THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CR – 00169 OF 2015

UGANDA.....PROSECUTOR

VERSUS

NANSUBUGA ROSE

KABASEKE JOSEPH

TUMUSIIME POSAINO

TUMUSIIME VINCENT

ALINDE JOSEPHAT

TUMUMPE EMMANUEL

KYAMANYA DENIS **.....ACCUSED**

BYARUHANGA WALLEN

KABAGAMBE GODFREY

KAMPULIRA DENIS

MWESIGYE FRANCIS

MWEISGYE JOHN

TUMWESIGYE EMMANUEL

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANHONY OJOK,JUDGE.

Judgment

The accused persons were indicted with Murder Contrary to **Section 188** and **189** of the Penal Code Act. It is alleged that the accused persons on 2nd February 2015 at Mukarama Trading Centre in Kyegegwa District murdered Mukalazi Wilson. The accused persons all denied the offence. All the accused persons gave sworn evidence save for A12 who chose to keep quiet and they did not call any other witnesses. A3 was found with No case to answer and A4 (now deceased). The prosecution brought 4 witnesses to prove its case beyond reasonable doubt. The accused persons all raised a defence of Alibi.

Ojok Alex Michael – Regional Principal State Attorney appeared for the Prosecution and Counsel Kiziito Deo for the accused persons on State Brief.

Burden of proof

It is a requirement by the law that the prosecution must prove its case beyond reasonable doubt because the accused has no duty to prove, his innocence (**Article 28** of the Constitution). (See: **Woolmington versus D.P.P. [1935] AC 462. Uganda versus Joseph Lote [1978] HCB 269**).

It is our principle of the law that an accused person should be convicted on the strength of the case as proved by prosecution but not on weakness of his defence. (See: **Insrail Epuku s/o Achietu versus R [1934] I 166 at page 167**).

Standard of proof

The standard of proof is beyond reasonable doubt as discussed in the case of **Miller versus Minister of Pensions (1947) 2 .All .ER 372 at 373;**wherein **Lord Denning** stated as follows**;**

"That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice".

Prosecution must prove all the ingredients of the Offence of Murder in order to sustain a conviction thereof. In the case of **Uganda versus Bosco Okello [1992-93] HCB 68 , Uganda versus Muzamiru Bakubye & Anor, High Court Criminal Session No.399/2010,** it was held that Prosecution must prove the following ingredients beyond reasonable doubt:-

1. That the deceased is dead;
2. That the death was caused unlawfully;
3. That there was malice aforethought; and
4. That the Accused person directly or indirectly participated in the commission of the alleged Offence. (**See: Also, Uganda versus Kalungi Constance HC Criminal case No. 443/2007** and **Mukombe Moses Bulo versus Uganda SC. Criminal Appeal 12/95**.

Whether the deceased died:

PW1, PW2, PW3 and PW4 were all consistent in as far as the death of the deceased is concerned. The evidence of the prosecution witnesses was corroborated by the post mortem report of the deceased. Therefore, there was no doubt as to the death of Mukalazi Wilson.

Whether the death was caused unlawfully:

All homicides in Uganda are presumed by law to be unlawful except where such deaths are excusable by law itself. Such excuses consist of the following;

1. Death caused accidentally
2. Death occasioned in defence of life or property
3. Death which is carried out in the execution of a lawful sentence
4. Death that is occasioned as a result of extreme and immediate provocation.

The evidence of all the four prosecution witnesses convince me that the death of Mukalazi Wilson does not fall in any of the categories of excusable homicides. I therefore find that the death was caused by an unlawful act and the prosecution has proved this ingredient beyond reasonable doubt.

Whether there was malice aforethought:

Section 191 of the Penal Code Act which lays out circumstances under which malice aforethought is deemed to be established. These are:

1. An intention to cause the death of any person, whether such person is the one actually killed or not.
2. Knowledge that the act or omission will probably cause death of same person, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused.

In the instant case the accused persons first beat up the deceased and then set him ablaze. The Mukalazi Wilson was also found with multiple cuts on his head and neck which were concluded to have been part of the cause of his death as per the evidence of PW3. I find that the prosecution proved this ingredient to the satisfaction of this Court. Thus, there was malice aforethought in the commission of murder in the instant case.

Whether the Accused person directly or indirectly participated in the commission of the alleged Offence:

The prosecution brought two eye witnesses PW1 and PW2. PW1 told Court that he knew all the accused persons. He told Court that A1 had told the other participants not to kill the Mukalazi Wilson but rather to break his legs and take him to Police.

