

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

**CRIMINAL SESSION CASE NO. 049 OF 2015**

**UGANDA..... PROSECUTOR**

**VERSUS**

- 1. PHILLIAM YONA**
- 2. DRAGA EZEKIEL**
- 3. ADOMATI GEOFFREY..... ACCUSED**

**JUDGMENT**

**BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA**

**Facts and brief background**

- 1] The three accused persons were with two others on an unspecified date, jointly indicted of three counts of murder C/s to sections 188 and 189 of the Penal Code Act (PCA) Cap 120 LOU, attempted murder C/s 204 PCA and, arson C/s to sections 327(a) PCA. It was stated in the indictment that the accused persons and others still at large on 20/7/14, at Lwambogo Village in the Jinja District, with malice aforethought, unlawfully killed KALAWO KALENZI JAMES and on the same date, and in the same place, attempted to cause the death of NAIGAGA HARRIET and yet still, on the same date and in the same place, willfully and unlawfully set fire to the dwelling house, the property of ACHIENG MARY.

All five accused persons denied the offence and their pleas of not guilty were recorded on 13/12/2016.

- 2] Eriku Stephen who had been jointly indicted with the accused persons was discharged by the Court after the prosecution conceded that no sufficient evidence, had been adduced to implicate him. Also, in my ruling of 1/11/2018, I discharged all five accused persons of the offence of arson. In the same ruling, I found that Draleku Geoffrey and Chandia Cosmas (Accused Nos. 4 and 5) had no case to answer to the charges of murder and attempted murder. I again found and that Philliam Yona and Draga Ezekiel had no case to answer to the charge of attempted murder.
- 3] Thus, Accused Nos. 1, 2 and 3 hereinabove were put on their defence with reference to the joint charge of murder, and Accused No. 3 herein above, was in addition, put on his defence for the charge of attempted murder. Stephen Muzuusa and Alaka Caleb presented the defence, while the State was represented by Julie Najjunju and subsequently, by Margaret Nakigudde.
- 4] It was the prosecution's case that during July 2014, PW1 Mary Achieng, then resident of Lwambogo Village, Buyengo Sub County, Kagoma in Jinja District lost her partner one Ajubule, a native of Arua. During Ajubule's vigil, Achieng was warned not to sleep at her house, because Ajubule's tribesmen suspected that she had poisoned him and they intended to revenge his death. Out of fear for her life, Achieng spent the night in the house of one Pongo in the neighbourhood, leaving her daughter Naigaga Harriet and other people, including Kalembe, Musana, Aliga and James Kalenzi in her house.
- 5] That on the night of 19/7/2014 at about 1 am, a person identifying himself as Titia with others, knocked on Acheng's door, and then kicked it open. The intruders then assaulted Naigaga and James Kalenzi with sticks and pangas, and abandoned Kalenzi severely bleeding behind one Adama's house. James Kalenzi eventually succumbed to his injuries.
- 6] A1 and A2 raised an alibi, and stated that there were not present in the home of Achieng at the time of the attack. On the other hand, A3 denied participation in Kalenzi's murder or the attempted murder of Naigaga. Counsel filed written submissions in support and defence of the charges which I will keenly consider, in my ruling.

## **The Law**

- 7] The elements of murder that require proof beyond reasonable doubt, were undisputed. According to Statute and case law, these are:-
- i. The deceased is dead.
  - ii. That death was caused unlawfully.
  - iii. The death was carried out with malice aforethought.
  - iv. The accused person(s) participated in the commission of the offence or, are responsible for the death.
- 8] The elements of attempted murder were set down in the decision in **Uganda Vrs Hassan Agade &Ors Crim. Session Case No. 001/2010** (unreported) to be
- I. The intention to cause death of another (malice aforethought)
  - II. Manifestation of that intention by an overt act
  - III. Participation of the accused
- 9] For both charges, the state is expected to prove the charge beyond all reasonable doubt, and that burden will remain upon them throughout the case. See for example, **Kizza Samuel vs. Uganda Criminal Appeal No. 102/2008 (C/A)**. According to **Woolmington vs. DPP (1935) AC 462**, the degree of proof expected must be one that carries a high degree of probability. I add, that the evidence expected of the prosecution must be so strong as to leave only remote probability in favour of the accused which can be dismissed as probably possible, but not in the least probable. Nothing short of that will suffice.

