

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUKONO
HCT- 03 – CR – SC – 0012 – 2010; CRB 643/2008 MKN

UGANDA ::PROSECUTION

VERSUS

ASP AURIEN JAMES PETER:: ACCUSED

Criminal law – murder – ingredients of murder – conduct of accused person immediately after the commission of the offence of running away and later handing himself over to police.

Evidence – contradictions and inconsistencies in the evidence of the prosecution – whether to grave to render the evidence to be rejected.

Evidence – circumstantial evidence – whether court can convict basing on the circumstantial evidence of the prosecution.

Evidence – burden and standard of proof – on whom the does the burden of proof lie in criminal offences – whether that burden ever shifts.

The accused, who was the District Police Commander at Lugazi, was indicted with the murder of his wife. Her was convicted and sentenced to death.

JUDGMENT

BEFORE: HON. JUSTICE LAWRENCE GIDUDU

The accused and the deceased were living together as husband and wife in the Police Barracks at Lugazi where the accused was the District Police Commander.

On 19th April, 2008 at about midnight, the deceased suffered a gunshot wound from which she died moments after. The accused was eventually indicted with her murder C/s 188 and 189 PCA. He denied the offence. The Prosecution adduced evidence from 16 witnesses the gist of whose evidence was that on that fateful night, the accused had quarreled with the deceased. The deceased for reasons not clear picked the accused's pistol and took it to her bedroom which she shared with her young daughter. Though husband and wife, the accused and deceased slept in separate rooms. When the accused

returned in the night, he was informed the deceased had picked his pistol.

The accused went to the deceased's bedroom and called her out to give him his pistol. The deceased opened her bedroom saying "you kill me I am here". They moved into the corridor and shortly a gunshot was fired. The deceased lay in a pool of blood. The accused took her to Kawolo Hospital but on realizing she was dead, he drove back and abandoned the body a few meters from Lugazi Police Station and went into hiding.

A week later, the accused handed himself into the Police at Kibuli CID Headquarters. He was detained and eventually charged.

The accused in his defence denied shooting the deceased. On the contrary, he saw the deceased shoot herself when he called her to return his pistol.

When told that his pistol was with the deceased, he went to her room and when he asked her to give it to him, the deceased opened the door, pointed a pistol at him and when he moved away, he looked back to see her point it at herself and he shouted at her to stop it but the deceased went ahead and shot herself dead.

The accused believes the deceased was agitated with guilt of her promiscuity which the accused had got information about. Once he realized she was dead, he left the body on the way to Lugazi Police Station and flashed lights of his car to alert the Police at the station about a disaster. He feared to be delayed by the Police to fill forms and record a statement because he wanted to rush to his village to assemble cows to pay a fine and dowry to the deceased's relatives who would become wild and destructive to life and property if they learnt of the death of their daughter.

Once the accused denies the offence with which he is charged, the Prosecution assumes the burden of proof of all the essential ingredients beyond reasonable doubt. *Woomington Versus DPP (1935) and Sekitoleko Versus Uganda (1967) EA 531* followed. On a charge of murder, the Prosecution has to prove the following essential ingredients;

- (i) That the death of a human being occurred.
- (ii) That the death was caused unlawfully.
- (iii) That death was caused with malice aforethought.
- (iv) That the accused participated in the crime.

On the first ingredient, it is without dispute that Apolot Christine alias Grace is dead and her body was buried in Bukedea on 21st April, 2008. Her body was picked by the roadside, taken to Kawolo Hospital mortuary where a postmortem confirmed she had died of a gunshot wound fired through her left eye.

Dr. Bacwa Kephher (PW11) attributed her death to brain death and severe haemorrhage. I must observe that Dr. Bachwa was a very lousy witness who though is a graduate of medicine could not explain how the penetration of a bullet through the eye and brain causes death. He appeared crafty and even stated that he felt the projectile one centimeter in the body and never looked at any other part of the deceased's body except the face. He was as irresponsible during the examination of the body as he was useless to the Prosecution. He could not explain how the projectile led to brain death or why he could not examine the entire body even by observation. The fact of death was proved by all the eye witnesses like the *OIC* CID Mr. Mugarura (PW14), the deceased's sister called Akello (PW8), her two sisters Asekenye

(PW2) and Atim (PW3) and the admission of the accused that the deceased died and he dumped her body by the roadside proves this ingredient beyond reasonable doubt.

