

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0093 OF 2015

UGANDA **PROSECUTOR**

5 **VERSUS**

A1. OROMCAN STEPHEN }
A2. OBOMBA PHILLIP }
A3. ONYUTHA ANDREA }..... **ACCUSED**
A4. AKUMU BETTY }
10 **A5. THOMWA DONALD** }
A6. KEUBER RONALD }

Before Hon. Justice Stephen Mubiru

JUDGMENT

15 The 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 the accused and others still at large, on or around the 20th day of January 2015 at Arisi village, Utheko Parish, Paidha sub-county in Zombo District murdered one Onoba William Karlo.

20 The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that about two years before the fateful day, the brother of the deceased, a one Primo, had eloped with the wife of D.W.3 Onyuthi Andrea, of more than eight years and with whom he had eight children. A week or so before the deceased went missing, a meeting was convened by the elders to resolve the issue. The deceased and all the accused attended that meeting. Sensing that the meeting was hostile, the deceased left it and warned his brother Primo not to show up. All persons in attendance, including the accused persons, suspected the deceased to have tipped off
25 Primo and were unhappy with him. Four days later, the deceased returned home panting and scared and told his wife how he had narrowly escaped the wrath of the accused persons who were among people who had surrounded him at around 11.00 pm while he was at the Trading Centre, and only let him free after realising he was not the person they were hunting for. The following day when he went back to the Trading Centre, he never returned. A search for him

ensued for the next ten days but yielded no results. His body was discovered on 23rd January 2015 in a stream about 150 meters away from his home, by some boys who were out hunting for birds.

5 A few days into the search for the deceased after he had gone missing but before his body was discovered, D.W.3 Onyuthi Andrea had informed P.W.4. Okumu Karlo, a brother of te deceased, that the deceased had told him he would be proceeding to the lake in Panyimur. About a week after the deceased had gone missing, while she was in her garden at around 8.00 am, P.W.3 Angelina Akumu overheard a conversation in which D.W.6 Keuber Ronald told D.W.2 Obomba
10 Phillip to keep quiet because "we have already finished up that thing," and the sister of the deceased was digging in the next garden. This was in response to an expression of doubt by D.W.2 Obomba Phillip as to whether the deceased had managed to make it home considering the way he had been beaten by D.W.1 Oromcan Stephen. Around the same time, D.W.3 Onyuthi Andrea, too went to P.W.4. and told him to take three boys and three dogs to the Namthim
15 Stream where the monkeys were destroying their garden of beans and the dogs would be able to smell something. At that time there were no beans in the garden since they had been harvested. The day before discovery of the body, D.W.4 Akumu Betty had been to the home of PW2 and PW3 and told them not to search for Obomba because he was not dead but just at the Namthim stream. The body of the deceased was eventually found at the Namthim stream, a place which
20 had been insinuated by D.W.3 Onyuthi Andrea and D.W.4 Akumu Betty. The accused were then arrested and charged with the offence of murder which they all denied.

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 each of them beyond reasonable doubt. The burden does
25 not shift to the accused persons and the accused may 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
30 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 is innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

- 5 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
 - 10 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 23rd February 2015 prepared by P.W.1 Dr.

15 Jeremy Oromcan of Nebbi Hospital, which was admitted during the preliminary hearing and marked as exhibit P.Ex.1. The body was identified to him by P.W.4. Okumu Karlo, a brother of the deceased, as that of Onoba William Karlo. P.W.2 Isabella Mandhawun, the wife of the deceased, testified too that she saw the body at the scene and attended the burial. P.W.4. was among the people who discovered the body and he also attended the funeral. P.W.5 (D/AIP

20 Choorom Kennedy, the investigating officer, went with the doctor to the scene from where a post mortem examination was done in his presence. He too saw the body at the scene. In their respective defences, the accused said they were only told that Onoba William Karlo was dead, after their 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

25 reasonable doubt that Onoba William Karlo is dead.

