

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

CRIMINAL SESSION CASE NO. 243/2015

5

UGANDAPROSECUTOR

VERSUS

10

1. NANKWANGA FAUZA Alias MAAMA JANAT

2. NAIGAGA AISHA

3. NAKAYIMA FATUMA

4. KAWAAZI JOSEPH

5. NANDASI SCOVIAN alias ALICE

15

6. WANKAMBI PATRICK alias MANDA.....ACCUSED

JUDGMENT

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

20

Nankwanga Fauza Alias Maama Janat was with six others were on an unspecified date indicted with the offence of murder contrary to sections 188 and 189 of the Penal Code Act. Cap. 120 LOU.

25

It was stated in the indictment that the accused persons and others still at large on 17/01/2016 at Mufubira Zone “A” in Jinja District, with malice aforethought unlawfully killed Namatovu Joan.

30

The prosecution case borne out of the evidence adduced is that, Namatovu Joan (hereinafter referred to as the deceased) and Nandasi Scovia alias Alice, shared a house in Mafubira Zone and often frequented a local *malwa* bar owned by one Kiiza Esther. That on the night of 16/1/2016, all the accused persons, the deceased and her sister Nakiyimba, convened to drink at that bar and while there, a quarrel

ensued between the deceased and the accused persons, and went on for some time. That during the quarrel, some of the accused persons made direct threats against the deceased. After that, the deceased and Nakiyimba then returned to their respective homes but later in the night, Nandasi again picked up the deceased to go
5 to attend a *Karokee* bar. The deceased was found dead the next morning with her body dumped in a shallow ditch near the house she shared with Nandasi.

In my ruling of 20/4/18, I found that three of the accused persons, namely, Naigaga Aisha, Nakayima Fatuma and Wankabi Patrick alias Manda had no case to answer
10 to the charge of murder. They were accordingly discharged and prosecution of Nankwanga Fauza alias Maama Janat, Kawaazi Joseph and Nandasi Scovia alias Alice continued. This is therefore is my judgment on their joint indictment.

On a charge of murder, the prosecution has the burden to prove the following
15 elements beyond reasonable doubt: -

- i. The deceased is dead.
- ii. That the death was unlawful.
- iii. The death was carried out with malice aforethought.
- iv. The accused person(s) participated in the commission of the offence or is
20 responsible for the death.

In his submissions, counsel for the accused conceded to the first three ingredients but strongly contested the participation of the accused. Even then, it is incumbent on the prosecution to prove all four elements of the charge to the required standard
25 which, according to the authority of **Woolmington vs. DPP [1935] AC 462 and Sekitoleko vs. Uganda [1967] EA 53**, should erase all reasonable doubt of the commission of the crime with malicious intent. Where the accused person raises a

reasonable doubt, either through weakness of the prosecution case or by his/her defence, then he must be acquitted. See for example **Abdu Ngobi vs. Uganda Criminal Appeal No. 10/1991 (Supreme Court)**.

- 5 The prosecution presented four witnesses to prove their case, with Ms. Rania Naluyima leading the prosecution and Mr. Esarait Robert representing the accused persons on a state brief.

Death of a human being

- 10 PW1, 2 and 4 saw the deceased's body on the morning of 17/1/2016 lying in a ditch. The post mortem report, an admitted document, indicated that the body of one Namatovu Joan was on 17/1/2016, brought into Jinja Hospital mortuary and identified by one Zziwa Julius, her father. PW2 testified that as part of the deceased's family, she received the body and attended her burial. That was
15 conclusive evidence that Namatovu Joan, a human being, died.

An unlawful death caused with malice afore thought

- The position of our law in that every homicide is presumed to be unlawful except for circumstances that make it excusable. A homicide will be qualified as
20 justifiable for example, in cases of self defence or if authorized by law. See for example **Uganda vs. Aggrey Kiyingi & Others Criminal Session case No. 030/2006**.

- PW1, and 2 testified that the deceased's body presented with what appeared to be a
25 broken neck and was found lying in a ditch meant for a banana plant sucker. The postmortem report indicated that the deceased had suffered bilateral subconjunctival hemorrhage with a twisted neck rotating in all directions. The cause of death was

determined to be strangulation. The testimony of PW1 and PW2, and the findings in P.Exhibit 1, indeed pointed to a violent assault proceeding the deceased's death. No evidence was put forward by either the prosecution or the accused, that the death although violent was justifiable or excusable or, that the injuries were self-inflicted. To my mind, it would be inconceivable that a person who met her death as a result of strangulation, her death would be classified as one allowed in law.

The second ingredient is also proved to the required standard.

Prosecution further claimed, and it was not disputed that the deceased's death was one caused with malice aforethought.

