

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT GULU**  
**CRIMINAL SESSIONS CASE No. 251 OF 2017**

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

5 **VERSUS**

- |    |                                   |   |       |                          |
|----|-----------------------------------|---|-------|--------------------------|
| 1. | <b>OYOO FRANCIS</b>               | } | ..... | <b>ACCUSED</b>           |
| 2. | <b>ATENYO MARGARET alias MANG</b> | } | ..... | <b>ACCUSED</b>           |
| 3. | <b>O. D.</b>                      | } | ..... | <b>JUVENILE OFFENDER</b> |

10 **Before: Hon Justice Stephen Mubiru**

**RULING**

The two accused persons and the juvenile offender in this case were jointly indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It was alleged that the two accused, the juvenile offender and others still at large, between the 21<sup>st</sup> December, 2016 and 27<sup>th</sup> December, 15 2016 at Omatogwe village in Kitgum District murdered one Ogenga George. Each of the two accused and the juvenile offender pleaded not guilty to the indictment.

The evidence of three witnesses was admitted during the preliminary hearing. The evidence of P.W.1 Dr. Geoffrey Akena a Medical Officer at Kitgum Hospital on 27<sup>th</sup> December, 2016 he 20 examined the body of Ogen George and he noted that maggots were oozing out of all body openings (had spent five days under the sun). The right foot was missing (tampered with by animals). Two spots of sharp wounds on the back at T2 and T3 both sides. The body was soiled with blood and the cause of death was massive haemorrhage leading to death. He also on 30<sup>th</sup> December, 2016 examined A1 and he found him to be 26 years old. He had a healing human bite 25 on the right upper arm (biceps) measuring 4 cms x 2 cms and was mentally sound. A2 was found to be 42 years old. No injuries and was mentally sound. A3 was found to be 16 years old. No injuries and was mentally sound. The reports were tendered in evidence.

In a bid to prove the indictment further, the prosecution called two additional witness and closed 30 its case. P.W.2, Ariemo Scovia, testified that she knew Ogena George as a man cohabiting with

A2 a widow to the father of A1 and A3. The cohabitation had began around 2015. Her home was about fifty metres from theirs. In 2016 A1 Oyoo left and went to a place called Okidi, in Labongo Amida sub-county. It is about 9-10 miles away. A2 did not like the wife of A1 and that caused A1 to move away with his wife. A2 would work together with the deceased but whenever  
5 they drank they would fight and A2 would defeat the deceased because she was stronger. They would fight at their home and once in the bush as they were making charcoal. A quarrel erupted while they were in the bush in November, 2015. She separated them and they returned home.

On 20<sup>th</sup> December, 2016 she saw A1 Oyoo who had come to visit the mother and picked  
10 pumpkins and took them to Oryang market. The deceased was at home. On 22<sup>nd</sup> December, 2016 Ogen went to her and told her he had come from their home where he was born and came to pick his shirt at the home of A2. He said he was returning from looking after animals. He said he was leaving A2 for good because they could no longer live in harmony. He told her A1 said he did not want to see him with his mother. A1 questioned how he could inherit her mother yet they are not  
15 clan-mates. Ogen said he was going back home in Lumule to look after animals and would not come back. He never came back when he picked his clothes. He went back home at around 10.00 am. He went missing from that day and a search began for him after the festive season. On 22<sup>nd</sup> December, 2016 she saw A2 in the house and she heard A2 Oyoo talk to her as she went past their house on my way to the borehole. It was at around 10.00 am. She did not see or hear A2  
20 Oyoo again. On 27<sup>th</sup> December, 2016 she received information that a body had been found. His body was found near the road in Omalo Dwee village in Lumule Parish near his home. That was where his wife lived. She did not go to the scene because she had a sick child.

A1 Oyoo Francis and A3 O. D. were arrested from Dol village, Oyang Parish, Kitgum Matidi  
25 Sub-county. That is their mother's village. Before that A1 was living in Okidi with his wife while A3 lived with his mother at Lagwee Konya village which is about six miles from Dol village. She did not know whether they had gone to live there or had simply gone to visit since it was the festive season. A2 Atenyo Margaret was arrested when she went for burial. A2 Atenyo Margaret continued to live at her home alone from 22<sup>nd</sup> December, 2016 to 27<sup>th</sup> December, 2016  
30 when the body was found. She has no grudge with any of the two accused and the juvenile

offender. A2 Atenyo Margaret is her mother in law. She is a co-wife to the husband of her mother in law.

5 P.W.3 Maurina Otim, testified that on 20<sup>th</sup> December, 2016 when she went to the garden, she called on the deceased and found him with A2 Mang. They were in my garden shelling pigeon peas. While they were in the garden, A1 Oyoo Francis sent A3 O. D. to come and inform the deceased and A2 Mang to go home because he needed them for a discussion. It was around 1.00 pm. O. D. did not tell them the reason. He had lunch with them first. O. D. went back but A2 Mang and the deceased did not. A1 Oyoo then came. She told him to eat but he replied that he  
10 was not going to eat. He said he wanted both his mother and his step father, the deceased, to go with him. Since it was getting late, she asked him to talk to his parents under a tree but he said he had an important communication to make which could not be discussed under a tree. He did not disclose what he wanted to tell his parents. He picked a stick from the deceased and he said it was good for killing. She did not know what for it was good for killing.

