

THE REPUBLIC OF UGANDA.  
IN THE HIGH COURT OF UGANDA

HOLDEN AT SOROTI  
CRIMINAL SESSION CASE NO. 20 OF 1993.

UGANDA .....PROSECUTOR

VERSUS

A1: DAVID OKIROR ..... ) ACCUSED

A2: ENERIKO EMONGOT.. )

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU

JUDGMENT:

The two accused persons are jointly charged with murder contrary to sections 183 and 184 of the Penal Code Act.

It is alleged that David Okiror and Eneriko Omongot on the 16th day of December, 1991 at Aguya village in the Soroti District murdered Pampus Okorio.

Evidence of PW1 is that she used to live with the deceased at her home as a manfriend. On the fateful day she had gone to drink with the deceased some enguli at the home of one Saulo Imalingat. She got drunk and on their way she called for help from her sister to take her home. The deceased was also drunk and he was of no great help to her.

Later one Osaa and Osele went and arrested her and the deceased on the ground that they had made a lot of noise and thereby had disturbed the village. PW1 and the deceased were taken to A1 because he was an R.C 1 Chairman of the village. Very many people were in groups drinking enguli and "kwete" at the home of A1. and they were being entertained to "akogo music" by the children.

The report made by Osaa and Osele prompted A1 to get a rope from his house with which he tied the deceased. He then got a piece of wood from a chair and started assaulting the deceased all over the body including the testicles. A2 who was also an R.C. official under A1 got a handle of a hoe and also beat the deceased all over the body but targeted also at the testicles.

In the end, the witness said A1 ordered those who were drinking at his home to go away which they did and remained ' PW1 herself, the deceased and both accused persons. At around dawn when the morning star was up, A1 and A2 ordered her to leave the place. By then the deceased was groaning and could not speak. She was told to return in the morning to check whether the deceased was still alive or dead. She left the deceased in the custody of A1 and A2.

In court, PW1 was able to show the piece of wood from a chair which A1 used in assaulting the deceased and she also showed a handle of a hoe which A2 used in beating the deceased. They were big pieces of wood and PW1 said she was able to see what the accused persons did to the deceased because she sat very near and there was camp fire from simsim stems burning at the time.

Hon. Justice  
J.W.N Tsembo 100  
J-Sc



The witness alleges also that A1 and A2 used the very pieces of wood in assaulting her and they also slapped her several times on both ears. As a result she was in great pain the following day and for the whole of that day, 17.12.91 the deceased was nowhere to be seen. It was on 18.12.91 that the body was found about 300 metres in the bush away from the home of A1. She saw the testicles were smashed and were swollen, there were injuries also on the head and heart and it was lying naked but swollen. The Police at Katakwi visited the scene and arrested A1 but A2 had run away.

On receiving a report that since Osaa and Osele had taken PW1 and the deceased under arrest to A1 on the allegation that they were a nuisance on the night of 16.12.91, both PW1 and the deceased by 17.12.91 had not shown up. So PW2 who is a cousin brother of the deceased got concerned and reported the matter to his R.C1 Chairman one Ekoluot Joseph. PW2 in the company of Joseph Ekoluot and some relatives of the deceased went and arrested Osaa and Osele.

The search team then went to the home of PW1 where they found her very sick and weak. She said A1 and A2 beat her and also assaulted the deceased. On reaching the home of A1, he was found sorting cotton together with his wives. He said he had set free PW1 and the deceased the previous night. Appearing before PW1, A1 did not repeat that story and his wives ran away and cotton was nowhere to be seen. That made the searching team more suspicious and anxious. However, after thorough search on that day, 17.12.91 there was no trace of the deceased person.

Before being taken to the Gombolola Headquarters on 18.12.91, A1 took PW2 aside and told him that A2 and himself killed the deceased. He then described the place where they had hidden the body. The body was hidden in the bush west of the home of A1.

On receiving that information, PW2 in the company of the searching team went and found the body in the place described by A1. It was in the bush some 200 metres away from the home of A1. There was no path of any sort leading to that bush. The witness saw the body lying on its back naked with swollen testicles, there was a mark around the neck as if it was strangled with a rope and some teeth were missing. According to the witness the body was horrible to look at and it was swollen.

Before the body was recovered on 18.12.91 the home of A1 was searched on 17.12.91 and the witness saw some blood stains on the compound. A piece of wood from a chair was found with blood stains on it. Later a handle of a hoe and an axe were recovered from the home of Osaa who picked them from the scene of crime earlier on as clan chief.



The matter was reported to the Police at Katakwi and two Policemen visited the scene. They then authorised the burial of the body after the relatives of the deceased failed to get transport for the doctor to carry postmortem.

Evidence of another eye witness, PW3 is that on 16.12.91 in the evening, he went with his friend Augustino Odisa to drink enguli at the home of A1. He found there very many people also drinking the same stuff and some children were entertaining the groups to "akogo music."

