THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KITGUM

CRIMINAL SESSIONS CASE No. 0363 OF 2018

UGANDA …… PROSECUTOR

VERSUS

1. OCAN DAVID TAMPIRA }
2. OMAL DENIS } …… ACCUSED

Before Hon. Justice Stephen Mubiru.

JUDGMENT

The two accused are jointly indicted with one count of Murder c/s 188 and 189 of *The Penal Code Act*. It is alleged that the two accused on the 9th day of March, 2014 at Cai village in Kitgum District murdered one Onek Michael. The prosecution case is that on the fateful night, the two accused and the deceased were at a Disco in Cai village. When the deceased left the disco arena briefly and went out with his girlfriend Irene Aryemo, the two accused followed him outside and assaulted him with a stick. He was rushed to Kitgum Government Hospital where he died two days later after emergency surgery to the abdomen. The autopsy established the cause of death as hypovolemic shock with sepsis caused by the perforation of the gut. Both accused were arrested and charged with the murder of the deceased.

In their respective defences, both accused denied having assaulted the deceased. A1 Ocan David Tampira testified that on the fateful day of 9th March, 2015 he went to Cai Market at 6.00 pm. He bought a pair of shoes and at 7.00 pm entered the dancing hall near the market where he spent the whole night dancing until day break. He returned home at around 7.00 am with his friends. He was the victim of a reprisal attack and relocated to the Gangdiang suburb of Kitgum. On 5th May, 2015 he learnt that A2 Omal had been arrested accused of having shot someone with a

catapult. He went to visit him at the police station and he too was arrested and charged with murder of Onek. He did not kill Onek and did not know him.

On his part, A2 Omal Denis stated that on the fateful day of 9th March, 2015 in the evening he left the village at around 5.00 pm for Cai village to dance, where he arrived at 6.00 pm. He danced the hall night with Amito Betty and Ongom. He left that dancing arena at 9.00 am and returned home. After their houses were burnt in a reprisal attack, he began living with the neighbours. He was arrested on the 3rd of March, 2015 at night at around 9.00 pm from Wau at the last funeral rites of a relative of his father whose name he could not remember. He was arrested by a one Okot Alex, in charge of the Youth who took him to the police. At the time of arrest he was told he had been shooting people with a catapult at Wau Central. The following morning at the suspect parade he was told he had been arrested for murder but he was not told the name of the deceased. It is from court that he got to know the name of the deceased. He did not kill Onek Michael.

Since each of the accused pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against each of them beyond reasonable doubt. The burden does not shift to any of the accused persons and each of them can only be convicted on the strength of the prosecution case and not because of weaknesses in their respective defences, (see *Ssekitoleko v. Uganda [1967] EA 531*). The accused do not have any obligation to prove their innocence. By their respective pleas of not guilty, each of the accused put in issue each and every essential ingredient of the two offences with which they are indicted and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure their 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 are innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

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
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. In the instant case the prosecution adduced a post mortem report dated 12th March, 2014 prepared by the then Medical Officer of Kitgum Government Hospital, which was admitted during the preliminary hearing and marked as exhibit P. Ex.1. The body was identified to him by a one Opoka Jimmy Kirala as that of Onek Michael. P.W.3 Olweny Michael, a nephew of the deceased, stated that he too saw the decased admitted in hospital before his death and testified that upon his death he was buried three days later at Lalwal village in Lemo. P.W.4 Oringa James too attended the funeral in Lemo. P.W.5 Odoki Francis, too attended the funeral in Lemo. In their respective defences, none of the accused admitted having seen the body. Defence Counsel though did not contest this element. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Onek Michael died on 12th March, 2014.

The prosecution had to prove further that the death of Onek Michael 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 authorised 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 “Hypovolemic Shock with sepsis caused by the perforation of the gut.” Hemorrhagic shock is a rapid fluid loss resulting in multiple organ failure due to inadequate circulating volume and subsequent inadequate passage of fluid through the circulatory system or lymphatic system to an organ or a tissue. On the other hand, Sepsis is a life-threatening condition that arises when the body's response to infection causes injury to its own tissues and organs.

