

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CR – CS – 0030 OF 2015

UGANDA.....PROSECUTION

VERSUS

KATEMBA SHARIF YAHAYA.....1ST ACCUSED

BYARUHANGA FIDEL RASHID ABDULRAHAM.....2ND ACCUSED

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

Judgment

The accused were indicted with Count I of Murder Contrary to **Section 188 & 189** of the Penal Code Act. It is alleged that the accused and others at large on 27th June 2014 at Kyaliboni Village in Kyegegwa District with malice a fore thought murdered Mukashaka Beatrice Beyaafa.

Count II of Attempted Murder Contrary to **Section 204** of the Penal Code Act. It is alleged that the accused and others still at large on 27th June 2014 at Kyaliboni Village in Kyegegwa District Unlawfully attempted to cause the death of Twinomugisha Sarah.

Count III of Attempted Murder contrary to **Section 204** of the Penal Code Act. It is alleged that the accused and others still at large on 27th June 2014 at Kyaliboni Village in Kyegegwa District Unlawfully attempted to cause the death of Tashobya Polly.

All the accused denied the III Counts and A1 and A2 raised a defence of Alibi. The prosecution produced 6 witnesses to prove its case. A3, A4, A5, A5 were found with no case to answer and were acquitted. A1gave unsworn evidence whereas A2 gave sworn evidence.

Burden of Proof

The burden of proof rests upon the prosecution throughout and never shifts except in a few instances provided for by law. It has further been laid down by decided cases that, in all indictments for murder, the standard of proof is even higher than in the ordinary criminal cases. (See: **A. Abonyo & Another versus R. [1962] EA** relied upon in the case of **Uganda versus Adonia Zoreka & No. 7770 DC Kikwenba Criminal case 103/87.**)

In order to consider the culpability of the Accused persons, several principles of the law are considered. The Accused persons are presumed innocent until the contrary is proved. (See: **Article 28 (3) (a)** of the Constitution of the Republic of Uganda, 1995 as amended.) Therefore, the Prosecution bears the burden to prove not only the fact that the offence was committed but that it was committed by the Accused persons or that the Accused persons participated in the commission of the alleged Offence. It is therefore relevant to place the Accused persons at the scene of crime.

Section 101 (2) of the Evidence Act provides that;

“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

It is further provided under **Section 103 of the Evidence Act** that;

“The burden of proof as to any particular fact lies on that person who wishes the Court to believe its existence, unless it is provided by law that the proof of that fact lie on any particular person.”

Standard of proof

The standard of proof is beyond reasonable doubt as discussed in the case of **Miller Vs. 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”.

Similarly in **Uganda versus Dick Ojok (1992-93) HCB 54**: it was held that in all criminal cases, the duty of proving the guilt of the Accused always lies on the Prosecution and that duty does not shift to the Accused except in a few statutory cases and the standard by which the Prosecution must prove the guilt of the Accused is beyond reasonable doubt.

The Accused persons can only be convicted on the basis of evidence adduced before Court, such evidence must be credible and not tainted by any lies or hearsay, or otherwise it will be rejected by the Court for being false. Therefore, the accused can only be convicted on the strength of the prosecution evidence and not on the weakness of his defence even when he appears to be telling lies. (See: **Kooky Sharma and Another versus Uganda Supreme Court Criminal Appeal No. 44 of 2000**)

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.**)

Wasswa Adam – Senior Resident State Attorney represented the Prosecution and Counsel Ruth Ongom appeared for the accused on State Brief.

That the deceased is dead:

Prosecution witnesses and medical evidence as tendered in Court and agreed upon by both Counsel under **Section 66** of the Trial on Indictments Act clearly proved this ingredient in as far as Count 1 is concerned.

That the death was caused unlawfully:

All death occasioned by one person onto another is Unlawful except in execution of a sentence passed in a fair trial by a Court of competent jurisdiction as per **Article 22** of the Constitution of the Republic of Uganda, 1995. This ingredient too was proved by the prosecution evidence beyond reasonable doubt on Count I.

That there was malice aforethought:

Section 191 of the Penal Code Act defines malice aforethought as;

“An intention to Cause death of any person whether such person is the person actually killed or not or knowledge that the Act or Omission causing death will probably cause death of some person, whether such person is the one actually killed or not although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused.”

The law is now well settled that malice aforethought being a mental element of the offence of murder is difficult to prove by direct evidence. However, malice aforethought can be inferred from the surrounding circumstances of the offence such as;

1. The nature of weapon used.
2. The part of the body targeted.
3. The manner in which the weapon was used.
4. The conduct of the accused before, during and after the attack. 9See **R Versus Tubere S/O Ochen [1945] 12 EACA 63**

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.

