

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0131 OF 2014

UGANDA **PROSECUTOR**

5 **VERSUS**

**A1. KUMAKECH TONNY alias MONO }
A2. ADAM MOHAMAD } **ACCUSED**
A3. RUVA AMOS alias NGELE }**

Before Hon. Justice Stephen Mubiru

10 **JUDGMENT**

The accused in this case is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the three accused on the 5th day of August 2013 at Afere village in Nebbi District murdered one Mohamad Ongom.

15 The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the fateful day, there was an event at the home of a neighbour who was hosting his in-laws that had visited that day. P.W.2 Giramia Sana, the wife of the deceased and P.W.3 Rukia Akumu the mother of the deceased heard and saw the three accused, three times that night, come to the home of the deceased to find out whether he was back so that they could attend that event
20 together. On the first two occasions, the deceased had not returned home from the Trading Centre. On the third occasion, at around 3.00 am, they found he had returned home and went out with him, barely three minutes later they received news he had been stabbed and was bleeding to death. The two witnesses rushed to the scene barely thirty meters away and found the deceased with a knife stuck on the right side of the chest of the deceased, he was bleeding through the
25 mouth and nose and could not speak. DW4 Okirwoth Patrick was present at the scene and saw the deceased stabbed in the chest, fall down, bleed profusely and it is him who immediately rushed him to Nebbi Hospital on his motorcycle. He died there soon after arrival and upon post mortem examination of his body, it was established that the cause of death was a “penetrating chest injury with ruptured pulmonary artery and perforated right upper lobe of the right lung.
30 Haemothorax.”

The three accused went missing soon thereafter, none of them attended the burial and were arrested almost a week, in respect of A1 and A2 and weeks, in respect of A3 after the incident. In his defence A1 Kumakech Tony alias Mono stated that although he was within the vicinity of the incident, he did not see what happened. He was carrying the music system back into the house after the event. A.2. Adam Mohammed said he was in Koch village and later went to Lobudegi village with A.1, his cousin, to his in-laws in pursuit of dowry issues relating to the marriage of their sister when they were surprised by arrest in connection with the death of Mohamad Ongom, a person he never even knew. A.3 Ruva Amos alias Ngele said he was in Bweyale going about his business of selling ropes only to be surprised with an arrest in connection with the death of Mohamad Ongom and returned to Nebbi.

Since all the accused in this case 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 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 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 5th August 2013 prepared by P.W.1 Dr. Lissa

Charles Kennedy of Nebbi Hospital, which was admitted during the preliminary hearing and marked as exhibit P.Ex.1. The body was identified to him by PW3 Rukia Akum, the mother of the victim as that of Mohamad Ongom. P.W.2 Giramia Santa, the wife of the deceased, too saw the body and attended the burial. P.W.4 D/AIP Coorom Kennedy the investigating officer was present in the mortuary during the post mortem examination of the body. D.W.1 Kumakech Tony alias Mono, saw the body being taken the ancestral home of the deceased and he said he attended the burial. The other two accused did not offer evidence on 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 Mohamad Ongom on 5th day of August 2013.

The prosecution had to prove further that the death of Mohamad Ongom 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.1 who conducted the autopsy established the cause of death as “penetrating chest injury with ruptured pulmonary artery and perforated right upper lobe of the right lung. Haemothorax” Exhibit P.Ex.1 5th August 2013 contains the details of his other findings which include a “stab wound 1 inch in length, 1st intercoastal space, right anterior chest at mammary line.” P.W.2 Giramia Santa, the wife of the deceased, said that when she arrived at the scene she found a knife stuck on the right side of the chest of the deceased, he was bleeding through the mouth and nose and could not speak. P.W.3 Rukia Akumu the mother of the victim as well testified that when she arrived at the scene she found a knife stuck on the right side of the chest of the deceased, he was bleeding through the mouth and nose and could not speak. In his defence, D.W.1 Kumakech Tony alias Mono stated that although he was within the vicinity of the incident, he did not see what happened and only saw the body being taken the ancestral home of the deceased and he attended the burial. The other two accused did not offer evidence on this element. DW4 Okirwoth Patrick testified that he was present at the scene and saw the deceased stabbed in the chest, fall down, bleed profusely and it is him who immediately rushed him to hospital on his motorcycle.

