THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0068 OF 2014

UGANDA …… PROSECUTOR

VERSUS

A1 KAPERE JUMA }
A2 OVANI BRIAN }
A3 KUMAKECH MEN GILBERT CANPARA } …… ACCUSED
A4 ANEK EVALYENE GENESI }

Before Hon. Justice Stephen Mubiru

SENTENCE AND REASONS FOR SENTENCE

The convict was indicted together with three others for the offence of murder c/s 188 and 189 of the *Penal Code Act* after a full trial. It was alleged that he together with four others, one of whom is at large having escaped from Paidha Prison, on the 21st day of March 2012 at Kiyaya East Village in Nebbi District murdered a one Onencan Dan.

The case first came up for plea taking on 15th July 2016. The indictment presented to court that day named five accused, the four herein who were present in court at the time and a one Munguryek Julius Angoo Bob Fastino, named as A5 , who was not in court. The court declined to record plea of the four accused when the fifth accused's whereabouts were unknown. The learned Senior Resident State Attorney sought an adjournment to 19th July 2016. On that day, she informed court that she had established that A5 had escaped from prison in Paidha in 2013 and has never been re-arrested. She then presented an amended indictment to court which excluded A5. The amended indictment was read and explained to A3 and A4 whereupon each one of them entered a plea of not guilty. A1 and A2 did not enter any plea on that date because the court was

informed there were ongoing negotiations for a plea bargain between the two accused and the prosecution. The case was set down for 8th August for receiving feedback on those negotiations and for commencement of hearing in respect of A3 and A4.

On 8th August 2016, since the parties reported that they had not reached an agreement regarding the plea negotiations in respect of A1and A2, the court decided that they should both plead to the indictment and would be free to change their plea in the course of the trial if the negotiations ended successfully. Both A1 and A2 pleaded not guilty to the indictment and the trial commenced.

During the preliminary hearing, the evidence of PW1 Dr. Jakor Oryema was admitted and his post mortem report tendered as exhibit PE.1. The testimony of four other prosecution witnesses was recorded and the case was adjourned to 16th August 2016 for further hearing of the prosecution case. On that day, the court was informed that a plea bargain had been successfully concluded in respect of A2. The court then allowed the learned Senior Resident State Attorney to introduce the plea agreement. The court then proceeded to ascertain that the accused had a full understanding of what the guilty plea meant and its consequences, the voluntariness of the accused's consent to the bargain and appreciation of its implication in terms of waiver of some of his fundamental constitutional trial rights specified in the first section of the plea agreement. The Court being satisfied that there was a factual basis for the plea, and having made the finding that the accused made a knowing, voluntary, and intelligent plea bargain, and after he had executed a confirmation of the agreement, went ahead to receive the agreement to form part of the record.

A2 was then allowed to take plea afresh to the amended indictment whereupon a plea of guilty was entered. The court then invited the learned Senior Resident State Attorney to provide court with the factual basis for the guilty plea, whereupon she narrated the following facts; the deceased was a resident of Pakwach Town Council. He used to ride a motorcycle for hire commonly known as boda-boda. It was registration number UDP 742 R, a Bajaj Boxer, red in colour, engine number DUMBSL-79066 and chassis number MD 2DDDMZZSWL-21515.

On the 21st of March 2012, the deceased who was dressed in a white shirt bearing the badge of Pakwach Secondary School, a pair of brown trousers, a white jersey with black stripes, left Pakwach Town Council at about 4.00 pm and informed his colleagues that he was going somewhere. He disappeared and his colleagues did not see him again.

On 20th June 2012, at about 9.00 pm, a man who was doing some work within the Town Council, saw A2 and A3 in possession of a Bajaj Boxer motorcycle, red in colour without a registration number plate. That night, A2 and others crossed river Nile in a canoe with a motorcycle to Nwoya District. The motorcycle was handed over to a one Okumu to go and sell in Nwoya District. While he was riding the motorcycle on the road, he was intercepted by rangers of the Uganda Wildlife Authority within Murchison Falls National Park. Okumu fled and disappeared into the bush. The rangers took the motorcycle to Pakwach Police Station.

