

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0151 OF 2015

UGANDA **PROSECUTOR**

VERSUS

A1. KERMUNDU PASTORE }
A2. OTING SEBEL } **ACCUSED**

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 accused and others still at large on the 29th day of March 2015 at Ali village, Pagei Parish, Warr sub-county in Zombo District murdered one Orwinya Rufino.

The prosecution case is that on the morning of 29th March 2015 at around 7.00 am, A.1 reported to the L.C.1 that a cow he had bought recently had gone missing the previous night. The L.C.1 mobilised some people and a search for the missing cow commenced. Part of the un-skinned carcass was subsequently found in one of the valleys on the village. The tail and one of the front leg and adjacent chunk of meat was missing from the carcass. The search party followed a trail of droplets of blood which led them to the home of the deceased whom they found repairing the roof of his house. When his house was searched, they found some fresh meat in a jerry can, the tail and the skin from the missing chunk of meat dumped in the latrine. When questioned, the deceased explained that one of his sons had brought the meat home and had taken most of it to a nearby trading centre for sale. A crowd soon gathered and began assaulting the deceased while accusing him of being an incurable thief. The L.C.1 Chairman called the police on phone but by the time they arrived at the scene, the deceased had been beaten to unconsciousness. The police directed that he should be taken to a nearby clinic but unfortunately he died before he could be taken to a major hospital for further management. Both accused were arrested for having participated in assaulting the deceased. Both denied the accusation in their defence. A.1 said he arrived at the scene after the deceased had been beaten and was already lying unconscious. A.2

said he attempted to rescue the deceased but was overpowered by the mob. They did not call any witnesses in their defence.

In his final submissions, the learned State Attorney Mr. Emmanuel Pirimba argued that all the ingredients had been proved and the accused ought to be convicted as indicted while counsel for the accused on state brief Mr. Onencan Ronald argued that whereas the first three ingredients of the offence had been proved, the prosecution had failed to prove the participation of the accused in the commission of the offence. He prayed that the accused be acquitted. In the opinion of the first assessor, all the ingredients of the offence were proved and both accused should be convicted as indicted. In the opinion of the second assessor, the first three ingredients of the offence had been proved but because the last ingredient was not, she advised the court to acquit both accused since A1 had only hit the deceased in anger without an intention to kill while A.2 used a small stick.

The prosecution has the burden of proving the case against both accused beyond reasonable doubt. The burden does not shift to the accused persons and they can only be 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 plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which they are indicted and the prosecution has the onus to prove each of the ingredients of the offence 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.

That Death of a human being occurred 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 relied on a post mortem report prepared by P.W.1 Medical Officer Amiloki Patrick, which was admitted at the preliminary hearing and exhibited as prosecution exhibit P.Ex.1, dated 30th March 2015. The body was identified to him by a one Bithum Janet as that of Rufino Ringtho. There is also the evidence P.W.3 No. 28815 D/C Ofwoyo Charles the police officer who came to the scene to rescue the deceased who said he later received information of his death. P.W.4 Ogenmungu Richard Sebel the L.C.1 Chairman stated Orwinya Rufino died on 29th March 2015 and was present as he was being assaulted. In his defence, A.1 Kermundu Pastore said he was present as the deceased was being taken to hospital but did not say anything about his subsequent death. On his part, A.2 Oting Sebel stated in his defence that Orwinya Rufino died on 29th March 2015. Defence Counsel did not contest this element. Having considered all the available evidence relating to this element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Rufino Ringtho died on 29th day of March 2015.

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. The cause of Rufino Ringtho's death is explained by P.W.1 Medical Officer Amiloki Patrick, who conducted the autopsy and established it was "excessive bleeding as a result of cuts on the head and possible head injury." Prosecution exhibit P.Ex.1 dated 30th March 2015 contains the details of the other findings which include "there were multiple marks / bruises on the body indicating violence. Two deep cuts on the parietal and occipital regions and multiple others on the body. The head is swollen with two cuts impregnated with oil, ears chopped. The trunk has several / multiple bruises. There are multiple bruises especially on the chest and supra pubic areas. The general observation is that the body was severely traumatised as multiple marks of violence were seen on the body especially head, trunk and could not make it to the main hospital after referral. The deceased could have been cut by pangas and beaten heavily by sticks / clubs". P.W.4 Ogenmungu Richard Sebel the L.C.1 Chairman stated the deceased was assaulted in his presence by a mob on suspicion of having stolen a cow. A.1 Kermundu Pastore in his defence said he found the deceased unconscious after being assaulted by a mob. A.2 Oting Sebel in his defence