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The evidence as a whole proves that the injuries sustained by the deceased were as a result of deliberate act of stabbing, hence a homicide. Not having found any lawful justification for the act of stabbing as described by D.W.4, the eyewitnesses, I agree with the assessors that the prosecution has proved beyond reasonable doubt Mohamad Ongom's death was unlawfully
5 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
10 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
15 usually consider first; the nature of the weapon used. In this case although the knife said to have been used in stabbing the deceased was not recovered, 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
20 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*). P.W.2 Giramia Santa, P.W.3 Rukia Akumu and DW4 Okirwoth Patrick all saw the knife. From that description, the court considers the definition of a deadly weapon in section 286 (3) of *The
25 Penal Code Act* as any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death, to find that the weapon used in stabbing the deceased was a deadly one.

The court also considers the manner it was applied. In this case it was used to inflict a deep stab
30 wound. The court further considers the part of the body of the victim that was targeted. In this case it was the chest, which is a delicate and vulnerable part of the body. The ferocity with which

the weapon was used can be determined from the impact. In the instant case it penetrated the chest, ruptured the pulmonary artery and perforated the right upper lobe of the right lung. P.W.1 who conducted the autopsy established the cause of death as “penetrating chest injury with ruptured pulmonary artery and perforated right upper lobe of the right lung.” Exhibit P.Ex.1
5 dated 5th August 2013 contains the details of his other findings which include a “stab wound 1 inch in length, 1st intercoastal space, right anterior chest at mammary line.”

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 a
10 deadly weapon (a knife), on a vulnerable part of the body (the chest), inflicting such a degree of injury that ruptured the pulmonary artery and perforated the right upper lobe of the right lung, causing profuse bleeding and eventual death. The prosecution has consequently proved beyond reasonable doubt that Mohamad Ongom’s death was caused with malice aforethought.

15 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. All the accused denied any participation. D.W.1 Kumakech Tony alias Mono stated that although he was within the vicinity of the incident, he did not see what happened. He was carrying the music system back into the house after the event. D.W.2. Adam Mohammed said he was in Koch village and later went to
20 Lobudegi village with A1, his cousin, to his in-laws in pursuit of dowry issues relating to the marriage of their sister when they were surprised by arrest in connection with the death of Mohamad Ongom, a person he never even knew. D.W.3 Ruva Amos alias Ngele was in Bweyale going about his business of selling ropes only to be surprised with an arrest in connection with the death of Mohamad Ongom and returned to Nebbi. DW4 Okirwoth Patrick testified that he
25 was present at the scene and saw D.W.3 Ruva Amos alias Ngele stab the deceased. D.W.2. was not at the scene while DW1 was operating the music system as Dee Jay throughout that time. None of the two played any part in the stabbing.

As regards A1 and A2, the only evidence against them is circumstantial. Both P.W.2 and P.W.3
30 testified that they were in the company of A3 shortly before he was stabbed. In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction

that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Shubadin Merali and another v. Uganda* [1963] EA 647; *Simon Musoke v. R* [1958] EA 715; *Teper v. R* [1952] AC 480 and *Onyango v. Uganda* [1967] EA 328 at page 331). I find that although the testimony of both P.W.2 and P.W.3 casts suspicion of the two accused, it is inadequate to rebut their defences. The prosecution has failed to prove their participation in commission of the offence beyond reasonable doubt. In the result, I find them not guilty and accordingly acquit them of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. Both of them should be set free forthwith unless they are being held in custody for other lawful cause.

I noted some contradictions between the testimony of both P.W.2 Giramia Santa, the wife of the deceased, and P.W.3 Rukia Akumu the mother of the deceased both of whom testified that when they arrived at the scene, they found a knife stuck on the right side of the chest of the deceased. In his testimony whereas DW4 Okirwoth Patrick who was present at the scene and saw testified that the deceased was stabbed on the left side of the chest after which the assailant fled with the knife. I have found this contradiction attributable to lapse of memory regarding details of the event as a result of lapse of time. I have not found it to be a deliberate untruthfulness of the part of this witness. Overall , he was a truthful witness.

A3 Ruva Amos alias Ngele was identified at the scene by DW4 Okirwoth Patrick as the person who stabbed the deceased. 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 and his 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 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 witness was familiar with the accused,

whether there was light to aid visual identification, the length of time taken by the witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused.

