

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MBALE**

**HCT-04-CR-SC-0057/2009**

**UGANDA .....PROSECUTOR**

**VERSUS**

**A.1 ASAMA JULIUS**

**A.2 EMURON SILVER**

**A.3 OKWENY JOHN .....ACCUSED**

**BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN**

**JUDGMENT**

Asama Julius (A.1), Emuron Silver A.2 and Okweny John A.3 are jointly indicted for the murder c/ss 188 and 189 of the Penal Code Act of Egolet Girifasio, the deceased.

The alleged offence is said to have taken place on the night of 4<sup>th</sup> April 2009 at Amotot village in Apopong Sub-county in Pallisa District. The accused persons denied the indictment respectively thus casting the burden of proving the indictment against each accused as required by the law.

During the trial the State was represented by Ms. Catherine Namakoye the learned Resident State

Attorney Mbale. The accused persons were represented by Mr. Twarabireho on private brief. The gentlemen assessors were Mr. Wepukhulu and Wananda.

Prosecution called a total of five witnesses.

During the preliminary hearing under S.66 of the Trial on Indictments Act the postmortem report was admitted in evidence uncontested by the defence. It comprised PW.1. The body of the deceased was examined by Dr. Otai J.B of Pallisa hospital. He did the post mortem on 6.6.2009

at the home of the deceased. It was identified by one Okiria Sam. The deceased was of the apparent age of 60 years and well nourished. It had external injuries comprising a contusion on the right clavicular area. Internal injuries were a fractured clavicle. The cause of death and reasons were shock, a fractured clavicle area and interthoracic haemorrhage. PF.48B was admitted in evidence as Exh. P.I.

The second prosecution witness was Oging Joseph an advocate of the High Court. He testified that the deceased was one of his workers. He sold a piece of land to PW.2 in the last week of May 2009. That the accused persons are neighbours and the deceased is their family member. While checking on his farm, the three accuseds i.e. A.1, A.2, A.3 met him while they were from their rice garden near the farm. They challenged him as to why the old man (deceased) sold land to him yet that was the only land the accused persons aspired to own after the deceased died. They argued that since the deceased had no biological children, they would automatically take over. That the three went ahead to order PW.2 to get his money back which would deny the deceased money to go for treatment. Emuron A.2 wondered why PW.2 could provide money to facilitate treatment of the deceased when family members did not. PW.2 advised them to approach the deceased personally but A.3 Okweny retorted that “at least we have told you. If you do not heed, we shall sponsor announcements on radio to ensure you have heard.” PW.2 went on to testify that two days later announcements were aired on Radio Continental. It ran that “Mr. Oging wherever he is, is notified that he bought hot air. Wherever he is should come for his money.” That prior to this PW.2 was warned by the accused that he was going to lose his worker. Then Asama said “we shall break his neck.” That A.2 Emuron Silvester added that “Even me alone can finish that old man” (deceased).

That after announcements, PW.2 got a telephone call from his farm manager (PW.3) that one of the workers had been discovered dead in the house. That because of the earlier threats, PW.2 concluded that the deceased must have been killed by the accused persons. He reported to Pallisa Police. The Police and a doctor visited the scene and a postmortem was performed on the deceased’s body. At the scene the accused persons who shared a compound with the deceased told PW.2 that the deceased died of poison. They stopped PW.2 and others to look at the body. That Okweny A.3 told PW.2 that “my cousin died of poison do not touch him.”

PW.2 further testified that at 3:00 a.m that night the farm manager Okiria Sam (PW.3) and the three accused persons went to his home. He asked what the problem was. The manager said the accused asked him to escort them to PW.2's home. The three accused told him that they were sorry to have killed the old man. They asked PW.2 to make effort to prevent examination of the dead body. For doing that the accused offered 1.5 million which PW.2 refused. That the money was similar to what he paid the deceased for land. He had paid the deceased 1.7 million. That PW.2 promised to settle the matter the next day but after the postmortem the three accused were arrested. As they were led away, they wailed on top of their voices that- "Pedun has brought us problems." Pedun is a sister to the mother of Emuron Silver A.2 and Asama Julius A.1.

Finally PW.2 testified that potential witnesses were being threatened for example Senabulya, Ochole told him that they cannot leave their families.

