

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE

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HIGH COURT OF UGANDA  
DATE: ---/---/---  
LITIGATION

HCT-04-CR-SC-0017-2010

UGANDA .....PROSECUTOR

VERSUS

MAKOMERI EDWARD.....ACCUSED

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

Makomeri Edward hereafter called the accused is indicted for murder of one Khanakwa Florence contrary to sections 188 and 189 of the Penal Code Act.

Prosecution alleges that the offence was committed on 14<sup>th</sup> day of August 2009. The accused denied the indictment.

To try and prove the indictment prosecution adduced the evidence of five prosecution witnesses.

PW.1 comprised the postmortem report PF.48C which was adduced in evidence during the preliminary hearing under S.66 Trial on Indictments Act (TIA) in which Dr. Rubanza travelled to Magale, Nanyinya village at the request of D/ASP

Wepukhulu Yahaya on 16.8.2009 to examine the body of a 41 year old female called Khanakwa Florence. The body was found on a mattress covered with a blanket and dressed in a white stripped gomesi with flowers. It also had a blood stained black skirt. The body had sunken eyes, spots and abrasions on the neck.

It also had a stab wound on the left chest below the breast measuring 3 x 2 x ½ cm. It had abrasions on the knees. There were no marks on the head, trunk and limbs. The chest cavity had huge clots of blood with a cut on the lower lobe of the lung.

According to Dr. Rubanza, the cause of death and reasons were respiratory failure from tension hemothorax and thorax as a result of the stab wound inflicted on her with force. No weapon or articles were found at the scene. The deceased appeared to have been in normal health state before demise. She had been brutally murdered 24 hours before examination. PF.48C was tendered in evidence and marked Exh.P.I.

PW.2 was Agatha Mutenyo who testified that on 14.8.2009 at 5:00p.m, she was at her home. She was preparing to cook her vegetables. When she tried to light the fire, it failed. She decided to go and get dry maize stocks to use for lighting the fire. She then saw a person lying near the roadside. Makomeri, the accused was around near the dead body. She made an alarm. Nobody answered the alarm. She asked the accused why he had killed a person. That he responded that he had killed his wife because of his dowry. The witness called the accused a brother-in-law.

PW.2 further testified that the accused walked away. That neighbours who later came to the scene included one Nicholas Nandekwe. The latter tried to follow the accused who was walking away slowly. The accused threatened to stab him if he continued following him. The witness did not know if the accused and deceased had problems between them. The accused was husband to the deceased.

In cross-examination, the witness said nobody was at the scene of crime apart from the accused. That she saw the accused with a knife and the deceased's clothes had blood stains. She did not see the accused stab the deceased but saw him standing with a blood stained knife.

PW.3 was No.19900 D/Sgt Egesa Barasa William a police officer attached to Magale Police Post. He testified that on 14.8.2009 at 5:00.m, he heard an alarm. He responded. As he was running to the scene he met Makomeri Edward 200 metres from the scene who stopped. PW.3 asked him why he was running. He told him that he had killed his wife. Asked why he did so, the accused replied that he killed for three reasons. One, he had married her with his own 4 cows. Two, she had disturbed him for 10 years. Three, she made him sale his land.

After the brief exchange, the accused ran again. PW.3 went to a nearby drinking joint calling for help. People responded and they tried to persue the accused but he disappeared into a banana plantation. It was getting dark. PW.3 continued to the scene where he found people gathered. He found the dead body lying. Although he did not know the deceased's names he knew her as the accused's wife. The accused is a cousin brother to PW.3.

PW.3 further revealed that the accused and his wife had domestic problems. They had separated. The deceased was staying at her brother's home. PW.3 had seen the deceased earlier at 4:35p.m while she was selling second hand clothes.

In cross-examination PW.3 said he could not arrest the accused because he was alone and sick. He saw a pierced wound on the left ribs of the deceased the following day when police from Magale came.

PW.4 was No. 36234 D/C Kateregga Swaibu attached to Lwakhaka Police Station. He knows the accused and he arrested him. PW.4 testified that on 15.8.09 he was in office at the counter. At 9:00a.m, he saw somebody come in from the behind door of the police station. The accused called him and said he had a problem. He revealed that he had killed his wife the previous evening and the deceased's relatives were hunting to kill him. That he came to police to save his life. PW.4 took him to the O/C Station who said he was aware of the case and ordered the detention of the accused.