Exhibit P. Ex.1 dated 12th March, 2014 contains the details of his other findings which include a “tender abdominal swelling with groin swelling. Abdominal cavity soiled with faecal matter, perforation at two spots 2 cms apart 8 cm from terminal ileum.” In his dying declaration to P.W.3 Olweny Michael, the deceased stated that he sustained those injuries as a result of assault. P.W.4 Oringa James testified that he witnessed the assault which involved use of a stick, kicking

and boxing by three assailants. P.W.5 Odoki Francis was with the deceased in a dancing hall when at around 10.00 am the deceased went out with a one Agnes and shortly after the witness responded to the deceased's call for help. He found him in a distressed condition and organised for him to be taken to Kitgum Hospital where he died two days later. I find that the injuries sustained by the deceased which eventually led to his death, were inflicted by physical assault. Not having found any lawful justification for that assault that caused those injuries, I agree with the assessors that the prosecution has proved beyond reasonable doubt that Onek Michael' 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 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, it is difficult to prove by direct evidence. Courts usually consider weapon used (in this case no weapon was recovered but is was described as a stick). 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*). It is enough if through the witnesses, the prosecution adduces evidence of a careful description to enable the court decide whether the weapon was lethal or not (see *E. Sentongo and P. Sebugwawo v. Uganda [1975] HCB 239*).

In the instant case, P.W.4 Oringa James described the stick used in assaulting the deceased as being about the size of the fore-arm of an adult man (him) and about a metre long. A deadly weapon is defined by section 286 (3) of *The Penal Code Act* to include instruments made or adapted for cutting and those which when used of offensive purposes are capable of causing death. I find that the stick as described by P.W.4 Oringa James used in assaulting the deceased

was deadly weapon. If the weapon used to inflict the injuries from which the deceased died are lethal or deadly weapons, or if the injuries are fatal or life threatening and inflicted on vital or vulnerable parts of the body malice afore thought will readily be inferred (see *Uganda v Manuela Awacango and Another H.C. Criminal Session Case No 16 of 2006*).

Furthermore, the court will consider the manner in which it was applied (fatal internal injuries were inflicted) and the part of the body of the victim that was targeted (the stomach region). The ferocity with which the weapon was used can be determined from the impact (perforation of the small intestine at two spots). P.W.1 who conducted the autopsy established the cause of death as "Hypovolemic Shock with sepsis caused by the perforation of the gut."Although there is no direct evidence of intention, malice aforethought can be inferred readily in a situation like this. Any perpetrator who beat the deceased using a stick as so described, with such force so as to inflict such injuries in the abdomen, must have foreseen that death would be a probable consequence of his or her act. On basis of the circumstantial evidence, I find, in agreement with the assessors that malice aforethought can be inferred. The prosecution has consequently proved beyond reasonable doubt that Onek Michael's death was caused with malice aforethought.

Lastly, the prosecution had to prove that each of the accused participated in commission of the offence. This is done by adducing direct or circumstantial evidence placing each of the accused at the scene of crime as perpetrator of the offence, or as an accessory thereto. Both accused denied having participated in the commission of the crime. Both accused raised the defence of alibi. An accused who puts up such a defence has no duty to prove it. The burden lies on the prosecution to disprove it by adducing evidence which squarely places the accused at the scene of crime as an active participant in the commission of the offence (see *Vicent Rwamaro v. Uganda [1988-90] HCB 70; Ssebyala and others v. Uganda [1969] E.A. 204* and *Col. Sabuni v. Uganda 1982 HCB 1*).

To disprove their defences, the prosecution relies on identification evidence of P.W.4 Oringa James who testified that on the night of 9th March, 2014 at around 10.00 - 11.00 pm he was going to the market at Cai when along a path just before the market, he heard voices of people fighting. He heard the voice of Michael Onek the deceased at a distance of about ten metres away. He

moved to the direction of the voice. One of the people involved in the fight flashed a torch at P.W.4 and asked whom he was but he kept quiet. He moved closer to them. He found three people attacking the deceased one of whom was a small boy who immediately ran away. He recognised A1 Ocan and A2 Omal. Onek Michael, both of whom he had known for about three years. They were beating him with a stick and the other was kicking. Ocan had a stick and Omal was just kicking. Ocan was beating him with a stick. It was about the size of a fore-arm and about a metre long. They hit him on the back twice in his presence. A2 was kicking the deceased in the ribs. The deceased was on the ground. He was not fighting back. There was moonlight and he was about three metres from them. When he moved closer they stopped assaulting the deceased and ran away. The two accused ran into the bush. He left the deceased at the scene and went to find help. He found Odoki Francis at the market who then took the deceased to the hospital at Kitgum Government Hospital by motorcycle. He spent one night at the hospital and died the following morning at the government hospital

The other eyewitness is P.W.5 Odoki Francis who testified that on 9th March, 2014 at around7.30 pm he went to the open market at Cai with Onek Michael, the deceased. It was around. They paid the entry fee to a dancing hall and danced. It was approaching 10.00 pm when Michael went out together with his friend Agnes, leaving him inside the dancing hall. Onek Michael called him later on phone and told him that he was being fought along the road. He said two boys had fought him. P.W.5 went to where the deceased was. He met Tampira and Ocan fighting the deceased. One was hitting him with a stick and the other was boxing him. is A2 Ocan was boxing the deceased while A1 Tampira was hitting him with a stick. He was about ten metres from them when he witnessed this and was aided by moonlight. He recognised the voice of A1Tampira as he said "let us beat him." He found Michael had already fallen onto the ground. The two ran into the bush. He picked Michael and took him to the Trading Centre where people were dancing from. He was complaining about pain in the abdomen and in the private parts. He secured a motorcycle and took him to Kitgum Government Hospital. He was taken to the theatre for an operation because his intestines had been perforated. He died during the night of 14th March, 2014.

