

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANA HOLDEN AT GULU
HCT - 02 - CR - SC - 0377 OF 2014

UGANDA:.....PROSECUTO
R

=VERSUS=

JUVENILE :.....ACCUSED

BEFORE: HON. LADY JUSTICE MARGARET MUTONYI

JUDGMENT

1. The accused O.R. a juvenile is indicted of the offence of murder C/S 188 and much as the indictment added S. 189 which stipulates the death penalty for murder, it is not applicable in this case. The state should not include S. 189 of the Penal Code Act in indictments where the accused persons are juvenile suspects. It creates unnecessary alarm on the side of the child suspect. The state should use the relevant sections in the Children Act as regards penalty.

2. The particulars of the offence are that O.R. on the 2nd day of June 2014 at Arwot Omiyo village Lakwana Sub County in Gulu District, unlawfully with malice aforethought murdered Komakech Daniel.
 3. The Prosecution led by learned State Attorney Mr. Kizito Aliwaali produced the testimony of (8) eight witnesses while the defence led by Senior Counsel Ladwar Walter Okidi called three witnesses.
 4. The burden of proof in this case rested on the prosecution throughout the trial. The standard of proof in criminal cases is very high. The prosecution had to prove beyond reasonable doubt all the essential ingredients of the offence of murder.
 5. The essential ingredients of the offence of murder are the following;
 - i. That death occurred of a human being
 - ii. That the death was caused by unlawful act or omission.
 - iii. That death was caused with malice aforethought
 - iv. That the accused participated in causing the death or caused the death.
- Both the learned State Attorney and defence lawyer filed written submissions in support of their respective cases.

6. The court was assisted by Mr. Acaye Alfred and Mr. Ocen Daniel as Assessors in this case.

7. The brief summary of the case is that O.R. on 31/5/2014 fought the deceased and threatened to kill him and the deceased's sister by hanging. That on 2/6/2014, the deceased went to school and returned home for lunch and went to graze cattle. His body was later discovered in the bush kneeling with a rope tied on a tree. The girl who saw the body informed other people, the area was cordoned off, and police was informed. The police came with the police dog which sniffed the body and traced the assailant, which tracing led to the home of the accused. At the home, the dog went to his hut, which was locked and then entered the family hut where it sniffed the juvenile. On opening the hut, it sniffed on his uniform of Opit Primary school. The uniform was exhibited. The details of further evidence will be highlighted as court resolves the issues.

8. From the ingredients of the offence, the court has to resolve the following issues which must be proved beyond reasonable doubt.

a. Whether death of a human being occurred?

b. Whether death was caused by some unlawful act.

- c. Whether there was malice aforethought on the part of the assailant
- d. Whether the accused was the assailant in this case.

9. RESOLUTION OF ISSUE

- (a) I will resolve the issue in their chronological order. The first being whether death of a human being occurred.

PW1 Okot Vincent the father of the deceased informed court that the deceased Komakech Daniel was his child.

On 2/6/2014, he got information around 5.pm that Komakech was dead. He went to the scene and indeed proved he was dead.

PW2, PW3, PW4 PW5 PW6, PW7 all proved Komakech died as they saw the body of the deceased. PW6 Dr. Olwedo Onen Julious James informed court that the deceased was identified to him by Okot Vincent PW1. He carried out an autopsy on the body and made a post-mortem report on 3/6/2014 and observed that the deceased sustained severe injuries to the heart which caused death and the neck was broken during lowering to be hanged on the tree. This PF 48 C was tendered in court as PE 5 and confirmed death of a human being.

Both the State Attorney and defence counsel in their submission agree to the fact that death of Daniel Komakech occurred.

The ingredient of death of a human being was proved beyond reasonable doubt.

b) The next issue is whether the death of Komakech Daniel was caused by some unlawful act? PW1 Okot Vincent, PW2 No. 41818 Sgt Odong Benson, PW3 No 47143 PC Eyagu Julius, PW4 Pamela Ayot, PW5 No.35846 D/C Yoaingon Francis and PW7 Akawo Proscovia all informed court that they saw the deceased hanging on a tree.

