THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

HCT -02-CR-CN-0021-2014

Arising from Kitgum Criminal Case No. 229/2010,

CRB NO. 670/2008

1. OKEMOTO ROBERT
2. OTTO MOSES
3. OKELLO NICHOLAS ::::::: :::::::::::::::::::::APPELLANTS
4. ODONGO SEVERINO

VERSUS

UGANDA ::RESPONDENT

JUDGEMENT OF HON. LADY JUSTICE MARGARET MUTONYI

Okemoto Robert hereinafter referred to as the 1st Appellant, Otto Moses hereinafter referred to as 2nd Appellant, Okello Nicholas hereinafter referred to as 3rd Appellant and Odongo Severino hereinafter referred to as 4th Appellant being aggrieved and dissatisfied with judgment, orders and sentences of the Chief Magistrate Kitgum His Worship Felix Omalla delivered on the 29/10/2014 and sentenced on the 13th day of November 2014, appealed to the High Court of Uganda at Gulu on the following grounds.

1. That the trial Chief Magistrate erred in law and facts in failing to evaluate the evidence of the witness, thereby arriving at a wrong conclusion.
2. That the trial Chief Magistrate erred in law and facts in holding that the Appellants were properly identified at the scene of the crime whereas not.
3. That the trial Chief Magistrate erred in law and facts in passing a very severe and excessive sentence in the circumstances and imposing illegal orders.

The appellants prayed that (1) the judgment, decision, and sentences of the lower court be quashed and set aside.

(2) The appellants be acquitted and set free.

The appellants were represented by Mr. Odongo from Odongo and Company Advocates while Uganda, the Respondent was represented by Mr. Patrick Omia, Resident Senior State Attorney Gulu.

Both Counsel filed written submissions which are on record and will refer to them as and when necessary.

Brief Background:

Seven accused persons including the appellants were jointly charged with two counts wit;

Attempted murder c/s 204 of the Penal Code Act where it was alleged that the seven and others still at large on the 6th day of May 2008 at Nyiki-nyiki village, Kitgum Town Council in Kitgum District attempted to cause the death of Ochen Joseph Kanto.

The second count was conspiracy to commit felony c/s 390 of the Penal Code Act where it was alleged that between January 2008 and 6th May 2008, at Nyiki-nyiki Parabongo village, Kitgum Town Council, the accused conspired together to commit the felony wit, attempted to kill Ochen Kanto Joseph c/s 204 of the Penal Code Act.

Bwomono Charles who was accused No.2 died and therefore his case abated. Okonya Marino Lol and Otto Moses were acquitted. Otto Moses was however held in prison until he was discharged by Hon. Justice John Eudes Keitirima on 5/3/2015 under this Appeal. He was detained in prison under unclear circumstances. No committal warrant was found on record.

The Chief Magistrate found 1st Appellant guilty of attempted murder and found 1st appellant, 3rd appellant and 4th appellant guilty of conspiracy, according to his judgment which is not numbered but would be page 3 of typed proceedings.

He went on to pass the following sentences:

The 1st appellant was sentenced to a fine of 3,000,000/= or in default serve 18 years on the first count and on the second count, to serve a non-custodial sentences of a fine of two million shillings and in default to serve 10 years in prison. All sentences of the 1st convict to run concurrently in terms of imprisonment.

All accused were to pay the complainant 20,000,000 shillings. An order on record dated 2/2/2015 where the learned Chief Magistrate ordered that all the accused persons to compensate the complainant shs. 20,000,000/=. All the seven originally charged accused persons were listed including Bwomono Charles who died and Okonya Michael who was discharged as he was never arrested and therefore not tried.

The grounds of appeal raises three issues to be resolved by this court.

1. Whether the 3 appellants were properly identified at the scene of the crime.
2. Whether the 3 appellants conspired to commit a felony.
3. Whether the sentences passed against the appellants are severe, excessive and illegal.

