

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0103 OF 2014

UGANDA **PROSECUTOR**

5 **VERSUS**

A1.EZUBO CHARLES alias Charlie }
A2. EFITRE LEO } **ACCUSED**
A3.ANGUDRI GEOFREY alias JEE }

Before Hon. Justice Stephen Mubiru

10 **JUDGMENT**

The three accused in this case were jointly indicted 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 11th day of October 2013 at Mitia / Nunu village in Arua District murdered one Etoma Albino.

15 The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the on 11th October 2013, violence erupted between the Mitia and Nunun Clans over a land dispute prompting the police to intervene. Before the police arrived at the scene, the accused and others at large assaulted the deceased so badly that by the time the police arrived,
20 the deceased was lying helpless on the road, with multiple external and internal injuries. The police arranged for his transport to hospital where he died hours later . In their respective defences, all the accused denied any participation. A1 set up an alibi. He was at the material time at to Odramacaku Trading Centre selling his merchandise. A2 as well said he was in Odramacaku Trading Centre at the material time and only learnt about the inter-clan fight from
25 the L.C.II Chairman who had kept his bicycle with him. A3 stated that he was in his garden in Mbaraka parish from where he returned at 5.00 pm only to find his household property like clothes and furniture were missing. Having failed to find the L.C 1 Chairman he went to the police to report and it is from there that he learnt of the fight that had taken place earlier in the day between the Mitia and Nunu Clans.

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Since all the accused in this case pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against each one of them beyond reasonable doubt. The burden does not shift to the accused persons and the accused may only be convicted on the strength of the prosecution case and not because of weaknesses in their respective defences, (see *Ssekitoleko v. Uganda* [1967] EA 531). The accused does not have any obligation to prove their innocence. By their respective pleas 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 beyond reasonable doubt before it can secure their conviction. 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.

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. In the instant case the prosecution adduced a post mortem report dated 12th October 2013, prepared by P.W.1 Dr. Amandu Charles of Arua Regional Referral Hospital, which was admitted during the preliminary hearing and marked as exhibit P.Ex.1. The body was identified to him by a one Nyakana Wilson as that of Albino Etoma. This evidence is corroborated by P.W.3 Drata Emmanuel, a son of the deceased, who saw the body of his father after his death in hospital and attended the funeral. P.W.4 Osua Robert, a neighbour of the deceased, too saw the body in hospital and he also attended the funeral. In their respective defences, none of the accused refuted this element. Defence Counsel did not contest this element too in his final submissions. In agreement with the assessors, I find that on basis of that evidence, the prosecution has proved beyond reasonable doubt that Albino Etoma, died on 11th October 2013.

The prosecution had to prove further that the death of Albino Etoma was unlawfully caused. 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 (see *R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*). P.W.1 who conducted the autopsy established the cause of death as “severe internal bleeding due to crush injury to the ribs and ruptured spleen.” Exhibit P.Ex.1 dated 12th October 2013 contains the details of his other findings which include a “Bruises on the left arm and chest wall. Fracture of the left humerus, multiple fractures of the ribs, left side (3rd to 10th) with crush injury to the spleen and the left lung”. P.W.5 ASP Eric Tunanukye who went to the scene and found the deceased helpless on the ground crying out for help, observed crushed bones of the left hand . He testified that the deceased had been hit by a club and was crying for help. The bones of his upper arm had been shattered but were not protruding. In their respective defences, none of the accused refuted this element and neither was it contested by defence counsel in his final submissions. I find that the injuries were neither accidental nor self-inflicted. Not having found any lawful justification for whoever caused those injuries, I agree with the assessors that the prosecution has proved beyond reasonable doubt Albino Etoma's death was caused unlawfully.

Thirdly, the prosecution was required to prove that the cause of death 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 assault would probably cause death. This may be deduced from circumstantial evidence (see *R v. Tubere s/o Ochen (1945) 12 EACA 63*).