PW1 testified that A2 was beating and tied the deceased, A10 was aiding in pulling and tying the deceased, A8 brought grass, A11 brought the fuel from A1's Shop though she denied ever dealing in fuel, and A9 brought grass also. His evidence was corroborated by PW2 who also placed A2, A8, and A10 at the scene of crime. However, there was a contradiction in his testimony in regard to A13 where he later said that the said accused person was at the scene of crime but eventually left. He also mentioned A6 and A5 as being at the scene but never mentioned how they participated in killing the deceased.

PW1 later stated that A7, A5, and A10 all participated in the beating of Mukalazi Wilson. In his testimony he emphasised the fact that A2, A8 and A10 were trying so hard to have the deceased killed despite the public outcry.

PW2 in his testimony told Court that A2 was holding the deceased, A5 and A7 were also present at the scene of crime, A8 was beating the deceased and A10 was holding him. That A2 is the one that even lit the match stick that set the fire on Mukalazi Wilson.

Counsel on State brief submitted that the accused were not arrested two months after the offence as told to Court by PW4 the Arresting Officer but rather a few days after. That, the same Officer stated that the accused were arrested according to the list that was given to Police by a relative of the deceased, and that no investigation was ever carried out before the arrest of the said accused persons. Further, that the alleged 2 five litre bottles that were said to have had the fuel that was used to burn the accused were never exhibited in Court. That therefore, PW4's evidence was full of falsehood and mere hearsay. He went on to cite the case of **Constantino Okwel Alias Magendo versus Uganda, SCCA No. 12 of 1990**, where the Supreme Court laid down the law as to contradictions and inconsistencies, Court stated that;

"In assessing the evidence of a witness his consistency or inconsistency, unless satisfactorily explained, will usually, but not necessarily, result in the evidence of a witness being rejected."

Therefore, where grave inconsistencies occur, the evidence may be rejected unless satisfactorily explained while minor inconsistencies may have no adverse effect on the testimony unless it points to deliberate untruthfulness.

In the case of **Uganda versus ASP Aurien James Peter Criminal case No. 012 of 2010 (Unreported),** Justice Lawrence Gidudu stated that on the issue of credibility and inconsistency of witnesses the Courts have decided in a number of cases that a witness may be untruthful in certain aspects of his evidence but truthful in the main substance of his evidence. He further stated that a witness who has been untruthful in some parts and truthful in other parts could be believed in those parts where he has been truthful.

The accused persons all raised a defence of Alibi and in the case of **Bagatenda Peta versus Uganda, SCCA No. 10 of 2006**, it was held that; the law is now well settled that an accused person who raises an alibi as a defence bears no burden to adduce evidence to prove it.

A1 told Court that at the time the alleged incident occurred and in response to the alarm as she came from her home. She met A11 who told her that there was no need to proceed to the scene of crime because it was "finished". She also mentioned having found A2, A5 and A7 at the scene of crime. She also went on to tell Court that these Co-accused had a grudge with the deceased who was also her brother, and had previously attacked him and even threatened to kill him.

A1 admitted that it was after the news of Mukalazi's death that she mentioned that they should have at least broken his ankles and taken him to Police but not killed him. That this was said as, she was grieving the death of her brother.

The Court of Appeal in **Uganda versus Kato Kajubi Godfrey, Criminal Appeal No. 39 of 2010** discussed at length an accomplice witness. The Court of appeal cited Supreme Court case of **Nasolo versus Uganda [2003] 1 EA 181 (SCU)** where the Supreme Court held that:

"In a criminal trial a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial. One of the clearest cases of an accomplice is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after a trial."

However, even in the absence of such confession or conviction, a court may find, on the strength of the evidence before it at the trial that a witness participated in the offence in one degree or another. Clearly, where a witness conspired to commit, or incited the commission of the offence under trial, he would be regarded as an accomplice.

Common intention

Section 20 of the Penal Code act defines common intention as:

"When two or more persons form an intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

From the prosecution evidence I note that A2, A5, A6, A7, A8, A9, A10, and A11 were all sufficiently placed at the scene of crime. However, much as A1 is among the accused and was alleged to have said that they should have at least broken the deceased's legs and taken him to Police. I am inclined to believe A1 as per her testimony must have indeed said this during the time of grief and shock over her brother who had been brutally killed as opposed to during the commission of the offence. I do not see any evidence placing A12 and A13 at the scene of crime during the commission of the offence.

I find that the state has not proved beyond reasonable doubt that A1, A12 and A13 participated in the murder of Mukalazi Wilson. I agree somehow with the assessors and I find A1, A12 and A13 innocent and are therefore acquitted. They should be released from custody unless lawfully held in connection with some other offence.