As the fist appellate court, I have the obligation to re-evaluate the evidence and satisfy myself as to whether the trial Chief Magistrate erred in law and facts and whether he subjected the evidence to proper evaluation. Depending on my findings, I may uphold the judgment and orders made there in or come up with a different decision all together. It is worth noting that as an appellate court, I do not have the benefit of seeing and observing the demeanor of the witnesses, but rely on the evidence on record.

I will resolve the issue in their chronological order. **Whether the 3 appellants were properly identified at the scene of the crime**.

With due respect to the learned Chief Magistrate, his judgment falls far below the expected judicial standards of judgment writing. He did not state the essential ingredients of the two offences of attempted murder and conspiracy to commit a felony.

His judgment does not therefore bring out the issues which he was to resolve. S. 204 of the Penal Code Act provides "***Any person who (a) attempts unlawfully to cause the death of another or (b) with intent to act, which it is his or her duty to do such act or omission being of such a nature as to be likely to endanger human life commits a felony and is liable to imprisonment for life."***

The essential ingredients in the above section are the following:

1. That there was an attempt to unlawfully cause death of another.
2. The attempt was with the intent to cause death.
3. The attempt is manifested through an act or omission.
4. That the accused is the person whose action or omission was intended to cause death of another.

On the second count, of conspiracy to commit a felony c/s 390 of the Penal Code Act it provides ***" Any person who conspires with another to commit any felony or to do any act in any part of the world which if done in Uganda would be a felony and which is an offence under the laws in force in the place where it is proposed to be done, commits a felony and is liable, if no other punishment is provided, to imprisonment for seven years or if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such lesser punishment".***

The essential ingredients under this section are the following:

1. There must be two persons or more.
2. The persons act in unison or agreement to commit a felony either in Uganda or outside Uganda.
3. Engagement in acts towards fulfilling the commission of a felony.

After spelling out the essential ingredients, then the trial Magistrate should have gone ahead to evaluate the evidence applying the facts to the law before drawing any conclusion.

Attempt is defined in Black's law Dictionary 6th Edition on page 127 as ordinarily means ***"an intent combined with an act falling short of the thing intended"*** and in criminal law it is ***"intent to commit a crime coupled with an act taken towards committing the offence"***

In the instant case, it was an attempt to commit murder by shooting the complainant in the first count and conspiracy to commit a felony of murder. Conspiracy is defined under the same dictionary (supra) at page 309 as a **"combination of between two or more persons formed for the purpose of committing, by their joint efforts some unlawful or criminal act…"**

For the trial court to come up with a judgment where the accused are convicted, it must be satisfied that the prosecution has proved all the essential ingredients of the offence of the crime beyond reasonable doubt.

This is because, the burden of proof in criminal cases rests on the prosecution since the accused persons are presumed innocent under the constitution of the Republic of Uganda Article 28(3) (Art.28 (a) or until one pleads guilty.

In the lower court, all the appellants pleaded not guilty which brought in issue all the ingredients of the offence of attempted murder and conspiracy to commit a felony.
The standard of proof is very high. It is beyond reasonable doubt.

The trial Chief Magistrate wrote in his judgment that court has taken into account both the burden and standard of proof, in all criminal cases and is bound by the same.

Let me revert to the first issue. The evidence on record, show that there was a gunshot and that the complainant PW1 was shot on the head and PW4 was shot on the nose slightly. The medical evidence in this case was in the form of PF3 which was dated 5/5/2009 and signed on 3/9/2013 and yet the offence was allegedly committed on 6/5/20108. The injuries were examined by the medical personnel 5 years later. I did not find any reasons on record why the form was filled after 5 years.

In fact the prosecution case had already been closed. The case was re-opened to call a medical officer and an investigation officer whose evidence was not very useful to court. The trial Chief Magistrate did not even refer to the issue of examining the victim five years later.

