THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

HCCS NO.256 OF 2001

UGANDA……..PROSECUTOR

VERSUS

AKURE JOHN & 4 OTHERS…….ACCUSED

BEFORE THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

The accused in this case were Akure John A1, Omoding Daniel A2, Obore Justin A3, Imalingat s/o Akure A4, and Okia Wilson A5. They were indicted for the offence of murder contrary to sections 183 of the Penal Code Act. The particulars of the indictment were that the accused with others on 27/5/200 at Kotyokotyo, Malera, in Kumi District murdered one Okokoro James Peter. Upon arraignment they each denied the offence.

The brief facts of the case according to the prosecution are that on the material day, Keturah Imuron PW1 was at home in the house with Helen Rose Amoding PW2, some children and Okokoro Peter, now deceased. At about 11 p.m. thugs came and started banging on the door till it gave way and fell inside. Her husband Okokoro Peter tried to hold the door in place but he was overpowered. Two of the thugs entered and cut up Okokoro Peter with pangas, and he bled to death. The thugs went away without harming any other person in the house.

There was no light inside the house when the thugs entered, but there was moonlight outside. The attack lasted only a short time. Matters were reported to the police and the 5 accused people were arrested.

At the close of the case for the prosecution. I discharged A3, A4 and A5 on a no case to answer and I promised to give reasons in this judgment.

For a submission of a no case to be upheld, it must be shown that the prosecution evidence adduced before the court does not make out a prima facie case against the accused person. A prima facie case is not made out if an essential ingredient of the offence charged is not proved by the evidence, or if the evidence is so discredited in cross examination or is so manifestly unreliable that no reasonable tribunal properly directing its mind to the law and the evidence would convict the accused person on it. Bhatt V Rep. [19570 E.A. 332.

In the case of ***Semambo and An. V. Uganda*** Cr. App. No. 76 of 1998, (C.A.), the court held that, "a prima facie case means a case sufficient to call for an answer from the accused person. At that stage the prosecution evidence may be sufficient to establish a fact in absence of evidence to the contrary, but is not conclusive. All the court has to decide at the close of the prosecution case is whether a case has been made out against the accused just sufficiently to require him to make his or her defence."

What this means in practice terms was explained in Bhatt (supra). When the court gave the meaning of a prima facie case. The court said thus,

> " remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to suggesting that the court would not be prepared to convict if no defense is made but rather hopes the defence will fill the gaps in the prosecution case."

Lord parker in PRACTICE NOTE [1962] 1 All. E.R. 448 laid out the principle that no prima facie case will be held to have made out where the prosecution has failed to prove an essential part of the offence charged or where the evidence of the prosecution has been so discredited in cross examination or was so manifestly unreliable that no reasonable tribunal could act on it.

The accused pleaded not guilty. As was held by Lord Goddard, "whenever there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused person, the nature of the act, and the existence of any necessary knowledge or intention." R. V. Sims [1964] 1 ALL ER 69. It is a cardinal principle of the criminal law that the burden of proving the charge beyond reasonable doubt is on the

prosecution. The prosecution must prove each and every ingredient, which constitutes an element of the offence. *Woolmington vs The DPP* [1935] AC 462, *Leonard Aniseth vs. Republic* [1963] EA 206. The accused ought not to be convicted on the weakness of the defence but on the strength of the prosecution case. *Uganda vs, Oloya* [1977] HCB 4.

In a charge for murder, the prosecution must prove beyond reasonable doubt that death occurred, that the death was unlawful; that it was caused with malice aforethought and lastly that the death was caused by the accused person.

The defence conceded the first three ingredients of the offence, that the death occurred, that it was unlawful, and that it was caused with malice aforethought.

Regarding the death of the deceased, PW1 Keturah Imuron the wife of the deceased witnessed her husband being cut by thugs and he bled to death in her presence. PWS Helen Rose Amoding was the daughter of the deceased. She likewise witnessed thugs cutting up her father and he died soon thereafter. PW3/AIP Chemere visited the scene of crime and saw the body of Okokoro which was identified to him by the wife, PW1. The defence did not contest that ingredient. The prosecution proved that ingredient beyond reasonable doubt.