I find that the prosecution proved beyond reasonable doubt that A2, A5, A6, A7, A8, A9, A10 and A11 jointly and severely participated in the murder of Mukalazi Wilson. They are guilty of the charge and therefore convicted of murder contrary to **section 188** and **189** of the Penal Code Act.

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OYUKO. ANTHONY OJOK

JUDGE

18/11/16

State Attorney: Ojok Alex Michael:

The convicts committed a serious offence of murder that attracts death on conviction. The offence was committed in a gruesome manner. The deceased was grabbed, tied and set ablaze which amounts to inhuman and degrading treatment. The offence was committed under mob justice which is rampant and Court should take that into consideration. The accused have been on remand for 1 year and 9 months. According to the sentencing guidelines the beginning point is 35 years, thus, Court taking into account the mitigating and aggravating factors can sentence to more or less years. My Lord, I pray for 30 years.

Allocutus: Kiziito Deo:

First and foremost I pray that Court has mercy on the convicts. This was an offence committed under mob justice and involved more than 40 people but only the convicts were arrested. My Lord I will go one by one;

A2 is 32 years old, a father of 4 children, 3 are school going, has a wife, was staying in a rented house and was the sole bread winner of the family. The convict has a recurring hernia problem for which he has had several operations. My lord we pray that the time spent on remand, the circumstances of the offence, a lenient sentence of not more than 5 years be given to the accused.

A5 is 33 years old, a father of 5 children, has 2 wives, was staying in a rented house, and was the sole bread winner and the burden has now been passed to his wife who does not work. The convict has spent 1 year and 9 months on remand. We pray that this is put into consideration and the circumstances of the offence that involved over 40 people, during sentencing. We pray for 5 years.

A6 is 48 years old, has 12 children, 4 orphans, was looking after his parents, all the children are school going and some are in advanced classes such as S.5 and S.6. He was also the sole bread winner and suffers from kidney disease for which he has had one operation but is recurrent. The convict has spent 1 year and 9 months on remand. We pray that this is put into consideration and the circumstances of the offence during sentencing. We pray for not more than 5 years.

A7 is 27 years old; he would have been resourceful to the country. He has 10 children, 7 of whom are school going, was staying in a rented house, was the sole bread winner and now the burden has been shifted to his wife who is not working. We pray for a lenient sentence of not more than 5 years.

A8 is 40 years old, has 8 children, 6 are school going. He is a married man and was the sole bread winner for his family. We pray for a lenient sentence of not more than 5 years putting into consideration the time spent on remand and the circumstances of the offence.

A9 is 29 years old, has 2 children, a wife and was the sole breadwinner. PW1 in his testimony said that he did not know him and PW2 in his evidence did not mention him at all. My Lord we pray for a caution.

A10 is 33 years old, a young man that can be resourceful once released. He has 3 children and a wife, was looking after his mother who is a widow. We pray for a lenient sentence of not more than 5 years putting into consideration the time spent on remand and the circumstances of the offence.

A11 is 29 years old with 2 children who are school going and a wife. He was also the sole bread winner. We pray for a lenient sentence of not more than 5 years.

Though prosecution asked for 30 years, it is my submission that a mistake is not rectified by a mistake. The offence of murder is grave but this was mob justice and I pray for lenience.

Court: Sentence and reasons thereof:

The convicts did not all actively participate in the killing but some brought grass and watched as the deceased was set ablaze. This in itself was bad enough. I thought of bringing the other convicts as accessories but I could not because the deceased was killed in such a brutal manner without a chance of being heard even if he were a thief.

They have been on remand for 1 year and 9 months. I take this period into consideration while considering the sentence to impose on them. I agree they are young people with families and responsibilities. They have also prayed for leniency. However, they took the life of an innocent person, even if the deceased was a thief, he would have been taken to the lawful authorities that is why we have police. The manner of killing and setting him a blaze leaves a lot to be desired and also teaching the would be offenders not to do the same.

I would have given the maximum sentence of death but the Susan Kigula case does not make the death sentence mandatory. Putting everything into consideration, I sentence each of A2,A5,A6,A7,A8,A9,A10 and A11 to 25 years less 1 year and 9 months, meaning 23 years and 3 months imprisonment on each convict.

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Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

18/11/16

Read in open court in the presence of

1. State Attorney
2. Kizito Deo counsel for the accused
3. Assessors
4. James Clerk.

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OYUKO. ANTHONY OJOK

JUDGE