PW1, PW2, PW3 and PW5 informed court that the deceased was found hanging on the tree in a kneeling position. PW2 Odong Benson stated he found a child wearing uniform killed and hanged with a rope while the legs were kneeling on the ground. He condoned the scene.

PW3 PC Eyagu Julius informed court that when he reached the scene, he found the deceased wearing school uniform in kneeling position with a rope tied around the neck. On the other side, the rope was just thrown over a tree branch. It was not even tied;

PW5 DC Yoaingon Francis informed court the deceased was hanging. He was tied on the tree and the rope was loose.

PW6 Dr. Olwedo Onen described the position of the body as hanging on a short tree with the legs on the ground transversely. He found bruises on both toes, chest and neck as external marks of violence.

When he opened the trunk he observed and wrote his findings in his medical language as haemopericardium, ruptured coronary arteries, haematrauma of liver, and described the bodily infirmity as severe damage of the heart. He stated the cause of death and reasons as cardiac arrest/respiratory secondary severe heart damage with heamapericardium. The neck was also broken. He further included in his report that the brick and rope (found at the scene) were the most likely weapons used.

His general observation was that the deceased sustained severe injuries to the heart which caused death and the neck broken with the rope during towing to be hanged on the tree. The deceased was a child of about 6 years.

When asked by court to clarify on his medical terminologies, he informed court that he looked at the state of the lungs and could tell whether the person was hanged or not. He informed court that a living tissue which is deprived of oxygen is seen. This can help the medical personnel to know whether the person was hanged when he was alive or

not. He clearly stated in this case, the person was hanged after death.

This witness informed court the rope was not tied but just coiled and the body was just towed to the tree.

Both the prosecution and defence in their submissions also agreed that the deceased was unlawfully killed.

The ingredient of unlawful cause of death has therefore been proved beyond reasonable doubt.

- c). This brings me to the issue of malice aforethought. Was the deceased's death caused with malice aforethought?
According to S. 191 of the Penal Code Act, malice aforethought shall be deemed to be established by evidence providing either of the following circumstances:-
- (a) *An intention to cause death of any person whether such person is the person killed or not*
 - (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.....*
- From the prosecution evidence that is also admitted by the defence in their submission save for the person who caused the death, it is apparent that the death of Komakech Daniel was premeditated.*

The assailant way laid him, took him to the bush, probably hit him with the ½ brick which left bruises on the chest, killed him, tied the rope around the neck and towed the body to be hanged or tied on the tree.

The intention to cause death of the deceased has been established beyond reasonable doubt. The assailant in this particular case did not forget any other person but the deceased Komakech Daniel. The assailant was armed with a rope and brick ready to inflict injury on the deceased with a view of causing his death.

This leads court to the last ingredient of the participation of the accused in causing the death of the deceased.

d). The last issue is the most controversial. Much as the defence agree with the prosecution on the first three ingredients, the accused denies being the person who caused the death of the deceased.

Before proceeding further, let me point out that the prosecution is relying on circumstantial evidence to prove this ingredient. This kind of evidence provide a basis for inference about the fact in dispute. The main issue therefore is whether court can infer guilt of the accused based on the circumstantial evidence.

PW3 No. 47143 PC Eyagu Julius informed court that he is attached to the canine unit Gulu Police station. He introduced himself as a

dog handler. He said his work is to be led by the dog from the scenes of crime to suspects of crime. He said he had handled this particular dog since 2011. He introduces the dog to the scene of the crime and it follows the smell of the suspect who might have been there. He informed court that if the dog gets the person it wants to bite him if he provokes it. He informed court that this dog can recover exhibits when it comes across them. It sniffs on them or remains there. He said the dog is 100% accurate on smell.

