REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CASE NO HCT-03 CR SC 0337 2010

UGANDA ……PROSECUTION

VERSUS

MAKONZI PATRICK AND OTUBA PATRICK…….ACCUSED

BEFORE HON LADY JUSTICE FAITH MWONDHA

JUDGMENT

The two accused persons were indicted on a charge of murder C/S 188 and 189 of the Penal Code Act as amended. It was alleged that Makonzi Patrick, Otuba Patrick and another still at large on the 26th day of December 2008 at Kasuleta village in Kamuli district murdered Kalulu Eriya.

The prosecution had the burden to prove the four ingredients in the murder charge beyond reasonable doubt to bring the guilt of the accused person home. The burden is on the prosecution throughout the trial **see R v. Johnson [1961} 2ALLER 969 and Sekitoleko v. Uganda [1997] EA 531.** Its settled law that the accused has no duty to prove his/her innocence even where he or she opts to keep quiet throughout the trial or offers a weak or incredible defense, he or she can only be convicted on the strength of the prosecution case against him/her, see **Justin Nankya v. Uganda SC CR App No 24/95 (Unreported) citing with approval Okoth Okale v. R [1955] EA 555.**

The following ingredients have to be proved to that standard above stated;

1. That the deceased is actually dead
2. That the cause of death is unlawful

3. That there was malice aforethought or intention to kill
4. That it was the accused who participated in the unlawful act/omission

The prosecution led evidence of seven witnesses in addition to the admitted evidence as per S.56 of the TID. The admitted evidence was contained in PF48B, the post mortem report when the deceased body was identified as one of that of Kalulu Erita and then PF24 when the accused was examined and he was found to be 38 years and his mental status was normal. Also PF24 where A1 was examined. All these were tendered and marked EXP1, EXP2 and EXP3 respectively.

On the first ingredient there was EXP1, the post mortem report PF48B. the body of the deceased was identified to the doctor by one Byesonsa as that of the deceased Eriya Kalulu and the cause of death and reason was slaughtering. PW1 told court that she was looking for the deceased whom she had sent and she found him dead in a forest in a pool of blood. PW2 also testified to the same effect as PW1. He said that he even accompanied the body to police. PW3 also testified that he saw the dead body. The neck had been cut and it was in a pool of blood. I was satisfied that this ingredient had been proved.

On the second ingredient, it was the evidence of the prosecution as contained in the postmortem report PF48B that the neck was cut and two figural arteries left and right had been cut. The neck had a big wound at the left temporal zone. The cause of death was slaughtering. Its settled law that every homicide is unlawful unless if it is justifiable, accidental and or excusable see Gusambizi S/O of Wesonga v. R [1948] 19 EACA 65. The way the deceased was killed from those cut wounds shows that the cause of death was unlawful. I was satisfied that this ingredient was proved.

On the third ingredient of malice aforethought its trite law as provided in S.191 of the Penal Code that malice aforethought is deemed to be established by;

a. an intention to cause death of any person whether such person is killed or not
b. knowledge that the act or omission causing death will probably cause death of some person whether 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.

It has also been settled in court decided cases that malice aforethought can be inferred from surrounding circumstances of the case including the actions of the accused, the conduct which follows the killing in particular the way the killing was carried out, the nature, the quality of injuries, the nature and the kind of weapon that was used. In fact those decided cases including the case of Uganda v. Kato and three others [1976] HCB 204 imposes a duty on the court to examine the above surrounding circumstances.

