

UGANDA / JUDGMENT

Uganda v Balikoowa (Criminal Session Case No. 0306 of 2014) [2016] UGHCCRD 133 (19 December 2016)

[2016] UGHCCRD 133

COURT

HC: Criminal Division (Uganda)

BEFORE

Luswata, J

CASE / FILE NUMBER

Criminal Session Case No. 0306 of 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 0306 OF 2014

UGANDA.....PROSECUTOR

VERSUS

BALIKOOWA JOSEPH.....ACCUSED

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

The accused was on an unspecified date indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act Cap 120 LOU. It was stated in the indictment that Balikoowa Joseph and others still at large, on the 20th August, 2013 at Kamuli Industrial area in Kamuli District, with malice aforethought, unlawfully killed one Nalwada Magaret (hereinafter referred to as the deceased). The accused denied the offence and a plea of not guilty was recorded on 7/12/16 He was represented by Counsel Adikini Esther while the state was represented by Ddungu Martin.

The prosecution case borne of the evidence adduced, is that, both the accused and deceased were residents of Bunangwe Zone, Nabwigulu Sub County in Kamuli District. On an unspecified date, the deceased rented a house and lived there for a few months preceding her death. That on an unspecified date, the accused who was known to be her man friend, was seen by the owner of the house entering and leaving the deceased's room and when he left, the deceased was found dead; possibly strangled. The deceased's body was taken to the mortuary and subsequently handled

over to her family for burial.

Prosecuting counsel presented two witnesses before closing his case. Defence made no submissions on “a no case to answer”, leaving it to the Court to decide. The following therefore is my decision.

It is trite that on a charge of murder, at whatever point the prosecution choose to close their case, the burden lies on them to adduce evidence that will prove the following elements beyond reasonable doubt:-

1. The deceased is dead.
2. That death was caused unlawfully.
3. The death was carried out with malice aforethought.
4. The accused person participated in the commission of the offence or, is responsible for the death.

By law, it is incumbent upon the prosecution to prove all four elements to the required standard, which according to the authority of **Woolmington Vs DPP (1935) AC 462** and **Sekitolelo Vs Uganda (1967) EA 53**, should erase all reasonable doubt of the commission of the crime with a malicious intent. In the words of Chief Justice Emeritus B. Odoki *’...the prosecutor should endeavor to adduce cogent and convincing evidence to satisfy the Court about the guilt of the accused beyond any reasonable doubt’*. See **A Guide to Criminal Procedure in Uganda. B. J. Odoki, 3rd Edition.**

It is expected that by the close of its case, the prosecution has made out a *prima facie* case, one on the face of it, is convincing enough to require that the accused be put on his defence. See for example **Rananlal T. Bhati Vrs R (1957) EA** followed in **Uganda Vrs Kivumbi & Ors Crim. Case No. 20/2011**. It is my duty then, even without prompting from the defence, to make a finding on whether with the evidence so far adduced by the prosecution, the accused has a case to answer against the charge for which he is indicted, and the following conditions must be fulfilled: -

1. That there has been no evidence to prove an essential element in the alleged offence, or
2. When the evidence adduced by the prosecutor has been so discredited as a result of cross examination or is so manifestly unreliable, that no reasonable tribunal could safely convict on it.

See “**A Guide to Criminal Procedure in Uganda**” (supra) at page 120.

Perepetwa Nankya, a 70 year old female, and looking very much her age, was presented as the first prosecution witness (PW1). She testified to have been the deceased’s landlady and owner of the house (one room) in which the deceased met her death. She could not remember the deceased’s name but stated that she could remember her well as one of her tenants who approached her for a room to rent and paid three months rent. She then entered and occupied the room alone but died before concluding her term. She was aware that a man whom she only described as one “Koowa” and a man friend or lover of the deceased and a village mate, at times

visited the deceased. PW1 herself had never talked to Koowa and came to know his identity from other people in the village who called him by that name. That on a date she could not remember, at around midday, the said Koowa came to her compound and she observed him entering the deceased's room. She took no note of how long he spent inside, but saw him leaving. Subsequently another man, she could not remember or specify, then also entered the same room, came out after a few minutes, and announced that the deceased was dead. She thereby alerted many people and the deceased's body was taken away by her relatives.

