

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0092 OF 2015

UGANDA **PROSECUTOR**

5

VERSUS

RASUL SAIDI **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 The accused in this case is indicted with two counts of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 14th day of August 2011 at Makor Patek village in Nebbi District murdered one murdered one Yindi Wathum, in Count One and Fuacan Joyce in Count Two.

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 14th day of August 2011, P.W.2 Naphthali Wathum a son of the deceased Wathum Yindi alias Akulu and brother of the deceased Fuacan Joyce, heard an alarm coming from the direction of their house where the second deceased was nursing the first who was sickly, and as he responded to the alarm. He saw the accused dash out of the house. The accused was wearing a white vest, and he was arrested the following day at the home of his
20 grandmother, wearing a white vest. The vest was found to have had traces to blood stains which the accused told P.W.3 No.35440 D/Sgt Andama K. Collins, that it was his own blood from an injury he had sustained earlier on. When the blood in the stains was forensically analysed by PW5 Onen Geoffrey, it was found to have DNA of the deceased Fuacan Joyce. The accused set up an alibi in his defence in which he denied having been at the home of the deceased at any time
25 during the day or night that fateful day.

Since the accused pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against him beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because
30 of weaknesses in his defence, (see *Ssekitoleko v. Uganda [1967] EA 531*). The accused does not

have any obligation to prove his innocence. 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 each of the ingredients beyond reasonable doubt before it can secure his conviction. Proof beyond reasonable doubt though does not mean proof beyond a shadow of
5 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 Aggravated Defilement, the prosecution must prove each of
10 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.

15 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 two post mortem reports, both dated 15th August 2011 prepared by P.W.1 Dr. Mageme Aloysius the Medical Superintendent of Nebbi Hospital, which were admitted
20 during the preliminary hearing and marked as exhibits P. Ex.1 and P. Ex.2 respectively. The bodies were identified to him by P.W.2. Wathum Naftali as those of Wathum Akulu and Fuacan Joyce respectively. P.W.2 saw the two bodies at the scene. P.W.3 No. 35440 D/Sgt Andama K. Collins), the Scenes of Crime Officer visited the scene, and found the two bodies at the scene. P.W.4 No. 22645 D/Cpl Paul Nicholas, the investigating officer too saw the two bodies at the
25 scene, and drew a sketch plan of the scene. In his defence, the accused said he did not see any of the bodies but was informed of the deaths by his grandmother, while in police custody, following his arrest. Defence Counsel did not contest this element. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that both Wathum Yindi alias Akulu and Fuacan Joyce died on 14th August
30 2011.

The prosecution had to prove further that the deaths of Wathum Yindi alias Akulu and Fuacan Joyce were 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 who conducted
5 the autopsy established the cause of death in respect of Wathum Yindi alias Akulu as “head injuries, arms deep cut wounds.” Exhibit P.Ex.1 dated 15th August 2011 contains the details of his other findings which include a “Deep cut injuries at the head and both arms. The old man had been murdered. The person seemed (sic) has used sharp panga or axe to cut him several times at the head and arms.” He also established the cause of death in respect of Fuacan Joyce as “injuries
10 at the head and arms deep cut wounds.” Exhibit P.Ex.2 dated 15th August 2011 contains the details of his other findings which include ““Deep cut injuries at the head and both arms. The lady had been murdered, the person seemed (sic) has used panga or axe to cut her several times at the head and at the arms.” P.W.2 who saw was the first to see the two bodies at the scene described seeing cut wounds on the hands and heads of both bodies with the aid of torch light.
15 P.W.3 No.35440 D/Sgt Andama K. Collins collected blood samples from both bodies at the scene described them as having had cut wounds. PW4 No. 22645 D/Cpl Paul Nicholas drew the sketch map of the scene and he made a graphic representation of the cut wounds he saw on both bodies. That evidence as a whole proves that the injuries sustained by the deceased were as a result of a vicious assault and that the deaths of both Wathum Yindi alias Akulu and Fuacan
20 Joyce’s deaths were homicides. Not having found any lawful justification for that acts which caused their deaths, I agree with the assessors that the prosecution has proved beyond reasonable doubt that their deaths were unlawfully caused.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice
25 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*).

30

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 was recovered but PW1 opined in both exhibit P.Ex.1 and exhibit P.Ex.2 that it could have been a panga or axe. This opinion is supported by the nature of the injuries found on the bodies of the two deceased which
5 were described as cut wounds. In any event 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 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*). I therefore find in accordance with section 286 (3) of *The*
10 *Penal Code Act* that either is an instruments used in causing the death of each of the deceased are adapted to cutting, hence a deadly weapons.

