

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0106 OF 2012

UGANDA

PROSECUTOR

VERSUS

ANGUIPI ISAAC alias ZAKO

ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused in this case is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 3rd day of August 2008 at Naipio village in Maracha District murdered one Blasio Jasindo.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on 2nd August 2008, a meeting was convened at Naipio village which was attended by the deceased. The meeting resolved that the accused and his family should be expelled from the village because he was accused of being a wizard. When he returned home, he briefed his wife P.W.2 (Lydia Cumaru). At about 5.00 pm that day, a mob came to their home and demolished the deceased's three houses and sugar cane plantation. At around 9.00 pm, the deceased relocated his entire family and took them to stay at a different village with the relatives of his wife. He returned to his demolished home. The following morning of 3rd August 2008, his wife returned too only to find him dead with visible external injuries on his body.

PW3 (Adiru Harriet) wife of the deceased's nephew, saw the mob that demolished the deceased's houses 5.00 pm. He saw the accused among them. At about 3.00 am, when she came out of her house to ease herself, she saw some people enter a house that had been built for his co-

wife but which was unoccupied by then. Immediately thereafter, she heard the accused pleading for his life saying “Zako don’t kill me. I am not the one who killed that person.” She got scared and returned to her house. She watched through the window of her house from where she saw a group of men assault the deceased. They pursued him as he tried to escape. She was able to recognize the accused among the people who assaulted the deceased. The group of assailants shortly after came to her house and set it on fire. She spent the night under a tree with some of her property which she had managed to save from the inferno. The following day at around 7.00 am, the body of the deceased was discovered around 300 metres from his demolished home. The police was alerted. They came to the scene where a post mortem was done on the body of the deceased. The accused was subsequently arrested and indicted with the offence of murder.

At the trial, the accused pleaded not guilty. In the unsworn statement he made in his defence, he denied having participated in killing the deceased. He said he spent the whole day of 2nd August 2008, which he remembers was a Saturday, at his home making bricks up to 6.00 pm. The following morning he went to Church from where he returned at around 11.00 am. He went to Nyadri Trading Centre only to be arrested by the police, to his surprise. He was taken to the police station where he recorded a statement denying the accusation of having participated in killing the deceased.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See *Ssekitoleko v. Uganda [1967] EA 531*). Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller Vs Minister of Pensions [1947] 2 ALL ER 372*).

For the accused to be convicted of murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. 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 first ingredient, death of a human being 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. In the instant case, the prosecution adduced a post mortem report prepared by PW1 (Dr. Andrew Vuni) which was admitted during the preliminary hearing and received in evidence as Exhibit P.E.1 dated 3rd August 2008. The doctor who carried out the autopsy indicated in that report that he examined the body of a one Jasindo Blasio which was identified to him by a one Zakayo Buatere Amosi. This evidence is corroborated by the testimony of PW2 (Lydia Cumaru) one of the widows the deceased who saw the body and attended the funeral. It is corroborated further by the evidence of PW3 (Adiru Harriet) the wife of the deceased's nephew who first discovered Jasindo's body at the scene. In his defence, the accused, DW1, did not address this issue at all. Defence counsel conceded to this ingredient in the final submissions. Having considered all the available evidence in relation to this ingredient, I am satisfied that it has been proved beyond reasonable doubt that Blasio Jasindo is dead.

The prosecution is also required to prove that the death was caused unlawfully. It is the law that any homicide is presumed to have been caused unlawfully unless it was accidental or it was authorized by law (see *Gusambizi s/o Wesonga v R. (1948) 15 E.A.C.A 63*). In the instant case, PW1 (Dr. Andrew Vuni) who conducted the autopsy established the cause of death to have been failure of the vital brain centers due to severe brain injury or damage. There was bleeding internally into the brain and externally from wounds. In his report, tendered as Exhibit P.E.1 dated 3rd August 2008, he provided details of the injuries sustained by the deceased. They include a compound skull fracture on the left parietal-occipital region measuring approximately 6 cms by 5 cms and 1 cm in depth. He also saw a cut wound across the palmar base of the left little finger measuring approximately 1 cm by ¼ cm and 1/5 cm in depth. There were two cut wounds on the right leg ankle measuring approximately 2 cm by 1 cm by ½ cm in depth and the other on the lower third of the leg measuring approximately 2 cms by 1 cm by ½ cm in depth. There was brain damage corresponding with the skull fracture.

The circumstances in which these injuries were inflicted were narrated by PW3 (Adiru Harriet) who stated they were as a result of physical assault. From the evidence adduced, I have not found

any lawful excuse for such assault. In his defence, the accused DW1 did not address this issue at all. Counsel for the accused did not contest this element either in her final submissions. Having considered all the available evidence in relation to this ingredient, I am satisfied that it has been proved beyond reasonable doubt that the cause of Blasio Jasindo's death was an unlawful act.