With regard to the unlawful nature of the death, the law is that every homicide is presumed to be unlawful unless it is accidental or it occurred in circumstances which make it justifiable. In the case that "a homicide unless accidental, will always be unlawful except of it is committed in circumstances which make it excusable."

PW1, PW2 and PW3 all saw the body of the deceased. It had cut wounds. PW1 and PW2 witnessed the sordid incident when thugs inflicted these wound upon the deceased and he died as a result therefrom. That death was not accidental. It was not authorized by law. It was certainly unlawful. The defence did not contest this ingredient. The prosecution proved it beyond reasonable doubt.

A person accused of the offence of murder will not be convicted of that offence unless it is proved that the death was caused with malice aforethought. Malice aforethought is a state of mind which is hardly ever proved, or knowledge that the act or omission causing death will

probably cause the death of some person. Section 186 of the Penal Code Act. This intention or knowledge will invariably be inferred from the circumstances under which the death occurred.

The court has set down the circumstances, which ought to be considered before making the inference whether malice aforethought was made out from the evidence. *Tubere vs. R* (1945) 12 EACA 63. The court must consider the type of weapon used, the nature of the injuries inflicted, the part of the body affected; whether vulnerable or not, and the conduct of the accused before, and after the attack. *Uganda vs. Turwomwe* (1978) HCB 182.

PW1 and PW2 saw the thugs cut the deceased with pangas. They cut him on the throat, forehead, and legs. A panga is a deadly weapon, as it is made or adapted for cutting, and it can cause death when used for offensive purposes. The head and throat which were cut are very vulnerable parts of the body. Any injury to such parts is life threatening. The injuries were multiple, and deep causing extensive bleeding from which death ensued. The only inference one draws from the above is that whoever inflicted those injuries; he did so with the intention of causing death. The defence did not contest this ingredient. The prosecution proved the ingredient of malice aforethought beyond reasonable doubt.

The participation of the accused was highly contested. It depended on the identification of the accused persons. There were two identifying witnesses. PW1 told court that at 11.00 p.m. T hey were in the house with no light. This was a single room round house with only one exit. The thugs banged the door, and the deceased came and tried to hold it in place, but he was overpowered, and it gave way. The witness said that she moved to the western part of the house, meaning further away from the doorway.

It was from this position that she was able to make the identification with the help of moonlight outside. The assailants also had torches which they flashed around, and these also helped in the identification. She stated that she recognized all the five accused as the assailants. She knew them prior to this event as they were all nighbours. She added that they were all present at their home because they all used to move together, all the time even during the day. She said that the incident lasted three hours, which was obviously not true. But could be explained by her inability to apprehend time.

PW2 was the other identifying witness. She was also inside the dark house when the thugs came. When there was banging on the door, she moved towards the entrance. When the door finally gave way, she was near enough and was able to identify the assailants with the help of moonlight from outside, and from the gig torches which the thugs were flashing. She said that A1 and A2 were the ones who called out to their father to open. These two were the only ones who entered. All the accused were village mates, and so she knew them prior to this incident.

Those were the conditions under which the identification was made. I found that there was no evidence connecting A3, A4 and A5 with the offence. Save for the fact that they used to move together with A1 and A2, there was no nexus between them and the offence charged. The test laid out in ***Bhatt (supra)*** was not satisfied. I accordingly discharged them having recorded a finding of not guilty.

The two accused, A1 and A2 each gave sworn testimony. Two witnesses were called for the defence. A1 told court that on 21/5/2000, he was collected by DW3 Okedi to go for the burial of his aunt Keletesia Amodot at a place called Achede, some 4 miles away. He remained there with his wife, till he was arrested on 28/5/2000 for the alleged murder of this brother, as he was cementing the grave. DW3 Odeke corroborated that testimony.

