

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

HCT-04-CR-SC-0067-2010

UGANDA.....PROSECUTOR

VERSUS

A.1 LOCOHOTO MICHAEL

A.2 BELUKWA RAPHAEL

A.3 LOMAKOL MAGALINA.....ACCUSED

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

The three accused persons to wit **A.1 Locohoto Michael, A.2 Belukwa Raphael** and **A.3 Lomakol Magadalina alias Nadonga** jointly indicted with the offence of murder c/ss 188 and 189 of the Penal Code Act.

Prosecution alleged that the three and others still at large on the 20th day of November 2009 at Mawero Solo 'B' village 'A' Busia Town Council in Busia District murdered **Agani Everline**. The trio denied the indictment respectively.

It is the law of this land that before the court can proceed to convict an accused person, prosecution must prove beyond any reasonable doubt the guilt of an accused person.

In a joint trial like the instant case, the proof has to be against each of the accused persons unless there is proof of a common intention by the accused persons to commit the offence. The burden of proof does not shift to the defence except in a few statutory offences where the law provides otherwise.

OKOTH OKALE V. R 1965 EA 555, 559.

In a case of murder like the instant one, prosecution bears the duty of proving that each of the accused persons participated in the killing of **Agani Everlyne** a human being and the killing was unlawful and was with malice aforethought.

I will deal with each of the ingredients separately.

(1) That a human being was killed.

According to the evidence adduced by prosecution and supported by the defence evidence there is no doubt that a human being called **Agani Everlyne** was killed on 20th November 2009 at Mawero Solo B village. According to exhibit PI and witnesses on both sides, the deceased was slaughtered to death. I believed that the deceased was killed and I so hold in agreement with the opinion of the gentleman assessors.

(2) Whether the killing was unlawful.

It was held in the famous case of **GUZAMBIZI WESONGA V. R. (1948) EACA 65** which has been successively upheld in many later cases that in all cases of homicide except where circumstances make it excusable, death is presumed to be unlawful. On this issue, prosecution relied on the evidence of PW.1 in exhibit P.I on which **Dr. Oundo** of Busia Hospital performed the post mortem report. He found that the body of the deceased had a fresh cut wound along the anterior aspect of the neck and transaction through the left Jugular vessels and trachea. It had bruises over the wrist area bilaterally. The cause of death of the deceased was found to be excessive bleeding due to the slit neck caused by a sharp edged object. All prosecution and defence witnesses confirmed the slaughter of the deceased. This evidence clearly proves beyond doubt that the death of **Agani Everline** was indeed unlawful. On this ingredient I agree with the assessors' opinion.

(3) That the accused persons participated in the killing.

To try and prove this ingredient prosecution relied on the evidence of **PW.2 Tereza Nangololo, PW.3 Namudama Angelina, PW.5 Wesonga Christopher** and **PW.6 No.24813 Emwodu David**.

PW.2 told court that she heard the deceased cry that "are you killing me." The cry was from **Locohoto's** house (a.1). She rushed there. That as she approached the house she saw **A.2 Belukwa** and **A.3 Magalina** run out of the house. She entered the house and saw **Agani** slaughtered. That she saw **A.1 Locohoto** hiding behind

the door. She did not see any of the accused person cut the deceased. The evidence of PW.2 was basically circumstantial.

PW.3 Namudama Angelina testified that she answered alarms at around 7:00p.m. She entered A.1's house wherein she found a slaughtered body of **Agani**. When she arrived at the scene, A.2 and A.3 tried to prevent her from entering the house. The two were in A.1's house but she did not see who killed the deceased. When cross-examined, PW.3 said she was not certain if there was anybody in the house of A.1.

PW.5 Wesonga Christopher told court that as Chairman he received a call from **Hudson Owor** the defence secretary alerting him of an alarm in his area. He rushed there and found the body of the deceased in the hut of **A.1 Locohoto**. He reported to police. When he saw A.1 he had blood on the shirt at the shoulder area.

PW.6 No 24813 Emwodu David visited the scene at around 8:30p.m and found A.1 under arrest and guarded by the public. He saw the dead body and organized for a postmortem which was done by a Doctor. He arrested A.1 and A.2 and later A.3.

That one suspect **Lokorotodo (Ekiritodo)** disappeared todate.

Each of the accused persons denied killing the deceased. Each put up a defence of alibi and explained the events as follows:

DW.1 testified that she was away drinking from 5:00p.m. to late at night. She then heard an alarm from the direction of her home where she had left children. She rushed there. When she arrived, her neighbours told her that **Ekoritodo** had killed **Agani**. The dead body was in A.1's house. Her husband A.2 had also gone to drink. When he came home he found **Agani** killed. That A.2 with **Nangololo** (PW.2) reported the case to the chairperson but were instead arrested.

DW.2 Locohoto A.1 a hawker said on the day in question he went to hawk merchandise. He returned at around 9:00p.m. He found when someone had died in his house. That before he went to work he left a visitor called **Ekoritodo** in the house. That the latter had visited A.2 and A.3 who requested him to accommodate the visitor since he was an in-law. DW.2 was told by PW.2 that **Ekoritodo** had killed **Agani** and run away. That he (DW.2) was attacked and injured by a mob because **Agani** died in his house. He showed the scars from the injury in court. He was arrested soon after.

