

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**

**HCT-04-CR- SC -169 OF 2016**

**UGANDA:.....PROSECUTOR  
VERSUS**

**A2 BUKONE ROBERT EZRA**

**A.3 WAKULU YEKO**

**A.4 KAPIO BUMALI AKA NDEIRE**

**A.5 KALIBOLI PETER**

**A.6 SABaidu AMOS ALIAS KAGINO**

**A.7 WAKULU WILSON AKAS MWOMBEKERI HENRY**

**A.8 KAMALIKOL THOMAS**

**A.9 KIRYA KANAN**

**A.10 NDOBOLI EMMANUEL**

**A.11 WAKULU YOSAM**

**A.12 MBULAMWANA ROBERT ..... ACCUSED**

**BEFORE: HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

Accused were all indicted for murder contrary to section 188 and 189 of the Penal Code Act.

Particulars are that accused and others at large on the 8<sup>th</sup> of December 2015 at Dodoi village in Kibuku district murdered **No. 33439 CPL Mangusho Ismael**.

All accused denied the charge.

The burden to prove this charge lies on the prosecution , and it must be beyond all reasonable doubt . To prove this charge, the prosecution must prove that:

1. There was death.
2. The death was unlawful.
3. There was malice afore thought.
4. The accused participated in the causing death.

**1. Death**

The evidence on record, through PE1(postmortem report), **PW1 ASP Oyee, PW2- Dongo Peter , PW3 Obumba, PW.4 Dyogo**-all confirmed that death occurred of **CPL Mangusho Ismael**.

The ingredient was therefore proved.

## **2. Death was unlawful**

There is a presumption that homicide is unlawful unless excused by law, but the presumption can be rebutted by evidence of accident or that it was permitted in the circumstances. The burden to rebut the presumption is on the accused.

(Per *Uganda V Okello (1992-93) HCB 68*).

In this case no such rebuttal was done. The homicide was therefore unlawful.

## **3. Malice aforethought**

To prove murder, it must be shown by prosecution that the deceased is dead, his death was unlawful caused. It was caused by the accused and was with malice aforethought.

Malice afore thought is a mental element, which can as well be proved from surrounding circumstances e.g the weapon used, the part of the body aimed at, the nature of the injuries. It has been held that the use of a gun shows malice forethought. All the above were summed up in *Uganda V John Ochieng (1992-1993) HCB 80*, that

*“Malice aforethought may be summarized as the intentional killing of a human being or knowledge that one’s act or omission will probably result in the death of a human being.”*

To establish the existence of malice aforethought court takes into account the following;

- a) The number of injuries inflicted.
- b) The part of the body where the injury was inflicted.
- c) Nature of the weapon used.
- d) The conduct of the killer before and after the attack .

Going by the above guidance from the law, was there malice aforethought?

The postmortem report shows that the assailants used a gunshot which wounds killed the deceased. The victim was also hit with a blunt object “repeatedly “on the left ambit, sharp objects used to cause injuries on the left leg”

Evidence from PW1, PW2, PW3, PW4 and PW5 shows that the deceased, a police officer, was disarmed by the assailants after falling down. There were gunshots aimed at PW1, when they failed to shoot him, they turned on the deceased and assaulted him as described to his death.

The above evidence is enough to prove that the assailants had the intention to kill.

Malice aforethought was therefore proved.

#### **4. Participation**

The evidence on record from the prosecution is based on the doctrine of common intention.

From the evidence of the prosecution it is proposed that all accused jointly with others at large participated in the killing of the deceased.

The defence case is that they did not participate as each of the accused separately put up a defence of alibi.

From the evidence therefore this court has to answer the following questions arising;

- a) Did the accused persons have a common intention to cause the death of the deceased?
- b) Were accused at the scene of crime at the time of death of the deceased?
- c) Did the prosecution destroy the defence of alibi?

I will first answer the question if all accused were at the scene of crime at the time the murder occurred.

From the evidence on record PW1 testified that he left Kadama police post alongside the deceased to go and visit a crime scene reported at Dodoi. They reached the scene and arrested **John Nangido**, however a group of armed people confronted them with pangas and clubs.