PW.3 Okiria Sam told court that he is a Farm Manager for PW.2's farm. That on 4.6.09 at 2:00 p.m he left the deceased alive. The next day 5th he went to the deceased's home and asked where he was. He asked the three accused persons who lived with him. They said the deceased left home early but they did not know where he went. PW.3 went to the farm but came back at midday looking for the deceased but did not get him. That at 6:30 p.m PW.3 went to a drinking place where villagers gather in the evening. He saw Okweny A.3 come to the chairman. He reported that the deceased had been found dead. The chairman left for the deceased's home. PW.3 followed him and indeed found the deceased dead. The body was in the house covered. That the three accused persons and LC.I told him he died of poison but he did not believe the story because as his worker, he could have told him if he had a problem. PW.3 was not told who poisoned the deceased.

PW.3 further testified that he rung and informed PW.2 who reported to police. The police came with a doctor who did the postmortem on 6th Earlier on 5th in the evening the three accused persons went to PW.3 and told him they killed the deceased but they should be pardoned. That they requested PW.3 to escort them to PW.2. PW.3 took them to PW.2. They talked with PW.2 but PW.3 did not know how the talks ended. That the accused had interest in the deceased's land.

PW.4 Musana Viliano testified that on 6.4.09 at around 6:00 p.m he passed through a road near the deceased's home. He found and heard the three accused persons asking the deceased some questions that "we heard you sold land, where is the money". PW.4 stood and listened. That when the deceased saw him, he told him that "these people have removed the money I got from the land from me." Upon this the accused chased PW.4 saying theirs was a family matter and since he was not a member he should go away. PW.4 rode away. On arrival at his home, he narrated the story to his wife. The next day at 6:00 p.m, PW.4 heard that the old man had died.

The last prosecution witness was No.13743 D/CPI Cyprian Olupot attached to Mbale Police but at the time of offence was attached to Pallisa Police Station. He accompanied the O/C CID Pallisa D/IP Etyan Alex and Dr. Otai to the scene of the murder. He helped turn the body for the doctor to do the postmortem and drew the sketch plan Exh.P.2 in which he indicated the closeness of the accuseds' houses to that of the deceased. A.3 Okweny's was 10 metres away and A.2 Emuron's house is only 3metres away. He was not sure of A.1 Asama's house. PW.5 arrested the accused persons.

In his unsworn defence, DW.1 Asama Julius (A.1) denied the offence. He said that on 4.6.09 he left for a business trip in Katakwi. He went to buy goats and cows. That he spent a night in Soroti. On 5.6.09 he arrived at Katakwi bought and loaded the animals. That at 3:00 p.m he received a call from the county chief asking where he was. The Chief told him that Egolet was dead. He left his goods with friends went to the park and travelled back. He arrived at 9:00p.m.

DW.1 denied airing any radio announcements or having a land transaction with PW.2. That he did not know where Oging's (PW.2) home is located. He also denied trying to bribe PW.2 or going to his home.

DW.2 Emuron Silver (A.2) also made an unsworn defence reiterating his denial of the offence. He testified that the deceased was his uncle. That he went to Luzira landing site in Gogonyo. He came out on 6.6.09. His brother Okello Joseph told him that Egolet was dead. That when he left home the deceased complained of sickness but DW.2 did not know what caused the death. He denied making radio announcements. He also does not know the location of PW.2's home. That he just saw him in court for the first time.

DW.3 Okweny George (A.3) denied committing this offence. He said that on 4.6.09 he went to mourn the death of a nephew to his wife in Adale village. He came back at 4:00 p.m and found people mourning. The deceased had died in the night but DW.3 does not know the cause of death. That he knows nothing about what PW.2 said.

In all criminal trials, it is trite law that before court can proceed to convict an accused person, prosecution must prove beyond any reasonable doubt the guilt of an accused person. In joint trials like the instant one, the guilt of each accused must come out in evidence and a common intent must be proved as well. The legal burden therefore lies on the prosecution to prove both the *actus reus* and *mens rea*. As was held in the famous case of **MILLER V. MINISTER OF PENSIONS [1947] 2 ALL.E.R 372, 373-4** on burden of proof,

*“The degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence “of course it is possible but not in the least probable “, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”*

The burden of adducing evidence lies on prosecution to support its case. The evidential burden on the defendant consists of raising evidence that will bring reasonable doubt into the mind of the judge. He needs not disprove absolutely the case for the prosecution and the evidence of the prosecution witnesses. **LUBOGO V. UGANDA [1967] EA 440.**

In a trial for murder like the instant one, prosecution has the duty of proving *inter alia* that;

- i) A human being was killed.
- ii) The killing was unlawful.
- iii) The accused participated in the killing.
- iv) The killing was with malice aforethought.

