UGANDA / JUDGMENT

Uganda v Murindwa & Anor (Hct-05-cr-sc-148-2006) [2009] UGHC 236 (31 March 2009)

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COURT
High Court of Uganda

CASE / FILE NUMBER
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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-SC-148-2006

UGANDA PROSECUTOR

VS

A1 MURINDWA JAMES)

A2 NYAMWIJA MOLLY) ACCUSED

BEFORE: THE HON. MR. JUSTICE LAWRENCE GIDUDU

JUDGMENT

Murindwa James - hereinafter called the accused, is indicted with murder C/Ss. 188 and 189 PCA. He denied the charges.

During the trial, the prosecution called evidence that on 26/4/05 at about 8.00 p.m. when Barigye Fred (PW2) was taking his sick child to a clinic, he met the accused and Byamukama Charles - now deceased. The deceased was his elder brother, he talked to the deceased. The deceased apparently concerned about the condition of PW2's child told PW2 to pass by his home after the clinic to brief him on the progress of treatment. PW2 passed by the deceased's home after the clinic but the deceased's wife (who was A2 to this indictment) said the deceased had not returned. PW2 told her that he had met the deceased and the accused and they could have gone to the accused's home to finish the waragi which the accused was carrying in a "Fanta" bottle.

The following morning, the deceased's wife went to PW2 and informed him that the deceased never returned that night. PW2

informed neighbours who included the accused and they mounted a search. During the search, along the path, they came across a scene of struggle. There were stains of blood, marks of tyre sandals and a match box.

A further search along the steam revealed the body of the deceased lying in water. PW2 raised an alarm that attracted many people. The LCs arrested the accused to explain how he parted with the deceased and when they examined him, he was wearing the same T-shirt he wore the day before and it had what appeared to be a blood stain.

It is PW2's evidence that the accused used to buy waragi for the deceased and would leave him drinking as he (accused|) goes to have sex with the deceased's wife.

The deceased's body appeared to have been strangled before it was dumped in the water. The post mortem report confirmed death by strangulation.

The accused denied murdering the deceased. His defence is that on the material day, he went to buy beer for his wife. He met the deceased at Kansiime's bar (PW3). They walked back together and met PW2 who was having a sick child.

The accused left the deceased talking to PW2 and went to his home. The following day he heard an alarm and when he went to the scene, he was told that the deceased had drowned in the stream. He was arrested for being the one last seen with the deceased. He was wearing a white shirt and not the exhibited T- shirt.

Once the accused denies the offence, the prosecution has a duty to prove all the essential ingredients of the offence beyond reasonable doubt. The accused has no duty to prove his innocence.

See *Sekitoleko vs. Uganda* [1967] EA 531 *Woolmington vs. DPP* (1935) AC. 462.

On an indictment for murder, the prosecution must prove beyond reasonable doubt the following ingredients:

1. That a person named in the indictment is dead.
2. That his death was unlawful.
3. That there was malice aforethought.
4. That the accused participated in the murder.

Whether Byamukama Charles is dead is not in contest. PW2 and others discovered his dead body and PW1's post mortem report revealed he died of strangulation - the medical term being Asphyxia. The body had bruises on the neck and eyelid. Pictures of the dead body were also tendered in court. Indeed the accused heard an alarm and was informed Byamukama is dead in the stream.

I have no difficulty finding as a fact that Byamukama Charles is dead.

Was his death unlawful? In homicide, death is presumed to be unlawful unless it is authorized by law or is excusable.

See *Gusambizi s/o Wesonga vs R* 1948) 15 EACA P. 65

In the instant case, medical evidence and that of eye witnesses is that the deceased's dead body was found in a steam where it was dumped after it was strangled. There was a scene of violence near where the body was i.e. 80 metres. The circumstances of this death reveal a criminal act. This issue was not contested and I find as a fact that the deceased was killed unlawfully.

Malice aforethought is an essential ingredient of the offence of murder. It refers to the intention to cause death or the knowledge that the act or omission would result in death. It can be inferred from the circumstances such as the weapon used, extent of the injuries, body parts targeted and the conduct of the accused before or after the event.

The post mortem report reveals external marks of violence as fractured ericoid cartilage with bruises around the neck and eye lid. Cause of death was Asphyxia. The neck was broken and air supply cut off. This was done manually.

