

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0118 OF 2014

UGANDA **PROSECUTOR**

VERSUS

A1. BERIWU PASKA }
A2. OYII PAKIVALE } **ACCUSED**
A3. ONEGA GEOFFREY }

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused are jointly charged with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the three of them and others still at large on the 25th day of April 2014 at Akeu village, Adolo Parish, Ndhew sub-county in Nebbi District murdered one Tani Anena.

The prosecution case is that the deceased and A.3 were brothers and lived in the same homestead with A.1 the wife of A.3 and A.2 their son. Sometime during March 2014, the deceased lodged a complaint with the elders of Akeu village, who included P.W.3 Obima Mateo, claiming that A.1 Beriwu Paska was practicing witchcraft and was responsible for the constant ill health of his children. The deceased had consulted a witchdoctor from whom he obtained that information. When the elders convened, A.1 denied the accusation and the elders decided the two parties should agree on a common witchdoctor for a confirmatory consultation. The first witchdoctor consulted exonerated A.1 while the second implicated her. The results being inconclusive, the elders advised that a third consultation should be done. The deceased and A.3, who is the husband of A.1, agreed to finance the final consultation. Three days later, the deceased delivered his contribution to P.W.3 while A.3 never did at all. On 24th April the deceased stopped at the home of P.W.3 to find out whether A.3 had delivered his contribution and informed P.W.3 that A.3 had declared he would one day kill the deceased. The following day, P.W.3 received a call from the L.C.1 Chairman indicating that the deceased had gone missing.

P.W.4 Anena Louis, the son of the deceased testified that the last time he saw his father alive was on 25th April 2014 when this witness and his wife were in their garden. His father was digging in his own garden next to theirs. Later the three accused came to their own garden in the same vicinity and began digging too. When he and his wife got exhausted, they picked their hoes and returned home passing by their father who said he would be following them shortly. They left him behind with the three accused, digging nearby. The three accused too returned later but the deceased never returned home. It rained from 1.00 pm to around 4.00 pm and still the deceased had not returned home after the rain stopped. At around 6.00 pm, his family became anxious and started searching for him, in vain. The following day the L.C. officials mobilised a big group of villagers and a search was mounted for the deceased. Subsequently, the body of the deceased was discovered buried under leaves, twigs and grass in the garden of a one Tekakwo, about 100 metres from the spot where P.W.4 had left him digging the previous day. His hoe and panga were missing.

P.W.5 A/IP Chorom Kennedy, the investigating officer, testified that on 26th April 2014, he received a report of a body of a deceased person which had been found at Akeu village. He proceeded to the scene and found a body buried under leaves, twigs and grass in the garden of a one Tekakwo. There were signs of a struggle in the grass near the spot where P.W.4 had left the deceased digging in his garden. From that spot, there was a trail in the soil which indicated the body had been dragged to the spot where it was discovered. Four different sets of footprints were visible along that trail. He arranged for the body to be taken for a post mortem examination and arrested both A.1 and A.2 as prime suspects based on the fact that they had a grudge with the deceased and were the last persons seen with him. A.3 had disappeared.

The post mortem report prepared by P.W.1, Medical Officer Omito Andrew, which was admitted at the preliminary hearing and exhibited as P.Ex.7 dated 26th April 2014 indicated that the cause of death was “brain damage, skull bone multiple fracture with haemorrhagic shock.” The doctor found “generalised peeling of skin of recent origin possibly assault. The jaw bone on the left side is broken and piercing the skin, oozing blood spontaneously from the site. The skull bone is completely broken and all the sutures are mobile.”

In her defence, D.W.1 Beriwu Paska testified that he did not go to the garden on 25th April 2014 but was instead at a rock at Agweno, pounding cassava with other women. She returned home

later and it is only the following morning that she heard a woman say the deceased was missing. She was preparing porridge for her children only to be surprised by a police officer who arrested her and telling her that her brother in law, the deceased had died. She together with other suspects was taken to Nebbi Police Station. She did not have any problem with the deceased but with his son P.W.4 Anena Louis, for intervening on the side of his wife when in 2010 a violent quarrel broke out between him and his wife over custody of their ten month old baby. She denied having participated in killing the deceased.

