THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CRIMINAL SESSION CASE No. 0066 OF 2009

UGANDA ……

PROSECUTOR

VERSUS

1. ISSA ODONGO }

2. ALUM AGNES } ::

ACCUSED

3. OKUMU CHARLES }

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

The three accused persons herein, Issa Odongo, Alum Agnes, and Okumu Charles, referred to respectively as A1, A2, and A3, or otherwise collectively as the Accused, were, together with one Oucha John Bosco, indicted for murder in contravention of sections 188 and 189 of the Penal Code Act. The particulars of the offence stated that on the 3rd day of July 2008, at Wantembo Village, in Butiaba Parish, Biiso Sub–County, Buliisa District, the Accused murdered Cpl. Otim Kenneth. They each denied the allegation. A plea of "Not Guilty" was accordingly entered for each of them; necessitating this trial.

However Oucha John Bosco changed his plea to guilty; for which he was convicted, and later sentenced. The trial then proceeded with the remaining three Accused herein who maintained their innocence. The prosecution had the duty to establish, beyond reasonable doubt, the three ingredients that constitute the offence of murder. These are that:

(i) There was death of a human being.

(ii) The death was caused by an act of homicide.

(iii) The homicide was committed with malice aforethought.

Then, to secure conviction of any of the Accused, the prosecution had to prove that such person was guilty of perpetrating the homicide; and with malice aforethought.

To prove that Cpl. Otim Kenneth is dead, the prosecution called witnesses who saw the dead body. Dr Abiriga – PW1 – of Masindi Hospital issued the post mortem examination report admitted in evidence as agreed facts under section 66 of the Trial on Indictments Act, and exhibited as *PE2*. Evidence was adduced in Court by RA 179231 Cpl. Magezi Boniface – PW2 – a UPDF Intelligence Officer of Butiaba Wantembo who identified the deceased, No. 25964 D/Constable Oyet Morris – PW3 – a police officer of Masindi Police Station Homicide Desk who carried out the investigations into the death, and Oucha John Bosco – PW4 – who confessed his participation in the killing of the deceased.

The evidence above proved beyond any shadow of doubt that indeed Cpl. Otim Kenneth is dead. This satisfies the requirement laid down in ***Kimweri vs. Republic [1968] E.A. 452***, that the ingredient of death of a person may be established either through production of a report of medical examination of such body, or by evidence from anyone to whom the deceased was known; and actually saw the dead body. The prosecution has, as rightly conceded by the defence, proved the ingredient of death of Cpl. Otim Kenneth beyond reasonable doubt**.**

The prosecution was also duty bound to establish that the death was a consequence of an act of homicide. The law presumes that any incident of homicide is a felony. This is well stated in cases such as ***R. vs. Gusambizi s/o Wesonga (1948) 15 E.A.C.A. 65; Uganda vs. Bosco Okello alias Anyanya, H.C. Crim. Sess. Case No. 143 of 1991 - [1992 - 1993] H.C.B. 68;*** and ***Uganda vs. Francis Gayira & Anor. H.C. Crim. Sess. Case No. 470 of 1995 – [1994 - 1995] H.C.B. 16***. However, as was pointed out in ***Festo Shirabu s/o Musungu vs. R (22) E.A.C.A. 454***, this presumption of unlawfulness may be rebutted by the person charged; by establishing, on a mere balance of probabilities, that the homicide was either justifiable or excusable.

Justifiable homicide, though intended, is not the result of any evil design, but rather done in the course of administration of justice or in the execution of duty. Instances of this are the execution of a lawful sentence of death, or an attempt to arrest an escaping felon carried out in a manner devoid of criminally careless or reckless conduct, which occasions death. It is therefore an absolute defence. Excusable homicide, on the other hand, is committed either in self defence or defence of a family member or property, or in response to offending provocation. It is either out

of necessity, or is accidental. Such excuse removes the homicide from murder to a lesser offence; such as manslaughter, which is punishable only to a lesser degree.

The evidence adduced by the eye witnesses in the matter before me, was that the corpse had a deep cut wound on the throat. The medical report (exhibit *PE2*) stated that this had severed the trachea (wind pipe) blood vessels and oesophagus (food canal), resulting in excessive bleeding. The body was photographed lying half naked in an open ground near an airstrip and was exhibited as *PE4.* There was no sign of any struggle at the scene; suggesting that the injury was inflicted elsewhere. PW4, who had been convicted on his own plea of guilty of participating in the killing of the deceased, and was sentenced, testified that the deceased's throat had been meticulously slit with a knife.