## **Count 1: Murder**

- 10] **Was death of human being proved? and if so, was it an unlawful death? Caused with malice aforethought?**

The fact of death was not contested and I am persuaded that the prosecution did prove the fact of death of Kalawo Kalenzi James to the required degree. PW2, PW3 and PW4 observed the deceased lying in a pool of blood about 100 meters from where he had been dragged by his assailants. Their first observation was that he was breathing with difficulty

and appeared to be near death. He eventually succumbed to his injuries. Kalenzi was confirmed dead in PEX 2, the postmortem report dated 20/7/14, and his body was identified by one Ngobi Rashid, the grandfather.

- 11] According to the postmortem report, Kalenzi's body had a deep cut wound on the right hand, and the cause of death was confirmed to be hemorrhagic shock due to an assault. The position of our law is that every homicide is presumed to be unlawful except for circumstances that make it justifiable or excusable. A homicide will be qualified as justifiable for example, in cases of self defence or if authorized by law. See for example **Uganda vs. Aggrey Kiyingi & Others Criminal Session case No. 030/2006.**
- 12] On the other hand, malice aforethought is defined in Section 191 PCA as the intention to cause death or knowledge that the act or omission will cause death. It was held in **Uganda Vs Okello 1992-93 HCB 18**, that malice aforethought is a mental element which can be established from the surrounding circumstances e.g. the weapon used, the parts of the body injured and the nature of the injuries. It was again held in **Sentali s/o Lemandwa Vs. R 1953 EACA20** that if death is caused by an unlawful act or omission done. In furtherance of an intention to commit a felony, malice aforethought is established.
- 13] It was indicated in the post mortem report that Kalenzi's injuries were the result of an assault. He suffered a deep cut wound on his right hand. This by itself would not be conclusive that the injuries were not self-inflicted or rendered as a result of an accident. However, PW2 and PW3 testified that Kalenzi was attacked by assailants with a panga. He was drunk and asleep and in that defenseless state, they cut him and dragged him out of the house and continued to assault him. This was an unsolicited and an unjustified assault, and therefore unlawful. The nature of the weapon used, the part of the body targeted, and the injuries inflicted also point to the fact that the assailants had the intention to kill Kalenzi. They were aware, and even sure, that the attack would result into Kalenzi's death. In other words, they foresaw death as a natural consequence of the actions perpetrated against Kalenzi.

14] I would conclude that the ingredients of death of a human being, one which was an unlawful death, and caused with malice afore thought, are present and were sufficiently proved beyond reasonable doubt. The issue therefore would be whether the three accused persons participated in the murder of Kalenzi.

### **Participation of the accused persons**

15] It would be incumbent on the prosecution to adduce evidence that would prove beyond reasonable doubt, not only to place the three accused persons at the crime scene, but also to show that they all participated in killing Kalenzi.

16] All three accused persons denied the offence and raised alibi. A1 denied working in Kakira or being at the scene whether at the time of the attack or earlier in the day. That he was picked up from his home while on his way to a function. On his part, A2 admitted being a sugar cane cutter and having ever worked with Kakira. He also admitted having been resident on the village for three years and that he was present at the crime scene during the day for one hour only. That on the fateful night, he was in his house with his wife a new mother, and he was woken up and arrested from there by the defence secretary.

17] On the other hand, A3 denied ever being a sugar cane cutter but admitted being resident on the same village with Achieng was present in her home the day preceding the attack between 1pm and 3pm, and assisted her in calling an ambulance. He denied being called Titia, knowledge of Kalenzi, the late Ajubule and PW1, 2 and 3. He mentioned that he run a pub called California and that when he declined to employ Naigaga, she vowed to get even with him.