In his defence, A.2 Oyirwoth Pakivale stated that on 21st April 2014 he together with other youths, went out hunting for edible rats in Pakwach. They returned from the hunt on the morning of 26th April 2014 at around 1.30 am. At daybreak, policemen came making inquiries about people who had been to the garden the previous day. He followed the police up to the scene where he found the body of his late uncle. His wife and mother were arrested, he took them fresh clothes and returned home only to find that his father's house had been set on fire by P.W.4 Anena Louis. He remained at the home of the L.C.1 Chairman. He was arrested on 28th April 2014 at Nebbi Police Station where he had gone to visit his mother and wife in custody. He too denied having participated in killing the deceased.

In his defence, A.3 Onega Geoffrey testified that on 25th April 2014 he went to the garden with his daughter in law and his brother's daughter in law. They returned home after their chores. Later at around 4.00 pm, he heard the sound of drums mobilising people to go and build the house of the Catechist. He joined other people in the construction which ended at around 7.00 pm and he returned home. The following morning, on his way back to the garden, he branched off to a neighbour's home whose child had sustained a snake bite. It is while there that he learnt that the deceased had not returned home. He proceeded to the garden again with his daughter in law and his brother's daughter in law. At around 11.00 am, he heard the sound of trumpets coming from the direction of his home. About ten minutes later, the people blowing the trumpets came to the garden where he was and told him they were searching for the deceased. He did not join them. He followed them home. Later he heard an alarm coming from the direction of the hill and he knew his brother was dead. He immediately went to make calls to the relatives announcing the death. P.W.4 Anena Louis set his house on fire and so he decided to leave the village and return to his maternal home. It is from there that he was arrested after a period of

three months. There was no problem between him and his late brother since it is his son P.W.4 Anena Louis who called his wife, A.1 a witch. He too denied having participated in killing the deceased.

In his submissions, counsel for the accused on state brief, Mr. Onencan Ronald conceded to the first three ingredients of the offence but contested the last. The thrust of his argument was that each of the accused had set up an alibi and the prosecution had failed to disprove any of the alibis. The prosecution case is based only on circumstantial evidence and it does not irresistibly point to the guilt of any of the accused persons. A.3 did not disappear from the village but had nowhere to live after his house was set on fire. He prayed for their acquittal.

Submitting in reply, the learned State Attorney, Mr. Emmanuel Pirimba argued that the alibis of each of the accused had been disproved by the testimony of P.W.4 Anena Louis which placed them at the scene of the crime. There is strong circumstantial evidence against them in that they bore a grudge against the deceased for calling A.1 a witch. They were the last persons seen with the deceased near the garden where his body was found. None of them participated in the search for the deceased when it was discovered he was missing. A.3 abandoned all his property and fled from the village. He never reported to anyone in authority the destruction of his property. He did not even visit his wife and son in custody until his arrest three months later. He never attended the funeral of his late brother. In his charge and caution statement tendered as exhibit P.Ex. 5, he stated that he was with both his co-accused in the garden. He prayed that all the accused be convicted as indicted.

In their joint opinion, the assessors advised court to convict the accused on grounds that all elements of the offence of murder had been proved. They advised the court to reject the defences of the accused since they had been placed at the scene of crime and the circumstantial evidence against them was strong enough to sustain a conviction.

In this case, the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused persons and the accused are only convicted on the strength of the prosecution case and not because of weaknesses in their defences, (See *Ssekitoleko v. Uganda* [1967] EA 531). By their respective pleas of not guilty, the accused put in issue each and every essential ingredient of the offence with which they are

charged and the prosecution has the onus to prove the ingredients of each count beyond reasonable doubt. 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 are 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.