I will advert to, and subject PW4's testimony to full consideration later in this judgment. Suffice it to observe here that it provides a persuasive pointer that the fatal ghastly throat injury the deceased's body bore was caused by a human hand. However, even without the evidence adduced by PW4, it was clear from the testimonies of the other prosecution witnesses that the gruesome throat injury the deceased suffered resulted from a deliberate act. There being no evidence to controvert or rebut this most inculpatory fact – which was also rightly conceded by the defence – the presumption that the death of Cpl. Otim Kenneth was an unlawful homicide is justified.

As for the ingredient of malice aforethought, where the perpetrator of any death has expressly declared his or her intention to cause death, it is easy to establish the existence of malice. Otherwise, malice aforethought remains an element of the mind, which may be established by inference from the conduct of the Accused or the circumstances under which such death was perpetrated. This position of the law is expressly captured in section 191 of the Penal Code Act; which provides as follows:

191. Malice aforethought.

Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances:-

(a) an intention to cause the death of any person, whether that person is the person killed or not, or

(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person 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."

The case of ***R. vs. Tubere s/o Ochen (1945) 12 E.A.C.A. 63****;* authoritatively set out the factors that may give rise to the inference that malice existed. Cases such as ***Uganda vs. Fabian Senzah [1975] H.C.B. 136,*** and ***Lutwama & Others vs. Uganda, S.C. Crim. Appeal No. 38 of 1989,*** re–affirmed this position. The factors include: the use of lethal weapon; targeting vulnerable parts of the victim's body; where the nature of the injury inflicted discloses that it was intended to cause grave damage, as for instance repeated blows or strikes; conduct of the assailant either before, during, or after the incident which is incompatible with innocence.

In the instant case before me, as pointed out above, PW4 confessed his participation, and testified that he and others held the victim helplessly down as his throat was slit in the manner a goat is slaughtered. The testimonies of witnesses who saw the injury on the corpse corroborated this. It is thus manifest that the injury inflicted on Cpl. Otim Kenneth was intended to cause the ultimate result; which is death. In keeping with the authority in ***Uganda vs. Turwomwe [1978] H.C.B. 16,*** I fully concur with the prosecution and defence counsels that the prosecution has established beyond reasonable doubt that the death of Cpl. Otim Kenneth was perpetrated by a person or persons possessed with malice aforethought in the execution of that vile act.

Regarding the identity of the perpetrator of this dastardly act, PW4 had in an extrajudicial statement to a magistrate, confessed that he, the Accused, and another person still at large, jointly participated in the killing of Cpl. Kenneth Otim; at the behest of A1. As prosecution witness, he owned the extrajudicial statement, and elaborated the facts; an account of which he said he had given to PW3 during the course of his investigations into the killing of the deceased. In his testimony he maintained that he had that fateful evening, been in the company of the deceased and others who were very well known to him; and that they drank at A1 and A2's home – cum – bar, up to late in the night.

His further testimony was that at the aforesaid bar, A1 seized Cpl. Kenneth Otim (the victim) whom he accused of having an affair with his wife A2, and then ordered the rest of the people in the bar – namely A2, A3, PW4, and one Jawiya – to hold the victim down. They tightly held the

victim's limbs and pinned him down helpless; and A1 picked a knife from the floor and, despite the victim's plea of innocence, slit the victim's throat with the knife until he died. A1 then took the deceased's phone and gave it to him (PW4) after removing and retaining the Sim card. After this, on A1's orders, they carried the corpse away to the airstrip for disposal; and that A1 threatened them with similar fate if any of them dared divulge what had transpired.

The Accused, however, all denied participation in the killing of Cpl. Otim Kenneth. A1 at first even denied knowledge of Kenneth Otim whose death he claimed to have learnt of from prison. On the other hand, he contended that it was at this trial that he heard of Otim's death, as he had not been given any explanation for being remanded. However, upon Court examination, he admitted having known the deceased who had been introduced to him by his wife (A2) as her relative; and that he did tell the police that Otim, whom he knew was dead, had been his in law.