18] Prosecuting counsel submitted that Naigaga properly identified all three accused persons as village mates, singling out A3 whom she referred to as 'Titia'. That earlier in the day before the attack, A3 hit her with a stick with accusations that she had killed Ajubule and later returned at night and attacked her with a panga. He first cut her and then turned on Kalenzi. That she was able to see him using candle light and was also able to see A2 with torch light. That likewise, Kalembe another prosecution witness testified that he knew A1

and A3 as village mates of more than twenty years, and, with light from candles, saw them during the raid on Achieng's house, attacking Naigaga and then pulling Kalenzi outside the house. In counsel's estimation, the accused by not denying the fact that they resided on the same village with Naigaga and Kalembe, and being employees of Kakira Sugar Factory, corroborated prosecution evidence and also placed them at the crime scene. She invited Court to convict the accused on both counts.

- 19] Defendant's counsel made a spirited and protracted oral submission in response. A summary of it is that none of the prosecution witnesses definitely identified A1 and A2 as people they saw during the attack, and where they did, their evidence was manifestly contradictory on the issue of who was present at the time of the attack, and the light used to identify them. That the contradictions were so vagrant that even the evidence against A3 referred to as Titia would be unreliable. He continued that no statutory searches or identification parades were carried out, and the manner of arrests by police would lead one to conclude that the accused were implicated because they were Lugbaras. He summarized the defences raised by the three accused persons, and pointed out that their alibis were strong, and the evidence of PW2 Naigaga, indicated a vendetta that she had with A3 because he had declined to employ her in his bar. He argued in conclusion that the prosecution had failed to prove the charge of murder of all three accused persons beyond reasonable doubt.
- 20] In brief rejoinder, prosecuting counsel invited the Court to treat the raised contradictions as minor and explainable. Specifically that Naigaga mentioned A2 both in her examination in chief and cross examination. Further that the wounds on Kalenzi's body were well explained in the postmortem report and any mistake by Naigaga with respect to the part of the body injured, could be explained by the fact that she was running away to save her live at the material time.
- 21] Only one assessor was available during my summing up of the case. His advise was that I disbelieve the accused persons' defences and find all three accused persons guilty of murder and A3, guilty on the charge of attempted murder.

## My decision

- 22] The accused's participation can only be confirmed by direct and circumstantial evidence placing them at the crime scene at the material time. The direct evidence would be testimonies of witnesses who claimed to have seen or identified the accused persons during the attack.
- 23] PW1 stated that she was absent from her home on the night of 19/7/14 and only learnt of the attack the next day. She knew all five accused persons but could only name A1 and A2. PW4 was allegedly called to the crime scene by one Aliga who had escaped the attack. He arrived at about 1:00pm and only participated in the arrest of some of the accused persons. PW5, the investigating officer's involvement, was after a citizens' arrest of the accused persons. He confessed he was not aware of where and how the arrests were done. He admitted that although all accused persons confessed to killing Kalenzi during interrogation, they were later to deny that fact in their charge and caution statements.
- 24] It is therefore evident that it is only PW2 and PW3 who witnessed the attack on Achieng's homestead on the night of 19/7/2014. I will accordingly carefully dissect their evidence.
- 25] The Court in **Amisi Katalikawe &Ors. Vs. Uganda (Criminal Appeal 17/94) (Supreme Court)** observed that before a court can rely on evidence of identification, the crucial test would be whether that evidence can safely be accepted as free from any possibility of error. The Court in **RoriaVs. Republic (1967) EA. 583** had earlier advised that the evidence of an identifying witness should be tested for its truthfulness and where conditions for correct identification are favorable, such task will be easier. Conversely, where the conditions are difficult, it would be unsafe to convict, in the absence of some other evidence connecting the accused with the offence.
- 26] The above decisions and that of **Abdalla Nabulere &Ors. Vs. Uganda (1979) HCB 77** offer valuable points that a court should consider when evaluating identification

evidence. These include; the consistency of the identifying witness, the conditions under which the identification was made, the span of time that the identification was made, how well the witness knew or was acquainted with the accused before the incident and, other relevant factors. The court in **Walakira Abas & Others vs. Uganda (Supreme Court Criminal Appeal No. 25/02 (unreported))** went on to say that a court which sets out to convict solely on the strength of identification evidence, ought to warn herself of the need for caution because “.....a mistaken eye witness can be convincing, and so can several such eye witnesses”.

