

IN THE HIGH COURT OF UGANDA AT SOROTI

CRIMINAL SESSION CASE NO. 29 OF 2012.

UGANDA V ENGONU CONELIOUS AND OJANGE GABRIEL.

JUDGMENT

BEFORE HON. LADY JUSTICE H. WOLAYO

Both accused persons are jointly indicted with two counts of murder c/s 188 of the penal code Act. In count one, It is alleged that the two accused persons on 2.7.2011 at Odapakol village, Kateta sub-county, Serere district with malice aforethought murdered Ekaju Justine.

In count two, it is alleged that the two on 2.7.2011 at Odapakol village, Serere district with malice aforethought murdered Ochom Emmanuel.

Prosecution was led by Ms Sera Rita Becky State Attorney while the accused persons were represented by Mr. Isodo on state brief.

Assessors were Engwedu Washington and Amoding Florence

Key elements of murder:

1. Proof of death
2. The deaths were unlawfully caused
3. The deaths were intentionally caused with malice aforethought.
4. Participation of both accused persons individually or jointly.

Proof of death

Prosecution relied on medical evidence and witness testimony to prove that death occurred. With regard to the deceased Ekaju Justine, prosecution relied on Pexh. 1 a post mortem report that shows the body was examined on 2.7.2011 by clinical officer Anyodi Catherine who found that the deceased suffered gun shot wounds in the trunk. The clinical officer

concluded that the deceased Ekaju sustained trauma to the liver, kidney and spleen that led to his death.

With regard to the deceased Ochom Emmanuel, prosecution relied on PW1 Ariko Julius who testified that on 2.7.2011 at about 5 .30 am, he was on his way to the lake with Ochom Emanuel his brother who was some ten meters behind, when the two came across three people standing by the road side and as he flashed his torch , he recognised one of them as Engonu A1 who ordered him in Swahili, ‘wewe simama’. On stopping, A1 Engonu shot at him in the abdomen at close range but the witness remained standing. Whereupon, Engonu pushed him down. At the time, Engonu was armed with a gun and his head was not covered. The other two assailants had masks and wore dark long attires.

In the meantime, the other two persons were attacking Ochom . As Engonu went to aid his accomplices, the witness made his escape while holding to his intestines, and hid in a nearby bush some 13 meters from where the three people including Engonu were arguing whether to kill Ochom or not. He also heard Ochom plead to one Opolot to spare his life. Shortly after, the witness Ariko heard a gun shot . He moved further away and heard the sound of a motor cycle and the sound of a second gun shot .

The evidence of PW1 Ariko with regard to death of Ochom is corroborated by that of PW3 Det. Const. Ogwal James who responded to reports of the incident in Serere on 2.7.2011 and on arrival at the scene , he found two bodies of people who had been shot. One was lying near a bicycle and another lay near a motor cycle. It was the evidence of PW1 Ariko in cross examination that he was riding a bicycle when he was stopped by A1 Engonu .

According to PW6 Det. Const. Okolis, he visited the scene of crime in Omagara village Kateta sub-county on 2.7.2011 and found two bodies with bullet wounds. One body had been shot in the chest while the other had been shot in the back.

From the foregoing, it is clear that Ochom Emmanuel, brother to Ariko was shot and killed on 2.7.2011 in spite of the absence of a post mortem report. Section 113 of the Evidence Act permits the court to presume the existence of certain facts. In **Kimweru v R [1968] EA 452**, the Court of Appeal for East Africa held,

‘that although death may be proved by circumstantial evidence, that evidence must be such as to compel the inference of death and must be such as to be inconsistent

with any theory of the alleged deceased being alive , with the result that taken as a whole, the evidence leaves no doubt whatsoever that the person in question is dead. ‘

The evidence of PW1 Ariko who was moving with his brother that morning when he heard his brother Ochom pleading with one Opolot to be spared and soon after a gun shot, coupled with the evidence of PW6 Det. Const. Okolis who saw two bullet riddled bodies leads to the irresistible conclusion that the state proved beyond reasonable doubt that Ochom Emmanuel is deceased.

Whether the deaths were unlawfully caused.

That the deceased Ekaju died of gun shot wounds was not disputed by the defense. Indeed Pexh. 1 was admitted by consent of both counsel. There is further evidence of Ariko PW1 that after he heard the first gunshot, he heard a second gunshot as he moved away from the scene. There is an irresistible conclusion that the second gun shot Ariko heard took down Ekaju Justine. The two bodies were seen by both PW3 Det. Const. Ogwal James and PW6 Det. Const. Okolis John Steven who visited the scene of crime on 2.7.2011 the date of the killings. Okolis described the two bodies as having bullet wounds in the chest and back respectively.