PW1 Ochen Joseph Kanto testified inter alia that on 6/5/2008, he was at his home at around 8:00pm watching a TV outside. He had his wife Akello Grace, Oura James, Ouma and other students who were staying with them. That while there, he saw Okonya Michael, (who was discharged). 1st appellant Okemoto Robert and Otto Moses (who was acquitted) moving up and down near my place. After a few minutes, he saw a certain person putting on a black jacket standing behind him. He became suspicious and tried t identify the person behind him. Immediately he jumped from the left side to the right side. I was then shot on the head by that person. When he was asked by court, he said " ***the person who was behind me is the one who shot me and I never recognized him***" earlier on he said the 1st appellant is an LDU and while under cross examination, he stated A6 who is Okello Nicholas made arrangement for his arrest (complainant's arrest).

In his evidence, the complainant did not identify the 1st appellant Okemoto Robert as the person who shot at him. From his testimony, he knew the 1st appellant very well. He was not the person he saw dressed in black jacket. He never identified the person who pulled the trigger but he saw him.

PW1 the complainant also never saw the 3rd appellant Okello Nicholas at the scene of the crime or near there. He did not also see the 4th appellant Odongo Severino at the scene of the crime or near there. PW1 only has a grudge with Okemoto Robert, the 1st appellant because he claims he attacked him in 2008, he reported to police and was arrested and detained for 17 months. The fourth appellant Odongo Severino and Ongee Marino, organized police officer to attest him on allegations that he had forged powers of Attorney and he was later released in the same year 2008. His evidence reveals a grudge between 1st appellant, 4th appellant and 3rd appellant. This explains the reason why they were charged together with others who were acquitted. They were suspected because of the existing grudge. PW2 Akello Grace, wife to PW1 did not see the 3rd

appellant Okello Nicholas and the 4th appellant Odongo Severino at the scene of the crime. She knew all the accused persons being neighbours.

She claimed she saw the 1st appellant, Okonya and Otto passing and then stopping. That they passed at a distance of 6 meters and after passing several times, they heard a gunshot.

She claimed she saw A1 ie. 1st appellant wearing a jacket but was not holding anything and she never saw the 4th appellant Odongo Severino.

She informed court that at the time of the gunshot, she was still seated with her husband and that there were many people there.

PW2 did not see the 1st appellant shoot the complainant. She did not see the 3rd appellant Okello Nicholas and 4th Appellant Odongo Severino at the scene at all. She claimed she saw Otto Moses who was acquitted among the people moving near their home.

PW3 Ocira Alex Otim an employee of the complainant made a statement at the police which was tendered in court as exhibit D1. His statement in court was very different.

In his statement dated 8/5/2008 which was made two days after the incident, and which I suppose was made based on his fresh memory of the events of 6/5/2008, he stated, ***" I usually assist Ochen Jospeh Kanto (victim) selling in his kiosk which also serves as a bar.***

On 6/5/2008, at around 21:30 hours, as I was in the kiosk, the light from the generator was on and some customers were watching film over the screen. The victim came from the town and joined us. He ordered for a drink which I brought to him together with his friend Ocira who was also hit by a bullet. The wife of the victim Grace Akello was also inside watching the film. I was up and down serving people and later when I entered inside the kiosk, behind the counter, I heard a gunshot and immediately, the generator stopped. At first, I thought the sound was from the generator which made it go off. As a rushed out, I found everybody running away and I also followed them without knowing what took place. The gunshot happened when I was inside whereby I cannot know who did it. This is what I can state"

Much as this statement was not made on oath, the employee of the complainant could not lie. He was right there at the scene of the crime moving up and down serving people but he never saw the appellants at the scene of the crime as stated by his bosses PW1 and PW2 who alleged they saw the 1st appellant and two other accused persons Otto and Okonya Michael.

In his evidence in court, PW3 departed completely from his police statement. He claimed at around 5 to 6 pm he saw Okonya come from town and went to the home which is next to the complainant. (He does not mention whose home). Later on after 6.pm, I saw him again coming from town with another person, I did not know. He was a short man, he resembled A1. It was A1 later on at around 7:30pm, when we had lit a generator, I saw Okonya going to town again alone.

