

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**

**CRIMINAL CASE No. 0109 OF 2014**

**UGANDA** .....

**PROSECUTOR**

**VERSUS**

**ADEGI GILBERT** .....

**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 on the 5<sup>th</sup> day of October 2013 at Aminzi village in Nebbi District, murdered one Oyenya Mateo.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that sometime in October 2013, a girl went missing from Aminzi Village, Pacaka Parish, Erusi Sub-County in Nebbi District. The deceased, two other women and a girl were suspected of complicity in the disappearance. On 5<sup>th</sup> October 2013, the village community gathered, arrested the three suspects and began subjecting them to sustained assault in an attempt to force them disclose the whereabouts of the missing child. A crime preventer alerted the police at the nearby Goli Police Post and the police intervened to save the lives of the suspects. The first policeman to arrive was the O/c Goli Police Post, P.W. 3 (SP Nuwamanya Ben Kashumbusha). He found the accused was performing rituals on the three adult women which involved tapping repeatedly on bamboo sticks ties with a piece of string on either side of each of their respective heads and in-between their fingers. The accused claimed to be a witchdoctor and that by those rituals the suspects would eventually reveal the whereabouts of the missing child.

The policeman was overwhelmed and could not stop the assault. He called for reinforcement. By the time the reinforcements came, which included P.W.4 (AIP Okema Michael Ibingira), the

suspects had been taken down the valley where it was said they had disclosed the missing child to have been. The assault continued in the meantime in a small pond where the suspects had been made to sit. After arrival of reinforcements, the police fired gunshots in the air to disperse the mob. They arrested the accused and took the women who had been assaulted to Nebbi Hospital where the deceased died the following day.

In the unsworn statement he made in his defence, the accused denied participation in the killing of the deceased. He said that on 3<sup>rd</sup> October 2013, he spent the day in his garden. When he returned home in the evening he found policemen waiting for him. They arrested him and took him to the police station. He called two witnesses both of whom supported his alibi.

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 v 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.

The first ingredient requires 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 regard, the only direct evidence adduced is the post mortem report prepared by PW1 (Oryema Stephen) a Medical Clinical Officer at Nebbi Hospital which was admitted during the preliminary hearing as Exhibit P.E.1 dated 7<sup>th</sup> October 2013. He conducted an autopsy at the Nebbi Hospital mortuary

where the body was identified to him by a one Ogwetha Luciano as that of Oyenya Onyako. In his defence, the accused DW1 stated that he was surprised to be arrested upon his return from the garden on 3<sup>rd</sup> October 2013. He has no knowledge of the incident that led to the death of the deceased. Counsel for the accused does not contest this ingredient in his final submissions. I have considered the evidence and observed that the person named in the indictment as the deceased is Oyenya Mateo yet the post mortem report names the deceased whose autopsy was done as Oyenya Onyako. This discrepancy was not explained by the prosecution. I have considered the circumstantial evidence of PW2 (No. 58823 D/C Emyedu Joseph) and PW4 (AIP Okema Michael Ibingira) who said they rescued the victim from a mob on 5<sup>th</sup> October 2013 and took her to Nebbi Hospital. Both described the victim as an old woman. The following day (6<sup>th</sup> October 2013), they heard she had died. The post mortem presented to court is in respect of an autopsy that was done at the Nebbi Hospital mortuary on 7<sup>th</sup> October 2013 of a 71 year old female. Despite the apparent unexplained discrepancy in names, the circumstantial evidence proves that Oyenya Mateo and Oyenya Onyako was one and the same person. Therefore in disagreement with the first assessor but in agreement with the second assessor, I find that from the evidence adduced, the prosecution has proved beyond reasonable doubt that Oyenya Mateo alias Oyenya Onyako, is dead.

The prosecution is further required to prove beyond reasonable doubt that the death was caused by an unlawful act. It is the law that any homicide is presumed to have been caused unlawfully unless it was accidental or it was authorized by law. PW1 (Oryema Stephen) a Medical Clinical Officer at Nebbi Hospital conducted the autopsy and established the cause of death to have been spinal damage and hemorrhagic shock due to severe bleeding. This was attributed to the injuries found on the body of the deceased which included; cuts on the scalp, severe bleeding and fractured neck bones. Exhibit P.E.1 dated 7<sup>th</sup> October 2013 contains the details of the findings. The circumstances in which these injuries were sustained were explained by PW2 (No. 58823 D/C Emyedu Joseph), PW3 (SP Nuwamanya Ben Kashumbusha) and PW4 (AIP Okema Michael Ibingira) who said the injuries were as a result of physical assault in an attempt to force the deceased to reveal the whereabouts of a missing child. In his defence, the accused DW1, did not directly address this ingredient since he denied any knowledge of the incident and set up an alibi. Counsel for the accused does not contest this ingredient in his final submissions. The evidence before court has not disclosed any lawful excuse for such assault. In the circumstances,

considering that the first assessor did not render an opinion in regard to this ingredient, in agreement with the second assessor, I find that from the evidence adduced, the prosecution has proved beyond reasonable doubt that the death was unlawfully caused.

