IN THE HIGH COURT OF UGANDA

HOLDEN AT TORORO

CRIMINAL SESSION CASE NO. 15/94

UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: PROSECUTION

VERSUS

1. YUMAN BUYA

2. MUSIBA TANASI ::::::::::::::::::::::::::::::::::::::::::::::::::::::::ACCUSED

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

The two accused persons: Yuman Buya (A1) and Musiba Tanasi (A2) (whom hereinafter I shall refer to as A1 and A2 respectively) are each indicated for murder 183 of the Penal Code Act. The indictment alleges that on 1-6-1993 at Higoye village, in Tororo district they (accused) murdered Mugaju Erifairi, each accused pleaded not guilty to the indictment.

It is trite law that when an accused person pleads guilty the prosecution is enjoined by way of evidence to prove each ingredient of the offence. It is our law that prosecution bears the responsibility of proving its case against an accused beyond reasonable doubt and the accused has no duty of proving his innocence: Woolminigton v DPP (1936) 462 and Okale v Republic (1965) EA 555 in particular at page 559. It is also the law that an accused person should not be convicted on the weakness of his defence but should be convicted on the strength of the case as proved by the prosecution: Isariel Epuka s/o Achietu v. R (1934) EACA at page 162, Where the accused is being tried for murder, as is the case in the present case prosecution is enjoined to prove beyond reasonable doubt, inter alia, that a human being was killed, that the killing was unlawful, that the killing was accompanied by malice aforethought and the accuse participated in the killing of that human being under section 183 of the Penal Code Act and the case of

I will start with the first ingredient of this offence. The evidence called by prosecution and also by defence clearly shows that the deceased Mugaju died on or about 1-6-1993. It would be unreasonable to say that the death of that human being has not been established when there is no evidence to the contrary. The evidence is that the unfortunate old died. Prosecution has

accordingly proved beyond reasonable doubt the death of a human being by the name of Mugaju Erifairi.

That takes me to the second ingredient of this offence which is whether or not the death of the deceased was unlawfully caused. Prosecution called the evidence of a number of witnesses who included Dr. Lugudo (PW4) and that evidence proved that the deceased died as a result of poisoning; both accused do not dispute that fact. It is the law that death of a human being unless accidently caused or it is authorised by the law is unlawfully: Gusambuzi s/o Wesonga v R (1948) EACA 65. Although the doctor who examined the deceased did not seem to be certain as to what could have been the cause of death and although defence raised a theory that the deceased could have died of poisonous mushrooms but not poisoned mushrooms, the evidence on record does point at one reasonable conclusion ant that conclusion is that the deceased due to having eaten mushrooms which had been poisoned. The evidence of Dr. Lugudo shows that when he examined the intestines of the deceased and the food he found there some poison, the possibility of the mushrooms having been poisonous cannot be true according to the evidence of that doctor whose evidence I have accepted as truthful. It is my considered opinion that the death of the deceased was not occasioned by lawful means and it was neither accidental nor authorised by law.

I now come to one pertinent question which is whether or not the 2 accused persons or one of them was responsible for the death of the deceased. The evidence against the two accused persons is basically circumstantial in a sense that nobody ever saw the accused persons putting poison in the mushrooms which the deceased is alleged to have eaten and caused his death. The law is that where prosecution case depends entirely on circumstantial evidence such circumstantial evidence must be of such a nature that it does not point to anything else other then the guilt of an accused person; Simon Musoke v R. (1958) EA 715. It is also the law that before the court can base a conviction on such evidence it must be satisfied that there are no coexisting factors tending to weaken or detour the circumstantial evidence: Teper v R (1952) AC at page 489 and Israili Epuka s/o Achietu v R (1934) 1 EACA 166 at page 168. In the present case the circumstantial evidence upon which prosecution based its case to connect

the accused with this case is contained in the evidence f the doctor (PW4) who examined the intestines of the deceased together with the food contents which he found to contain some insecticide; the other piece of evidence are relied upon by prosecution are the confessions

which were made by the two accused persons before a Magistrate Grade II one Atikatyang in which they said that they had actually poured some insecticide in the mushrooms.

It must be pointed out here that the two accused persons retracted their confessions during the trial, they both said that they made the confessions when they had been assaulted, I resolved that problem when I conducted a trial within trial and ruled that the confessions were voluntarily made. It is however the practice of this court that where a confession has been retracted such a retracted confession should be approached with caution and where necessary it should be corroborated by some other evidence: Tuwanmoi v Uganda (1967) EA 84 and Ochieng v Uganda (1969) EA 1. In the instant ease the 2 confessions have been sufficiently corroborated by the evidence of Dr. Lugudo who examined the intestines of the deceased and found there insecticide and the 2 accused in their confessions also clearly stated that the drug they had poured in the mushrooms was an insecticide used for killing bed bugs.