Malice aforethought being a mental element is difficult to prove by direct evidence. Courts usually consider first; the nature of the weapon used. In this case none were recovered. However, P.W.4 Osua Robert who witnessed the assault on the deceased from a distance testified that he saw the assailants using a big stick, about one and a half metres long and two inches in diameter, while others were kicking him. Considering the definition of a deadly weapon in section 286 (3) of *The Penal Code Act* as including any instrument which, when used for offensive purposes, is

likely to cause death, the court to finds that the weapon used in hitting the deceased was a deadly one.

The court also considers the manner in which it was used. In this case it was used by hitting the
5 deceased repeatedly resulting in multiple external injuries and a fatal internal injury, a ruptured spleen. The court further considers the part of the body of the victim that was targeted. In this case it was the side of the torso, which is a delicate and vulnerable part of the body considering that a number of the vital organs are located inside that region of the body. The ferocity with which the weapon was used can be determined from the impact. P.W.1 who conducted the
10 autopsy established the cause of death as “severe internal bleeding due to crush injury to the ribs and ruptured spleen.” It was applied with such force that it caused a fatal injury to a vital organ of the body. None of the accused offered any evidence in relation to this ingredient and neither was it contested by defence counsel in his final submissions. In agreement with the opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that Albino
15 Etoma's death was caused with malice aforethought.

Lastly, 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 their respective defences, all the accused denied participation. He said when the accused kicked his
20 door in and fell down, he b did not touch him. A1 set up an alibi. He was at the material time at Odramacaku Trading Centre selling his merchandise. A2 as well said he was in Odramacaku Trading Centre at the material time and only learnt about the inter-clan fight from the L.C.II Chairman who had kept his bicycle with him. A3 stated that he was in his garden in Mbaraka parish from where he returned at 5.00 pm only to find his household property like clothes and
25 furniture were missing. Having failed to find the L.C 1 Chairman he went to the police to report and it is from there that he learnt of the fight that had taken place earlier in the day between the Mitia and Nunu Clans.

To rebut those defences, the prosecution relies on the testimony of P.W.3 Drata Emmanuel, a
30 son of the deceased, who stated that when he went to his father in hospital where he was admitted after the assault, he named the three accused as his attackers. The law applicable to

dying declarations is section 30 of *The Evidence Act*. It is a statement made by a person who believes he is about to die in reference to the manner in which he or she sustained the injuries of which he or she is dying, or other immediate cause of his or her death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them. Dying declarations however, must always be received with caution, because the test of cross examination may be wanting and particulars of violence may have occurred circumstances of confusion and surprise. Although corroboration of such statements is not necessary as a matter of law, judicial practice requires that corroboration must always be sought for (see *Okale v. Republic [1965] E.A 555* and *Tuwamoi v. Uganda [1967] E.A.84*).

In the instant case, I find that the deceased knew the three accused before his death. He was assaulted in broad day light at around 3.00 pm. The assailants were in close proximity since they were using sticks and kicks to assault him. The attack took some prolonged time. P.W.4 was able to observe the beating for approximately five minutes yet by the time he chanced upon the scene, the beating had ensued earlier than his arrival and continued even after he left. This provided ample opportunity for the deceased to see and recognise his assailants. Although he was under distress as the victim of such a vicious attack, I am satisfied that this did not preclude him from correctly identifying them. Moreover, his declaration is corroborated by the testimony of PW4 Osua Robert who saw them from a distance of between 90 - 200 meters on an open, straight stretch of the road as he fled from the police who had come to arrest him over a reported land dispute. In the circumstances, the defences of each of accused has been effectively disproved and is thus rejected. Having rejected their defences, in agreement with the assessors, I find that this ingredient too has been proved beyond reasonable doubt. Each of the accused participated in unlawfully assaulting the deceased and it does not matter who of them delivered the fatal blow.

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. The accused before me set out in conjunction with one another to assault the deceased.