stated he was overpowered by a mob which then assaulted the deceased. Defence Counsel did not contest this element. Having considered all the available evidence relating to this element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Rufino Ringtho's death was a homicide and since there is no evidence of any lawful justification for the acts which caused his death, it has been proved beyond reasonable doubt that it 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 mental element that is difficult to prove by direct evidence. Courts usually consider weapon used (in this case a panga was recovered) and the manner it was applied (Two deep cuts on the parietal and occipital regions) and the part of the body of the victim that was targeted (the head). Ferocity can be determined from the impact (caused excessive bleeding). The evidence of P.W.1 Medical Officer Amiloki Patrick who conducted the autopsy established the cause of death as "excessive bleeding as a result of cuts on the head and possible head injury." Exhibit P.Ex.1 dated 30th March 2015 contains the details of the other findings which include "there were multiple marks / bruises on the body indicating violence. Two deep cuts on the parietal and occipital regions and multiple others on the body. The head is swollen with two cuts impregnated with oil, ears chopped. The trunk has several / multiple bruises. There are multiple bruises especially on the chest and supra pubic areas. The general observation is that the body was severely traumatised as multiple marks of violence were seen on the body especially head, trunk and could not make it to the main hospital after referral. The deceased could have been cut by pangas and beaten heavily by sticks / clubs". Although P.W.4 Ogenmungu Richard Sebel the L.C.1 Chairman stated he removed all pangas from the scene, this part of his evidence was only intended to favour the accused and is rejected as a lie since the injuries found on the body prove otherwise. In his defence, A.1 Kermundu Pastore did not mention the weapons used in assaulting the deceased. A.2 Oting Sebel stated that the panga, exhibit P.Ex.4, was retrieved from the house of the deceased in an attempt to cut sticks for construction of a makeshift stretcher. Defence Counsel did not contest this element. Having considered all the available evidence relating to this

element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Rufino Ringtho's death was caused with malice aforethought.

As to whether it is the accused that caused the unlawful death, 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. In this regard, the prosecution relies entirely on the evidence of P.W.4 Ogenmungu Richard Sebel the L.C.1 Chairman who stated that he saw D.W.1 used the tail of the cow and D.W.2 a stick to assault the deceased. He described both weapons. In his defence D.W.1 Kermundu Pastore stated that he came to the scene after the deceased had been assaulted and was unconscious. D.W.2 Oting Sebel denied participating in the assault but that he instead went out of his way to protect and save the life of the deceased only that he was overwhelmed by the mob which went on to assault the deceased.

Both accused have admitted being at the scene at one point or another but have denied participation in the commissions of the offence. They have no duty to prove their defences. The burden lies on the prosecution to disprove their defences by adducing evidence which proves that they were participants in the commission of the crime. There is only one identifying witness P.W.4 implicating them as active participants in the commission of the offence. This being identification evidence, it should be considered with caution. To sustain a conviction, a court may rely on identification evidence given by an eye witness to the commission of an offence. 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.

In the instant case, the identifying witnesses knew both accused persons before as residents with whom they lived on the same village. The assault took place during day time. It therefore took place during broad day light and continued for a considerable time. The witnesses saw both accused from distances favourable to correct identification. Although the attack occurred in chaotic circumstances associated with mob justice, I am satisfied that the factors favouring correct identification of both accused far outweighed those unfavourable to correct identification. The second accused contended this witness bore a grudge against him relating to a dispute over land. I have considered the fact that this accused stated that when the suspected thief was found,

P.W.4 called him on phone to inform him about that development. To me this was an indication of the trust and confidence this witness had in the accused, rather than a manifestation of the alleged grudge. I cannot think of any other reason why this witness would have called the accused rather than the Secretary for Defence in a situation of that nature. Moreover, I saw this witness testify in court and the degree of reluctance with which he implicated both accused persons to the extent that I suspect he underrated and minimised the level of their participation in the offence rather than exaggerate it. That to me is not conduct of a person out to falsely implicate the accused based on any grudge as alleged. I am therefore satisfied that the evidence of identification is free from the possibility of error or mistake and that it is not motivated by any malice against any of the accused persons. The denials raised by the accused in their defences have been disproved by the prosecution evidence of identification. The prosecution has succeeded in placing each of the accused at the scene of crime as an active participant in the commission of the offence.

