

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0036 OF 2015

UGANDA **PROSECUTOR**

5 **VERSUS**

A1.ADRAMA WILFRED OZEE } ACCUSED
A2. ATANDU MOSES } }

Before Hon. Justice Stephen Mubiru

10 **JUDGMENT**

The two accused in this case are jointly indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that both accused on the 1st day of September 2013 at Okokoro Trading Centre in Maracha District murdered one Nyakuni Kamilo.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are
15 briefly that on the on the night of 1st September 2013 at around 9.00 pm, the deceased together with his cousin PW2 were riding their respective bicycles back home with the newly acquired wife of PW2 whom the deceased was carrying on the carrier his bicycle. PW2 was following them from behind when they met the two accused among a group of about fourteen other youths returning from Okokoro Trading Centre. A1 pushed a log in-between the frame of the deceased's
20 bicycle, causing the deceased and the bride of PW2 to fall onto the ground. Immediately both accused and the rest of the group joined in assaulting the deceased and PW2. The deceased was beaten to death while PW2 was beaten to unconsciousness. When PW2 subsequently regained his consciousness at around 2.00 am, he realised the deceased had been killed. He went to the home of a relative nearby in search of help. He was taken to the hospital where he was admitted
25 while the relatives proceeded to the scene of the attack where they found the body of the deceased. On their way to the scene, they met A1 coming from the direction where the body of the deceased was found. At daybreak, around 8.00 am the police came to the scene and allowed the relatives to take the body home from where the post mortem was done later that day. A1 chose not to say anything in his defence while A2 set up an alibi.

Since both accused pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against each of them 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 respective defences, (see *Ssekitoleko v. Uganda* [1967] EA 531). The accused do 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 charged 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 are innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

For the accused to be convicted of Aggravated Defilement, 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 2nd September 2013 prepared by P.W.1 Dr. Ambayo Richard, a Medical Officer of Arua Regional Police Clinic, which was admitted during the preliminary hearing and marked as exhibit P.Ex.2. The body was identified to him by a one Nyai Moses, a cousin of the deceased as that of Nyakuni Kamilo. P.W.4 No. 29157 Cpl Onega Christopher, saw the body at the scene and drew a sketch map locating the position where it was found. In their respective defences, the accused did not refute this element. Defence Counsel did not contest this element too. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Nyakuni Kamilo died on 1st September 2013.

The prosecution had to prove further that the death of Nyakuni Kamilo 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.2 testified that he saw the deceased assaulted with sticks,
5 logs and stones at the spot where his body was found the following day. The testimony of this eyewitness proves that the injuries sustained by the deceased were as a result of assault. His evidence is corroborated by that of P.W.1 who conducted the autopsy and established the cause of death as “head injury resulting from a blunt head trauma following an assault.” Exhibit P.Ex.2 dated 2nd September 2013 contains the details of his other findings which include “features of
10 violence on the head, back of right hand. Bruises / abrasions. Depressed abraded occipital area with comminuted fracture / defect (10 cms) with diffused brain bleeding. Bruised right back of the hand (1 x 2 cms).” In their respective defences, the accused did not refute this element. Defence Counsel too did not contest it. Not having found any lawful justification for the assault as described by the eyewitness, I agree with the assessors that the prosecution has proved beyond
15 reasonable doubt Nyakuni Kamilo's death was unlawfully caused.

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
20 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
25 usually consider first; the nature of the weapon used. In this case three bloodstained clubs were recovered. They were not produced in court but only an exhibit slip P. Ex 3 indicating that they had been recovered from the scene and handed over to the police store-man was tendered in court. Nevertheless, It has been held before that there is no burden on the prosecution to prove the nature of the weapon used in inflicting the harm which caused death nor is there an
30 obligation to prove how the instrument was obtained or applied in inflicting the harm (see *S. Mungai v. Republic [1965] EA 782 at p 787* and *Kooky Sharma and another v. Uganda S. C.*

