

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0401 OF 2015

UGANDA

PROSECUTOR

5 **VERSUS**

1. **KYANDA FRED }**

2. **WAMBI RONALD } ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 The accused in this case were jointly indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 20th day of December, 2014 at Kagonji village in Nakaseke District murdered a one Wamala.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are
15 briefly that P.W.2 saw both accused with a mobile phone suspected to belong to the deceased as they looked for someone interested in buying it. A day or so later, a one "Kabody" was grazing cattle when he came across the body of the deceased behind an anthill. He alerted the police who came to the scene, recovered the body and began an investigation into the death. Their investigation led to the arrest of the two accused who then were able to lead the police to the
20 exact spot where the body was recovered from, yet it was not an obvious spot; both had previously been seen purchasing beans from a shop in the vicinity; beans were found scattered at the scene of an apparent struggle in close proximity of the spot where the body was recovered from. In their respective defences, each of the accused denied any participation in commission of the offence. A1 stated that he was on his way to his home village in Mbale, aboard a truck
25 carrying charcoal, when he was ordered to disembark, taken into a saloon car where he found A2 already under arrest and both were taken to the police cells. On his part A2 stated that he had given money to A1 to take back home to his own family and was going about his business as a

charcoal burner aboard a truck that was going to load charcoal when he was arrested and taken onto a truck on which A1 was already under arrest and both were taken to the police station. From there both were led by the police to the spot where the police had previously recovered by the police.

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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 can only be 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 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 Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

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

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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. In the instant case there is the post mortem report dated 25th December, 2014 prepared by P.W.1 Dr. Mubeezi a Medical Officer at Nakaseke Hospital, which was admitted during the preliminary hearing and marked as exhibit P. Ex. 1. The body was identified to him by a one Lukundo, Chairman L.C. II as that of Wamala. In addition, P.W.2 No. 38986 D/Cpl Mpiirwe Albert, who accompanied the Investigating Officer to the scene and participated in recovery of the body from the scene, drew a

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sketch map of the scene and organised for the post mortem to be conducted at Nakaseke Hospital testified that he too saw the body. P.W.4 No. 43294 D/Cpl Musana Samuel, the first police officer to investigate the case testified that he went to the scene where he too saw the body. None of the accused offered any evidence in relation to this element in their respective defences.

5 Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Wamala died on 20th December, 2014.

The prosecution had to prove further that the death of Wamala was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to have been caused
10 unlawfully unless it was accidental or it was authorized by law (see *R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*). P.W.1 who conducted the autopsy established the cause of death as “strangulation leading to asphyxia.” Exhibit P. Ex. 1 dated 25th December, 2014 contains the details of his other findings which include a “bruises on abdominal wall, weak region, neck moves in all directions.” P.W.2 No. 38986 D/Cpl Mpiirwe Albert, who saw the body at the scene
15 saw some bruises on the abdomen and the neck was loose. There were drag marks at the scene indicative of the fact that the body was pulled from the road to the spot behind the anthill from where it was recovered by the police. P.W.4 No. 43294 D/Cpl Musana Samuel, too saw bruises on the neck and the abdomen. Considered as a whole, the evidence rules out natural or accidental death and establishes beyond reasonable doubt that the death was a homicide. Not having found
20 any lawful justification for such assault on the deceased as deduced from the injuries as described by the witnesses, I agree with the assessors that the prosecution has proved beyond reasonable doubt Wamala's death was unlawfully caused.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice
25 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 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*).

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Malice aforethought being a mental element is difficult to prove by direct evidence. Courts usually consider first; the nature of the weapon used, secondly manner in which it was used and thirdly the part of the body that was targeted. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably
5 cause death. There is no direct evidence in this case regarding this element. Proof of intention is entirely based on circumstantial evidence. Despite the absence of direct evidence of intention, on basis of the circumstantial evidence, malice aforethought can be inferred from the fact that deadly force was used to strangle the deceased and the part of the body of the victim that was targeted (the neck). Any human being who inflicts such injury on another must be deemed to
10 have knowledge that it will probably cause the death of the victim. The accused did not offer any evidence on this element as well I find, in agreement with the assessors that the prosecution has consequently proved beyond reasonable doubt that Wamala's death was caused with malice aforethought.