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 this case, the court was presented with a post mortem report prepared by P.W.1, Medical Officer Omito Andrew, which was admitted at the preliminary hearing as Exhibit P.Ex.7 dated 26th April 2014. The body was identified to him by a one Opio Muzamil as that of Tanislav Anena. It is corroborated by the testimony of P.W.3, Obima Mateo, the clan elder who saw the body of the deceased when it was returned by the police after the post mortem. P.W.4, Anena Louis, a son of the deceased too testified that he saw his body at the scene after it was discovered and attended the funeral. P.W.5, A/IP Chorom Kennedy, the Investigating Officer saw the body at the scene and organised for it to be taken for post mortem examination. On her part D.W.1, Paska Beriwu, in her defence stated that she saw the body of the deceased at the scene after it was discovered before she was arrested shortly thereafter. D.W.2, Oyirwoth Pakivale, said on 26th April 2014 he came back from a three day hunting expedition. He followed the police up to the scene where he saw the body of the deceased. D.W.3, Onega Geoffrey in his defence stated that he heard the search party mention that they had found the body of the deceased. He did not attend his funeral though. Defence counsel did not contest this element in his final submissions. Considering the evidence as a whole and in agreement with the joint opinion of the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that Tani Anena is dead.

It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or it was authorized by law. P.W.1, Medical Officer Omito Andrew, who conducted the autopsy, established the cause of death as “brain damage, skull bone multiple fracture with haemorrhagic shock.” Exhibit P.Ex.1 dated 26th April 2014 contains the details of the other findings which include “generalised peeling of skin of recent origin possibly assault. The jaw bone on the left side is broken and piercing the skin, oozing blood spontaneously from the site. The skull bone is completely broken and all the sutures are mobile” P.W.5 A/IP Chorom Kennedy, the investigating officer, testified that there were signs of a struggle in the grass near the spot where P.W.4 had left the deceased digging in his garden. From that spot, there was a trail in the soil which indicated the body had been dragged to the spot where it was discovered. Four different sets of footprints were visible along that trail. P.W.4 and P.W.5 further testified that when the body was eventually discovered it was covered with leaves, grass and twigs in an apparent attempt to conceal it. The attempt at concealment is suggestive of realisation that the death had been caused unlawfully. In their respective defences of alibi, none of the accused specifically addressed this element. Defence counsel did not contest this element in his final submissions. Considering the evidence as a whole and in agreement with the joint opinion of the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that Tani Anena’s death was a homicide and since there is no evidence of any lawful justification for the act(s) which caused the injuries seen on his body that led to his death, it has been proved beyond reasonable doubt that his death was unlawfully caused.

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 assault would probably cause death. Malice aforethought is a state of mind that is difficult to prove by direct evidence. Courts usually consider the weapon used (in this case none was recovered) and the manner it was applied (there were fatal injuries inflicted) and the part of the body of the victim that was targeted (the head). Ferocity can be determined from the impact (the skull was crushed. The skull bone was completely broken and all the sutures were mobile). Whatever weapon was used in attacking the deceased, it was used with such ferocity that it crushed the skull of the deceased. The assailant(s) also targeted a very

sensitive part of the body, the head. In their respective defences of alibi, none of the accused specifically addressed this element. Defence counsel did not contest this element in his final submissions. Considering the evidence as a whole and in agreement with the joint opinion of the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that Tani Anena's death was caused with malice aforethought.

Finally, there should be credible direct or circumstantial evidence placing each of the accused at the scene of the crime as an active participant in the commission of the offence. All the accused raised the defence of alibi. An accused who puts up such a defence has no duty to prove it. The burden lies on the prosecution to disprove it by adducing evidence which squarely places the accused at the scene of crime as an active participant in the commission of the offence. To counteract these defences, the prosecution relies first on the testimony of P.W.4, Anena Louis, the son of the deceased who testified that he saw the three accused on 25th April 2014 digging in their garden which was near that of the deceased. It is trite law that to sustain a conviction, a court may rely on identification evidence given by an eye witness. However, it is necessary, especially where the identification is made under difficult conditions, to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. To do so, the Court evaluates the evidence having regard to factors that are favourable, and those that are unfavourable, to correct identification. Before convicting solely on strength of identification evidence, the Court ought to warn itself of the need for caution, because a mistaken eye witness can be convincing, and so can several such eye witnesses.