5 This witness knew the accused before the incident. In terms of proximity, he was less than six feet from the deceased when he was stabbed. As regards duration, he saw the accused approach from the direction of his home before he stabbed the deceased giving him ample opportunity to recognise him. Lastly, there was an electric bulb powered by the generator also used to power the music system that was being used at the event. The bulb hung from a tree branch toward the
10 left side of the deceased, not too far away from the spot from where he was stabbed, which provided light sufficient enough for him to see the accused and the knife with which the accused stabbed the deceased. Having considered the evidence as a whole, I have not found any possibility of mistaken identification or error on the part of this witness. In agreement with the assessors, I am satisfied that their evidence is free from mistake or error. Consequently I find that
15 it is the accused Ruva Amos alias Ngele that stabbed Mohamad Ongom 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 as against A.3 Ruva Amos alias Ngele and I hereby find him
20 guilty and accordingly convict him for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Arua this 7th day of August, 2017.

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Stephen Mubiru
Judge.
7th August, 2017.

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7th August, 2017

9.20 pm

Attendance

Ms. Sharon Ngayiyo, Court Clerk.

5 Ms. Harriet Adubango, Senior Resident State Attorney, for the Prosecution.

Mr. Ronald Onencan, Counsel for the accused person on state brief is present in court

The accused is present in court.

SENTENCE AND REASONS FOR SENTENCE

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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; the offence of murder is a serious offence carrying the death penalty. The circumstances of the death where the victim was murdered brutally using a knife. He deserves a deterrent sentence to enable him reform. This is one of such cases where there is a plan and execution of the offence. He was persistent in getting the deceased. He deserves the death penalty.

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In his *allocutus*, the convict prayed for lenience on grounds that he has problems of sickness, a simple fracture after an accident in 2015. He has hepatitis "B", and four children. His father died and he is left with a mother who is very weak and he used to look after her and all those children. He prayed for mercy so that he can serve his sentence and go back and develop Uganda.

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I have considered all the mitigating factors mentioned above and especially the fact that at the age of 25 he is still a relatively young man. This though is one such case where the mitigating factors I have reproduced above coupled can hardly mitigate the punishment due to the gruesome manner in which the offence was committed. I have for example considered *Mugabe v Uganda C.A. Cr. Appeal No. 412 of 2009*, where the Court of Appeal in its decision of 18th December 2014, confirmed the death sentence for a thirty year old convict who following an allegation of rape against him, was heard threatening that he would kill a member of the deceased's family. The deceased was aged twelve years and on the fateful day he was sent by his father to sell milk at a nearby Trading Centre. He never returned home. The relatives made a search for him and his body was discovered in a house in a banana plantation. The appellant had been seen coming out

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of a house near that plantation. On examination of the body of the deceased, it was revealed that the stomach had been cut open and the heart and lungs had been removed. His private parts had also been cut off and were missing from his body. The cause of death was severe hemorrhage due to cut wounds and the body parts removed. The accused pleaded guilty on arraignment. He
5 was sentenced to death despite his plea of guilty.

This was a gruesome death where the deceased was practically killed in the proximity of his mother and wife. They suffered the indignity of finding their loved one helpless gasping for breath with a knife stuck in his chest. I know a life can never be adequately compensated, not
10 even with another life but the death penalty remains one of the lawful sentences for this type of crime. The court should not balk out of the duty entrusted to it to express public indignation towards some of the extreme modes of perpetration of crime.

The maximum penalty for the offence murder as prescribed by section 189 of the *Penal Code Act*
15 is death. This represents the maximum sentence and is reserved for the worst of the worst cases of murder. The convicts before me committed the offence in the worst of the worst of manners. It was a horrific, brutal, callous, calculated, well planned and pre-meditated, senseless killing. It is an offence, which the mitigating factors advanced by the convict will not mitigate. It is one that deserves the death sentence if only to exact retribution for the undignified, brutal and horrendous
20 manner in which the deceased was killed and also to deter other would be offenders. I therefore sentence the accused to death. He is to hang until he is dead. I so order.

The convict is advised that they he has a right of appeal against both conviction and sentence, within a period of fourteen days

25 Dated at Arua this 7th day of August, 2017.

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Stephen Mubiru
Judge.
7th August, 2017