With regard to the deceased Ochom , the evidence of his brother Ariko PW1 that he heard A1 Engonu and his two accomplices arguing whether to kill Ochom who pleaded to Opolot not to kill him point to the logical inference that his death was unlawfully caused.

The prosecution therefore proved beyond reasonable doubt that the deaths of the two deceased persons were unlawfully caused.

Whether the deaths were caused with malice aforethought

Under this issue, prosecution had a duty to prove that the deaths were intentionally caused or that the actions of the accused persons were such that they did not care whether the deceased persons died.

Prosecution relied on PW1 Ariko and medical evidence to prove malice aforethought.

From the evidence of PW1 Ariko, he survived death when after being shot by Engonu A1, the latter pushed him down, then rushed to tackle Ariko's brother Ochom who was moving some ten meters behind him . As his brother was being attacked by A1 Engonu and two

others whom Ariko did not identify as they wore masks, he hid in a nearby bush from where he heard his brother plead with one Opolot not to kill him followed by a gunshot. A short while later, Ariko heard another gun shot. Pexh. 1 revealed injuries to liver, kidney and spleen of Ekaju. The pleading for his life that amounts to a dying declaration and then the gun shots that killed the deceased Ochom constitutes circumstantial evidence that the perpetrators did not care if the deceased died which leads to the inference that there was malice aforethought.

Participation of A1 Engonu

Prosecution relied on several witnesses to prove participation.

This is a case of a single identifying witness in as far as Ariko PW1 who survived the attack on himself and his deceased brother identified Engonu A1 whom he knew as a neighbour for approx. ten years. I believed Ariko that he was shot at in spite of absence of medical evidence. He displayed a scar on his abdomen resulting from a gun shot wound. Ariko identified Engonu when he flashed a torch in his face that early morning at about 5.30 am.

It is trite law that where there is a single identifying witness, the court must be satisfied that conditions favoured correct identification. In Court of Appeal **Criminal Appeal No. 203 of 2004 Asiku and anor v U**, the Court of Appeal reiterated conditions favourable for correct identification. These are:

1. Whether the accused was known to the witness at the time of the offence.
2. The conditions of lighting
3. The length of time the witness took to identify the accused
4. The distance from which the witness identified the accused.

All these conditions were present in this case. It was dawn, Ariko had a torch, he was shot at close range by A1 Enongu who then moved to join two other people to attack the deceased Ocom who was some ten meters behind Ariko.

In as far as Ariko's testimony is concerned, A1 is placed at the scene of crime on 2.7.2011 at dawn, at about 5.30 a.m.

Prosecution also relied on discovery of exhibits linking A1 Enongu to the crime.

According to PW3 Det. Const. Ogwal James, on 2.7.2011, he was attached to Soroti CPS when he was required to respond to an incident that had happened in Serere district. He came to learn that A1 was arrested in connection with the incident where two people were shot dead. Later, PW3 and other police officers went to search A1's home in Agirigoi Omagara village where an SMG rifle without a butt, five loaded magazines, two voters card one belonging to the deceased Ekaju Justine and another to one Olupot were recovered. Also recovered were an army uniform, and four mobile phones . According to PW3 all these items were in a pot buried in a garden about 50 meters from A1's home.

It was PW3's evidence that he handed the items to the store man CPS Soroti .

The evidence of PW5 Cpl. Odong Francis is that in July 2011, he was stationed at Soroti CPS and on 6.7.2011, officers from Rapid response Unit brought him exhibits that he exhibited in the register. These included a stick grenade, offensive grenade, SMG rifle, five magazines, a baton, two head masks, army belt, pair of army boots, a weighing scale, army cap, army camouflage uniform, plain army uniform, police cap, four nokia phones, a black jacket, grey trousers, light blue shirt, two voters cards for Ekaju and Olupot respectively, a big clay pot with a cover. According to PW5 Odong, on 7.7.2011, Det. Sgt. Mbulaite signed for these exhibits and took them to Rapid response Unit Kireka. The items were recorded on Pexh. 9, a police exhibit slip, by AIP Kedi on 2.7.2011 who was said to be now deceased.