They demanded for the release of **Nangido**. In the chaos that ensued the deceased attempted to run, he fell down where upon they began assaulting him and cutting him.

A1- picked the gun and shot him through the eye, killing him instantly.

At the scene, he was able to identify **Kirya Kanan, Ndoboli Emmanuel** and **Kamalikoli Thomas**. He also was able to confirm their identity during an identification parade. The results of the identification parade were agreed on as agreed issues and the reports dully received in evidence as PE2.

PW2- testified that he was at the scene weeding rice. Accused persons emerged on the scene and assaulted him and his brother Opio. He ran to police and sought assistance of PW1 and the deceased. At the scene only **Nangido** was still there so PW1 and the deceased arrested and handcuffed him, trying to lead him away to police for interrogations.

Suddenly accused persons surfaced from their hideouts and they were armed with pangas and began assaulting the deceased. He named those he saw as **Sabaidu, Bukone, Kirya, Wakulu, Kalibani, Kanani, Kapio, and Mzee Yeko, Kamalikul, Robert** and **Isebeudihu**.

**PW3- Obumba Balam** stated that he was with PW1, PW2 and deceased after arresting John at the scene.

A mob of over 40 people came armed with sticks, some with pangas.

He identified **Ndoboli, Wakulu, Saturday, Peter Kaligoli, Mumbekeri, Yeku Wakulu, Mbulamwana, Sabaidu** and **Koire**. That Efuloni was saying “we go the guns have no bullets” **David** kicked **Mangusho** and fell down. **PW1 (Oyee)** turned to shoot but the gun jammed. The mob kept advancing so he ran away. A1 grabbed the deceased’s gun and shot him once.

The others also assaulted the deceased. These were, **Saturday, Yeko, Wakulu, Kapio, Kaliboli, Wilson Wakulu, Kamalikoli, Kirya Kanan, Ndoboli** and **Wakulu**.

**PW4- Dyogo David** rode to the scene on a bicycle, on the way back at 2:00pm, they met **Bukone Robert** (A2) trying to run away and people arrested him. He had run from Dodoi (scene of crime).

**PW5 Talya Paul** said he made a follow up of his complaint at Kibuku police regarding a land dispute where deceased was later killed. He met there with the suspects

In his complaint file, who were **Kapio, Bumali, Peter Kaliboli** and others but they were very unstable and appeared panicky. They kept communicating on phone. When their bond was

extended they rode away fast. Shortly after, information reached the station that the police officer had been killed.

**PW6: Kaigo Fred**, was at police and extended bond for **Kapio Bumali** and others at around 9:00am. They left and he learnt of the death at 12:00noon that same day, and visited the scene which ended up to be the same land for which he had extended bond of the suspects earlier mentioned.

In defence DW1 stated that on that day he was at his home weeding. Later he was arrested.

DW2- said he was not there because between 9:00am – 11:00am he was at police then went to the garage.

DW3 said he was in Mbale at the time.

DW4- said he was in hospital at Mbale. He was there for 2 days.

DW5- **Wakulu** said he was in Kamonkoli on that day

DW6: Said he was in Kibuku from 8:30am to 10:30am. That they left police at 10:30am and went to the garage to repair a motorcycle. In the evening he went to Kadama.

DW7- said he was at Buparama going home from school. He reached at 11:30am, then left to look after cattle. He was arrested at night from his home at 3:00am. DW8- said he was in Kagweri Kasekye village

DW9: said he was in Bakatikoko making bricks from 7:00am to 1:00pm.

DW10- said he was in Kagumu Sub-County.

D11- was in Mbale Naboa road from 8:00am to 3:00pm. He left Mbale and reached home at 10:00am.

D12- said he was looking after cattle. Was with **Mudanya, Langido and Mumberege** (only four people) and admitted his involvement.

He claimed that **Nangido** had been arrested with other people, so when they chased them, witnesses and others fought them to help themselves. He claimed he accidentally shot the deceased. But all other accused were not there at the scene.