Case Law has established that in deciding whether or not the prosecution has discharged its burden, the court looks at the surrounding circumstances in each particular case that include the nature and number of injuries inflicted, the part of the body injured, the nature of the weapon used and also the conduct of the accused immediately before and after the attack. (See: **Uganda versus John Ochen [1992-93] HCB, Uganda versus. Adonia Zoreka & No. 7770 DC Kikwemba Criminal case 103/87** where the trial Judge relied upon the case of **R. versus Tubere (1945)12 EACA 63 and Ekadeho s/o Lomuli versus R. [1959]EA 168 (CA)**).

In the instant case the accused were members of a Muslim group that had been threatening members of their community to convert to Islam. On the night of the alleged incident a church was attacked where a member was murdered and others were occasioned grievous harm.

PW1 told Court that he sustained injuries that were caused by Jimmy who was the leader of the group. He also confirmed that the deceased Beatrice was attacked by the Jimmy (now deceased) and later on was attacked by A1. That the assailants also went on to descend on PW3 who also sustained injuries over repeated attacks.

PW2 in his testimony told court that he witnessed the assailants attacking members of the church as he hid in a cassava garden among the assailant he managed to recognise A1 and A2. The weapons used by the assailants included a panga (which was exhibited in Court), a spear, an axe and a hoe. The assailants mainly targeted the heads of their victims as per the medical report of the deceased, and the evidence of PW1 and PW3 who was attacked by A2. The weapons in my opinion were used in such a manner to finish off their targets. It is alleged that the accused had a group that before the attack had been threatening some of the prosecution witnesses to convert to Islam but they declined.

PW4 in his evidence told Court that at the time of arrest of A2 he was found with a double edged panga, a white and red scarf and a cream kanzu which were given to PW6 to handle as exhibits. The same save for the kanzu were tendered in Court by PW6 and the scarf had

markings on the parts that were stained with blood. In their evidence PW1, PW2 and PW3 had all stated that A2 was wearing a kanzu and had the said scarf covering his face at the time of the attack.

In regard to the above and the evidence as adduced by the Prosecution witnesses I find that the prosecution proved the ingredient of malice afore thought beyond reasonable doubt on all Counts.

Prosecution also argued common intention and their evidence points sufficiently to the existence of a common intention to execute an unlawful purpose.

The law provides that, where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of that purpose an offence is committed of such nature that its commission was a probable consequence of that purpose, each of them is deemed to have committed the offence. **(See: Section 20 Penal Code Act & Andrea Obonyo & Others versus R. [1962]1 EA 542 (CAN), Opoya versus Uganda [1967]1 EA 752 (CAK) and Isingoma versus Uganda [1986]1 EA 155 (SCU).**

The Court of Appeal has held that;

“To prove common intention, it is not necessary to prove prior agreement between assailants. It is sufficient to prove their intention which can be inferred from their actions. It can be inferred from the presence of the accused, their actions or omissions to disassociate themselves from the attack.” **(See: Birikadde versus Uganda [1986] HCB 6.)**

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

In regard to participation PW1, PW2, PW3 and PW5, were all consistent in their testimonies in regard to the participation of A1 and A2 on the three counts. PW1 and PW3 were even victims of the incident. The accused were known to these witnesses, the manner in which the attack happened, there was close proximity between the accused and the witness. There was also sufficient light provided by a lantern that enabled the victims to identify A1 and A2. Therefore, ruling out a possibility of mistaken identity.

The accused raised a defence of Alibi and the law regarding an alibi is that where an accused person sets it up, he does not assume the burden of proving it. The burden of disproving the alibi remains on the prosecution; and the prosecution discharges that burden by leading cogent evidence that places the accused at the scene of crime at the time of the offence. (See: **Sekitoleko Versus Uganda (1967) E.A 531**).

The prosecution was however able to place accused sufficiently at the scene of crime.

In a nutshell, I find that the prosecution proved its case beyond reasonable doubt and proved all the ingredients to the satisfaction of this Court. With the nature of the attack, weapons used, parts of the body subject to the attack, previous conduct of the accused, the death of a person as evidenced by the post-mortem report, I therefore find the accused guilty and should be convicted on Count I of Murder, Count II of Attempted Murder, and Count III of Attempted murder.

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OYUKO. ANTHONY OJOK

JUDGE

14/11/16