In cross examination, he claimed he told police that he had seen Okonya and that he does not know why the police did not record that he had seen Okonya and A1 at 5pm.
He even contradicted himself because in his story to court, he said he saw Okonya between 5 to 6 pm and it was later after 6.pm that he saw Okonya again with a person he did not know Okonya was with A1 the 1st appellant? This is a witness who was telling court deliberate lies. In any case no identification parade was held for him to identify the first appellant because he never mentioned him at all in his police statement. Any prudent judicial officer ought to have known that PW3 was telling court lies to support his boss's allegation. His testimony does not support the evidence of PW1 and PW2 at all.

PW4 Ocira James informed court that on that day, he was watching a film with the wife of the complainant, the complainant and other people he did not know. That while watching the film, Okemoto Robert, 1st appellant, Okonya and Puto (Bwomono) passed in front of us. This was around 8.pm. That they passed at 1 meter from where he was seated.

That they passed three times, standing at a dark spot and then come back. That he asked Okemoto why they could not sit down and watch, and he told him, he wanted to buy a cigarette first. That after three minutes he heard a gunshot behind him.

In cross examination, he claimed he could have even touched them if he wanted because they passed very near him.

PW2 stated she was seated next to PW1 and she saw the 3 accused passing about 6 meters away. PW4 claims he was about 1½ meters away from PW1 which means if at all the 3 accused passed near him, they were about 4 meters away. There is no way one can touch a person who is passing four meters away.

PW4 also claims they would hide in dark spots. No other witness was brought to corroborate the issue of 1st appellant hiding in dark spots. And one wonders why PW4 who claimed was enjoying the Kinigeria film, left watching and concentrated on the movements of the people he allegedly saw. Being a friend to the complainant according to the first information to police by PW3, he spiced his evidence to suit the imagination of his friend PW1.

The trial Chief Magistrate did not summarize the evidence of the prosecution case at all in his judgment. He had done that, which is done during evaluation of evidence, he would have discovered that the prosecution evidence did not put the 1st appellant, 3rd appellant and 4th appellant at the scene of the crime. The 1st appellant is said to have passed by and after about 3 minutes, there was a gunshot. This does not mean that he is the one who shot the complainant.

The learned Chief Magistrate had this to state in his judgment on page 2 last paragraph. "**As said earlier, the prosecution identified A1, A2 and A3 as those who were present at the time the gunshot hit the complainant. Thereafter the incident though neigbours, all disappeared until at different intervals were arrested and charged. A4 gave a reason he did not respond to the gunshot. Because he had people cry that A2 had shot the complainant"**

To me, though, there is no direct evidence showing who shot, they were party to the shooting. It is unfortunate that A2 did not last to face the trial; possibly he could have evidence linking us to evidence close on A1, A2 and A3 were discharged due to death, and failure to bring A3 to justice A1 is singularly found to be guilty of attempted murder c/s 204 of the Penal Code Act"

His decision is not backed up by direct evidence nor circumstantial evidence. The prosecution evidence did not prove that they saw 1st appellant or Bwomono Charles A2 or Okonya Michael shoot the complainant.

Criminal liability is personal responsibility. The prosecution has the burden to prove its allegation against each accused person beyond reasonable doubt. The Chief Magistrate therefore erred in law and in fact by ruling that therefore since A1 and A3 were discharged due to death and failure to bring A3 to justice, A1 i.e. 1st Appellant is singularly found guilty of attempted murder. His conviction is not based on the prosecution evidence but the trial Chief Magistrate fanciful imagination to an extent that he imagined A2 could have had evidence linking A1, and A3 to the crime. Even if A2 had lived, he was not a prosecution witness but an accused.

In my opinion, all the 3 appellants were not properly identified and placed at the scene of the crime at the time of shooting. The complainant who saw the person who shot him did not identify any of the accused persons more so the 1st appellant as the person who shot him on the head.

