

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0128 OF 2014

UGANDA **PROSECUTOR**

VERSUS

A1. ODONGO MICHAEL }
A2. RUPINY ODAGA } **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 27th day of April 2013 at Paleo Island in Nebbi District murdered one Okumu Patrick.

The prosecution case is that the accused persons were in-laws of the deceased. Their sister, the wife of the deceased, had wrongfully sold a fishnet belonging to A.2 as a result of which a dispute broke out between them and their sister. The deceased sided with his wife and this bred bad blood between him and the two accused. On 27th day of April 2013, the two accused st out on a boat together with the deceased to go out fishing. Later that evening, the two accused returned with the body of the deceased which had external injuries indicative of a possible foul play in the causation of his death. The two accused were arrested for suspected murder hence this prosecution in which both of them in their defence denied having killed the deceased. They rather stated that they found his body deserted at Paleo Island and only felt compelled to return it being the body of their in-law.

At the close of the trial, the learned State Attorney, Mr. Primba Emmanuel submitted that all the ingredients of the offence had been proved beyond reasonable doubt and that therefore each of the accused should be convicted as indicted. In response, defence counsel on state brief Mr. Onencan Ronald submitted that although the prosecution had proved death of the deceased, they

had failed to prove that the death was unlawfully caused since the possibility of an accidental death had not been ruled out. He further submitted that malice aforethought had not been proved since the cause of death was not proved beyond reasonable doubt. He concluded by arguing that participation of the accused in causation of the death had not been established by the available evidence and therefore both accused should be acquitted. In their joint opinion, the assessors advised the court to acquit the two accused since the prosecution had failed to prove beyond reasonable doubt that the death was caused unlawfully with malice aforethought and the evidence implicating the two accused was not strong enough.

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 *Ssekitoleso 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.

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 of the deceased. In this case, the prosecution presented a post mortem report prepared by P.W.1 the Medical Officer of Panyigoro Health Centre III, Mr. Arijule Copperfield, which was admitted at the preliminary hearing as exhibit P.Ex.1 dated 28th April 2013. The body was identified to him

by a one Okema Geoffrey as that of Okumu Patrick alias Kambi. In addition, there is the evidence P.W.3 Oyai Munguriek, a brother of the deceased who saw the body in a boat at the shore when it was returned from Paleo Island and attended the funeral. P.W.4 Okema Geoffrey, the father of the deceased picked the body from Ayila village and took it for burial. On their part D.W.1 Odongo Michael and D.W.2 Rupiny Odaga admitted returning the body from Paleo Island. Defence Counsel did not contest this element. Having considered the available evidence as a whole in relation to this element and in agreement with the joint opinion of the assessors, I find that it has been proved beyond reasonable doubt that Okumu Patrick is dead.

The prosecution is required to prove that Okumu Patrick's death was caused by an unlawful act. 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. However, the prosecution must prove first that the death was a homicide before this presumption can be applied. This is done by adducing evidence which proves that it was not suicidal, accidental, in execution of a lawful sentence of death or otherwise legally justified or excused.

In this regard, the prosecution relied on the evidence of P.W.1 the Medical Officer of Panyigoro Health Centre III, Mr. Arijule Copperfield, who conducted the autopsy by which he established the two causes of death as "Cardiac arrest / collapse and respiratory failure." Exhibit P.Ex.1 dated 28th April 2013 contains the details of the other findings which include "the body was swollen with multiple wounds, blisters and fractured vertebrae bone at the neck. Visible multiple injuries / marks consequent upon violent attack. Depressed left parietal area with scars and blood oozing through the ears. Generalised burns / blisters. Gross soft tissue injuries due to burns on the viscera. Multiple soft tissue injury and suspected head injury and fracture of the neck (following twisting). No weapons were seen however visible marks of violence suggest use of sharp instrument: panga, knife / iron bar or clubs were used to effect death." Unfortunately, this medical officer was not called to explain by what means and on what basis he formed the opinion that the injuries he saw were "consequent upon violent attack" and that the fracture of the neck was as a result of "twisting."

Expert evidence must always be received with great caution. It is necessary for expert witnesses to explain the methodology and technology used to arrive at the conclusions they do. It has to be proved that the expert arrived at the conclusion on the basis of a scientific approach. It is

necessary for the expert to give cogent scientific reasons for arriving at his or her conclusion. However, in the present case, the prosecution did not disclose details of the scientific methods that aided the doctor to reach the conclusions he did. The omission of this aspect casts a shadow of doubt upon the fairness and accuracy of the report of this expert. It is not possible to tell how the doctor ruled out the possibility of an accidental or suicidal death, unrelated at all to a homicide. Once there is a shadow of doubt, then the court should refrain from relying upon the report of such expert.

