

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CRIMINAL SESSIONS CASE No. 0094 OF 2014**

**UGANDA** ..... **PROSECUTOR**

5 **VERSUS**

**A1. MALISHI STEPHEN alias PEMBELE** }  
**A2. ACIDRI MORRIS alias MOMO** } ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

10 **JUDGMENT**

The two accused are indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 30<sup>th</sup> day of December 2012 at Pajulu sub-county in Arua District murdered one Edema Aldo.

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The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the on 30<sup>th</sup> day of December 2012 a report was received at Arua Central Police Station of a murder which had occurred at Pajulu sub-county police post. PW4 (D/AIP Draundu Pastel) was assigned to investigate the case. He went to the police post where he found a body of  
20 a suspect in the police cells. The body was lying in a pool of blood. Both hands were tied at the back and both legs were tied. He saw multiple injuries on the body including stab wounds on the head, on the back and some swellings on the head during his investigations. He recorded statements from witnesses. They told him that the accused had spearheaded the beating of the deceased who was a suspected thief. A post mortem was done on the body and it established that  
25 the cause of death as “intra abdominal haemorrhage due to splenic rupture and hemophenothorax. The two accused implicated in the commission of the offence were then arrested from their respective homes. They denied any involvement in causing the death.

30 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 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. The prosecution adduced the post mortem report dated 30<sup>th</sup> December 2012 prepared by P.W.1 Dr. Apo Julius of Arua Regional Referral Hospital, which was admitted during the preliminary hearing and marked  
20 as exhibit P.Ex.2. The body was identified by an unspecified person from Arua Police as that of Mr. Ali. This is corroborated by the testimony of P.W.3 D/AIP Afemya Alex, who saw the body at Pajulu Police Post, and arranged for its post mortem examination. P.W.3 took the initiative to look for and find the parents of the deceased at Kova village. They identified the body as that of their son Edema Aldo. It was handed over to them for burial. In their respective defences, the  
25 accused did not offer any evidence regarding this element. 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 Edema Aldo died on 30<sup>th</sup> December 2012.

30 The prosecution had to prove further that the deaths of Edema Aldo 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*

5 *Wesonga (1948) 15 EACA 65*). P.W.1 who conducted the autopsy established the cause of death as “intra abdominal haemorrhage due to splenic rupture and hemophenothorax.” Exhibit P.Ex.1 dated 30<sup>th</sup> December 2012 contains the details of his other findings which include a “multiple bruises / contusions all over the body. Depression of the left chest wall. Abdomen grossly  
10 distended. Autopsy done and found ruptured spleen with gross heaemopentoreum. Left lung lacerated with massive hemophenothorax.” P.W.3 D/AIP Afemya Alex, who saw the body at Pajulu Police Post testified that he found the body in the police cell lying in a pool of blood. Both hands were tied at the back and both legs were tied. He saw multiple injuries on the body including stab wounds on the head, on the back and some swellings on the head. In their  
15 respective defences, the accused did not offer any evidence regarding this element. Defence Counsel did not contest this element. That evidence as a whole proves that the injuries sustained by the deceased were as a result of a vicious assault and that the death was a homicide. Not having found any lawful justification for the acts which caused his death, I agree with the assessors that the prosecution has proved beyond reasonable doubt that his death was unlawfully caused.

20 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*).

25 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 P.W.3 D/AIP Afemya Alex testified that the police officer at Pajulu Police Post handed over to him the panga allegedly used to assault the deceased. He however neither produced that panga in evidence nor its whereabouts. He only described it as having had a handle made out of a rubber car tyre. This testimony is supported by the nature of some of the injuries found on the body of the deceased which  
30 included stab wounds on the head and on the back. 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 Penal Code Act* that the instruments used in causing the death of each of the deceased were adapted to cutting, hence 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 victim that was targeted. In this case multiple bruises / contusions were found all over the body as well as depression of the left chest wall. the autopsy disclosed a ruptured spleen and left lung lacerated with massive internal bleeding. The ferocity with which the weapon(s) was / were used can be determined from the impact. In the instant case the left side of the rib cage was crushed. The autopsy revealed the cause of death as “intra abdominal haemorrhage due to splenic rupture and hemophenothorax.” The accused did not offer any evidence on this element. Defence Counsel did not contest this 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 and other objects), on a vulnerable parts of the body (the head and ribcage), inflicting severe internal injuries leading to internal bleeding and death . The prosecution has consequently proved beyond reasonable doubt that Edema Aldo’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. The accused denied any participation. The prosecution relies entirely on information given to the investigation officer PW4 (D/AIP Draundu Pastel) during his investigations. He recorded statements from witnesses. None of them testified. They told him that the accused had spearheaded the beating of the deceased who was a suspected thief. Defence counsel contested this element as being based on hearsay evidence.

Section 59 of *The Evidence Act* requires that oral evidence must, in all cases whatever, be direct; that is to say if it refers to a fact which could be seen, it must be the evidence of a witness who

says he or she saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it; if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner.

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Testimony based on what a witness has heard from another person rather than on direct personal knowledge or experience is referred to as hearsay evidence, in other words, evidence of those who relate, not what they know themselves, but what they have heard from others. A statement made out of court that is offered in court as evidence to prove the truth of the matter asserted is generally inadmissible as hearsay. This is because statements made out of court normally are not made under oath, a judge cannot personally observe the demeanour of someone who makes such a statement outside the courtroom, and an opposing party cannot cross-examine such a person. Such statements hinder the ability of the court to probe the testimony for inaccuracies caused by ambiguity, insincerity, faulty perception, or erroneous memory. Thus, statements made out of court are perceived as untrustworthy. There are a number of exceptions, none of which apply to this case. The implication is that the prosecution has not offered any credible evidence implicating any of the two accused in the commission of the offence.

In the final result, I find that the prosecution has failed to prove the last essential ingredient of offence beyond reasonable doubt and I hereby find the two accused not guilty and consequently acquit each of them of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. They should be set free forthwith unless they are being held for other lawful reason.

25 Dated at Arua this 7<sup>th</sup> day of August, 2017.

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Stephen Mubiru  
Judge.  
7<sup>th</sup> August 2017