The prosecution had to prove further that the death of Onoba William Karlo 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 Dr. Jeremy Oromcan of Nebbi Hospital

30 who conducted the autopsy formed the opinion that the deceased was “brutally murdered with some sharp high velocity equipment.” Exhibit P.Ex.1 dated 23rd February 2015 contains the

5 details of his other findings which include a “the body was found in a deep trench of water i.e. river, surrounded by shrub and water.” P.W.2 who saw the body at the scene stated that it had cut wounds. P.W.4 who too saw the body at the scene said both hands had been cut off, there were stab wound in the ribs. P.W.5 D/AIP Choorom Kennedy said that when he saw the body at the scene, the left palm had been chopped off and could not be found at the scene. The rest of the body was decomposing. In their respective defences, the accused said they were only told that Onoba William Karlo was dead, after their arrest. Defence Counsel did not contest this element. There was nothing found within the vicinity of the body suggesting that the death was accidentally caused or that it was a suicide. The injuries seen of the body by their nature do not seem to have been self-inflicted. The evidence as a whole has established that Onoba William Karlo's 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.

15 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, no weapon was recovered. 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 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*). P.W.2 who saw the body at the scene stated that it had cut wounds. P.W.4 who too saw the body at the scene said both hands had been

cut off, there were stab wound in the ribs. P.W.5 D/AIP Choorom Kennedy said that when he saw the body at the scene, the left palm had been chopped off and could not be found at the scene. From that description, the court considers the definition of a deadly weapon in section 286 (3) of *The Penal Code Act* as any instrument made or adapted for shooting, stabbing or cutting
5 and any instrument which, when used for offensive purposes, is likely to cause death, to find that the weapon used in inflicting the injuries seen on the body of the deceased, was a deadly one.

The court also considers the manner it was applied. In this case it was used to inflict stab wounds and cuts. The court further considers the part of the body of the victim that was targeted. In this
10 case some of the wounds were visible at the ribs, 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 due to the state of decomposition, the doctor was unable to open the body but opined that brutally murdered with some sharp high velocity equipment. I have no basis for disregarding this opinion which appears to be consistent with those injuries that were still visible on parts of
15 the body that had not decomposed yet. None of the accused offered any evidence in relation to this ingredient and in agreement with the opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that Onoba William Karlo's death was caused with malice aforethought.

20 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 Oromcan Stephen stated that he only learnt about the death following his arrest at 5.00 pm on 18th February 2015 while at his shop. D.W.2 Obomba Phillip stated the he only learnt about the death following his arrest on 18th February 2015 while on his way home.
25 D.W.3 Onyuthi Andrea as well learnt about the death following his arrest at 11.00 pm on 18th February 2015 while on his way home. Although the brother of the deceased, Primo had eloped with his wife in the past, that issue had long been resolved and he did not bear any grudge against the deceased or his brother Primo. D.W.4 Akumu Betty stated that she learnt about the death following her arrest on 18th February 2015 while at Nebbi Police Station where she had
30 gone to find out why her son, D.W.1. had been arrested. D.W.5 Twomwa Donald said he learnt about the death following his arrest on 28th February 2015 at 8.00 am while sleeping at his home.

D.W.6 Keuber Ronald too learnt about the death following his arrest early in the morning of 1st March 2015 as he left his home for the garden.

To refute those defences, the prosecution relies entirely on circumstantial evidence, woven
5 together by the following strands; about two years before, the brother of the deceased, a one
Primo, had eloped with the wife of D.W.3 Onyuthi Andrea, of more than eight years and with
whom he had eight children. A week or so before the deceased went missing, a meeting was
convened by the elders to resolve the issue. The deceased and all the accused attended that
10 meeting. Sensing that the meeting was hostile and could harm his brother, the deceased left the
meeting, went home and warned his brother Primo not to show up. All persons in attendance,
including the accused persons, suspected the deceased to have tipped off Primo and were
unhappy with him.

Four days later, the deceased returned home panting and scared and told his wife how he had
15 narrowly escaped the wrath of the accused persons who were among a group of other people
who had surrounded him at around 11.00 pm while he was at the Trading Centre, and only let
him free after realising he was not the person they were hunting for. The following day when he
went back to the Trading Centre, he never returned home. His wife, PW2 alerted the relatives
and a search for his whereabouts ensued for the next ten days but yielded no results. His body
20 was eventually discovered on 23rd January 2015 in a stream about 150 meters away from his
home, by some boys who were out hunting for birds.

