

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT ARUA
CASE NO: HCT-02-CR-SC-005 OF 2004

UGANDA :..... PROSECUTOR

VERSUS

A1. OPIO CYPRIANO MASKINI }
A2. YAMU FABIANO ANECHO }
A3. OMIRAMBE ALFRED MOSES }
A4. ORYEMA JOSEPH ATHOBAR }..... ACCUSED

BEFORE: HON. MR JUSTICE AUGUSTUS KANIA

JUDGMENT:-

The accused persons, Opio Cypriano Maskini, Yamu Fabiano Anecho Omirambe Alfred Moses and Oryema Joseph Othokobar, hereinafter in this judgment referred to simply as A1, A2, A3, and A4 respectively are jointly indicted on one count of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence are that the accused persons on the 27th

day of February 2002 at Vira village in the Nebbi District murdered Biryema.

The brief facts of this case on which the prosecution relies are that the fateful night when the deceased and her daughter PW2 Beatrice Ngamita had retired from the night in her house the accused persons came to her home and lured her out of her house on the pretext she was to accompany them to attend night prayers which were part of certain funeral rites. The deceased complied and came out of her house and accompanied the accused persons. Because the deceased's daughter PW2 Beatrice Ngamita became suspicious of the motives of the accused, she decided to follow them at a distance. When they had not gone very far, the accused started brutally assaulting the deceased with sticks and clubs. When PW2 Beatrice Ngamita protested to the accused of the treatment of her mother, they turned on her and assaulted her. At this PW2 Beatrice Ngamita went to PW3 Saverio Okumu and informed him of what was happening to her mother. PW3 Saverio Okumu went to the scene

and when he questioned propriety of what the accused were doing to the deceased, the accused assaulted him as well forcing him to flee back to his house. PW2 Beatrice Ngamita witnessed her mother being killed. As for PW3 Saverio Okumu, when he went back to the scene the deceased was already dead so he ordered the accused to remove the body of the deceased from this area and take it to their own village and the accused dragged the body and left it at the home of A1. PW2 Beatrice Ngamita informed her uncle who in turn informed the authorities in consequence of which the accused persons were arrested.

All the accused persons who made unsworn statements denied the offence. A1 set up the defence of alibi while A1, A3 and A4 denied the offence outright.

When an accused persons pleads not guilty to the offence with which he is charged, he thereby puts in issue each and every essential ingredient of the offence. The accused persons in the

instant case by pleading not guilty are thereby putting in issue each and every essential ingredient of murder with which they are charged. Having done so it is the duty of the prosecution to prove the guilt of the accused. This burden is all along the trial on the prosecution and never shifts onto the accused to prove their innocence. To secure a verdict of guilty the prosecution will have to discharge this burden of proof beyond reasonable doubt. If from the evidence a doubt arises as to the guilt of the accused, such doubt must be resolved in favour of the accused leading to his committal. See **Woolmington Vs DPP [1935] AC 462.**

It is also trite that the accused is to be convicted on the strength of the prosecution case but not on the weakness of the case for defence. See **Israel Epuku s/o Achietu Vs R [1934] 1 EACA 166.**

The essential ingredients of the offence of murder which the prosecution has the duty to prove beyond reasonable doubt are the following:-

- (i) That the deceased is dead.
- (ii) That the death of the deceased was unlawfully caused.
- (iii) That the accused participated in causing in causing the said death.

With regard to the fact of the death of the deceased the prosecution relies first of all on the medical report comprised in PF 48B compiled by PW1 Asiki Gershom which was tendered as an exhibit marked P1. In it PW1 Dr Asiki Gershom states that he saw the body of a female on 1/3/2002 which was identified to him as the body of Biryema by PW4 Odongo Tanislau. He examined the body at 4.00p.m.

