THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ADJUMANI

CRIMINAL SESSION NO. 0002 0F 2011

UGANDA :::::::::::::::::::::: PROSECUTOR

=VERSUS=

ANYAMA FESTUS
& ANOTHER :::::::::::::::::::::: ACCUSED

JUDGMENT

BEFORE HON. JUSTICE NYANZI YASIN

ANYAMA FESTO A1 and DRAMWE SAMUEL were indicted for murder under section 188 and 189 of the penal code Act. At the level of whether a prima facie case had been made against the accused persons I acguitted A2. This judgment therefore concerns of the offence allege that A1 on the 4th day of November 2008 at Ajujo village in Adjumani District murdered EDEMA

KITI. Meaning A1 unlawfully caused the death of the deceased with the intention to do so.

The background to this case as far as can be gathered from the evidence is as stated below. That on the 4th November 2008 night, PW2 together with 4(four) other person went out for fishing. It was around 10.00am. The four others he was with were EDEMA KITI the deceased, WILLIAM, ARUBOKO TABAN and PAJALE. Unfortunately of all the 4 it is only PW2 who is surviving. All others are dead. Rain started falling, and the group decided to take shelter from the rain at the nearby home since the area in which they were has sparsely located house units.

That decision led them to the home of the accused person. The deceased knocked on the door to ask for permission instead of being permitted to enter the accused got out with a panga as according to him he suspected the group to be of bad people since they had failed to identify themselves. He straight away cut the deceased, PW2 and others ran away for their lives. A2 who was found in the house with A1 also ran away begging the accused not to cut them. Although A1 in his caution and charge statement admitted in court as Exh.PE2 implicated A2 to have taken part cutting this court after considering evidence of PW2 found that A2 had no case to answer.

Due to injuries of cuts on the head, arms, legs and lower abdomen, the deceased fell just a few meters from the accused's house as shown on Exh.PE1 the sketch plan entered in evidence by PW1. He was on the morning of 5th November 2008 collected to be taken for medical attention but died before he would reach the medical unit. It was also relevantly

stated by PW1, PW2, PW4 and PW6 that the deceased was a refuge person. He came from the Sudan.

The accused was looked for and was found in his mother's home which is just next to his in the same compound. According to evidence he has hiding there from.

He was taken to police where he recorded a charge and caution statement admitting to have cut the deceased. At the trial when an application was made by the state to receive the charge and caution statements of A1, learned counsel for the accused Mr. Alule Augustine did not object. The accused therefore never retracted this statement. When court ruled that he had a case to answer he rejected to defend himself by keeping quite.

Since the accused person pleaded not guilty on being arranged before court the prosecution had to prove all the ingredients of offence to the required standard of proof. That standard is that of beyond reasonable doubt. See Art. 28(3) (a) Constitution of Uganda, **WOOLINGTON –VS- DPP [1935] A.C 154** and **MANCINI –VS- DPP [1942] A.C 1.** Locally in the case of **PAULO OMALE =VS= UGANDA crim. Appeal No. 6 of 1977** (unreported) the court of appeal re-affirmed the above positions. It held that it is the obligation of the prosecution to prove that the accused killed the deceased with malice aforethought.

In the instant case the prosecution must prove all the ingredients of the offence of murder c/s 188 and 189 namely;-

a) That EDEMA KITI is dead.
b) That FESTO ANYAMA caused his death.

c) That the death of EDEME KITI was caused with malice aforethought.
d) That death was unlawful

I now consider the evidence available on each ingredient in the order they were presented by the prosecution and answered by the defence.

IS EDEMA KITI DEAD

Prosecution adduced evidence of eye witnesses who knew the deceased during his life time and saw him at the time of death and after. First on record is evidence of PW1 Chandia Queen. She said she found the deceased being carried. He was still alive but very weak. He could talk but with difficulty.

He talked to her that he was cut by the accused and soon died. If death of a person comes into question like it is now such statement made by a person in expectation of death and death actually occurs thereafter are relevant to prove death. That is the effect of the provision of S.30 (a) EVIDENCE ACT cap.6 the prosecution relied on this provision of the law and I agree with their submission. There was no serious challenge to PW1 in cross examination. I find that using Pw1's evidence it would be established that **EDEMA KITI** is dead.

The second piece of evidence comes from PW2 **IRAMA JUSTO**. He was a friend of the deceased. He was with him on that day. He saw him being cut by the accused. He saw him cut, weak and unconscious on the scene where he fell. He saw the body at the deceased's home. He described the cuts it

had on the head, lower abdomen and the hand. This piece of evidence is also relevant and I accept it to prove that EDEMA is dead.

The third piece of evidence comes from PW3. He was with RWC office Refugee Welfare Committee offices. The deceased was a refugee. The body was taken to the camp. It was identified to him by L.C 1 chairman. He saw it cut with wounds on the head, stomach, eye and on the hands. This evidence adds its weight to other to prove EDEMA is dead.