Homicide, unless accidental or authorized by law is always unlawful. See *Gusambizi s/o Wesonge Versus Rep.* (1948) 15 EACA 65. The Prosecution contends that this was a homicide while the defence argues that this was a suicide. The resolution of this issue is so intertwined with the issue of participation that I propose to deal with both issues at ago. If I find that the accused shot the deceased, then that will be homicide which is unlawful. If I find that the deceased shot herself, then that is not homicide. I will resolve this when dealing with the issue of participation.

The next ingredient for consideration is whether there was malice aforethought. Citing the case of *R. Versus Tubere s/o Ochieng* (1945) EACA 63. Ms. Jane Kajuga the learned Principal State Attorney, asked the Court to consider the weapon used, the part of the body targeted, the degree of injury and the conduct of the accused before and after the act. It was her submission that a gun was used and the bullet went through the head injuring her seriously and she bled to death. The gun is a lethal weapon and the shot through the head was intended to cause death. Finally, that the accused's utterances that his child shall "grow on milk" demonstrated his intent to cause death. In reply, Mr. Duncan Ondimu, learned Counsel for accused argued at length about the conduct of the accused before, during and after the incident. He submitted that there was no serious quarrel that would cause the accused to kill the deceased and that once the deceased was injured, the accused acted responsibly by taking her to hospital and when he became aware she was dead, he did not hide the body but put it in an open place where the Police would find it and due to the fact that the accused got confused, he took time to recover before reporting to the police and was not in hiding. That he kept communicating with fellow police officers like PW14 before he finally handed in himself. I understood this submission to be made from the point of view that the deceased shot herself so the accused did not act suspiciously before, during and after the incident.

In Criminal Law, malice aforethought is deemed to be established from evidence of circumstances of the intention to cause the death of any person or of the knowledge that the act or omission causing death will probably cause the death of some person see S. 191 PCA. To establish these circumstances, the Court examines the nature of the weapon used. If it is a deadly weapon, the intention to cause or knowledge that death would occur is deemed to be established.

Further, the body part targeted and the nature of injuries caused is material for consideration in this regard. If a vulnerable part of the body is targeted with intensity, then the intention to cause death is inferred. The conduct of the accused is also material if he/she acts suspiciously or becomes restless or disappears and goes into hiding after the act.

See Mugao & Another Versus Rep. (1972) EA 545 and *Okuja Versus Rep.* (1973) EA 546.

In this case, there is no doubt that the deceased died of a bullet wound inflicted through her left eye tearing through the brain leading to excessive bleeding and death. A gun is a lethal weapon and the head which was targeted would lead to instant death because the head has a vulnerable organ like the brain that controls all other parts of the body.

Whoever aimed the gun that fired that shot intended to cause death or had knowledge that the

act of firing the bullet into a head would cause death. On this basis alone, I would find that the Prosecution has proved malice aforethought. However, there is an aspect regarding the conduct of the accused which is intertwined with the ingredient of participation. The accused contends the injuries were self inflicted by the deceased while the Prosecution argues that the accused fired the lethal bullet. It is, therefore, prudent if I discuss the accused's conduct when dealing with participation as I do so here below.

The Prosecution evidence in regard to participation is based entirely on circumstantial evidence. There were only two eye witnesses to this act. The accused and the deceased. The deceased is not available to give her account of what happened and the accused pins her death on her suicide. The Prosecution contends it was a homicide committed by the accused and the learned Principal State Attorney asked me to evaluate the following circumstantial evidence.

- (i) Statements of the accused to Prosecution witnesses; PW8 testified the accused told her "I have killed. My child will grow with milk" (sic);

PW5 O/Sgt Adanga testified the accused told him "I have killed my wife accidentally" and handed in the pistol.

