

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CRIMINAL SESSIONS CASE No. 0122 OF 2015**

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

5 **VERSUS**

**A1. ODHIAMBO TOM** } ..... **ACCUSED**  
**A2. ATAYO GODFREY** }

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

10 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 two accused on the 2<sup>nd</sup> day of April 2013 at Adriko Cell in Arua District murdered one Oryem Saidi Musa.

15 The facts of the case as presented by the prosecution are briefly that on the night of on 2<sup>nd</sup> day of April 2013 the deceased went to the home of his estranged lover, Zalika, to collect his personal effect after they had fallen out. Instead, Zalika raised an alarm referring to the deceased as a thief, accusing him as well of having spread powdered pepper through her ventilator to her discomfort. A mob soon descended on the deceased, assaulting him severely as a result of which  
20 he died a few hours later from the injuries he sustained. The two accused, both of whom lived in the neighbourhood of Zalika, were arrested as some of the persons identified to have participated in assaulting the deceased. Both accused denied any participation. A1 set up an alibi saying he had not spent that night at home only to be surprised by an arrest the following morning while A2 said he was only an onlooker.

25 Since both 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  
30 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 5 *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.
- 10 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 15 that they knew the deceased and attended the burial or saw the dead body. The prosecution adduced the post mortem report 2<sup>nd</sup> April 2013 prepared by P.W.1 Dr. Ambayo Richard of Arua Regional Referral Hospital, which was admitted during the preliminary hearing and marked as exhibit P.Ex.1. The body was identified to him by a one Ajobe Yusuf Musa as that of Saidi Musa Oryem. P.W.2 Saidi Kapere, the L,C1 Chairman testified that he too saw the body. P.W.3 Rasul 20 Musa Kombo, who lived in the neighbourhood of the place from where the deceased was assaulted testified too that he saw the body. P.W.4 No. 31186 D/Cpl Opio Neri, the investigating officer took the body to hospital and arranged for its post mortem examination. In their respective defences both accused did not refute this element. Defence Counsel did not contest this element as well in his final submissions. Having considered the evidence as a whole, and in 25 agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Oryem Saidi Musa died on 2<sup>nd</sup> day of April 2013.

The prosecution had to prove further that the deaths of Oryem Saidi Musa was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to 30 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 “head injury resulting from blunt head trauma. Manner of death - unnatural.”

Exhibit P.Ex.1 dated 2<sup>nd</sup> April 2013 contains the details of his other findings which include a “oozing blood from nostrils and mouth. Hematoma, front right side of head. 3-lacerations front and mid roof of head sizes, smallest - 2 x 0.5 cms on scalp largest 3 x 0.5 cms. Bruised scalp over mid parietal comminuted fracture right parietal bone with brain matter protruding through the defect. Fractured skull size - 13 x 14 cms other fracture line running through left orbital (length - 7 cms) and through frontal bone, length - 6 cm fractured right parietal lobe of brain, diffused brain haemorrhage.” At the scene, P.W.2 saw the deceased bleeding through the ears and nose and the face was covered in a lot of blood. He directed PW3 to remove the shirt of the deceased and tie it around the head to stop the bleeding. PW3 testified that when he went to the scene, he found the deceased had been stabbed and was lying on the ground. He was asked by PW2 to tie the head with a shirt to stop the bleeding. When taking the body of the deceased to the mortuary for a post mortem, PW4 saw a wound on the head. Both accused did not offer evidence on 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.

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*).

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 or seen by any of the witnesses who testified. They were only able to see the nature of the injuries sustained by the deceased which included swelling of the front right side of head, lacerations on the front and top of the head and scalp, bruises on the scalp and fracture of the skull with brain matter protruding. 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*). On basis of the nature of injuries sustained by the deceased and in accordance with section 286 (3) of *The Penal Code Act* which defines deadly weapons as including instruments adapted to stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death, I find that the weapons used in assaulting the deceased were deadly weapons..

The court also considers the manner in which such weapons were used. In this case they were used to inflict multiple fatal injuries on the head of the deceased, including fracture of the skull. The court further considers the part of the body of the victim that was targeted. In this case it was mainly the head, which is a vulnerable part of the body. The ferocity with which the weapon was used can be determined from the impact. In the instant case there was a head injury resulting from blunt head trauma causing a comminuted fracture of the right parietal bone with brain matter protruding through the defect. 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 weapons, on a vulnerable parts of the body (the head), inflicting severe injury by way of a fracture of the right parietal bone with brain matter protruding through the defect, leading to internal bleeding and death . The prosecution has consequently proved beyond reasonable doubt that Oryem Saidi Musa'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. A1 set up an alibi. He stated that he spent the fateful night at central Nile offloading clothes from trucks going to Kubala. At 8.00 am the following day, he took food to his family and when he arrived home, he found a mob that began to beat him, arrested him and took him to the police. He called his wife, Candiru Ramula, as a witness and she testified as D.W.4. She stated that she spent that night with her husband, A1 at home and when they heard commotion at night coming from Zalika's home, they both went out and saw what was going on and shortly thereafter returned to

their house together. None of them participated in assaulting the deceased but were mere onlookers as they found the deceased already severely assaulted, bleeding profusely and weak.

