

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE.

CRIMINAL SESSION CASE 127 OF 2012

UGANDA ::PROSECUTOR

VS

LUBANGO ABRAHAM ::ACCUSED

BEFORE HON. JUSTICE LAWRENCE GIDUDU

JUDGMENT.

Kakayi Priscilla was found dead in her house on 7th November, 2011. Lubango Abraham, now accused, was arrested for her murder. He denied the charges hence this trial.

The prosecution case is that a day before her body was discovered, the deceased was planning a journey to Kenya as usual, in the company of the accused. The accused was at the deceased's house where he usually stays. The two were herbalists. They had planned to leave very early. The next day the deceased's sons found her house locked but the goat was still inside. In the afternoon, they decided to open the behind door only to find her dead. She suffered a fractured skull with the brain matter exposed. A postmortem report concluded she died of hemorrhagic shock due to excess bleeding. The accused who had spent a night in the same house was missing. Two days later, he was sighted in Lwakhakha trading centre and arrested after a chase.

The accused denied being in the deceased's house or village that day and night. It was his defence that on that day and night, he was with his sister in Mbale town helping her with shop keeping.

The following day the sister sent him to Lwakhakha trading center to shop for goods for sale. While there, he was ambushed by a mob that took him to the police without charges. He was detained. Shortly the police charged him with the murder of an old woman. He contends the charges were a frame up as revenge for the reports he had made about villagers who possessed illegal guns.

On an indictment for murder, the prosecution has the burden of proving the following essential ingredients of murder beyond reasonable doubt.

- I. Death of a person
- II. Death must have been caused unlawfully
- III. Death must have been caused with malice aforethought.
- IV. The accused must have participated.

At the conclusion of the trial, both the prosecution and defence witnesses agree that Kakayi was murdered and is buried. The cause of her death was unlawful because she died of wounds inflicted upon her by assailants. The impact of the injuries caused her instant death. Dr. Bumba observed in the postmortem report thus:- " The murderer had enough time to make a single precise strong hit, the deceased could have been asleep at the time of attack"

This observation reveals that this was a premeditated attack. The force used was great. The target was the head. The impact caused the brain matter to pour out. The intention to kill is abundant. Malice aforethought was proved beyond reasonable doubt. The first three ingredients are proved beyond reasonable doubt.

The accused denied participation in the murder and set up an alibi.

The prosecution adduced the evidence of the deceased's sons such as Mafukimabi (PW1) and Makabuli (PW5) whose evidence is that the accused was in company of the deceased at her home in the morning and later in the evening. That the two spent a night in the same house as they usually did when going on a journey. Wakweyika (P4) a neighbour to the deceased also testified that he indeed saw and even talked to the accused in the deceased's home the day before she was found dead. The following morning the accused was not seen and

it was at first presumed he had gone with the deceased to Kenya. Suspicion was raised when PW realized the deceased had not taken out the goat before going away as she usually does. It is then that he pushed the hind door which gave way only to find his mother murdered. The accused could not be traced until 2 days later when PW7 (Wafula Rashid) got a call to arrest him which he did after a chase. It was the evidence of PW7's that the accused ran into river Manafa and failed to cross to Kenya because of the depth of the water and the high current.

The accused denied the charges and set up an alibi. He denied being in the deceased's home and contended that the charges are a frame up by people he had accused of having guns in the area. They framed him to pay back for his report to the police.

It was his evidence that after he had got problems in the village, he sold his property and joined his sister Salifu Margaret, DW2, in Mbale to do business. That on the material day, he was with his sister in Mbale and two days later went to Lwakhakha to buy shop goods only to be mobbed by people calling him a thief. They frog matched him to the police at Lwakhakha where the police accused him of murdering the deceased.

Ms Chekwech, the learned State Attorney asked me to find that the accused is responsible for the reason that he was seen in the home of the deceased by PW3- PW5 as eye witnesses and on the basis of circumstantial evidence. It was her argument that the accused was the last person to be seen with the deceased alive. The next day the deceased is found killed in the house she shared with the accused who had himself disappeared until he was arrested.

On the other hand Mr. Madaba, learned counsel the accused asked me to acquit the accused on the grounds that the prosecution witnesses were not consistent. That PW3 even told the police that he did not know who killed his mother. Further that PW3 was contradictory in that he said he broke the front door to access the house whereas the police officer who visited the scene testified that it was the hind door that was used to access the body of the deceased. Counsel also relied on the alibi which he says was confirmed by the accused's sister DW2.

The prosecution case is based on both direct and circumstantial. The evidence of witnesses that say they saw and talked to the accused in the home of the deceased is direct. While the evidence of the circumstances surrounding her death is circumstantial.

I now examine these two threads of evidence vis a vis the defence case. It was submitted for the accused that the evidence of the prosecution regarding the accused's presence in the deceased's home was contradictory. It was pointed out that PW3 did not tell the police that the accused was in the deceased's home three times the day before she died. The statement was exhibited.