PW14 testified that the accused told him he was going to report to CID Headquarters. PW7 (PIC Oketcho Nico) who also rang the accused was told he was going to report himself.

The Prosecution contends these were utterances of the killer and proves his participation rendering the cause of death unlawful.

- (ii) Threats. The Prosecution submits that PW8 testified about the quarrel that the accused and deceased had that day (19th April, 2008) after which the deceased rang her two sisters PW2 and PW3 to inform them of the looming danger. PW2 (Asekenye) testified that the deceased rang her on 19th April, 2008 at about 8.00 pm and told her the accused was threatening to kill her because somebody had rang him alleging she had been in a lodge in Kampala with another man and requested the witness to pray for her. Later at midnight same night, somebody rang her to say the deceased had been shot by the accused and was in Kawolo Hospital and she should hurry there.

PW3 (Atim Mary) also testified that on the same day (19th April, 2008) at about 7.00 pm, the deceased called her and told her in a depressed voice that the accused had alleged she had been in a lodge with a man. That she had explained she had been to Owino market to buy clothes but the accused never believed her. The phone went off before the witness could advise her on what to do. The following morning, PW2 called her to say the deceased had been shot dead. The learned Principal State Attorney cited the case of *Mureeba Janet & 2 Ors. Versus Uganda Criminal Appeal 13/2003 (SC)* and Section 30(a) of the Evidence Act for the proposition that these threats constituted circumstances of the transaction which resulted in her death.

- (iii) Conduct of the accused after.

The Prosecution contends that the accused did not call PW2 and PW3 to inform them of the tragedy and instead disappeared after dumping the body by the

roadside and never reported to the Police as he had promised PW7 and PW14. That the accused who is a Senior Police Officer should not have gone into hiding if the deceased had shot herself. The Prosecution faulted the accused's defence that he wanted to sort out the hostilities that would follow the reaction of the deceased's relatives arguing that he was acting with a guilty mind to anticipate such trouble.

On the other hand, the defence submitted that the circumstantial evidence was weak and the Prosecution witnesses were not credible enough to prove the participation of the accused in the death of his wife.

Mr. Ondimu for the accused argued that there was no serious quarrel to warrant the shooting of the deceased by the accused. He pointed out the following actions by the accused as indications of his innocence.

- (i) Handing over the pistol to PW5 a Police officer.
- (ii) Taking the deceased to hospital as a sign that he wanted to save life rather than take it.
- (iii) Depositing the body in an open place where it could be picked early.
- (iv) He kept communicating with police about the incident.
- (v) He handed himself out to the police.
- (vi) It was argued for the accused that if he was guilty, he would have acted to the contrary.

Further, that the accused's defence that the deceased took the pistol and when the accused demanded for it, she opened the door and shot herself creates the existence of other circumstances rendering the Prosecution evidence rather weak.

Finally, the defence attacked the credibility of the Prosecution witnesses and argued that they should be treated with caution because some of them made two contradictory statements and were not credible witnesses.

The law on how to treat circumstantial evidence has been re-stated in a number of cases. The test to be applied was re-stated in the case of *Simoni Musoke Versus R.* (1958) EA 715 that in a case depending exclusively upon circumstantial evidence, the Court must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt and also before drawing the inference of guilt the Court must be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt. See also *Moses Kalyowa & 3 Ors. Versus Uganda Criminal Appeal 4/1985 (Supreme Court)*.

On the credibility and inconsistency of witnesses, the Courts have stated in a number of cases that a witness may be untruthful in certain aspects of his evidence but truthful in the main substance of his evidence. Further, that a witness who has been untruthful in some parts and truthful in other parts could be believed in those parts where he has been truthful. But whereas it is true to say that minor discrepancies might be explained away by immediate delay before the accused person was brought to trial, grave inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. *Uganda Versus Rutaro* (1976) HCB 162; *Uganda Versus George W.*

Yiga (1979) HCB 217 and Uganda Versus Abdalla Nasur (1982) HCB 1 followed.

My task now is to consider those aspects of circumstantial evidence adduced by the Prosecution and evaluate it against the defence case and draw the necessary conclusions.