I hasten to say that the two confessions made by the 2 accused persons have not only been corroborated but they are truthful, they are so detailed that there cannot be fabrication of any kind. The accused must have told the truth in those confessions.

There is however another issue concerning the accused persons and that is he issue of common intention, The 2 accused persons in their confessions gave details of what part each of then played in administering the poison; Al bought the poison, A2 kept it and on this particular day they were all together when Al poured it in the saucepan. Common intention can he gathered from the conduct of the accused and there need be no express agreement among the parties R. v Tabulayenka s/o Kirya and others (1943) 10 EACA 51. In the instant case Al wanted to poison the deceased because he (Al) alleged he (deceased) was killing his children, A2 wanted to have the deceased poisoned because he had allegedly made him impotent. Those revelations in the accused's confessions do show that the 2 accused persons were all the time working under common intention to unlawfully deal with the deceased. Since these people had a common intention it is immaterial as to which part each of the 2 accused played in administering the poison. It is my considered view that the prosecution has proved beyond reasonable doubt that the 2 accused persons were jointly involved in causing the death of the deceased.

The two accused in their confessions put up provocation by witchcraft as their defence but when in court they gave up that defence possibly because they did not want to have anything

that would connect them with the deceased's death; their counsel also asked the court not to consider that defence possibly for the same reason. As pointed out earlier the deceased was the father of Al whom he alleged in his confession had been killing his children and A2 was annoyed because the deceased had bewitched him by rendering him impotent. The law regarding the defence of provocation is clearly stated in section 188 of the Penal Code Act and the same principle is well stipulated in the case of: R v. Galikuwa (1951) 18 EACA 175. Witchcraft can only be regarded as a defence in form of provocation if it falls within the principles stated in Galikuwa's case (supra). In the present case I must say the circumstances under which the poison was administered did not fall under the established principles under which this defence operates. This case must be clearly distinguished from the cases of: R v Fabiano Keneni (1941) 8 EACA 96 and that of R v V. Clement Maganga 91943) 10 EACA 49. In that in those 2 cases the deceased was actually caught when performing his dirty act of witchcraft which is not the case in the present case. A2 complained that he had actually seen the deceased in the evenings when he was naked when he was performing some evil things which he thinks rendered him impotent but he (A2) did not act there and then as was the position in the two cases quoted above he waited for too long and that allowed his temper to cool down. Even if the allegation by both accused about how the old man had used supernatural powers to punish then was true, still the defence of provocation by witchcraft could not he availed to them as that defence is limited to physical as opposed to metaphysical situations: R. v. Kauna (1945) 12 EACA 104.

I now turn to the defence of alibi which was raised by A2. According to him the incident took Place when he was away and he returned only to find the deceased already inflicted. It is the law that when an accused puts up a defence of alibi the duty is upon prosecution to destroy that defence by adducing evidence which puts the accused at the scene of crime at the time the offence was being committed. The accused does not bear the duty of proving his alibi: Sekitoleko v Uganda (1967) EA 531. In the instant case the accused himself in, his confession, which I have already accepted as truthful, stated that he was present at home and in fact he saw Al pouring the poison into the mushroom. So his defence of alibi cannot be sustained since his on confession which has been corroborated by the evidence of PW4 puts him at the scene of crime.

Considering the evidence of Dr Lugudo and the 2 statements (confessions) made by accused persons I am in no doubt about the participation of the two accused persons jointly in

administering poison to the food which was intended to be consumed by the deceased. The accused's denial of that participation when in court here cannot he accepted as being truthful.

The next matter to be attended to is the issue of malice aforethought. It is the law of this country that no satisfactory' conviction can be obtained for murder without prosecution proving the existance of malice aforethought. (See; section 136 and the case of Lukoya v Uganda (1968) EA 332 at page 334. In deciding whether or not prosecution has established malice aforethought the court must address its mind to such matters as weapon used in inflicting the injury, the number of injuries which were inflicted and the conduct of the accused before or after the incident: Tubere s/c Ochieng (1945) 12 EACA 63. In the present case the accused persons in their confessions stated that they wished to deal with the deceased because of the misfortunes he had inflicted upon them. A2 specifically stated that he and Al planned to have him killed but A2 simply said their intention was to deal with him. The evidence of both Dr. Lugudo and Mpima (PW4) AND (PW6) respectively did not resolve the question of whether or not the quantity of poison which was found in the deceased's body was enough to have caused his death. In view of this uncertainty as to the amount or quantity of the poison administered I find it rather unsafe to say conclusively that the offence of murder was committed, but I am convinced beyond reasonable doubt that the offence of manslaughter was committed.

In those circumstances I feel it is safe to acquit the accused persons of murder but to find each of them guilty of manslaughter. I accordingly acquit each of them of the offence of murder but convict each of them of the offence of manslaughter under section 182 of the Penal Code Act and section 85 of T.I.D.

C M. KATO
JUDGE
15/5/1995