I will deal with each ingredient separately.

**i) Whether a human being was killed.**

According to the evidence adduced by the prosecution comprised in PW.1, PW.2, PW.3, PW.4 and PW.5 and the three accused persons and the final submissions by both learned counsel there is no doubt that Egolet Girifasio of Amolot village in Apopong sub-county, Pallisa District died on 4th April 2009 at night. The evidence adduced in this case has proved this ingredient beyond any reasonable doubt.

**ii) Whether the death/killing was unlawful**

Both prosecution and the defence acknowledge that this was a homicide. In the case of *GUSAMBIZI S/O WESONGA V. R. [1948] 15 EACA 65* it was held that in all cases of homicide, except where circumstances make it excusable, death is presumed to be unlawful. In this case prosecution relied on the evidence of Dr. Otai J.R of Pallisa Hospital who did the postmortem on the deceased's body. He found the cause of death to have been shock, fracture of the clavicle and intra thoracic, haemorrhage. This cannot be considered a natural cause. I am equally satisfied that the death of Egolet Girifasio was unlawful.

**iii) Whether each of the accused participated in the killing**

From the web of evidence adduced by the prosecution, it is apparent that their case depends on circumstantial evidence. The prosecution contends that circumstantial evidence implicates the accused persons. On the other hand learned counsel for the defence contends that prosecution evidence brings out circumstances that weaken the inference of guilt on the part of the accused persons. Learned counsel submitted that the evidence of acquisition of land from the deceased did not feature in PW.2's statement. Further that PW.2 had no record of the announcement allegedly made by the accused persons. That alleging that PW.2 was going to be bribed by the accused was a concoction because he never reported this to police. That PW.2 never told PW.3 that they tried to bribe him. That PW.3 learnt of the death at a drinking point when A.3 told the chairman but the chairman was never called to testify. That prosecution evidence was afterthoughts which should not be believed. Learned counsel further submitted that prosecution evidence failed to put the accused at the scene. The defences of Alibi were not disproved but prosecution contends that it disproved the Alibi's and squarely placed the accused at the scene.

The law relating to admissibility and assessment of circumstantial evidence is well settled. Circumstantial evidence must be narrowly examined because evidence of this kind may be fabricated to cast suspicion on another. Therefore to constitute a basis for conviction, circumstantial evidence must be such as creates moral certainty about the guilt of an accused. It must be evidence that is incapable of explanation upon any other hypothesis other than the guilt of the accused.

1. **MUREEBA JANET & 2 ORS V. UGANDA CR. APP. 13 OF 2003 (S. C),**
2. **ANDREA OBONYO V. R. [1962] EA 542,**
3. **SIMON MUSOKE V. R. [1958] EA 715,**
4. **TEPER V. R [1952] AC 480, 489,**
5. **CHARLES LWAMUNDA V. UGANDA SC CR APP. 6/93.**

My evaluation of the circumstantial evidence adduced by the prosecution gives me the impression that it was strong and reliable. PW.2 Oging Joseph struck me as a truthful witness who had no reason to tell lies in court. This witness knew each of the accused persons very well. All are related to the deceased. The deceased had no biological child. He however owned property including land. He sold part of the land to PW.2. PW.2 paid him money. This did not please the accused persons who were against the deceased's sale of land in which they were interested. They hoped to acquire the land after the demise of the deceased. The accused persons confronted PW.2 accusing him of purchasing the land they were interested in. They told him to retrieve his money which PW.2 turned down. He advised them to approach the deceased person. Okweny A.3 told PW.2 in his face that, "at least we have told you. If you do not heed we shall sponsor announcements on radio to ensure you have heard." Indeed announcements were put on radio two days later. The announcements stated thus,

*"Mr. Oging wherever he is, is notified that he bought air. Wherever he is should come for his money,"*

Before the announcement, PW.2 was warned that he would lose his worker. Asama said, "we shall break his neck!" Emuron Silvester A.2 said "Even me alone can finish that old man" PW.2 heard all this direct from the accused persons. Soon after he got a call from PW.3 his farm

manager that the deceased had died. Okweny A.2 told him that the deceased had died of poison. He is quoted to have told PW.2 that, “my cousin died of poison do not touch him.”

