doubt.

Evidence at the back ground of this case is that the incident took place on the night of 9.1.95 at around 11.00 pm according to PW2 the only identifying witness. An electric light was in the sitting room and also in the bed room at the time. It was bright light and the deceased was shot at close range in the presence of PW2. That eye witness claimed that he had identified the assailants properly on the fateful night. He said with the help of that bright electric light and for the fact that the 2 assassins hailed from the same village with him, he was able to identify them. The witness allegedly identified one Matege Lukuyukuyu and Kitimbo s/o Mawerere now the accused as being the assassins on the fateful night. It is trite law that the evidence of a single identifying witness can be relied upon to secure a conviction provided the court warns itself of the danger to do so.

However, where the evidence of the only identifying witness has been gravely discredited in cross examination or has been manifestly unreliable the court must take great caution and it may not convict an accused on the strength of such evidence. In the present case the eye witness PW2 in his identification evidence fatally contradicted himself. Whereas he said the assassins hailed from Makoka village with him and that before the incident the attackers were quite close to him about 5 metres only and that bright electric light was on at the time to enable him to identify the thugs,

In his evidence he identified the assassins as Matege Lukugukuyu and the accused Kitimbo s/o Mawerere. The following day however, the witness made a police statement on 10.1.95. Regretably, however, the witness did not mention those names of the so called assassins to the police though the matter was still very fresh in his mind. The only reasonable explanation in the premises was that the witness did not see or recognise the assassins on the fateful night.

Evidence is that even on 14.1.95, PW2 could not recall the names of his attackers. It was only when he went to Makoka village that he remembered the names of his assailants. In those circumstances, I am in agreement with the learned defence counsel that PW2 had framed the case to incriminate the accused allegedly on the land dispute which existed between the witness and the fathers of Matege and the accused respectively. In my humble view this was a mere afterthought. In that regard the prosecution has failed to establish that the accused was at the scene of crime. Failure to adduce sufficient evidence to put the accused at the scene of crime is fatal to the prosecution case. In Uganda v. Karoli Mukuluma and 3 ors, Criminal session case no. 154/91, (unreported) the onus is always on the prosecution to prove its case beyond reasonable doubt.

It is trite law that when the prosecution fails to prove one of essential ingredients of an offence, such failure is fatal to the prosecution case in that a prima facie is not established. In Bhatt v. R. (1957)EA 332, it was held inter alia that the onus is on the prosecution to prove this case beyond reasonable doubt and a prima facie case is not made out if, at the close the prosecution, the case merely "on full consideration might possibly be thought sufficient to sustain a conviction." A mere scintilla of evidence can never be enough; nor can any amount of discredited evidence as was the situation in the present case. There is no evidence on record in the instant case putting the accused at the scene of crime. Consequently a

prima facie case is not established by the prosecution upon which a reasonable tribunal wound convict in the absence of an explanation by the defence in this case. In the premises this case is dismiised and the accused is acquitted under section 71 of Trial on Indictments Decree and he is forthwith set free unless lawfully being held for some other crime.

In the 2nd count the accused is charged with a non-existing offence. In the premises the matter attracts no comment.

S. G. ENGWAU
JUDGE
12.11.1996

12.11.96: Accused before the court
Mutyabule for the accused on state brief
Odumbi for the state.
Ruling delivered in an open court.

S. G. ENGWAU
JUDGE
12.1.96