

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT GULU**  
**CRIMINAL SESSIONS CASE No. 173 OF 2016**

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

5 **VERSUS**

1. **ACAN CHRISTINE** }  
2. **OJOK JAMES** } ..... **ACCUSED**  
3. **AMAL PROSSY** }

10 **Before: Hon Justice Stephen Mubiru**

**RULING**

The three accused in this case are jointly indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the three accused and others still at large, on 14<sup>th</sup> April 2016 at Dog-Asula village in Nwoya District murdered one Aketowanga Sandra, a girl aged approximately two years. Each of the three accused pleaded not guilty to the indictment.

The evidence of three witnesses was admitted during the preliminary hearing. The evidence of P.W.1 Dr. Olwedo Onen a Principal Medical Officer was to the effect that on 16<sup>th</sup> April, 2016 he examined the body of Aketowanga Sandra. Externally he found that the body had a penetrative wound on the right inguinal. There were cut wounds upon the arms, protruding gut on the left lumbar region, a cut left ear, a cut and removal of part of the stomach. There was a fractured cervical spine (broken neck). The cause of death was respiratory arrest due to fractured cervical spine which caused injuries to the nerve root of the phrenic nerve that supplies the diaphragm which is a principal muscle for respiration. The report was tendered in evidence.

That of P.W.2, a Psychiatric Nursing Officer at Anaka Hospital, was to the effect that on 20<sup>th</sup> April, 2016 he examined; A1 whom he found to be of the apparent age of 50 years and mentally normal; A2 was found to be 28 years and mentally normal; A3 was 19 years old and mentally normal. None of them had any physical injury. The three reports too were tendered in evidence. Lastly, the evidence of P.W.3 D/ AIP Oketayot Simon Ochima a scene of crimes officer attached

to Nwoya Police Station, was to the effect that on 16<sup>th</sup> April, 2016 he took seven photographs of the scene of crime and of the body. The seven photographs were tendered in evidence.

In a bid to prove the indictment against the accused further, the prosecution called three additional witness and closed its case. P.W.4 Akello Brenda, the mother of the deceased testified  
5 that the deceased was two years and one month old at the time she died. On 14<sup>th</sup> April, 2016 at around 8.00 am, she received a call from her husband Arop Charles that she should return home because he was on his way from Kampala. At that time she was at Lukae village where they had recently bought a piece of land on which land she was planting groundnuts. She had spent there four days and she was supposed to return at Alero village about one mile away, where her home  
10 was. She went to look for a boda-boda and on return she found the child missing. She spent about 15 minutes looking to find the boda-boda. When she received the call, she left the deceased at home with another young child of about four years. She was known as Lakicha Prossy the daughter of her co-wife.

15 When she returned after securing a boda-boda, she found her child, the deceased, missing. She asked Lakicha and she told her a certain person had come and taken Sandra away. She told her the person had asked the deceased to go and buy bread. She said that it was a woman who came and convinced the child to go with her and receive bread. She searched for the child for two days but could not find her. The home of Agwai was about 200 metres from her home where she left  
20 the children. A1 is the wife of Mzee Agwai and A3 is their daughter. After failing to find the child, she reported to the L.C.1 Chairman of that village. They searched for the child but in vain. The search involved very many people from Lukae Trading Centre. The matter was then reported to the Akaka Police Station (Nwoya Police Station). They ordered that they continue with the search. On the morning of 16<sup>th</sup> April, 2016 they found the body of the child in a nearby  
25 swamp, approximately a kilometre from her home. Some of the body parts were missing. The lower lip had been cut off, one of the ears had been cut off, the stomach had been cut open on one side. A portion of the hair had been shaved off.

On 14<sup>th</sup> April, 2016 A2 Ojok had been in the garden near her home. As she left to look for a  
30 boda-boda, she saw A2 was in his garden. He was near the home. It was in a distance of about fifty meters away. He was still in his garden when she returned with the boda-boda. She asked

him for the whereabouts of the child and he told her he had not seen the child and did not know where she was. Her home was visible from that garden. A2 was smearing the floor of the house with cow dung as they moved with A1 during the search. The following morning A1 went to a witchdoctor and they met her during the search of 15<sup>th</sup> April, 2016. She told them she was coming from a witchdoctor. She did not tell them why she went there. The witchdoctor eventually came from Lukae, the same village. He told them that three people moved with the child towards the home of Ojok and that the child was dead and the neck was broken. A2 was suspected because he was in the garden and he could see what happened. A3 was suspected because she was seen carrying the child. A1 was arrested because she went to the witchdoctor. A1 was arrested on 15<sup>th</sup> April, 2016.

P.W.5 Apio Dorcus, testified that she dropped out of school due to lack of fees. She was residing in Lukae at the time of the incident but currently resides at Layibi. She knew Akello Brenda as new settler on that village. She had not known any of the accused before but on the 14<sup>th</sup> April, 2016 as she was on her way from school, at around 4.00 pm she went to her mother who was with a friend, Vicentina, at the trading centre to ask her for money to buy food. She found her laying on the ground. She asked her for money and she gave her shs. 2,000/= She had not learnt of the missing child yet at Lukae. She then heard Vicentina say "you see the child who is missing being carried." She said Amal is passing by with a child. She turned and she saw a child being carried. She saw Amal with a child, she had a red dress on. She was at a distance of about thirty metres. She had placed her between the rider of a boda-boda and herself. The child was about two years old. She was a girl. She had never seen the child before. She had seen Amal before but she did not know her name. Amal had no child of her own. They were coming from the direction of Anaka toward Lukae Trading Centre. It was around 5.00 pm. Vicentia was drunk at that time. I never saw Amal again that evening.