There were only two people at the scene of this act and one of them died. The one who survived is the accused and denies being a participant.

The first person to reach the scene was Akello Hellen Ruth (PW8) the sister to the deceased. The relevant part of her evidence is this:-

"We retired to bed at about 9.00 pm. Accused returned, knocked and I opened for him and returned to my room. Then I heard accused say Grace bring my pistol. This was about 5 minutes after he returned. Grace was saying - you kill me I am here. They then moved into the corridor between the kitchen and bathroom. I could hear their movements. The accused was demanding for his pistol but Grace was replying "you kill me I am here" then I heard a sound and thought a bulb had bust. I rushed out and saw Grace lying down and the accused said "I have killed" she was lying facing up. I saw blood coming from her left eye.

Accused also said "my child will grow with milk" (sic)"

The Prosecution contends that the events and utterances which PW8 testified to puts the accused in a position of the killer and not a witness to the suicide as defence argued.

There is no doubt that the accused had taken the accused's pistol. Was she keeping it away for fear of the accused using it given the quarrel they had just had or was it for shooting the accused or did she want to commit suicide only in the presence of the accused?

According to the evidence of PW8, when the accused demanded for his pistol, the deceased came out saying here I am kill me. She repeated this statement as they moved out into the corridor and then a shot was fired and when PW8 came out of her room, the accused says I have killed and my child will grow on milk which means by taking milk maybe from a cow or supermarket. Why would the accused say I have killed and the child will grow by taking milk?

In his defence the accused stated that when he went to ask the deceased for his pistol, she said "you are lucky you were going to find me dead." She picked the pistol, pointed at him. He turned to move away expecting a shot and when none came out he turned to look at the deceased only to see her point it at herself and he shouted "don't, don't, don't" but she shot herself all the same. He got shocked, confused and picked up the pistol as PW8 came out of her room. He then told her the deceased had shot herself accidentally.

When PW8 testified, she was not cross examined on the utterances of the deceased that she was going to kill herself. That evidence remains intact. I have two versions and one of them must be true and the other false. According to exhibit "p10", PW8's room was next to that where the deceased slept. PW8 was not asked if she heard the deceased say any other words apart from offering herself to be killed by the accused. It is also not clear if the deceased knew how to operate a pistol and fire a shot. I am not satisfied why if the deceased wanted to shoot herself why she first aimed the pistol at the accused before turning to herself. Could she not do it from her bedroom and could she not shoot the accused first then turn to herself? Besides, the accused who is a Senior Police Officer witnessing a case of self shooting, would not be expected to pick up the gun from the scene before calling the police to record a case of suicide. The testimony of PW8 regarding the shooting when weighed against the accused's defence stands unchallenged. Further, when Sgt. Adanga heard the shot and went to the direction where the sound of a shot had come from, he met the accused driving out of his residence. He stopped and told him he (accused) had shot his wife accidentally and handed him the pistol. It was the evidence of OICpl. Ogwal Alex (PW10) who was also on night duty that when PW5 returned to the station after going out to find out about the gunshot, he told him that the OPC had shot his wife during a scuffle and was taking her to hospital. He handed him a pistol which belonged to the OPC with six rounds out of the seven which he had signed for on 11th April, 2008 from the Armory man Sgt. Ogwal Bell (PW6). PW5 was not sure if the victim was dead or alive and once PW5 found the body of the deceased abandoned by the roadside near the post office, he returned and instructed PW10 to record a case of murder by shooting. PW10 recorded the case of murder by shooting in *SO/02/20104/08* and exhibited the pistol and wrote the first information sheet which was Court exhibit NO.7. Up to this stage, the events after the death of the deceased were unfolding naturally and I believe the testimonies of PW8, PW5, PW6 and PW10 in accordance with Section 113 of the Evidence Act. But as I shall show later in this judgment when dealing with the credibility of the witnesses, the case took a different twist upon light of the day with the intervention of the then Regional Police CID Officer. The defence asked me to disregard the evidence of PW8 and PW5 because they each have two contradictory statements on the file. Both PW5 and PW8 agree to have made two statements which are contradictory. Their first statements incriminate the accused while their second statements exonerate him.

