

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0173 OF 2015

UGANDA

PROSECUTOR

VERSUS

A1 ANDABATI KASTO SAMUEL }

A2 DRABE MILTON }

A3 DRAPARI KENNEDY }

A4 DRALEMA JOEL }

ACCUSED

A5 ANDRUGA SEREPH }

A6 ONGUA RICHARD DRATIA }

A7 YIACIA LAWRENCE }

A8 ADIRU AGNES }

Before Hon. Justice Stephen Mubiru

RULING

The accused in this case were jointly indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on 12th September 2012 at Yivu-Pio village in Maracha District, they murdered a one Asitia Milsome Stephen. The accused pleaded not guilty to the indictment. In a bid to prove the indictment against the accused, the prosecution called a total of six witnesses and closed its case.

At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence (see section 73 (2) of *The Trial on Indictments Act*). Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be

entitled to an acquittal (See *Wabiro alias Musa v R* [1960] E.A. 184 and *Kadiri Kyanju and Others v Uganda* [1974] HCB 215).

A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v R.* [1957] EA 332). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] ALL E.R 448 and also applied in *Uganda v Alfred Ateu* [1974] HCB 179, as follows:-

- a) When there has been no evidence to prove an essential ingredient in the alleged offence,
or
- b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

It was the submission of the learned Senior Resident State Attorney prosecuting the case, Ms. Harriet Adubango, that sufficient evidence had been adduced establishing a *prima facie* case against the accused such as would require them to be put to their defence. On his part, defence counsel Mr. Richard Bundu submitted a *prima facie* case had not been made out since the prosecution had not led evidence to prove that any of the accused was at the scene of crime at the time the offence is alleged to have been committed. He therefore contested the element of participation of the accused in the commission of the offence.

At this stage, I have to determine whether the prosecution has led sufficient evidence capable of proving each of the ingredients of the offence of murder, if the accused chose not to say anything in their defence, and whether such evidence has not been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it. For the accused to be required to defend themselves, the prosecution must have led evidence of such a quality or standard on each of the following essential ingredients;

1. That death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

Regarding the element of proof of death of a human being, death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body of the deceased. In this case, the prosecution adduced evidence of a post mortem report prepared by PW1 (Dr. Arije Francis) which was received in evidence as Exhibit P.E.1. It is dated 12th September 2014. This is a witness who saw the body of the deceased and conducted an autopsy at Maracha Hospital Mortuary. The body was identified to him as that of Asitia Milsome Stephen. PW2 (ASP Okot Michael) a police officer who worked with and knew the deceased very well before his death testified that he saw the body of the deceased at the scene where he died from and also took part in transporting the body to the hospital mortuary. PW6 (Asibazio Juliet) a crime preventer who worked with and knew the deceased very well before his death testified that she saw the body of the deceased at the at Maracha Police Station after it had been recovered from the scene. This evidence was not discredited as a result of cross examination, neither is it manifestly unreliable that no reasonable court could safely convict on it. I am therefore satisfied that the prosecution led sufficient evidence regarding this element capable of supporting a finding that Special Police Constable Asitia Milsome Stephen is dead, if the accused chose not to say anything in their defence.

The second ingredient requires the prosecution to prove that the death was caused unlawfully. Death of a human being is a homicide if the dead person was once alive and is now dead because

of the act of another human being. Among the witnesses who testified, PW6 (Asibazio Juliet) was the last person to see the deceased alive. They were together at Yivu Primary School on the night of 12th September 2014 guarding a police vehicle. She explained how she and the deceased ran to escape a mob that was after their lives. From a vantage point as she hid in the bush, she heard the deceased cry out for help as he was being assaulted by the mob which had caught up with him. The following morning he was found dead at the spot where he had been assaulted.

The law is that any homicide is presumed to have been caused unlawfully unless it was accidental or otherwise legally justified (see *Gusambizi s/o Wesonga v R. (1948) 15 E.A.C.A 63*). In the instant case, the evidence of PW1 (Dr. Arije Francis) who conducted the autopsy established the cause of death to have been cut wounds with a fracture of the skull and cervical vertebrae with a resultant hemorrhagic shock. The doctor observed several external injuries on the body of the deceased which included; a 5 cm cut wound with fracture of the left parietal skull with brain matter exuding out, an 8 cm cut wound at the occipital skull, a 3 cm cut wound on the left supra orbital area, and a cut wound at the chin with a fracture of the mandible. He also observed internal injuries which included; a fracture of the cervical vertebrae, a broken upper incisor tooth and excessive bleeding through the ears, nose, mouth and cut wounds. These findings are contained in his report, Exhibit P.E.1 dated 12th September 2014. There being no evidence to suggest that they were self inflicted or that they were caused in a justifiable or excusable manner and since this evidence is not manifestly unreliable that no reasonable court could safely convict on it, it is capable of proving that the death of Police Constable Asitia Milsome Stephen was an unlawful homicide. I am therefore satisfied that the prosecution led sufficient evidence regarding this element capable of supporting a finding that his death was caused unlawfully, if the accused chose not to say anything in their defence.