At around 9 p.m. the witness saw one Osaa and Osele bring the deceased and PW1 to A1 who was R.C1 Chairman of the area. Music was stopped and Osaa and Osele told the crowd that they had brought the deceased and PW1 to A1 because they were found fighting in their home.

On receiving that information, the witness saw A1 tie both PW1 and the deceased with a rope. Then he saw A1 with a piece of wood from a chair and A2 with a handle of a hoe start beating the deceased and PW1. The witness pleaded for their release until the matter would be settled the following morning but only PW1 was released. A1 tied the deceased on a pole in the kitchen.

When the witness questioned the wisdom of Osaa and Osele for bringing the deceased and PW1 to the drinking place, Osaa answered by slapping him once on the ear. Thereafter Osaa removed the handle of a hoe which A2 was using in assaulting the deceased and PW1 and went away with it.

As if the slap had not taught the witness a good lesson, he still insisted to plead that the deceased also be set free, but this time A2 chased him away. He went away but leaving PW1 and the deceased in the custody of A1 and A2 and by then the deceased was groaning, especially as he was beaten on the testicles.

The following morning the witness went to the home of PW1 to find out their conditions. He found PW1 in great pain but the deceased was not there. She told him that she was set free at dawn but left the deceased still in the custody of A1 and A2. At around 11 a.m. the relatives of the deceased went to the home of A1 looking for his whereabouts. The witness heard A1 tell the deceased's relatives that he had the previous night released PW1 and the deceased free. On that day the body of the deceased was not found.

The following day, the body was found in the bush and on observation the witness saw the neck swollen with injuries thereon and he also saw injuries on the testicles. The body was very dirty and it was lying naked.

In his defence, A1 admitted that on 16.12.91 groups of people came to his home for drinks including PW3 and A2. He admitted also that Osele and Osaa brought to him PW1 and the deceased whom they found fighting.



In his capacity as R.C.1 Chairman, the deceased told him that he had fought PW1 because she refused to go with him home but PW1 told him that the deceased assaulted her because he suspected her to be having an affair with one Omugenyi.

As his R.C.1 members were not all present at that time, A1 claims that he told PW1 and the deceased to go to their respective homes and return the following morning for settlement of the matter. He says Osaa and Osele were the first to leave his home followed by PW1 and eventually by the deceased whom he had advised to take some time or else they would fight again on the way. Eventually PW3, A2 and Francis Ilemut who had remained drinking also left his home.

In a nutshell, A1 in his defence denied murdering P. Okorio the deceased in this case. He also denied assaulting the deceased and PW1. He blamed PW1, however for fabricating the story against him because he had refused to settle the matter at home when the deceased was arrested for stealing the property of one Okabe. He also points a finger at PW1 because on 28.9.91 R.C. Committee sent the deceased away from the village because he was a man from Katakwi and was a thief.

The defence of A2 is also a total denial of murdering the deceased. He admits that on 12.12.91 he was drinking enguli at the home of A1 with his friend Francis Ilemut and that there were also other people including PW3. He said on that day Osele and Osaa brought PW1 and the deceased to A1 on the ground that they found them fighting on the way and PW1 was raising an alarm. He says the deceased told A1 that he had boxed PW1 severely on the head several times because she pulled him by the testicles. However, PW1 said the deceased fought her because he saw her talking to one Omugenyi at the market.

As A1 at the material time did not have all his R.C.1 members, the deceased and PW1 were told to return the following day. After their drinks PW3, one Emma and A2 also left for their respective homes. The following morning A2 left for Kapujan where his daughter had lost a child.

On his return on 21.12.91, he learnt that Osaa, Osele, A1 and his father had been arrested allegedly for murdering the deceased and there was pending message that he should also report himself to the Police which he did. He alleges that PW1 has fabricated the story against him because she is a thief like her man the deceased whom they had sent away from the village. As for PW3, it is because they had assaulted the father of A2 on the allegation that A2 had run away completely from the village in fear of the alleged murder. He denied ever assaulting the deceased with a handle of a hoe or at all.

In a charge of murder the prosecution must prove the following ingredients beyond reasonable doubt: THAT, a person has died; that his death was unlawfully caused with malice aforethought and that his death was caused by the accused persons.



As to whether a person died in the present case, the defence does not dispute the fact that the deceased Okorio actually died. Evidence is that he died on 16.12.91. There is no medical evidence as to the circumstances which led to his death. However, in Kimweri vs. R (1968) EA 452, death can be proved by other evidence other than medical evidence even when the body is not recovered. In the present case, evidence is that the body of the deceased was recovered on 18.12.91 in the bush 200 metres away from the home of A1 with multiple injuries thereon.

On the issue of malice aforethought, the defence argues that the story of the two eye witnesses, PW1 and PW3 is doubtful in that whereas PW3 said A1 at first tied PW1 and the deceased with a rope and later tied the deceased on a pole at a kitchen after the beating, but PW1 said nothing of the sort.

The defence also contends that since there were very many people at the drinking party including one Ogwang, the brother of the deceased, they never raised a finger in stopping the beatings.

