

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT ARUA
CASE NO: HCT-02-CR-SC-0039 OF 2003

UGANDA ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

**A1. H/G No. 2324 SGT LUKECHA JUSTINE }
A2. H/G PTE OPIRA TULA }
A3. H/G No. 3222 PTE OKWERA SIMON }::ACCUSED**

BEFORE: HON. MR JUSTICE AUGUSTUS KANIA

JUDGMENT:-

No 2324 Sgt Lukecha Justine and No.3222 Pte Okwera Simon hereinafter simply referred to as A1 and A2 respectively, are jointly indicted on one count of murder contrary to sections 183 and 184 of the Penal Code Act. Or see now sections 188 and 189 of the Penal Code Act 2000.

It is alleged in the particulars of the offence that A1 and A2 on the 18th day of March 2001 at Labongogali, in Ameru Division in the

Gulu District murdered Adongo. Both accused persons denied the offence and pleaded not guilty.

The facts on which the prosecution relied are briefly that on the fateful day 18th March 2001 at 7.30p.m. while PW2 Latigo Oyat Komakech Patrick was sitting in front of his father's house in Labongogali camp and chatting with PW3 Otto Dominic and PW4 Lowum Robert suddenly three soldiers in military uniform and armed with guns appeared at the scene and they started assaulting PW2 Oyat Latigo Komakech Patrick, PW3 Otto Dominic and PW4 Lowum Robert. The last two fled into the bush while PW2 Oyat Latigo Komakech Patrick ran towards his house. The assailants caught up with the latter and he was hit on the head with the butt of the gun thereby inflicting on him a wound from which he bled. He attempted to enter into his house but before he could do so one of the assailants pulled him back and A1 ordered A2 to shoot him. A2 fired his gun, missed PW2 Oyat Latigo Komakech Patrick but the bullet caught the deceased who

was sleeping in the doorway. The prosecution witnesses PW2 Oyat Latigo Komakech Patrick, PW3 Otto Dominic and PW4 Lowum Robert who testified as eyewitnesses all claim to have identified the accused persons who were members of the UPDF responsible for guarding the Displaced People's Camp at Labongogali and were well known to them.

A1 and A2 both made sworn statements. A1 put across an alibi to the effect that he was not at the scene when Akongo was shot. He contended that he was that fateful evening inspecting positions of soldiers he had deployed at various guard posts when he heard a gunshot. He came towards the direction of the gunshot and then the scene of the offence. A2 on his part admitted firing the fatal gunshot but this was because he was obeying superior orders for him to shoot PW2 Oyat Latigo Komakech Patrick.

The above in brief is the summary of the case for both the prosecution and the defence.

In our criminal justice system, an accused person is presumed to be innocent until his guilt has been proved. The onus of proving the guilt of the accused rests with the prosecution. It remains with the prosecution throughout the trial and at no stage does it shift on to the accused to prove his innocence. The prosecution can only secure the conviction of the accused if it proves his/her guilty beyond reasonable doubt. In the event there is a doubt whether the accused really committed the offence such doubt must be resolved in favour of the accused leading to his/her acquittal. See **Woolmington Vs DPP [1935] AC 462.**

It is also a cardinal principle of our criminal jurisprudence that an accused person is to be convicted not on the weakness of the case for the defence but rather on the strength of the prosecution case. See **Israel Epuku s/o Achietu Vs R [1934] 1 EACA 166.**

In proving its case beyond reasonable doubt in the case of murder the prosecution must prove beyond reasonable doubt the following four essential ingredients of murder:-

1. The fact of the death of the deceased.
2. That the said death was caused by unlawful means.
3. That it was caused with malice aforethought.
4. That the accused participated in causing the said death.

With regard to the fact of the death of the deceased, though there is no medical report of death PW2 Oyat Latigo Komakech Patrick, the father of the deceased, and PW3 Otto Dominic uncle of the deceased testified that they took the victim Akongo to a clinic after she had been shot, she died soon after arrival at the clinic. Both witnesses also testified that the body of the deceased was brought back home and buried and that both of them attended the burial. The evidence of PW4 Lowum Robert was to the same effect.

Apart from the above prosecution evidence, Mr Oyarmoi and Mr Oloya learned counsel for A2 and A1 respectively conceded that the fact of the death of Akongo had been proved beyond reasonable doubt. From the prosecution evidence on record which was in no way contradicted, I find that the prosecution has proved beyond reasonable doubt that Akongo is dead.