Although D.W.1 Odongo Michael and D.W.2 Rupiny Odaga did not offer any evidence on this element, their Counsel contended that it has not been proved beyond reasonable doubt. In absence of direct evidence of the circumstances in which the deceased died, the prosecution theory of causation of the death in issue is based only on circumstantial evidence of the injuries. The court can only infer that this death was a homicide can be inferred after ruling out natural or accidental death. On a careful consideration of the facts and circumstances of the case I am unable to determine that Okumu Patrick's death was a homicide. Without proof of a scientific basis for the opinion offered by P.W.1 the possibility that his conclusions are based only surmises and conjectures cannot be rule out. Once it is not proved that the death was a homicide, the presumption that it was unlawfully caused has no basis. In agreement with the joint opinion of the assessors I find that it has not been proved beyond reasonable doubt that Okumu Patrick 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 the deceased died as a result of assault and 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 none was recovered) and the manner it was applied (some fatal injuries were found on the body) and the part of the body of the victim that was targeted (the neck and head). Ferocity can be determined from the impact (neck bones fractured). The only evidence relating to this ingredient is that of P.W.1 the Medical Officer of Panyigoro Health Centre III, Mr. Arijule Copperfield, who conducted the autopsy, and established the two causes of death as "Cardiac arrest / collapse and respiratory

failure.” Exhibit P.Ex.1 dated 28th April 2013 contains the details of the other findings which include “the body was swollen with multiple wounds, blisters and fractured vertebrae bone at the neck. Visible multiple injuries / marks consequent upon violent attack. Depressed left parietal area with scars and blood oozing through the ears. Generalised burns / blisters. Gross soft tissue injuries due to burns on the viscera. Multiple soft tissue injury and suspected head injury and fracture of the neck (following twisting). No weapons were seen however visible marks of violence suggest use of sharp instrument: panga, knife / iron bar or clubs were used to effect death.”

Both accused did not offer any evidence on this element. Defence Counsel contested this element too in his final submissions. In absence of direct evidence of intention, the prosecution relies only on circumstantial evidence of those injuries. Having doubted the scientific basis of the opinion offered by this witness whereby it was then not possible to rule out natural or accidental death. The circumstantial evidence does not irresistibly points to an inference of malice aforethought. Defence Counsel contested this element in his final submissions. In agreement with the joint opinion of the assessors I find that it has not been proved beyond reasonable doubt that Okumu Patrick’s death was caused with malice aforethought.

Lastly, I have to consider whether the prosecution have proved beyond reasonable doubt that 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. Both accused denied any participation. Their version is that they found the body of the deceased abandoned at the island and brought it back home. They proceeded to alert the local authorities. They have no obligation to prove this. The burden lies on the prosecution to disprove their defences.

To disprove their defence, the prosecution relies entirely on circumstantial evidence. The strands of these circumstances are that; the deceased and the two accused had a history of a dispute over a fishnet. The two accused are the last persons to be seen with the deceased alive when went out to the lake together with him on the same boat. They later returned him dead that evening. They neither participated in the funeral arrangements nor his burial despite being his in-laws. Their

explanation for this conduct is that when they reached the shore, A1 instructed A2 to notify the authorities of the death, which A2 did by reporting to the L.C.II Chairperson who advised him to leave the matter to him. A1 stayed behind with the body in the boat until the relatives of the deceased came to pick it. Both neither went for the vigil nor the burial because they had heard rumours implicating them in causing the death of their in-law. They feared reprisals. They were advised to escape from the village but they refused to do so until the day of their arrest.

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 accuseds' 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 (see *Simon Musoke v. R* [1958] EA 715, *Mwangi v. Republic* [1983] KLR 327, *R v. Kipkering Arap Koske and another* (16) EACA 135 and *Sharma Kooky and another v. Uganda* [2002] 2 EA 589 (SCU) 589 at 609).

Circumstantial evidence must always be narrowly examined. In light of the plausible explanations advanced by the accused, the prosecution's circumstantial evidence is incapable of irresistibly pointing to their guilt. For that reason, in agreement with the joint opinion of the assessors, I find that the prosecution has not proved beyond reasonable doubt that any of the accused caused Okumu Patrick's death. Consequently I find both accused persons not guilty. The two accused are acquitted of the offence of Murder c/s 188 and 189 of *The Penal Code Act*. They should be set free forthwith unless they are being held for other lawful cause.

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

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Stephen Mubiru
Judge.