On his part, A2 said that he was a mere onlooker at the scene. She went to the scene with her  
5 mother, D.W.3 Susan Candiru alias Odroru and when they found people assaulting the deceased, he asked them why they were beating the deceased. People were beating the deceased badly. They said the deceased had just been spraying red pepper on people and that is why he was being beaten. They kept saying that the deceased was a thief. Since he was a young he became frightened, he left the place and went back home. On her part, the mother of A2 stated that at the  
10 scene, they found many people and some were carrying sticks. No one was beating the deceased at that time since they found him already beaten. A2 then tied him up the deceased with a rope thrown by someone from inside the house. Having recognised the deceased as neighbour, she told her son to return home. They both shortly returned home leaving the deceased still alive.

15 To rebut those two defences, the prosecution relies on the identification evidence of P.W.3 Rasul Musa Kombo, a neighbour and P.W.2 Saidi Kapere, the L.C.1 Chairman, both of whom testified that they saw A1 walk away from the scene and A2 tie the legs of the deceased with a rope. D.W.3 the mother of A2 testified that she saw his son A2 tie the legs of the deceased. P.W.3 Rasul Musa Kombo testified that he saw A1 pick a basin from the house of Zalika, place a blood  
20 stained shirt under his armpit and go to bathe. P.W.2 Saidi Kapere said he arrived at the scene as A1 was returning to his house.

The evidence against A1 is essentially circumstantial. He has presented a contradictory defence in that his alibi has been destroyed by the testimony of P.W.2 Saidi Kapere, P.W.3 Rasul Musa  
25 Kombo and his wife, D.W.4 Candiru Ramula all of whom testified that he was present at the scene. He was seen leaving the scene and his conduct in holding what appeared to P.W.3 to be a blood stained shirt and thereafter taking a bath was highly suspicious conduct. However, no one saw him assault the deceased and the alleged blood-stained shirt was never recovered. In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon  
30 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 5 647; *Simon Musoke v. R* [1958] EA 715; *Teper v. R* [1952] AC 480 and *Onyango v. Uganda* [1967] EA 328 at page 331).

Having duly cautioned myself, I find that the evidence against A1 casts a lot of suspicion against him but does not create moral certainty that he participated in the assault. Consequently, the 10 prosecution has failed to prove the case against him beyond reasonable doubt and I hereby find him not guilty. He is consequently 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.

As regards A2, his defence of being a mere onlooker at the scene is disproved by the testimony 15 of P.W.2 Saidi Kapere, P.W.3 Rasul Musa Kombo and his own mother, D.W.3 Susan Candiru alias Odroru. The three witnesses saw him tie the legs of the deceased with a rope. Section 19 (1) (b) and (c) of the *Penal Code Act*, lists persons who are deemed to have taken part in committing an offence and to be guilty of the offence and who may as a consequence be charged with actually committing it. This includes every person who does or omits to do any act for the 20 purpose of enabling or aiding another person to commit the offence and every person who aids or abets another person in committing the offence

Under section 19 of *The Penal Code Act*, there are different modes of participation in crime; direct perpetrators, joint perpetrators under a common concerted plan, accessories before the 25 offence, etc. Each of the modes of participation may, independently, give rise to criminal responsibility. Individual criminal responsibility can be incurred where there is either aiding or abetting, but not necessarily both. Either aiding or abetting alone is sufficient to render the perpetrator criminally responsible. "Aiding" and "abetting" are not synonymous though they are so often used conjunctively and treated as a single broad legal concept. They are distinct legal 30 concepts. Abetting implies facilitating, encouraging, instigating or advising the commission of a crime. It involves facilitating (making it easier, smoother or possible) the commission of an act

by being sympathetic thereto. Aiding means assisting (usually giving material support) or helping another to commit a crime.

Aiding and abetting refers to any act of assistance or support in the commission of the crime.

5 Such mode of participation may take the form of tangible assistance, or verbal statements. It includes all acts of assistance or encouragement that substantially contribute to, or have a substantial effect on, the completion of the crime. The *actus reus* for aiding and abetting is that the accused carries out acts specifically directed to assist, encourage or lend moral support i.e. give practical assistance, encouragement, or moral support which has a substantial effect on the  
10 perpetration of the crime. It must be proved that the alleged aider and abettor committed acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime.

