

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0153 OF 2016

UGANDA **PROSECUTOR**
VERSUS
ADEBO ODROA RICHARD **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is 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 Ejupala Market in Arua District murdered one Olema James.

The prosecution case is that the deceased was arrested by an L.C.I Chairman of his village on suspicion of having stolen a goat. He was taken by motorcycle to Ejupala Market Police Post. As soon as they had arrived, word quickly spread around the market of a thief who had just been brought to the police post under arrest. The accused and another person still at large where the first to arrive at the police post from a distance of about ten metres where his friend's stall was. Along the way, the accused was seen to pick a cobbler's knife from one of the stall. When he came to where the deceased was, he stuck the deceased with a vicious blow of that knife inflicting a slightly diagonal cut stretching from the right shoulder to the back of the right thigh. He immediately threw the knife down and fled the scene. The Officer in Charge of the police post pursued him to his friend's shop, about ten metres from the police post and grabbed him. He pulled him out from behind the stall counter where he had dived to hide and brought him back to the police post. The crowd that had gathered became rowdy intending to rescue him. The police officer quickly locked up the deceased, then bleeding profusely, with the accused inside the office and rushed to his home nearby where he picked his rifle and began shooting in the air to disperse the crowd. He called for reinforcement and when it arrived, it was able to quickly disperse the crowd and restore calm. When the office was opened, the deceased was found dead, having bled to death and the accused was then re-arrested and taken to Arua Central Police

Station where he was charged. In his defence during trial, he denied any participation and said he was arrested on 29th April 2013 while walking innocently along the road and then falsely accused with causing the death of the deceased.

At the conclusion of the trial the State Attorney Ms. Jamilar Faidha submitted that the accused should be convicted since the prosecution had proved all the ingredients of the offence beyond reasonable doubt. Defence counsel on state brief Ms. Winfred Adukule, conceding to the fact that death had been proved and that it was caused unlawfully, submitted that the prosecution had failed to prove malice aforethought since the weapon was not recovered and there was a discrepancy between the nature of the injury as explained by P.W.3 and the actual injury found on the body of the deceased. She argued further that the evidence of identification was not free from the possibility of mistake. In their joint opinion, the assessors advised the court to reject the defence and convict the accused as indicted.

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 person and the accused can only be convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v. Uganda [1967] EA 531*). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove 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 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 there is the post-mortem report prepared by P.W.1 Dr. Ambayo Richard which was admitted during the preliminary hearing as exhibit P.Ex.2 dated 29th April 2013. The body was identified to him by a one Ondia Antonio as that of Olema James. In addition, the prosecution adduced the evidence P.W.3 Oguzu Modesto the police officer in whose presence the offence was committed. He placed the victim in his office and when he opened it later after calm had been restored, the victim was found dead in a pool of blood. P.W.4 No. 20387 D/Cpl Atayo Amati Victor, a police officer called to the scene testified that when the office at the police post was opened, there was a body of a deceased person in a pool of blood. The accused put up a defence of alibi and did not offer any evidence on this element. Defence Counsel did not contest this element. Having considered all the available evidence regarding this ingredient and in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that Olema James 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 who conducted the autopsy established the cause of death as “Haemorrhagic shock resulting from a sharp edged object (implement) injury.” Exhibit P.Ex.2 dated 29th April 2013 contains the details of his other findings which include “a decomposing body. A stab defect (wound) on the back of the right lower third of the thigh 10x4x4 cm cutting through a big blood vessel. Decomposing organs.” P.W.3 the police officer in whose presence the offence was committed explained the circumstances in which the deceased died, following an assault. The accused put up a defence of alibi and did not offer any evidence on this element. Defence Counsel did not contest this element. Having considered all the available evidence regarding this ingredient and in agreement with the joint opinion of the assessors that Olema James’s death was a homicide, and since there is no evidence suggesting any lawful justification for the acts which caused his death, I find that the prosecution has 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 mental element that is difficult to prove by direct evidence. Courts usually consider the weapon used (in this case it was described as a cobbler's knife) and the manner it was applied (a single fatal injury inflicted) and the part of the body of the victim that was targeted (the back of the right lower third of the thigh). The ferocity with which the weapon was applied can be determined from the impact (a cut through a major blood vessel). These details are contained in exhibit P.Ex.2 dated 29th April 2013. Although the weapon was not recovered but the visible marks of violence on the body of the deceased suggest use of sharp instrument. In *Regina v Cunningham [1957] 2 QB 396* it was held that malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards 'the person injured'. The same principle is repeated by Mr. Turner in his 10th edition of *Russell on Crime* at p. 1592.