The discrepancy in the dates when PW5 Odong received items and the date in Pexh. 9 indicating 2.7.2011 as date when AIP Kedi recorded the items on the exhibit slip is self explanatory. While Odong received the exhibits on 6.7.2011, AIP Kedi (deceased) recorded them on 2.7.2011.

The witness identified a baton, 240,000/ cash , four nokia phones, and weighing scale , and that were marked PExh. 4, 5, 6 , 7 respectively as some of the exhibits recovered and exhibited under exhibit slip marked Pexh. 9.

PW6 Det. Okolis John corroborated PW5 on the recovery of exhibits in a pot in a garden near the home of A1. According to Okolis, A1 directed AIP Ayer to where the gun was so Ayer called Okolis and another Officer and directed them where the gun was hidden.

PW6 Okolis proceeded as per directions and found an area with soft soil close to a tomato garden and found a big pot buried underground. The items described by PW5 were in the pot. PW3 Det. Ogwal described this location as 50 meters from house of A1.

Prior to the recovery of these items, PW6 Okolis searched Engonu's house on the day of the incident after he had visited the scene and received information that A1 was involved.

After visiting the crime scene, he and other officers searched A1's house after arresting him and found the following items:

An extension cable, a pair of trousers wet at the hem, ordinary wet jacket, a bicycle with fresh soil suggesting it had been used in the night, a torch, panga and 240,000/. These exhibits were recorded on an exhibit slip marked pexh. 8.

PW4 Atim Betty, a concubine of A1 testified that one day approx. three months prior to the killings, A1 called her to give her money and on reaching him, she found him seated on the bed dismantling a gun. She also saw a pair of army uniform and a pair of police uniform.

The recovery of this gun that was seen by PW4 Atim, after directions were procured from A1 himself and the location of the gun about 50 meters from his home according to PW4 Det. Ogwal, a few days after the killing of the two deceased persons is strong circumstantial evidence that it is the same weapon linked to A1 that was used in the shooting and therefore circumstantial evidence of his participation in the two deaths.

According to PW4 Atim Betty, who was cohabiting with A1 shows that on 1.7.2011, she was at home alone at night and did not know where A1 had gone. In the morning, he returned at about 6 a.m dressed in a light blue shirt and brown trousers that had spots of blood on them. He went to bathe then went to see bodies of people who had been killed. According to the witness Atim, a person had come in the morning and told A1 that two people had been killed.

This circumstantial evidence of the gun that Atim saw A1 with some three months prior to the murders, the recovery of a gun near his home by police, his disappearance from home on the night of 1.7.2011, only to return in the morning at 6 am after the killings with blood stained clothes according to Atim PW3, coupled with the identification by Ariko PW1

during the attack on Ariko and Ochom the deceased, place A1 at the scene of crime and proves his participation in the deaths of Ochom and Ekaju.

With regard to participation in the death of Ekaju Justin, PW5 Cpl Odong Francis who received exhibits from PW6 Okolis who recovered them describes a voter's card in the name of Ekaju Justin that was among the items he exhibited and which PW6 and others found in a pot near the home of A1.

Secondly, Ariko PW1 described how he heard a second gun shot after the first shot that killed his brother. The second shot was heard shortly after the sound of a motor cycle which PW6 found at the scene on 2.7.2011.

The discovery of Ekaju's voter's card after his death, the two deaths happening within minutes of each other means it is A1 and his two accomplices that were responsible for the death of Ekaju Justin.

Participation by A2 Ojange.

Prosecution relied on evidence of PW1 Ariko, PW2 Adeke Grace and PW4 Atim Betty. According to PW1 Ariko, he did not know A2 Ojange but he often saw him move with Enongu. During the attack by A1 Enongu and two others, Ariko did not recognise the other two whom he said wore musks and long dark attires.

PW2 Adeke grace, being a wife of A1, i was satisfied that she was not compelled to testify and had come to court willingly. Her evidence is that she is a resident of Kanyangan village, Kateta sub-county. That in May 2011, at 9 pm, she was at home when her brother in law Ojange A2 came to her home with a polythene bag which she suspected contained a gun. She showed him a place to sleep in the kitchen and at midnight, Adeke went to the kitchen to collect a match box and saw a gun placed against the kitchen wall. On asking him about the gun, Ojange did not respond.

It was the evidence of Adeke PW2 that on 2.7.2011, police officers visited her home and she told them about the gun she had seen with Ojange.