He raised an alibi; stating that for three weeks, from the 29th of June 2008, he was in Paidha; and that he returned to Butiaba upon learning of the arrest of his wife A2; but was himself arrested from Buliisa, when he followed her seeking an explanation for her arrest. He and his wife (A2) vehemently denied that they owned any bar; he being a Moslem. He however corroborated PW3's testimony that he used to work together closely with the police; and that there was no grudge between him and PW3. He contended that he had not known A3 or PW4 before; and that he only came to know the former from prison, and the latter from the police after his (A1's) arrest and detention.

A2 testified that the deceased, whom she had introduced to her husband (A1) as her uncle, used to eat and take tea at her home. She stated that she learnt of Otim's death from the police station the day she was arrested; and told her husband from Buliisa where she was detained, that she had been arrested because of the death of Otim. She stated further that A1, herself, and others were jointly charged in the Magistrate's Court for the murder of the deceased; and when being committed to the High Court, they were given a summary of the facts of the manner the deceased had allegedly been killed. She stated that her husband had lied to Court when he contended that he learnt of the death of Otim Kenneth during this trial. She however stated that she came to know A3 from Court; and knew PW4 from prison.

A3 testified that although he was a resident of Pida 'A' village, the first time he met A1 and A2 was from the military barracks when they were being taken to Masindi. He denied that A1 was

the Defence Secretary of his village, and also denied any knowledge of A1's bar. Later, however, he revealed that he had known A1 as a resident of Butiaba who used to come and watch movies at the premises where he was showing video. He denied knowledge of the deceased; but admitted that he heard from his employer's mother, of the death of a soldier the very day the soldier had died. He contended that he knew PW4 after his arrest; but that PW4's wife was his close neighbour, and had sold him a phone which he in turn sold to A3. He admitted that he was charged in Court, jointly with the other Accused, for the murder of Otim Kenneth.

It is quite clear that PW4, who in his confession gave direct evidence of the circumstances under which Cpl. Otim Kenneth was killed, was an accomplice in the felony. I warned the lady and gentleman assessors of the need to treat his evidence with the requisite caution; as it would be unsafe to place any reliance on it, without any independent evidence in corroboration. The need for caution is pertinent here, in view of the revelation by PW4 that A1 had promised him reward for his role in the commission of the felony; but which, however, A1 failed to honour. There is therefore the possibility that PW4 could be acting out of malice.

The evidence required to support accomplice evidence, as was pointed out in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997,*** must be independent, and corroborative evidence. However, upon exercising the caution regarding the danger of acting on uncorroborated accomplice evidence, I can safely base a conviction solely based on it; regardless. Right from his admission in the plain statement recorded by PW3, his confession in the extrajudicial statement he made before a magistrate and exhibited as *PE1,* his plea of guilty, and then his reiteration on oath before this Court, PW4 consistently maintained that he participated with the Accused in the killing of Cpl. Otim Kenneth.

PW4 was quite firm and withstood cross examination in Court. He unreservedly implicated himself; thereby negating any notion that his implicating of A1 was driven by revenge, owing to A1's failure to reward him as he had promised. He absolved Omara Adam who had earlier been together with him and Otim; but who was no longer in their company when Otim was being killed. This resulted in the discharge of Omara Adam who had been charged with them; and was manifestation of PW4's conscientious and dependable nature. Furthermore, there was not even the slightest indication that PW4's consistent confession had at any stage been obtained either by duress or the promise of any reward or benefit to him.

On the contrary, PW4 had at first pleaded guilty to the indictment; but later, his defence counsel informed Court that he had, of his own volition, expressed his wish to change his plea. I warned him in open Court to beware that a plea of guilty on a charge of murder would lead to conviction; and possibly attract a death sentence. Despite this caution, PW4 pleaded guilty on the very facts he had availed in his extrajudicial statement. I find him a credible witness whose evidence is of great value. His subsequent testimony as PW4, which I could act upon even without the need for corroboration, is in fact corroborated by independent evidence; albeit that it is circumstantial.

PW3 testified that he had known A1 as the Secretary for Defence for Pida 'A' village, and an elder with whom he always worked closely to fight crime in the area; hence he had no grudge against him. His investigations established that A2 is A1's wife, and A3 was a resident of the same village as A1 and A2. He testified further that the day Cpl. Otim was found dead, but before he was identified, A1 came to the police post and informed him that he had heard that Cpl. Otim had been killed. That day, all L.C. officials of the area, except A1, came to the scene where the body was. His further testimony was that when A1 came to the police post that day, he informed him (PW3) that he had a trip to Nebbi; and strangely, at dawn of the following morning, A1 left for Nebbi on a goods–boat instead of the usual passenger boat.