PW.5 was No.30919 PC Waliwalya who testified that on 14.8.09 he was still attached to Mufutu police post. While on duty, he received a telephone call from one Kakala Paul of Nanjinya village reporting that one Makomeri Edward, accused had stabbed his wife to death and had ran away. That people were organizing to riot and destroy his family and relatives. As in-charge post, he deployed staff to rash to the scene at Bunamesi village and protect the area. PW.5 accompanied the officers. At the scene, he found a body of a female person lying near the roadside. It had a wound on the lower chest left side. The body was identified by Kakara

who made the report. The deceased was wife to the accused who had disappeared at the time. PW.5 cordoned-off the area. The O/C CID Magale Cpl Mwausi was informed. He came to the scene the following morning. While at the scene, PW.5 received information from D/C Mteregga (PW.4) that the accused lied himself in saying he murdered his wife. The witness saw a blood stained knife recovered by the O/C CID from a certain lady. It was a locally made knife sharpened on one side, with blood stains. PW.5 knew the accused and deceased before. One time the deceased reported a case of neglecting to provide for the family. The accused once responded to summonses and the two were reconciled.

This was the close of the prosecution case.

In his sworn defence, the accused reiterated his denial of the indictment. He explained that on 14.8.09 in the morning he went to the garden with his children. They later came back home and embarked on carpentry work. At 5:00p.m, the accused went to look for food. He then saw people running towards his home. When they reached home, they told him that he had killed his wife. They surrounded him and he entered his house for fear of his life which he could lose innocently. The people started destroying the house. He remained inside. He did not get any reason why they said he had killed his wife. That they lived in peace although when he went to work in Kayunga he found when his wife had gone away. DW.1 tried to convince her to come back in vain. He denied ever being reported to police for neglect of his family. That at the time of attack the children were outside. That he escaped from the house when it became dark and sought refuge at Lwakhaka police. He denied reporting that he killed his wife. That he went to police for protection.

DW.2 was Peter Wananda son to the accused. He testified that on 14<sup>th</sup> August 2009 he was at home with his father doing carpentry work. They saw people come wanting to beat father. They did not know why they wanted to beat him. They alleged he killed his wife. DW.2 further testified that the gang started destroying the house but did not get hold of the father. He does not know who killed his mother. The mob came around 6:00p.m armed with pangas, sticks and spears. After destroying the house they left.

DW.3 was Wanzehere Wilberforce another son to the accused. He did not know why he was in court.

In cross-examination DW.3 said all of them ran away from home including DW.2, Peter. This was the close of the defence case:

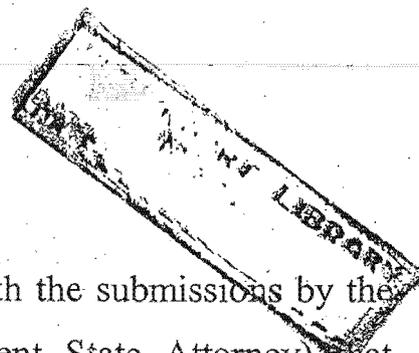
Before court can proceed to convict an accused person in a criminal trial the prosecution must have proved beyond any reasonable doubt the guilt of that accused person. This burden of proof does not shift to the defence unless the law expressly provides so. *Woolmington v. D.P.P [1935] A.C. 462.*

In a trial for murder like in the instant case, prosecution bears the duty of proving *inter alia* that:

- (1) A human being was killed;
- (2) The killing was unlawful;
- (3) The accused participated in that killing, and;

(4) The killing was with malice aforethought.

I will deal with each ingredient separately.



**(i) Whether a human being was killed.**

Mr. Nabende learned counsel for the defence agreed with the submissions by the learned counsel for the State Alpha Ogwang (Resident State Attorney) that sufficient evidence was adduced to prove that a human being was killed. The evidence by PW.1, the Doctor, which was admitted under S.66 TIA comprising the postmortem report confirmed the death of Khanakwa Florence. The cause of death were a stab wound.

I believed the prosecution evidence that Khanakwa Florence was stabbed to death on the date and place indicated in the evidence and I so hold.

**(ii) Whether the death was unlawfully caused,**

Both the learned Resident State Attorney and defence counsel agree that the circumstances which led to the death of the deceased were unlawful. It was held in the celebrated case *Mumbizi S/o Wesonga v. R (1941) 1 CA 65* that in all cases of homicides except where circumstances make it excusable, death is presumed to be unlawful. On this point prosecution relied on the evidence of PW.I which revealed the nature of injuries suffered by the deceased and the cause and reasons of death to prove that the death of Khanakwa Florence was unlawful. I agree with the prosecution that this ingredient has been proved beyond any reasonable doubt and I so hold.