- 27] Naigaga admitted that she did not know A1’s name and did not see him during the attack. On the other hand, Kalembe admitted knowing him well as one with whom she had worked in the Madhivani sugar plantations for several years. That when A3 kicked the house door open, A1 also entered and she was able to identify him using light from two candles that she had lit before going to sleep. She admitted that although she saw A1 and A2 pull Kalenzi out of the house she was very scared, stayed in corner and eventually run out of the house and did not return until 2am, to rescue the children she had left there. She did not witness A1 cut Kalenzi but eventually saw Kalenzi in a pool of blood. Although Naigaga admitted not knowing A2 by name, she identified him by the light of the torch that he was using she stated that he entered the house, nodded his head and cut Kalenzi with a panga in the ribs. Kalembe did not mention seeing A2 at all.
- 28] Again, Naigaga stated she knew A3 as one Titia and had first seen and recognized him during the day in Acheng’s homestead. That at around 10.00am, he knocked on the door of the house she had slept in with several others. That by way of deification and using a voice that she recognized, he stated that “*I am Titia, we have come several people*”. He then kicked the door open and entered with several other people. Once he entered the house, he charged at her and cut her left hand palm. He then turned and cut Kalenzi. She then run out of the house towards Kisoga with A3 in hot pursuit. She mentioned that she identified A3 with light from two lit candles.
- 29] On the other hand, Kalembe testified that had previously known A3 for 20 years as one Titia a sugar cane cutter. That she first recognized him by voice when he identified



himself as “Titia” and ordered them to open the door. She again recognized him inside the house with the help of a lit candle. She watched him pull Kalenzi from the house and begin cutting him. However, she remained inside the house until when she managed to run out to hide.

- 30] I begin by cautioning myself with regard to the evidence of the identifying witnesses. According to Naigaga, A3 broke into the house with seven other assailants. This alone, depicts a situation of commotion made worse by the fact that it was an attack with panga wielding assailants. Both witnesses admitted that they were very scared and eventually run out of the house. However, both Naigaga and Kalembe were consistent that they saw A3 during the attack. They mentioned light from candles and torch light. The assailants who actually cut both Naigaga and Karenzi must have been quite near to them to be recognized fairly well. Kalembe mentioned that she had known A3 for 20 years as a sugar cane cutter and indeed A3, admitted being one. Naigaga mentioned that she was able to recognize A3’s voice before he kicked the door open because earlier in the day, he had attempted to hit her with a stick with threats and accusations that she was involved in killing Ajubule.
- 31] Identification by voice is acceptable with a rider that it must be regarded with the greatest care and caution to avoid mistaken identity. See for example **Sharma & Anor Vrs Uganda (2002)2 EA 589**. The Court ought to consider whether the victim is familiar with the accused’s voice even if there is no proof that they have talked to the accused directly before. See for example, **Sabwe Abdu Vrs Uganda Criminal Appeal No. 19/2007**.
- 32] I have considered the contradictions alluded to by defence counsel which mainly involved the scuffle during the attack. I find the contradictions minor with regard to the evidence concerning A3. They would not dispel the fact that A3 was properly identified during the attack. Naigaga knew his name and had seen and talked to him earlier in the day. Kalembe mentioned that she had known and worked with him as a sugar cane cutter and heard him identify himself as Titia before entering the house. He was thus not a stranger to them. There was thus no need to hold an identification parade, which is in fact, not a mandatory requirement.