Criminal Appeal No.44 of 2000). It is enough if through the witnesses, the prosecution adduces evidence of a careful description to enable the court decide whether the weapon was lethal or not (see *E. Sentongo and P. Sebugwawo v. Uganda [1975] HCB 239*). From their description by P.W.4 No. 29157 Cpl Onega Christopher, they were eucalyptus poles of about seven to ten centimetres in diameter and three meters long each. On basis of that description, I find in accordance with section 286 (3) of *The Penal Code Act* that they are instruments which when used for offensive purposes, are likely to cause death, hence deadly weapons.

and the manner it was applied () and the part of the body of the victim that was targeted (the head). The ferocity with which the weapon was used can be determined from the impact (the skull was fractured). A1 did not offer any evidence on this element while A2 denied participation. No direct evidence of intention. Intention is based only on circumstantial evidence of the injuries. Defence Counsel did not contest this element. Consider whether malice aforethought can be inferred.

The court also considers the manner they were used. In this case they were used to inflict multiple head injuries including a depressed abraded occipital area with comminuted fracture / defect with diffused brain bleeding. The court further considers the part of the body of the victim that was targeted. In this case it was the head, which is a delicate and vulnerable part of the body. The ferocity with which the weapons were used can be determined from the impact. In the instant case P.W.1 who conducted the autopsy established the cause of death as “head injury resulting from a blunt head trauma following an assault.” A1 did not offer any evidence on this element while A2 denied participation. Defence Counsel did not contest this element.

Despite the absence of direct evidence of intention, on basis of the circumstantial evidence, I find, in agreement with the assessors that malice aforethought can be inferred from use of deadly weapons (eucalyptus poles), on a vulnerable part of the body (the head), inflicting such a degree of injury that caused a comminuted fracture of the skull with diffused brain bleeding and eventual death. The prosecution has consequently proved beyond reasonable doubt that Nyakuni Kamilo’s death was caused with malice aforethought.

Lastly, there should be credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence. A2 denied any participation. He said he spent the evening of 1st September 2013 at the trading Centre watching a video from 6.00 pm until 10.00 when he returned home along a road different from the one
5 where the deceased was killed. He was surprised to be arrested by the police on the morning of 2nd September 2013 while on his way to hospital where he was taking food to his sister who was admitted there after being assaulted by her husband. A1 did not offer any evidence on this element..

The prosecution relies on the identification evidence of P.W.2 and the circumstantial evidence of
10 P.W.3 who states that he saw A1 that night about 400 metres from the scene and his behaviour was suspicious. This being evidence of visual identification which took place at night, the question to be determined is whether the identifying witnesses were able to recognise the accused and their actions. In circumstances of this nature, the court is required to first warn itself of likely dangers of acting on such evidence and only do so after being satisfied that correct
15 identification was made which is free of error or mistake (see *Abdalla Bin Wendo v. R (1953) 20 EACA 106*; *Roria v. R [1967] EA 583* and *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*). In doing so, the court considers; whether the witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the accused and the proximity of the witnesses to the accused at the time of
20 observing the accused.

As regards familiarity, both P.W.2 and P.W.3 knew the accused as village-mates. In terms of proximity, each of them was less than ten feet from the accused at the time they saw them. As regards duration, in the case of P.W.2 he saw both accused assault the deceased for a few
25 minutes before they descended on him in turn. P.W.3 saw A1 for a moment before he turned and looked in the opposite direction. Considering prior familiarity, I am satisfied that each of the witnesses had ample opportunity to recognise the accused. Lastly, there was moonlight by which PW2 was riding a bicycle which provided light sufficient enough for each of the witnesses to see and recognise the accused. Having considered the evidence as a whole, I have not found any
30 possibility of mistaken identification by any of the identifying witnesses.

P.W.2 gave a detailed account of the involvement of each of the two accused in the assault and the weapons each used. Having been placed at the scene as active participants in the assault of the deceased, it is immaterial that there is no proof of which 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 accused that assaulted Nyakuni Kamilo 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 the accused guilty and convict him for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Arua this 2nd day of August, 2017.