PW5 explained in his testimony that he made the second statement (exhibit P2) on the instructions of Rashid Juma the Regional CID Officer who had taken over the file one week later. He was even uneasy when mentioning this fact in what I believe was pressure from superior officers and even recorded the time on the second statement as having been made at 10.00, 30 minutes earlier than he made the first statement. He confirmed on oath that his first statement that tallied with the entry in the *SD/02/20104/08* as the true one. SP Mugarura who was the District CID Officer and testified as PW14 explained in his evidence that he suspected the new twist from officers from the Regional CID Headquarters taking over the investigations would lead to loss of evidence and decided to photocopy the file before he handed over the file to them. Indeed it is the photocopy of PW5's statement that he produced (exhibit P3) that was available. PW5's original statement had been removed from the file and has never been seen. Rashid Juma is since dead and could not be produced to explain where he put PW5's original statement. I appreciate the difficulty of PW5 a junior officer standing by evidence that pins his District Police Commander when told by senior officers to change his position. This explanation is logical and the defence attack on it is without merit in the circumstances.

Similarly, PW8 who was a dependant of the accused and girl friend to the accused's son called David Mpagi explained how she was taken into hiding by Mpagi and was in May 2009 taken to the Central Police Station to make additional statement to conform to the version of the defence. She was the person in the next room and heard what was going on. 2 days after burial, both PW2 and PW3 who are her sisters testified about her disappearance from the village. DIIP Adupa Vincent (PW13) testified about how he arrested Mpagi and when Mpagi was detailed to produce PW8, Mpagi took him to Old Kampala Police Barracks in October 2009 more than one year since the death of her sister in April 2008. PW13's evidence on how PW8 was discovered in hiding was not challenged and PW8 herself confirms it. PW8 admits she was a girl friend to the accused's son. This relationship though obscene given the fact that Mpagi was in a sexual relationship with a sister of his father's wife brought pressure to bear on PW8 to save her father in law - the accused by making an additional statement that is false to save her inlaw from criminal charge. I would dismiss her second statement as I would dismiss PW5's second statement as false statements procured with criminal intentions of compounding a felony. I would accept the testimonies of PW5 and PW8 given on oath as truthful of what happened on the night of 19th and early hours of 20th April, 2008.

Let me examine other aspects of circumstantial evidence as adduced by the Prosecution. This is in regard to threats to kill the deceased which frightened her so much that she called her two sisters PW2 and PW3 and told them to pray for her because the accused was this time more annoyed than ever before and she was expecting the worst.

The Prosecution asked the Court to treat the verbal statements of the deceased to her two sisters just a few hours before her death as relevant and constituting circumstances of a transaction that led to her death. The Prosecution asked me to admit those statements to PW2 and PW3 under Section 30(a) of the Evidence Act and cited the case of *Mureba Janet and 2 Ors. Versus Uganda Criminal Appeal 13/2003 (SC)* in support of that submission. The defence argued that *Mureba's* case requires at pages 13 of the Judgment that such evidence be examined narrowly because it could be fabricated and that co-existing circumstances existed which made *Mureeba's* case inapplicable. In the present case, there is no dispute about the accused's presence at the scene. His defence is that it is the deceased who pulled the trigger to herself causing her death. This is a possibility which can amount to a co-existing circumstance. Indeed the lady assessor believed so and advised me to find the accused not guilty.

However, why should the deceased who had lived with the accused for about 5 years ring her two sisters a few hours to her death in a depressed voice telling them to pray for her because the accused was in a bad mood after suspecting her to have been in a lodge with another man? The accused testified that she read the letter written by one Peter who had seen her go with one Akuraja a policeman. But this letter if it existed did not say that the two had gone to play sex. However, the accused says she was guilty and decided to end her life. There was time between when she is supposed to have read the letter and when she died. She had time to call her two elder sisters. She told them that the accused was suspecting her and was very annoyed more than ever before. According to PW2, the accused was threatening to kill her and requested for prayers. This was at 8.00 pm and by midnight, another call came through from a lady that said the deceased had been shot and was in Kawolo Hospital before getting another call at 6.00 am that the deceased was dead.