The next ingredient to be considered is proof that the unlawful act 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. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of the assault would probably cause death. Malice aforethought is a mental element that is difficult to prove by direct evidence. Courts usually consider weapon used, the manner in which it was used and the part of the body of the victim's body that was targeted. The court was provided with the testimony of PW2 (No. 58823 D/C Emyedu Joseph), PW3 (SP Nuwamanya Ben Kashumbusha) and PW4 (AIP Okema Michael Ibingira) who said sticks were used to hit the deceased repeatedly on the back and on the head. They gave a description of the sticks and the manner in which they were used to assault the deceased. This went on for a prolonged period of time.

The sticks allegedly used in assaulting the deceased were never recovered nor exhibited in court. In the attempt to describe them, there was material discrepancy in the description provided by the witnesses and the manner in which they were used. PW2 (No. 58823 D/C Emyedu Joseph) described them as "big as the microphone stand and about 1.6 metres long....the accused would raise it from a height above his head and beat the deceased." Describing the same stick PW3 (SP Nuwamanya Ben Kashumbusha) said "he had tied two bamboo sticks with a string on each side of the head and was tapping on those sticks.....the stick was less than an inch in diameter." The court was therefore unable to form a definitive opinion regarding the size and length of the stick used as a weapon in assaulting the deceased. It was not possible from the evidence to determine whether the stick can be classified as deadly weapons. The inference of malice aforethought therefore could not be made on basis of the weapon used being deadly.

Where no deadly weapon is involved in causation of the death, court is then required to determine whether death was a natural consequence of the act that caused the death and whether whoever did it foresaw death as a natural consequence of the act. Voluntary performance of any act, with reasonable foresight that it is likely to cause death, but with such a reckless disregard

for the probability of the death of another human being ensuing, is a justifiable basis for inferring malice aforethought. Fatal injuries inflicted on vital or vulnerable parts of the body in a deliberate manner may support such an inference. The testimony of PW2 (No. 58823 D/C Emyedu Joseph), PW3 (SP Nuwamanya Ben Kashumbusha) and PW4 (AIP Okema Michael Ibingira) painted a picture of an assault of an old woman that went on for a prolonged period, most of it targeting the head, the neck and the back. In the circumstances, the assault was done with such a reckless disregard for the probability of the death of the old woman ensuing, yet it should have been foreseeable that in light of her advanced age, which on post mortem examination was put at 71 years, her death as a result of such assault was imminent. In his defence, the accused DW1, did not directly address this ingredient since he denied any knowledge of the incident and set up an alibi. Counsel for the accused does not contest this ingredient in his final submissions. Considering that the first assessor did not render an opinion in regard to this ingredient, in agreement with the second assessor, I find that from the evidence adduced, the prosecution has proved beyond reasonable doubt that the death was caused with malice aforethought.

Lastly, the prosecution has the burden of proving beyond reasonable doubt that it is the accused that caused the unlawful death. There should be credible evidence placing the accused at the scene of the crime, not as an innocent bystander but as an active participant in the crime. In his unsworn statement, the deceased set up an alibi. He said that on 3<sup>rd</sup> October 2013, he was in his garden during the day and upon his return home in the evening, he found police officers waiting at his home whereupon he was arrested. Although he appears not to have explained his whereabouts on the material day mentioned in the indictment, I have given him the benefit of doubt as this could have been a lapse of memory due to passage of time. An accused that sets up an alibi does not have the burden to prove it but rather the burden is on the prosecution to disprove that alibi. His witnesses DW2 and DW3 said they were not aware of his involvement in any incident of the nature described in the indictment and by the prosecution witnesses. Counsel for the accused disputes this ingredient in his final submissions. His argument is that P.W.2 was lying when he said that the accused was using a big stick. He also is the only one who mentioned the presence of two witchdoctors at the scene. He contends that what the accused was seen doing was mere tapping on the head in the performance of rituals. The deceased was beaten by other persons.