It implies in general that, at the moment he acted, the accused knew of the assistance he was  
15 providing in the commission of the principal offence. In other words, the accused must have acted knowingly. “Knowingly” in the context of murder means knowledge of the principal offender’s murderous intent. He or she must have carried out the act with the knowledge that it would assist in the killing of the deceased. The prosecution must prove that he had or she knowledge that acts he or she performed, would assist in the commission of the crime by the  
20 principal or that the perpetration of the crime would be the possible and foreseeable result of his conduct. The accomplice must have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.

A distinction is to be made between aiding and abetting and participation in pursuance of a  
25 common purpose or design to commit a crime. In crimes requiring specific intent like murder, it is not necessary to prove that the aider and abettor shared the *mens rea* of the principal, but that he or she must have known of the principal perpetrator’s specific intent. With respect to aiding and abetting murder, the only mental element required is proof that the accused knew of the murderous intent of the actual perpetrator, but he or she need not share this specific intent. If A2  
30 was only aware of the criminal intent of the mob and he gave it substantial assistance or encouragement in the commission of the crime then he was only an aider and abettor but if he

shared the intent of the mob, then he is criminally responsible both as a co-perpetrator and as an aider and abettor. In adducing evidence that A2 tied the legs of the deceased with a rope, the Prosecution has demonstrated that A2 carried out an act of substantial practical assistance to the principal offenders, culminating in the latter's actual commission of the crime. The assistance had a substantial effect on the commission of the offence. It has been shown that his participation substantially contributed to, or had a substantial effect on the consummation of the crime. By virtue of section 19 (1) (b) and (c) of the *Penal Code Act*, he is deemed to have taken part in committing an offence and to be guilty of the offence.

In the final result, I find that the prosecution has proved all the ingredients of the offence as against A2. He is therefore found guilty and consequently convicted of the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Arua this 3<sup>rd</sup> day of August, 2017.

.....  
Stephen Mubiru  
Judge.  
3<sup>rd</sup> August 2017

4<sup>th</sup> August 2017

10.22 am

Attendance

Ms. Mary Ayaru, Court Clerk.

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

Mr. Onencna Ronald holding brief for Mr. Owiny Gerald, 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 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 State attorney prayed for a deterrent sentence on the following grounds; murder is a serious offence. The maximum punishment is death. The manner in which the offence was committed was brutal. The deceased suffered a very painful death. He suffered many injuries. Life is sacred and must be respected by



all. Even if the deceased was alleged to be a thief, he should not have been killed. A deterrent sentence will enable the convict re-think and reform and it will also send the right signal to society not to take the law into their hands for whatever reasons.

5 Counsel for the convict prayed for a lenient custodial sentence the following grounds; he is s first offender. He is youthful at the age of 21 years old, capable of reforming. He has spent three years and three months on remand. Although murder is a serious offence, Para 21 (b) of the sentencing guidelines requires court to take into account that he was just an abetter. He is a remorseful young man. He was in school in Arua Prison Primary school. His future should not be  
10 completely ruined. In his *allocutus*, the convict prayed for lenience on grounds that he was in school, Arua Prison Primary school in P.6 at the time he was arrested. His age was written as eighteen years. He was beaten by the police. He does not know what happened to him that day. He has pain in his head, hernia, and is carrying a cross. He does not have a child yet and is carrying a cross. He wants to continue going to school. He did not want to get involved but it is  
15 someone who told him get involved. He was told to tie the legs because he was a thief.

The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of the worst cases of Murder. In light of the fact that the convict incurred only accessory liability, I have for that reason discounted the death sentence.

20 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 nevertheless considered the aggravating factors in this case being; the degree of injury  
25 inflicted on the victim since upon examination he was found to have deep cuts on the head. Accordingly, in light of those aggravating factors, I have adopted a starting point of ten years' imprisonment. I have considered the fact that the convict is a first offender, a young man at the time at the age of 18 years who played only an accessory role in the murder. I for that reason consider the period of four (4) years' imprisonment to be an appropriate reformatory sentence in  
30 light of the mitigating factors.

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, I observe that the convict was charged on 9<sup>th</sup> April 5 2013 and has been in custody since then. Having taken into account and set off that period, I therefore sentence him to “time served” and he should be set free upon the rising of this court unless he is being held for other lawful reason.

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

10 Dated at Arua this 4<sup>th</sup> day of August, 2017.

.....  
Stephen Mubiru  
Judge.  
4<sup>th</sup> August, 2017