The last piece of evidence comes from PW4 No. 23758 detective sergeant Opio. He went with Doctor Oper to the camp where the body was. He saw the body and assisted the doctor in making of the post mortem report. He described the same cuts other witnesses described to this court to be on the body. He saw the deceased in his death state. That was the reason and basis that as police arrested the suspect was charged with murder.

It is true that no post mortem report was tendered in evidence to prove death. However it was required basically to prove that Edema is dead. This court has ample evidence as shown above from which it can draw a conclusion beyond reasonable doubt that EDEMA is not a living but a dead person. Although the defence argued so much on the post mortem report, I will not go any further with that discussion because to me it was proved to the required standard that the deceased died through other acceptable pieces of evidence. A post-mortem report is not the only means of establishing death.

DID FESTO ANYAMA CAUSE EDEMA'S DEATH?

There are three pieces of evidence concerning this matter. PW1's meaning of the dieing declaration, PW3's being an eye witness and Exh. PE2 and the

charge and caution statement. I have chosen the 3 pieces because they direct in nature. I will review them in the same order above.

I have already concluded that PW1's evidence is acceptable under **S.30 (a) of the Evidence Act.** The deceased identified ANYAMA to be the person who cut him.

This piece of evidence is corroborated by evidence of PW3 who saw the same ANYAMA in the act of cutting the deceased.

The second item is the evidence of PW3. he was present during the time of the commission of the offence. He knew the accused before the offence was committed and knew the place where they went to be the place of Anyama.

The only problem with PW3's evidence is identification. He is a single identifying witness who witnesses the event at night. If I am to accept his evidence it must be corroborated. I am aware of the danger of mistaken identity to case of a single identifying witness. However, here, PW3's evidence is corroborated by PW1's testimony and as I will show soon later by Exh. PE2 the charge and caution statement. That the person he saw cutting Edema is the same person who caused his death.

The fact that he knew the accused before eased identification for him despite the unfavourable conditions. See **SULA KATO =VS= UGANDA crim. Appeal No. 30 of 1999 C.A** where a teacher known to a pupil defiled her. The witness PW3 also was in good enough distance actually both the accused and PW3 were in the same place before he (PW3) ran away. He started cutting when he was seeing all that went along way in aiding PW3 identify the accused. In **UGANDA VS WILSON SIMBANA (S.C) Crim. Appeal No. 37 of 1995** unreported. The highest court in this land held that

court dealing with the question of whether there was proper identification or not considers the following;-

1) Whether the witness knew the accused person before the incident.
2) The time the incident is alleged to have taken place.
3) The length of time and opportunity the witness had observing the accused.
4) The distance between the witness and the accused.

I have been guided by all the above and conclude that PW3 could positively identify the accused without the fear of mistaken identity.

The last piece of evidence for my consideration on the issue whether it is the accused who killed the deceased, is his charge and caution statement exhibited in this court through PW6 and received as Exh. PE2. the usual course of events where a charge and caution statement containing a confession is to be tendered in evidence and the accused person repudiates his or her confession, did not occur here. When Mr. Omia Patrick the learned state attorney applied to have exhibit PE2 tendered in evidence the defence counsel did not object. Neither did the accused person retract it.

Consequently I will not concern myself with the discussion that would follow if the confession had been repudiated. However in **EDONG S/O ETAT Vs R [1954] 21 EACA 338** the East Africa Court of Appeal held that;-

> ***"If there is a good reason to think that the claim of events leading to the confession was started by physical violence to the person of the***

accused it would be a valid exercise of a trial Judge's discretion to reject the statement."

I do not have any evidence on record to point to that. I equally do not have any evidence. Violence, force, I treat promise or any inducement calculated to cause untrue confession. I would therefore find Exh.PE2 relevant to prove that it is the accused who killed the deceased. EXh. PE2 it self cite part of that evidence below

"When we were already on the bed, with one called Aramwe Samuel about four people came to my place and knocked at the door to my house. By then it was drizzling. When I opened the door three of them ran away and this created doubt because one of them was left on my compound. I tried my level best to interrogate him but he could not identify himself. This made me to believe that he could be a wrong person and out of anger I really happened to cut him with a panga on the back"

Another important part is

"He died the following day on 5th November 2008 at Olifi refuges camp.

Having occupied the charge and caution statement which contained the above evidence, it is conclusive that the accused person is the one who killed the deceased.

<u>DID HE KILL HIM WITH MALICE AFORETHOUGHT?</u>

Malice aforethought has a statutory definition S.191 of the penal code Act defines malice aforethought as below – it is;-

a) **"An intention to cause death of a person whether such person is the person actually killed or not**

b) **Knowledge that the act or omission causing death will probably cause death of some person .....accompanied by indifference whether death is caused or not by a wish that it may not be caused".**

In order to establish the intention to kill this court has always looked at cases of this nature

a) The weapon used to kill
b) Nature of the injury caused
c) Part of the body injured
d) Conduct of the accused before and after the commission of the offence.