According to PW2 Beatrice Ngamita she was present when the deceased was killed. She saw the body of the deceased at the

scene and attended the deceased's burial. PW3 Saverio Okumu came to the scene of crime when the assailants were assaulting the deceased. When they assaulted him because he had wanted to know why they were assaulting the deceased he fled back to his house when he later returned to the scene he found the deceased had died. The prosecution additionally relied on the evidence of PW4 Tanislau Ondongo and PW6 No. 376 D/Sgt Anyoli Geoffrey who both saw the body of the deceased in Vira village between two houses at the home of A1. the above overwhelming evidence of witnesses who saw the body of the deceased was in no way disputed by the accused. On the contrary Mr Oyarmoi, learned counsel for the accused conceded that the prosecution has proved the fact of the death of the deceased beyond reasonable doubt. From the above uncontested prosecution evidence of the fact of the death of the deceased, I find that the prosecution has proved the first ingredient of the offence of murder beyond reasonable doubt.

With regard to the second ingredient that the death of the deceased was unlawfully caused, there is presumption in law that all homicides are unlawful unless they are justifiable at law or they occur accidentally. See **Busambizi s/o Wesonga Vs R [1948] 1 EACA 65**. See also **Article 22 of the Constitution of the Republic of Uganda** which guarantees the right to life in that nobody is to be deprived of life unless it is in execution of a court order of a court of competent jurisdiction after the due process of the law.

Whether the death of a deceased person is unlawful or not can be arrived at from the circumstances of the offence. In the instant case the deceased who had according to her daughter gone to bed was lured out of her bed on the pretext that she was to accompany her assailants to prayers at last funeral rites. She unsuspectingly accompanied her assailants who set upon her with sticks and clubs and beat her to death. These circumstances were in no way accidental but they were deliberate, criminal and

premeditated. They were not justifiable circumstances at law as the deceased was subjected to no due process of law but was instead arbitrarily and extrajudicially killed. I find that from the circumstances under which the deceased met her death, her death was unlawfully caused. The prosecution has therefore proved the second ingredient of murder beyond reasonable doubt.

The next ingredient to consider is whether the death of the deceased was caused with malice aforethought what amounts to malice aforethought is to be found in section 191 of the Penal Code Act where it is provided as follows:-

“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 the death of some person whether such person is the person actually killed or not though such knowledge is accompanied by indifference whether death is caused or by a wish that it may not be caused”

from the above definition in Section 191 of the Penal Code Act it is clear that malice aforethought is a mental state to be found only in the mind of the accused. Because it is the state of mind of the accused it can not be proved by direct evidence but can only be inferred from the circumstances surrounding the commission of the offence or the circumstances under which the deceased met his/her death.

Circumstances in the commission of the offence which are used for gathering the existence of malice aforethought include the weapon used for causing the death of the deceased, the nature of injuries inflicted and the parts of the body on which the injuries are

inflicted. If the weapon used for causing the death is a deadly weapon if the injuries that led to the death are severe and life threatening or fatal and inflicted on very vital or vulnerable parts of the body, malice aforethought will be easily deemed to exist. In the cases of **Uganda Vs Turwomwe [1978] HCB 182** and **R Vs Tubere [1945] 12 EACA 63** where fatal injuries inflicted with deadly weapons on very vital or vulnerable parts of the body, malice aforethought was readily deemed to have existed.

In the instant case according to the evidence of PW2 Beatrice Ngamita and PW3 Saverio Okumu the assailants of the deceased repeatedly assaulted the deceased over a long period of time with sticks and clubs. Two witnesses gave evidence, that some of these sticks were big while other were small. PW6 No. 376 D/Sgt Anyoli Geoffrey who recovered these sticks gave a similar description of them. When PW7 No.26027 D/C Acidri John tendered the 4 sticks recovered from the scene which were marked P2, P3, P4 and P5 one of them was decidedly a club.

Section 286 (3) of the Penal Code Act defines deadly weapons to include any instrument which when used for offensive purposes is likely to cause death. In this context the club and the sticks the assailants used to repeatedly assault the deceased were deadly weapons. In his post mortem report comprised in Pf 48B which is exhibit P2 on the court record PW1 Dr Asiki Gershom found on the body of the deceased a crush injury on the left supra orbital region measuring 12cm x 8 cm with brain tissue oozing through the defect, abrasion and bruises on the scapular region. Internally he observed the fracture of the frontal bone with injury to the underlying brain tissue, destruction of the left eyeball and the fracture of the upper right humerus – PW1 Dr Asiki Gershom concluded that death was due to the open head injury with brain laceration resulting in cardio respiratory arrest.

