

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA**

**CRIMINAL SESSION NO. 0033/2010**

**UGANDA** ..... **PROSECUTOR**

**=VERSUS=**

**AYIKANYING CHARLES**  
**& ANOTHER** ..... **ACCUSED**

**JUDGMENT**

**BEFORE HON. JUSTICE LAMECK .N. MUKASA**

Representative

Ms Adubango Harriet (RSA) for State

Mr. Okello Oyarmoi for Accused

Assessors

Mr. Okumu Opentho Adam

Mr. Kanyi Isotopes

Court Clerk

Mr. Canrach Emmanuel

The accused persons, Ayikanying Charles and Odubi Alfred are indicted of Murder contrary to section 188 & 189 of the Penal Code Act. The particulars are that the two, with others still at large, on 15<sup>th</sup> December 2008 at Ambere village, Nebbi District murdered Ovuru Niknea.

Under the provisions of Article 28 (3) (a) of the Constitution of Republic of Uganda all accused persons are presumed innocent until proven guilty or pleads guilty. Both accused persons pleaded not guilty. The burden of proof rests on the prosecution to prove each of the following ingredients of Murder beyond reasonable doubt against each of the accused persons:-

1. That the person named in the indictment i.e. Ovuru Niknea, is dead;
2. The death was caused unlawful;
3. The killing was done with malice aforethought,
4. The accused persons any of them participated in causing the death.

The prosecution adduces the testimonies of 7 witnesses; Dr. Oromcan Jerry (PW1), Anna Acaya (PW2), Olema Alphonsio (PW4), Otuba Aman (PW5), No. 35440 D/Cpl Andama Collins (PW6), D/IP Okee Billy Bon (PW7). The accused persons each relied on his own unsworn statement.

The first ingredient whether Ovuru Niknea is dead. PW2, Anna Acaya, one of the deceased's wives, testified that her said husband is dead. That he was assaulted by his children and died on the spot. That his body was buried two days after. PW3, Piwen Pawungu Gertrude, the deceased granddaughter, PW4 Olama Alphonsio, the LC1 chairman Ambere village, where the deceased resided, and PW5, Otuba Amon, the deceased's son all testified that Ovuru Niknea died on 16<sup>th</sup> December 2008. PW6, No. 35440 D/Cpl

Andama Collins and PW7 D/IP Okee Billy Bon, who visited the scene of crime on 16<sup>th</sup> December 2008, testified that they saw the dead body of Ovuru Niknea. Dr. Oromcan Jerry testified that on 16<sup>th</sup> December 2008 at Ambere village he examined the body of Ovuru Niknea. Both accused persons, in their respective unsworn details, apparently admit that their father Ovuru Niknea is dead. This ingredient is not disputed by the defence.

The above evidence leaves no doubt that Ovuru Niknea is dead. I therefore, find that the prosecution has proved beyond doubt that Ovuru Niknea is dead.

PW2 testified that her husband was beaten and stabbed with knives and part of his neck cut. That he was killed by his children. She stated that at around 3.00 pm while in the kitchen the deceased's son called Oroma came. The witness heard him quarrelling with the deceased. She came out of the kitchen and found Oroma beating the deceased. That as the deceased was trying to walk away saying he was going to the local council Oroma kicked him. That as the deceased tried to get up Oroma was joined by the accused persons, Ayikanying Charles (A1) and Odubi Alfred (A2). That she saw all the three bending on the deceased. She saw Odubi stab the deceased on the side of the eye, Ayikanying stabs him on the sides of the ribs and Oroma cut him on the neck.

PW3 testified that on 15<sup>th</sup> December 2008 while at home with the deceased and PW2, she saw Odubi, Ayikanying and Oroma come home, together with their children called Odiba, Oduga, Olotha and Omirambe. The deceased sent her to call his brother Eliya but she did not find him and came back. The deceased then picked his book to go to the L.C. When he walked for a

short distance Odubi and Ayikanying who had clubs hit the deceased with their clubs. Oroma pulled out a knife and stabbed the deceased at the neck and on the ribs.

That Ayikanying and Oroma were also each armed with a bow and arrow. After the deceased death the witness testified that, they said an arrow stuck at the side of his ear. She stated:

***“I reached the scene and removed the deceased’s hand which the assailants had forced into his month. I observed an arrow which was pierced in his ear”***

She stated that there was also a club left at the scene.