This now leads me to the issue of whether the death of Akongo was caused by unlawful means. There is a presumption of law that every homicide is unlawful except if it occurs accidentally or of some reason it is justifiable in law See **Busambuzi s/o Wesonga [1948] 15 EACA 65.**

Whether a homicide is unlawfully caused or not can be decided from the circumstances of the commission of the offence from the evidence on record PW2 Oyat Latigo Komakech Patrick, PW3 Otto Dominic and PW4 Luwum Robert were peacefully relaxing in

the court yard of PW2 Oyat Latigo Komakech's father when the assailants dressed in military uniform and carrying guns invaded them and dispersed them. They finally got hold of PW2 Oyat Latigo Komakech and assaulted him. At the end an assailant ordered one of their group to shoot PW2 Oyat Latigo Komakech. The person ordered to shoot PW2 Oyat Latigo Komakech missed him and instead shot Akongo who was sleeping by the doorway. The circumstances of the death of Akongo as above are in no way accidental nor are they in anyway justified. As rightly conceded Mr Oloya, and Mr Oyarmoi learned counsel for A1 and A2 respectively, I find that the prosecution has proved beyond reasonable doubt that the death of Akongo was caused unlawfully.

I now turn to the third ingredient which is that the death of deceased was caused with malice aforethought. Malice aforethought is defined in section 186 now section 191 of the Penal Code Act in the following words:-

“186. Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances –

- (a) an intention to cause the death of any person, whether such person is the person actually killed or not; or
- (b) knowledge that the act or omission causing death will probably cause of the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.

From the above definition it is clear that malice aforethought is a mental disposition of the accused. As a state of mind it is not capable of proof by direct evidence. It can only be deduced or gathered from the circumstances surrounding the commission of the offence. Factors that the courts use to infer the presence of

malice aforethought include the nature of the weapon used, the injuries inflicted and the part of the body on which the injuries are inflicted. If the weapon used is a deadly weapon, injuries inflicted fatal on vulnerable parts of the body, malice aforethought will easily flow. In **Uganda Vs Turwomwe [1978] HCB 15, Nnaku Vs Uganda [1978] HCB 182 and R Vs Tubere [1945] 12 EACA 63.** Malice aforethought was readily inferred pangas which are deadly weapons were used to inflict fatal wounds on vulnerable parts of the bodies of the deceased's persons. In the instant case Akongo was shot with a gun which is a deadly weapon in the terms of section 273 (2) of the Penal Code Act inflicting a fatal wound to her buttocks with an exit wound in her genitalia which are vulnerable parts of the body. From the above circumstances whoever shot the deceased did so with malice aforethought. That the person targeted to be shot was somebody else does not exclude the existence of malice aforethought in the light of section 186 of the Penal Code Act (supra). In the result the prosecution

has proved beyond reasonable doubt that who ever shot the deceased had malice aforethought.

This now brings me to the fourth ingredient of the offence of murder, which is the participation of the accused. I shall start with the evidence of the prosecution that incriminated A2 and revert to examine the evidence that implicates A1.

The first piece of evidence that implicated A1 is that of PW2 Latigo Oyat Komakech Patrick which was to the effect that the assailants comprising of A1, A2 and one Opira Tula, assaulted him and when he attempted to enter his house he was dragged back by Opira Tula. At this A1 ordered A2 to shoot him. A2 aimed his gun at him and fired but the bullet missed him and instead shot Akongo. PW4 Luwum Robert gave evidence that while in his house he heard footsteps of people and he went towards the house of PW2 Latigo Oyat Komakech Patrick. He then saw three soldiers in uniform and he found them to be A1, Opira Tula and A2

who were all known to him. The three were assaulting PW2 Latigo Oyat Komakech Patrick. When the latter fell down the witness saw A2 aim at him with his gun and fire. The bullet missed its targeted instead hit Akongo.

The third piece of evidence that implicates A2 in this offence in his own admission. On oath A2 testified that that fateful day at around 7.30p.m., he accompanied A1 and Opira Tula to the camp at the request of A1. On arrival at the home of PW2 Latigo Oyat Komakech Patrick they found three people but on seeing them two of these fled. When they asked for the identities of the two people who had run away PW2 Latigo Oyat Komakech Patrick started despising them. At this stage A1 ordered A2 to shoot PW2 Latigo Oyat Komakech Patrick but he missed the latter and the bullet instead hit Akongo hitting her fatally. The evidence of the above two prosecution witnesses together with his evidence of admission proves beyond reasonable doubt that A2 participated in causing the death of the deceased.

