

IN THE HIGH COURT OF UGANDA AT SOROTI

CRIMINAL SESSION CASE NO. 49 OF 2013

UGANDA V JAMES OGWANG

BEFORE : HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The accused person was indicted for murder c/s 188& 189 of the Penal Code Act. It is alleged that on 30th June 2012 at Iyalakwe village, Alito parish, Amuria district, the accused person murdered Aucho Mary.

Prosecution was led by Adongo Harriet State Attorney while accused persons was represented on state brief by counsel Obore David.

Assessors were Amoding Florence and Engwedu Washington.

The prosecution had a duty to prove the following facts beyond reasonable doubt:

1. the deceased died unlawfully
2. the death was intentionally caused with malice aforethought by an act or omission of the accused person or
3. that the accused person did not care if the act or omission caused death.

Unlawful death

That the death of the deceased was unlawfully caused was not disputed. A post mortem report admitted by consent of both parties PF48, shows that a medical examination carried out on 1st July 2012 revealed that the deceased sustained a deep cut wound on the head as a result of being hit with a hoe.

To the extent that death was caused by an act of another, the death was unlawfully caused.

That death was caused with malice aforethought.

Prosecution relied on PF48, evidence of PW3 Okwii Tonny, PW1 Okweda John and PW2 D/Sgt Ochuli Tonny to prove malice afore thought and participation by the accused person.

According to PW3 Okwii Tonny, on 30th June 2016, the accused person who is also his father and the deceased Auchu Mary, his mother, left home at about 4 p.m for the bar while he remained behind and then went to school to play football.

It was the testimony of Okwii that the pair returned home at about 10 p.m and the family had dinner after which Okwii went to his house while his parents entered their house. Shortly after the couple entered their house, Okwii whose house was about 70 feet from the parents' house heard them quarrel. Okwii asked his father what the problem was and his father responded that there was no problem after which Okwii returned to his house.

It was further Okwii's evidence that shortly after he had returned to his house, he heard his mother crying and on entering his parents' house, he found the accused holding an axe .

According to Okwii, with assistance from his brother Omalla Pious, the two disarmed the accused who then thanked Okwii for helping him and he promised not to fight again.

It was the testimony of Okwii that he had returned to his house when he heard his parents struggling in the house so he returned to their house a third time, grabbed the accused person and his mother by their hands and dragged them outside the house whereupon all three fell to the ground.

According to Okwii, when he released their hands, the accused person rushed inside the house, emerged holding a hoe , rushed to the deceased and struck her on the head with back side of the hoe. It was Okwii's testimony that his mother who had been standing fell down, Okwii went to her and observed that she was foaming and bleeding from the mouth and she was dead.

According to Okwii, this happened at 12.35 a.m after which he rode to the LC 1 Chairman Okweda to make a report.

According to Okweda PW1 , he found the deceased dead while the accused had been arrested and tied with ropes on a tree. People present at the scene were Angol Calvin Peter brother of the accused and Anna Oyira co wife of the deceased. He observed with the help of a torch and moonlight that the deceased was bleeding from the head.

The hoe that had been used to hit the deceased was recovered by Det. Occuli who visited the scene on 1st July 2012 which , according to the witness , had blood on the back side at the time of recovery. This hoe was exhibited as PE.3.

An analysis of the foregoing evidence reveals that the death of the deceased was caused with malice aforethought. This can be inferred from the conduct of the accused person prior to the fatal blow. Twice his son Okwii intervened to stop him from fighting the deceased who according to Okwii was crying. This piece of evidence means the accused person was the aggressor during the two episodes when Okwii intervened and indeed when Okwii intervened the third time, and pulled the two outside the house, it was the accused who rushed back inside the house, picked a hoe with which he hit the deceased on the head and she died almost instantly.

Okwii who spoke in a sincere manner and with pain was a credible witness. In defence, the accused who gave sworn testimony admitted he had no grudge with his son and so did Okwii. In his defence, the accused alleged that he had gone out for a short call with the deceased when they were attacked. I reject this version of events and I believe Okwii.