A few days into the search for the deceased, D.W.3 Onyuthi Andrea had informed P.W.4.
Okumu Karlo that the deceased had said he would be proceeding to the lake in Panyimur. About
25 a week after the deceased had gone missing, at around 8.00 am while she was in her garden
located about twenty meters away from that of DW2 and DW6 separated by some or reeds or
bush in-between, PW3 Angelina Akumu overheard D.W.6 Keuber Ronald tell D.W.2 Obomba
Phillip to keep quiet because "we have already finished up that thing," and the sister of the
deceased was digging in the next garden. This was in response to an expression of doubt by
30 D.W.2 Obomba Phillip as to whether the deceased had managed to make it home considering the
way he had been beaten by D.W.1 Oromcan Stephen. Around the same time, D.W.3 Onyuthi

Andrea too went to P.W.4. and told him to take three boys and three dogs to the Namthim Stream where the monkeys were destroying their garden of beans and the dogs would be able to smell something. At that time there were no beans in the garden since they had been harvested. The day before discovery of the body, D.W.4 Akumu Betty had been to the home of PW2 and
5 PW3 and told them not to search for Obomba because he was not dead but was just at the Namthim stream. The body of the deceased was eventually found at the place which had been insinuated by D.W.3 Onyuthi Andrea and D.W.4 Akumu Betty.

In his final submissions, defence counsel argued that the evidence could not support the
10 conviction of any of the accused since it only raised suspicion against them. The learned Senior Resident State Attorney disagreed. She argued that it conclusively points to thier guilt and capable of supporting their conviction.

In a case depending exclusively upon circumstantial evidence, the court must find before
15 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
20 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*).

In the instant case, there are three levels of circumstantial evidence adduced; in the first category
25 is D.W.5 Twomwa Donald against whom the only evidence is that he attended a meeting a week or so before the deceased disappeared and was among those who expressed displeasure at the accused having tipped off his brother Primo not to attend the meeting. The other evidence is that the evening before the day he disappeared, the deceased told his wife P.W.2. that he was among the people who had surrounded him.

30

This latter part of the evidence is essentially hearsay. A statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible because under 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
5 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.

10 Although under section 30 of *The Evidence Act*, a statement made by a person who believes he is about to die in reference to the manner in which he or she sustained the injuries of which he or she is dying, or other immediate cause of his or her death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them, the statement to P.W.2 does not qualify as a dying declaration.
15 In the result, there is no credible evidence implicating the accused in the commission of the offence. The only piece of circumstantial evidence against this accused then remains the fact of his having attended the emotionally charged meeting convened a week or so prior to the disappearance of the deceased. It is too weak to support a conviction. I therefore find that the prosecution has not proved the case against him beyond reasonable doubt. He is accordingly
20 found not guilty and is hereby acquitted of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. He should be set free forthwith unless he is being held for other lawful reason.

In the second category are those accused against whom the circumstantial evidence raises a high level of suspicion. In this category is D.W.3 Onyuthi Andrea who was involved in a dispute with
25 the brother of the deceased Primo and attended the emotionally charged meeting convened a week or so prior to the disappearance of the deceased intended to chastise Primo. Despite his denial, the evidence suggests that he bore a grudge against Primo and by extension, the deceased for having tipped him off to avoid that meeting. He further gave P.W.4 false information that the deceased had gone to Panyimur whereas not. He then told the family of the deceased parables
30 about where the body of the deceased could be found and indeed it was found there a day or so later. The second accused in this category is D.W.1 whom P.W.3 overheard being implicated by

D.W.6 as the person who assaulted the deceased so severely that it was feared the deceased may not have made it home. The third accused in the category is D.W.2 who too was overheard by P.W.3. inquiring about the condition of the deceased and whether he was able to make it home after the assault by D.W.1. Lastly it includes D.W.4. who indicated that the deceased was not
5 dead even before anyone had suspected that he was. In parables, she too pointed out where the deceased could be found and indeed his body was found at that location the following day.

The evidence adduced against the four accused in that category suggests that they not only had some information about the circumstances in which the deceased died, but also knew that he was
10 dead and where his body was to be found. It however falls short of implicating them in the perpetration of the offence. It does not conclusively point to the fact that they were participants in the commission of the offence. It does not irresistibly point to their guilt. Despite having raised such a high suspicion against them, I find that the available circumstantial evidence is not strong enough to support their conviction. I therefore find that the prosecution has not proved the
15 case against A.1, A2, A3 and A4 beyond reasonable doubt. Each of them is accordingly found not guilty and is hereby acquitted of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. Each of them should be set free forthwith unless he is being held for other lawful reason.