The neck is an important and vulnerable part of the body through which runs the respiratory system, the spinal cord and the central nervous system. If the bones on the neck are twisted, they cut off air supply and damage the nerves killing the person almost instantly. An attack on that part, save in circumstances of self defence, can only mean that the assailant wanted to cause death. Indeed the body was disposed of in a stream. The assailant intended that the deceased should not survive but should die. There was no contest on this issue and I have no difficulty finding that there was malice aforethought.

The last and contested ingredient was partici8pation.

The accused denied taking part in the killing. The prosecution evidence is entirely circumstantial.

In a case depending exclusively upon circumstantial evidence, court must find before deciding upon conviction that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis from that of guilt.

See Simon Musoke v R [1958] EA 715.

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

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

Indeed I warned the assessors about this requirement as I do to myself.

It was contended for the state that the evidence of PW2 and PW3 places the accused in the company of the deceased and that was the last time the deceased was seen alive. That the body was discovered the following morning along the same direction the two had last been seen walking to.

That PW3 had sold waragi and a matchbox to the accused and that the match box was recovered from the scene of struggle while the Fanta bottle in which PW3 sold waragi to the accused was recovered from the accused's house.

That the accused was betrayed by the blood stain on his T-shirt which was the same one he had wore the day before. And that on account of PW2's testimony, the accused had a motive to kill the deceased in order to have a free hand in a love affair with the deceased's wife.

The learned defence counsel for the accused challenged the stain on the exhibited T-shirt on grounds that it was not proved to be blood. That there was no proof of a home affair as motivation for causing death. That the fact that PW2 testified that the accused took part in the search, then he was innocent and that there is a possibility that the deceased was killed by other people.

My duty is to examine these pieces of circumstantial evidence against the defence challenge and establish if the inculpatory facts are inconsistent with the guilt of the accused and that there are no other co-existing circumstances that weaken that inference.

First of all the accused does not deny being in the company of the deceased on the material night but contends that he left him in the company of PW2 - the deceased's young brother.

PW2 on the other hand testified that though he met the deceased, he left him proceeding with the accused as he (PW2) took his child to a clinic. That he checked on the deceased to brief him on the treatment but found that he had not reached home and indeed the deceased's wife called him in the morning at about 6.30 a.m. to inform him (PW2) that the deceased never returned where upon a search was mounted.

The time between when PW2 saw the deceased in company of accused and when he checked his home after the clinic was barely an hour, i.e. between 8.00 p.m. and 9.00 p.m. Even after 9.00 p.m. the deceased never reached home until the following day when his body was found in a steam. Could the deceased have met the assailants on the way? The scene where the struggle took place is before the accused's home. Could they have parted company before the deceased was killed? Why would the accused's company with the deceased be a cause of suspicion once the deceased is found dead?

The defence attacked the inference of guilty contending it does not rule out other assailants being responsible. And that the alleged blood stain is not proved as such. I agree that the stain on the T-shirt was not scientifically proven to be blood of either a human being or that of the same group as the deceased. The investigating officer should have subjected the stain to scientific analysis by the Government Analyst. It has not been proved to be blood from the deceased.

However, this alleged stain when placed in the context of the company of the accused and the deceased and the deceased being found dead the next morning is a source of a strong inference that the stain is due to the contact the two had while in company of one another.

PW2 who was key to the prosecution case was a composed and credible witness.

He acted responsibly by going to brief the deceased on the line of treatment but did not find him home. Even when the deceased's wife informed him of the disappearance of her husband, he mobilized people to search. PW2's credibility about which I concur with the lady and gentleman assessors negatives the accused's defence that he never proceeded home with the deceased.

In his defence, the accused contended that he was arrested just because he was the last person to be seen with the deceased and that when he defended himself that it was PW2 who was last with the deceased; he was freed but later arrested by the LC Chairman. That PW2 was not at the scene when the body of the deceased was discovered. That while he was being taken to Sub County, the defence secretary saw many people coming after them, and he decided to leave the accused behind on the way as he ran to the sub-county to get re-enforcement so that those people do not kill the accused. Frankly, this defence is fraught with lies that defeat common sense. It is abundantly clear that the search for the deceased was spearheaded by PW2 who must have been very visible to the accused.

