

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT ARUA
CRIMINAL SESSION CASE NO. 0028 OF 2009

UGANDA

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PROSECUTOR

=VERSUS=

1. **OGINGO MICHAEL BENEDICT (SP)]**

2. **NYAKUNI RASHID (SPC)] :::**

ACCUSED

BEFORE: THE HON. JUSTICE J.W. KWESIGA

JUDGMENT

OGINGO MICHAEL BENEDICT and NYAKUNI RASHID are jointly indicted under sections 188 and 189 of the Penal Code with Murder of Ezangubo Steven. It is alleged in the particulars of the offence that the two above named accused persons on the 25th day of December 2008, at Alikua trading Centre, in Maracha – Terego District murdered Ezangubo Steven.

These charges arise from the following brief facts. On the 25th day of December 2008 several people including the deceased attended a video show at a community hall at Alikua trading centre which ended at about 9.30 p.m. The show was followed by a disco dance in the same Hall contrary to the Local authority directives not to hold disco dances in the area which had been declared insecure due to the security conditions in the immediate neighboring country and the military operations which were taking places in areas not far from this trading centre. A1 SP OGINGO the District police commander (DPC) in charge of the area and A2 SPC Nyakuni his guard arrived at the trading Centre at about 10.00 p.m armed with a pistol and a she gun respectively to stop the dance and disperse the people. In the process of stopping and dispersing the crowd that was found in the Hall gun shots were fired and the deceased EZANGO STEHEN was caught by a bullet in the head and died at the spot.

The prosecution called nine (9) witnesses to prove its case while each of the accused persons gave unsworn statements in defence, admitted having been at the scene but denied responsibility for the alleged homicide. For the prosecution to secure a conviction against any of the accused persons must prove the following ingredients of the offence namely;-

- a. The fact of death of EZANGUBO STEPHEN
- b. That the death was unlawfully caused
- c. That the death was caused with malice aforethought.
- d. That the accused persons participated in causing the death of EZANGUBO STEPHEN.

In our criminal justice system, it is the prosecution that always has the duty to prove the case as a whole against the accused person. The Constitution of the republic of Uganda [1995] under Article 28(3) (a) provides that every person who is charged with a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.

The above presumption of innocence can only be displaced or rebutted by the production of sufficient evidence that proves the contrary, that the accused person is guilty. It follows therefore that the accused person could keep quiet in his defence or give a defence which may be weak or sound ridiculous provided the above stipulated essential ingredients of the offence beyond reasonable doubt, the accused person would be entitled to an acquittal.

At the close of the prosecution case the defence submission of no case to answer was overruled and the two accused persons gave their defences which shall be examined and evaluated together with the prosecution evidence to arrive at this Court's final decision because justice must be done both to the prosecutor/complainant and the accused.

As much as there is evidence adduced by the prosecution through its witnesses, there may be evidence given by the prosecution witnesses which may be favourable to the accused person. Similarly there may be evidence adduced by the accused person to exonerate himself from the criminal liability, therefore the two cases must be considered together and the case decided as a whole.

I will proceed to examine the evidence that is available on each of the essential ingredients of the offence as set out above. The first issue to settle is whether the prosecution has proved that Steven Ezangubo is dead.

PW2 OSOGA JIMMY, who knew the deceased very well testified that Ezangubo was shot in his presence immediately after gunshots that were fired at Alikua Community Hall on 25th December 2008 he went where Ezangubo had been standing and saw him lying dead on the ground. He reported the death to Nyadri Police station the same night. He attended the burial later.

PW3 ALETIRU SCOVIA's testimony corroborates that of PW2 in proof of the death of EZANGUBO and so does the evidence of Candia Alfred PW4.

PW8 Dr. Pariyo Hillary, a medical officer examined a dead body which was identified as that of Ezangubo Steven by Eneko Kastole, the deceased's father. The post-mortem Report P.5 established that he died of gunshot wounds which included extensive brain damage and a shattered skull. Gunshot injuries to the head and brain were the cause of death. The above evidence constitutes proof beyond reasonable doubt that the deceased moved is the indictment, Ezangubo Steven, died on 25th December 2008.

The deceased among other people were peacefully celebrating the Christmas day of 25th December 2008 at the community centre at Alikua. The D.P.C of Nyadri Police, A1 entered the dancing hall and compelled the stoppage of the dance on the grounds that the staging of the dance was done without the necessary authority security resolutions.

There was no evidence that the celebrating crowd was in anyway violent or constituted a threat of any specific nature. The evidence available from PW3 Aletiru Scovia who had been dancing with the deceased and was standing next to the deceased shows the deceased had heeded the order to stop dancing and was going home. He was standing peacefully waiting for other children to go home with when the deceased was shot through the head and he died instantly. This death was not justified. The deceased was not a threat to anybody when he was shot. He was not short in prevention of any crime. There was no evidence to support any possibility of an accident or provocation what so ever from the deceased or any body associated or around the deceased. The

crowd was in the process of leaving the dancing hall area. All the above and the circumstances surrounding the events in which the deceased died the prosecution proved that the death of Ezangubo Steven was caused unlawfully. The death was not accidental and was not legally justified.