He informed court that on 2/6/2014 around 9.p.m. he went with the dog and introduced it to the area. That the dog then led them up to the home of O.R. the accused. When it reached the home, it went straight to the house which was locked. It then proceeded to the kitchen where all the family members were gathered and went straight to O.R. When he saw the dog, he came out and the dog followed him. He was told to open the door of his hut because that was the first place the dog went and remained. When the door was opened, the dog went and sniffed on his uniform he put on that day. That they were many clothes but the dog smelt the short several times. The uniform was picked and tendered in court as PE1 and PE2 respectively i.e. the dirty white short and dirty blue short.

In cross examination, he confirmed he introduced the dog to the dead body which was at the scene which had been cordoned off.

He confirmed that the dog targeted O.R. and when he came out, it followed him and when he opened the door, the dog went straight to his clothes.

PW5 D/C Yoaingon Francis accompanied PW3 as they were led by the dog. The dog smelt around, sniffed the body and led them through the valley up to O.R.'s home. It went straight to the hut which was later discovered to be where O. R. sleeps with his younger brother. The dog moved around O. R. and smelt on him and his uniform a white shirt and blue short.

PW2 Sgt Odong Benson attached to Lakwana Police Post informed court inter alia that when he received a call from LC5 councilor Odong Damasco about the dead child who was hanging on a tree, he went to the scene and cordoned it. He informed Gulu Police Station who responded by sending a team with a police dog. They reached around 9.00pm and the dog handler PW3 took the dog to the dead body, and it started to sniff the dead body and started tracking the foot mark. They all followed as a team.

The dog led them to the home of Ocen Bosco, the father of the accused which had four (4) grass thatched huts. It led them to the locked hut and jumped trying to enter the house. That after failing to enter, it went to another hut where the suspect was sitting with some of the family members.

The dog according to this witness went directly to the accused who was identified as O.R. The dog moved around him and did not want to go to any other person. When O.R. opened the door to his hut, the dog sniffed on his uniform yet there was some other uniform. This witness told court that the scene was presumed and that the dog performs better when the scene is not tempered with.

PW1 the father of the victim informed court, he was not there when the dog came.

PW4 Pamela Ayot was a child of tender age. Court conducted a viore dire and was of the view that she was possessed with sufficient intelligence. She told court she was ready to tell the truth according to what she saw.

She took oath and informed court that she is a pupil of Opit Primary school in P.5. She knew O.R. as a pupil in the same school. She informed court that on Saturday she found the accused sitted on her deceased brother Komakech Daniel. This was at the well. She removed him from the child and he threatened to kill the boy with a rope. In her own words she said

“He said that now that I have removed him from our child, he will get the boy and strangle him with a rope. It was a Saturday. On Monday, we found Daniel dead”

This witness informed court that on that day, the deceased went to school and returned home. He took cattle to drink water around 2.00p.m.

In cross examination, she further said, the accused threatened to kill both of them and that when the child died, she informed the parents about the accused's threats and maintained he threatened to strangle them with a rope. She said she did not inform the parents of the threats because she never expected him to execute his threats.

10. The accused in his defence put up an alibi.

In criminal matters the burden of proof rests with the prosecution and never shifts. After putting up an alibi, the prosecution had to prove that he was actually at the scene. In the case of **Sekitoleko Vs Uganda (1977) EA 531**, it was held that the burden of proving an alibi does not lie on the prisoner. When an accused puts up an alibi, he passes the burden to the prosecution to adduce evidence to destroyed the alibi by placing the accused at the scene of the crime.

In this case the accused and his witness DW1 Vincent Akona 11 years old who also made his statement on oath as he was possessed with sufficient intelligence informed court that on that Saturday they went to Ajay in Ayum dug the whole day from morning and returned home at about 8.00p.m. The accused denied ever going to the well on that Saturday and ever fighting

with deceased. He said on 2/6/2014, he went to Opit Primary school and stayed at school up to 5.00pm when children were sent back home.

In cross examination, he said he went home for lunch and then went back to school until 5.00pm.