**(iii) Whether the accused participated in the killing**

In his submission, Mr. Nabende for the defence said prosecution failed to connect the accused to this offence. That the evidence of PW.2 should be discredited because the witness could not say the deceased made any noise. That the witness could not see the blood stained knife since she was 100 metres from the scene. That although the accused is said to have held a knife, it was not revealed whether he used it. Further that the witness did not see the accused use the knife. That the evidence of PW.3 was contradicting about the time of offence. That the witness said he met the accused at 4:30p.m yet he heard the alarm at 5:00p.m. That PW.3 was shaking and shivering suggestive of telling lies. That being a police officer, PW.3 ought to have arrested the accused when he met him on the way running and revealed that he had killed his wife. That the evidence of PW.4 should not be admitted because he did not make a charge and caution statement. Further that the knife used to kill the deceased was not tendered in evidence. That the blood was not proved to be of a human being.

That the accused's defence of alibi was not disproved. The accused was at home at the material time. That the alibi is proved by DW.2 and DW.3 son to the accused. Finally, Mr. Nabende submitted that it has not been proved that the accused killed the deceased.

On the other hand prosecution submitted that it had proved all the ingredients of murder against the accused person basing on the evidence adduced by it.

The prosecution case substantially relied on circumstantial evidence to try and connect the accused person to this offence. Circumstantial evidence must always

be narrowly examined because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of guilt of the accused from circumstantial evidence to be sure that there are no other co-existing circumstances that would weaken or destroy the inference per Lord *Normand in Teper v. R. 1952 A.C. 480 at P.489*. The evidence for the prosecution by PW.2 is to the effect that on 14.8.09 she came out of her house to go and get dry maize stocks to help her light fire. She saw the accused whom she described as her in-law standing along the road. Where he was standing was the body of the deceased. She saw the accused holding a blood stained knife. The body of the deceased had a stab wound on the left rib below the breast. The accused was the only one at the scene and when PW.2 asked him why he had killed the deceased, the accused said it was because of his cows. The witness passed the same spot a few minutes earlier with vegetables without seeing anything unusual around the same spot.

When people answered the alarm and one Nicholas confronted him the accused threatened to stab him. The evidence of PW.2 is minutely corroborated by that of PW.3 D/Sgt Egesa a cousin to the accused. PW.3 said he heard an alarm at 5:00p.m to which he responded. As PW.3 ran towards the scene he met the accused running in the opposite direction. The accused stopped and when PW.3 asked him why he was running away, the accused told him that he had killed his wife because she had disturbed him for 10 years yet she made him sale his land and that he had paid dowry for the deceased. Prosecution adduced other evidence of PW.4 that the accused handed himself in at Lwakhaka Police saying he had killed his wife the previous evening and relatives of the deceased were hunting to kill him. The medical evidence (PW.I) indicates that the deceased died of a stab wound.

The accused raised a defence of alibi. The duty is on prosecution to disprove such a defence so as to place the accused at the scene of crime. The accused says he knew about the death of his wife when a mob attacked his home and he locked himself inside the house. His two sons DW.2 and DW.3 supported the defence version of events. I was not persuaded to believe the defence story given the consistent prosecution case. The evidence of PW.2 and PW.3 placed the accused at the scene of crime. The offence took place in broad day light at 5:00p.m. The accused and the witnesses knew each other. The accused talked to the witnesses. There was therefore no possibility of any mistaken identity. The defence story appears made up and an afterthought. Circumstances described do not make it truthful. For example the accused says he locked himself in the house when he saw the mob come. That the mob destroyed the house while the accused was inside.

It is unbelievable that a mob would attack in broad day light and let the suspects hide in the house. DW.3 told court that together with DW.2 they ran away when they saw the mob. The accused says he was at home with the children and escaped through the door and ran away. These contradictions suggest the defence story is an afterthought. The accused said he reported to police for protection and not to report. I did not believe the accused. PW.4 gave truthful evidence and I did not find any reason why he could tell this court lies. PW.4 did not know the accused. He was stationed at a far away police station of Lwakhaka. He said the accused reached there at 9:00A.M on the 15.8.09 and unusually entered through the behind door. He said he went for protection. The accused reported to police the following day for apparent lack of options.

Given the strong prosecution evidence, I do not agree with the submission by defence counsel that the participation of the accused in this offence has not been proved. The defence of alibi was successfully disproved by the prosecution. The evidence by police officers in this case was circumstantial evidence from what was heard from the accused. It needed not necessarily be turned into a charge and caution statement.

