

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

HCT-04-CR-SC-0201-2008

UGANDA.....PROSECUTOR

VERSUS

OKION DAVID.....ACCUSED

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

Okion David hereinafter referred to as the accused is indicted for the Murder of one Okanya Isaac. Prosecution alleges that the accused committed the offence on 22nd June 2007 at Omukulai village in Kibaale sub-county in Pallisa District.

The accused denied the offence.

In an attempt to prove the offence against the accused person prosecution led by Mrs. Alpha Ogwang the learned Resident State Attorney called the evidence of five prosecution witnesses.

The defence is represented by Mr. Mutembuli Yusuf on State brief. Only the accused testified in his defence.

In criminal trials, before court can proceed to convict an accused person, prosecution evidence must have proved him or her guilty beyond any reasonable doubt. This burden of proof rests on the prosecution throughout the trial. It does not shift unless the law provides otherwise ***Oketh Okale v. R. [1965] E.A. 555 at 559.***

In a case of murder like the instant one prosecution has a duty to prove *inter alia* that:-

- (1) A human being was killed.
- (2) The killing was unlawful.
- (3) The accused participated in the killing.
- (4) The killing was with malice aforethought.

From the evidence adduced by the prosecution and as conceded by defence counsel, there is no doubt that a human being in the names of Okanya Isaac was killed. Ingredient number one is answered in the affirmative.

Mr. Mutembuli, learned defence counsel contested the remaining three ingredients of whether the killing was unlawfully done, with malice aforethought and by the accused person.

I will deal with each of those ingredients separately.

- (2) Whether the killing was unlawful.

PW.1 Ochieng Raphael testified that on 22.6.2007 he saw the accused and the deceased struggling for a cow. That each of them was pulling the cow in a different direction. That the deceased over powered the accused and took away the cow. Then the accused

picked a bottle and hit the deceased's head with it. The deceased fell down and was bleeding from the head. On 23.6.2007 the brother to the deceased called Engole Okion Charles came and took the deceased for treatment, where he died.

PW.2 Okello David testified that after doing casual work at Engole's home, he went home. That one Omwiru came and told the deceased that he had seen a cow grazing in Engole's garden. Then at 6:00p.m PW.2 heard an alarm from the direction of Engole's garden. When he answered the alarm he found the deceased lying down bleeding from the head and his clothes were soaked in blood. The deceased was taken for treatment by Ochieng. As he was going to answer the alarm, he saw the accused running away with a cow towards his home.

PW.3 No.12603 D/W/Sgt Acham Florence received a case file MCB on 24.6.2007 in which the accused was alleged to have hit his brother with a bottle on the head who later died at St. Andrews Clinic at Pallisa. She took the body for a postmortem at Pallisa main hospital. She also visited the scene where the fight took place. She saw signs of a struggle and blood stains- she drew the sketch plan, picked the bottle pieces and took them to Pallisa Police where they were exhibited.

PW.4 Dorothy Alupo told court that there was a fight between the accused and the deceased over a cow. That the two kicked each other as they struggled for the rope on the cow. She saw the accused pick a bottle which the deceased had put down and hit the deceased on the head. The bottle broke into pieces. The deceased fell down and the accused ran away with the cow.

PW.5 No. 31763 DC Okurut Robert arrested the accused from Abulabula Trading Centre Kadungulu Sub-county, Soroti District where the accused had registered as a visitor in the names Okello Peter a resident of Omereit village, Mukongoro sub-county, Kumi District. When PW.5 challenged the accused on his identity the latter revealed his actual identity as Okioni David. The accused was transferred to Pallisa.

In his defence, the accused denied the offence. He testified that he did not know how Okanya died. He denied fighting Okanya because he had no grudge with him and the deceased was his best friend.

In his submission, Mr. Mutembuli learned counsel for the accused said since none of the broken pieces of bottle were exhibited yet they were recovered, it is difficult to believe that a bottle was used to hit the deceased. Further that in absence of the postmortem report, it is difficult to establish what caused the death of the deceased. That none of the prosecution witnesses saw the accused hit the deceased with any bottle.