Another strong circumstantial evidence is that that very night at 3:00Am, the three accused visited the home of PW.2 in company of PW.3. They told PW.3 that they were sorry to have killed the old man. They asked PW.2 to ensure that the body was not examined. They offered PW.2 1.5 million to do this which was rejected by PW.2. The following day upon arrest, all the three wailed loudly that “Pedun has brought us problems.”

This evidence was minutely corroborated by that of PW.3 Okiria Sam the Farm Manager for PW.2. He knows all the accused and knew the deceased as their worker. He knew the accused persons and the deceased had a land wrangle. PW.3 saw the deceased on 4.6.09 alive. When he went to his home the following day, 5<sup>th</sup> and asked where he was from the accused persons who lived together with him, they said the deceased left home early. PW.3 went at midday again but did not see the deceased. At 6:30 p.m when A.3 Okweny informed the chairman that the deceased had died PW.3 followed them to the home of deceased where he was told the deceased died of poison. Later in the night, the accused persons asked to be taken to PW.2 to ask for forgiveness saying they killed the deceased. As testified by PW.2, these people woke him up at 3:00Am and proposed a pardon for each other.

The above evidence is further corroborated by that of PW.4 Musana William. This witness was on his way on 6.4.09 at 6:00p.m. When he reached the deceased’s home he heard the three accused persons and the deceased quarrelling. He got interested and went near. The accused were harassing the deceased for money he sold from his land. In fact the deceased told PW.4 that the money had already been removed from him. The accused persons chased PW.4 saying he should not interfere in family matters. The following day in the evening he heard Egolet the deceased had died.

The above evidence is so interwoven that it leaves no doubt in my mind that the three accused persons had a hand in the demise of Egolet. There is no other probable explanation on any hypothesis than that of guilt of each of the accused persons.



I believed the prosecution evidence and did not believe the defence version of events. They each told lies that they were not at the scene of crime at the time of offence. All prosecution witnesses knew the accused very well. They saw them the day before the deceased Egolet died. The Farm Manager PW.3 talked to the accused when he was looking for the deceased. They lied to him that the deceased left home early when the deceased had already been killed and the body was in his house. In my view the statements made by each of the accused persons to PW.2, PW.3 and PW.4 constitute circumstances leading to the death of the deceased and are admissible (see **Mureba's** case supra).

DW.1's defence story was a made up story and an afterthought. I was not convinced that he went for a business trip to Katakwi to buy animals for his trade. He said he left the animals he bought loaded and boarded other transport. There is no logic in this evidence. Why leave the animals already loaded and come back alone? A further lie by DW.1 was to say that he did not know PW.2 or where his home is yet PW.2 is a neighbor to their home and they went to him to plead so that the offence could be concealed.

DW.2 also told court blatant lies that he had gone to the landing site at Gogonyo and learnt of the news about the death of his uncle from his brother Okello Joseph. I was surprised that DW.2 could say he came to know PW.2 from court and did not know where his home was. This was a lie given the strong evidence from PW.3 and PW.4.

DW.3's defence was a pack of lies as well. He said he went to attend a funeral of a nephew to his wife at Adale village on 4.6.09. That when he came back at 4:00 p.m he found people mourning. But by 4:00 p.m the deceased had not died. DW.3 contradicts himself by saying that the deceased died at night that day.

In a defence of alibi, an accused person has no duty to prove the same. Once that defence is raised, the duty shifts to the prosecution to adduce evidence to disprove it. From my above analysis of the evidence, I am confidently satisfied that prosecution has successfully disproved the defence of alibi put forward by each of the accused persons. Each of the accused persons has been put squarely at the scene of crime. The conduct of each of the accused persons irresistibly

points to their guilt. Circumstantial evidence is about the cumulative effect of the totality of the evidence. Different pieces of evidence should be looked at together.

I am satisfied beyond any reasonable doubt that each of the accused persons participated in killing the deceased. They killed the deceased in a primitive hope that they will take his land. As testified by PW.4 and shown in exhibit P.2, the three accused persons live closely to the house of the deceased that they ought to have known what was happening to the deceased in case of an attack unless the attack was by the accused themselves like in the instant case.