Section 191 of the Penal Code provides that;

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 such person is the person actually 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.*

What is required of the prosecution is to prove that the accused intended to kill, and in doing so, all relevant circumstances should be put before the court because the existence of malice aforethought is not a question of opinion but one of fact to be determined from all the available evidence. See for example **Nandudu Grace & Another vs. Uganda [Criminal Appeal No. 4/09]** followed in **Uganda vs. Matsiko; Criminal session case No. 68/2013**] Judge Tibulya Margaret.

Case law has provided that evidence to look out for in determining whether the death was one caused with malice aforethought are: -

- The nature of weapon used.
- The manner in which the weapon was used.
- 5 - The part of the body targeted.
- The conduct of the accused during and after the incident e.g. whether there is evidence of impurity.

See: **R vs. Tubere [1945]12 EACA and Tindigwihura Mbahe vs. Uganda Criminal Appeal No. 9/1997 [Supreme Court].**

10

Further the court in **Nanyingo Harriet & Another vs. Uganda; Criminal Application No. 24/2002** also quoted in **Uganda vs. Matsiko [supra]** found that
*“for a court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act that caused the death, and if
15 the accused foresaw death as a natural consequence of the act.”*

The person who attacked the deceased targeted the neck which is a very vulnerable part of the body. The intention was to end her life and strangulation by any means, points to an intention to kill and the attacker did indeed succeed in their mission.
20 There was sufficient evidence pointing to a death carried out with malice aforethought.

Participation of the three accused persons

The accused's participation in the crime was strongly contested.

25

A1 Nankwanga admitted being present at the bar with the accused on the night of 16/1/2016. That the deceased provoked her into a quarrel to the point of

threatening actual violence. She did not raise to the provocation and at 9pm left the bar and learnt of the deceased's death from her daughters, after midday, the following day. She denied uttering threats to the deceased or leaving the area after learning of the deceased's death.

5

A4 Kawaazi Joseph, also admitted being present at the bar on 16/1/2016 and witnessed a bitter quarrel outside the bar between A1 and a woman he did not know then, but later came to know as the deceased. He cautioned the two women but issued no death threats against the deceased, and then retreated back to the bar, where he remained until he left. He learnt of the deceased's death the next day.

10

A6 Nandasi Scovia Alias Alice, likewise admitted being at the bar with the deceased from about 7pm. She too witnessed, what she described as a bitter quarrel, between A1 and the deceased. That she left the bar towards 10.00pm to attend a Kariokee show. She parted with the deceased at that time and did not return to the house that they shared. That at about 7am the next morning while returning home, Rajab a neighbor alerted her of a body in the banana plantation, which she recognized to be that of the deceased.

15

In her submissions, and citing authority, prosecuting counsel argued that all three accused persons admitted being present at the bar and that the conduct of Nankwanga and Kawaazi amounted to threats and indication of malice and therefore motive for killing the deceased. Further that the undisputed fact that Alice was the person last seen with the deceased, the "last seen doctrine" should be invoked especially, when she failed to satisfactorily explain how the deceased met her death.

20

25

On his part, defence counsel argued that Alice stated that during the quarrel, Kawaazi was clearly on the side of and not against the deceased. That in any case, both Nankwanga and Kawaazi denied having made any threats against the deceased which was evidence supported by PW3 the bar owner. In his estimation, the quarrel over one Manda could not amount to a serious motive to kill the deceased, especially when Nankwanga denied having had an affair with Manda. He continued that the circumstantial evidence was not strong enough to implicate the accused persons, and it could not be eliminated that being drunk, the deceased met an accidental death or a third person may have killed her.

10

My decision

It is clear that there was no eye witness to the offence and thus, the prosecution case depended entirely on circumstantial evidence presented by the four witnesses, and other compelling evidence. Both counsel argued extensively on that point and in addition, provided very useful authorities that this court will consider.

According to the decision in **Teper Vrs R (1952) AC 489 and Simon Musoke Vrs R (1958) EA 715** circumstantial evidence is

“.....evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It would be no derogation of evidence to say it is circumstantial”.

The decision by the Supreme Court of Nigeria sitting at **Abuja in Tajudeen Iliyasu Vrs The State SC 241/2013** considered that evidence in great detail. It was held that:-

“.....it is evidence of surrounding circumstances which by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics....this is so for in their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that the act,
5 conduct or omission of the accused person, caused the death of the deceased person. Simply put, it meant that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence

However the court cautioned that “....such circumstantial evidence must
10 point to only one conclusion, namely that the offence had been committed and that it was the accused person who committed it. For the purpose of drawing an inference of an accused’s person’s guilt from circumstantial evidence, there must not be other co-existing circumstances which would weaken or destroy that inference.....Thus, all other factors and surrounding
15 circumstances must be carefully considered for they may be enough to adversely affect the inference of guilt....Each case depends on its own facts. However, one test which such evidence must satisfy, is that it should lead to the guilt of the accused person and leave no degree to possibility or chance that other persons could have been responsible for the commission of the
20 offence.