The prosecution is further required to prove that the unlawful act which caused the death of the deceased, was actuated by 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. 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 *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 afore thought will readily be inferred (see *Uganda v Manuela Awacango and Another H.C. Criminal Session Case No 16 of 2006*)

In the instant case, none of the witnesses saw the weapons with which the deceased was assaulted. It is therefore not possible to make an inference of malice aforethought on that basis. The question then is whether in light of the fact that some of the injuries inflicted on the deceased were fatal, whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. PW1 (Dr. Andrew Vuni) who conducted the autopsy established that the injuries were on the head, the left little finger and the lower right leg of the deceased. The stomach head is a vulnerable part of the body. Death is in my view a natural consequence of a cut to the head such as was found on the body of the deceased. Any person who inflicts such an injury to this part of the body, must foresee that death is a likely consequence of his or her act. In his defence, the accused DW1 did not address this ingredient. Counsel for the accused did not contest it either in her final submissions. Having considered all the available evidence in relation to this ingredient, I am satisfied that it has been proved beyond reasonable doubt that the cause of Blasio Jasindo's death was an unlawful act actuated by malice aforethought.

Lastly, the prosecution must prove that it is the accused that caused the unlawful death. There should be credible evidence placing the accused at the scene of the crime as an active participant

in the commission of the offence. The key identifying witness was the victim who is now dead. The prosecution relied on his dying declaration as heard by PW3 (Adiru Harriet). However, court is required to proceed with caution in respect of dying declarations (see *Mibulo Edward v Uganda S.C. Cr. Appeal No.17 of 1995*).

In this case, I have considered the circumstances in which it was made. The deceased was attacked suddenly at night. It appears though that he knew the accused because he called him by name. The declaration is corroborated by the testimony of PW3 (Adiru Harriet) who shortly thereafter saw the accused among the people who emerged from the house and continued to assault and pursue the deceased. I have considered though that this is evidence of a single identifying witness. The attack having taken place at night, I have considered that fact that the witness had known the accused before the attack, the attack took some considerable time as she watched before the deceased temporarily escaped from his assailants, at about fifty meters away, she was in reasonable proximity to the scene and there was moonlight.

The accused raised the defence is alibi. The accused did not have any obligation to prove this defence. The burden was on the prosecution to disprove this defence. In her final submissions, counsel for the accused argues that PW3 did not see the accused that night but relied on the fact that he had seen him the previous day. The conditions that prevailed at the scene did not favour correct identification because of the distance and absence of moonlight. She argues that the witness could have been mistaken. To the contrary, I am satisfied that the conditions favoured correct identification and that her evidence is free of error or mistake. The defence of alibi has therefore been effectively disproved by the prosecution and the accused has squarely been placed at the scene of crime as an active participant in the commission of the offence.

In the final result, in agreement with the assessors, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby convict the accused for the offence of Murder c/s 188 and 189 of the *Penal Code Act*

Dated at Arua this 25th day of August, 2016.

Stephen Mubiru

Judge.

30th August 2016

2.30 pm

Attendance

Ms. Andicia Meka, Court Clerk.

Ms. Harriet Adubango, Senior Resident State Attorney, for the prosecution.

Counsel for the convict is absent.

The convict is present in Court.

SENTENCE AND REASONS FOR SENTENCE

The convict was found guilty of the offence of murder c/s 188 and 189 of the *Penal Code Act* after a full trial. In her submissions on sentencing, the learned Senior Resident State attorney prayed for a deterrent sentence on the following grounds; the offence carries the maximum penalty of death. The convict not only participated in demolishing the deceased's homestead but also went ahead to participate in killing him. He therefore deserves a deterrent sentence for him and other members of society to learn not to take the law into their own hands.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender and a relatively young man at the age of 35 years. He has a family of two children. He has been on remand since 30th May 2011, a period of five years and three months. He is remorseful, has learnt his lesson and deserves a lenient sentence will enable him return to his home and look after his family. In his *allocutus*, the convict prayed for lenience on account on grounds that his children have no one to look after them and have dropped out of school.

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.

Where there is a deliberate, pre-meditated killing of a victim, courts are inclined to impose life imprisonment especially where the offence involved use of deadly weapons in committing the offence. In this case, there is no direct evidence that the convict used such a weapon, although the evidence suggest that one of the persons with whom he attacked the deceased must have had such a weapon. I have excluded the sentence of life imprisonment on that ground

I have nevertheless considered the aggravating factors in this case being; the degree of injury inflicted on the victim since upon examination he was found to have deep cuts on the head. The attack followed an earlier one in the day where the homestead of the accused was demolished. Accordingly, in light of those aggravating factors, I have adopted a starting point of forty years' imprisonment.

I have considered the fact that the convict is a first offender, a relatively young man and has a young family. Despite those considerations, I consider a deterrent sentence to be appropriate in the circumstances. I for that reason consider the period of thirty two (32) years' imprisonment to be an appropriate deterrent sentence in light of the mitigating factors.

In accordance with Article 23 (8) of the Constitution and Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, to the effect that the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account, I observe that the convict was charged on 30th May 2011 and been in custody since then. I hereby take into account and set off a period of five years and three months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of twenty six (26) years and three (9) months, to be served starting from today.

The convict is advised that he has a right of appeal against both conviction and sentence within a period of fourteen days.

Dated at Arua this 30th day of August, 2016.

Stephen Mubiru

Judge.