His witness DW2 Okello Denis informed court he saw O. R. at school at 10.00am during break time but he did not see him in the afternoon. He saw him again at 5.00pm. They moved together after 5.00pm, went to the scene of the crime, went back home with O.R. at about 6.00pm and went back to their home.

PW7 Akawo Brenda was called after the close of the prosecution and defence case. This witness was called under S. 80(2) and S.39 (2) of the Trial on Indictment Act. She informed court that on Saturday around 3.00pm she saw O.R. passing by the borehole, and went to their home and that the deceased came with his sister PW4 when he was crying. She did not witness the fight but saw O.R. on Saturday.

11. From the evidence on record PW4 Ayot Pamela a sister to the deceased informed court that O.R. threatened to kill the deceased and herself by strangulation.

The deceased who was threatened on Saturday is found murdered on Monday just 2 days after the threat. A rope is tied

around his neck much as it is not said to be the cause of death. It was tied after his death according to PW6 the Doctor.

The police dog is introduced to the scene of crime within the same day of the alleged murder because the deceased went to school and was alive before 2.00pm

After the body was discovered, before 5.00pm, the area was cordoned off. The police dog was brought in at around 9.00pm about six to seven hours after death and it leads the police to the home of O.R. who had threatened the deceased on Saturday.

I have cautioned myself that in examining the evidence adduced before me, no inference of guilt should be drawn unless it meets the standard of proof in criminal cases.

In the case of **Kifamunte Henry vs. Uganda SC- CR - APP. No. 10/1997** cited by the state, it was held that evidence of previous threats is relevant as such evidence shows an expression of intention, it goes beyond mere motives and tends to connect the accused person with the killing.

The defence counsel submitted that the cause of death was different from the threat. That medical evidence showed that death was by heart attack.

With due respect to counsel, the killer was armed with the brick and a rope. The intention of fulfilling the threat of death by strangulation was manifested by tying the rope around the neck and ceiling it on a tree branch.

The evidence in this case is by children which needs corroboration. PW4 informed court that Opiyo Ronald threatened to kill. PW7 saw him on Saturday the day he issued the threats, the accused and his younger brother Akewo stated they were not in the village on that day as they left early for another village and came back at night corroboration is the act of strengthening or confirming alleged facts. The death of Komakech Daniel two days after and the state in which the body was found, tied on a tree with a rope around his neck corroborates the evidence of PW4 the sister who heard the threats.

Court listened carefully to the defence of the accused.

On Monday 2/6/2014, he went to school. His witness DW2 did not see him at lunch time. In his evidence he said he was at school the whole day. It was during cross examination that he stated he went home for lunch. In any case, the deceased met his death between lunch time and 5.00pm when he left home to graze the cattle. Court is convinced, the accused issued threats.

12. Evidence of the police dog is another piece of circumstantial evidence. Much as sniffer dogs have played an important

role in police investigations for decades with their keen sense of smell being noticed and utilized, a lot of caution has been taken before relying on their evidence.

According to the dog handler, the dog detects odours directly from the source of residual scents. The questions to be asked are many:-

- i. Does the odour of the suspect persist in an area after the original source is no longer present? And for how long can it persist? Obviously the area was full of many other different odours many of which even more powerful than that of the suspect in this case who was a thirteen year old child.
- ii. Can the dog distinguish between the different odours even if one smell over powers another and trace a specific scent to its source?
- iii. Can a trained dog when taken to the scene of recent crime quickly like in the instant case track the suspect from the scene?
- iv. Can the dog locate a suspect using an object or piece of cloth known to have belonged to or been in touch with the suspect?
- v. How does the dog handler communicate with the dog?
- vi. How powerful is the sense of smell of a sniffer dog.
- vii. Has it got a superior sense that can be relied on in criminal investigations?

Because of the many questions evidence from sniffer dogs have been both rejected and admitted depending on the circumstances of the case. But one fact which is clear is that, such evidence when admitted must be corroborated by some other evidence which gives strength to the canine evidence as presented through its handler or trainer. The prosecution must provide answers to the above questions in the affirmative before admission of police dog evidence.