The law is that once an accused sets up the defence of alibi he has no duty to disprove it. (See: *Festo Androa Asenua and Kakooza V Uganda CR. App.1 of 1998*)

The case espouses the principle that:

*“The Burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render impossible as to have committed the imputed act”*

From the evidence of the prosecution the crime happened at around 11:40am. Witnesses PW1, PW2, PW3, PW4 and PW5 all were at the scene at that time and were all eye witnesses who saw what happened. From the evidence these witnesses identified the accused persons as follows;

PW2, PW3, PW4- identified A2 (**Bukone**)

PW1, PW2, PW3- identified A3 (**Wakulu**)

PW2 and PW3-identified A4(**Kapio**)

PW1, PW2, PW5- Identified A5 (**Kaliboli**)

PW2 and PW3-Identified A6 (**Sabaidu**)

PW2 and PW3- Identified A7 (**Wakulu W**)

PW2 and PW3-identified A8 (**Kamalikoli**)

PW1 and PW2-Identified A9(**Kirya Kanan**)

PW1 and PW3- Identified A10 (**Ndoboli**)

PW2 and PW3- Identified A11 (**Wakulu Yosam**)

PW2 and PW3- Identified A12 (**Mbulamwana**)

These witnesses were not guessing but were part of the whole transaction as it unfolded, starting with the earlier incident of the Kidnap of **Opio** by the accused’s relatives whom PW5 and PW6 testified were reporting to police on the land case.

The defence alibi does not exclude the possibility that each of these people met at 11:00-11:40am at the scene of crime before proceeding to do their life style jobs and businesses of the day as explained in their respective defence.

The evidence of D12 was destroyed in cross-examination where he had earlier stated that they were only 4 of them at the scene, but later conceded to say “**Nangido** had been arrested with other people. So when they chased us we fought them to help ourselves.” His statement sharply contradicts his statement to court in admission of the charge which is part of this same case, and court takes judicial notice of. He therefore could not be relied on as offering corroboration for the accused’s alibi.

The evidence of identification has been checked to avoid any possibility of mistaken identity following the guidance laid down in the case of *Bogere Moses v. U. Cr. App. 1/97*, followed in *Abdala Nabulere & Ors v. Ug. Cr. App. 9 (1978) HCB 77*.

I examined the conditions for identification, and found that there was enough light at the scene-being day. I also noted that these were close relatives or village mates to PW2, PW3, PW4 and PW5, so they knew each other very well. I took note of the fact that the officer PW1 had been in contact with these people following up an earlier complaint between them as per testimony of PW5 and PW6. These were people he knew before.

There is evidence of PE2 which was admitted evidence, and hence an agreed fact by defence that those contents were true. If PW1 identified the accused from the parade as having been at the scene, then there is no way the defence can opt out of their own admitted facts. There was therefore no mistaken identity. The defence of alibi was effectively destroyed by the prosecution. I find that the accused were all placed at the scene of crime.

The next question is whether being at the scene of crime all the accused had a common intention to commit the crime of murder.

In his evidence to court PW2 stated as follows “When they came they asked where we got permission to dig. It is **Wakulu** who asked. We told them the land was ours. Our father defeated your father in court. They told us that we are going to kill somebody here”. The Chairman and **Isebaidhu** came and got one of us called **Opio Isa**. We made an alarm and people answered... I went to police at Kadama and reported”

It is clear that the transaction of murder began from the factors enumerated above and continued till police came resulting into the incident of death. The people were all acting in unison.

Under section 20 of the Penal Code Act;

*“ When two or more persons form a common intention to prosecute an unlawful purpose with one another and in the process an offence is committed of such a nature that it was a probable consequence of the common purpose each of the perpetrators will be deemed to have committed the offence.”*

In *Uganda V Ponsiano Wambuga and 2 others [1977] HCB 59*,

*“Where three accused are jointly tried for murder as in the instant case it is necessary for the prosecution to prove beyond reasonable doubt that they had formed a common intent to kill the deceased.”*

From our case evidence of PW1,PW2,PW3 and PW4- effectively shows there was common intent and preparation as seen from the act of gathering together, being armed with clubs and pangas , pursuing the police who were armed, allowing A1 to assault and disarm the deceased, who later fell down. Trying to pursue PW1, and then turning on the deceased whom A1 shot in the eye while each accused took turns to assault the lower legs. (See evidence of PW1, PW2, PW3 and PW4 and EX 1).