Applying the definition in S.191 of the Act and the trite position of the law above to the present case,

a) The accused used a panga to cause injury
b) He caused multiple deep injuries on the body
c) He cut the head, stomach both of which are sensitive parts of the body.
d) His conduct after the offence was that he left his house and hide in his mother's house.

It is my conclusion that the accused person had the intention to cause death or knowledge that his act of using a panga to cut the deceased's head, stomach, hands and the body would cause death no matter that it was not his wish to cause death. This ingredient has also been proved beyond reasonable doubt.

WAS THE DEATH UNLAWFUL?

I had handled this ingredient last to reduce on amount of arguments that would be advanced by either side. Having established that, EDEMA is dead. He died of cut wounds. His death was caused by the accused intentionally; it is simple to conclude that EDEMA'S death was unlawful. The law is all homicides are unlawful unless probed to be accidential or execusible. I do not find EDEMA'S death to follow under that category.

DEFENCE

In order to make a finding that the prosecution has proved its case beyond reasonable doubt against an accused person the court must dispose off all or any defence set up by the accused or disclosed to have been set up from the facts. This position was settled in the case of **R –VS- SHARMPAL SINGH [1962] EA 13**

In the present case the accused kept quite and said nothing in his defence. However it is the duty of the judge to deal with such alternative defences if they emerge from the evidence not withstanding that such defences/s was/were not put forward by the accused.

In **UGANDA –VS- MAGARA RAMADHAN, Crim. Session case No. 0239 of 2006**

The accused did not revise the defence of provocation the trial judge traced it from the facts and resolved it. He actually found that the defence of provocation in that case was sustainable and held that there was no malice aforethought.

Similarly in the present case I have looked at Exh. PE2 where the accused used these words

"This made me to believe that he could be a wrong person and not of anger I really happened to cut him with a panga on the back....." (emphasis mine)

However the accused did not say that the deceased did anything that provoked him. He only failed to identify himself. Why would that failure cause so much anger to the extent of using a panga to cut the deceased?

Interpreting S.193 of the penal code Act the Judge in MAGARA case (supra) said that its essential ingredient are;-

"Any wrongful act or insult of such nature as to be likely when done to an ordinary person to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed"

I have considered all the evidence in total especially evidence of PW3 and Exh. PE3 and failed to get any act that the deceased did to deprive the deceased of self control. According to the accused the deceased failed to identify himself on being asked to. To me that means he kept quite. How would keeping quite be so insulting to the extent of causing death in the manner that in which it was cause is hard to believe. In DUFFY [1949] 1 ALLER 932 it was held that provocation is some act or sense of acts which would cause any reasonable person and actually caused accused person to subject to passion as to make him/her for the moment not the master of his mind. If a finding of provocation is established by provision of S.192 of the penal code Act a charge of murder is reduced to one of manslaughter. I have not found the accused's position compelling enough for me to make a finding of provocation.

He chose to act senselessly and ought to be accountable for his conduct. I accordingly reject the defence of being angered which he raised in his charge and caution statement. I agree with the advice of the lady and gentleman assessors that I convict the accused person.

I accordingly find the accused person guilty of the offence of murder c/s 188 and 189 of PCA and convict him accordingly.

Nyanzi Yasin
17/06/2011

Mr. Omia P for the state
Mr. Madira J for Accused
Accused in Court.
Baak court clerk.

Judgment read in open court with above present.

Mr. Omia Patrick
As far as the offence of murder is concerned is a first offender. However the accused is serving a sentence of 8 years after pleading guilty to the offence of manslaughter under Crim. Session case No. 14/2011. He killed his father. It is striking factors of this case. After committing the offence of 2004 and after escaping from prison he committed this offence. This points to the accused being a serious killer. The accused said he would kill others because he killed his father. He finds killing people a hobby. The offence is

serious death is the maximum punishment. At 32 he has shown life style of a killer. The accused should be sentenced to death. He is dangerous.

Mr. Madira

Acc: I am 33 years. I have 2 wives, one died. I have twins, I have 5 children in all. My elder wife has the children. She is present.

Mr. Madira

Accused has been on remand for 1 year and seven months (19) months. He has no previous murder record. The offence he was convicted of the ingredients are different. In the first case he never intended to cause death. Looking at the circumstances of the present case, though court found there was no provocation, a ordinary man like the accused would feel uncertained by a person who comes to the home at night as deceased did. He has realized his mistake. He has family responsibility. We pray for linency for his sentence.

Court: No representation of family.

Court:

I have considered the fact that the accused has ever killed a person. That person was his own father. That he escaped from lawful custody and went into hiding. That while in hiding he killed another person. If the accused were to be repentant the death of his own father at his hands would have been a big lesson. He learnt nothing from it. He killed a circumstance which did not require even a beating. I am not persuaded to be lenient with him. He is the type of person to be excluded from Society but I do not agree that he be also killed. He is therefore sentenced to life imprisonment.

Signed

17/06/2011

Judgment read in open court in presence of above.

Right of appeal explained.

NYANZI YASIN

17/06/2011