PW3 found all this unusual, and suspicious, since A1 never used to inform the police about any of his trips; and the strict security rule in place was that all passenger boats departed from Butiaba around 8.00 a.m. after security clearance. PW3 further testified that he was surprised when A1 returned from Nebbi, two weeks after the incident, and told the officer in charge of Butiaba police post in his (PW3's) presence that he (A1) had left for Nebbi without knowledge of any death in his area. PW3 further testified that PW4 confessed to him and he referred PW4 to the District C.I.D. Officer, D/ASP Obel Mathew, who instructed him to take PW4 to a magistrate in Masindi to record a charge and caution statement.

He testified further that he recovered the deceased's phone Sim card exhibited as *PE6* from one Manano Tumitho, a nephew of A1 who has reportedly since relocated to the DRC, who revealed that it was A1 who had given him the Sim card on the 4th July 2008. He recovered the phone exhibited as *PE5* from one Akuguzibwe who claimed to have bought it from A3. He arrested A3 after making a futile attempt to flee. He testified further still that one Ochai, who later died in a boat which had capsized, made a statement to him stating that the evening before Cpl. Otim

Kenneth's body was found, the deceased had been at his bar with A1, A3, PW4, and one Jawiya; and left together with them.

PW2 in his testimony stated that the evening of the day the body of the deceased was recovered, he and a friend of the deceased went to the home of A1 and A2; wherefrom A1 asked them a lot of questions about the deceased, whose death he said he had learnt of from the police post. A2 also told them that she had heard that the deceased had been killed. PW2 testified further that close neighbours of A1, some of whom they used to freely mix with and drink together over the weekends, were surprisingly fleeing upon seeing them that day; and when they queried A1 why his neighbours were behaving in this manner, A1 surmised that this was probably because PW2 and his colleague were new faces in the area.

PW2's further testimony was that the first time he and his colleague went to A1's home after the death of Otim Kenneth, they found that the floor of the house had freshly been smeared up to the veranda with black soil; which was not yet dry, hence they had to sit outside. Later, he and PW3 led a team that arrested A1 upon his return from Nebbi and took him to Butiaba police post where A2 was already in custody. He testified that both A1 and A2 admitted that the deceased used to drink alcohol at their place, and could even take his rest on their bed; but they denied killing him. Akugizibwe Ronald (PW5) corroborated A3's testimony regarding the sale of the Nokia 6020 phone; adding that A3 had assured him that he would avail him the receipt of the phone upon collection from Bweyale.

I have closely examined the evidence on record. A1 initially denied having any knowledge of the deceased; and only after probing by Court, did he retract and admit that the deceased used to frequent his home as a relative of his wife. I was not amused by his contention that no explanation had been given him for his arrest or arraignment in Court, in view of his wife A2's, as well as A3's contradictory testimonies. His contention that he had been unaware of any death before he left for Nebbi was inconsistent with his earlier revelation to PW3 that the deceased was Otim Kenneth. Similarly, his claim that he had not known A3 before his arrest was contradicted by A3, who disclosed that he used to watch video movies at A3's premises.

Given that he conceded that there was no grudge between him and PW3 whom he admitted he used to work closely with, I find the testimony of PW3 that A1 was at Butiaba the day the body of the deceased was recovered; and was actually the first person to identify the deceased, to be

the truth. Accordingly, A1's contention that he was in Nebbi at the time of the recovery of the deceased's body is a naked lie that cannot fool anyone. His litany of inconsistencies and pack of lies have exposed him as a shameless consummate liar. I reject his alibi, which is surely a fabrication, with all the contempt it certainly deserves. His departure for Nebbi under suspicious circumstances was not conduct compatible with innocence.

It is clear that A1's visit to the police and report of his intended trip to Nebbi, and his return after the arrest of his wife A2, were all meant to constitute a red herring to divert suspicion away from him. The revelation by Tumitho Manano that it was A1 who had given him the Sim card established to belong to the deceased, corroborated PW4's evidence that A1 had removed the Sim card from the deceased's phone and retained it. The fabricated alibi raised by A1, which I have roundly rejected, is also 'other evidence' in support of the accomplice evidence of PW4. Both A2 and A3 were either inconsistent, or contradictory of one another.