I noted that no attempt was made by prosecuting counsel to lead the witness to connect the person "Koowa" to the accused in the dock whose names are "Balikoowa Joseph". Significantly, PW1 stated she did not know the accused and when asked in cross examination to point out the one "Koowa", in court, she could not do so. Considering her age and probable impaired sight, the Court allowed the accused to be brought to a distance of less than a meter to where PW1 was standing. She still could not recognize the accused for himself or to be the one "Koowa" she had constantly referred to in her testimony. Asked about the fact of seeing "Koowa" entering the deceased's house, she admitted that the man she saw resembled Koowa but that her house was about 150ft from the one in which the deceased met her death. She was emphatic that she did not see Koowa strangle the deceased, and was not sure if the deceased was actually strangled.

PW2 did not offer much evidence to support the charge or corroborate the evidence of PW1. She testified to be married to the deceased's brother and only got to know of the deceased's residence on 20/8/13, the day she died. That it was the deceased's mother who reported the death and requested her to proceed to the deceased's home, which she did. She found when the body had already been removed and taken to the mortuary. Although she viewed the body at the mortuary and attended the burial, she never came to know how the deceased met her death. She never interviewed PW1 nor had any knowledge of one Koowa.

The question to be asked now is that, has the prosecution at this point raised a *prima facie case*, one on which a reasonable tribunal properly directing its mind to the law and the evidence pass a conviction if no explanation is offered by the defence? See **Rananlal T. Bhati Vrs R (supra)**.

With regard to the ingredients of the offence, only the fact of death was proved to the required standard. Both prosecution witnesses viewed the deceased's body and according to PW2, the deceased died on 20/8/13 and the body was subsequently handed over to the deceased's family and subsequently buried in Mpungwe, Jinja District. That evidence was not seriously challenged in cross examination.

Neither prosecution witness was able to confirm the cause of death. They did not witness the act of death, and PW1 was only speculating when she said that the mode of death pointed to strangulation. There was no medical evidence to support her suspicions, and no circumstances were present for the Court to deduce whether the cause of death was unlawful or to the contrary, excusable, accidental or justifiable. Again, without any evidence of the intention of the person who may have caused the death, or evidence of any palpable marks on the body to suggest injury intended to cause death, the Court cannot deduce that the death was carried out with malice

aforethought. I would conclude that the second and third ingredients of the offence of murder were also not proved to the required standard.

It was incumbent on the prosecution even at this point, to prove the participation of the accused in committing the offence. They needed to adduce evidence to place him on the scene of crime and in addition, show that he and no other, murdered the deceased.

PW1 as the principle witness sadly dismally failed in her role. She could not remember vividly much of what happened on the fateful day. She referred to one "Koowa" as the one suspected to have committed the crime but could not, when asked, identify the accused as Koowa. She in fact could not recognize the accused at all which would throw serious doubt as to whether he is the man Koowa that she saw entering the deceased's house that day.

Although her memory on some facts could be attributed to her advanced age, she stated that her sight was not impaired and the light in Court was sufficient for her to view the person in the dock. Indeed, she was able when asked to state that she could see the Judge, who at the Bench, was sitting even further away from where she was allowed to view the accused. In my opinion, she genuinely did not know the accused, a strong inference that the man in the dock that day is not the "Koowa" whom she knew and had seen enter the deceased's room. Her testimony was further complicated when she stated that after Koowa left the deceased's room, another man entered and stayed there for an unspecified period of time. He then came out and informed her that the deceased is dead. She could not remember this man's identity or the time he spent inside the deceased's room. Could this new entrant have done the deed himself?

Beyond that, PW1 was not consistent in her testimony. On the one hand she claimed the deceased fell sick and died abruptly, but then changed to give the account above. She stated that the deceased had resided in her house for three months but changed to say that she died before she had completed the term of two months that she had paid for. Again, at one point she insisted that Koowa was only a casual friend of the deceased, but changed to say that he was her lover and yet again changed to say that she did not concern herself much about the relationship between Koowa and the deceased! She did admit though that she would not know all the persons who visited her tenants over a period of time, and could not tell the people who visited the deceased for the period she was her tenant.

In my view, the evidence of PW1 was so manifestly unreliable, that I cannot safely rely on it to base a conviction. It was so scanty and contradictory and did not support the indictment to constitute a **prima facie** case for which the accused can be called upon to defend. In summary, the accused has no case to answer to the charge of murder.

Thereby, the charge for which the accused is indicted is dismissed forthwith. He is accordingly discharged unless he has any other pending criminal charges against him.

I so order.

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EVA K. LUSWATA

JUDGE

19/12/16

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