In the instant case, P.W.4 knew all three accused since they lived in the same homestead, they were out in an open space in the garden when he saw them, it was daytime and he walked past them on his way home having observed them since the morning hours until the early afternoon hours when he retired to go home. I am satisfied that the conditions which prevailed in the garden were conducive to proper identification and that his evidence is free from the possibility of error. However, both D.W.1, Paska Beriwu and D.W.3, Onega Geoffrey in their respective defences contended that P.W.4 bore a grudge against them and by insinuation that it is the reason he implicated both of them. I have considered the contents of the charge and caution statement of D.W.3, Onega Geoffrey recorded on 20th September 2014, five months after the death of the deceased which was tendered in court as exhibit P.Ex.5A. In that statement, he stated that "on

25th April 2014 at about 8.00 am, Anena the son of Tani Anena went ahead of us to the garden at Azii L.C.1 village. Later on Scovia, my wife Paska, Tekakwo and I also went to the garden at Azii L.C.1 village.” I therefore find that the identification evidence of P.W.4 is corroborated by that statement of D.W.3 in exhibit P.Ex.5A which dissipates any possibility that P.W.4’s testimony is motivated by malice. Since there is no evidence that either A.2 or A.3 ever left the garden at the material time, the prosecution therefore has succeeded in destroying the respective alibi’s of A.2 and A.3 and squarely placed them at the scene of crime.

However for A.1 her defence was that she never went to the garden on 25th April 2014 but was instead at a rock at Agweno, pounding cassava with other women. Although the statement that she was never in the garden on 25th April 2014 is a lie, her statement that at one point in time she was at a rock at Agweno, pounding cassava is corroborated by the charge and caution statement of D.W.3, Onega Geoffrey, exhibit P.Ex.5A, in which he stated that “we were digging in different gardens. Paska was pounding cassava on a rock.” It is not clear how far the rock is from the garden since no evidence was led on this point. What seems clear though is that at one point A.1 left A.2 and A.3 in the garden and went to pound cassava. It is not possible from the evidence to tell whether she left the garden before or after the death of the deceased. This doubt must be resolved in her favour and since the prosecution did not adduce evidence discounting the possibility that A.1 was not at the scene when the deceased died, this has created a reasonable doubt in the case against her and therefore the prosecution has failed to disprove her alibi. For that reason she is hereby acquitted and should be released forthwith unless she is being held for other lawful reason.

To prove their participation of A.2 and A.3 in the commission of the crime, the prosecution relies entirely on circumstantial evidence. The first element is the existence of a grudge between the family of the deceased and that of the accused person when the deceased alleged that A.1 was a witch. The existence of this grudge is acknowledged by A.3 in his charge and caution statement, exhibit P.Ex.5A, where he stated, “Since the year 2011 up to the time Tani Anena died he had been having a grudge with my wife Paska. The whole family of Tani Anena were having misunderstandings with my wife Paska.” The second element is that P.W.4 left them behind in the garden in close proximity of the deceased and they were the last persons to be seen near the deceased that day. The third element in the chain is the testimony of P.W.5 (A/IP Chorom

Kennedy) the Investigating Officer who saw drag marks leading from where deceased was attacked from his garden. P.W.4 had left the deceased digging to the spot on Tekakwo's garden where the body was eventually found. Fourthly, none of them participated in the search for the body of the deceased yet A.3 announced the death of the deceased even before he had seen the body or received first hand information in a situation where it would have been easier to suspect that it was the victim of the snake bite whose death was being proclaimed. Fifthly, A.3 immediately thereafter disappeared from the village and the explanation he gave is incredible as an explanation justifying his extraordinary conduct in abandoning his home, garden and family. He did not attempt to visit A.1 and A.2 in custody until his arrest several months later. He never attended the burial of his late brother, the deceased in this case without any reasonable explanation.