In the instant case, there is cogent evidence that there were deep wounds and in fact the doctor put it bluntly as contained in EXP 1 that he cause of death was slaughtering. The quality and nature of injuries just establish the intention to kill as provided in S.191 (a) above. PW1 and PW2 testified that there was a panga which panga belonged to their home and the evidence was that it was the deceased who took it from their home. The accused told him that they were going to eat jack fruit. And there was a cut jack fruit where the deceased was found lying in the pool of blood. It was the evidence of the prosecution by PW6 a Government forensic scientist that when he examined and or analyzed the EXP., EX B and EXC, where the police wanted to know whether the EX PA which was a blood sample was for the deceased as donor and EXP B or C where blood was found on the panga and another sample was blood found down where the body was lying. The DNA extracted from EX PB and C the analyst found that blood on EX PB and C matched. On further analysis it was statistically evaluated, it was established that it was 9 billion times more likely that the deceased was the donor of blood stains on EX PC (panga) rather than untested unrecognized person. The analyst report was tendered and marked as EXP 7. I was satisfied that there was malice aforethought and or intention to kill.

On the fourth ingredient of participation, there was evidence brought by PW1 that she sent the deceased to take goats to graze. That the accused also took water for the cows though he went in a different direction. There was undisputed and unchallenged evidence by PW2 that the deceased told one Mirionce one of his siblings that he was going to eat jackfruit so he came home and carried the panga secretly as he did not want his friends to follow him. That PW1 made lunch ready and she wanted the two ie the accused1 and the deceased to come and eat. That it was around 1:00pm and she started calling them but to no avail. Both of them disappeared and PW1 started searching for them with her dog. That after she had moved, the dog went ahead barking. That when she reached the spot where the dog had stopped she saw the deceased dead. That there

was a panga and jack fruit. That she raised an alarm and people came. That Makonzi A1 disappeared and did not see him until the day of the trial. PW2 testified to the same effect, only that he said that Mirionce a child of 4 years had told him that Makonzi told the deceased to go and eat jack fruit. He identified the panga as that belonging to the family. That it was the deceased who took it from home and he came back purposely to pick it.

The A1 according to PW7 was arrested that very day in broad day light hiding in a forest in an LC where A2 resided. He was naked lying on ant hill. PW7 was the chairman of that LCI zone Kanyonyaga while A1 was in Kasuleta LC1. He was found after PW7 had been informed that A1 was one of the suspects and so he and other village mates mounted a search. That when A1 wanted to run he was arrested and people started beating him. That he told them that it was A2 who sent him to kill the child. That they went to A2's house where A2 was found. That people beat him also so they were hurried to police Post at Kayanyago.

There was PW4 who was D/Inspector of Police who recorded the charge and caution of A1. The charge and caution was tendered as an Exhibit and was marked EXP4. There was no objection from the defense or accused. In that charge and caution he stated that it was in October 2008 when his uncle A2 Otuba Patrick went to him and told him that there was a rich man who wanted the bones of a human being and Otuba A2 told him that he would give him shs 1,500,000/= if he got those bones for him. That in December he was going to Otuba's house and he met him. That he gave him 50,000/=. That he told him that they would get a child where they could get the head and take to the rich man. That he went with him and Otuba gave him jack fruit which he hid. That he came and took the deceased Kalulu Eriya and told him that they were going to eat the jack fruit on 26/12/08. So he left and went home. That he had told Otuba A2 where to meet on 26/12/08.

So on 26/12/08, he told Eriya (deceased) that they were to eat the fruit at 1: oopm. That that time the deceased took goats to the bush and he followed him with a jerry can and sauce pan for the cows so that when he finished giving the cows water and the deceased had tied the goats, he told him to go and get the panga so that they could go and eat the fruit. That the decease went home and got the panga and they moved to the bush where the jack fruit was. That when he reached there, he cut the jack fruit. That before they started to eat he signaled A2 who was hiding. That A2 (Otuba) came grabbed the deceased by the throat and he told him to handle the boy by the

hands so that he can cut the boy. That he used the panga the accused used to cut the jack fruit. That the panga was not very sharp and so they were still there A2 cutting the A1 heard his mother calling him. That they run away etc (see EXP 4). They went into hiding in A2's house while A2 was camouflaging staying outside when A1 was in the house. Later A2 told him to go and hide in the forest. That people started beating the drum and they found him in A2's forest hiding. That they beat him and he told them that he was with A2, when they killed the deceased. A2 was also arrested and he was found taking malwa. That he A2 was also beaten.