In a bid to disprove that alibi, the prosecution relied on the eyewitness accounts of PW2 (No. 58823 D/C Emyedu Joseph), PW3 (SP Nuwamanya Ben Kashumbusha) and PW4 (AIP Okema Michael Ibingira). Consider the defence of the accused DW1. Despite the discrepancies in the description of the implements the accused was using in assaulting the deceased, I have not found any inconsistencies in the testimony of these witnesses regarding the presence of the accused at the scene of the crime. Although none of them claims to have known the accused before, the incident happened during day time. For a prolonged period of time, the accused was the centre of attraction as he took center stage in the assaults disguised as rituals designed to cause the deceased to disclose the whereabouts of a missing child. He was therefore under their observation for a long time and in close proximity. I am satisfied that their identification of the accused is free from error and the possibility of mistake.

Defence counsel argues that the accused was simply performing rituals and the deceased was instead assaulted by other members of the public. There is no evidence that the deceased had consented to those rituals which involved hitting her with sticks. Without her consent, what the accused was doing was technically an assault on the deceased. He was therefore acting in a common design with the rest of the mob in assaulting the deceased variously. The doctrine of common intention would render him equally liable criminally with the rest of the mob. Common intention refers to the common design of two or more persons acting together. A pre-arranged plan need not have to be developed for a considerable period before the criminal act, but could have developed all of a sudden on the spot or spontaneously.

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. In “twin crime” situations such as where members of a group agree on their main goal to commit a primary criminal act (e.g. assault) but did not share the intention of one of the members to also commit a collateral criminal act (e.g. killing) which was incidental to the main goal, if the collateral criminal act were such as the participants in the primary criminal act knew to be likely to be committed in the attempt to commit the primary criminal act, or in the commission of the first primary criminal act, or in consequence of the commission of the primary criminal act, each of such persons is liable for that collateral criminal act in the same manner as if the act were done by him alone.

For those reasons, in disagreement with the first assessor but in agreement with the second assessor, I find that from the evidence adduced, the alibi has been disproved. The accused has been effectively placed at the scene of crime as an active participant in the commission of the offence. The prosecution has proved beyond reasonable doubt that the accused participated in causing the death of the deceased.

In the final result, in disagreement with the first assessor but in agreement with the second assessor, 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 26<sup>th</sup> day of August, 2016.

.....

Stephen Mubiru  
Judge.

31<sup>st</sup> 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 tortured a 71 year old woman to death. He therefore deserves a deterrent sentence for him and other members of society to learn to avoid dangerous rituals.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender and a young man at the age of 24 years still capable of reform. He has been on remand since October 2013, a period of two years and ten months. In his *allocutus*, the convict prayed for lenience on grounds that he is an orphan who was also responsible for looking after the children of his deceased siblings. He as well has two young children. All the children have dropped out of school and their future as useful citizens of Uganda is now ruined. His mother is a double amputee. He suggested a custodial sentence of three years.

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 most egregious cases of Murder. I do not consider this to be a case falling in the category. 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 22<sup>nd</sup> 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. Similarly in *Sunday v Uganda C.A Crim. Appeal No. 103 of 2006*, the Court of Appeal upheld a sentence of life imprisonment for a 35 year old convict who was part of a mob which, armed with pangas, spears and sticks, attacked a defenseless elderly woman until they killed her.



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 this case, there is no evidence that the convict used 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 assault on the deceased went on for a prolonged time. The convict deliberately targeted and caused death of a vulnerable 71 year old woman. He was part of a mob and for most of the time led the assault under the guise of performing rituals. Accordingly, in light of those aggravating factors, I have adopted a starting point of twenty years' imprisonment. I am guided in this by the decision in *Byaruhanga v Uganda, C.A Crim. Appeal No. 144 of 2007*, where in its judgment of 18<sup>th</sup> December 2014, the Court of Appeal considered a sentence of 20 years' imprisonment reformatory for a 29 year old convict who drowned his seven months old baby. The convict had failed to live up to his responsibility as a father to the deceased who was victimized for the broken relationship between him and the mother of the deceased.

I have considered the fact that the convict is a first offender, a relatively young man and has considerable family responsibilities. He caused the death as a result of reckless disregard for life rather than out of premeditation. I consider a reformatory sentence to be appropriate in the circumstances. I for that reason regard the period of sixteen (16) years' imprisonment to be an appropriate reformatory 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 8<sup>th</sup> October 2013 and has been in custody since then. I hereby take into account and set off a period of two years and ten months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of thirteen (13) years and three (2) 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 31<sup>st</sup> day of August, 2016.

Stephen Mubiru

Judge.