In the case of **Uganda versus Muheirwe Chris A2 Kyomugisha Jovia, Mbarara HCT - 05 - CR - CV - 0011 - 2012**, Justice Duncan Gaswaga considered many cases where sniffer dogs were used and some justices described it as hearsay evidence and therefore not admissible while others held that additional evidence explaining the faculty by which these dogs are able to follow the scent of one human being, rejecting the scent of all others would suffice.

He cited the following cases,

- a. S. Vs Shabalala 1986 (4) SA 734
- b. The State vs. Jonas He pule No. CA 4 of 2001 - Namibian court
- c. R vs Trupedo 1920 AD 58
- d. Omondi and Anor V Republic 1967 EA 802,
- e. Ramkarran vs. The state 1992 SCS 156 (Mauritius)
- f. Dilip vs. R 1990 SCJ 217 from sychelles

g. R. vs Haas (1962) 39 WWR 224 and many others. In the end he came up with the following propositions as principles that may govern the considerations for the exclusion or admissibility of and weight to be attached to tracker (sniffer) dog evidence.

1. The evidence must be treated with utmost care (caution) by court and given the fullest sort of explanation by the prosecution.

1. There must be material before the court establishing the experience and qualification of the dog handler.

2. The reputations skill and training of the tracker dog require to be proved the court (of course by the handler/trainer who is familiar with the dog's characteristics of the dog).

3. The circumstances relating to the actual trailing must be demonstrated. Preservation of the scene is crucial. And the trail must have not become stale.

4. The human handler must not try to explore the inner workings of the criminals mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behavior of the dog and give an expert opinion as to the interferences which might properly be drawn from a particular action by the dog.

5. The court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from material not subject to the truth eliciting process of cross examination.

6. It should be borne in the mind of the trial judge that according to the circumstances other witnesses deposed to the evidence; the canine evidence might be at the fore front of the prosecution case or a lesser link in the chain of evidence. Counsel for the accused vehemently challenged and criticized the evidence of the police dog. He submitted the evidence is classified as retrospectant circumstantial evidence which if admitted should be with a lot of caution because it is inherently unreliable. This is because the dog cannot be cross examined. See the citing case of **Abdallah Bin Wendo and Shek Bin Mwambere Vs R (1953) Vol. 20 EACA** at page 166 where it was held that “***where police dogs are used to supply corroboration of an identification of a suspect, it should be accompanied by the person who has trained the dogs and cannot describe accurately the nature of the test employed.***”

PW3 PC Eyagu Julius informed court he is attached to the canine unit and he is referred to as dog handler. He has been in charge since 2011 and he has only one dog. He explained to court how he uses the dog. He introduces it to the scene of crime and it follows the smell of the suspects. It even recovers exhibits. When it was introduced to the scene of the crime which was cordoned and therefore preserved, it led them to the home of the accused. It went straight to his hut and sniffed him out of the other family members, it sniffed also his uniform.

When the uniform was exhibited it was dirty and therefore had sufficient Adour for the accused to enable the dog utilize its sense of smell.

Looking at the time between the commission of the crime and identification of the suspect, it was within less than 12 hours. According to the evidence before court, the scene was preserved and the trail had not become stale.

The handler informed court that the dog's sense of smell was 100% perfect. The scene of the crime and the home of the accused was not very much far apart.

The dog did track the people who first discovered the deceased. In courts view it only trailed the adour of the person who killed the deceased.

Unlike in the case of **Abdalla Bin Wendo and brother (Supra)**, where the person who trained the dog did not attend court, here the person who handles the dog appeared and testified.

It should be a trainer or a dog handler who can give evidence and interprets the actions of the dog. PW3 who has been with this dog for 3 years, he knew it very well.

The defence submitted that the accused did not have an opportunity to kill the deceased because their homes are in different directions and he was Dw2. The bed rock of the prosecution case is the earlier threats and the identification by the sniffer dog. This is purely circumstantial.

