THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN

AT TORORO

CRIMINAL SESSION CASE NO. 48/93

UGANDA::PROSECUTOR

VERSUS

DONATO OKWARE OTHIENO::ACCUSED

BEFORE: THE HON. MR. JUSTICE C.M.KATO

JUDGEMENT

The accused person Donato Okware Othieno is indicted for the murder of one Pius Ochieng Jadwong contrary to the provisions of suction 183 of the Penal Code Act.

The gist of the case for prosecution has been that on the night of 26th October, 1991 at the village of Nyim-Nyim in the District of Tororo the accused murdered the deceased Pius Ochieng Jadwong.

The accused pleaded not guilty to the indictment and set up a defence of alibi.

It is trite law that when an accused person pleads not guilty to any charge the prosecution is enjoined to prove each and every ingredient of the offence with which the accused is charged.

It is also required by the law that the prosecution must prove its case beyond reasonable doubt because the accused has no duty to prove, his innocence: Woolmington v D.P.P. [1935] AC 462. Uganda v Joseph Lote [1978] HCB 269. It is our principle of the law that as accused person should be convicted on the strength of the case as proved by prosecution but not on

weakness of his defence: Insrail Epuku s/o Achietu v R [1934] I 166 at page 167.

In a case of murder like the one now under consideration the prosecution must prove that somebody was killed, that the killing was unlawful, that the killer had malice aforethought and that the accused indirectly or directly participated in the killing. In the instant case it is not seriously disputed that on the night of 26th October, 1991 Pius Ochieng, Jadwong, was violently killed at his home. It is also an accepted fact that his killing was effected by shooting. These facts clearly show that his death was not accidental and therefore it was unlawfully caused. It was said in the case of Gusambizi s/o Wesonga v R [1948] 15 EACA 65, that in all cases of homicide death is said to have been unlawfully caused unless it is accidental or has been authorized by law. In the present case it cannot he justifiably said that Jadwong's death was accidental or was authorised by any law.

It is my finding that prosecution has proved beyond reasonable doubt the first two ingredients of this offence.

On the issue of malice aforethought it was said in the case of: Tubere s/o Ochieng v R [1945] 12 EACA 63 that in considering whether or not malice afore thought has been established the court should consider such things as the weapon used, the nature of injuries caused and the port of the body where such injuries were inflicted. In the present case there was overwhelming evidence that the deceased died as a result of 5 gun shot wounds inflicted upon him on different parts of his body. A gun is a lethal weapon end anybody who shoots at another in such part of the body as heart or lungs must have intended to cause the death of the deceased. It is my finding that malice aforethought has been proved by prosecution beyond reasonable doubt. The position being what it is I hold that prosecution has proved beyond reasonable doubt that there was murder committed.

That leads me to the pertinent question which is: who killed this unfortunate man? It is the case for prosecution that the deceased was killed by the accused but the defence is adamant that the accused did not take part in the death of the deceased.

This issue of who killed the deceased is tied up with two questions of identification and the accused's defence of alibi. Th court heard evidence of one identifying witness by the names of Anna Adikini. Although by the provisions of section 132 of the Evidence Act the court can proceed to convict an accused on the evidence of one identifying witness, it is increasingly becoming the practice of this court to view such evidence with great caution especially where the offence is committed at night time when conditions are difficult: Roria v Republic [1967] EA 583. Abudulla Wendo v R [1953] 20 EA 166 and Uganda v M.Eparu [1976] HCB 267 at 268. It is the law that where the case for prosecution depends wholly on the evidence of identification such evidence should be water tight: James Kaweka Musoke v Uganda [1983] HCB 1 at page 2. Adikini's evidence can not be said to have met this test.

In determining whether or not conditions favouring correct identification existed The court is usually guided by a number of things which include such things as source of light, the distance between the witness and the accused, whether or not the accused was a stranger: Abudala Nabudere v Uganda [1979] HCB 77. In the present case Adikini testified that when she was sleeping with the deceased she realised that one of their houses was ablaze, she went out to find out what was happening; as she was moving towards the burning house she heard voices saying "woyo ndiyo bibiyake". Then she turned round and recognised the accused who was dressed in light blue shirt and dark trousers. This evidence was attacked by learned counsel for defence Mr. Wandera. It is not in dispute that the accused was known to the witness and that there was light from the burning house. These facts must, however, be weighed against the prevailing situation at that time.

In the first place when Adikini left the house her attention was attracted towards the burning house and when she heard the voices she must have been taken by surprise and when she turned she did not concentrate on the person she claims she saw. The inpression created by her evidence is that she just turned around and had a glance at the person who she says she saw. It cannot be said that in such circumstances she was composed enough to recognise anybody nor can it be said that she had enough time to idenitify anybody. Conditions for correct identification did not exist. It must be pointed out here that the shirt and pair of trousers tendered in court by a policeman were never identification by Adikini in court as being the very clothes she saw the accused wearing on that fateful night.

As regards to the defence of alibi raised by the accused it must be stressed that when that defence is raised by the accused he does not assume the burden of proof, it is the duty of prosecution to adduce evidence that can destroy such a defence by putting the accused at the scene of the crime at the time the crime was committed: Sekitoleko v Uganda [1967] EA 531. Leonard Anisetu v Republic [1963] EA 206. In the present case the prosecution has failed to discharge that burden to the satisfaction of this court.

Prosecution triad to establish by circumstantial evidence that the accused had been seen in company of deceased's adversaries one James Magode Ikwiya but there was nothing on record to show that his being in company with that man had anything to do with this case. What has however puzzled this court is that Ikwiya himself who had a serious quarrel with the accused during the day and whom the deceased repeatedly said should be held responsible if anything happened to him was not made a subject of this case in one way or another. The officer who investigated this case expressed in court his surprise that Magode was never jointly charged with the present accused.

Be that as it may, I must state that considering the evidence as a whole and in full agreement with the opinions of the two gentlemen assessors, I find that prosecution has not proved its case against the accused to the standard required to secure a secure conviction. In these circumstances I find the accusud not guilty and I do acquit him of the offence of murder.

C.M.KATO

JUDGE

29/4/94