PW4 testified that when he came to the scene on 15<sup>th</sup> December 2008 when he came to the scene with the police he saw two arrows which were picked by the police.

PW5 testified that when he observed his father’s body he saw wounds on his neck, stomach and on the head near the ear.

PW6, the scene of crime officer, took photographs of the scene and body. He observed that the body had a wound at the side of the mouth and a pierced wound at ribs. That two arrows and a cassava stick, stained with blood, were secured from the scene. PW7, the investigating officer, who visited the scene with PW6, tendered in court the two arrows and blood stained cassava stick he recovered from the scene. He stated that he

observed the body and saw a deep cut wound on the lower jaw near the neck and stab wound on the left side of the ribs.

Dr. Oromcan Jerry, who examined the body, testified that the cause of death was severe haemorrhage, hypoxia, dyspnoea and hypotension.

He found that the body had external marks of violence to list:

- Left mandibular stab wound with a fractured left mandible.
- Left deep stab wound at the 11<sup>th</sup> intercostal space between the ribs,
- Left severe stabs and cut wound of the chest,
- Cut toe on the left limb.

In his opinion the weapon used was likely to have been a chaise knife and club.

The above prosecution evidence shows that Ovuru Niknea's death was neither natural, accidental nor authorized by law. It was homicidal and therefore unlawful. See **Gasambiyi Umboya c/s R [1948] 15 EACA 65**.

As to whether there was malice aforethought, section 191 of the Penal Code Act stipulates that malice aforethought is deemed established by evidence proving either of the following circumstances:-

- a) ***“An intention to cause the death of any person whether such person is the person actually killed or not.***
- b) ***Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is 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”.***

Such intention or knowledge, being a state of mind can be determined by examining the nature of the weapon used, the manner in which it is used, the

parts of the body affected and the conduct of the accused before, during and after the act. See **R v Tabere [1945] 12 EACA 63, Uganda Vs Kokey Shaban & Ano. HC Crim. Case No. 40 of 1998.**

The doctor's opinion is that the injuries sustained were inflicted by a sharp knife and club. PW2 and PW3, who witnessed the assault on the deceased, testified that the deceased was beaten with clubs and cut with a knife. PW3's evidence that the attackers were also armed with arrows and bows is corroborated by PW6 and PW7's testimonies that two arrows were recovered at the scene of crime. The nature of the injuries on the deceased body show that the weapons savagely were used at the vulnerable parts of the deceased body. Dr. Oromcan testified that the main cause of death was the deep stab on the chest. That the stab wound allowed his finger go into the chest cavity an indication that there was injury to the lung and that once there was such injury there was an immediate difficult of breathing causing the death.

The nature of weapons used, the extent of the injuries and parts of the body affected impute an intention to kill on the assailants. I accordingly find that the prosecution has proved beyond reasonable doubt that the killing was with malice aforethought.

The last ingredient whether the deceased was killed by the accused persons or any of them. According to PW2 and PW3 who witnesses the killing, the deceased was killed by a group of the two accused person, one Oroma and their children called Odiba, Olupa, Otuke and Omirambe.

Before court were only Ayikanying Charles (A1) and Odubi Alfred (A2). Section 19 of the Penal Code Act provides that if two or more persons for a common intent to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed which is a probable consequence of that purpose each of them is deemed to have committed the offence. His no defence that the offence was actually executed by only one person if the others do not in anyway disengage themselves. Common intention under the above section imputes a pre-arranged plan. However section 20 of the Penal Code Act provides that a common intention may develop in the cause of the events which take place.

PW2 and PW3's testimony as that they witnesses A1 and A2 participate in the assault on the deceased, leading to his death. PW1 testified that she saw Oroma beating and kicking the deceased. That he was joined by A1 and A2. she saw A1 and A2 stabs the deceased and saw Oroma cut the deceased at the neck. PW3 testified that she saw A1 and A2 hit the deceased with clubs and saw Oroma pull out a knife and stab the deceased at the neck and ribs. That A1 and Oroma were also each armed with an arrow and bow. The issue is whether there was proper and unmistakable identification of the accused persons or any of them at the scene of crime in the course of assault on the deceased.