In the last category is D.W.6 Keuber Ronald. Apart from having attended the emotionally
20 charged meeting convened a week or so prior to the disappearance of the deceased, intended to chastise Primo, and expressing displeasure with the fact that the deceased had tipped off his brother not to attend the meeting, he was also overheard by P.W.3 telling D.W.2 that; "we have already finished up that thing" when D.W.2 inquired about the condition of the deceased and whether he had made it home after the severe assault by D.W.1. That statement is not only self
25 incriminatory but his conduct in cautioning D.W.2 not to talk about the condition in which the deceased was the last time they saw him, lest the sister of the deceased who was digging in the garden nearby would hear him, proves that he was a participant in the assault on the deceased that caused his death. That was a heavily loaded statement considering that eventually the deceased was found dead after a few days and his body was decomposing. In the context of the
30 facts in which it was uttered, it meant one thing only, that this accused had participated in "finishing up" the deceased, who was the subject of their discussion.

The principle against self-incrimination reflected in Article 28 (11) of *The Constitution of the Republic of Uganda, 1995* is meant to protect against unreliable confessions and the abuse of power by the state. This protection manifests itself in the form of the "right to silence." It is therefore triggered only where the individual being compelled to give information is in an adversarial, or at least an inquisitorial, relationship with the state. Common law draws a fundamental distinction between incriminating evidence and self-incriminating evidence: the former is evidence which tends to establish the accused's guilt, while the latter is evidence which tends to establish the accused's guilt by his or her own admission, or based upon his or her own communication. The principle against self-incrimination requires protection against the use of compelled evidence which tends to establish the accused's guilt on the basis of the latter grounds, but not the former. In the instant case, when D.W.6 uttered those self incriminatory statements, which are determinative of his guilt, he was not even a suspect at the time. He was not under any inquiry or investigation, indeed he had not been arrested. He was not compelled to make that statement but he did so spontaneously on his own free will. I therefore find that the cumulative circumstantial evidence against D.W.6 Keuber Ronald irresistibly points to his guilt.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt as against D.W.6 Keuber Ronald and I hereby find him guilty and 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.

.....
Stephen Mubiru
Judge.
7th August 2017

7th August 2017

2.43 pm

Attendance

Ms. Topacu Consolate, Court Clerk.

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

Mr. Okello Oyarmoi, Counsel for all accused persons on state brief is present in court

All the accused persons are present in court.

SENTENCE AND REASONS FOR SENTENCE

10

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 carrying the death sentence. The circumstances of the offence should be considered. People took the law into their hands to punish someone that were not happy with. The accused deserves a deterrent sentence. A long custodial sentence is deserved to deter him and others.

15

Counsel for the convict prayed for a lenient custodial sentence on the following grounds; he is a first offender aged 27 years and head of his family. He has been on remand for two years and seven months. A young man, he is capable of reforming if given the opportunity. He prays for lenience. In his *allocutus*, the convict prayed for lenience on ground that he has problems, his mother and father died. They left young children under his care. He prayed the court to look into that issue and give him a short custodial sentence and he has a chest problem.

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25

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 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.

30

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
5 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
10 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
15 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
20 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
25 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.

30

In light of the aggravating factors outlined by the learned State Attorney, and the undignified manner in which the body of the deceased was left to decompose only 150 meters from his home, I consider a starting point of forty years' imprisonment for the convict. Against this, I have considered the submissions made in mitigation of sentence. I conclude that the aggravating
5 circumstances in this case outweigh the mitigating factors. I consider a deterrent sentence to be appropriate for the convict. I for that reason deem a period of thirty (35) years' imprisonment to be appropriate as the minimum sanction necessary to sufficiently punish the convict without imposing an unnecessary burden on public resources.

10 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. The convict has been in custody since January 2015. I hereby take into account and set off a period of two years and seven months as the period
15 the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of thirty two (32) years and five (5) months to be served starting today.

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

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

.....
Stephen Mubiru
Judge.
7th August, 2017