It turns out therefore that the prosecution relies on the identification evidence of P.W.4 Oringa James and that of P.W.5 Odoki Francis. Where prosecution is based on the evidence of indentifying witnesses under difficult conditions, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166*; *Roria v. Republic [1967] E.A 583*; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. l of 1997)*. It is necessary to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. The Court evaluates the evidence having regard to factors that are favourable, and those that are unfavourable, to correct identification. In doing so, the court considers; whether the witnesses were familiar with the offender, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the offender and the proximity of the witnesses to the offender at the time of observing him.

I have considered the circumstances that prevailed when both P.W.4 Oringa James and that of P.W.5 Odoki Francis claim to have seen the two accused at the scene of crime. It was during the night but there was moonlight which aided their observation and recognition of the accused. Under those conditions of lighting, both witnesses came into close proximity of both accused. They also had known the two accused before. The attack though does not seem to have taken a considerable period of time such as would have given them ample time and opportunity to have an unimpeded look at both accused. This is evidenced by the fact that whereas in his statement to the police (exhibit D. Ex.2) made on 9th March, 2014 he stated that it was A2 who hit the deceased with a stick while A1 boxed the deceased, in court he testified that A1 Ocan had a stick and was beating the deceased with it, while A2 Omal was just kicking the deceased. I addition, while in his statement to the police recorded on 13th March, 2014 (exhibit D. Ex.3) P.W.5 stated that by the time he arrived at the scene he found only the deceased and it is him who showed him the stick with which he had been assaulted and revealed to him the identity of the persons who assaulted him, in court he testified that he witnessed the beating and that he actually saw the two assault the deceased.

The inconsistencies are further compounded by the dying declaration of the deceased as narrated by P.W.3 Olweny Michael. According to him, the deceased while admitted at Kitgum

Government Hospital before he underwent surgery told him that it is A2 Omal David who assaulted him. He said A2 Omal David had found him seated with some lady near the disco and asked him why he was befriending the wife of his brother. He picked a stick and hit the deceased with it on the stomach. A1 tried to intervene and stop him saying that the woman was no longer theirs because they had left her.

According to section 30 of *The Evidence Act* a statement made by a person who believes he is about to die in reference to the manner in which he or she sustained the injuries of which he or she is dying, or other immediate cause of his or her death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them, is admissible. Dying declarations however, must always be received with caution, because the test of cross examination may be wanting and particulars of violence may have occurred in circumstances of confusion and surprise. Although corroboration of such statements is not necessary as a matter of law, judicial practice requires that corroboration must always be sought for (see *Oketh Okale and others v. Republic [1965] EA 55;* and *Uganda v. Tomasi Omukono and others [1977] HCB 61*). Nevertheless, there may be circumstances which go to show that the deceased could not have been mistaken. "Other evidence" includes not only evidence such as amounts to corroboration but to exceptional circumstances which when considered together with identification evidence reasonably excludes any possibility of error.

In the instant case, both accused admitted having been in the disco hall that night. It is thus an indisputable fact that both of them placed themselves within the vicinity of the scene. The attack was not sudden so as to have taken the deceased unawares, A2 Omal David having first rebuked the deceased for going out with the wife of his brother. In his defence, A2 Omal David admitted that he knew Irene Aryemo as the wife of his cousin Nyeko Patrick, although he denied having seen her at the disco hall that night. Given those circumstances, the danger of mistaken identification was greatly minimized and the deceased could not have been mistaken in the identification of the two accused.

I am inclined though to reject the evidence of P.W.5 Odoki Francis regarding his visual identification of the accused. Courts may rely on parts of the testimony of a witness which are truthful and reject the parts which are false. It may believe the evidence of a contradicting witness and reject the part containing lies or, reject the whole evidence of such witness who may be telling lies, but act on the rest of the evidence, or accept reasonable explanation for the inconsistencies (see *Uganda v. Rutaro [1976] HCB 162*; *Uganda v. George W. Yiga [1977] HCB 217*; *Saggu v. Road Master Cycles (U) Ltd. [2002] I EA 258*; *Kiiza Besigye v. Museveni Y. K and Electoral Commission [2001 – 2005] 3 HCB 4*). I find this part of the evidence of P.W.5 to be untruthful in so far as it is least likely that the deceased could have called him on phone in the heat of the altercation as he was being assaulted. The more likely occurrence is that he arrived at the scene after the assailants had fled and his version to the police in exhibit D. Ex.2 is closer to the truth. It is the deceased who revealed to him his assailants.