I agree with prosecuting counsel that the above decision is persuasive. Indeed the Justices who extensively quoted other Nigerian authorities also drew much inspiration from leading English cases and authors on the matter. Their
25 observations do not depart from what in practice is followed by our courts. I will accordingly rely on it.

I am persuaded that all three accused persons were present during a heated quarrel between the deceased and Nankwanga at Esther's bar on the night of 16/1/2016. Both PW2, Kawaazi and Alice, mentioned that it was a fight over the affections of one Manda towards either woman. According to PW2 and Alice, it was not the first time they had fought over that issue. Again According to PW2, Nankwanga used the words "*this is Mafubira and not Kampala, I will show you*" and other threats that she would strangle her. Alice confirmed she heard the first statement. A4 stated he heard Nankwanga utter the words "*you prostitute...prostitute....you don't know this is Mafubira, but I will show you*". Again it was PW2 who heard Kawaazi address the deceased that "*...don't be familiar with me, don't play with me, it takes me no time to strangle you....you have met me when I have not smoked opium*" and that he then turned to the bar owner and continued "*.....get me a cigarette, today I want to show this girl*". He continued that he was well known by the police in the area and that he could not be detained if he killed the deceased. That he repeated that statement two times. The deceased was found strangled to death the next day.

Based on those facts, and how the accused persons conducted themselves upon and after leaving Esther's bar, prosecuting counsel persuaded the court to invoke "*the last seen doctrine*" which has global application to homicides. According to the decision in **Tajudeen Iiyasu Vrs The State (Supra)**, "*.....creates a rebuttable presumption to the effect that the person last seen with a deceased person bears full responsibility for his or her death....Thus where an accused person was the last person to be seen in the company of the deceased person, they have the duty to give an explanation relating to how the latter met his or her death. In the absence of such explanation, a trial courtwill be justified in drawing the inference that the accused person killed the deceased person*".

In addition, the last seen doctrine cannot be applied when the accused was the last person to be seen with the accused but there is no other circumstantial evidence.

See **Ismail Vrs the State** quoted in **Criminal Evidence in Nigeria** by **Jide**

5 **Bodede 2nd Edition** (at [www.lawfeildlawyers .com](http://www.lawfeildlawyers.com))

It is my opinion that the above doctrine is by its nature circumstantial evidence.

The Court in **Taylor Vrs R** warned that “.....*in dealing with the conviction which is exclusively depended on circumstantial evidence, it is necessary before drawing*

10 *the inference of the accused’s guilt to be sure that there are no other co-existing circumstances which would weaken or destroy the inference*”. It is important therefore that beyond the ascertainment, I consider all other facts presenting after the deceased and accused persons left the bar.

15 Both Nankwanga and Kawaazi denied uttering threats against the deceased. Nankwanga claimed the deceased provoked her and even attempted to beat her. Their fight was confirmed by all testifying witnesses present. That fight which was not the first one between the two women, could point to motive by Nankwanga to harm or even murder the deceased. However, she stated she left the bar at about
20 9pm, leaving the deceased and Alice behind. She did not hear from the deceased until knowing of her death, the next day. Her counsel argued that her decision to report to the sub-county offices after she heard she was implicated in the offence, points to her innocence.

25 I am persuaded that Nankwanga and the deceased indeed had a bitter vocal fight at the bar on the night of 16/1/2016. She stated that she left the bar at around 9pm when the deceased was still being restrained from further fights. PW3 confirmed

she saw Nankwanga leave at that time. Nankwanga confirmed that she related her story to the LCI. PW4 the investigating officer revealed that the accused persons admitted having had a drink with the deceased in Esther's bar the night before her body. Even with such an admissions, I see no effort made by the police to
5 investigate Nankwanga's alibi to confirm that she went straight home after the bar. In my view, a fight over a man with the deceased with no other incriminating evidence would not be enough to lead to the unequivocal conclusion that Nankwanga was involved in the murder of the deceased. It certainly would not persuade the Court to invoke the "last seen doctrine" when the deceased was infact
10 last seen with Alice. In conclusion, Nankwanga's participation in the deceased's death was not been proved to the required standard.

Kawaazi may have allegedly uttered much stronger and direct threats against the deceased person. PW2 stated that he actually mentioned the word '*strangle you*'
15 and boasted that even if he did strangle the deceased, no one would arrest him. Kawaazi denied uttering the threats and no one save for PW2 heard them. PW3 mentioned that when she watched the fight, it was only Nankwanga and the deceased exchanging words. Prosecuting counsel argued that it may well be that those words were uttered before or after PW3 arrived on the scene. That may be so,
20 but as I have said, however strong, that threat by itself could not provide satisfactory circumstantial evidence implicating Kawaazi.