From the evidence by the prosecution the three accused persons had a common intention to kill the deceased. According to S.20 of the Penal Code Act where 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. The evidence on record has it that the genesis to this offence was made by all the three accused persons in unison. PW.2, PW.3 and PW.4 narrated how the three were incensed by the sale of land by the deceased. They together warned PW.2 not to go ahead and retain the land. They put announcements on radio restraining the PW.2 saying he bought air. They told PW.3 that they killed the deceased and should pardon each other. They went to PW.2 and asked him to stop examination of the body. They lied that the deceased died of poison.

All this shows that the three had a common intention to prosecute this unlawful act. They are each culpable in the same degree.

**iv) Whether the killing was with malice aforethought.**

Mr. Twarabireho for the accused persons did not doubt proof of this ingredient by the prosecution. He conceded to it as he did to issues (i) and (ii). Ms. Catherine Namakoye the learned resident State Attorney submitted that she proved the existence of malice aforethought in this homicide on the part of each of the accused persons.

Under S.191 of the Penal Code Act malice aforethought may be established by evidence providing either of the following circumstances.

a) an intention to cause 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, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.

In the instant case, I have found that the accused persons in liaison with each other killed Egolet.

According to Exh. P.1 (PW.1), the postmortem report death was caused by shock, fractured clavicle and intrathoracic haemorrhage. These were fatal injuries on an old man aged 60 years. Prosecution adduced other evidence to show that the accused vowed on several occasions to eliminate the deceased for selling land they hoped to inherit. A.1 Asama told PW.2 that “we shall break his neck.” Emuron A.2 said “even me alone can finish that man.” The accused warned and chased away PW.4 from their home when he found them harassing the old man. Given these events and utterances, I agree with the prosecution that when they attacked the deceased, they had the intention to cause death. They knew their actions would cause death.

In the circumstances therefore it is appropriate to infer malice aforethought.

In their unanimous opinion the gentlemen assessors advised me to acquit the accused person because the money for a bribe totaling 1 .5m/= was not exhibited.

Secondly that the discussion between the accused and PW.2 was not recorded. Further that the radio announcements were not retrieved and produced in court to support PW.2’s evidence. That the evidence of PW.4 was not reported anywhere. That he only reported to PW.3 at the burial. Finally that the ingredient of the participation of the accused has not been proved beyond any reasonable doubt.

With due respect, I do not agree with the opinion of the assessors. It is not true that the money which was being offered to PW.2 was accepted by PW.2. PW.2 rejected this money so there is no way it could have been exhibited in court. Secondly, it would be expecting too much if court

required that the talk between the accused persons and PW.2 should have been recorded for it to be proved. The accused persons went to PW.2 accompanied by PW.3 late in the night and visited by surprise. It was not necessary that their talk could be recorded. This piece of evidence was from the person who talked to and heard from the accused persons. The radio announcements being heard by PW.2 was equally direct evidence which may be admitted or rejected. Finally, the gentlemen assessors did not consider the guidance I gave them that this case depended on circumstantial evidence. This would have enabled them to advise court whether it is inconsistent with the guilt of each of the accused person.

In the result, I will find A.1 Asama Julius, A.2 Emuron Silver and A.3 Okweny John guilty and order as follows:

1. A. I Asama Julius is found guilty and convicted of murder c/s 188 and 189 of the Penal Code Act.
2. A.2 Emuron Silver is found guilty and convicted of murder c/s 188 and 189 of the Penal Code Act.
3. A.3 Okweny John is found guilty and convicted of murder c/s 188 and 189 of the Penal Code Act.

25.5.2010

All 3 accused in court.

Ogwang Resident State Attorney on brief for Namakoye.

Twarebireho on private brief.

Wanale Interpreter.

Loyce for Atesot.

## **SENTENCE AND REASONS**

I will consider that each of the convicts is a first offender. But as submitted by the Resident State Attorney, they began by committing a serious offence where a life was lost. The circumstances under which this offence was committed were savage and deplorable. It was inexcusable that the convicts could kill the deceased for his land because he had no child and they hoped to inherit or

take his land. This homicide was in all respects premeditated. I have not been convinced that the convicts deserve a light sentence.

In view of the fact that death is no longer mandatory each of the convicts will serve 28 years in jail.

A.1 is sentenced to 28 years.

A.2 is sentenced to 28 years.

A.3 is sentenced to 28 years.

Right of appeal explained.

**Musota Stephen**

**JUDGE**

**25.5.2010**