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She went to the deceased and asked him to go and listen to his son A1, but he said he was a man and would not go. She construed it to mean there was something wrong and she told the mother A2 to go and listen to his son A1. She went home at around 2.00 pm and returned at around 5.00 pm. She asked the deceased what the problem was but he just said that he was a man, meaning  
20 that he was brave "Okutu Lango" (ready to face any difficulties). The deceased refused to eat. A2 remained silent and would not respond to her questions. She decided to give A2 some of the pigeon peas in appreciation for the work she had done for me but the deceased stopped her and said that they planned to return to the garden the following day.

25 The following morning she found the deceased with A2 already in the garden. The family elder of A2 was present and she sat A2 down and talked to her. The elder told her the issue between A1 and A2 and the deceased was serious but that he would sit A2 down and talk to her since A2 was in the habit of fighting the deceased. She left the garden at 7.00 pm because it rained. The daughter of A2 came and told her that they should leave since there was a serious matter to be  
30 discussed. It was at around 7.30 pm. She told the deceased to come early the following morning.

The following day 22<sup>nd</sup> December, 2016 in the morning she found only A2 in the morning. She asked where the deceased was and instead she retoted whether the deceased had not spent the night at her home. She told her the deceased had not spent a night at her home any of the previous days. The deceased did not come to the garden that day. The previous day, they had  
5 parted at the main road and the deceased, A2 and her daughter took the same direction together. They finished the work early, and she returned home at midday. She last saw the deceased on 21<sup>st</sup> December, 2016.

On 27<sup>th</sup> December, she received information that a dead body had been found and on inquiring  
10 whose it was she was told that it was that of Ogenga. She waited for her husband and relayed the information. When she last saw A1 at the time he referred to a stick as good for killing, she could not tell his mood since it was her first time to see him. He told her that he was resident in Okidi, in Amida sub-county, Kitgum District. It is about fourteen miles from her garden. She did not know how the accused and the juvenile offender were arrested. It is while she was at the burial  
15 that she learnt they had been arrested. It is possible that she told the police that A2 had told her that the deceased had spent the night at the home of her co-wife or probably at the disco but that he had not returned home. She was told that the body of the deceased was found near a garden in Lumule village. The distance between Lumule and Lagwe-konye is about two miles.

20 At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, required 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 had been made out against the accused and the juvenile offender that they would be put to their respective defences (see section 73 (2) of *The Trial on Indictments Act*). Where at the close of the prosecution case a *prima facie* case has  
25 not been made out, the accused and the juvenile offender 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*). Having considered the evidence against each of them, I found a mere scintilla of evidence against A1 and none against the rest. I acquitted them and undertook to explain the detailed reasons in this ruling.

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 had to determine whether the prosecution had led sufficient evidence capable of proving each of the ingredients of the offence of murder, if the accused and the juvenile offender chose not to say anything in their respective defences, and whether such evidence had 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 and the juvenile offender 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. There is a post mortem report, by P.W.1 Dr. Geoffrey Akena, who examined the body. A reasonable tribunal could on basis of that evidence find that Ogenga George is dead.

5 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. Geoffrey Akena who examined the body of Ogenga George opined that the cause of death was massive haemorrhage leading to  
10 death. This was based on his observation of two spots of sharp wounds on the back at T2 and T3 both sides. The body was soiled with blood. 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 Ogenga George'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.

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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  
20 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 back) and the part of the body of the victim that was targeted (the back). The ferocity can be determined from the impact (deep stab wounds). In the circumstances, A reasonable tribunal could on basis of that evidence draw the inference of malice aforethought and  
25 conclude that Ogenga George's death was caused with malice aforethought.

Lastly, as to whether there is sufficient evidence to implicate each of the accused and the juvenile offender as having caused Ogenga George's death, unlawfully and with malice aforethought, this required the production of credible direct or circumstantial evidence  
30 implicating them as the perpetrator's of the offence. In this, the prosecution relied entirely on suspicion. The suspicion of P.W.2 and P.W.3 springs from the fact that there had been repeated

fights between A2 and the deceased and blood between A1 and the deceased. The only credible piece of circumstantial evidence was the healing bite mark on the shoulder of A1, and this was a mere scintilla. That they were arrested at the home of the grandparents of A1 and A3 is not inconsistent with the fact that this was a festive season.

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The body of the deceased was also found was found near the road in Omalo Dwee village in Lumule Parish near his home where his wife lived, on a different village from Lagwe-konye village, where the two accused and the juvenile offender were ordinarily resident. He could have been killed by anyone. Having considered the quality of this evidence as a whole, I came to the  
10 conclusion that no reasonable tribunal could on its basis conclude that any of the two accused and the juvenile offender caused Ogenga George's death. For that reason, the prosecution failed to lead credible evidence capable of supporting such a finding.

Having evaluated the evidence, I formed the opinion that if the two accused and the juvenile  
15 offender 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 found that no prima facie case had been made out requiring any of the two accused and the juvenile offender to be put on their respective defences. I accordingly, found each of the two accused not guilty and the juvenile offender not responsible and thereby acquitted each of them of the offence of Murder c/s 188 and 189 of the  
20 *Penal Code Act*. Each of them was ordered to be set free forthwith unless he or she was being lawfully held on other lawful charges.

Dated at Gulu this 24<sup>th</sup> day of September, 2018

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.....  
Stephen Mubiru  
Judge,  
24<sup>th</sup> September, 2018.