The intention to kill may be inferred from the fact that a deep cut was administered to the back of the right lower third of the thigh. This part of the body is not considered to be that sensitive such as would readily support an inference of malice by an attack directed at it but considering the depth of the cut inflicted, whoever inflicted it intended to do grievous bodily harm and must have foreseen the probability of severing a major blood vessels and causing excessive bleeding. The assailant by his act of stabbing the deceased with the cobbler's knife deliberately meant to cause grievous bodily harm that from its depth he knew was likely to cause death and was reckless whether death ensued or not. In *R v Whybrow (1951) 35 Cr. App. R. 141 at p. 146*, Lord Chief Justice Goddard said in part:

If a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm. Therefore, if one person attacks another, inflicting a wound in such a way that an ordinary, reasonable person must know that at least grievous bodily harm will result, and death results, there is the malice aforethought sufficient to support the charge of murder.

The accused put up a defence of alibi and did not offer any evidence on this element. Defence Counsel did not contest this element. There is no direct evidence of intention. Intention is based only on circumstantial evidence of the injuries. Having considered all the available evidence regarding this ingredient and in agreement with the joint opinion of the assessors, I find that the evidence has ruled out the possibility of a natural or accidental death. Consequently, circumstantial evidence has proved beyond reasonable doubt that Olema James's death was caused with malice aforethought.

The accused cannot be convicted unless there is credible direct or circumstantial evidence placing him at the scene of the crime as an active participant in the commission of the offence. The accused put up a defence of alibi. He denied any participation and said he was arrested on 29th April 2013 while walking innocently along the road. He further said that the date of the alleged offence was not even a market day. He has no duty of proving the alibi or lack of participation. The burden lies on the prosecution to disprove his defence by adducing evidence which proves that he was a participant in the commission of the crime.

To counteract that defence the prosecution relies on the evidence of P.W.3 Oguzu Modesto the police officer in whose presence the offence was committed. He stated that he saw the accused pick the cobble's knife, strike the deceased, throw down the knife and run. He arrested him from under the counter of a neighbouring stall and locked him up in the office of the police post. 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, it has been contended that the scene was chaotic and therefore the witness may have been mistaken. Nevertheless, at the time the deceased was struck with the knife, only a

couple of persons had arrived at the scene, including the accused. The crowd grew bigger after the injury had been inflicted. The witness' view could not have been obstructed. The attack was in broad day light in close proximity of the witness. He reacted immediately and arrested the accused within a distance of ten metres from the scene of crime as he crouched behind a stall counter. I am satisfied on consideration of all the conditions that prevailed at the scene that the factors favourable to correct identification were far greater than those that were unfavourable. This witness could not have been mistaken and his evidence is therefore free from error. In any event it is corroborated by that of P.W.4 No. 20387 D/Cpl Atayo Amati Victor, a police officer called to the scene who found the accused already under arrest and locked up in the office of the police post and it is from there that he re-arrested him. Although defence counsel contested this element on basis of the possibility of mistaken identification due to the chaotic circumstances at the scene, after considering the evidence as a whole, I find that the prosecution has successfully disproved the accused's alibi. That being the case, in agreement with the joint opinion of the assessors I find that the prosecution has proved beyond reasonable doubt that it is the accused that caused the death of Olema James.

In the final result, I find the accused guilty and hereby convict him of the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

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

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Stephen Mubiru
Judge.

10th February 2017

9.05 am

Attendance

Ms. Mary Ayaru, Court Clerk.

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

Mr. Samuel Ondoma for the convict on State Brief, absent.

The convict is present in Court.

SENTENCE AND REASONS FOR SENTENCE

The convict was 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; the offence carries the maximum penalty of death. Life is sacred and should be respected by all. In this case life was lost in a reckless manner and cannot be restored. The convict together with others attacked the deceased even when the police stopped them. They could not heed police advice. The convict took the law into his hands when there were lawful ways of dealing with the suspected thief. The convict has not been remorseful at all. He deserves a long custodial sentence since the offence of murder is on the rise in order to deter would be offenders. She suggested a term of 25 years' imprisonment.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender. He is a young man at the age of 35 years. He is diabetic, a condition that is difficult to manage under prison conditions. He has been on remand for three years and ten months. He has a wife and two children who have no one to look after them since his parents died while he was in prison. He deserves a lenient sentence and counsel proposed 5 years' imprisonment. In his *allocutus*, the convict expressed regret for what he did and prayed for a lenient sentence since his land was being grabbed while he is incarcerated.

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, the convict used a cobbler's knife. The killing though appears to have been spontaneous without pre-meditation or careful planning. It was a result of a reckless and rash act. 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, sadistic strike at a defenceless person who was already under arrest. Accordingly, in light of those aggravating factors, I have adopted a starting point of thirty five years' imprisonment.

I have considered the fact that the convict is a first offender, a young man who in his *allocutus* expressed remorse and regret for what he did. I for that reason deem a period of twenty seven (27) 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 in custody since 27th April 2013. I hereby take into account and set off a period of three years and nine months as the period the convict has already spent on remand. I therefore sentence him to a term of imprisonment of twenty (23) years and three (3) months, to be served starting today.

The convict is advised that he has 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.