

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

HCT-04-CR-SC- 0043-2012

UGANDA.....PROSECUTOR

VERSUS

A.1 NYOTE CHARLES alias YOWANA

A.2 NAMUNYALA MICHAEL alias SHAMBI

A.3 WAMARE GODFREY

A.4 KHAUKA PATRICK

A.5 WAKHAKHA BONIFASI.....ACCUSED

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Accused stands charged of the offence of murder c/s 188 and 189 of the Penal Code Act. Accused denied the charge.

Prosecution has the burden to prove the charge beyond reasonable doubt. The ingredients to be proved are the following:

1. That there was death of a human being.
2. That the death was unlawfully caused.
3. That the killing was done with malice aforethought.
4. Each of the accused persons participated in the killing of the deceased.

RESOLUTION:

1. Whether there was death of a human being.

Prosecution led evidence through PW.1 the widow, who confirmed that her husband was killed on 24th January 2011. PW.2, PW.3, and PW.4, all confirmed that the deceased indeed died. The post-mortem report (PE.2) confirms that **Wanyama Erinest**, died of severe head injuries. The evidence is enough to prove that a death occurred.

2. Whether the death was unlawfully caused.

The evidence of PW.1, PW.2, PW.3 and PW.4 and PE.2 (post-mortem) show that the deceased was violently murdered. The death was not by natural causes. The case of *Uganda v. Bosco Okello (1992-93) 68 HCB 68*, emphasised the settled law that all homicides are presumed unlawful unless excused by the law or rebutted by excuse of accident. The evidence on record does not show that there was any lawful excuse for causing the death of the deceased. The ingredient is accordingly proved.

3. Whether the death was caused with malice aforethought

According to Section 191 of the Penal Code Act, malice aforethought is inferred from the existence of an intention to cause death or from knowledge that the act of the accused would probably cause death.

According to *Uganda v. Bosco Okello (1992-93) 68 J. Okello*, (as he then was) held that malice aforethought can be inferred from surrounding circumstances such as;

- (i) The weapon used.
- (ii) The part of the body affected.
- (iii) The nature of the injuries inflicted.

Evidence led by PW.1, PW.2, PW.3 and PW.4 and PE.2 (post mortem) shows that the deceased was severely beaten, cut and assaulted. The witnesses described how the assailants cut the deceased on the head, thighs, on the back and legs. Pangas, sticks and stones were used to inflict the wounds. PW.4, said that he found deceased writing in pain, covered with blood like a “chicken” which had been cut. He described very heavy stones and blood found at the scene near the deceased’s body. The above descriptions of the actions by the assailants show that they had premeditated resolute to cause death. The parts of the body aimed at like the head, were vulnerable parts, and this showed that they had the intention to cause death. The evidence above satisfies the inference that the death was done with malice aforethought.

4. Whether all the accused persons participated in the killing of the deceased:

PW.1, PW.2, PW.3, and PW.4 are proposing that all accused persons participated in this crime. The evidence of the witnesses PW.1, PW.2 and PW.3 is of eye witnesses who claimed they saw with their eyes each of the five accused persons carrying out the killing. PW.4, recorded a confession from **A.1- Nyote** which was admitted as (PE.3), which implicates the accused.

In defence, counsel argued court to find that the identification conditions were not favourable for the witnesses to conclude that they positively recognised the accused persons. He argued that owing to the fact that the attackers were many about 100, PW.1, who was scared could not have correctly identified the culprits. He also faulted PW.1’s testimony of identification on grounds that the banana

plantation was thick and could not have allowed her to correctly see what was going on in the courtyard where accused was killed from.

Counsel further pointed out that witnesses PW.1 and PW.2 contradicted each other regarding the number of people involved in the mob, etc. He also doubted A.1-**Nyote**'s involvement pointing out that he denied the charge and caution statement and he should not be found liable for the murder on that basis. He referred court to the case of *DRACAKU S/S AFIA & OR. V. R UGANDA CR. APPEAL NO. 12-1963 (1963) E.A. 363*. It was his submission that participation of accused persons was not proved and they must be acquitted.

The above submission raises serious points that this court must examine in evaluating the evidence on record. Regarding the contradictions which defence counsel pointed out in numbers of the people involved, I do not find this a major contradiction. Evidence of PW.1 of an eye witness who herself was a victim of this assault, was clear, consistent and unshaken during cross examination. The accused persons talked to her at close range, arrested her, assaulted her and led her along to her home. These were relatives whom she knew very well. There was no mistaken identity to the point when they met PW.3 (her daughter) who also saw them, talked to them and showed them where her father was. They left PW.1 and went for the deceased whom they grabbed and according to PW.3 they moved around with, danced with him around as if for circumcision before taking him to his home while assaulting him. PW.3, had in the meantime also encountered the same group earlier when they asked him where his mother was and he showed them the garden where they followed her and assaulted her from there.

The conditions for proper identification as laid down in the case of *Abdalla Nabulere v. Uganda [1979] HCB 77* were not abused at all.