Discussing what amounts to putting the accused persons at the scene of crime the Supreme Court in **Bogere Moses and Ano. -Vs- Uganda Crim.App No. 1 of 1997** held:

*“.....what then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof of the required standard that the accused was at the scene of crime at*

*the material time. To hold that such proof has been achieved, the court must not bare itself on the isolated evaluation of the prosecution evidence alone, but must bare itself upon the evaluation of the evidences as a whole. Where the prosecution adduced evidence showing that the accused person was at the scene of crime and the defence not duly denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judiciously and give reasons why one and not the other version is accepted. It is a misunderstanding to accept the one version and the hold that because of the acceptance perse the often version is unsustainable”.*

As to identification by eye witnesses court must satisfy itself for the evidence before it whether the conditions under which the identification is claimed to have been made were or were not difficult. In so doing Court must consider the evidence showing correct identification together with the conditions rendering it difficult. See **Bogere Moses & Ano. –VS- Uganda (Supra)**.

Court has to consider the circumstances in which the identification came to be made. In Abdalla Nabulere & Ano Vs Uganda [1979] HCB Court sets down the following to be considered:-

- a) The length of the accused was under the witness observation.
- b) The light that enabled the witness to observe the accused.
- c) The familiarity of the witness and the accused;
- d) The proximity a distance between the witness and the attacker in the cause of the attack; and

e) Any other follies which helped the witness to identify the attacker.

It was also observed by Hon. Justice Baligenuine in Uganda VS Kayaiga Kizito [1994] II KALR 113. That a witness can be truthful and yet may be honestly mistaken. She then stated:

***“The ultimate test therefore is whether the evidence can be accepted as being free from possibility of error. Even when there are more than one witness claiming to have identified the accused the same rule apply”.***

The accused persons are step-sons of PW1 paternal uncles of PW3 and residents of the same area. Therefore not strangers. The attack was in the afternoon during broad day light. Their evidence is that the deceased was confronted in their courtyard and assaulted in cassava garden just near the court yard. PW2, PW3, PW4 and PW5 testified that the accused persons did not attend their father's burial. That following his death the two accused persons and Oroma, with their respective family ran away from the village. According to PW3, PW4 and PW5 A1 was arrested after about 10 days from his in-laws at Lawara village about 2 to 3 miles away. A2 was arrested from Amoru District, from Oroma's in-laws garden, about 50 to 60 miles away. Oroma's whereabouts are to date unknown. Such conduct of failure to bury their father and disappearing from the area immediate after his death is not the conduct of innocent people.

In his statement A1 testified that on that day he came back home to find the police and many people surrounding his home. That when he inquired why they had invaded his home, he was referred to his father Olune he said those people had said he paid them to invade his home. That he went to his father

whom he find holding a bow and arrows. That as he approached his father ordered him to stop and go away. His father started moving towards him and shot arrow twice towards him. He was off longest. That as the old man continued advancing towards him, he picked a stove and threw it on his father. That the stove landed on the neck and he fell down. The accused stated that as the deceased was struggling to get up, he ran away. When he had run for a short distance he heard people making an alarm that the old man had died. He run to his in-laws place and started staying there.

By his own testimony A1 admits going to the deceased's home, admits assaulting the deceased, though according to him with a stone, and hitting him on the neck. He states that the deceased fell down and shortly heard an alarm that he had died. He also admits running away from the village and staying with his in-laws.

The prosecution witnesses' evidence considered together with Anyikanying's own evidence clearly shows that A1 participated in causing Ovuru Nkinea's death.

Odubi Alfred denies assaulting his father. He testified that on 15<sup>th</sup> December 2008 at around 4.00 pm he had an alarm from the direction of A1's home. When he went to A1's home he found people gathered and his houses down loaded. While there his step-brothers came armed with weapons saying they had come to revenge the death of their father whom A1 had killed. He ran into hiding. When at around 7.00 pm he attempted to live home he found that his houses had been set on fire.

A2 thereby denies killing his father and explains the reason for his absence from the village.