The other evidence relied on is that of PW4 Atim Betty. Her evidence is that she had cohabited with A1 Enongu for six months prior to the incident of 2.7.2011. On

interviewing her , i found that she was not compelled to testify against A1 and in any case, she was not a wife within the meaning of section 36 of the Evidence Act.

Her evidence is that A2 Ojange often visited her home and each time he came, he would leave with A1 at night only for A1 to return in the morning.

On the night of 1.7.2011, the evidence of PW4 Atim is that she was alone at home and she didn't know where Engonu had gone. On the next day in the morning when it was still dark , A2 came to her and asked for 500/ to repair a bicycle so he could ride to Ngora.

The evidence of Adeke PW2 and Atim PW4 who were wife and mistress to A1 tends to show that A2 Ojange was a close associate of A1.

In Mureeba and three others v U Criminal Appeal 13 of 2003(SC), the 1st appellant was sighted by the deceased in her area of residence and she voiced these concerns to PW1 Muhammed and the conduct of the other appellants being seen with a gun during the day of the murder . The day after the murder, the 1st appellant was rejoicing and dancing that the deceased had been killed.

The Supreme Court upheld the findings of the Court of Appeal and the trial judge that this evidence was admissible and constituted circumstantial evidence that pointed irresistibly to the guilt of the appellants. The Court held that ,

It is a well established principle stated in decided cases that in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. Simon Musoke Vs. R. (1958) EA 715 and Bogere Charles refers.

In the instant case, the regular visits of A2 to Enongu's residences where PW2 Adeke saw him with a gun, his conduct the morning of the murders when he arrived at PW 4 Atim's home asking for 500/ to repair a bicycle so he could go to Ngora constitutes circumstantial evidence of his guilt and participation in the murder of the two deceased persons as his intention was to flee far from the scene. According to PW6 Okolis, A2 was arrested when he handed himself to the LC V chairman of Serere Mr. Opit.

Admissibility of evidence irregularly obtained

It was suggested by the defence that PW6 Okolis illegally obtained the directions to the pot that contained the gun and grenades. DEXH. 2 was tendered during examination in chief of A1 evidence. The document gives directions but it is not signed. PW6 did not mention securing written directions from A1. His evidence was that he got directions from AIP Ayera and it is A1 who gave her the directions. A similar point was considered **Kenya HC criminal Appeal No. 22 of 2013 reported as Abiud Muchiri & anor v R (2014) eKLR**. In that case, the appellants were charged with aggravated robbery and the 1st appellant led police to the store where the stolen property was kept.

In dealing with whether this evidence was illegally obtained, the appellate court relied on the principle that was stated in **Karuna s/o Kania v R (1955) 22 EACA 364** that all facts relevant to the matters in issue are relevant. The East African court of appeal held that the

‘the test to be applied in considering whether evidence is admissible is whether it is relevant to matters in issue. If it is relevant, the court is not concerned with how it was obtained...’.

The exception to this rule is confessions not properly obtained.

As prosecution did not attempt to tender DEXH. 2, the argument that the discovery of the gun was through unlawful means does not hold water.

In any case, I closely examined DEXH.1 and DEXH. 3 that were samples of documents were authored by A1 and saw little or no difference with the handwriting in DEXH. 2.

That said, I find that the evidence of the gun, Ekaju’s voter’s card, and magazines found in a pot buried in the ground some 50 meters from A1’s home located in Amagoro, and situated in the same area as the scene of the murders is admissible as facts relevant to the matters in issue.

Exhibits recovered and not exhibited.

According to PW5 Odong, the storeman, he received a rifle, magazines and voters card for deceased Ekaju from Rapid Response Police on 6.7.2011 but these items along with grenades were taken to Rapid response police in Kireka by Det. Mbulaite for the accused persons to be tried by the Court Martial as was the practice those days. What is crucial is that these items

were described by the different witnesses who handled them from recovery to the storage to the movement out of the police station.

In **Mohamed Taki v R [1961] EA 206**, the appellant was convicted by the magistrate's court of receiving stolen watches . The court relied on one Bossa who a postal clerk who stole the watches at the post office while they were in transit from Switzerland to addressees in Uganda. Invoices and orders for the watches was accepted as evidence of the stolen watches. On appeal, it was held that the addressees were entitled to give oral evidence of orders they placed . It was further held that while the magistrate should have had before him conditions that made section 30 of the Evidence Ordinance applicable, he was satisfied himself that the attendance of witnesses from Switzerland could not be procured without unreasonable delay.