This takes me to the 2nd issue of <u>whether the 3 appellants conspired to commit a felony.</u>
As mentioned earlier, criminal responsibility is personnel to an individual even in the case of conspiracy. This was the holding in the case of **<u>R. v Shannon (1974)2 ALL ER 1009 at page 1020-1021</u>**. Where the House of Lords supported this view. The prosecution had to prove that the appellant had an agreement, and that the agreement was to kill the complainant by shooting and that the appellants masterminded the shooting. There is no credible evidence on record whatsoever which proves conspiracy to commit the felony.

PW3 attempted to bring in the conspiracy theory by claiming he saw one Okonya moving from town to a home near the complainant, around 5 pm to 6pm. Then seeing him with a person who resembled A1, the first appellant. This was very different from his police statement.

The trial Chief Magistrate did not even comment on the credibility of this witness who in my opinion told court lies. He was not illiterate that he did not read through his statement. Apart from this witness, no other prosecution witness said anything about conspiracy. A classic case of conspiracy is that of **Arvind Patel versus Uganda, SCCA No.36/2002**, in that case Arvind Patel was charged with one Okello to kill the complainant.

There was overwhelming evidence to prove the agreement to show that the purpose of the agreement was to kill the complainant and that it was the appellant who masterminded it. The appellant's accountant, PW2 one Sgt. Nsubuga PW3, one Jumba, the appellant's driver and PW4 one Odeke were supposed to carry out the mission. A witness heard the appellant making an agreement with Odeke and Andrew Okello at the first meeting held at Railway goods shed in Kampala.

The conspiracy was reported to police and eventually the two were arrested i.e. the appellant and Okello. Okello pleaded guilty and appellant was tried and convicted.

In the case under review, there is no single witness, who testified that Okemoto Robert, Okello Nicholas and Odongo Severino held meetings and conspired to kill the complainant by shooting between January and May 2008. In the instant case no evidence was adduced by the prosecution that they agreed that A1 was to carry out the mission by shooting on that day.

The prosecution did not adduce any evidence in court, by way of tendering in the alleged gun that was recovered from A1/1st appellant's home, no evidence from the ballistic expert. I agree with the submissions of counsel for the appellant that the trial Chief Magistrate imported his own evidence about the ballistic report. There was no need for him to have added evidence from his own head.

The so called ballistic report the trial Magistrate is making reference too is extraneous. It was not officially tendered in court by anyone as he was never summoned as a witness. This kind of conduct of deciding cases based on extraneous information is illegal and perverts the course of justice. How did he get to know about it?

No gun was tendered in court and identified as the gun used by 1st appellant to shoot or agreed by the accused person/appellants to be used in the commission of the crime. He did not evaluate evidence of the prosecution at all on the count of conspiracy. It was very erroneous of him in law and fact to base his conviction on the basis of defence evidence which did not amount to admission.

The learned Chief Magistrate went on to hold as follows on the conspiracy charge.

"Only 3 accused persons were identified but on defence A4 said, he could not respond to the incident though he was at home for fear since A2's name was being cried that he shot the complainant, het he is 50 metres away but also disappeared and arrested later, he also admits they had a meeting to sort out the land challenges caused by the complainant. A6 also told court that A1 had told him that the dispute would make parties kill themselves and that he thought it was fool's day. That even on hearing A6 and A7, did not report to police or any authority. That they all knew what would happen but decided to keep to themselves. That means A1, A2 A3 together with A6 and A7 knew about their plan and only waited for the day which was the 6/5/2008.

Therefore, I find A1/1st appellant, A6 Okoth Nicholas, 3rd Appellant, and A7, Odongo Severino , 4th Appellant guilty of conspiracy" he does not state anywhere inhis judgment that the prosecution witnesses proved the offence of consipiracy to commit a felony. It is in his imagination that A1, A2, A3 together with A6 and A7 knew about their plan and only waited for the day which was 6/5/2008. No witness mentioned that they held a meeting and agreed on the date of 6/5/2008 to fulfill the plan of killing the complainant.