According to *Uganda Vs. Sebagonda and Son of Miruho( 1977) HCB 7*, it was held that where there is a common intention it is immaterial who inflicts the fatal injury to the deceased as long as when the injury is inflicted the parties are carrying out a common purpose and in such a case one is responsible for the acts of the other.

In this case it is clear that all accused were determined to execute their unlawful purpose.

The evidence of D12 is to the effect that he grabbed the gun in presence of others. It is clear that all others did not restrain him but looked on. D12 in cross-examination said *“we fought them to help ourselves.”*

This evidence when compared with evidence of PW3, who said:



*“David S/o Koire and Efulaimu were leading telling their friends the “we go the guns have no bullets...” Each took a different side. David reached Mangusho and knocked him he fell down. Oyee tried to shoot seeing people advancing ... he shot twice the gun jammed. He saw the mob advancing – he ran away Odeya grabbed Mangusho’s gun and shot him once.... I was close I saw.. others then began hitting him... they were hitting legs...”*

The evidence is corroborated by PW1 & PW2. It is also consistent with PE1 which shows cut wounds on the leg in addition to the bullet wound.

The question which arises is why were the accused advancing at the policemen who were armed?

The statement “there are no bullets” points at a mind already prepared for battle. The intention was to carry out the threat earlier on announced as per PW4’s testimony “that today we shall kill somebody”

It has been held in *Uganda V Kassim Obura and Another [1981] HCB 9*, that

*“ If the evidence supports the inference that violence of any degree has been used in prosecuting a common design incidentally resulting in death, and if the offence charged was a probable consequence of the use of that violence , then all sharing in the design are murderers.”*

In the instant case the appellants had complied in substance with the common design varying only in the manner of execution namely the collateral clubbing of the deceased and therefore they were held to be murderers.

That case informs the case before me where I find similarly that all accused having participated in hitting of the deceased by their sticks and pangas were in the same mind with A1- the intention to kill the deceased.

I have found enough evidence of common intention in the evidence led by prosecution and do not agree with defence arguments that accused were not at the scene of crime, yet he conceded to the contents of PE2. I do not find any contradictions in the contents of PE1 (postmortem) and PW1, PW2 and PW3’s evidence regarding the assaults on the deceased. As already shown they

all maintained that accused was hit on the legs. The Doctor found that the deceased was hit with several blunt objects on the leg. I therefore in conclusion find that all accused were in the common intention to commit the murder.

The findings above effectively answered the last question posed by this court whether the accused's alibi was destroyed by the prosecution. I find that it was destroyed.

I therefore find that the prosecution has led sufficient evidence to show that each of the accused persons was in common intention with A1 in committing the offence of murder.

It was found in the Kenyan case of *R V Chebiegon Arapcheron and Kepdit Arap Muyaken 15 KR1 100*, that:

*“where three persons set out armed with lethal weapons with the common intention of stealing goats, and one of them in order to fulfill their purpose kills the custodian of the goats all are liable to be convicted of murder.”*

In our case all accused left their homes armed with lethal weapons hoping to solve their land wrangle by forceful use of arms. Even when the citadel representative or custodian of the law (police) force them to comply they chose to fight back and in the process, the police officer was murdered. Similarly, all are liable to be convicted of murder.

The assessors were cautioned on the implications of the evidence before court. The need to carefully evaluate all evidence before taking a decision. They unanimously advised court to find all accused liable.

Therefore for all reasons above and basing on the principle of common intention as contained in section 20 of the Penal Code Act, I do hereby find that the prosecution has proved the charge against all accused persons. Each of them is convicted of murder contrary to section 188 & 189 of the Penal Code Act as charged. I so order.

**Henry I. Kawesa**

**JUDGE**  
**03.04.2017**