While A2 admitted being at the scene of crime and actually firing the fatal shot, A1 denied any participation on the commission of the offence and contended that he was not even at the scene of crime. This is in spite of the evidence of PW2 Latigo Oyat Komakech Patrick that A1 was among the assailants who attacked his home and shot the deceased dead and the evidence of PW3 Otto Dominic that among the assailants he identified the accused by the help of a lamp.

It is trite that when the guilt of an accused person is dependent on the visual identification even if a multiple of witnesses under different conditions, if such identification is denied, it is necessary to critically examine the conditions under which such identification was made to determine if it was positive without the possibility of an error or mistake. See **Abdalla Nabulere & Others Vs Uganda [1979] HCB 77**. These conditions are:-

1. Whether the accused was known to the witness at the time of identification.
2. Conditions of lighting.
3. The length of time it took for the witness to identify the accused.
4. The distance the accused was from the witness when he came under the observation of the witness.

In the instant case PW2 Latigo Oyat Komakech Patrick and PW3 Otto Dominic testified that they both knew A1 as the commander of the local military detach. As regards the condition of lighting PW2 Latigo Oyat Komakech Patrick testified that the assailants attacked at 7.30p.m. when there was still natural light so he could clearly identify his assailants. PW3 Otto Dominic on his part gave evidence that when the assailants first attacked, he fled and hid but later on he was able to identify A1 as the commander of the detach by the aid of a lamp the wife of PW2 Latigo Oyat Komakech Patrick had lit. from the evidence of PW2 Latigo Oyat

Komakech Patrick it is really not very clear how long the assailants and particularly A1 was exposed to the witness. His evidence is that when the assailants stormed his home before he could enter in his house A1 hit him on the head with the butt of the gun and ordered A2 to shoot him. After A2 had fired his gun the witness fled closely pulled by another of the assailants.

My impression of this evidence is that the assailants and particularly A1 was not exposed to the witness for a long period of time.

With regard to the proximity of A1 when PW2 Latigo Oyat Komakech Patrick identified A1, his evidence is that when the assailants stormed his home he fled into his house but the assailants followed him and A1 hit him on the head with the butt of a gun and thereafter ordered A2 to shoot him.

From the above evidence it is clear the assailants and particularly A1 were very close to PW2 Latigo Oyat Komakech Patrick when the identification of A1 by PW2 Latigo Oyat Komakech Patrick was for a short time but A1 was well known to the witness, there was still natural light since it was only 7.30p.m. and A1 was very close to the witness to the degree of being able to hit him on the head with the butt of the gun. I find that the conditions under which PW2 Latigo Oyat Komakech Patrick identified A1 were favourable to correct identification without the possibility of an error or mistake.

PW3 Otto Dominic apart from having known A1 prior to this offence testified that he identified him by the aid of a lamp the wife of PW2 Latigo Oyat Komakech Patrick had lit. he made the identification when he left his hiding place and went to the scene with the aim of rescuing PW2 Latigo Oyat Komakech Patrick, he was therefore close to A1 when he identified him. As he went to the scene after first going into hiding. The length of time during

which he identified A1 must have been brief. However because A1 was familiar to him there was adequate light from a lamp and because he was at the scene the conditions under which PW3 Otto Dominic identified A1 were conducive to a positive identification free of error or mistake. I find that PW2 and PW3 correctly identified A1 as one of the assailants who stormed the complainant's home and shot dead the deceased. This visual identification is also supported by the testimony of PW3 Otto Dominic that he also identified A1 by his voice.

The above identification also corroborates A2's evidence that it was A1 who ordered him to shoot, as indeed the evidence of a co-accused implicating his co-accused requires to be corroborated.

Apart from the above evidence implicating A1 and A2 in the commission of this offence both accused person are further implicated by the doctrine of common intention as spelt out in section of the Penal Code Act. It provides as follows:-

“2. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed if such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence”

For the doctrine of common intention to operate against an accused person it need not be proved that the accused entered into an agreement or pact to commit the offence. Common intention will be inferred from the conduct, presence or actions of the accused or from his failing to disengage himself from the commission of the offence. If violence is used in achieving the common intention and it results in the death of a human being, then all the participants will be deemed to have committed murder. See **Andrea Obonyo Vs R [1962] EA 542** and **James Ssemwogerere Vs Uganda [1979] HCB 71**.

