

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KASESE
HCT – 01 – CR – CS – 0054 OF 2015

UGANDA.....PROSECUTOR

VERSUS

NGONGO MUSTAFFA alias MAWAZO }
WALINA HAMISI alias BAKAMWEGA }**ACCUSED**

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

The accused were indicted with seven Counts of murder Contrary to **Sections 188 and 189** of the Penal Code Act. It was alleged that the accused persons on 5th July 2014 and others still at large at Bigando Village, Kitwamba Sub-County, Kasese District murdered CPL Nabimanya Grace, Karungi Pofia, Tarindeka Joseline, Kwarikunda Rosette, Nabagye Enid, Akankunda Alice, and Bariho Monica.

The accused were also indicted with Count VIII, of Arson Contrary to **Section 327** of the penal Code Act. It was alleged that the accused persons with others still at large on 5th July 2014 at Bigando Village, Kitwamba Sub-County, Kasese District wilfully and unlawfully set fire upon the dwelling house of CPL Nabimanya Grace.

The accused persons denied committing all the eight counts.

The prosecution produced 6 witnesses in a bid of proving their case. The defence produced 2 witnesses; each of the accused produced one witness.

Murungi Philbert State Attorney appeared for the State and Counsel Edgar Tukahaabwa represented the accused on State Brief.

Summary of evidence:

PW3 Beinoburyo Colleb told Court that he saw the accused kill the deceased and it was at 2pm. The accused and about other 20 people came with knives and pangas. They found Nabimanya Grace sleeping and cut him. That after killing Nabimanya Grace they set the house on fire. PW3 was outside. That there after they went and attacked another house hold and also set it on fire. PW3 was then chased by the attackers and made an alarm as he run towards UWA quarters. That he reported to UWA Officials who came to the scene of crime and found dead bodies. That he also reported to Police who later came on the very day at

6:00pm. Some people were arrested that very day and A1 was arrested later. An identification parade was conducted and A1 was identified by PW3 who signed on the Identification Parade Report which was admitted as PE1.

PW4 Natukunda Richard also told Court that he saw the accused persons kill the deceased and this happened at 4:00pm. That he saw fire and came running to the scene of crime from his home which is about half a Kilometre away. Among the attackers he identified A1. He then called the Police and that a total of 5 houses were set on fire.

PW5 Muhido Mathias the Investigating Officer, told Court that when he reached at the scene of crime he found two of the now deceased persons, Monica and Kukunda severely cut lying in a maize plantation. That he also found houses on fire. During the investigations he found that the accused persons among others were part of the attackers.

PW6 Ronald Mpirirwe told Court that he also identified A1 among the attackers of the deceased.

Burden of proof:

In order to consider the culpability of the Accused persons, certain several principles of the law are considered. The Accused persons are presumed innocent until the contrary is proved. **(See: Article 28 (3) (a) of the Constitution of the Republic of Uganda 1995 as amended.)** Therefore, the Prosecution bears the burden to prove not only the fact that the offence was committed but that it was committed by the Accused persons or that the Accused persons participated in the commission of the alleged Offence. It is therefore relevant to place the Accused persons at the scene of crime.

Section 101 (2) of the Evidence Act provides that;

“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

It is further provided under **Section 103** of the Evidence Act that;

“The burden of proof as to any particular fact lies on that person who wishes the Court to believe its existence, unless it is provided by law that the proof of that fact lie on any particular person.”

Standard of proof:

Regarding the standard of proof, the Prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt. **(See: Woolmington versus DPP [1935] AC 462).** However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the Accused, it should be resolved in the favour of the Accused persons. Therefore, the Accused persons must not be convicted because they have put a weak defence but rather that Prosecution case strongly incriminates them and that there is no other reasonable hypothesis than the fact that the Accused persons committed the alleged crime.

The standard of proof is beyond reasonable doubt as discussed in the case of **Miller versus Minister of Pensions (1947) 2 All ER 372 at 373**; wherein **Lord Denning** stated as follows;

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice”.

Similarly, in **Uganda versus Dick Ojok (1992-93) HCB 54**: it was held that in all criminal cases, the duty of proving the guilt of the Accused always lies on the Prosecution and that duty does not shift to the Accused except in a few statutory cases and the standard by which the Prosecution must prove the guilt of the Accused is beyond reasonable doubt.

With respect to the nature of evidence required, the Accused persons can only be convicted on the basis of evidence adduced before Court, such evidence must be credible and not tainted by any lies or hearsay, and otherwise it will be rejected by the Court for being false.