The combined effect of the dying declaration and the identification evidence of P.W.4 Oringa James places both accused at the scene of crime, and is consistent as regards the participation of A2 Omal David. However, there is inconsistence between the police statement and testimony in court of P.W.4 Oringa James as to the level of participation of A1 Ocan David Tampira, which in turn contradicts the dying declaration of the deceased by which the deceased entirely absolved A1 Ocan David Tampira. Although in cases where a police statement is used to impeach the credibility of a witness and such statement is proved to be contradictory to his or her testimony, the court will always prefer the witness' evidence which is tested by cross-examination (see *Chemonges Fred v. Uganda, S. C. Criminal Appeal No. 12 of 2001*), unexplained inconsistencies and contradictions will not be taken lightly.

It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002* and *Uganda v. Abdallah Nassur [1982]*

HCB). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case.

In the instant case the contradictions relate to the question whether A1 Ocan David Tampira participated in the commission of the offence at all or only restrained A2 Omal David from assaulting the deceased. The contradictory elements are material therefore in so far as they are essential to the determination of the case against A1 Ocan David Tampira. This there for is a major contradiction in respect of which the prosecution has not advanced any explanation and I cannot find any from the available evidence. This contradiction will this be resolved in favour of the accused. I find that the prosecution has failed to prove beyond reasonable doubt that A1 Ocan David Tampira participated in assaulting the deceased. In agreement with one of the assessors but in disagreement with the other, he is found not guilty and is accordingly acquitted of the offence of Murder c/s 188 and 189 of *The Penal Code Act.* He should be st free forthwith unless there are other lawful reasons for keeping him in custody.

As regards A2 Omal David I have not found any significant unfavourable circumstances which could have negatively affected the ability of the deceased and P.W.4 Oringa James to see and recognise him as the person who assaulted the deceased. The prosecution has proved beyond reasonable doubt that he committed the offence. In agreement both assessors, A2 Omal David is found guilty and accordingly convicted for the offence of Murder c/s 188 and 189 of *The Penal Code Act*.

Dated at Gulu this 30th day of November, 2018

Stephen Mubiru
Judge,
30th November, 2018.

SENTENCE AND REASONS FOR SENTENCE

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.

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 regardless of the sanctity of life. This maximum sentence is therefore usually reserved for the most egregious cases of Murder and Aggravated Robbery, committed in a brutal, in an extremely brutal, grotesque, gruesome, diabolical, revolting or dastardly, callous manner so as to arouse intense and extreme indignation of the community.

According to paragraph 18, Part 6 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013,* the court may only pass a sentence of death in

exceptional circumstances in the “rarest of the rare” cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate. By implication, life is the norm and death is the exception. However, "rarest of rare" is often misunderstood to mean the rarity of the case. To the contrary, the court is supposed to look at the case holistically, understand the factors that led to the crime, the circumstances of the convict and the victim, among other things, before pronouncing the sentence. The death sentence is supposed to be imposed when the alternative option is unquestionably foreclosed. It a punishment of last resort when, alternative punishment of a long period of imprisonment or life imprisonment will be futile and serves no purpose. This case does not fit the category of "rarest of rare" and for that reason I have found that the death penalty is inappropriate for the convict.

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. In *Ninsiima v. Uganda Crim. Appeal No. 180 of* 2010, the Court of appeal opined that these guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial.

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 State Attorney, the submissions made in mitigation of sentence and in the *allocutus* of the convict, I conclude that the aggravating circumstances in this case outweigh the mitigating factors. I consider a deterrent sentence to be appropriate for the convict. I for that reason deem a period of forty (40) years' imprisonment. By reason of the mitigation advanced, it is reduced to thirty two (32) years.

It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take into account the period spent on remand while sentencing a convict. Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, requires the court to "deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This requires a mathematical deduction by way of set-off. The convict, A2 Omal David, was remanded on 16th March, 2015 and hence has been on remand for three (3) years and nine (9) months. I hereby take into account and set off the period of time the convict has already spent on remand. I therefore sentence A2 Omal David to a term of imprisonment of twenty eight (28) years, to be served starting today.

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

Dated at Gulu this 30th day of November, 2018

……..
Stephen Mubiru
Judge,
30th November, 2018.