Before settling the issue of whether or not there was malice afore-thought I will deal with the issue of participation of the accused persons. Each accused person has his criminal responsibility unless he is joined to the other by the principles of common intention. Each accused person's role or participation shall be closely examined to determine individual accused's responsibility or common intention.

Both A1 and A2 admit in their defence that they were at the scene at the material time. That on the 25th day of December 2008 A1 went to the scene to stop unauthorized disco dance which he considered a security risk following the instruction of the R.D.C of Nyadri District. A2 went to the scene as an escort to A1 without knowledge of why A1 went to the scene. The first accused person admitted firing one pistol bullet while inside the hall in the roof of the hall to scare off the disco attendant who had man handled his arm which held the pistol.

On the other hand A2 who had been left out side guarding the motor cycle of A1 while armed with a rifle denied ever firing a single bullet, then who shot Ezangubo Steven dead under the above given circumstances?. The answer can be established from the following evaluation of the evidence.

PW2 OSOGA JUMMY recognized A1 and A2 upon their arrival at the scene because he was seated outside the dancing hall and there was an electricity lit bulb at the gate of the Hall. Both were well known to him. He heard two gun shots inside the hall. A2 fired two gun shots while standing at the gate.

“--- I saw Nyakuni shoot two gun shots. I saw where he shot. Nyakuni shot to the direction away in the direction opposite to the entrance of the hall ----- I reached where the shooting was, he was lying down upwards bleeding. He was dead”

Under cross- examination by counsel for A2 he stated D.P.C shot two bullets inside the hall while Nyakuni shot the last two bullets out side the hall.

PW4 CANDIA ALFRED was outside the hall when the two accused persons arrived. They were well known to him before. The D.P.C fired one bullet at the entrance of the hall in the air with a pistol. He heard two gun shots inside the hall. He ran to hide behind the wall of the hall when he heard the first gunshots from inside the hall. A2 who had remained outside the hall fired two gunshots and he saw the person in front of him fall down. Scovia Aletiru shouted Steven had been shot, he flashed his telephone light and recognized the deceased as Steven Ezangubo, his brother.

Under cross – examination PW4 started

“----- I saw Nyakuni shooting, I was about 5 to 6 meters from the door of the hall where he was. He held his gun horizontally. I was squatting when I saw him shoot”.

He further stated there was a candle light two (2) meters from the door of the Hall after the electric bulb had been switched off when the D.P.C shot the first bullets from inside the hall.

PW5 ELECU CHARLES (SP), the arresting offer, recovered from A1 a pistol with two bullets and from A2 a rifle with 28 bullets which were exhibited as P.3 (pistol) and P.4 (the rifle)

PW7 ABINDU NELSON (Sgt) tendered in Court A star Pistol No. Do 5213, marked “P.3” and a rifle No. 75 K 2963 marked P.4.

PW9 CPL OPIO JULIUS testified that he had deployed A2 Nyakuni to guard the residence of D.P.C (A1) and he issued him with a she gun No. 29632 with 30 rounds of ammunition. That he returned the gun on 26th December 2008 with 28 rounds of ammunitions. He identified the gun (P.4), 27 rounds of live ammunitions and I cartridge of the bullet which had been testified by the Ballistic expert. The importance of this witnesses evidence is that Nyakuni did not account for the two bullets which were missing from the 30 rounds of ammunitions he received on the 25th

day of December 2008. In his defence he stated that he did not count the bullets when he was deployed on 25th December 2008 and that he did not fire any shot at Alikua community hall.

PW9 CPL Opio was not challenged on the issue that he gave the accused 30 rounds of ammunition or that he recovered 28 rounds of ammunition from A2. PWI Robina Kirinya, the Ballistic expert confirmed that she received the she gun 75K 29632 with 28 rounds of ammunition in a magazine she testfired one leaving 27 live rounds. She found the rifle capable of firing. The findings are contained in prosecution exhibit P.1. The above evidence examined together leads to a finding that A2 Nyakuni was issued with 30 bullets and he did not account for the (2) two missing bullets.

PW4 CANDIA and PW2 Osoga testified that Nyakuni fired two gunshots as they saw him. This evidence renders Nyakuni's testimony that he did not shoot at all an absolute lie and not accepted by this Court, I find it as a fact that Nyakuni, A2, on 25th December 2008 at Alikua Community hall fired two gunshots and this explains the fact that he could not account for the missing two bullets.

The deceased was standing with PW3 Scovia outside the Hall on their way home. The accused A2 was standing at the hall's entrance and directed his gun to the direction opposite the hall entrance, the direction where the deceased person was standing immediately after the accused fired the two shots, the deceased fell down and died of massive head injuries which resulted from the entry of a bullet and the exit of the bullet through the deceased's head. The other gun shots fired at the scene were testified to by all the prosecution witnesses at the scene, PW2, PW3 and PW4 that they were fired inside the Dance/video hall by A1 who had come to stop the celebration.

The fact that A1 shot in the Hall and in air was confirmed by both accused persons in their defence evidence. There was no evidence, and there were no other circumstances to suggest that there were gun shots from any other source or direction. The above evidence leaves only one conclusion that the deceased was shot dead by A2 SPC Nyakuni Rashid.