In his statement A1 appears to support that he was alone when he confronted and assaulted his father. A2 states that he left his home after hearing the alarm and was at A1's home that their step-brothers came over accusing A1 of killing their father. In his testimony PW4, Olama Alphosio, the village chairperson wondered why Odubi Alfred was arrested. He testified that on 15<sup>th</sup> December 2008 Piwen Pawuga Getrude, PW3, reported to him that Oroma, Anyikanying Charles (A1) and Ochiba Collins had killed her grandfather. This was a report made immediately after the death, with all facts fresh in PW3's mind. He stated that A2 was not among those who were reported to him.

From the prosecution and the defence evidence it is apparent that the deceased's death was a result of a land dispute between him and the children born of him and PW2 as the one part and A1 and children born of the deceased and PW2's co-wife in the other part PW3 is the direct granddaughter to PW2. With PW4's evidence and such background information it is probable that A2 was named as involved after a reflection on the matter.

That leaves doubt in my mind. In **Mushikhura Watete & Others Vs Uganda Crim. App. No. 10 of 2000** their Lordship of the Supreme Court observed:

*“We should observe that generally Court should go a long way to give an accused, particularly one on a capital charge latitude in the prosecution and undisputed of his defence. The court should, where appropriate, consider any relevant material before it if it be favourable to the defence”.*

For the above reason I differ for the gentleman assessor and I find that the prosecution has failed to prove beyond reasonable doubt that A2 participated in causing the deceased's death.

Mr. Oyarmoi, counsel for the accused person, argued that though A1 admitted conflicting with the deceased, he had acted in self-defence when he threw a stone at the deceased. However the findings at the scene do not support A1's testimony. That is no evidence of a stone found at the scene of death. The arrows were not found away from the spot where the deceased had fallen. The evidence shows that the deceased's body was stabbed or cut wounds. According to PW2 an arrow was found stuck at the side of the deceased ear. According to PW6 and PW7 they recovered two arrows from the spot where the deceased's body had been recovered. Arrows shot out by the deceased should have been away from him and not on his body or at the spot where his body had fallen. I therefore do not believe A1's version that he acted in self defence. I accordingly find that the prosecution has proved beyond reasonable doubt that A1 participated in causing OVURU Niknea's death.

In agreement with the gentlemen assessors I find Ayikanying Charles guilty of Murder and he is accordingly convicted.

I disagree with the gentlemen assessors and found Odubi Alfred not guilty of Murder. He is accordingly acquitted.

**LAMECK .N. MUKASA**

**JUDGE**

**16/01/2012**

**16/01/2012**

Mr. Bamutira for state

Mr. Oyarmoi for accused

both accused present

Mr. Canrach Emmanuel court clerk.

Court:Judgment read.

Ayikanying Charles find guilt and convicted of murder.

Odubi Alfred found not guilty and acquitted.

Signed

**Mr. Bamulutira**

I have no previous record of conviction against the convict. Has been on remand since 30/12/2008 convict failed in his duty to protect the life of his father. He was not proud of having a father and caused his death. Has not

been remorseful. These offences are rampant in Nebbi District. I therefore pray for a deterrent sentence to be a lesson and would be offences.

I pray for the maximum sentence.

**Mr. Oyarmoi:**

Convict is a first offender. He is now 58 years, married and sole bread winner of his family. He has 5 children of whom 4 are in school. The convict is remorseful and sorry for having caused the death of his dear father.

He has been on remand for a period of 3 years. He prays for leniency. If period of about 5 years will help him come out early to care for his family.

Convict: I also have 7 children of my brother who is mentally sick to look after.

Court: I have considered what the state counsel has said. I have also considered what has been stated by counsel for the accused in mitigation and what the convict has stated.

I appreciate that the convict has responsibility to look after his family and his brother vulnerable children. However that has to be balanced with his responsibility and society and the state. He had a constitutional duty to protect and preserve the life of others. He had a particular duty of safeguard the life of his father, the duty he abused by taking away his father's life. He is under a duty to observe the rule of law but instead took the law in his own hands.

In the premises and considering the period the convict has been on remand the convict is sentenced to 25 (twenty five) years of imprisonment.

Signed

LAMECK .N. MUKASA

JUDGE

The convict has a right of appeal against conviction, sentence or both.

**LAMECK .N. MUKASA**

**JUDGE**