In the instant case, PW4 Cpl Odong the storeman who received the rifle , magazines and voter's card for Ekaju testified the items were taken by Det. Mbulaite to Rapid Response Unit in Kireka. I am therefore satisfied that the chain of custody of the items was well established.

Counsel for the accused persons submitted that there is no evidence that the rifle or gun recovered could fire as no ballistic report was tendered.

I have found elsewhere in this judgment that circumstantial evidence points irresistibly to the two accused persons as the perpetrators of the two murders.

Common intention

In **Simbwa Paul v U Criminal Appeal 23 of 2012 (Court of Appeal) reported as UGCA (2014) 57 on ulii** , the Court of Appeal cited with approval **Court of Appeal Criminal Appeal 6 of 1978 Kisegerwa & anor v U** where it was held that

' in order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence.... Common intention may be inferred from presence of the accused persons, their actions and omissions to dissociate from the assault.'

I have found that circumstantial evidence led me to infer that A2 was an active participant in the murders of the two deceased persons.

Both A1 and A2 were close associates. A2 had been cited with a gun in May 2011 by Adeke PW2. On the morning of the murders, he arrived at the home of Atim PW4 at dawn.

The two therefore shared a common intention to kill when the two deceased persons were gunned down under circumstances already discussed.

Both accused gave sworn statements in which they raised the defence of alibi. A1's statement is that he was at home on 2.7.2011 and he did not leave home at 4 a.m as alleged by PW4 Atim. He was arrested in the morning as he made his way to the scene of crime.

It is noteworthy that PW4 Atim did not say he left the house at 4 a.m. Her evidence was she did not know where he was that night and he returned in the morning at 6 a.m. A1 admits to being in Amagaro village that morning. I find that his alibi was destroyed by the evidence of PW4 Atim whom I believed. A1 claimed that PW4 had a grudge against him hence her adverse testimony. While it is true, PW4 testified he had a grudge with A1 because he assaulted her, it did not mean she lied to court about his movements that night.

With regard to A2 Ojange, his statement was that he was in Akora village on 2.7.2011 at his home.

I reject this alibi as he was placed near the scene of crime by PW4 Atim.

I agree with the two assessors that both accused persons be found guilty as indicted for the reasons given above.

I accordingly find that the state has proved beyond reasonable doubt that the two accused persons acting with a common intention caused the deaths of Ekaju Justin and Ochom Emmanuel with malice aforethought.

Each of the accused persons is convicted of both counts one and two as indicted.

DATED AT SOROTI THIS 5TH DAY OF JUNE 2015.

HON. LADY JUSTICE H. WOLAYO

5.6.2015:

Both accused present.

Opio holding brief for Isodo for accused.

Sera Rita Becky for state.

Assessors: Engwedu and Amoding.

Court Clerk Ecutu.

Court: Judgment read out.

State: I have no past criminal records of the two. However, murders were committed with brutality. Murder by shooting is common. Pray for a deterrence sentence. Pray for maximum penalty.

Opio: Both have no previous criminal record. A1 has five children, 2 wives. He suffers a heart complication. A2, has six children of his own, has five other orphans of his brother. He suffers from ulcers, kidneys ailments. Pray for a reformatory sentence. My clients say they are sorry for what happened.

A1: During this incident, I lost 47 cows taken by relatives of deceased. I lost 1 m cash, and sim sin was burnt. Goats were taken.

A2: I have a waster discarder. I have no medical forms as proof. My home was looted and burnt down. My children have no support and care.

Court: For sentence on 8/6/2015.

HON. LADY JUSTICE H. WOLAYO,
JUDGE,
5.6.2015.

SENTENCE

The senseless killing of two people who were on their way to work is an aggravating factor. The right to life is God given and no one had the right to take it away. That the two convicts are young men of 29 years and therefore capable of reform and is a mitigating factor.

Considering the circumstances of his case, appropriate sentence Is 30 years for each count. But as both convicts have been on remand since July 2011, each is sentenced to 26 years on each count. Sentences to run consecutively.

HON. LADY JUSTICE H. WOLAYO,
JUDGE,
8.6.2015.

8.6.2015:

Both accused present.

Isodo for accused.

Sera for state.

Court Clerk Ecutu.

Court: Sentence read out.

HON. LADY JUSTICE H. WOLAYO,
JUDGE,
8.6.2015.