From the finding of PW1 Dr Asiki Gershom the injuries inflicted on the deceased were very fatal. The same injuries were affecting very vital parts of the body in that they were inflicted on the head

region and particularly on the brain, which is the centre of all activity in the body. From the above circumstances, I find that the prosecution has proved beyond reasonable doubt the assailants who caused the death of the deceased did so with malice aforethought.

This now leaves us with the last ingredient of the offence of murder which is whether it is the accused persons participated in causing the unlawful death of the deceased with malice aforethought. The first piece of evidence that incriminates the accused person in the commission of the offence is the evidence of PW2 Beatrice Ngamita which is to the effect that the fateful night when she and the deceased had retired in their house and had slept, the accused came to their home, and called out to the deceased asking her to accompany them to a home where last funeral rites prayers were being held. The deceased at first resisted but the accused persons persuaded her and she went out of the house and accompanied the accused. PW2 Beatrice

Ngamita gave evidence that because she became suspicious she decided to follow the accused and the deceased. When they had gone 150 metres away from the house, the accused persons started assaulting the deceased with all sizes of sticks. On reaching the scene PW2 Beatrice Ngamita was also assaulted by the accused so she fled back home and informed one Underu with whom she returned to the scene. The deceased was still alive but the accused were still assaulting her. It was PW2 Beatrice Ngamita's evidence further that when Underu asked the assailants why they were assaulting the deceased, the accused persons replied that they had to kill the deceased because they had been paid shs.15,000/= by Opio to kill her when she realized that the deceased was dead she ran to her uncle PW4 Tanslau Odongo and informed him of the incident. It was also the evidence of this witness that she identified the accused persons as the assailants of the deceased because that night there was bright moonlight.

The second piece of eyewitness evidence that links the accused to the commission of this offence is that of PW3 Saverio Okumu Underu. His evidence is that after returning from a prayer meeting at midnight he went to sleep only to be awakened by PW2 Beatrice Ngamita and to be told that the accused persons had called the deceased from her house and were then assaulting her in the valley. He proceeded to the scene which was about 100 metres away from his home and found A1, A2, A3 and A4 assaulting the deceased with sticks of various sizes. He questioned them why they were beating her they answered they were beating her because she had set the house of Opio Maskini on fire. When he tried to restrain them, they assaulted him so he ran back home. PW3 Saverio Okumu alias Underu further testified that when she returned to the scene the deceased was dead. He asked the accused to remove the body since the land in which they had killed the deceased did not belong to them. A2, A3 and A4 were then arrested at a drinking place at Ameza in Konga village, by the LCI and LCII Chairmen and when

questioned they stated that they had killed the deceased because she had set the house of A1 Opio on fire. He also testified that that night there was moonlight.

While in law of practice there is no need of corroboration of the evidence of identification by a multiple number of identifying witnesses there is still need to critically examine the conditions under which such identification was made. This is because like in the case of a sole identifying witness who may be honest but mistaken, it is possible for a number of honest witnesses but on telling the truth to be all mistaken. See **Abdallah Nabulere & Others Vs Uganda [1979] HCB 77.**

The safeguards laid down in **Abdallah Wendo & Another Vs R [1953] 20 EACA 166** and **Roria Vs R [1967] EA 583** for ensuring that an identification made in difficult condition was positive without the possibility of an error or mistake are applied to identification evidence of a multiplicity of witnesses of such

identification was made under difficult conditions. These safeguards are:-

- (a) The familiarity of the accused to the witness at the time of identification.
- (b) The condition of lighting.
- (c) The distance between the accused and the witness at the time of identification.
- (d) The length of time the accused was exposed to the witness.

In the instant case the accused persons were not only known to PW2 Beatrice Ngamita but they all closely related to her. A1 and A2 are her half brother while A3 is her nephew and A4 her uncle. Though PW3 Saverio Okumu Underu did not specifically state that he knew accused persons, the way he easily referred to them by name in court and the fact that these were people of the same village with him I find that the accused were well known to the

witness. I find that the accused were well known to both PW2 Beatrice Ngamita and PW3 Saverio Okumu alias Underu.