15 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. Both accused denied any participation. A1 stated that he was on his way to his home village in Mbale, aboard a truck carrying charcoal, when he was ordered to disembark, taken into a saloon car where he found A2 already under arrest and both were taken to the police cells. On his part A2 stated that he had
20 given money to A1 to take back home to his own family and was going about his business as a charcoal burner aboard a truck that was going to load charcoal when he was arrested and taken onto a truck on which A1 was already under arrest and both were taken to the police station. From there both were led by the police to the spot where the police had previously recovered by the police. The burden lies on the prosecution to disprove their respective defences by adducing
25 evidence which proves that each of them was a participant in the commission of the crime.

To refute their defences, the prosecution relies entirely on circumstantial evidence. Where the prosecution case rests on circumstantial evidence, it is the requirement of the law that in order for the court to sustain a conviction on basis of such evidence, the court must find before
30 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 accused's 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).

The incriminating circumstantial evidence in this case is woven together by the following strands;- P.W.2 saw both accused with a mobile phone suspected to belong to the deceased as they looked for someone interested in buying it; the two accused were able to lead the police to the exact spot where the body was recovered from, yet it was not an obvious spot; both had previously been seen purchasing beans from a shop in the vicinity; beans were found scattered at the scene of an apparent struggle in close proximity of the spot where the body was recovered from; they gave a contradictory versions each of them gave in their defence when explaining the circumstances of their arrest.

I have considered the defence presented by each of the accused by way of denial of the incriminating aspects, further stating that it is the police, that he was coerced them and led them to the spot where the body had previously been recovered. This is a situation in which the court is asked to assess the credibility of witnesses on either side from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. The determination must largely be based on its reasonableness or unreasonableness in light of all the circumstances of the case and of the views formed by the court on the reliability and credibility of the witnesses. The version advanced by the accused is unimpressive or unpersuasive on account of the fact that there is no reason advanced that would have forced the police to incriminate them. None of the prosecution witnesses was discredited by cross-examination. In this aspect, the prosecution evidence was not discredited by cross-examination.

Only a person complicit in killing the deceased could have known where the body had previously been recovered from. According to section 29 of *The Evidence Act*, facts deposited to as discovered in consequence of information received from a person accused of any offence, so

much of that information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. In the result, the prosecution version is more believable than that of the accused. I find that there are no other co-existing circumstances which would weaken or destroy the inference that it is the accused who committed the offence. Moreover, the accused in their respective defences contradicted one another, A1 saying that it is A2 who was arrested first and A2 stating the vice versa. A1 saying that upon his arrest he found A2 already under arrest and in a saloon car by which both were taken to the police station, while A2 stated that he found A2 already under arrest and both were placed on a truck which took them to the police station. These unexplained inconsistencies amount to blatant lies. Whereas lies told by an accused person may not form the basis of his conviction, deliberate lies told by an accused can provide useful corroboration of the prosecution case (see *Twehamye Abdul v. Uganda, C. A. Criminal Appeal No.49 of 1999*; *Kutegana Stephen v. Uganda C. A. Criminal Appeal No. 60 of 1999* and *Siras Kiiza alias Tumuramye and another v. Uganda, C. A. Criminal Appeal No. 130 of 2003*). Lies are inconsistent with innocence. Proved lies can be used to corroborate prosecution evidence (See *Juma Ramadhan v. Republic Cr. App. No. 1 of 1973* (unreported)).

That defence of each of the accused having been disproved and in agreement with the assessors, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby find each of the two accused guilty and convict each of them accordingly for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Luwero this 7th day of February, 2018.

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Stephen Mubiru

Judge.

7th February, 2018

Later.

Attendance

Court is assembled as before.

SENTENCE AND REASONS FOR SENTENCE

The convicts have been found guilty of the offence of murder c/s 188 and 189 of the *Penal Code Act* after a full trial. In his submissions on sentencing, the learned Resident State attorney Mr. Ntaro Nasur prayed for a deterrent sentence on the following grounds; although they have no previous criminal record and have been on remand for three years, the life of the deceased was terminated by a ruthless act of the accused. The minimum is thirty five years. They require to be taken out of society. He proposed thirty years' imprisonment.