.....
Stephen Mubiru
Judge.
2nd August 2017

4th August 2017

10.08 am

Attendance

Ms. Mary Ayaru, Court Clerk.

Mr. Emmanuel Pirimba Resident State Attorney, for the Prosecution.

Mr. Oyarmoi Okello, Counsel for the accused person on state brief is present in court

The accused is 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 Senior Resident State attorney
5 prayed for a deterrent sentence on the following grounds; the offence of murder is serious. The maximum punishment is death. Life must be respected by all because once it is lost it cannot be regained. The circumstances of the offence are such that life was lost under very unfortunate reasons. They killed him just for the fun of killing. It was by the mercy of God that PW2 survived. A very serious consideration be taken of the case. Even his new wife left him because
10 of this incident. This was additional harm. They should serve not less than thirty years considering the brutal manner in which they committed the offence

Counsel for the convicts prayed for a lenient custodial sentence on the following grounds; it is an unfortunate event. Both accused are first offenders aged 30 and 28 years respectively. They head
15 their respective families. They have been on remand for three years and ten months. They have learnt a lot from what they have done. They pray for lenience. A long custodial sentence would completely ruin them. Ten to fifteen years would be appropriate. In his *allocutus*, A1 prayed for a lenient sentence on the following grounds; he had a family at home before arrest. He lost his family when he was imprisoned. He had four children with two wives, both have left. The
20 children were left behind. His mother died a long time ago, the house has collapsed. He does not know where they live now. There is no one to pay their fees. He requested the court to forgive him. He prayed for a few years to enable him help the children. The offence was committed as a result of disagreement in a disco over a woman and he was drunk that day, coming home while yelling and the colleagues asked him who was yelling. He asked for forgiveness from court. If
25 court releases him, he will serve as an example to people not to commit offences as he did. He said he was ashamed of wasting court's time. On his part, A2 in his *allocutus* too prayed for lenience on the following grounds; he is sick, feels pain around the waist, he fell off a vehicle. Right now his mother is powerless. Because his father died, his mother was left powerless. He is the only one left and he does not have a brother.

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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. Degree of culpability refers to factors of intent, motivation, and circumstance that bear on the convict's blameworthiness.

During trial, court considers legal culpability of the convict including the convict's intentions,
5 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
10 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
15 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,
20 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. However, failed defences at trial are relevant
25 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
30 manner, I have for those reasons discounted the death sentence.

The court had the opportunity to observe both convicts in the manner they went about their defences to the indictment as an indication of the degree of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of the sanctity of life manifested by each of them. A1 came across as a person who deeply regrets the result of his actions. He made several intimations of the desire to plead guilty only that he could not agree that he had the intention to kill. He appears to be a victim of the doctrine of common intention in that he joined in criminal conduct of persons who had that intention, which he probably did not share. He realises that his conduct was the result of being jilted at the Disco dance and the state of self induced intoxication. He nevertheless remains accountable in law for his actions.

10 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.

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I consider a starting point of forty years' imprisonment. Against this, I have considered in respect of A1, the submissions made in mitigation of sentence and in his *allocutus* and thereby reduce the period to twenty five 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

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spent on remand from the sentence considered appropriate, after all factors have been taken into account. I observe that AI has been in custody since 28th November 2013. I hereby take into account and set off a period of three years and eight months as the period the convict has already spent on remand. I therefore sentence A1 to a term of imprisonment of twenty one (21) years and
5 four (4) months, to be served starting today.

In respect of A2, I have considered the submissions made in mitigation of sentence and in his *allocutus*, more especially his relatively youthful age and thereby reduce the starting point to thirty years' imprisonment. In accordance with Article 23 (8) of the Constitution and Regulation
10 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 he has been in custody since 28th November 2013. I hereby take into account and set off a period of three years and eight months as the period the convict has already spent on remand. I therefore
15 sentence A2 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.

20 Dated at Arua this 4th day of August, 2017.

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Stephen Mubiru
Judge.
4th August, 2017