Kawaazi stated, and it was not rebutted that he was meeting the deceased for the first time at the bar. Alice corroborated that evidence when she explained that the
25 deceased was a visitor in the area, who had come to spend the festive period with her. There would thus be no prolonged vendetta between Kawaazi and the deceased. Alice corroborated Kawaazi's testimony that he tried to quell the fight

and even advised her to report the matter to the LC. Further, Kawaazi stated that he retreated into the bar and did not know when Nankwanga or the deceased left the bar.

5 PW3 watched the group leave between 9.10pm and 10.00pm. That after they left, the deceased approached her and informed her that she wanted to return home for a change of clothes and then proceed to the Kariokee show. It would follow that Kawaazi was not the last person seen with the deceased. Again no facts were put forward to show that Kawaazi's alibi was discredited or that he was anywhere near
10 where the deceased's body was found. His behavior after the incident was far from suspicious. He returned to the bar as was custom from where he was arrested three days later. I would find that the evidence presented to prove his participation was also not strong enough to implicate him in the deceased's death.

15 On the other hand, Alice admitted sharing a house with the deceased in Mafubira and was one of the first people to view the body. She was present during the fight but neither PW2 nor PW3 implicated her as being abusive or violent towards the deceased. There would be no motive for her to participate in or murder the deceased. However, prosecution evidence and her own professed admissions of
20 what she did after leaving the bar, may compel this court to consider the "last seen doctrine", because there was strong evidence that it was Alice who was last seen with the deceased at the bar.

Her testimony was that after the quarrel subsided, she was invited by a friend to a
25 kariokee event. She continued that she invited but the deceased declined to join her, and towards 10.00pm, they parted at the bar. That Alice spent the night at the bar and learnt of the deceased's death at 7am in the morning, as she was returning

home. PW1 and PW2 confirmed much of that evidence and in addition that Alice told them she gave the deceased money to buy chapatti and thereafter also declined to escort the deceased home, opting to go straight to the Kariokee event leaving the deceased to return home alone. PW1 mentioned that at first when questioned, Alice
5 declined to name the person with whom the deceased had had a fight, but later mentioned four people, leading to their arrest.

PW3 claims to have seen Nankwanga and Kawaazi leave the bar between 9.30pm and 10.00pm leaving the deceased and Alice behind. She then watched the
10 deceased leave the bar with Alice at around 10.00pm. She confessed she had many customers and appeared confused as to whether the deceased left in the company of Alice or Alice and one Diana. However, she was clear that the deceased informed her she was going to change clothes and then proceed to the Kariokee event.

15

I am persuaded that at some point the deceased had voiced a preference to proceed to the Kariokee event. She was seen leaving the bar with Alice who did not deny that fact. Alice would thus be the last person seen with the deceased before her death. However, Alice did explain that the deceased declined to join her at the
20 Kariokee and headed home. This could have been a discussion they had as they headed out of the bar. No evidence was adduced to infer that infact Alice did appear at the Kariokee bar with the deceased or headed home with her. Her first explanation to both PW1 and PW2 was that she spent the night at the bar with a man friend. Her previous relationship with the deceased was good and infact,
25 PW1's suspicions were aroused only because Alice first refused to reveal the names of the people that the deceased had quarreled with. She eventually revealed

those names and her behavior following the discovery of the deceased's body could not be termed as suspicious.

5 The "recent seen doctrine" would not apply to Alice because the evidence that she parted ways with the deceased before going to the kariokee event was never rebutted. Even if the doctrine applied to her, the court still had to find other circumstantial evidence incriminating Alice, and there was none. This is because, similar to the other two accused persons, the chain of events that would incriminate her, were unclear and uncertain. She had no known vendetta against the deceased and could not tell what happened to the hereafter they parted ways at the bar. In any case, no evidence was adduced to show that there was any effort to investigate the truth of where Alice had spent the night, in order to discredit her alibi. In my view, the prosecution evidence did not clearly and forcibly suggest that Alice participated in, or murdered the deceased. I would accordingly find that, her
10 participation was also not proved to the required standard.
15

In summary I find that the fourth ingredient of the accused persons' participation in the death of the deceased was not proved beyond reasonable doubt.

20 I would accordingly move to find that the prosecution has not proved the charge of murder preferred against Nankwanga Fauza Alias Maama Janat, Kawaazi Joseph and Nandasi Scovia alias Alice. They are herewith acquitted and I order for their immediate release, save it they are faced with other lawful charges.

25 I so order.

Signed

EVA K. LUSWATA
JUDGE
DATE: 27/6/2019