The evidence of PW2 and PW3 when analysed or examined narrowly reveal proximity between the reporting of the threats and the subsequent death just a few hours. These in my view are statements that constitute circumstances of a transaction that identify the killer who caused her death. This evidence is relevant under section 30(a) of the Evidence Act which provides;

"Statements, written or verbal of relevant facts made by a person who is deadare themselves relevant facts in the following cases:-

- (a) When the statement is made by a person as to the cause of his or her death or as to any of the circumstances of the transaction which resulted in his or her death in cases in which the case of that person's death comes into question and the statements are relevant whether the person who made them was or was not at the time when they made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his or her death comes into question.
- (b)
- (c) The last aspect which was advanced by the Prosecution relates to the conduct of the accused after the death of the deceased. The Prosecution contends that by depositing the body by the roadside and going in hiding after lying he was going to report to CID Headquarters were acts inconsistent with the innocence of the accused. The defence argued to the contrary that the accused did not hide the body but left it where it could be recovered easily and his rushing to the village was not an act of disappearance but a rush to avail cows to the deceased's relatives so that they do not cause mayhem to property and lives of the accused and his relatives.

The accused is no ordinary person but a Senior Police Officer who was commanding the District of Mukono. He testified that he feared to be arrested if he went with the body to the Police Station and could neither leave the body at the Hospital because she had not died in admission. Was he so confused or was he overtaken by the desire to protect his property and the lives of his relatives by rushing to the village to organize cows to cool the tempers of the deceased's relatives? Was this a reasonable conduct or was it conduct of a guilty person?

In *Uganda Versus Yowana Baptist Kabandize* (1982) HCB 93, this Court held that the conduct of the accused immediately after the death of the deceased of running away from the scene of crime and of being in a restless mood in the swamp clearly showed a guilty mind and in *Remegious Kiwanuka Versus Uganda Criminal Appeal* 41 of 1995, the Supreme Court held that the disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence. This is because such sudden disappearance from the area is incompatible with innocent conduct of such a person. I was asked by the defence to treat the conduct of the accused as normal. He went home to sort out the deceased's relatives and make burial arrangements before reporting as he did.

If I may pause the question, why would the accused want to have the deceased buried before he gives his side of the story to the police? The deceased had died of a gunshot wound from a pistol the accused had signed for from the armory. Why did he believe he should only provide an explanation after the body has been buried? Is this the innocent conduct of a District Police Commander? I was asked to consider that he would have hidden the body of the deceased if he was guilty. I find this, with respect, untenable,

witnesses like PW4, PW8, PW5 were aware that the accused had an injured wife in his vehicle, would he hide away the body and claim nothing had happened? He would have to account for her. PW8 had ran away from the vehicle once she became aware the deceased was dead and had run back to the barracks while wailing. How then could the accused hide the body? When I analyse the conduct of the accused from the perspective that the deceased shot herself, I find that such conduct raises more questions than answers. The accused tampers with the scene by removing the pistol. He deposits the body on the road and concentrates on appeasing the deceased's relatives with cows and provides his brother (DW2) with money to go to Lugazi to pick the body for burial and takes his time (8 days) before reporting to the Police Headquarters. When he eventually reports, he says the deceased killed herself. I would say no. if she had killed herself, the accused would have involved the police at that stage to establish that fact and would not have dumped the body by the roadside. He could have made a report to his station at Lugazi and if there was any fear of reprisals, he should have alerted his relatives to take care of the situation the way they did because he did not physically appear in public even in the village. He was in my view a fugitive who could run but could not hide forever.

The State called expert witnesses like the medical doctor (PW11) and Ms. Robinah Kirinya (PW15) who added little value to the case if any. PW3 who saw the body in the mortuary was emphatic that the deceased was pregnant and that a feutous had been removed from her following an operation but Dr. Bachwa said he never examined the rest of the body. He only looked at the wound on the face and did not turn the body to do an examination or observation of the whole body.