I find that while no statements of intent to kill were uttered by the accused person, the action of picking a hoe after he had earlier been disarmed of an axe, then using the hoe to hit the deceased on the head which killed her leads to an inference that he intended the consequence of death. Obviously, the force used to hit the deceased was lethal otherwise, she would not have died.

In **Nanyonjo Harriet and anor v Uganda SC Criminal Appeal No. 24 of 2002 (ulii)**, the Supreme Court held that

For a court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act that caused death and if the accused foresaw death as a natural consequence of the act.

In Nanyonjo's case, the appellant assaulted the deceased child with her hands until she died. The Supreme Court entered a finding of manslaughter.

In **Gabula David v Uganda, SC Criminal Appeal No. 4 of 2002**, the Supreme Court found that malice aforethought was proved from facts where the appellant uttered the intention to kill, then battered the child's head and finally hang her by the neck until she died.

Applying these two precedents to the instant case, the aggressive conduct of the accused prior to the lethal strike and the action of striking the deceased on the head with the back of the hoe was intended to inflict maximum damage to her head and therefore death.

Defence of intoxication

The accused did not raise the defense of intoxication but from the evidence of PW3 Okwii, his parents went to the bar to drink which means the two had taken some alcohol by the time they returned at 10 p.m. In law, intoxication is available as a defence to murder if the reasoning of the accused was so impaired that he did not know what he was doing.

After returning from the bar at about 10 p.m, the accused whom i have found was the aggressor quarrelled with the deceased . The first time Okwii intervened, he had the sense of mind to inform Okwii that there was no problem. The second time Okwii intervened, he thanked Okwii for disarming him of the axe.

This was conduct of a rationale person who knew what he was doing. At 12.35 a.m, more than two hours after returning from the bar and during which time he was the aggressor , it cannot be said that he was too intoxicated to know what he was doing.

I find that the accused was in full control of his faculties and intended to end the life of the deceased when he struck her with the back side of the hoe, on the head, a delicate part of the body killing her.

Identification of accused person

Another issue that i must consider arises from the fact that Okwii was a single identifying witness of an offence that took place at night although he mentioned other people who did not testify. It was suggested by the defence during cross examination of the witness that there wasn't sufficient lighting for Okwii to see clearly who struck the deceased. However, Okwii clarified that there was light from a hurricane lamp in the house of the accused but the door was open and there was moonlight.

In **Court of Appeal Criminal Appeal No. 203 of 2004 Asiku and anor v U** , conditions that favour correct identification were outlined as follows.

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 .

I am satisfied that Okwii knew his father the accused and mother , he was very close to them when the accused hit the deceased with a hoe and there was moonlight.

The accused in his own sworn statement placed himself at the scene of crime and indeed he was so close to her that he heard her utter the words '*my lord Jesus Christ*' possibly before he struck her.

Consequently , i find that the accused person was correctly identified by Okwii as the person who killed the deceased.

I therefore agree with the two assessors that the state has proved beyond reasonable doubt that the accused caused the death of the deceased with malice aforethought and he is accordingly convicted of murder as indicted.

DATED AT SOROTI THIS 4TH DAY OF APRIL 2016.

HON. LADY JUSTICE H. WOLAYO

SENTENCE

This case is aggravated by the fact the accused intended that the deceased who was his wife and mother of his children dies.

This case is a part of a pattern of violence against women , a pattern that is prohibited by international norms laid down in human rights instruments like Declaration on Violence Against Women and Convention on Elimination of Violence Against Women. The fact that women continue to die at the hands of their spouses is a signal for courts to hand down appropriate sentences to deter other would be offenders.

While the fact that the accused person has young children and orphans is a mitigating factor, the duty of the court to protect the equal rights of women to life overrides these mitigating factors.

Appropriate sentence is 40 years. As accused has been on remand since June 2012, he is sentenced to 36 years imprisonment.

Right of appeal explained.

DATED AT SOROTI THIS 6TH DAY OF APRIL 2015.

HON. LADY JUSTICE H. WOLAYO