The officers were of lower ranks than required. It is not true as submitted by the defence that PW.2 was 100 metres from the scene of crime all along. There was no contradiction in the time frame when the incident happened. PW.3 said he saw the deceased at around 4:30p.m and heard the alarm at 5:00p.m. He saw the accused ran. The shivering of the witness did not suggest he was lying. It had much to do with his ill health. PW.3 could not arrest for he explained he was not on duty therefore he was not armed and he was sick.

Regarding the failure to prove the exhibited knife as the one used did not in my view weaken the prosecution case about the participation of the accused in this homicide.

PW.2 the only identifying witness gave believable circumstantial evidence that the accused used the knife he was holding to kill his victim. The knife was blood stained and only the accused was at the scene. The body had a stab wound. Defence counsel did not substantiate why he believed the deceased ought to have made noise after she was stabbed.

It is my considered view therefore that the strong prosecution evidence points to no other inference other than that of the guilt of the accused person. There is no other

hypothesis created by the defence evidence. Whenever it is proved that the deceased was murdered and that the accused was immediately afterwards seen running away from the scene whereat he was seen with a blood stained knife in hand, such facts raise a violent presumption that the accused was the murderer; for the blood, the weapon and the hasty flight are all circumstances necessarily attending the fact presumed, namely the homicide.

I am satisfied beyond any reasonable doubt that the accused participated in this homicide.

**(iv) Whether the killing was with malice aforethought?**

Malice aforethought may be said to mean either of the following states of mind or co-existing with the act or by which death is caused. This may exist where the act or omission is not premeditated;

- (a) An intention to cause death or grievous bodily harm to any person, whether such person is the person actually killed or not.
- (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not or by a wish that it may not be caused.

No provocation however great will extenuate or justify homicide where there is evidence of express malice.

Going by the evidence adduced by the prosecution regarding the nature of injuries sustained by the deceased at the hands of the accused person and the weapon used as well as the part of the body attacked i.e. on the left ribs just below the breast where vital organs of the person are located, it shows that whoever attacked the deceased did it with malice aforethought. Having found that it was the accused who stabbed his estranged wife to death, the killing was done with malice aforethought.

In their unanimous joint opinion the lady and gentleman assessors have advised me to find the accused guilty and convict him of murder because prosecution has proved the offence to their satisfaction.

I agree with the opinion of the assessors.

Consequently, I will find Makomeri Edward guilty and convict him of murder c/ss 188 and 189 of the Penal Code Act.



**Musota Stephen**

**JUDGE**

**5.11.2010**

5.11.2010

Accused produced.

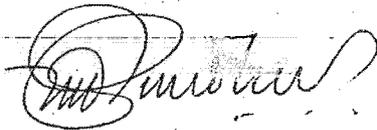
Alpha Ogwang for State.

Nabende on State brief.

Kimono interpreter.

Resident State Attorney: Case for judgment.

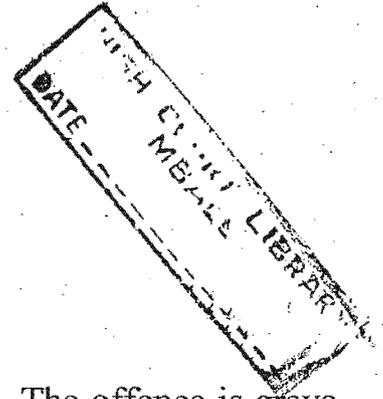
Court: Judgment delivered.



Musota Stephen

JUDGE

5.11.2010



Resident State Attorney:

To the best of my knowledge the convict is a first offender. The offence is grave resulting in a loss of a human being. The life can not come back. Domestic violence is rampant. I pray for a sentence to deter others.

Nabende:

The convict is a first offender. The convict has 10 children. The youngest is 2 years old. These orphans lost their mother. The father is a convict. Survival is going to be difficult. The convict has reformed I believe. Information from prison show the convict is born again. He is a pastor in prison. I pray court gives the convict a lesser sentence given the children left behind so he can look at them.

### Sentence and Reasons

The convict is a first offender. He started by committing a grave offence leading to the loss of his own wife and mother to his children. While sentencing the convict, I will consider the respective submissions by both learned counsel. I will

also consider the purpose of sentence. I am not convinced that the convict should get a light sentence because of the 10 children and that he is a self-proclaimed pastor. This will serve as a wrong signal to would be offenders. Domestic violence is rampant in this country and something should be done to eliminate it. Since the state did not ask for the ultimate sentence, I will sentence the convict to life imprisonment.

Right of appeal explained.



**Musota Stephen**

**JUDGE**

**5.11.2010**