Under section 20 of *The Penal Code Act*, when 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 a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence. Therefore, where offences are alleged to have been committed by two or more people in the course of the same unlawful transaction, there is no need to prove that each of them participated in each of the offences if by their nature they were a probable consequence of the prosecution of that purpose. It is enough if they are proved to have shared a common intention. What is required under the law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not to have dissuaded themselves from the intended criminal act for which they shared the common intention.

In the instant case, the accused persons set out together assault the victim. They used different types of weapons in doing so, some deadly and others not. In such circumstances, it should have been apparent to all that the criminal design could quickly descend into the infliction of fatal or life threatening injuries on the victim. None of the accused disassociated themselves from the ongoing assault. When several persons simultaneously attack a victim it matters not that each one of them may have his or her individual motive, but sharing the common intention to harm

the victim in circumstances where the nature of the assault is life threatening to the extent that death is a foreseeable probability of the assault, each can individually inflict a separate blow fatal or not and yet all of them would be deemed to share a common intention to kill. I do not believe P.W.4 when he said he removed all pangas from the scene to avoid fatal injuries being inflicted on the deceased. The post mortem report disproves this aspect of his evidence. That some of the assailants had pangas must have visible to all participants in the assault, including the two accused. Each member of the mob was aware of the probable result of using pangas in assaulting the deceased yet the two accused did not dissociate themselves from the attack. The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of both accused. No direct evidence of common intention is necessary. In a case like this each would be individually liable for causation of the ultimate death irrespective of the nature of injury, or the lack of it, he or she inflicted on the deceased. There need not be proof that it is the two accused who delivered the fatal blow. I am therefore satisfied that the prosecution has proved participation in causation of the death of the deceased by each of the accused persons beyond reasonable doubt.

In disagreement with the opinion of the second assessor but in agreement with that of the first assessor, the evidence has established the offence Murder rather than Manslaughter. For that reason I hereby find each of the accused persons guilty and hereby convict each of the two accused for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Arua this 3rd day of February, 2017.

Stephen Mubiru
Judge.

10th February 2017

9.28 am

Attendance

Ms. Sharon Ngaiyo, Court Clerk.

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

Mr. Samuel Ondoma for the convicts on State Brief.

Both convicts are present in Court.

SENTENCE AND REASONS FOR SENTENCE

The convicts were found guilty of the offence of murder c/s 188 and 189 of the *Penal Code Act* following a full trial. In her submissions on sentencing, the learned State attorney prayed for a deterrent sentence on the following grounds; the offence carries a maximum penalty of death. Life was lost by their actions together with other people and it cannot be restored. The convicts took the law into their own hands and have not been remorseful in which case A1 still believes he is a victim. Murders committed as a result of mob justice are on the rise in the region and therefore the convicts deserve long custodial sentences in order to deter mob justice in the region. She prayed for the maximum sentence.

Counsel for the convicts prayed for a lenient custodial sentence on the following grounds; both convicts are first offenders. Each of them participated minimally as part of the mob which killed the deceased. They both have been on remand since 10th April 2015. A1 is 81 years old while A2 is 32 years old. A1 is partially blind, has hearing problems and also suffers from hernia. His wife died and there is no one to look after the children at home. A2 is relatively young and capable of reform. He has a wife and four children. He too suffers from Hernia and an eye problem. Counsel prayed for a suspended sentence in respect of A1 and a lenient sentence in respect of A2. In his *allocutus*, A1 prayed for a lenient sentence because he did not wish the deceased dead but was rather interested in obtaining compensation from him for his stolen cow. On his part, A2 prayed for lenience because he has a very old mother to look after and since he never received education, he wished to ensure that his children are educated.

Sentencing is a reflection of more than just the seriousness of the offence. The court at this stage, in sentencing multiple convicts at the same trial where the facts permit, may take into account the degree of culpability of each of the convicts. As counsel for the convicts argued in mitigation, each of them participated minimally as part of the mob which killed the deceased. Degree of culpability refers to factors of intent, motivation, and circumstance that bear on the convict's blameworthiness. Under the widely accepted modern hierarchy of mental states, an offender is most culpable for causing harm purposely and progressively less culpable for doing so knowingly, recklessly, or negligently.