Evidence of the eye witnesses PW1 and PW3 is that A1 used a piece of wood from a chair in assaulting the deceased but A2 used a handle of a hoe. It is alleged that A1 and A2 assaulted the deceased all over the body including the testicles. Defence contention is who actually inflicted the fatal blow. Moreover motive for the killing is not established, but the defence story is that on the fateful night, the deceased fought PW1 and A1 and A2 being R.C. officials could not again take that fight to be theirs instead of settling the matter. Pieces of wood allegedly used in assaulting the deceased mysteriously found their way to court without any witness exhibiting them.

In the circumstances of the present case, defence contention is that the prosecution has failed to prove a common intention to kill the deceased and consequently malice aforethought is not proved beyond reasonable doubt. In the premises, the accused persons are not guilty of murder but are guilty of a lesser cognate offence of manslaughter: Uganda vs. Ponsiano Wambuga & 2 Others (1977) HCB 59.

The prosecution on the other hand relies on the evidence of PW1 and PW3 who witnessed A1 and A2 assaulting the deceased all over the body including the testicles with a piece of wood from a chair and a handle of a hoe respectively. But I'm in agreement with the defence that weapons allegedly used by A1 and A2 in assaulting the deceased were not exhibited in court. In the premises the court cannot take for granted that those were the weapons used by the accused persons in assaulting the deceased.



The prosecution also contends that when the body was discovered, it bore marks of torture. It had lost some teeth, the neck was swollen, the testicles were smashed and swollen and there were wounds on the head. From the nature of the wounds found on the body, weapons used and the parts of the body assaulted indicated that the killers had intended to kill the deceased. Moreover the accused persons when releasing PW1 told her to check the following morning whether the deceased was still alive or dead. The prosecution fortified its side that homicide unless it is accidental is always unlawful unless when it is committed in circumstances making it excusable: R vs. Busambuzi Wesonga (1948) 15 EACA 65.

The circumstances relating to the present case, it is argued, are not excusable but complete homicide with malice aforethought. In Kimweri's case (supra) death can be proved by other evidence other than medical evidence even when the body is not recovered. Evidence of the injuries found on the body, parts of the body injured and the weapons allegedly used in assaulting the deceased in the present case does not establish beyond reasonable doubt a common intention to kill the deceased. Consequently malice aforethought was not proved beyond reasonable doubt. The prosecution had at their disposal the weapons allegedly used in assaulting the deceased but never exhibited them in court.

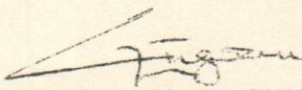
As to whether it was the accused persons who killed the deceased, defence argument is that the deceased could have died through natural causes or might have been killed by unknown people. The prosecution relies on the evidence of PW1 and PW3 who saw the accused persons assault the deceased. There was a camp fire at the scene and the accused persons were well known to the witnesses before the incident took place at the home of A1. It is submitted mistaken identity could not arise in the circumstances and I do concede to that submission.

In addition, evidence of PW2 is that on 18.12.91, after failing to trace the body the previous day, A1 told him that the body was hidden in the bush west of his (A1's) home. The body was found exactly in that place, 200 metres away from the home of A1. The witness also said A1 told him that he (A1) had killed the deceased with A2. Defence contention that naturally after getting such information A1 should have been asked to lead the searching team to that bush does not hold water in view of the fact that there was fear that the relatives of the deceased could have revenged at that time.

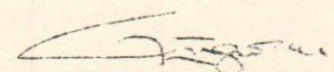
The defence is total denial of what happened but they did not deny the presence of PW1 and the deceased at the home of A1 on the fateful night. They deny assaulting the deceased but the prosecution witnesses generally had no grudges against them. There is overwhelming evidence putting both accused persons at the scene of crime.



In the circumstances of the present case, there was not enough proof of a common intention to kill the deceased and consequently malice aforethought was not proved beyond reasonable doubt and therefore the two accused persons are not guilty of murder. They are acquitted on indictment of murder but found guilty and convicted of a lesser offence of manslaughter contrary to sections 182 and 185 of the Penal Code Act.

  
STEVEN GEORGE ENGWAU  
JUDGE  
27.9.94.

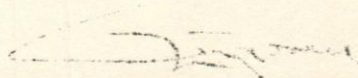
30.9.94: Both accused before the court.  
Mr. Kakembo for accused on private brief.  
Ms Khisa for the State.  
Judgment delivered in open court.

  
STEVEN GEORGE ENGWAU  
JUDGE  
30.9.94.

Sentence: At the time this offence was committed A1 and A2 were R.C. officials and were therefore in leadership in their village. To assault the deceased who was brought before them instead of settling the matter amounted to an abuse of office. There was no justification for them to assault the deceased which resulted into his death.

In the circumstances, a deterrent sentence would be reasonable and adequate to deter those in authority from abusing their powers.

Accordingly, each accused is sentenced to six years' imprisonment.

  
STEVEN GEORGE ENGWAU  
JUDGE  
30.9.94.