Both PW2 Beatrice Ngamita and PW3 Saverio Okumu Underu testified that the fateful night there was bright moonlight by which they were able to identify the accused.

As for the length of time the accused persons came under the observation of the witnesses, PW2 Beatrice Ngamita's evidence is that when the deceased came out to join the accused persons she followed them at a distance wheny they started to assault the deceased she went to the scene. At the scene the accused also assaulted her so she had to leave and report to PW3 Saverio Okumu Underu. When she came back to the scene with PW3 Saverio Okumu alias Underu she found the accused still assaulting the deceased and they continued assaulting her in her presence until the deceased died. The evidence of PW3 Saverio Okumu is that when he reached the scene he found all the

accused persons assaulting the deceased. On questioning them why they were assaulting the deceased, the accused persons turned onto him and assaulted him so he fled back to his house. This witness gave evidence that when he returned to the scene he found the deceased had died. He then told the accused to remove the body of the deceased from the scene since the land on which they killed her did not belong to them. From the testimony of both witnesses of house they interacted with the accused that fateful night, I find they observed the accused for some considerable period of time. Both witnesses came to the scene twice and each of them was assaulted by the assailants.

PW3 Saverio Okumu Underu conducted a conversation with the accused twice each time when PW2 Beatrice Ngamita was present. From these events it is clear accused were observed by the witnesses for an extended period of time.

As for the distance from which PW2 Beatrice Ngamita identified the accused her evidence is that when the accused started beating the deceased, she went to them and the accused also assaulted her. She ran away and went back to the scene with PW3 Saverio Okumu who wanted to know from the assailants why they were assaulting the deceased and she remained at the scene until the deceased died. From her narrative of the incident PW2 Beatrice Ngamita was at the scene and therefore must have been very close to the accused persons. The evidence of PW3 Saverio Okumu Underu in this regard is that when PW2 Beatrice Ngamita informed him that the deceased was being assaulted by the accused in the valley she went with her to the scene. At the scene he challenged the accused as to why they were assaulting the deceased and at this the assailants assaulted him so he fled. He returned later to find the deceased had died but the assailants were still at the scene. He asked them to take away the body of the deceased since the land on which she was killed did not belong to the accused. The two times the witness was at the

scene and the time he was assaulted by the assailants must have brought the accused very close to PW3 Saverio Okumu.

Because the accused were very well known to both PW2 Beatrice Ngamita and PW3 Saverio Okumu Underu, there was bright moonlight, the witness observed the accused over a long period from very close, I find that the conditions under which these two witnesses identified the accused favoured correct identification free from error or mistake and that the two eyewitnesses correctly identified the accused persons as the people who caused the unlawful death of the deceased. The prosecution has therefore proved beyond reasonable doubt the participation of the accused in the death of the deceased.

Mr Aullian the learned Resident State Attorney submitted that the accused had common intention and therefore are caught by the doctrine of common intention. The relating to the doctrine of

common intention is to be found in Section of the Penal Code Act which provides as follows:-

“When two 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 of such purpose an offence is committed of such 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 the prosecution need not prove that the accused agreed or made a pact with his co-accused to commit the offence. That the accused acted in concert or was part of the common intention is inferred from his conduct, his presence or actions or from his failure to disassociate, distance or disengage himself from the commission of the offence. It is enough when it is

demonstrated by the actions, conduct and omissions that the accused is acting in concert with others in pursuit of such unlawful purpose to infer that he has formed a common intention with such other persons if violence is used in achieving such common intention and the death of a human being occurs, then each of the person who participated will be guilty of murder. The doctrine common intention was eloquently illustrated in **Andera Obonyo Vs R [1962] EA 542** and **James Semwogerere Vs Uganda**.

Immaterial who strikes the fatal blow provided that the fatal injury is inflicted when the parties are prosecuting common intention. See **Ssebaganda s/o Miruho Vs R [1977] HCB 7**.

