

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
CRIMINAL SESSION CASE NO. 50 OF 2009
UGANDA V MUKALU RAJAB AND EKAU CUTHBERT

JUDGMENT BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

In this case, the accused persons are charged with murder c/s 188 and 189 of the Penal Code Act. It is alleged that the two accused persons on 8th June 2009, at Ojingai village, Kyere sub-county, Serere district murdered Omutojo James Charles.

Prosecution was represented by Mr. Okello State Attorney while accused persons were defended by Mr. Isodo on state brief. Assessors were Joshua Ochole and Florence Amoding.

The duty of the prosecution was to prove beyond reasonable doubt that a death occurred unlawfully; that the accused persons caused the death of the deceased with malice aforethought. The burden of proof in criminal cases is beyond reasonable doubt and that burden never shifts to the accused persons.

Proof of death

At the commencement of the trial the post mortem report was admitted by agreement of both state Attorney and counsel on state brief as PEXH. 1. The report states that the examination was made in the presence of D/Cpl Osile Stephen and the body identified by Okudet Fastin as that of Omutojo James Patrick . The body was in a coffin in a grave, there were bloodstains all over the head and the covering

clothes. The tongue was protruding, neck was very flexible. Cause of death was stated to be from force applied in the neck through strangulation. The report is duly stamped with Serere health centre IV stamp and signed by an unnamed District Medical Officer, on 12th June 2009.

In his oral submissions, Mr. Isodo attacked the post mortem report as inadmissible because the author is not known. In reply, Mr. Okello submitted that as counsel had consented to the admission of the report in evidence, he cannot challenge it at this stage. Counsel for the state then supplied an authority by the Supreme Court, **Criminal Appeal No. 20 of 2001 Birembo Sebastian and anor v Uganda** in support of his submission. The Supreme Court held that counsel in that appeal should not complain about contents of the post mortem report as it was admitted by consent. I therefore find that as Mr. Isodo consented to admission of the report at the commencement of the trial, he cannot be heard to challenge it at this stage of the trial. This means that the post mortem report is proof that the deceased's life was unlawfully taken away.

Malice aforethought

This is defined by section 191 of the penal code as an intention to cause the death of any person, or knowledge that the act or omission will probably cause death accompanied with indifference to such eventuality.

Participation of the accused persons.

The state called four witnesses to prove its case against the accused persons. On 8th June, 2009, PWI Eyagu Amos went to the house of Ekau A1 to take enguli at about 8.30 p.m. Shortly thereafter, the deceased joined the group but one Opolot asked the deceased ' what do you want from here today?' to which the deceased

responded that he had come to take enguli as he was tired. According to PW1 Eyagu, the deceased was served enguli by Ekau and he then sat down with PW1. It was at this point that Opolot came and squeezed the neck of the deceased and ordered PW 1 to leave the scene immediately or else. PW1 moved away but remained at a distance to watch what was going on.

Although in examination in chief, PW1 states that the two accused persons and others stumped and stepped on the deceased as he lay down, in cross examination he was not certain of Mukalu's participation in the assault. Indeed in his police statement, he said Mukalu was not at the scene when the assault took place but Ekau and others had carried the body to Mukalu's shrine for cleansing. As the stumping of the deceased was going on, the group was saying 'let us kill him'. According to PW1 the group comprised of Opolot, Etaket, Ekau, Mukalu and two others he didn't know.

The standard of proof in criminal cases is that it must be beyond reasonable doubt. In view of the uncertainty of PW1 Eyagu on the participation of Mukalu in the assault or even of his presence at the scene during the assault on the deceased, I make a finding that A1 did not participate in the assault of the deceased and I acquit him of the charge of murder.

I find that Ekau and others acting with a common intention unlawfully and intentionally caused the death of the deceased. As Opolot squeezed the deceased's neck, the others including Ekau joined in assaulting the deceased. I also find evidence of prior plan to kill the deceased from the hostile reception the deceased got when he arrived at Ekau's house and the utterances by the group during the assault.

In **Criminal Appeal 24 of 2002, Nanyonjo H & Senyonjo K v U**, the Supreme Court held that where the 2nd appellant witnessed the 1st appellant assault the deceased and did not dissociate himself from the assault by stopping her or by protecting the child, in choosing to do nothing about the assault, he associated himself with it. In the instant case, A2 Ekau in fact participated in assaulting the deceased by stumping and stepping on him thereby associating himself with the intention to cause death of the deceased.

A2 made an unsworn statement in which he denied participation in the death of the deceased.

I find that A2 acted with others and under the principle of common intention, he is responsible along with others for the death of the deceased. I disagree with Mr. Ocole, assessor, that both accused persons are not guilty, but I find Ekau Cuthbert guilty of murder for the reasons I have given above. I am in disagreement with Ms Amoding that both are guilty but find that only Cuthbert Ekau guilty of murder for the reasons I have given above.

Ekau –A2 is accordingly convicted of murder c/188 of the penal code.

Accessory after the fact

PW2 Opio John Patrick was returning home on the night of 8th June 2009 at about 9 p.m with a friend Oenu Joseph and when he got to Mukalu's home, he heard people talking, and they were carrying a person. The group then entered Mukalu's shrine, then emerged and took the path where PW2 Opio and his friend were standing. He recognized the group as Opolot, Etaket, Mukalu, Ekau and another person he didn't know. PW2 Opio was able to see the group as there was

moonlight and he stood at a distance of about two and a half meters away. He saw them put down the person they were carrying but he did not go to the place and instead took another direction.

On the next day, PW2 Opio went to the trading centre and heard that a body had been found on the path that leads to the borehole , which in fact is the path where the witness had seen Mukalu and others carry a person . When PW2 named the accused persons to the police, they went into hiding and were later arrested.

A1 gave sworn evidence in which he denied participation in the murder of the deceased.

I am satisfied with the testimony of PW2 Opio John Patrick that A1 Mukalu participated along with others in the disposal of the body of the deceased.

He is accordingly convicted of accessory after the act c/s 206 of the penal code.

DATED AT SOROTI THIS 01st DAY OF JULY 2014.

HON. LADY JUSTICE H. WOLAYO