Following investigations by the police, it was confirmed the motorcycle bore the same engine and chassis number as that of the deceased who was missing. Only the registration number plate was missing. A2 was arrested and consequently led the police to a place in the bush where the body of the deceased had been abandoned. The police recovered the skeleton of the deceased since the body had completely decomposed. They also recovered the clothes of the deceased. A charge and caution statement was recorded from A2 at Nebbi Police Station on 10th August 2012 in which he admitted that he and two others had a common plan to rob the motorcycle from the deceased. On the fateful day, the deceased carried him as a passenger on the motorcycle and along the way picked to others. At a certain point, one of them who is at large administered chloroform to the deceased, suffocating him to death before the three of them rode away on the motorcycle. The postmortem could not determine the cause of death as the body had completely decomposed. A2 was charged with the offence.

Upon ascertaining from the accused that the facts as stated were correct, he was convicted on his own plea of guilty for the offence of Murder c/s 188 and 189 of the *Penal Code Act*. In justification of the sentence of fifteen years' imprisonment proposed in the plea agreement, the learned State Attorney adopted the aggravating factors stipulated in the plea agreement and added that the deceased was a young man at the age of 18 years trying to earn a living and it was

a well planned murder. In his submissions in mitigation of sentence, the learned defence counsel adopted the factors stipulated in the plea agreement and added that the accused had played an accessory role in commission of the offence, which should be taken into account to reduce the degree of his culpability.

In his victim impact statement, an elder brother of the deceased was of the view that A2 deserved to be sentenced to death. He explained that the mother of the deceased was so traumatized that she left Pakwach and returned to the village. She suffers from hypertension as a result of the trauma. All members of the family of the deceased are still traumatized whenever they pass by the spot where his remains were found and fear to venture into the accused's village or meet any members of his family

The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of the worst cases of Murder. I do not consider this to be a case falling in the category of the most extreme cases of murder. I have not been presented with any of the extremely grave circumstances specified in Regulation 20 of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* that would justify the imposition of the death penalty and I have for that reason discounted the death sentence.

Where the death penalty is not imposed, the starting point in the determination of a custodial sentence for offences of murder has been prescribed by Item 1 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35 years' imprisonment. According to *Ninsiima v Uganda Crim. Appeal No. 180 of* 2010, these guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial. A Judge can in some circumstances depart from the sentencing guidelines but is under a duty to explain reasons for doing so.

Since in sentencing the convict, I must take into account and seek guidance from current sentencing practices in relation to cases of this nature, I have considered the case of *Bukenya v Uganda C.A Crim. Appeal No. 51 of 2007*, where in its judgment of 22nd December 2014, the

Court of Appeal upheld a sentence of life imprisonment for a 36 year old man convicted of murder. He had used a knife and a spear to stab the deceased, who was his brother, to death after an earlier fight. In *Byaruhanga v Uganda, C.A Crim. Appeal No. 144 of 2007*, in its judgment of 18th December 2014, the Court of Appeal reduced the sentence from a term of imprisonment of 22 years to 20 years in respect of a convict who had drowned his seven month old baby in a swamp. The convict was the father of the child and he decided to kill his own child because he did not see any reason for being disturbed by the child who had been left to him by the child's mother who got married nearby. The reduction in sentence was on account of the convict having spent almost five years on remand

Both involved the deliberate, pre-meditated killing of victims closely related to the perpetrators. In the first case, life imprisonment was in my view imposed due to the use of deadly weapons in committing the offence. In the second case, the Court of Appeal was of the view that the weight of the punishment should also take into account the element of reform especially when the offender is relatively young as in that case.

The killing of a human being is never an offence to be taken lightly. The maximum penalty of death reflects the gravity with which society the offence of murder. I have considered the aggravating factors in this case being; the youthful age of the victim, the careful and meticulous planning that went into the commission of the offence, the devastating effect it has had on the immediate family of the deceased. I have nevertheless also considered the mitigating factors in favour of the convict being; the fact that the convict is a first offender and from the very beginning of the trial indicated his willingness to plead guilty to the offence and readily did so at the earliest opportunity. I have also considered his accessory role in the commission of the offence. He is also still a relatively young man at the age of 23 capable of reforming and becoming a useful member of society. In the circumstances, I have discounted imposition of life imprisonment. Having considered the sentencing guidelines and the current sentencing practice in relation to offences of this nature, and the fact that the convict has already spent four years on remand, I hereby accept the submitted plea agreement entered into by the accused, his counsel, and the Senior Resident State Attorney and in accordance thereto, sentence the accused to a term of imprisonment of fifteen (15) years, to be served starting from today.

Having been convicted and sentenced on his own plea of guilty, the convict is advised that he has a right of appeal against the legality and severity of this sentence, within a period of fourteen days.

Dated at Arua this 18th day of August, 2016

Stephen Mubiru

Judge.