

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT NEBBI
CRIMINAL SESSIONS CASE No. 0153 OF 2015

UGANDA **PROSECUTOR**

5 **VERSUS**

1. **WANICAN JULIUS** }
2. **OPIDI OFOYURU** } **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 The two accused are jointly charged with one count of Murder c/s 188 and 189 of *The Penal Code Act*. It is alleged that the accused and others at large during the month of February, 2015 at Jupaluza village, Serr Parish, Abanga sub-county in Zombo District murdered one Kasamba Charles.

15 The prosecution case against then is that during the evening of 21st February, 2015 at around 9.00 pm, the deceased returned home from the market carrying two passengers on his borrowed motorcycle. It was dark and threatening to rain. He told his wife P.W.2 Muber Agnes that the two passengers had requested him to carry them to Padea village otherwise known as Obayo village. By aid of torchlight, she recognised one of the passengers as A1 Wanican and another
20 man she had not seen before who spoke Alur with a Congo accent, whose name she did not know. The deceased did not return home that day. The following morning a body of a man was found dumped a kilometre away in River Ledha river that separates Jangokoro from Abanga village. It was taken to Paidha Health Centre from where P.W.2 Muber Agnes later recognised it as that of her husband, Kasamba Charles. The body had signs of violence including stab wounds
25 and cuts indicating he had been murdered. During May, 2015 a Crime Preventer P.W.3 Obima James met A2 at the home of Ozunga, a witchdoctor's in Mengu village, and also overheard some women on the village say that rumours were circulating implicating the two accused in the murder and he relayed that information to Serr Police Post, resulting in the arrest of the two of them.

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At the close of the prosecution, Counsel for the two accused Mr. Pirwoth Michael submitted that no case to answer had been made out against any of the accused. The submission was sustained in respect of A2 Opidi Ofoyuru, he was acquitted and set free but was overruled in respect of A1 Wanican Julius, who was accordingly put to his defence. In his defence, A1 denied any participation in the commission of the offence. He stated that he spent the entire 15th February, 2015 with his wife in his garden in Owenjo. The following morning which was a Saturday, 16th February, 2015 he crossed the road at about 8.00 am to buy sugar. He saw the Chairman of the area L.C.1 Ocamker coming from the direction of Pakadha pushing his motorcycle. He asked him where he was coming from and he said he was coming from the police in Pakadha and that a body of someone had been found dumped in the water of Ledha stream, which is about five hundred to seven hundred metres from his home. He participated in retrieving the body from the water but did not recognise it. In April, 2015 the O/c of the police post alleged he had disappeared from his home whereas not. On 14th April, 2015 around 10.00 pm he was arrested from his home while having supper and implicated in the death of the deceased.

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The prosecution has the burden of proving the case against both accused beyond reasonable doubt. The burden does not shift to the accused persons and they can only be convicted on the strength of the prosecution case and not because of weaknesses in their defences, (See *Ssekitoleko v. Uganda [1967] EA 531*). By their plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which they are indicted and the prosecution has the onus to prove each of the ingredients of the offence beyond reasonable doubt. 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 are innocent, (see *Miller Vs Minister of Pensions [1947] 2 ALL ER 372*).

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For the accused to be convicted of Murder, 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

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4. That it was the accused who caused the unlawful death.

Death of a human being 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 of the deceased. In this case, the prosecution relied on the testimony of P.W.3 Obima James, who
5 discovered the body at the scene in Ledha River. They also presented a post mortem report dated 21st February, 2015 prepared by Dr. Odongo Joel a Senior Medical Clinical Officer of Jangokoro Health Centre III, which was admitted in evidence by consent and marked as exhibit P. Ex.3. He examined the body of Kasamba Charles. It is corroborated by the testimony of P.W.2 Muber Agne, the widow of the deceased, who saw the body at Paidha mortuary and attended the burial
10 at Andi village the following day. Defence Counsel did not contest this element. Having considered the available evidence as a whole in relation to this element and in agreement with the joint opinion of the assessors, I find that it has been proved beyond reasonable doubt that Kasamba Charles is dead.

15 The prosecution is required to prove that Kasamba Charles's death was caused by an unlawful act. 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. However, the prosecution must prove first that the death was a homicide before this presumption can be applied. This is done by adducing evidence which proves that it was not suicidal, accidental, in
20 execution of a lawful sentence of death or otherwise legally justified or excused.

In this regard, the prosecution relied on the evidence of Dr. Odongo Joel a Senior Medical Clinical Officer of Jangokoro Health Centre III who conducted the autopsy established the cause of death as "fractured cervical vertebrae and deep stabbed (3) wounds up to the right lung,
25 leading to internal bleeding (cardio respiratory failure) finally death." Exhibit P. Ex.3 dated 21st February, 2015 contains the details of his other findings which include a "possibly tortured, killed and dropped into a stream of water. The weapon used is possibly a sharp long knife." P.W.2 Muber Agnes, the widow of the deceased, too saw the body and testified that she saw a cut wound on the neck and a stab wound on the chest. Cut wounds on the left thigh and right side
30 ribs. P.W.3 Obima James too saw a stab wound on the chest.