DW.3 Bulawa Raphael testified that on the fateful day he had gone to drink. He was at the drinking joint between 5:00p.m – 9:30p.m. While coming home he heard an alarm while approaching home. He found **PW.2 Nangololo and PW.3 Namudama**. PW.2 told him that **Ekoritodo** had killed **Agani** and run away. He entered and saw the body of the deceased in A.1's hut with a slit neck. Together with the others they were arrested when they went to report to the chairman LC.I called **Owor**.

This was the defence evidence.

Prosecution counsel **Mr. Bwiso** submitted that he had adduced sufficient evidence to prove the offence against the accuseds. On the other hand, **Ms. Aketch** for the accused persons contended that prosecution has failed to prove the indictment against each of the accused persons to the required standard.

After a careful evaluation of the evidence as a whole, I am inclined to agree with **Ms. Aketch's** submission. The only evidence which seems to implicate the accused persons to this offence is what PW.2 said she heard. She testified that she heard the deceased cry out that "are you killing me." That this cry came from **Locohoto's** (A.1) house. However there was no mention of the person killing the deceased. PW.2 did not see anybody slaughter the deceased. Secondly each of the accused persons' respective defences of alibi were not disproved by the prosecution evidence.

The defence story was consistent as opposed to prosecution evidence. I believed the defence of DW.1 that she was in a drinking joint and only came back home on hearing an alarm from the direction of her home which was neighbouring that of **DW.2 Locohoto** where the deceased met her death. DW.2 said he was hawking merchandise the whole day and came back home in the night only to find the deceased killed in his hut. This was the reason he was arrested. Before he left for work, he left one **Ekoritodo** at his home and this was the man everybody said had killed the deceased. This evidence is supported by that of PW.2 who said she met **Ekoritodo** with a blood stained knife running away.

DW.2 testified that PW.2 told him on arrival at the scene that **Ekoritodo** had killed **Agani Everline**. There was no sufficient evidence to show that **Ekoritodo** acted with the help of any of the accused persons to kill the deceased. After the death of the deceased there appears to have been a lot of confusion at the scene. Whereas prosecution witnesses give different versions of where the accused persons were found, the defence story sufficiently explains this. None of the accused persons denies being at the scene of crime. The prosecution witnesses did not exactly tell who did what to the deceased. None of the prosecution witnesses saw the deceased being killed. Whereas PW.2 says she found the accused in A.1's house when she arrived, PW.3 is not certain if there was anybody in the house. Many people were going in and coming out of A.1's house.

It is unsafe to conclude from those uncoordinated movements that the accused persons who are neighbours to each other had a hand in the death of the deceased. There is no direct or circumstantial evidence to link any of the accused persons to this offence instead **Ekoritodo** who was not apprehended has an explanation to do in relation to the death of **Agani**. Therefore without **Ekoritodo** it will be unsafe to convict any of the accused persons because such conviction cannot be undone in future if **Ekoritodo** is arrested.

None of the accused persons ran away or conducted themselves in a guilty manner. They never ran away. They tried to reach the authorities to report the death. In the process they were instead arrested by the overzealous police.

The defence story was consistent and I believed it. It created doubt in my mind as to the guilt of each of the accused persons.

I will resolve this doubt in favour of each of the accused persons.

I will find that prosecution has not proved participation of any of the accused persons in this homicide beyond any reasonable doubt. For the reasons I have given I do not agree with the gentleman assessors' opinion.

(4) Whether the killing was with malice aforethought.

Malice aforethought is an intention to kill. It is established by taking into account the cause of death of the death. In the instant case although the weapon used was not recovered it is undisputed that the deceased was killed after being slaughtered like an animal. Whoever slit the neck of the deceased knew that death would result. A neck is a vulnerable part of the body. Therefore whoever slaughtered the deceased had the intention to kill and had malice aforethought. Although the circumstances under which the life of the deceased was determined is suggestive of presence of malice aforethought there is no evidence to connect any of the accused persons to the intent. Therefore malice aforethought cannot be attributed to any of the accused persons.

In view of my above holdings I will find that prosecution has failed to prove the guilt of each of the accused persons beyond any reasonable doubt.

Consequently I will order as follows:

1. **A.1 Locohoto Michael** is acquitted of murder c/s 188 and 189 of the Penal Code Act.
2. **A.2 Belukwa Raphael** is acquitted of murder c/s 188 and 189 of the Penal Code Act.
3. **A.3 Lomakol Magalina** is acquitted of murder c/s 188 and 189 of the Penal Code Act

The indictment is dismissed and the three are set free unless lawfully held.

Musota Stephen

JUDGE

13.5.2011

13.5.2011

All 3 accused produced.

Namatovu Resident State Attorney.

Aketch on State brief for accuseds.

No. 7761 WDR Topoth Charles Interpreter/Karamojong.

Mangeni only Assessor present.

Court: Judgment at 12:00noon. Remand in custody.

Musota Stephen

JUDGE

13.5.2011

12:15p.m. Court resumed.

Constituted as before.

Resident State Attorney: Case for judgment.

Court: Judgment delivered.

Musota Stephen

JUDGE

13.5.2011