The death of the victim was a probable and foreseeable consequence of the prosecution of that unlawful purpose considering the nature of weapons they openly used to assault the deceased. Consequently, each of them is deemed to have committed the offence proved by evidence to have been committed during that unlawful transaction. In agreement with the assessors, I am satisfied that the evidence of their identification as participants in the prosecution of that unlawful purpose is free from mistake or error. Consequently I find that it is the three accused persons that assaulted Albino Etoma thereby causing his death.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby find each of the accused guilty and accordingly convict each of them for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

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

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Stephen Mubiru
Judge.
3rd August 2017

4th August 2017

9.42 am

Attendance

- Ms. Sharon Ngayiyo, Court Clerk.
- Mr. Emmanuel Pirimba Resident State Attorney, for the Prosecution.
- Mr. Onencan Ronald, Counsel for the accused persons on state brief is present in court
- All three accused are present in court.
- Both Assessors are 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* after a full trial. In her submissions on sentencing, the learned State attorney prayed for a deterrent sentence on the following grounds; Murder is a serious offence. It carries the death penalty. The circumstances should be considered. The deceased was an old man who ought to have been protected. The young men chose to take away his life. Life is sacred and ought to be protected. Deterrence is required. There appears to have been a land dispute but the police had

already intervened. There was no reason to take away the life of an old man. A long custodial sentence will enable them to reform and deter other would be offenders.

5 Counsel for the convicts prayed for a lenient custodial sentence on the following grounds; they are first offenders, young people capable of reform. They are remorseful. They have spent three years and four months on remand. They have family responsibilities. They deserve lenience, preferably ten years imprisonment to enable them to return to society. All the convicts have been on remand since December 2012. In his *allocutus*, A1 prayed for a lenient sentence on the following grounds; he is sick, suffers from typhoid and when he does heavy work, he bleeds
10 from the nose. He has a family if six children. He pays school fees for his siblings. Three of his children are in primary and three in nursery. One of his brothers' child cannot now progress to senior secondary. His father is weak and cannot do heavy work. His wife abandoned the children at home. His aunt was asked to take care of them. She broke her leg and now uses a walking stick. When he was in prison the complainants burnt his houses.

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In his *allocutus*, A2 prayed for a lenient sentence on the following grounds; he is very sorry for the accusation. His brother died and left three children out of whom the last one was born with HIV. Because there is no one to take care of the child, he has left ARVs and whenever he takes the drugs he needs food and there is no one to provide. He has dropped out of school. He plans to
20 go to school after prison. In his *allocutus*, A3 prayed for a lenient sentence on the following grounds; he is sick, diabetic and suffers from hepatitis "B." in April he lost his wife. She has left three children and there is no one to take care of them. He is sorry for what has happened. The fact that the death of Etoma is attributed to them. He prayed to get out and help the children and the illnesses cannot allow him to be in prison for long.

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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. Where each of them participated differently as part of the mob, the court may have to determine the degree of culpability of each by considering
30 such factors as intent, motivation, and circumstance that bear on each convict's blameworthiness.

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. In this case, the nature of the facts do not
5 allow for a distinction in the moral culpability of each of the convicts. They therefore have been taken as sharing the same degree of culpability.

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
10 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 regardless of the sanctity of life. This maximum sentence is therefore usually reserved for the most egregious cases of Murder
15 committed in a brutal, gruesome, callous manner. Although the one in this case was committed in a brutal, callous manner, I have not found it to have been so egregious as to deserve a death sentence. For those reasons the death sentence is discounted.

Where the death penalty is not imposed, the starting point in the determination of a custodial
20 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
25 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
30 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.

In light of the aggravating factors outlined by the learned State Attorney, I consider a starting point of forty years' imprisonment. Against this, I have considered the submissions made in mitigation of sentence and in the *allocutus* of the three convicts and thereby reduce the period to thirty 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 the three convicts have been in custody since 1st November 2013. I hereby take into account and set off a period of three years and eight months as the period the convicts have already spent on remand. I therefore sentence each of the convicts A1. Ezubo Charles, A2. Efitre Leo, and A3. Angudri Geoffrey, to a term of imprisonment of twenty six (26) years and four (4) 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 4th day of August, 2017.

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Stephen Mubiru
Judge.
4th August, 2017

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