- 33] In my view Kalembe had known A3 long enough to recognize his voice. Even Naigaga who had talked to him earlier in the day, would reasonably recognize his voice. Both Kalembe and Naigaga observe A3 from different points of the house with sufficient light. Naigaga saw him stab Kalenzi and both witnesses stated they saw him drag Kalenzi out of the house. Kalenzi was later to be found in a pool of blood by Naigaga and Kabandize struggling for breath and eventually succumbed to his injuries. The earlier threats by A3 in Naigaga's hearing that he and others would avenge Ajubule's death, and the discovery of A3's blood stained sandal next to Kalenzi's body and at his door step, offered satisfactory circumstantial evidence that at some material time, he was present at the spot where Kalenzi's body was found. That evidence corroborated the evidence of Naigaga and Kalembe that A3 dragged Kalenzi out of the house and participated in stabbing him to death. I am therefore prepared to infer that A3 attacked Kalenzi, stabbed and then left him for dead at the spot where he was discovered. I conclude that A3 participated in murdering the late Kalenzi.
- 34] On the other hand, although Kalembe insisted she saw A1 during the attack and explained what he did, Naigaga gave a contradicting statement. She was emphatic that she did not see A1 enter the house did not leave him there when she run off to save her life. She repeated that statement three times in her testimony. I would agree with defence counsel that that was contradicting testimony which was manifestly unreliable. I am aware that Kalembe would be a single identifying witness with respect of A1's participation. In my view, the circumstances of this case would call for corroboration, and with Naigaga's emphatic statement, there is none.
- 35] Yet again, Kalembe made no mention of seeing A2 during the attack. She stated that she was only able to identify two people (A1 and A3). That means that Naigaga was a single identifying witness with respect to A2. Her evidence must thus be taken with much caution and where possible, corroboration sought to support it.
- 36] Naigaga did not know A2's name but claims she identified him with the help of the light from the torch. He entered the house, nodded his head and then proceeded to cut Kalenzi

with a panga in the ribs. It is doubtful that in such difficult circumstances when she was under much fear, she could identify him well enough when she had never seen him before. Beyond that, there was no other evidence connecting A2 to the attack or murder of Kalenzi. In fact, the comment by Kabandize that A2 was arrested because he did not greet the mourners at Achieng's house, discredited prosecution's evidence more. It was correct as pointed out by his counsel, that he did not respond to the mourners because he did not speak their language.

37] In my view, both A1 and A2 were not placed at the crime scene to the level required of a criminal trial for murder. I would for that reason depart from the assessor's advise that I find them guilty of murder.

38] In summary, I find that the participation of the A1 and A2 in the murder of Kalenzi has not been proved beyond reasonable doubt. It follows that the entire charge of murder has not been proved. A1 Phillip Yona and A2 Draga Ezekiel are accordingly acquitted and should be released forthwith unless faced with other lawful charges.

39] On the other hand, I find A3 Adomati Geoffrey guilty of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act, and convict him accordingly.

### **Count 2: Attempted murder**

40] The ingredients of attempted murder have been stated and will not be repeated here. I note that not much was submitted by counsel to sum up this particular charge. On the other hand, the sole assessor advised that I find A3 guilty as charged.

41] According to PW2 Naigaga, she was attacked and cut with a panga during the attack. It was indicated in PEX1 an admitted document that, PW3 had a cut wound of about 2cm caused by a sharp object (panga) which was classified as "*harm*". On the face of it, the classification of the injury would be one, not serious enough to point to the fact that the aggressor intended to end the life of PW2. However, if taken within context of the entire attack, it would point to an intention to kill. The weapon used can be classified as a deadly weapon which if used on a vulnerable part of the body would result into death. Further, the attack on the entire household was deadly enough to result and indeed did

result into the death of one of the inhabitants. It is likely that if Naigaga had not fled in fear of her life, the assailants would have continued assaulting her to death, because their intention was indeed to end her life. It is quite obvious that her injuries were a result of an overt act by her assailant or assailants to put into action their intention to kill her.

42] In my view, sufficient evidence was adduced to prove the the first two ingredients of the offence of attempted murder beyond reasonable doubt.

43] Again, only PW2 and PW3 witnessed the attack against Naigaga which the prosecution contends was an attempt at her life. Naigaga testified that A3 cut her left hand palm before she run out of the house with A3 in hot pursuit. Kalembe supported that evidence by claiming that with the help from light of a candle, she witnessed A3 cut PW2 with a panga and she started screaming. There appeared to be some contradiction in Naigaga's evidence whether A3 first attacked her before turning on Kalenzi, and vice versa. In my view, this was a minor contradiction that could have resulted from a lack of concentration during the attack. It would not take away the fact that A3 was observed by the victim and another witness attacking Naigaga.

44] Stemming from the above, I would hold that prosecution proved the charge of attempted murder of one Naigaga Harriet by A3 beyond reasonable doubt. I accordingly find A3 Adomati Geoffrey guilty of the charge of attempted murder contrary to Section 204 of the Penal Code Act, and convict him accordingly.

I so order.

Signed

**EVA K. LUSWATA**

**JUDGE**

**26/06/2019**