In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. I have considered the totality of the circumstantial evidence against both A.2 and A.3 and I find that it irresistibly points to their guilt. The evidence is corroborated by the lies told by both accused in their defences. Since there are no other co-existing circumstances which would weaken or destroy the inference that the two accused participated in killing the deceased. Although defence counsel contested this element in his final submissions, considering the evidence as a whole and in agreement with the joint opinion of the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that A.2 and A.3 participated in causing the death of Tani Anena's. Accordingly, both A.2 Oyirwoth Pakivale and A.3 Onega Geoffrey are hereby convicted of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Arua this 6th day of February, 2017.

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Stephen Mubiru
Judge.

8th February 2017

11.06 am

Attendance

Ms. Sharon Ngayiyo, Court Clerk.

Ms. Jamilar Faidha, State Attorney, for the prosecution.

Mr. Samuel Ondoma for the convicts on State Brief.

The two convicts are present in Court.

SENTENCE AND REASONS FOR SENTENCE

The two convicts A2 and A3 were found guilty of the offence of Murder c/s 188 and 189 of the *Penal Code Act* after a full trial. In his submissions on sentencing, the learned State attorney prayed for a deterrent sentence on the following grounds; the offence carries the maximum penalty of death. They took the law into their own hands and killed the deceased in a most inhuman manner. They are not remorseful. They therefore deserve a long custodial sentence.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convicts are first offenders and remorseful. A.2 is a young man at the age of 21 years. A.3 is a 52 year old man with a large family for which he is the sole bread winner. They have been on remand for two years. In his *allocutus*, A.2 stated that he has nothing to say since he was convicted for an offence he did not know about. A3 stated his legs are weak, he has a large family to look after, including the orphans of his deceased brother whom he considers to be his children and prayed for the peaceful repose of the soul of the deceased.

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. This is not one of such cases. 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. I have taken into account the 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. 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 defenceless elderly woman until they killed her. In *Byaruhanga v Uganda, C.A Crim. Appeal No. 144 of 2007*, where in its judgment of 18th 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.

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 convicts used such weapons, although the injuries inflicted on the deceased tend to suggest so. I have excluded the sentence of life imprisonment on that ground. I have nevertheless considered the aggravating factors in this case being; it was a vicious strike at the head of the deceased. Accordingly, in light of that aggravating factor, I have adopted a starting point of thirty years' imprisonment.

I have considered the fact that the convicts are first offenders, A.2 is a young man. I consider a reformatory sentence to be appropriate for A.2. I for that reason deem a period of fifteen (15) years' imprisonment to be an appropriate reformatory sentence in light of the mitigating factors in his favour. 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 2nd May 2014 and been in custody since then. I hereby take into account and set off a period of two years and nine months as the period the convict has already spent on remand. I therefore sentence A.2 Oyii Pakivale to a term of imprisonment of twelve (12) years and three (3) months, to be served starting today.

On the other hand, A.3 is a man with considerable family responsibilities. Nevertheless, he killed his own brother over an allegation of witchcraft made against his wife. He deserves a deterrent sentence. I for that reason consider the period of twenty five (25) years' imprisonment to be an appropriate deterrent sentence in light of the mitigating factors in his favour. 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 2nd May 2014 and been in custody since then. I hereby take into account and set off a period of two years and nine months as the period the convict has already spent on remand. I therefore sentence A.3 Onega Geoffrey to a term of imprisonment of twenty two (22) years and three (3) months, to be served starting today.

The convicts are advised that they have a right of appeal against both conviction and sentence within a period of fourteen days.

Dated at Arua this 8th day of February, 2017.

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Stephen Mubiru,
Judge.