In the instant case A1, A2 and one Opira Tula while armed with guns attacked PW2 Latigo Oyat Komakech Patrick and a group of other people who were peacefully relaxing in the court yard of the father of PW2 Latigo Oyat Komakech Patrick. The assailants violently assaulted the latter. On the order of A1, A2 shot at PW2 Latigo Oyat Komakech Patrick and instead shot Akongo who died later as a result of wounds she sustained.

From the above facts all the three assailants formed a common intention to unlawfully violently assault PW2 Latigo Oyat Komakech Patrick in conjunction with one another. In the course of the prosecution of this unlawful purpose murder which was a probable consequence of prosecution of the assault was committed thus making all the assailants guilty of the said murder,

Though A2 is the one who actually pulled the trigger, A1 is caught by the operation of the doctrine of common intention as at not

time he dissociated himself from the prosecution of the unlawful act. To the contrary he was the commander of the assailants and actually gave the order to A2 to shoot PW2 Latigo Oyat Komakech Patrick who was likely to be missed only for his daughter to be caught by the bullet. I reject the submissions of Mr Oloya learned counsel for A1 that the act of A2 shooting the deceased was an independent act for which A1 is not liable under the doctrine of common intention.

A2 admitted having shot the deceased but pleading that in shooting the deceased he was following superior order in that A1 who was his commander had ordered him to shoot. Mr Oyarmoi learned counsel for A2 submitted that because A2 was obeying superior orders in shooting the deceased, malice aforethought is negatived. Further argued that A2 was mistaken in obeying the order to shoot, he reasonably believed he was duty bound to obey so his liability is reduced to that of manslaughter.

Mr Oyarmoi did not at all support his submission on the defence of superior orders with any law or authority. I have not known of such a defence more so the order is so manifestly unlawful as was here the case. This line of defence must be rejected.

A1 who made a sworn statement pleaded an alibi to the effect that he was visiting guard posts of soldiers he himself had deployed in the Displaced People's Camp when he heard gun shot. He responded and went to the scene to find a person had been shot. In fact A1 is stating that he was not at the scene when Akongo was shot. It is trite that once the accused advances the defence of alibi he does not assume the duty to prove his alibi is true. The burden is on the prosecution to negative the alibi, prove it is false and to put the accused by evidence squarely, at the scene of crime. See **Uganda Vs Sebyala [1967] EA 204**, **Sekitoleko Vs Uganda [1967] EA 53** and **Uganda Vs Fremjjo Kakooza [1984] HCB 1**.

In the instant case PW2 Latigo Oyat Komakech Patrick, PW3 Otto Dominic and PW4 Luwum Robert all testified that the assailants including A1 and A2 were known to them. PW2 and PW3 both heard A1 ordering A2 to shoot the complainant Latigo Oyat Komakech Patrick. The evidence of identification of these witnesses puts A1 squarely at the scene of crime. It is now trite that once an accused has been positively identified or recognized at the scene of crime his alibi is hereby displaced. See **Abdu Ngobi Vs Uganda SC Criminal Appeal No. 10/91.**

In the result the prosecution having proved all the essential ingredients of the offence of murder beyond reasonable doubt, in agreement with the unanimous opinion of the assessors, I find A1 No. 2324 Sgt Lukecha Justine and No. 3222 Pte Okwera Simon guilty of the murder of Akongo contrary to sections 188 and 189 of the Penal Code Act, Laws of Uganda 2000 and convict them accordingly.

AUGUSTUS KANIA

JUDGE

21/04/2004.

Right of Appeal is explained.

AUGUSTUS KANIA

JUDGE

21/04/2004.

SENTENCE:

No. 2324 Sgt Lukecha Justine and No.3222 Pte Okwera Simon
the offence of murder has only one punishment which is the death

sentence. You are both sentenced to death. This sentence shall be carried out as by law prescribed.

AUGUSTUS KANIA

JUDGE

21/04/2004.

21/4/2004:-

Mr Ogwang for the state.

Mr Oloya for the accused.

Mr Odur Court Clerk.

Both accused in court.

Court:-

Judgment read in the presence of the above.

AUGUSTUS KANIA

JUDGE

21/04/2004.