During cross examination, PW3 whose police statement was exhibited, testified that he was the first person to discover the deceased when he broke the behind door. He went on to state that he told the police that the accused had been at the deceased's house but due to the panic caused by the sudden loss of his mother, he did not state that the accused slept in the house with the deceased. He also told the police that the accused was a suspect. The relevant part in the police statement is that the deceased had been warned even by local leaders to avoid associating with the accused but she could not heed advice.

The courts have held in a number of cases that grave inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected while minor discrepancies might be explained away by inordinate delay before the accused was brought to trial. See. *Uganda v G W Yigga* (1977) HCB 216 and *Uganda v Dusman Sabuni* (1981) HCB 1

In this case, PW3 explained that the panic caused by the sudden discovery of his dead mother. He made a statement that very evening and could not reasonably be expected in that state of mind to state all the circumstances leading to his mother's death. He needed to compose himself. I accept his explanation as being true. A person who suddenly discovers his mother murdered cannot be expected to state in writing all circumstances surrounding the death in less than two hours after discovering the body.

Besides, a contradiction, arises where a witness tells court a different story from the one he/she told the police. It does not arise where a witness tells court more than what he/she told the police. This is because a police statement is not evidence given to prove a crime but to support a charge for a specific crime. A conviction cannot be based on a police statement but on evidence given on oath in court. Consequently I do not find any contradiction which goes to the root of the case or one that would weaken the evidence of PW3.

Learned defence counsel invited court to believe the accused's alibi that he was never in that village on the material day and night but spent that time in Mbale town selling in a shop owned by his sister. The prosecution relies on circumstantial evidence to place the accused at the scene and hold him responsible for the crime.

It is trite that when accused sets up an alibi which is a defence, such accused does not assume any responsibility to prove the alibi. It remains the responsibility of the prosecution to place the accused at the scene of crime by adducing evidence to that effect. If on the consideration of the whole of the evidence it is found that the alibi is true or that the court is left in doubt as to whether it is true or untrue, then the court is bound to give the accused the benefit of the doubt and acquit him. Even where the prosecution has proved the alibi to be false, the court still has to consider if the evidence adduced proves the case beyond reasonable doubt or not. See *Uganda v Dusman Sabuni* (1978) HCB 1

As circumstantial evidence, the courts have in a number of cases given guidance on how to approach such evidence. In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction ensure that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis from that of guilt.

See *Simon Musoke v R* [1958] EA 715.

Further, it is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

See *Teper vs R* (1952) AC 480 at P.489.

I warned the lady and gentleman assessors about this requirement as I do to myself. I was asked to find that the accused was the killer because he was the last person to be seen with the deceased. That they shared a house for a night and by morning he was gone while the deceased was dead in the house. The accused denied killing the deceased who he referred to as a very old woman and attributed his troubles to the adverse reports he had made against the area leaders for having illegal guns. He also set up an alibi.

During the testimony of the prosecution witnesses, the accused did not cross examine them about the reports of illegal guns. The area LC also gave evidence as PW6. He was not challenged about these grudges claimed by the accused. The courts have held in a number of cases that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or palpably untrue. See. *Uganda v Dusman Sabuni* (supra)

The accused's claim that he was framed for giving information to the police can only be an afterthought on the basis of the above principle.

Further, the accused's sister, DW2, gave evidence to support the alibi. She stated that she was with the accused on the material day and night and was surprised that he was arrested for killing an old woman who is their relative. She said she

went to attend burial and spent only five minutes at the home of the deceased. She did not wait for the burial and did not even look at the dead body because she wanted to see so many other people in the village.

The prosecution asked me to treat this evidence as untrue because it was queer for somebody to travel to the village to bury a relative and chooses to spend only five minutes at the funeral home before going off without even looking at the body.

I should observe here that the accused is related to the deceased through marriage. The accused's former wife with whom he has four children is a granddaughter of the deceased. The accused's sister went to attend burial as an in law. Her evidence that she spent only five minutes at the home of the deceased is incredible and untrue.

The accused in his evidence stated that while in Lwakhakha trading centre on a shopping trip, he was all of a sudden arrested by a mob that called him a thief and frog matched him to the police. At the police, he was informed he was the one that killed the deceased. This defence is also incredible. How a mob would suddenly arrest a person calling him a thief and shortly the police refer to him as the killer stretches my imagination too far. When this defence is assessed with the prosecution evidence regarding the accused's being seen at the deceased's house, spending there a night, disappearing the following day and running away into a river before his arrest, I find that the accused and his sister's version of events is unbelievable. The prosecution evidence regarding his presence in the village that day and night is credible. The fact that he was the last person to be seen with the deceased alive constitutes inculpatory facts which are incompatible

with the innocence of the accused. These facts are incapable of explanation on any other reasonable hypothesis other than guilt.

After careful consideration of the evidence for both sides, I am in agreement with the lady and gentleman assessors that the prosecution has not only placed the accused at the scene of crime but also proved through circumstantial evidence that he is the killer.

The defence version can only be a lie and an afterthought. The prosecution has proved the case against the accused beyond reasonable doubt. I find him guilty of murder and convict him accordingly.

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Lawrence Gidudu

JUDGE

19,Sept, 2014