Though he admitted to having no facilities to do an autopsy, his treatment of the duty to carry out a postmortem was wanting. He filled PF 488 in such a scanty manner that showed he was not suitable for the job. He must have filled the form from some unseemly place. Similarly the ballistic expert had no finding relevant to this case. There was no dispute about the capacity of the pistol to fire a bullet and yet that is the only confirmation she gave. She takes her time to do analysis and could not tell when the pistol last fired. She only added to our time and paper usage.

The lady and gentleman assessors gave me separate opinions. The gentleman assessor was not clear in his opinion but observed that since the deceased asked the accused to kill her, there was no malice aforethought. He advised me to find the accused guilty of manslaughter. I got the impression that the gentleman assessor based his opinion on the belief that the deceased put herself in harm's ways by asking the accused to kill her.

The lady assessor was clear that to her there were contradictions in the Prosecution witnesses and thus the Prosecution failed to prove the case against the accused. She advised me to acquit the accused. With respect, I am unable to take either advise from the two assessors.

In my summing up, I explained what constitutes circumstantial evidence and how to treat witnesses whose evidence is partly true and partly false.

With respect, the two assessors did not appreciate the law as stated and took the absence of the eye witnesses as lack of direct evidence to mean that the case was not proven.

Anticipating the complex nature of the evidence before the Court and its bulk, I had asked at the end of the summing up notes, for the assessors thus:

"Assess the entire Prosecution evidence against the accused's defence and advise me if you believe the Prosecution has proved the case against the accused beyond reasonable doubt or do you have a reasonable doubt".

I believe the assessors reached that opinion because they did not treat the evidence as a whole but picked out isolated pieces and chose the easier route - advise to find not guilty. In *Miller Versus Minister of Pension (1947)* 2 All ER 372. Lord Denning explained the term beyond reasonable doubt thus:-

"The degree of beyond reasonable doubt is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice".

If the two assessors had considered the accumulated import of the several pieces of circumstantial evidence adduced by the Prosecution and the explanation given for the existence of two versions of evidence by some witnesses, they would have found that the possibility of the deceased shooting herself was a remote one. It was possible but the least probable.

The two sisters receive distress calls from the deceased, in a matter of hours, they receive news that she has died.

When PW8 hears a gunshot and comes out of her room, the accused tells her "I have killed".

When the accused seeks help from PIC Allu to help carry the victim and asked the accused what happened, the accused tells him she has been shot. He did not say she shot herself. When he meets Sgt. Adanga, he tells him he had shot his wife accidentally. When PW14 find the body dumped by the roadside with bloody wounds and calls the accused, he replied, he was going to report to CID Headquarters. When PIC Oketcho calls him to say a message has been sent out about the murder of his wife, he says he is going to report. In the village, the accused mobilizes cows and money to pay fine and dowry for the deceased and sends his brother to bring the body for burial before he had recorded any statement or made any report about how she came to die of a gunshot wound fired by his gun (pistol).

After the deceased is buried, the accused then organizes to come out of his hiding and reports after a week to CID Headquarters. In his formal statement recorded by ACP Tumuhimbise Kato (PW12) he says his wife shot herself and his main concern was to find cows to pay fines and dowry and this effort coupled with his hypertensive condition prevented him from reporting early to the police. It is my finding that the accumulated import of all these pieces of circumstantial evidence lead to the irresistible inference of guilty and are incapable of explanation on any other reasonable hypothesis than guilt. The hypothesis by the defence that she shot herself is not a reasonable one. In that sense, I accept the submission by the Prosecution that evidence adduced though circumstantial when carefully examined has proved the ingredients of the offence of murder beyond reasonable doubt. Having found that the accused killed the accused, the cause of death is therefore, proven to be unlawful. It was a

homicide.

Having accepted that the conduct of the accused after the act of death was not usual, he is proven to have acted with malice aforethought. He fired the bullet through the eye tearing through the brain which caused immediate death.

The accused was at the scene and his subsequent conduct betrayed him. He acted with overwhelming guilt and therefore, his participation is proved beyond reasonable doubt.

