

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

CRIMINAL SESSIONS CASE No. 1348 OF 2016

UGANDA PROSECUTOR

5 **VERSUS**

- 1. **MWESIGWA JAMADA }**
- 2. **ORYEM JAMES alias DIZZO }**
- 3. **KADDU JOHN alias HEAVY } ACCUSED**
- 4. **SSERWADDA HARUNA JAMIL alias SADAM }**

10 **Before Hon. Justice Stephen Mubiru**

RULING

The four 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 four accused and others still at large, on the 7th August 2015 at Mbuya II Zone II in the Nakawa Division of Kampala District murdered one Mugerwa
15 Muhaisini alias Muwa. Each of the four accused pleaded not guilty to the indictment. In a bid to prove the indictment against the four accused, the prosecution adduced the post mortem report and the medical examination report of A1 Mwesigwa Jamada, both of which were admitted at the preliminary hearing, called two additional witnesses and closed its case.

20 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 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
25 entitled to an acquittal (See *Wabiro alias Musa v. R [1960] E.A. 184 and Kadiri Kyanju and Others v. Uganda [1974] HCB 215*).

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 they run 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.

Both defence and prosecution counsel chose not to make any submissions on the question as to whether or not the evidence establishes a *prima facie* case against any of the accused. 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 defence, 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. There is a post mortem report prepared
5 by P.W.2; Dr. Wamala Dan a Medical Clinical Officer of Kampala Capital Authority Mortuary. It shows that on 8th August, 2015 he examined the body of Mugerwa Muhaissin identified to him by Mugerwa Hamidu, the father of the deceased. He was a male aged 16 years at the time. He observed that the body was not wasted. There is also the testimony of P.W.4 Nasuuna Hafswa Mugerwa, the mother of the deceased who testified that the deceased died in her presence shortly
10 after their arrival at Mulago Hospital, where he had been rushed for medical attention, even before he could be attended to by a doctor. The doctor confirmed his death to her after examining his iris. I find that as regard this element, there is sufficient evidence at this stage that could support a finding that proof at this stage that Mugerwa Muhaisini alias Muwa is dead, if the accused chose not to say anything in their defence.

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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. In his dying declaration to P.W.4 Nasuuna Hafswa
20 Mugerwa at around 3.00 am on 8th August, 2015, he stated that he had been assaulted on two occasions by A1 Mwesigwa Jamada and A2 Oryem James alias Dizo; first on 6th August, 2015 at a place near Mukomboti Bar during the early evening hours and the second time on 7th August, 2015 at a place he never disclosed. On the first occasion, his mother's phone had been taken away from him by the assailants who proceeded to withdraw money from her mobile account.
25 He never disclosed this to his mother until the wee hours of the morning of 8th August, 2015. On the second occasion, he had gone back to his assailants to demand the refund of that money.

In the post mortem report prepared by P.W.2; Dr. Wamala Dan, although he observed that there were bruises on the lower and upper limbs on the body of the deceased, it was no indicated as to
30 whether or not any of them were fatal. He found internally that the deceased had suffered sub

pleural petechial haemorrhage of the right lung (the escape of blood from a ruptured vessel), visceral pericardial scarring of the left and right ventricle (inflammation of the lining around the heart (the pericardium) that causes chest pain and accumulation of fluid around the heart (pericardial effusion). There are many causes of pericarditis, including infections, injury, 5 radiation treatment, and chronic diseases. This inflammation of the lining surrounding the heart may be an associated complication of many diseases but may also be due to trauma. Classically, the pain is begins in the centre of the chest and radiates to the neck or upper back. The pain is sharp and stabbing, but may also be felt as a dull, ache or burning pain. The intensity may be mild or very severe and it can come on gradually or suddenly. The pain makes it hurt to take a 10 breath), and cerebral oedema (swelling of the brain - it can result from overuse, trauma or infection). Despite the fact that all those symptoms would ordinarily suggest traumatic injury, in the space provided for expressing his opinion as to the cause of death he wrote; "organs and blood taken for toxicology analysis," which expression is suggestive of death from a toxic substance or an infection. In general terms, the findings are inconclusive.

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It is unfortunate that the results of the toxicological analysis have not been submitted to court. The quality of this evidence is inadequate and incapable of ruling out death by toxic substance or infection rather than physical assault. No reasonable tribunal could on basis of that evidence draw the inference that Mugerwa Muhaisini alias Muwa's death was a homicide. For that reason, 20 the prosecution has failed to 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 25 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 (it is not clear whether any of the injuries were fatal) and the part of the body of the victim that was 30 targeted (internal injuries to the right lung, the left and right ventricles and the brain). The ferocity can be determined from the impact (suspected toxic substance in the body system). In

the circumstances, malice aforethought could only be inferred if there was evidence of an unlawful cause of death. Since the evidence led so far is incapable of ruling out death by toxic substance rather than physical assault, no reasonable tribunal could in the circumstances conclude that Mugerwa Muhaisini alias Muwa's death was caused with malice aforethought if the accused chose to remain silent in their defence. For that reason, the prosecution has failed to lead credible evidence capable of supporting such a finding.

Lastly, as to whether there is sufficient evidence to implicate the accused as having caused Mugerwa Muhaisini alias Muwa'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 perpetrators of the offence. In this, the prosecution relies entirely on the dying declaration of the deceased. As one of the exceptions to the rule against hearsay, under 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 as a dying declaration.

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 under 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. It is not possible to consider the circumstances prevailing at the time the deceased was assaulted since the time, place, condition of lighting and the manner of the assault are unknown. Although A1 Mwesigwa Jamada was known and A2 Oryem James alias Dizo may have been known to the deceased before, neither is their proximity to the deceased at the time of the alleged assault, nor the span of time for which he observed them is known. The other two accused are not implicated in any way apart from the allegation that they belonged to a shadowy local youth group known as UNATO. Moreover, the behaviour of the deceased in not disclosing to his mother that her phone had been grabbed from him, and money withdrawn from her mobile money account by his assailants until late afternoon of 7th August, 2015 is very curious behaviour that casts doubt on his veracity and

On its own, this piece of evidence is un-reliable yet there is no other evidence to corroborate it. No reasonable tribunal could on the basis of that evidence conclude that the accused caused Odria Siginia's death. For that reason, the prosecution has failed to lead credible evidence
5 capable of supporting such a finding.

Having evaluated the evidence, I have formed the opinion that if the 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
10 four accused to be put to his defence. I accordingly, find each of the accused not guilty and hereby acquit each of them of offence of Murder c/s 188 and 189 of the *Penal Code Act*. Each of them should be set free forthwith unless he is lawfully held on other charges.

Dated at Kampala this 24th day of January, 2019.

15 Stephen Mubiru
 Judge
 24th January, 2019.