Counsel for the convicts Mr. Asaph Tumubwine prayed for a lenient custodial sentence on the following grounds; Accused No. 1 has no previous conviction and has been on remand for three years. He is aged 40 years and has a family comprising a wife and seven children. He suffers from Hernia which he sustained while in prison. He prayed that he is given a shorter sentence not exceeding ten years. It is not long sentences that deter and reform. Even shorter ones may deter. He deserves a lenient sentence. As for the second accused, he is 32 years old and has been looking after his elderly father and five other siblings. He too has no previous criminal record. He has been on remand for three years. He prayed for lenient sentence of not more than ten years. In their *allocutus*, each of the convicts prayed for a lenient sentence. A1 I state that he suffers from two hernias, he has seven children and both his parents died. He prayed for lenience and to be released. On his part A2 stated that his mother died. She left him five siblings to look after. His father is aged. He prayed to be released to go and look after his children.

Sentencing is a reflection of more than just the seriousness of the offence. The court at this stage, in sentencing multiple convicts at the same trial where the facts permit, may take into account the degree of culpability of each of the convicts. Degree of culpability refers to factors of intent, motivation, and circumstance that bear on the convict's blameworthiness. Under the widely accepted modern hierarchy of mental states, an offender is most culpable for causing harm purposely and progressively less culpable for doing so knowingly, recklessly, or negligently.

During trial, court considers legal culpability of the convict including the convict's intentions, motives, and attitudes. At sentencing, the court should look beyond the cognitive dimensions of the convict's culpability and should consider the affective and volitional dimension as well. I have not found any facts in this case that are extenuating or that distinguish the degree of culpability of the two convicts. They will therefore be sentenced without distinction.

Murder is one of the most serious and most severely punished of all commonly committed crimes. The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. In cases of deliberate, pre-meditated killing of a victim, courts are inclined to impose the death sentence especially where the offence involved use of deadly weapons, used in a manner reflective of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind that has no regard for the sanctity of life. This maximum sentence is therefore usually reserved for the most egregious cases of Murder committed in a brutal, gruesome, callous manner. This case is not in that category of the most egregious cases of murder committed in a brutal, callous manner, I have for those reasons discounted the death sentence.

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 have taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Bukenya v. Uganda C.A Crim. Appeal No. 51 of 2007*, where in its judgment of 22nd December 2014, the Court of Appeal upheld a sentence of life imprisonment for a 36 year old man convicted of murder. He had used a knife and a spear to stab the deceased, who was his brother, to death after an earlier fight. Similarly in *Sunday v Uganda C.A Crim. Appeal No. 103 of 2006*, the Court of Appeal upheld a sentence of life imprisonment for a 35 year old convict who was part of a mob which, armed with pangas, spears and sticks, attacked a defenceless elderly woman until they killed her. In *Byaruhanga v. Uganda, C.A Crim. Appeal No. 144 of 2007*, where in its judgment of 18th December 2014, the Court of Appeal considered a sentence of 20 years' imprisonment reformatory for a 29 year old convict who drowned his seven months old baby. The convict had failed to live up to his responsibility as a father to the deceased who was victimized for the broken relationship between him and the mother of the deceased.

In light of the aggravating factors outlined by the learned Resident State Attorney, and the fact that this murder was motivated by sheer greed, I consider a starting point of forty five years' imprisonment. Against this, I have considered the submissions made in mitigation of sentence and in the *allocutus* of both convicts and thereby reduce the sentence to thirty four years' imprisonment. 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, after all factors have been taken into account, I note that both convicts have been in custody since 31st December 2014. I hereby take into account and set off a period of three years and one month as the period the convicts have already spent on remand. I therefore sentence each of the convicts to a term of imprisonment of thirty six (36) years and eleven (11) months, to be served starting today.

The convicts are advised that they have a right of appeal against both conviction and sentence within a period of fourteen days.

Dated at Luwero this 7th day of February, 2018.

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Stephen Mubiru

Judge.

7th February, 2018.