Prosecution must prove all the ingredients of the Offence of Murder in order to sustain a conviction thereof. In the case of **Uganda versus Bosco Okello [1992-93] HCB 68 , Uganda versus Muzamiru Bakubye & Anor High Court Criminal Session No.399/2010**, where it was held that Prosecution must prove the following ingredients beyond reasonable doubt:-

1. That the deceased is dead;
2. That the death was caused unlawfully;
3. That there was malice aforethought;
4. That the Accused person directly or indirectly participated in the commission of the alleged Offence.

That the deceased is dead:

The prosecution witnesses told Court that the deceased persons died due to burns caused by the fire that was set on their houses and the others due to severe cuts. The prosecution also produced medical evidence to prove that there was death. This ingredient was therefore proved sufficiently.

That the death was caused unlawfully;

In the instant case the deceased persons died due to burns caused by fire that was set on their houses and the others were cut by pangas. There is no doubt that the death of the deceased persons was unlawful.

That there was malice aforethought;

Malice aforethought is defined under **Section 191** of the Penal Code Act to mean;

“An intention to cause death of any person, whether such person is the one actually killed or not.

Knowledge that the act or omission causing death will probably cause death of a person, whether that person is the one killed or not, though such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may be caused.”

Malice aforethought is therefore a mental element of the offence of murder which in many cases is difficult to prove by direct evidence. However, it can be inferred from the surrounding circumstances of the offence as was held in **R versus Tubere (1945) 12 E.A.C.A 63, Akol Patrick & Others versus Uganda (2006) H.C.B (Vol.1)6 and Uganda versus Aggrey Kiyinji & Others Kampala High Court Criminal Session Case No.30 of 2006;**

The circumstances are:-

1. The weapon used, whether lethal or not.
2. The part of the body targeted (whether vulnerable or not);
3. The manner in which the weapon was used (whether repeatedly or not); and
4. The conduct of the assailant before, during and after the attack.

In summary, in arriving at a conclusion as to whether malice aforethought has been established, the court must consider the weapon used, the manner in which it was used and the part of the body injured.

In the instant case there was use of pangas and arson. The deceased persons died due to burns and also severe cuts that were inflicted on their bodies. The manner in which the offences were committed was gruesome and very cruel. In the circumstances there was malice aforethought during the commission of the 8 counts.

That the Accused person directly or indirectly participated in the commission of the alleged Offence:

PW3 identified A1 at the scene of crime and also at Police after arrest during an identification parade. PW3 told Court that A1 had a panga during the commission of the offences.

A2 was identified by PW4 who saw him among the attackers during the commission of the offences. He also identified A1. PW4's evidence was corroborated by PW5 who told Court that he was called by PW4 who told him about the incident and among the attackers mentioned were A1 and A2.

The offence was committed during the day which means that there was enough light to identify the accused persons. PW3, PW4 and PW6 were all in close proximity to the scene of crime and the accused persons were known to them for some time.

PW5 told Court that after the incident A2 went into hiding for 7 months and was arrested in February 2015. The circumstances of his arrest also speak volumes since he wanted to cut with a panga the Arresting officer alleging that he thought that he was being attacked by

thugs. Generally the conduct of A2 was not one of an innocent person. (See: **Uganda versus Sam Onen (1991) HCB P.7**)

PW3's evidence had minor inconsistencies that did not touch the root of the case.

Both accused persons denied all the 8 counts and raised the defence of alibi. However, the prosecution through its witnesses managed to sufficiently place the accused persons at the scene of crime because the offences were committed during the day thus, there was sufficient lighting, the accused were known to the witness for some time and there was close proximity.

I disagree with both assessors and I find the accused persons guilty of all the 8 counts and are hereby each convicted as indicted.

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OYUKO. ANTHONY OJOK
JUDGE
03/04/2017

State: Murungi Philbert State Attorney:

No past record of the convict, however Count I – 7 carry a maximum sentence of death. This offence is rampant in this jurisdiction. I pray for a long custodial sentence to be given to the convicts. Count 8 is also rampant in this jurisdiction and I pray for an appropriate sentence.

Allocutus:

Edgar T: convicts are first offenders, A1 is 30 years old, with a family of 5 children and a wife, he suffers from ulcers and he has been on remand for 2 years and 7 months. A2 is 33 years with a family of 5 children and a wife and suffers from complications. Has been on remand for 2 years and 1 month. The crime was committed by a group of people of about 20 and the convicts should not carry the burden of other people.

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OYUKO. ANTHONY OJOK
JUDGE
03/04/2017

Court: The Convicts are first offenders and have been on remand for some time. They are family people and this was a group of about 20 people. On Counts I – VII, I sentence each of the convicts to 40 years imprisonment and on Count VIII I sentence each of the convicts to 5 years imprisonment. The sentences will run concurrently.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE
03/04/2017