

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0146 OF 2016

UGANDA **PROSECUTOR**

VERSUS

A1. ALIOMUKE CHARLES }
A2. TIKO JESCA } **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused are jointly charged with two counts 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 3rd day of January 2014 at Tivubaria village in Arua District in Count 1 murdered a one Lematia Tom and in count 2 a one Abuko Martha.

The prosecution case is that in the morning hours of 3rd January 2014, there was a physical confrontation between A.2 and the wife of her neighbour Lematia Tom. Both the accused and Lematia’s wife reported the incident to the nearby police post. Subsequently, A.2 was overheard saying that the Lematias were a menace that should be got rid of. Later that evening at around 8.00 pm, a mob which included both accused persons, beat Lematia to death by the roadside near the home of A.2 and thereafter proceeded to the home of his mother whom they beat to death as well and set her house on fire. In their defense, both accused persons denied participation in killing the two deceased persons and stated that at the time of the killings, they were at Omogor Police Post where they had gone to report a case of assault by Lematia of A.2 and attempted Arson all committed by Lematia against A.2 at her home around 8.00 pm that evening. At the time they went to report, they bypassed a group of people who had come to the rescue of A.2 for the alarm she had raised during the assault on her and attempted arson on her house by Lematia.

The learned State Attorney, Ms. Faidha Jamilar submitted that the evidence adduced had proved beyond reasonable doubt that both accused participated in the murder and that therefore their alibis were disproved. She prayed that they should be found guilty and convicted as indicted. On his part, Counsel for both accused on private brief Mr. Kiwa Francis, although conceding to the fact that the prosecution had proved the fact that the two victims are dead, that their death was unlawfully caused and that it was with malice aforethought, they had failed to disprove the alibis of the accused. The evidence of identification adduced against them should be disbelieved and that therefore they should be found not guilty and accordingly acquitted. In their joint opinion, the assessors advised the court to reject the defences of alibi relied on by the accused persons and convict them accordingly.

In this case, the prosecution has the burden of proving the case against each of the accused beyond reasonable doubt. The burden does not shift to the accused persons and the accused 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 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 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. The prosecution presented two post mortem reports prepared by P.W.1 the Hospital Director of Arua Regional

Referral Hospital Mr. Asiandu Richard, which were admitted during the preliminary hearing as exhibit P.Ex.1 dated 4th January 2014 in respect of Abuko Martha and exhibit P.Ex.2 dated 4th January 2014 in respect of Lematia Tom. The bodies were identified to him by a one Matua Charles as that of Abuko Martha and Lematia Tom respectively. This evidence is supported by that of P.W.3 No. 31538 D/Cpl Francis Epidra, a Scenes of Crime Officer who saw both bodies at the scene. In addition, P.W.4 Matua Charles, a son of the first deceased and brother of the second, testified that he found the two bodies at the hospital mortuary and identified them to the doctor. P.W.5. Felix Atandu, a grandson to the first deceased and nephew of the second deceased testified that he witnessed the killing of both deceased persons and saw their dead bodies. On his part, D.W.1 Aliomuke Charles denied having seen any of the bodies and so did D.W.2 Tiko Jesca. D.W.3 (Atoneita Avako) was never asked about this element. 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 both Abuko Martha and Lematia Tom died on 3rd January 2014.

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 the Hospital Director of Arua Regional Referral Hospital Mr. Asiandu Richard found the cause of Lematia's death to have been "severe brain damage and hypovolemic shock due to severe external haemorrhage" while in respect of Abuko Martha he found "severe head injury and hypovolemic shock due to external haemorrhage." On the body of Lematia Tom he saw "multiple cut wounds on the head and face. Severe brain contusion and fracture of the skull" while on the body of Abuko Martha he saw a "deep cut wound on the occipital area and brain contusion." P.W.5. witnessed the killing of both deceased persons and he testified that they died at the hands of a mob which assaulted them one after the other. P.W.3 No. 31538 D/Cpl Francis Epidra who saw both bodies at the scene described circumstances suggestive of a homicide. From exhibits P.Ex.6A - C photographs of both deceased taken by P.W.3 at the scene, some of the external injuries mentioned in the medical reports are visible as well as one of the suspected murder weapons. D.W.1 and D.W.2 did not offer any evidence on this element. D.W.3 was never asked about this element. I am satisfied that the available evidence rules out the possibility of natural or accidental death. 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 both Abuko Martha's and Lematia Tom's deaths were homicides and since there is no evidence of any lawful justification for the acts which caused their deaths.

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 none was recovered but P.W.5. provided a description which included clubs, sticks, clubs and a military knife) and the manner they were applied (a number of fatal injuries inflicted were found on the bodies of both deceased persons) and the part of the body of the victims that was targeted (both were hit or cut on the head). The ferocity of the attack can be determined from the impact (fracture of the skull, brain damage and contusion as well as excessive bleeding caused). P.W.1 who conducted the autopsies found that the body of Lematia Tom had "multiple cut wounds on the head and face. Severe brain contusion and fracture of the skull" while on the body of Abuko Martha he saw a "deep cut wound on the occipital area and brain contusion." D.W.1 and D.W.2 did not offer any evidence on this element. D.W.3 Atoneita Avako was never asked about this element. There is no direct evidence of intention to cause death of any of the deceased. The inference is entirely based on circumstantial evidence of the injuries mentioned above. 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 both Abuko Martha's and Lematia Tom's deaths were 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. Both accused denied any participation. Their version is that they left the home of A.2 at around 8.00 pm and went to Omogoro Police Post to report a case of assault and attempted arson by Lematia Tom. They therefore rely on the defence of alibi. They have no duty to prove lack of participation or their defence of alibi. The burden lies on the prosecution to disprove their defence by adducing evidence which proves that they were participants in the commission of the crime.