Indeed, PW2 said he had met the accused and informed him of the disappearance of the deceased and the accused joined in the search. I have already appreciated the credibility of PW2 in this case. It can only be a lie for the accused to state that PW2 was absent upon the discovery of the body and that they started looking for him after he (accused) had been freed temporarily. Secondly, I find it incredible that the defence secretary who was taking the accused to the sub-county would abandon him with his hands tied to run to the sub-county to get re-enforcement. The mob could have lynched the accused. Although an accused person should not be found guilty on the weakness in his defence, the fact that I find lies in his defence leaves me with no option but to believe the prosecution case since no other explanation has been raised by the defence to create doubt in the inculpatory facts being relied upon by the prosecution.

The defence invited court to consider that the accused did not ran away but according to PW2, he also participated in the search for the deceased. Granted, while an innocent person may not run away, a guilty person may also stay around to divert attention and cover up for the crime.

When PW2 met the accused, he informed him of the disappearance of the deceased and the search proceeded well. When the body was found, questions arose as to how the deceased ended the day. That is when PW2 informed the local authorities that the accused was the last person he saw the deceased with at night. When the accused was questioned, he was betrayed with what appeared to be a stain on the T-shirt which he had worn the previous day. This evidence when linked with that of PW3 who stated she sold a match box to the accused plus a bottle of waragi and PW4 found a match box at the scene where the struggle took place, it goes beyond suspicion to prove that the accused must have been the assailant. PW3 denied selling beer to the accused and identified the Fanta bottle into which he had sold waragi to the accused before he departed

with the deceased.

As was held in R v Taylor, Weaver and Donovanu (1928) Cr. App. R. 20 cited in Tumuhairwe v Uganda [1967] EA 328 at P.331, circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.

It was PW2's evidence that the accused had an extra marital affair with the deceased's wife and used to buy him booze as he (accused) goes to have sex with the wife of the deceased. Indeed on the fateful day, the accused bought waragi from PW3 and went in the company of the deceased. The deceased never reached home because PW2 cross-checked at about 9.00 p.m. when he was from the clinic and in the morning when the deceased's wife reported that the deceased was missing. These circumstances when considered with the fact that there was a scene of struggle and a match box was found which PW3 says she sold to the accused who was a known smoker of cigarettes and the fact that the Fanta bottle into which PW3 had sold waragi to the accused was recovered from the accused's home while empty leads to the irresistible inference that the deceased was entertained on waragi before he was strangled having been weakened by booze. The discovery of the body in the area along the route both accused and deceased took leads to the irresistible inference that the accused committed murder of the deceased.

My examination of the surrounding circumstances of this case leads me to conclude, in agreement with the lady and gentleman assessors that the accused participated in the murder of the deceased, Byamukama Charles. On the basis of circumstantial evidence I find that the prosecution has proved the ingredient of participation by Murindwa James beyond reasonable doubt.

From the above analysis, there is no evidence to suggest that Nyamwija Molly (formerly A2) either participated in planning or in the actual murder. In fact A2 could have been a state witness because the reason for her indictment is completely lacking on the file. It is for this reason that I acquitted her on a no case to answer.

For the reasons outlined above, the prosecution has proved the case against Murindwa James beyond reasonable doubt. I find him guilty of murder c/s 188 and 189 PCA and I convict him accordingly.

Lawrence Gidudu

Judge

31/3/2009

31/3/2009 Accused present Pros. Arinaitwe

Dhabangi for accused on brief

Ngabirano - translator

Court: Judgment read in open court

31/3/2009

Allocutus

Pros:

Convict is a first offender.

Offences of murder are becoming rampant in the country.

Courts should keep people like the accused away from society. Court should protect the weak from the strong. Since life was lost, we invite court to impose the maximum.

Dhabanqi:

I pray for time to talk to convict.

Court:

Granted.

Dhabanqi:

Accused is aged 36 years. Married with children. The elder child is 13 years. Punishment is intended to rehabilitate convicts. The convict has been in prison for over 3 years. He seeks lenience. Murindwa:

I have spent four years in prison. I did not commit this offence. I moved with a person but I do not know how he died. I lost 2 children while I was in prison. I pray for discharge since I did not commit the offence.