It is now well settled, as was pointed out by the Court of Appeal for Eastern Africa in ***Barland Singh v. Reginam (1954) 21 E.A.C.A. 209,*** at p. 211, that evidence which is not exclusively circumstantial, even where it is not entirely inconsistent with innocence, may be of great evidential value as corroboration of other evidence; as it is only where it stands alone that circumstantial evidence must be inconsistent with any other hypothesis other than guilt, and the need to establish that there exists no co existing circumstance that could weaken or altogether negate the circumstantial evidence. Both prosecution and defence testimonies have provided ample corroboration of the accomplice evidence of PW4 regarding the manner Cpl. Kenneth Otim met his death.

On the role each of the Accused played that fateful night. The Penal Code Act of Uganda, (Cap 120 – Revised Ed. 2000) provides as follows:

"20. *Joint offenders in prosecution of common purpose.*

> *When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."*

In ***Abdi Alli v. R (1956) 23 E.A.C.A. 573,*** at p. 575, the Court construed a similar provision in the Indian Evidence Act and stated that:

> *"…the existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of common intention must not be too readily applied or pushed too far. … It is only when a court can, with some judicial certitude, hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with other in order to bring about that result that this section* [of the Penal Code] *can be applied."*

In ***Ezera Kyabanamaizi v. R. [1962] E.A. 309,*** a gang conducted a raid resulting in the killing of some people; the Court held at p. 317 that:

> *"…in view of the nature of the raid it is to be inferred that the participants had the common intent to carry out robbery with violence, that murder was committed in the prosecution of that purpose, and that murder was a probable consequence of the prosecution of that purpose. In the circumstances, all the members of the gang are equally guilty of the murder, and the details as to the individual or individuals who actually inflicted the wounds on the deceased are of comparatively minor importance. What is necessary … is evidence tending to show that the individual appellants were in fact active members of the gang."*

In ***Andrea Obonyo & Others v. R. [1962] E.A. 542,*** a gang raided a trading centre; resulting in some killings. The Court held at p. 546 that:

> *"… in a charge of this nature the essential issues … were:*
>
> *(1) whether the murder of the deceased was committed in the prosecution of a common unlawful purpose of the gang and was a probable consequence of the prosecution of that purpose and*
> *(2) whether the individual appellants have been shown to have been members of that gang sharing the common purpose. … that murder was a probable consequence of the prosecution of that common purpose … and that the deceased was murdered in the*

prosecution of such purpose … In those circumstances each member of the gang was guilty of murder."

In ***R. v. John s/o Njiwa Samwedi [1962] E.A. 552*** the Court held at p. 554 as follows:

"If two persons together steal, and one of them employs violence, …with a weapon, particularly if such a weapon is carried openly by one of the thieves, there would be grounds for holding that violence was, at lowest, contemplated, and therefore agreed to by the other thief as well."

In ***Dafasi Magayi and Others v. Uganda [1965] E.A. 667,*** at p. 670, the Court, approved the following passage from the judgment of the trial Court:

"The inference, from the actions of all the accused persons in taking part in this unmerciful beating, is irresistible – not only did none of the accused persons disassociate himself from the assault but they each prosecuted it with vigour. Not only was the deceased's death the probable consequence of the prosecution of their common purpose but the inevitable one. No one could have survived such a beating and no one could have suspected that he might. A clearer case for the application of s.22 of the Penal Code is difficult to imagine. "

In the case now before me, PW4 was clear that A1 seized Cpl. Kenneth Otim accusing him of having an affair with his wife A2; and that the rest of the Accused should help him to hold the victim, which they did. Throughout the process of A1 slaughtering the victim like an animal, none of the Accused either tried to restrain A1 or dissociated themselves from the act. Their joint and several actions meet the requirements laid down in the authorities cited above in proof of their pursuit of a common intention to cause grievous harm if not outright death to their victim. They all acted in concert in pursuit of that most culpable enterprise.

I am therefore in full agreement with the lady and gentleman assessors that the prosecution has proved, against each and every one of the Accused, all the elements of the offence of murder for which they have been jointly and severally indicted; and accordingly, I convict each of them.

Chigamoy Owiny – Dollo

JUDGE

14 – 01 – 2011