Ms. Alpha Ogwang the learned Resident State Attorney submitted to the contrary. PW.1, PW.2 told court that they saw the accused and deceased fight over a cow. They saw the accused hit the deceased on the head with a bottle. The bottle was smashed and the deceased fell down bleeding. He was taken to hospital on 23.6.2007 or 24.6.2007 where he died later. PW.4 confirmed that both the accused and deceased fought and kicked each other. She saw the accused pick a bottle and hit it on the deceased's head. That the bottle broke into pieces. The deceased fell down. He died two days later from the clinic he was taken for treatment.

Unfortunately, no medical evidence was adduced by the prosecution to show what the actual cause of death of the deceased was.

PW.3 testified that she visited the scene of crime, drew the sketch plan. At the scene. She found broken pieces of glass and blood stains. He exhibited the broken glass. She took the body to Pallisa hospital for a postmortem examination but does not disclose when she took the body. She does not mention the date. She made her statement on 15 December 2007 although she received the MCB file (a file for a minor case) on 24.6.2007.

The prosecution did not rely on any of this important evidence. The broken bottles were not exhibited. No medical evidence was adduced to show what the cause of death of the deceased was. No postmortem report was adduced in evidence. The fight took place on 22.6.2007 at 6:00p.m according to PW.1. He says one Engole Okon Charles took the deceased for treatment on 23.6.2007. He does not tell where he was taken for treatment. PW.1 says he went to the home of the deceased and found he was unable to talk. On 24.6.2007 that is when he took him to St. Andrew's Clinic where he died at 3:00p.m. Given the time lag between the fight and the death, and the fact that the deceased was treated in a clinic yet he was drinking before the fight it makes it difficult for this court to conclusively determine what the actual cause of the deceased's death was. The deceased did not die instantly, he took some days with intervening circumstances. It would be extremely risky to only rely on the evidence of the eye witnesses who were not consistent on the circumstances leading to the fight. On this point I agree with learned counsel for the accused person.

The stories of the eye witnesses i.e. PW.I and PW.4 were at variance. Whereas PW.1 does not talk about the presence of the wife of the accused, PW.4 does. It is not clear if the struggle for the cow involved three people. PW.1 talks of a soda green bottle but PW.4 says it was a beer bottle which his brother had bought for him and was drinking beer. Further evidence has it that during the scuffle it was the deceased who overpowered the accused. PW.4 did not go to the scene of the fight but observed the fight “from a distance.” PW.4 also said PW.1 who is a purported witness went to the scene after the fight. This contradictory evidence leaves the prosecution evidence unreliable and unsafe to base on in absence of the postmortem or medical evidence. It is difficult to conclude with certainty that the accused hit the deceased with a bottle and the blow was fatal. There was no streamlined movement of the deceased between the time of the fight and his death.

In view of the above conclusions I am unable to find that the death of the deceased was caused by the accused and unlawfully. It goes without saying therefore that no malice aforethought can be imputed on the accused person.

In their respective opinions the gentlemen assessors were agreed that all the three ingredients of illegal death, and participation of the accused were proved by the prosecution. They differed on the issue of malice aforethought. Whereas Mr. Wanalobi Medad was of the view that the accused committed murder, Mr. Kotaki Dison was of the view that the accused be convicted of a lesser offence of manslaughter. I am with due respect unable to agree with both assessors.

To a lay person’s point of view, the story of the witnesses appears convincing. But legally it is not. Murder is a serious crime. It carries a maximum sentence of death.

The life and right of an accused person is at stake. This calls for a very strict standard of proof.

For the reasons I have given above, I found that the standard was not met by the prosecution evidence. It is un-excusable that exhibits collected by the police and medical evidence which had been procured by police was not adduced in evidence. The deceased did not die instantly. He died after some days of the fight. He was in and out of hospital. There was a dire need of expert evidence to prove beyond doubt the cause of death of the deceased. Without such evidence and given the contradictory accounts of the would be eye witnesses, the prosecution evidence was weakened. I therefore do not agree with the opinion of assessors.

Consequently, I will find Okion David not guilty and acquit him of murder. He is set free.

Musota Stephen

JUDGE

21.4.2011

21.4.2011

Accused in court.

Alpha Ogwang Resident State Attorney.

Mutembuli on State brief.

Loyce for Atesot.

Resident State Attorney: Case for judgment.

Court: Stood over for 15 minutes.

Musota Stephen

JUDGE

21.4.2011

9.55A.m.

Court resumed constituted as before.

Resident State Attorney: Case for judgment.

Court: Judgment delivered.

Musota Stephen

JUDGE

21.4.2011