In my consideration opinion based on the evidence on record supporting the charge of conspiracy to commit a felony c/s 390 of the PCA. It is trite law that a conviction should be based on the prosecution case not the weakness of the defence.

The last issue and ground is <u>whether the sentences passed against the appellants were severe, excessive and illegal.</u>

On this issue, Council for the Appellants left it to court while the learned State Attorney (Senior) submitted, the sentences imposed by the Chief Magistrate were appropriates and should be maintained as they are lenient given the fact that the offence of attempted murder attracts a maximum of life imprisonment. He was silent on the offence of conspiracy to commit a felony.

He submitted the order of compensation of 5,000,000/= each be maintained as well. And prayed for the Appeal to be dismissed as it has no merit. Article 28(8) of the constitution of the Republic of Uganda 1995 provides, "***No penalty shall be imposed for a criminal offence that is severe in degree or description than the maximum penalty that could have been imposed for the offence at the time it was committed***" supposing there was evidence to support the charges, of which this court is saying, there was no sufficient evidence on record, the trial Chief Magistrate erred in Law to sentence the Appellants to a non-custodial sentence of 2 million shillings and in default serve 10 years imprisonment for the offence of conspiracy to commit a felony.

The trial magistrate I believe never looked at the law. S. 390 of the CPA prescribes seven years imprisonment as penalty on conviction as the maximum. I wonder where he got 10 years. This is contrary to the law and therefore illegal.

Attempted murder attracts a sentence of life imprisonment, a sentence of 18 years is therefore within the ambit of the law. However, the trial magistrate imposed fines of 3,000,000/= or in default imprisonment for 18 years and 2,000,000/= or in default imprisonment of 10 years. Supposing the convictions were backed by evidence, there is a problem with the fines imposed and default sentences. It was held in the case of **Okae Terensio and 3 others vs Uganda, HCT-02-CO-CN-07/07** here in Gulu by Justice Remmy Kasule as he then was that the default sentences of 2 years in default of paying a fine of shs. 400,000/= for all appellants is erroneous in law as it offends the provisions of s. 180 (d) of the MCA, Cap.16, Laws of Uganda.

This section has a scale which fixes the maximum period and it would appear, the maximum period for any fine above 100,000/= is 12 months. Even, the 4th schedule under the sentencing guidelines under legal notice 8/2013 is very clear on this.

The sentence of 18 years imprisonment is therefore erroneous and so is that of 10 years in default of payment of 3,000,000/= and 2,000,000/= shillings respectively. The learned State Attorney also supported the compensation of 5,000,000 million shillings by each appellant. He just made an omnibus order for compensation which did not have any background. The compensation of 20,000,000/= extracted and signed by the Chief Magistrate is bad in law by reason of being omnibus and ambiguous.

In the course of the proceedings, the complainant did not directly or through the State Attorney pray for compensation of 20,000,000/=. A trial court may award or order for compensation, but the court must be guided by evidence before it can exercise its discretion.

It would also be very difficult to execute such an ambiguous and omnibus order. With the above said, as the first Appellate Court, after reviewing and re-evaluating the evidence, I am of the view that the trial Chief Magistrate did not properly evaluate the evidence before him and as a result, erroneously convicted the Appellants and sentenced them. He also made erroneous orders on compensation. In the result, the Appeal is allowed on all grounds, the convictions, sentences and orders are quashed and set aside.

The appellants are acquitted in the manner following 1st appellant is acquitted on the charge of attempted murder c/s 204 of the Penal Code Act and conspiracy to commit a felony c/s 290 of the Penal Code Act. 3rd, 4th, appellants are acquitted on the charge of conspiracy to commit a felony c/s 290 of the CPA. They should be released unless lawfully held on other charges.

The state is free to appeal against the ruling to the Court of Appeal in 30 days.

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Hon. Lady Justice Margaret Mutonyi

Judge

30/6/2015