**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**HOLDEN AT PALLISA**

**HCT-04-CR-SC-003/2013**

**UGANDA :::::::::::::::::::::::::::::::::::::::::: PROSECUTOR**

**VERSUS**

**A.1 OKIRIA BEN OKENDI alias OMODING JOHN**

**A.2 BAKAYA SAM alias BAGEYA :::::::::::::::::::::::: ACCUSED**

**BEFORE: HON. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

The accused are charged of murder. To prove murder the prosecution has the burden to prove beyond doubt that:

1. There was death.
2. The death was unlawful.
3. There was malice aforethought.
4. Accused participated.

Accused denied the charge.

The prosecution then sought to prove the charge as follows.

**Death:**

Prosecution relied on PW.1's evidence who found **Odeke** dead with a cut wound. They also relied on PE.3 confirming death. This ingredient was not contested. It is therefore proved.

**Death was unlawful:**

The law is that all homicides unless excused are unlawful per ***Uganda v. Kulabako Night Jeniffer Cr. See. 61/1991*** (unreported).

There is no evidence that this death was accidental or excused. The ingredient is thus proved.

**Malice aforethought**

The law was stated in section 191 (a) of the Penal Code Act. It has been widely interpreted by case law ***Uganda v. John Ochieng (1992-93) HCB 80*** malice aforethought is inferred from the weapon used, body part targeted, number of injuries and conduct of accused during and after the offence. Prosecution referred to PE.3 showing deep cut wounds on the neck and alleged use of a panga by the assailant to infer malice aforethought. This ingredient was not challenged and on basis of that evidence this ingredient stands proved.

**Participation of accused:**

The accused denied participation setting up the defence of alibi. The prosecution infers the participation of accused basing on circumstantial evidence contained in the testimonies of PW.1 and PW.2.

In submissions counsel for defence points at the weakness of PW.1 and PW.2's evidence in view of accused's defence of alibi. He points at the fact that none of the witnesses is an eye witness. There was no corroboration of their evidence which renders it merely speculative. He points at inconsistencies in their evidence of the sniffer dog, and challenged the evidence of threats as not proved.

I have carefully evaluated the evidence on record. I find that the evidence by prosecution is not of eye witnesses. The evidence of PW.1 is speculative. The fact that A.1 and A.2 went to PW.1's home and discussed the whereabouts of the deceased does not conclusively infer guilt, without an independent other evidence. The evidence of PW.2 who just charged deceased's phone, and saw him proceed home, and also saw A.1 and A.2 head the same direction is also inconclusive evidence of participation. These witnesses both gave differing versions as to the destination of the dog. The sniffer dog evidence was wrongly introduced. Such evidence is expert opinion evidence and it must be adduced by the dog handler who testifies concerning the

expertise of himself and his dog. That evidence is lacking. There is no link between the dog and accused at all in the evidence on record.

The evidence of a threat is denied by the defence, and PW.1 and PW.2 did not have any proof that accused indeed uttered the threats as alleged. There is a missing link to connect the alleged threat to the death. The evidence on record is too weak to establish that link.

The prosecution has failed to adduce any scintilla of evidence to place the accused at the scene of crime. The defence of alibi is not destroyed.

In ***Chesakit Matayo v. Uganda Court of Appeal No. 95/2004*** court held that:

> "*It is trite law that by setting up an alibi an accused person does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case*."

His duty is stated in ***Chemulon Were Olango (1937) 4 EACA 46*** that:

> "*The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act*."

The evidence by both A.1 and A.2 sufficiently explains their whereabouts at the alleged time. The prosecution has therefore failed to place the accused at the scene of crime, and thereby failed to prove their participation.

This ingredient is not proved. The assessors found that participation of accused was not proved and advised that they be acquitted.
I do agree.

Accused have not been found guilty of this charge, prosecution having failed to prove their participation.
I accordingly find them not guilty of the charge and accordingly acquit them of the same.

**Henry I. Kawesa**

**JUDGE**

**13.09.2016**