As was held in *Masanja Omari Mulera Versus Republic (1979) LRT 14*, circumstantial evidence can be sufficient to establish the offence of murder and it is no derogation of evidence to say that it is circumstantial. For reasons contained herein, I find the accused, Aurien James Peter, guilty of murder C/SS 188 and 189 PCA and I convict him accordingly.

Signed
Lawrence Gidudu
JUDGE
29/11/2010

29/11/2010: Accused in dock.

Kajuga for state

Kunya H. }

Musoke H. } for defence

Bijule – court clerk

COURT: Judgment read in open Court.

Signed by :

Lawrence Gidudu

JUDGE

29/11/2010

ALLOCUTUS

PROSECUTION: No previous record of conviction. We, however, pray for the maximum sentence. Aggravating circumstances exist i.e.

- Convict is a Senior Police Officer who used his gun to do the opposite.
- Violence in homes where spouses are killing themselves is on the increase. I pray that this Court sends a message to the community to stop this violence.

MR. KUNYA: Convict is a first offender. Conduct and good character of the convict who has served the police force from 1974. This is the only blemish on his long years of service. He rose to the rank of ASP and OPC. In 1994, he was incharge of security during construction of Namboole Stadium. He was commended by the police. He has attended several courses on police rank. He has recommendations from his village which speaks very well of him. The recommendation is from Suula L. C. 1, Bukedea.

The circumstances surrounding this incident leave some benefit so that he does not suffer the maximum. The convict should be given second chance to live. Convict has a large family of dependants of whom are 8 children who are school going. They need his support. Convict is hypersensitive and needs medication.

In view of the holding in *Kigula's* case and the period he has been on remand, he should be given a reasonable term of imprisonment.

MR. AURIEN: I am extremely sorry for the death of my wife especially when I was seeing. It hurt me and raised my blood pressure. I was referred to the heart institute who discovered 2 arteries of my heart are not normal.

I have been in prison for 2 years and seven months and attended reformatory programs like behavior change, alternative to violence, Alpha course, Bible studies and I am a born again Christian.

I am now transformed who should be given a chance to go back to the community to serve them. I have been in service for 36 years. The conviction denies me terminal benefits and this leads to disaster for my family. I pray that I am released in this session.

PROSECUTION: I leave it to court.

REASONS AND SENTENCE

The convict is a first offender who has been on remand for 21/2 years. The maximum sentence for this crime is death for which the Prosecution has asked me to impose reasoning that the OPC acted irresponsibly and that cases of domestic violence are on the increase. The convict who has been in the police force for 36 years has asked for lenience on account of his being a first offender who is sorry for witnessing the death of his wife. He asked me to tamper justice with mercy and impose a lenient sentence that would enable him to rejoin society as a reformed person.

I have given considerable thought to both submissions and considered the circumstances under which this death occurred. The aggravating circumstances are that the convict should have acted with restraint given his role as the keeper of law and order. The deceased was only 24 years and was pregnant when shot dead. She died a young girl leaving a very young baby. Though the convict is a first offender who has been in service for a long time 36 years and this act comes in to dent his exemplary record. With this conviction, all his benefits are gone.

The death sentence is no longer a mandatory one in cases of murder but where the DPC - a very senior police officer is found guilty of murdering a person who was living with him as a wife and mother of his child, while he was just suspecting her of being promiscuous, this Court would be hard pressed to find mitigating circumstances not to impose the maximum sentence. If there had been a fight over the pistol before the deceased was killed, I would have imposed the sentence of imprisonment for life. But when I consider the events after the act, I am unable to find reasons to consider a lesser sentence.

Those charged with keeping law and order would be the least expected to kill their spouses. Domestic violence that leads to the death of one spouse must be condemned by this Court by imposing a sentence that fits the crime. There was ample time for the convict to handle the situation without loss of life. He cannot get away with her death as lightly as the defence asked me to do. I, therefore, sentence the convict to suffer death in a manner provided by law.

Signed by :

Lawrence Gidudu

JUDGE

29/11/2010

COURT: Right of appeal against conviction and sentence explained

Signed by :

Lawrence Gidudu

JUDGE

29/11/2010