The court also considers the manner it was applied. In this case it was or they were used to inflict multiple fatal cuts on each of the deceased. The court further considers the part of the body of the
15 victim that was targeted. In this case it was the heads, which are delicate and vulnerable parts of the body. The ferocity with which the weapon(s) was / were used can be determined from the impact. In the instant case the cuts were described as deep. P.W.1 who conducted the autopsy established the cause of death in both instances as “Deep cut injuries at the head and both arms.” The accused did not offer any evidence on this element. Defence Counsel did not contest this
20 element too. 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 weapon(s) (panga or axe), on a vulnerable part of the body (the head), inflicting deep cut wounds which caused profuse bleeding and eventual death. The prosecution has consequently proved beyond reasonable doubt that Wathum Yindi alias Akulu and Fuacan
25 Joyce’s deaths were homicides and were 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. The accused denied any participation. He instead said he was not at the home of the deceased at all during the material
30 time. To refute his claim, the prosecution relies firstly on the identification evidence of P.W.2 Naphali Wathum. He was identified the accused at the scene as he dashed out of the house.

This being evidence of visual identification which took place at night, the question to be determined is whether the identifying witness was able to recognise the accused. 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 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 observing the accused.

10

As regards familiarity, both P.W. 2 knew the accused as a nephew. In terms of proximity he was approximately ten metres from him. As regards duration, he only had a fleeting moment and the assailant had turned his back to him as he fled the scene. He may not have had ample opportunity to recognise him. Lastly, there was moonlight which may have provided light sufficient enough for him to recognise the assailant. His evidence though is corroborated by the fact that the following morning the accused was found in attire fitting that he had seen the previous night. It is corroborated further by circumstantial evidence of the fact that; there had been a land dispute previously between the brother of the accused and the deceased Wathum Yindi alias Akulu which was decided by the elders in favour of the deceased, the accused was wearing upon his arrest had traces to blood stains which he told P.W.3 No.35440 D/Sgt Andama K. Collins was his own blood but when forensically analysed by PW5 Onen Geoffrey, was found to have DNA of the deceased Fuacan Joyce. The existence of this blood on his attire placed him squarely at the scene of the crime and the prosecution evidence taken as a whole disproved his alibi. In the result, I have not found any possibility of mistaken identification. In agreement with the assessors, I am satisfied that their evidence is free from mistake or error. Consequently I find that it has been proved beyond reasonable doubt that the accused participated in causing the deaths of Wathum Yindi alias Akulu and Fuacan Joyce.

25

In the final result, I find that the prosecution has proved all the essential ingredients of the two offences beyond reasonable doubt and I hereby find the accused guilty and convict him for the

30

offence of Murder c/s 188 and 189 of the *Penal Code Act* in respect of counts one and two respectively.

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

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

5

4th August 2017

10.29 am

10 Attendance

Ms. Sharon Ngayiyo, Court Clerk.

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

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

15

The accused 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 Senior Resident State attorney prayed for a deterrent sentence on the following grounds; murder is a serious offence and the maximum penalty is death. Two people lost their lives as a result of the offence. The circumstances are serious and the murder was executed in a brutal manner. Both had deep cut wound and the accused did not respect the sanctity of life which should be respected by all. A long custodial sentence would be appropriate for him to re-think his life. He is related to both deceased,. He should have sought other means of resolving the dispute.

Counsel for the convict prayed for a lenient custodial sentence on the following grounds; the convict is aged only 22 years and married. He was the bread winner of his family. He is a first offender. He has been on remand for three years and six months. He has learnt a lot from his mistake and prays for lenience. A long custodial sentence would ruin his life and that of his family members who will suffer for a very long time to come. In his *allocutus*, the convict prayed for a short custodial sentence because he is the bread winner at home. The only siblings he has are six and very young and he was taking care of them.

Sentencing is a reflection of more than just the seriousness of the offence. The court at this stage is guided by the principle of proportionality which operates to prohibit punishment that exceeds the seriousness of the offending behaviour for which the offender is being sentenced. It requires
5 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.

10

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
15 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 comes close to that category of the most egregious cases of murder committed in a brutal, callous manner, I have however because
20 of the youthful age of the convict, 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
25 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,
30 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. I have considered the aggravating factors in this case being that the victims suffered multiple deep cuts on the head and hands. The manner in which the offence was committed involved use of deadly weapons, in a manner reflective of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of the sanctity of life. The convict not only poses a serious danger to society but the sentence should reflect punishment that fits both the crime and the offender. For that reason, the convict deserves to spend the rest of his natural life in prison. He is consequently sentenced to life imprisonment in respect of Count one and a further sentence of life imprisonment in respect of count two. Both sentences are to run concurrently.

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 4th day of August, 2017.

.....

Stephen Mubiru
Judge.
4th August, 2017

25