

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT NEBBI**  
**CRIMINAL SESSIONS CASE No. 0144 OF 2015**

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

5 **VERSUS**

**OCHIR BENSON** ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

10 The accused is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 18<sup>th</sup> day of January, 2015 at Patek Arumokeng village in Nebbi District murdered one Opio Jerry.

The prosecution case is that on the fateful night, the deceased was taken out of a disco hall back  
15 to the home of a one Gilbert, a cousin of the accused from where he was accused of having stolen Gilbert's shoes. The accused together with Gilbert participated in assaulting the deceased in a bid to cause him reveal the whereabouts of the missing shoes. In assaulting the deceased, the accused used a dry piece of wood repeatedly despite the pleas of P.W.2 Obed Odong Nekyon, a brother of the deceased, that he should stop. the accused thereafter dragged the weakened and  
20 injured deceased along the ground to a distant bridge where he was intercepted by another of the brother's of the deceased or managed to rescue the deceased. The deceased then chose to return alone to his home in Parombo for the night but was unable to make it. The following morning he was found lying at the point of death by the roadside where he had collapsed. He was rushed to Nebbi General Hospital but he died a few hours later. The case was reported to the police  
25 resulting in the arrest of the accused.

In his defence, the accused denied any participation. He stated that he was present but saw the deceased as he was questioned at the home of his uncle Olangi Geoffrey by his own brothers Nick and Monday as well as Gilbert, a cousin of the accused. The deceased disclosed that the  
30 suspected stolen items, shoes, beddings and mattresses were at Parombo. He was set free and

began his journey to Parombo. The accused went back home only to learn the following morning that the deceased was dead.

5 Since the 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 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 10 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 *Miller v. 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.
- 20 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 that they knew the deceased and attended the burial or saw the dead body. The prosecution 25 adduced the post mortem report dated 19<sup>th</sup> January, 2015 prepared by P.W.3 Mr. Oryema Stephen who at the time was a Medical Clinical Officer of Nebbi General Hospital, and it was marked as exhibit P. Ex.2. The body was identified to him by a one Dwong Paroth Monday as that of Opio Jerry. P.W.2 Obed Odong Nekyon, a brother of the deceased, who stated that his brother was pronounced dead on arrival at Nebbi hospital and he was buried on 19<sup>th</sup> January, 30 2015 at Patek Arumokeng village. Defence Counsel did not contest this element as well in his final submissions. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Opio Jerry died on 19<sup>th</sup> January, 2015.

The prosecution had to prove further that the deaths of Opio Jerry 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.3 Mr. Oryema Stephen who at the time was a Medical  
5 Clinical Officer of Nebbi General Hospital, conducted the autopsy and established the cause of death as “a ruptured spleen that caused severe haemorrhage both internally and externally.” Exhibit P. Ex.2 dated 19<sup>th</sup> January, 2015 contains the details of his other findings which include; “multiple wounds, contusions and lacerations due to sticks / beating. Swelling on the left hypochondrium (the upper part of the abdomen) indicating ruptured spleen.” P.W.2 who  
10 witnessed the circumstances in which those injuries were inflicted stated that it was by beating with bare hands and a piece of dry wood and dragging on the ground. This evidence as a whole proves that the injuries sustained by the deceased were as a result of a prolonged 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  
15 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  
20 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  
25 usually consider first; the nature of the weapon used. In this case the weapon seen by P.W.2 was never recovered. 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 description made by P.W.2 as a dry piece of  
30 wood about the size of a forearm and one meter long, 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 piece of wood used in assaulting the deceased was a deadly weapon.

5 The court also considers the manner in which such weapons were used. In this case it was used to inflict a fatal injury by way of a ruptured spleen leading to severe haemorrhage. The court further considers the part of the body of the victim that was targeted. In this case it was mainly the left hypochondrium (the upper part of the abdomen), which is a vulnerable part of the body. The ferocity with which the weapon was used can be determined from the impact. The accused  
10 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 a deadly weapon, on a vulnerable part of the body, inflicting severe injury leading to internal bleeding and death. The prosecution has consequently proved beyond reasonable doubt that Opio  
15 Jerry's death was caused with malice aforethought.