During trial, court considers legal culpability of the convict including the convict's intentions, motives, and attitudes. At sentencing, the court should look beyond the cognitive dimensions of the convict's culpability and should consider the affective and volitional dimension as well. It may as a result consider extenuating circumstances, which are; those factors reflecting on the moral blameworthiness, as opposed to the legal culpability of the convict. It is for that reason that the principle of proportionality operates to prohibit punishment that exceeds the seriousness of the offending behaviour for which the offender is being sentenced. It requires that the punishment must fit both the crime and the offender and operates as a restraint on excessive punishment as well as a prohibition against punishment that is too lenient. The principle of parsimony on the other hand requires that the court should select the least severe sentencing option available to achieve the purpose or purposes of sentencing for which the sentence is imposed in the particular case before the court.

Murder is one of the most serious and most severely punished of all commonly committed crimes. The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. In cases of deliberate, pre-meditated killing of a victim, courts are inclined to impose the death sentence especially where the offence involved use of deadly weapons, used in a manner reflective of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind with no regard for the sanctity of life. This maximum sentence is therefore usually reserved for the most egregious cases of Murder committed in a brutal, gruesome, callous manner. However, failed defences at trial are relevant to finding extenuating circumstances and for that reason murders involving ordinary provocation not amounting to legal provocation, self induced intoxication, mental disorder, emotional disturbance, medical insanity not amounting to legal insanity and accomplice liability may reduce moral blameworthiness and provide grounds for not imposing a death sentence . This case is not in the category of the most egregious cases of murder committed in a brutal, callous manner. I have for those reasons 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.

Taking into account the aggravating factors outlined by the learned State Attorney, I consider a starting point of twenty years' imprisonment as befitting convicts whose contribution to the overall commission of the offence is of the nature attributed to the two convict before me. Against this, I have considered the submissions made in mitigation of sentence and in the *allocutus* of both convicts. In an attempt to determine the moral blameworthiness of the convicts, I have been guided by the nature of the weapons each of them used in assaulting the deceased, and the manner in which it was used. A1 used the tail of the stolen cow while A2 used what was described as a small stick. None of these, especially the former, is capable of inflicting the nature of injuries that caused the death of the deceased, save for their culpability being founded on the doctrine of common intention. The weapons they used in assaulting the deceased are not in themselves demonstrative of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind with no regard for the sanctity of life by each of them. As a result, their participation is more at the level of accessory rather than principal liability.

I also consider that a relatively long prison sentence is a more severe punishment for someone who is already in their 60s or 70s than for someone in their 20s or 30s. To a person above 70 years, a long custodial sentence could easily be tantamount to a sentence of death. In my view, physically infirm older offenders, like A.1 before me, do not present a very serious threat to

society since older offenders released from prison are less likely to reoffend than younger offenders. I have also considered Regulation 9 (4) (a) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, which provides that; “The court may not sentence an offender to a custodial sentence where the offender, is of advanced age.” Advanced age for purposes of the guidelines is 75 years. Although his counsel had prayed for a suspended sentence, I do not consider it necessary since this convict does not present any apparent risk of re-offending in a similar manner to require the rehabilitative attributes of such a sentence. At the age of 81 years, A1 has been on remand since 10th April 2015 which period I consider to be appropriate punishment and I therefore sentence him to “time already served.” He is to be set free forthwith unless he is being held for other lawful reason.

In respect of A2, having considered a starting point of twenty years’ imprisonment, against this, I have taken into account the submissions made in mitigation of sentence and in his *allocutus*, I conclude that the mitigating circumstances in his case outweigh the aggravating factors. I consider a reformatory sentence to be appropriate for this convict and thereby reduce the sentence he deserves to eleven years’ imprisonment. 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 A2 has been in custody since 10th April 2015. I hereby take into account and set off a period of one year and ten months as the period he has already spent on remand. I therefore sentence A.2 Oting Sebel to a term of imprisonment of nine (9) years and one (1) month, 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 10th day of February, 2017.

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Stephen Mubiru
Judge.