To disprove their defence, the prosecution relies on the evidence of P.W.5 who testified that he witnessed the killing of both deceased persons. The court reminds itself that eyewitness evidence is not perfect. Even the most well-intentioned witnesses can identify the wrong person or fail to identify the perpetrator of a crime. 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.

I have closely examined the identification evidence of this witness. He said before the incident, he knew A.2 as a neighbour and A.1 only by appearance as a person who lived further away. He only came to know his name after the incident. At the scene where Lematia was killed, he said his ability to identify both accused was with the aid of moonlight and light from a motorcycle headlamp, which was parked near the scene and its light was shining directly at the mob as they assaulted the deceased. At one point, he stood amongst the mob until one of the assailants recognised him as a relative of the victim and ordered him to keep away. He went and stood at a distance of about 40 – 50 metres and continued to watch from there. At the scene where Abuko Martha was killed, he was aided by moonlight and the fire from the burning houses. Both attacks took some time sufficient to have aided correct identification.

On the other hand, I have taken into account the factors which might have rendered identification difficult. The incidents happened at night and A.2 contended there was no moonlight that night. The scenes were chaotic and scary for this witness who was crying most of the time. He was from time to time ordered by the assailants to leave the scene since he was a relative to both victims. Counsel for the accused contended that this witness could be exaggerating and only maliciously implicating the two accused. I saw the witness testify. He struck me as a truthful and steady witness. He was consistent in giving details of the individuals he saw participate in the assaults and the role each one of them played. He gave details of the weapons he saw at the scenes. He was consistent in respect of these details even under the rigorous cross-examination of counsel. On account of the volume of detail he managed to see and was able to recall I believe him when he says there was moonlight that night which aided his vision. I am satisfied that his

evidence is free from the possibility of error or mistake and is not motivated by any malice against the accused persons.

His evidence is corroborated partly by the admission of both accused persons that they were at the home of A.2 at around 8.00 pm. By their evidence, the accused placed themselves within the vicinity of the crime at the time the two offences are alleged to have been committed. I do not believe their explanation that they left shortly before the assaults began and therefore were not aware of the subsequent killing of the two deceased persons. Their version is incredible and is hereby rejected. I am inclined to believe that there was an altercation between A.2 and Lematia in which A.1 joined on the side of his sister A.1 which escalated into mob justice in which the two of them participated. The killing of both deceased was during one criminal transaction and according to 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.

For those reasons, I find that the alibi set up by the accused persons has been disproved by the prosecution. The identification evidence has proved beyond reasonable doubt that both accused were active participants in the killing of both deceased persons. Therefore, in agreement with the assessors, I find that the prosecution has proved the case against both accused beyond reasonable doubt. I hereby convict both accused for the offence of Murder c/s 188 and 189 of the *Penal Code Act* in respect of Count 1 and 2 respectively.

Dated at Arua this 9th day of February, 2017.

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Stephen Mubiru
Judge.

10th February 2017

9.40 am

Attendance

Ms. Mary Ayaru, Court Clerk.

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

Mr. Samuel Ondoma for the convict 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* 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 a maximum penalty of death. Life is sacred and ought to be respected because once taken it cannot be restored. The convicts took the law into their own hands and killed the deceased in a very gruesome manner in the presence of P.W.5 who is still traumatised by the experience. They used all manner of weapons and the deceased died very painful deaths. The convicts are not remorseful and deserve long custodial sentences in order to deter mob justice in the region.

Counsel for the convicts prayed for a lenient custodial sentence on the following grounds; both convicts are first offenders and brother and sister. Both have been on remand for 3 years and six months. A1 is 33 years old; A2 is 30 years old. A1 has two wives and seven children who depend on him. His land is being grabbed because of his imprisonment. He was involved in an accident and his ribs hurt. He deserves lenience and a sentence of 4 years' imprisonment would be appropriate. A2 is widow and now her children have no one to look after them. She suffers from ulcers and occasional attacks of epilepsy. In their *allocutus*, each of the convicts said they had nothing to supplement what their advocate had submitted on their behalf. In his victim impact statement, P.W.4 stated he had forgiven them but leaves it to court to decide.

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. 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.

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. I have not found any significant difference in blameworthiness between the two convicts.

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 regardless of 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. 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.

In light of the aggravating factors outlined by the learned State Attorney, I consider a starting point of forty years' imprisonment for the two convicts on basis of their blameworthiness. Against this, I have considered the submissions made in mitigation of sentence and in the *allocutus* of both convicts. I conclude that the aggravating circumstances in this case outweigh the mitigating factors. I consider a deterrent sentence to be appropriate for each of the convicts. I for that reason deem a period of thirty five (35) years' imprisonment in respect of each count to be appropriate as the minimum sanction necessary to sufficiently punish the convicts without imposing an unnecessary burden on public resources. 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 hereby take into account and set off a period of three years and six months in respect of each count as the period the convicts have already spent on remand. I therefore sentence each of the convicts A.1 Aliomuke Charles and A. 2 Tiko Jesca to a term of imprisonment of thirty one (31) years and six (6) months, in respect of count 1 and a term of imprisonment of thirty one (31) years and six (6) months in respect of count 2. Both sentences are to run concurrently and are 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.