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. The accused denied any participation. He was present but only saw the deceased as he was questioned at the home of his  
20 uncle Olangi Geoffrey by his own brothers Nick and Monday as well as Gilbert, a cousin of the accused. The deceased disclosed that the suspected stolen items, shoes, beddings and mattresses were at Parombo. He was set free and began his journey to Parombo. The accused went back home only to learn the following morning that the deceased was dead.

25 To refute that defence, the prosecution relies on the identification evidence of P.W.2 Obed Odong Nekyon, who with the aid of bright moonlight and light from the house of Olangi Geoffrey, saw the accused beat the deceased. The accused in his defence placed himself at the scene but only denied participation. I have considered the factors unfavorable to correct identification and find that they are far outweighed by those in favour of correct identification.  
30 His defence of being a mere onlooker at the scene is disproved by the testimony of P.W.2 Obed Odong Nekyon. The witness saw him hit the deceased with a piece of wood.

In his charge and caution statement, he only admitted to having slapped the deceased. 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 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 offence, etc. Each of the modes of participation may, independently, give rise to criminal responsibility. If the accused 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. 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 against the accused. 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 Nebbi this 11<sup>th</sup> day of May, 2018.

.....  
Stephen Mubiru  
Judge.  
11<sup>th</sup> May, 2018.

16<sup>th</sup> May, 2018,

3.13 pm

Attendance

Mr. Cannyutuyo Michael, Court Clerk.

Mr. Muzige Amuza, Senior Resident State Attorney, for the Prosecution.

Mr. Ronald Onencan, Counsel for the accused person on state brief is present in court

The accused is present in court.

Both Assessors are present

## 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 Resident State attorney prayed for  
5 a deterrent sentence on the following grounds; although the convict is presumed to be a first offender, he used a dangerous weapon, i.e. a piece of wood that he used to torture the deceased. Its size and length made it dangerous. He aimed at a vulnerable part of the body, the spleen. The assault was continuous inflicting repeated injuries. The degrading nature of the assault by pulling the deceased along the ground. He was part of a group that assaulted the deceased. It was also a  
10 planned assault. The deceased was pulled out of a show and he was taken away to distance away from possible help. He proposed a sentence of life imprisonment.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender. It is s case of mob justice and the degree of his participation should be  
15 considered. He has spent three and a half years on remand. He was in primary seven at the time of the offence. He was 22 at the time of trial and this is capable of reform. He can be a good citizen of the country. In *Livingstone Kakooza v. Uganda, S. C App. No. 17 of 1993* it was held that a maximum should be exceptional to a first offender. A long custodial sentence is unwarranted. Reform is one of the purposes of sentencing. He is remorseful and thus he prayed  
20 for lenience. The years he has spent would be appropriate. He proposed fifteen years but not life imprisonment.

In his *allocutus*, the convict prayed for lenience on grounds that he is left with the mother only. His father died and left three children. He is the oldest among them. His immediate younger  
25 brother died and there is no one to look after the mother since the third one is disabled. By the time he was remanded his house had been burnt down and that scared his mother and he does not know where she is now. He suffers from Hepatitis "B" and is asthmatic. Due to that illness he has no proper help in prison. They are many in prison with no proper feeding and medication and sometimes he loses his strength all over a sudden. He collapsed in court. He was in school and  
30 now he has dropped out. He has forgiven the complainant. If he is kept in prison for many years his land will be taken.

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. This case does not fit that description and I have for that reason discounted the death sentence.

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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

10 I have considered the aggravating factors in this case being; the degree of injury 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 thirty years' imprisonment. I have considered the fact that the convict is a first offender, a young man at the time at the age of 21 years. I for that reason consider the period of twenty two (22) years' imprisonment to be an  
15 appropriate reformatory sentence in light of the rest 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,  
20 after all factors have been taken into account, I observe that the convict was charged on 15<sup>th</sup> May, 2015 and has been in custody since then, I hereby take into account and set off three years as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of nineteen (19) years, to be served starting today.

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

Dated at Nebbi this 16<sup>th</sup> day of May, 2018.

.....  
Stephen Mubiru  
Judge.  
16<sup>th</sup> May, 2018.

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