I have considered the fact that A1 and A2 were together at the same, they were both armed and they both fired bullets at the scene. Are they bound by the doctrine of common intention? Under the doctrine of common intention it is immaterial as to who delivered the fatal shot provided the two or more accused were on a common mission which was unlawful.

The learned Resident State Attorney submitted that at the start there was no unlawful mission when A1 came to stop the dance but the moment he applied excessive force of firing in the air to disperse the crowd, he acted unlawfully. He invited Court to dismiss his defence that he fired once while inside the hall when one of the dance attendants held his arm that held the pistol and he was compelled to use the free hand to retrieve the pistol and fired in the air to scare off the attack and to force the crowd to disperse. The fact that he fired a pistol shot at the entrance and inside the hall and the fact that Nyakuni shot a person from out side and they were on same mission, they should be found to have had common intention.

For there to be common intention, it is not necessary for the accused person to have had any agreement before the attack on their victims but their intention may be inferred from their presence, their actions or omissions and failure to disassociate oneself from the attack. **See section 22 of the Penal Code and Bumakali Lutwama & 4 Others =VS= Uganda (sc) Cr. Appeal No. 38 of 1989.**

The prosecution witness PW2 and PW4 confirmed that its A2 that shot towards the people and in the process the deceased was caught by the fatal bullet. The evidence also confirms that A1 had earlier shot in the air. He was still inside the hall when the fatal shots were fired at the people by A2. A1 asked A2 whether he had shot a person and he denied, they left the scene. On the same motor cycle without A1 knowing that A2 had shot a person. He asked A2 twice and he assured him he had shot in the air which A1 believed.

A1 testified that he came with A2 only as his escort and he had no role to play in stopping the dance. A2 confirms this in his evidence that all along he thought A1 had come to attend the dance. There was no coincidence of intention or purpose and common intention can not be inferred from their presence because they were disassociated by their purpose and actions. A1 did not attack or shoot at people which A2 did. Their shooting was d

In view of the above I find no evidence of common intention and each accused person's role shall be examined on its own merits. PW2 OSOGA gave direct evidence that he saw Nyakuni shoot twice in the direction where people were and the shots killed the deceased Steven Ezangubo. This evidence is corroborated by the fact that whereas he had been issued with 30 rounds of live ammunitions he returned only 28 after the incident. He admitted that he was at the scene with the gun which was admitted as prosecution exhibit No. P.4. together with 28 bullets. In view of the above evidence I have no doubt that SPC Nyakuni shot Ezangubo dead on 25th December 2008.

The final issue to determine is whether the death of Ezangubo was caused with malice afore thought.

Section 191(b) of the Penal Code defines Malice afore thought. That malice afore thought shall be deemed to be established by providing evidence that shows

“Knowledge that can act or omission causing death will probably cause the death of some person—although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused”.

SPC Nyakuni shot not in the air but to the direction where people who had left the hall were. The prosecution evidence is that he shot almost horizontally. It is not material that he did not intend to kill a specific person. He had knowledge as a police officer, that by so positioning his gun before firing two bullets he would probably cause death. Therefore, he acted with malice aforethought in terms of section 191(b) of the Penal Code. Both assessors advised me to find both accused persons guilty of murder but for the reasons given above and in absence of common intention I find the accused persons severally liable in the circumstances.

I find Ogingo Michael Benedict A1 not guilty and I find Nyakuni Rashid A2 guilty as charged and I convict him of murder under section 188 and 189 of the Penal Code. Ogingo Michael benedict is hereby acquitted.

Dated 17th of September 2009

Sgd JUSTICE J.W KWESIGA

JUDGE

17/9/2009

Present

ASIIKU NELLY for state

Mr. Manzi:- Holding brief for Mr. Oyarmoi and Madira Jimmy for the Accused persons.

Sgd JUSTICE J.W. KWESIGA

17/9/2009

STATE

The convict has been on remand for 9 months. He is first offence, 57 years old. He is a police officer, offence is grave, serious, and Maximum is death. Being a police officer he should have acted diligently to protect the people, his duty. He acted recklessly. A deterrent sentence be given to the accused person. To warn other police officers not to abuse their powers.

ACCUSED:-

I have children going to school. I have orphans to look after. I suffer from diabetes. I did not know who would look after them.

DEFENCE COUNSEL

The convict has no previous records. He is of advanced age 57 years old. He had been a police officer. He has been dedicated without a criminal record. He has family responsibility. He has extended family.

In the circumstances if this case to meet ends of Justice, a long term would not serve a good purpose. We pray for lenience. We pray for a minimum sentence.

COURT

I have considered the submissions made in this case, I have considered that the convict is a man of advanced age of 57 years who is sickly. The offence of murder attracts death sentence and sometimes life imprisonment which under the law is about 20 years imprisonment. I have exercised utmost lenience and I do hereby sentence him to 10(ten) years imprisonment because of his age and illness. He may appeal against the decision of this Court

JUSTICE J.W. KWESIGA

17/9/2009