The accused put a spirited defence including making signals to his witnesses as they were testifying in his defence. Court had to put

the witnesses far from him. He however continued to make signals to the witness by using his head and eyes. Court was compelled to send him out since he was ably represented by Counsel. The above notwithstanding, conviction in criminal matters is not based on the weakness of the defence. The defence is not obliged to prove the innocence of the accused. It is the duty of the prosecution to prove the guilty of the accused. It is the duty of the prosecution in this case to prove that the circumstances of the case point to the guilt of the accused beyond reasonable doubt.

In the case of (1) Mureeba Janet, (2) Aliga Ismail, (3) Byaruhanga Kassim Vs Uganda.

SC Criminal Appeal No.13 of 2003 citing the case of **R Vs Kipkering Arap Koske and Anar [1949] 16 EACA 135.** Where it was stated “**in order to justify an circumstantial evidence, the inferences of guilt, the incalpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.**”

Applying the test set out in the above cases to this case, PW2 gets the accused O.R. assaulting the deceased on a Saturday, he threatens to kill the deceased by strangulation with a rope, on Monday, the deceased komakech Daniel is found dead, with a rope tied around his neck and coiled on a tree branch. He is in kneeling position and postmortem rules out suicide or death by strangulation but confirms unlawful death.

The police dog is introduced to the scene of crime within a few hours before the odour disappears. The scene had not become stale. Many people appeared at the scene which was cordoned off. It is not clear exactly when the cordoning took place. But the dog managed to distinguished the odour of all these people and sniffed out O.R. who had earlier on threatened the deceased. At his home, the dog just went to his hut and then traced him in his fathers' hut. He was identified by the canine from other family members. Because the dog just sniffed at the door of the closed hut, which was established to be where O.R. sleeps, the door was opened and on entering the dog sniffed on his uniform and bed sheets. OR went to school that day and wore the uniform. It had his odour because he wore then the whole day.

The above scenario is incapable of explanation upon any other reasonable hypothesis than that of guilt. Court was convinced with the evidence of PW4 and PW7 who saw O.R. on Saturday. PW4 heard him utter the threats. It is not probable that any other person caused the death of Komakech Daniel.

His defence of Alibi is rejected by this court. His brother DW1 Akano was not in the same class with him. He did not therefore stay with him the whole day on 2/6/2014. His friend DW2 saw him at break time and never saw him the afternoon until at 5.00pm. By 5.00pm, Komakech Daniel was already dead.

I agree with the gentle man assessors on their opinions I have warned myself about the danger of convicting an accused on the

evidence of the police dog. Courts are divided on its evidence because it cannot be cross examined neither can it speak. But the dog handler or trained are the persons who testify on its behalf just like in cases of dumb and dog persons where court relies on an interpreter in sign language.

The dog handler does not direct the dog. He is led by the dog and interpreters its action. In this case, it led them to the home of O. R., sniffed on his uniform and bed sheets and not any other person's clothing and he happens to be the person who threatened to kill. In courts view, it is immaterial whether he killed the deceased by strangulation or not. What is material is that he killed the deceased as threatened and tied a rope around his neck. I agree with the State Attorney that there are no other-co-existing circumstances to weaken or destroy the inference of guilty. Court is of the view that the circumstantial evidence as led by the prosecution has proved the case of murder against O.R. beyond reasonable doubt.

He is accordingly referred to the FCC for appropriate orders.

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Margaret Mutonyi
Judge
15/09/2014

Right of appeal explained

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Margaret Mutonyi
Judge

15/09/2014

10.50

Juvenile in court

Akena Geoffrey holding brief for Ladwar Okidi

Kizito Aliwaali for State Acaye Alfred Assessor

Ocen Daniel Assessor

Lamwaka Susan Christine- Assistant Probation and
Social Welfare Officer.

Bosco Ocen father of the accused.

Anna for court clerk.

Kizito: It is for sentence

Court: Judgment read and delivered in the presence of
the above.

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Margaret Mutonyi
Judge

15/09/2014