The accused1 in his sworn statement agreed almost with everything he stated in the charge and caution apart from the concoction of saying that A2 came with another man and they had pangas. Also he made a variation that they asked him whether to kill him or kill the deceased. Also the variation that the deceased was killed on the other side of the swamp. The charge and caution was voluntary and it was corroborating the prosecution case in the material particulars e.g. the panga which was used as a panga from the deceased family, the blood stain on it which was analyzed and was found to be that of the deceased. PW2 identified this panga, the evidence that the deceased came back to pick the panga and it was A2 who had told him to do so as he was luring him into death. The deceased went to tie the goats and Makonzi followed with a jerry can of water and sauce pan in guise to fulfill his deal. I had no doubt whatsoever that A1 participated in the killing. The A2 in his defense there was nothing of merit. There was nothing to shake the prosecution case.

The defense of A1 and the confession put him at the scene of crime. And this case even the evidence of circumstances implicates them together with the principle of common intention. A2 stated that he refused to go and search for A1 because he was drunk. This was too far fetched. He was merely passing off to deceive the public that he was innocent. There was earlier evidence to the effect that A2 had even been reported to police for making A1 get involved in witchcraft matters by PW1. Then PW3 also narrated how A2 was involved in the murder. The two accused persons were examined on PF24 which were tendered as EXP2 and EXP3, they were adults and of sound mind.

From the evidence as established of the prosecution and the defense as a whole even without the charge and caution still the prosecution would have proved its case beyond reasonable doubt under the other evidence circumstantially and the principle of common interview. It was stated in

the case of **Simon Musoke v. R [1958} EA 715**, that in a case depending wholly or largely on circumstantial evidence court must before deciding on a conviction find that the inculpatory facts mere incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. And in the case of **Teper v. R [1952] AC 489** it stated that before drawing the inference of the accused's guilt from circumstantial evidence, court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference. The instant case is one where I have examined the circumstances and found that the inference can't be weakened. For instance if the A1 was not guilty why didn't he go back home when he heard the alarm but instead just crossed the swamp and went into hiding. If he was drunk and could not join the search how did he know that the malwa pot was hit and broken by the angry mob?

There is both direct and circumstantial evidence to bring the guilt of both accused home.

Under the principle of common intention still the two accused persons are culpable. S.20 of the Penal Code Act provides, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose each of them is deemed to have committed the offence.

Both A1 and A2 had an intention of getting bones for the rich man and money exchanged hands from A2 to A1. A1 ensured that the head is got for the rich man. It was held in the case of ***R v. Okulle [1941] 8 EACA 80*** **as follows: -** whether or not an accused person was part of the pursuit of a common intention, can be established from or deduced his or her presence a t the scene of crime and his or her actions or failure to disassociate himself from the pursuit of the common intention. It is even irrelevant whether the accused person did physically participate in the actual commission of the offence or not. It's sufficient to show that he associated himself with the unlawful purpose.''

In the instant case there is overwhelming evidence as already summarized above in this judgment that the A1 and A2 did not only associate with the unlawful purpose but the indeed participated in it as the evidence both direct and circumstantial put them squarely at the scene of crime. A1's evidence in regard to his confession (charge and caution which was proved and admitted without

any retraction is admissible. According to the Evidence Act, ‘When more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other persons as well as the person who makes such confession.

My well considered view is that the confession was intact and proved that both accused persons participated in the unlawful act of murder.

The assessors in their opinion advised me to find A1 guilty and acquit A2. I disagreed with the assessors on the acquittal of A2 because the evidence of the prosecution was so cogent to show that A2 had a common intention of prosecuting an unlawful purpose. And the circumstantial evidence was over whelming and provided a strong inference of guilt beyond reasonable doubt.

I therefore find that the prosecution proved its case beyond reasonable doubt and I find both A1 and A2 guilty and they are convicted accordingly of murder C/S 188/189 of the Penal Code as charged.

Faith Mwondha
Judge
24/09/2010