A2 told court that he was discharged from Atutur hospital on 25/5/2000, and he went home where he remained all the time, as he was still weak. He was arrested on 28/5/2000 from his home.

DW4 Aloko Joyce, the wife of A2 corroborated that testimony. She testified that in the night of 27/5/2000, she was in bed with her husband. She continued to administer to him his medicines throughout the night, as he was still weak. They did not leave their house at all that night.

The two accused put up the defence of alibi. In Uganda vs. George Wilson Simbwa Cr. App. No.37 of 1995, (unreported), it was held that the court must examine both the prosecution evidence and the defence evidence before coming to a decision. Prosecution evidence ought not to be examined in isolation of the defence evidence. The accused, when he sets up an alibi as a defence, he or she does not thereby assume any responsibility of proving the alibi. The prosecution is under a duty to negative the alibi by evidence. See also ***Kibale Ishma vs. Uganda*** Cr. App. No. 21 of 1998, (SC) (unreported)

The prosecution must produce evidence which places the accused squarely at the scene of crime. In Bogere Moses & another vs. Uganda Cr. App. No. 1 of 1997. (SC) (unreported), the court gave what amounts to putting the accused at the scene of crime. It held that this "must mean proof to 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 base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable."

The evidence of identification from the prosecution was the prosecution was from PW1, an old woman who did not know her age. She told court that when the attackers towards the westerns part of the house. This was a single roomed house within the house at this time. The witness was therefore moving further into the darker part of the house for her safety, which was only natural. It was from this position that she was able to make the identification she did. She told court that all the five accused entered the house. The conditions under which the identification was made were not favourable for making a correct identification.

PW2 the other eye witness rather moved towards the door when the banging started. She told court that only two assailants entered the house which was dark. There was an immediate violent confrontation when the two assailants started assaulting the deceased. That notwithstanding, she was able to identify the other three assailant who did not enter the house, as there was moonlight, and because they used to move together as a group. Even in this regard, the conditions under which the identification was made were difficult for a proper identification.

It was difficult to believe PW1 when she testified that she was able to recognize all the 5 accused the confrontation, and from her place of hiding, yet PW2 who was nearer them only saw two enter. The witness was aware that these five men always moved together and where one was present, the other four were to be found also present. That appears to be the reason why all the five accused were suspected. The testimony of PW1 regarding identification was not to be relied upon. It was highly suspect.

That left only the testimony of PW2 regarding identification, which was made in unfavourable conditions. What was then required was other evidence to corroborate that identification evidence.

In Mugoya Wilson vs. Uganda Cr. App. No. 8 of 1999, (unreported), the court defined corroboration evidence as being “independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particulars not only the evidence that the crime has been committed but also that the accused committed it”

In this case, there was no such evidence of corroboration. Such was missing. In those circumstances it was unsafe to rely on the identification of a single witness, which identification was made in unfavourable conditions.

The defence of alibi which the accused put up wew not broken. There remained a doubt whether A1 was not at the funeral of his Aunt Keletesia in Achede as he told court. It was also doubtful whether A2 was not in his house with his wife DW4 sleeping, having only been discharged from Atutur hospital two days before the attack on the deceased.

In the criminal law, where a doubt is created in the prosecution evidence regarding an essential ingredient of the offence charged, such a doubt must be resolved in favour of the accused person, because in that case, the prosecution will have failed to prove all the essential ingrdients of the offence to that degree set out in *Woolmington V, The D.P.P. (supra).*

I found that the prosecution did not prove the ingredient of the participation of the accused persons in the death of Akokoro James Peter beyond reasonable doubt, and I so hold.

The gentlemen assessors advised me to find the two accused persons guilty as charged. For the reasons I have given concerning my doubts about their participation in the attack on the home of the deceased, I am unable to accept their advice.

In the premises, I find the two accused persons not guilty of the offence of murder contrary to section 183 of the Penal Code Act, and I acquit them accordingly. They are to be set free and at liberty forthwith unless they are held on other lawful charges.

RUGADYA ATWOKI

JUDGE

8/08/2003