According to the prosecution's evidence, there were favourable conditions for identification in that all culprits were well known to the witnesses as close relatives/neighbours, it was broad day light, they talked, they were very close to each other throughout, the banana plantation where the witnesses hid to watch the final assault of the deceased was very close to the scene, and PW.4 clearly stated that though thick, one could see very well what was going on in the courtyard.

I therefore find that there was nothing to fault the identification of the accused by the witnesses as they described the events.

The testimonies of PW.1, PW.2, PW.3 and PW.4 are well corroborated by the charge and caution statement in which **A.1- Nyote** explains that he participated in arresting the deceased. That he hit him and other people followed the assault. However in evidence in chief in court he changed his story and claimed he was not there (alibi). The entire defence put up by all accused is of alibi. However PW.1, PW.2, PW.3 and PW.4 gave very consistent evidence which was of eye witnesses and they squarely placed all accused persons on the scene of crime. A.1 in his confession revealed that the cause of this death was his wife's sickness whom deceased was suspected to have bewitched. He revealed that this angered him and the people and resulted into the assaults. DW.8 who claimed is the clan chairman gave evidence which further corroborated the prosecution's case, that deceased died because of being suspected as a witch. He confirmed PW.1's testimony that true she had also been assaulted shortly before her husband's death. This

concretises the chain of causation and adds credibility to the prosecution's witnesses testimonies as being a true account of what happened that day. The prosecution attacked the defence case as a ploy by accused to deny responsibility by telling lies.

Prosecution pointed out the discrepancies in the evidence of DW.6, DW.7 and DW.8. The witnesses attempted to show court that accused persons had gone to dig at the time of crime but during cross examination, each failed to concretely explain the discrepancies in their allotments of time to their alleged activities between 6:00a.m- 8:00a.m. Notable is the testimony of DW.8 which court noted that it was grossly evasive and deliberately coined to avoid telling court the truth. DW.7's demeanour was also inconsistent with truthfulness. She appeared evasive and chose to openly confess in court that she came to court to testify so that her husband (A.5) goes home.

Those witnesses were untruthful and unreliable. Accused themselves were equally evasive and denied any relationship with the deceased or the prosecution witnesses. I find their evidence unreliable and grossly untruthful. The alibi set up is destroyed in respect of each accused person by the evidence of PW.1, PW.2, PW.3, PW.4 and the confession statement. The prosecution has proved the participation of each of the accused- A.1, A.2, A.3, A.4, and A.5 in this offence. I find this ingredient has been proved.

Both assessors in their joint opinion advised this court to find all accused persons guilty of the charge and to convict them. I do agree with their opinion and I do hold that the prosecution has proved the charge against all accused persons. I find each one of them guilty of murder as charged. I do convict them accordingly.

Henry I. Kawesa

JUDGE

22.01.2014

22.01.2014

Accused present.

Resident State Attorney Justine.

Jude Wamimbi (for accused).

Resident State Attorney: We are for judgment.

Court: Judgment delivered in presence of all parties above.

Henry I. Kawesa

JUDGE

22.01.2014

Resident State Attorney:

Each convict is a first offender. This offence attracts maximum of death upon conviction. Each has spent 2 years, 8 months. Considering the circumstances the deceased died in a very brutal manner at the hands of the convicts. These cases have increased. Community members should be deterred from mob justice. They ought to have taken the matter to court.

In circumstances I pray that each convict be given a deterrent sentence to work as a lesson to all others. Pray for reformatory sentence.

Henry I. Kawesa

JUDGE

22.01.2014

Jude: Convicts are first offenders they have spent 2 and 8 months on remand. They pray for leniency. They have reformed. They are not saved, they pray to make peace. The first (**Nyote**) has five school going children aged between 4- 15 years. **A.2 Namunyala Stephen** has family of 3 children of 3- 6 years. He is sickly and at time of arrest he had been assaulted, taken to Murchison bay for treatment- he is without treatment to cater for his condition. Third convict has family of 4 children and wife. He is a sole bread winner, children are out of school.

A.4- (**Khaukha** is sickly. Prior to his arrest he had been involved in an accident his leg was broken- fixed metals. Needs constant medical care.

A.5- is aged 60 years. Considering life expectancy of a Ugandan, he can be considered of advanced age and give him a lenient sentence.

PW.3 said others are in the village still free. We pray for leniency.

Henry I. Kawesa

JUDGE

22.01.2014

Court: Sentence

The offence is murder. Maximum is death. Each convict has been on remand for 2 years 8 months. There is need to deter mob justice. All accused need to know that killing is illegal and once convicted you also are liable to suffer death. The life of an innocent person was lost and cannot be replaced. Mitigations as given for each are hereby taken into consideration. Instead of death which is maximum, each will serve a custodial sentence of 12 years. Those who are sick, should indicate to Prison authority for their consideration. No evidence of age has been proved for A.4; no consideration given.

Henry I. Kawesa

JUDGE

22.01.2014