In absence of direct evidence of the circumstances in which the deceased died, the prosecution theory of causation of the death in issue is based only on circumstantial evidence of the injuries. The court can only infer that this death was a homicide can be inferred after ruling out natural or accidental death. On a careful consideration of the facts and circumstances of the case I find that
5 Kasamba Charles’s death was not a natural or suicidal death. I find that his death was a homicide and there is no justification or excuse for its occurrence that has been advanced. In agreement with the joint opinion of the assessors I find that it has been proved beyond reasonable doubt that Kasamba Charles was unlawfully caused.

10 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 the deceased died as a result of assault and whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. Malice aforethought is a mental element that is difficult to
15 prove by direct evidence. Courts usually consider the weapon used, the manner in which it was used and the part of the body of the victim that was targeted. The ferocity with which it was used can be determined from its impact on the body.

In absence of direct evidence of intention, the prosecution relies only on circumstantial evidence
20 of the weapon suspected to have been used (in this case no weapon was recovered but a knife is suspected) and the manner it was applied (multiple fatal injuries inflicted) and the part of the body of the victim that was targeted (the chest and neck). The ferocity with which the weapon was used can be determined from the impact (fractured cervical vertebrae and three deep stab wounds up to the right lung). Dr. Odongo Joel a Senior Medical Clinical Officer of Jangokoro
25 Health Centre III who conducted the autopsy established the cause of death as “fractured cervical vertebrae and deep stabbed (3) wounds up to the right lung, leading to internal bleeding (cardio respiratory failure) finally death.” Defence Counsel did not contest this element. The deceased left his home the previous evening in perfect health. His body is recovered the following morning with such signs of violence and his motorcycle is missing. In agreement with the joint
30 opinion of the assessors I find that it has been proved beyond reasonable doubt and indeed that it

can safely be inferred on basis of that circumstantial evidence that Kasamba Charles's death was caused with malice aforethought.

5 Lastly, I have to consider whether the prosecution have proved beyond reasonable doubt that it is A2 that caused the unlawful death. There should be credible direct or circumstantial evidence placing HIM at the scene of the crime as an active participant in the commission of the offence. A2 was acquitted at the close of the prosecution case because the only evidence against him was circumstantial comprising the following strands; he used to be seen in the company of A2; he was seen at the home of a witchdoctor, a one of Ozunga, in Mengu village days following the death of the deceased; he had been implicated by rumours from some women on the village. This evidence could not sustain a conviction. He was accordingly acquitted and set free.

15 In his defence, A2 Wanican Julius denied any participation. He spent the entire 15th February, 2015 with his wife in his garden in Owenjo. The following morning which was a Saturday, 16th February, 2015 he crossed the road at about 8.00 am to buy sugar. He saw the Chairman of the area L.C.1 Ocamker coming from the direction of Pakadha pushing his motorcycle. He asked him where he was coming from and he said he was coming from the police in Pakada and that a body of someone had been found dumped in the water of Ledha stream, which is about five hundred to seven hundred metres from his home. He participated in retrieving the body from the water but did not recognise it. In April, 2015 the O/c of the police post alleged he had disappeared from his home whereas not. On 14th April, 2015 around 10.00 pm he was arrested from his home while having supper and implicated in the death of the deceased.

25 To disprove his defence, the prosecution relies entirely on identification evidence of P.W.2 who testified that she saw him as one of the passengers on her husband's motorcycle and on circumstantial evidence, woven together by the following strands; the accused was one of the last persons to be seen with the deceased; the body was recovered within 500 metres of his home. In circumstances of this nature, the court is required to first warn itself of the 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 witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the accused and the proximity of the witnesses to the accused at the time of observing the accused.

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P.W.2 as a single identifying witness used to see the accused only when he passed by her home. It is not clear how often this was, at what time of the day, or from what distance. She never had opportunity to interact with him. On the evening she claims to have recognised him, it was at around 9.00 pm, threatening to rain and dark. Although she stood near the motorcycle and had a torch, it was not flashed directly at the passengers on the motorcycle. Her evidence of identification is not of a quality that can be safely said to be free from the possibility of mistake or error. In any event, even if she did recognise A1 Wanican Julius, her evidence would only show that he was one of the last persons seen with the accused.

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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 accuseds' 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 *Simon Musoke v. R* [1958] EA 715, *Mwangi v. Republic* [1983] KLR 327, *R v. Kipkering Arap Koske and another* (16) EACA 135 and *Sharma Kooky and another v. Uganda* [2002] 2 EA 589 (SCU) 589 at 609).

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Circumstantial evidence must always be narrowly examined. In light of the fact that at its best or construed from the best possible light it is only capable of establishing that A1 was one of the last persons seen with the deceased before discovery of his body. Since the time and place of the deceased's death are unknown, there are just too many possibilities and imponderables. For example it has not been ruled out that he could have met his death on his way back after dropping off the passengers. The prosecution's circumstantial evidence is incapable of irresistibly pointing to their guilt of A1 Wanican Julius, either.

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For that reason, in agreement with the joint opinion of the assessors, I find that the prosecution has not proved beyond reasonable doubt that any of the accused caused Kasamba Charles's death. Consequently I find A1 Wanican Julius not guilty. He is accordingly acquitted of the offence of Murder c/s 188 and 189 of *The Penal Code Act*. He should be set free forthwith unless
5 he is being held for other lawful cause.

Dated at Nebbi this 10th day of May, 2018.

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Stephen Mubiru
Judge.
10th May, 2018

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