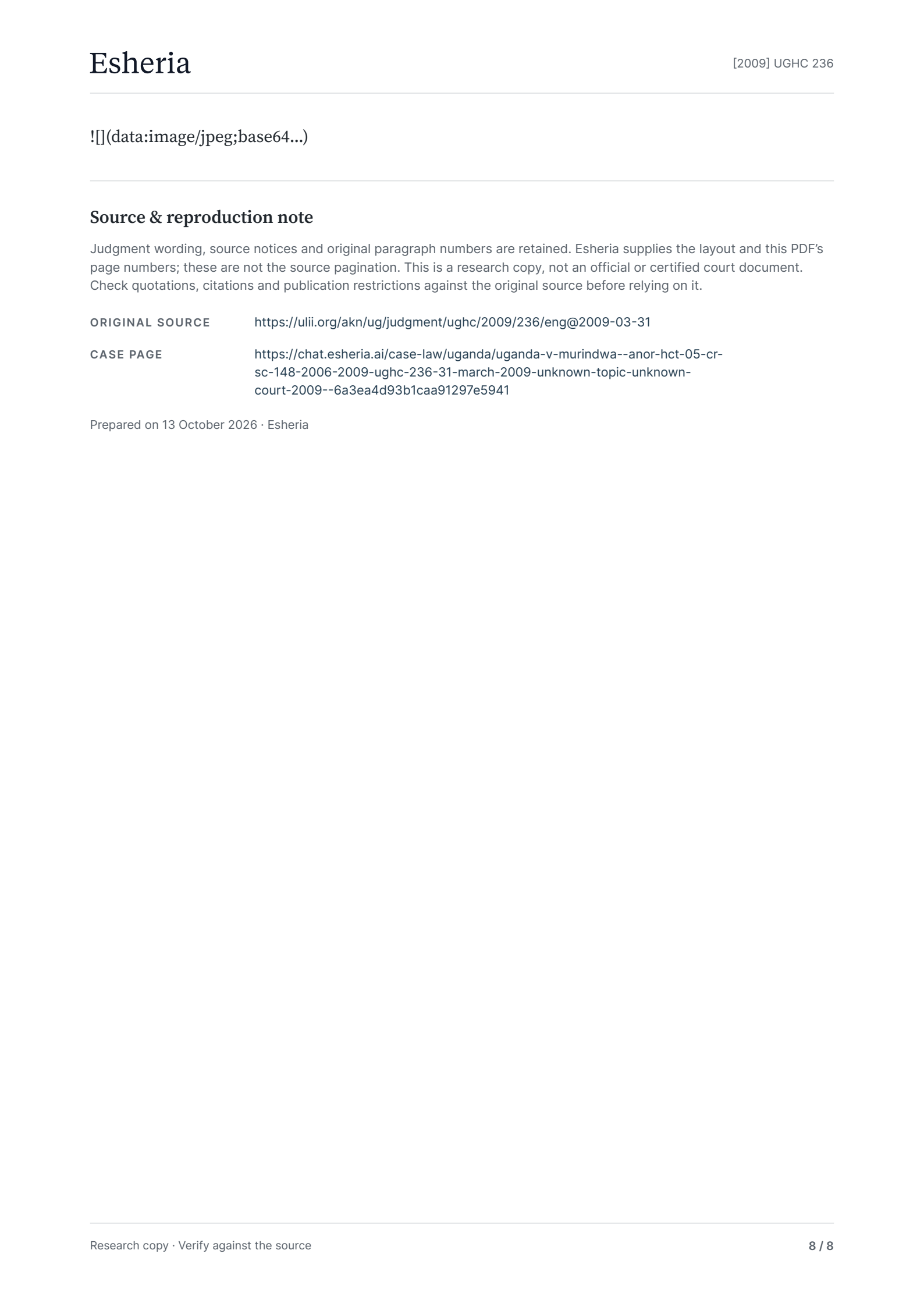
Reasons and Sentence

The convict is a first offender and has been on remand for 4 years. He maintains his innocence in the crime. These are factors in his favour. The prosecution has prayed for maximum sentence which is death. The reason being to keep such people away and to prevent future murders.

I agree that the offence committed is very serious one but at 36 years, it may not drive this court to impose the maximum against the accused.

I am exercising mercy upon the convict by imposing a life imprisonment sentence upon him.

Court: R/A explained to accused. 14 days.



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