In the instant case according to PW2 Beatrice Ngamita the accused persons lured the deceased from her house in the dead of night. When she came out they took her some distance away from her house and all the four accused persons brutally assaulted her with sticks and clubs of various sizes over a long

period of time. PW3 Saverio Okumu gave identical evidence in this respect. As a result of this assault the deceased died.

The very act of assaulting the deceased was an unlawful purpose. The accused prosecuted this purpose by beating the deceased indiscriminately in her vital parts of the body and in the process murder which was a probable consequence of this unlawful purpose was committed. For this reason the doctrine of common intention operates against all the accused as there is no evidence that any of them distanced or disassociated himself from the unlawful purpose. The contrary has been proved by the testimony of PW2 Beatrice Ngamita and of PW3 Saverio Okumu who both gave evidence that all accused persons were armed with sticks of various sizes and took part in assaulting the deceased. In these circumstances all the accused are deemed to have committed the offence of murder.

The accused persons all made unsworn statements and in one way or other all raised an alibi. It is now trite that once an accused person raised the defence of alibi he does not assume the duty to prove it is true. It is the duty of the prosecution by evidence to disprove the alibi of the accused and put him squarely at the scene of crime. See **Leonard Aniseth Vs Republic [1963] EA 206** and **Uganda Vs Sebyala [1967] EA 204** and **Sekitoleko Vs Uganda [1967] EA 53**.

In the instance case PW2 Beatrice Ngamita and PW3 Saverio Okumu Underu testified having identified the accused persons at the scene of crime. I also found that this identification was positive without possibility of an error or mistake. It is now trite that if an accused has been positively identified at the scene of crime he is thereby put squarely at the scene. I therefore reject the alibi of the accused persons and found that all four of them have been by the prosecution evidence put squarely at the scene.

There are certain aspects of the prosecution evidence where there are contradictions. For example were as PW2 Beatrice Ngamita gave evidence that when the deceased died she was naked because the accused undressed her when they were assaulting her PW3 Saverio Okumu disputed this. PW2 Beatrice Ngamita testified that when PW3 Saverio Okumu asked the accused why they were beating the deceased they answered that Opio had paid them shs.15,000/= to kill the deceased. PW3 Saverio Okumu on his part testified that the assailants replied that they were assaulting the deceased because she set Opio's houses on fire.

The law on inconsistencies in the prosecution evidence that if these are major and go to the root of the case, they must be resolved in favour of the accused. If they are minor and are the result of loss of memory and lapse of time, they may be ignored unless they are shown to be deliberate lies to mislead the court.

See Alfred Tajar Vs Uganda EACA Cr. Appeal No. 167/1969.

In the instant case I don't find the above instances of inconsistencies major and to go to the root of this case, which is that the accused person murdered the deceased's. Whether the deceased died naked or with her clothes on is not a major inconsistency, which should be resolved in favour of the accused.

In the result, the prosecution having proved each and every essential ingredient of the offence of murder beyond reasonable doubt, in agreement with the unanimous opinion of the assessors find the accused persons Opio Cypriano Maskini, Yamu Fabiano Anecho, Omirambe Alfred Moses and Oryema Joseph Othobar guilty of the murder of Biryema contrary to sections 188 and 189 of the Penal Code Act and convict them accordingly.

AUGUSTUS KANIA

JUDGE

2/6/2004.

Right of Appeal explained.

AUGUSTUS KANIA

JUDGE

2/6/2004.

SENTENCE:-

Opio Cypriano Maskini, Yamu Fabiano Anecho, Omirambe Alfred Moses and Oryema Joseph Othobar there is only one punishment for the offence of murder of which you have been convicted and that is the death penalty. You shall suffer death. This sentence shall be carried out in the manner prescribed by law.

AUGUSTUS KANIA

JUDGE

2/6/2004.

In the presence of-

Mr Acellam – Resident State Attorney.

Mr Oyarmoi for the accused.

Mr Boyi Court Clerk.

Mr Okumu – Alur/English Interpreter.

AUGUSTUS KANIA

JUDGE

2/6/2004.