P.W.6 D/AIP Oketta-yot Simon Lucima, testified that he is a police officer attached to Lira Police Station. In April, 2016 he was at Nwoya Police Station where he investigated a murder case. On 14<sup>th</sup> April, 2016 I received a complaint of a missing child reported by Akello Brenda the mother of the deceased which occurred at Dobacwa, Lumuru sub-county in Nwoya District. They mobilised the community to search for the missing child. On 16<sup>th</sup> April, 2016 they received

a report from the Chairman LC.1 of the area that the body of the child had been found floating on a swamp on the same village. He proceeded to the scene led by the L.C.s of the area and found the body floating on the water, naked. He removed it from the water and on examining it he found the ear, tongue and lower lip missing. He suspected sacrifice. He carried the body to Gulu  
5 Regional Referral Hospital and a post mortem was done by Dr. Olwech.

Information was later received on which basis they arrested about seven people on the village including the three accused. One Vicentina implicated the three accused. She said she saw A3 Amal Prossy carrying the child on a boda-boda. Amal is the daughter of A1 Acan Christine. She  
10 too was arrested because when the kid disappeared. He was told that A1 was at the material time at her home which is not very far from the home of the complainant. It was reported that before the incident, she had been seen with a witchdoctor and they also interviewed the witchdoctor. The three accused denied completely any involvement in the murder. A2 was also arrested because he uttered words before the death of the child to the effect that the land belonged to his  
15 father and that they would witness a blood stain. It was one week before the incident and when people went for a search he never participated. He was also an neighbour. Under cross-examination, he stated that the three accused were arrested based on suspicion from the community. The arrests were based on suspicion. They said that at the time the child went missing A3 was at home. He went to her home but he stopped outside and did not verify whether  
20 it was true or not she had been smearing her floor with cow dung. That was all I did.

At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he  
25 should be put to his defence (see section 73 (2) of *The Trial on Indictments Act*). Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (See *Wabiro alias Musa v R [1960] E.A. 184* and *Kadiri Kyanju and Others v Uganda [1974] HCB 215*).

30 A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no

evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v R. [1957] EA 332*). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] *ALL E.R 448* and also applied in *Uganda v Alfred Ateu [1974] HCB 179*, as follows:-

- a) When there has been no evidence to prove an essential ingredient in the alleged offence, or
- b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

At this stage, I have to determine whether the prosecution has led sufficient evidence capable of proving each of the ingredients of the offence of murder, if the accused chose not to say anything in their respective defences, and whether such evidence has not been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it. For the accused to be required to defend themselves, the prosecution must have led evidence of such a quality or standard on each of the following essential ingredients;

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

Regarding the required proof of death of a human being, the fact of 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. Although there is no post mortem report, the evidence of P.W.1 Dr. Olwedo Onen, who examined the body, that of P.W.6 D/AIP Oketta-Yot Simon Lucima who retrieved it from the scene, coupled with that of P.W.4 Akello Brenda,

the mother of the deceased who saw it at the scene and attended the funeral is sufficient proof. A reasonable tribunal could on basis of that evidence find that Aketowanga Sandra is dead.

As to whether that death was as a result of 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. In the instant case, there is no direct evidence explaining the circumstances in which the deceased died. P.W.1 Dr. Olwedo Onen who examined the body of Aketowanga Sandra opined that the cause of death was respiratory arrest due to fractured cervical spine which caused injuries to the nerve root of the phrenic nerve that supplies the diaphragm which is a principal muscle for respiration. This was based on his observation that there was a fractured cervical spine (broken neck). The quality of this evidence is adequate and capable of ruling out natural or accidental death. A reasonable tribunal could on basis of that evidence draw the inference that Aketowanga Sandra's death was a homicide. For that reason, the prosecution has lead credible evidence capable of explaining the cause of death as having been unlawful.

As to whether this 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 anyone intended to cause the death of the deceased or knew that death would result from their act. Malice aforethought is a mental element that is difficult to prove by direct evidence. Courts usually consider weapon used (in this case none was recovered) and the manner it was applied (fatal injury to the neck) and the part of the body of the victim that was targeted (the neck). The ferocity can be determined from the impact (suspected strangulation). In the circumstances, A reasonable tribunal could on basis of that evidence draw the inference of malice aforethought and conclude that Aketowanga Sandra's death was caused with malice aforethought.

Lastly, as to whether there is sufficient evidence to implicate each of the accused as having caused Aketowanga Sandra's death, unlawfully and with malice aforethought, this required the production of credible direct or circumstantial evidence placing each of the accused at the scene of the crime as a participant in perpetration of the offence. In this, the prosecution relies entirely on circumstantial evidence. P.W.6 suspects A1 because she is a mother to A3 and involved a

witchdoctor in the search. A2 is suspected because he was digging in his garden near the home of the mother of the deceased the day she disappeared and had the previous week uttered a threat involving spillage of blood. A3 is suspected because during the afternoon of the day the child went missing she was seen with a child on a motorcycle. However P.W.5 who claimed to have  
5 seen her did not know the child and had never seen her before. Having considered the quality of this evidence as a whole, I have come to the conclusion that no reasonable tribunal could on the its basis conclude that any of the three accused caused Aketowanga Sandra's death. For that reason, the prosecution has failed to lead credible evidence capable of supporting such a finding.

10 Having evaluated the evidence, I have formed the opinion that if the three accused chose to remain silent, this court would not have evidence sufficient to hold any of them responsible for the death of the deceased. I therefore find that no prima facie case has been made out requiring any of the accused to be put on their respective defences. I accordingly, find each of the three  
15 accused not guilty and hereby acquit each of them of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. Each of them should be set free forthwith unless he or she is lawfully held on other lawful charges.

Dated at Gulu this 20<sup>th</sup> day of August, 2018

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Stephen Mubiru  
Judge,  
20<sup>th</sup> August, 2018.

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