The third ingredient required is that the unlawful killing of the deceased was caused with malice aforethought. Malice aforethought is defined by section 191 of the *Penal Code Act* as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person. The question is whether whoever inflicted those injuries on the deceased intended to cause death or knew that they would probably cause death. Malice aforethought is a mental element that is difficult to prove by direct evidence. Courts usually consider the weapon used, the manner in which it was used, and the part of the body of the

victim that was targeted (see *See R v Tubere s/o Ochen (1945) 12 E.A.C.A. 63*. If the weapon used to inflict the injuries from which the deceased died are lethal or deadly weapons, or if the injuries are fatal or life threatening and inflicted on vital or vulnerable parts of the body malice aforethought will readily be inferred (see *Uganda v Manuela Awacango and Another H.C. Criminal Session Case No 16 of 2006*).

The weapons used to inflict the injuries itemized in the post mortem report were never recovered nor exhibited in court but PW1 (Dr. Arije Francis) was of the opinion that machetes had been used to inflict the cut wound. Any person who used such a weapon to cut the head of the deceased, fracturing the skull and causing the oozing out of brain matter, must have foreseen that death was a probable consequence of his or her act. So did the one who applied such force to the neck that resulted in the fracture of the cervical vertebrae. Both actions targeted vulnerable parts of the body. Each of them is capable of supporting an inference of malice aforethought. This evidence is not manifestly unreliable that no reasonable court could safely convict on it, it is capable of proving that the death of Police Constable Asitia Milsome Stephen was caused with malice aforethought. I am therefore satisfied that the prosecution led sufficient evidence regarding this element capable of supporting a finding that his death was caused with malice aforethought, if the accused chose not to say anything in his defence.

The last ingredient requires proof that it is the accused who committed the unlawful act which led to the death of the deceased. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime. The evidence adduced in this case places the accused in three categories.

The first category is of accused persons who have not been mentioned at all as having been sighted anywhere on the day the deceased is alleged to have died. These include; A3 Drapali Kennedy, A4 Dralema Joel, A5 Andrugá Sereph, A6 Ongua Richard Dratia and A8 Adiru Agnes. On basis of the evidence on record, if these accused chose to remain silent, this court would not have evidence sufficient to hold any of them responsible for the unlawful act that resulted in the injuries that caused the death of the deceased. I therefore find that no prima facie case has been made out requiring any of the five accused persons to be put to their defence.

In the second category, are accused persons who were sighted at one point or another during the night of 11th September 2014 when the deceased is alleged to have died. These include A2 Drabe Milton who was in the company of another unnamed man when they met PW2 (ASP Okot Michael) and his team of police officers who were proceeding on foot to Alikwa village, to the home of Abdul Hamid Karim, whose family was under threat of mob justice. Shortly after meeting A2, the police were attacked by a mob which PW2 estimated as having comprised over 800 people. This evidence succeeded only in placing A2 at the scene where PW2 and the rest of the police officers were attacked. However, mere presence of A2 at the scene when the attack was perpetrated is not by itself indicative of the existence of conspiracy between him and the rest of the mob. There is no evidence that A2 showed any guilty participation in the criminal design entertained by the rest of the mob. In any event, the attack on PW2 and his team by that mob, occurred close to two kilometers away from Yivu Primary School where the deceased was attacked from. There is no evidence placing him at the scene of crime in Yivu Primary School. I therefore find that no prima facie case has been made out requiring A2 to be put to his defence.

The other person in this category is A7 Yacia Lawrence. On the night 11th September 2014 when the deceased is alleged to have died, he was seen by PW5 Chandibale Hassan, as part of a group of people who attacked his home and his neighbour's home, Abdul Hamid Karim, and threw stones at both houses causing the roof to his (PW5) kiosk to collapse. This witness placed A7 at a location close to two kilometers away from Yivu Primary School where the deceased was attacked from. There is no evidence placing A7 at the scene of crime. There is no evidence as well to suggest that he had a common design with the mob which attacked the deceased. I therefore find that no prima facie case has been made out requiring A7 to be put to his defence.

This leaves only A1 Andabati Kasto Samuel in the last category. He is the only one in respect of whom evidence has been led placing him at the scene of the crime. The testimony of both PW2 (ASP Okot Michael) and PW6 (Asibazio Juliet) placed him at Yivu Primary School on the night of 11th September 2014. Although PW6 was unable to make a dock identification of A1, he is known by other witnesses to have been the school night watchman. This was stated by PW3 who said he used to see Ai around Yivu Primary school and he was told A1 was a watchman at the school. PW4 (Mawa Godfrey Onyacha) who was a teacher at that school at the time also knew A1 as the school watchman. PW5 (Candibe Hassan) who is P.T.A. member of the school also

identified A1 as the school watchman. PW6 in her testimony said that it is the school watchman who showed the mob the direction she and the deceased had taken in a bid to escape.

The prosecution at this stage is not required to have proved the case against A1 beyond reasonable doubt. All that is required of it is to adduce such evidence as would be likely to lead a reasonable tribunal, bearing in mind the law, to convict if A1 chose not to say anything in his defence. All this evidence taken together meets the standard of a *prima facie* case against A1.

In the final result, I find that the prosecution has failed to make out a *prima facie* case against A2 Drabe Milton, A3 Drapali Kennedy, A4 Dralema Joel, A5 Andruga Sereph, A6 Ongua Richard Dratia, A7 Yacia Lawrence and A8 Adiru Agnes. I accordingly, find that the seven of them are not guilty of the offence of murder and I hereby acquit them. They should be set free forthwith unless they are lawfully held on other charges.

I however find that a *prima facie* case has been made out against A1. He is hereby put to his defence and the court will proceed to explain to him the options available to him in making his defence.

Dated at Arua this 19th day of August, 2016.

Stephen Mubiru

Judge