THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CR-SC-076 OF 2017

FPT-00-CR-AA-099-2016

UGANDA:::PROSECUTION

VERSUS

1. **MASIKO PAULINO**
2. **ATAGENZIRE JOSEPH**
3. **TIBASOBOLE ROBERT::ACCUSED**

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO.

JUDGMENT

The accused persons were indicted with the offence of murder contrary to Section 188 and 189 of the Penal Code Act Cap 120.

It was alleged that A.1 Masiko Paulino, A.2 Atagenzire Joseph, A.3 Tibasobole Robert and others still at large on the 26th day of March, 2016 at Kidomi Village in Kyenjojo District, murdered Bright Adolf.

The prosecution's case was that the three accused persons and the deceased were residents of Bwendero village in Kyenjojo Town Council. That on the night of 25/3/2016, Begumya William's goats were stolen and slaughtered from the deceased's home. A1 is also a biological father to Begumya William.

That Masiko Paulino then organised a mob on the 26/3/2016 including A2 and A3 to attack the deceased's home, they grabbed him, tied him with ropes and dragged him to the home of Agaba John who was also a suspect and biological brother to the deceased. That the accused persons started beating the deceased in Agaba's home, and also attacked Agaba with

pangas cutting off his finger completely. They later set the deceased on fire. Authorities were informed and later police intervened. The body was taken for post mortem and the accused persons were subsequently arrested.

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 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 East African 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.

However, this is the point where 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 persons to be required to defend themselves, the prosecution must have led evidence of such a quality or standard on each of the essential ingredients of the offence and in this case being murder. When accorded their legal right to enter a defence after a ruling on prima facie case found that they had to defend themselves, all the accused persons choose the option of remaining silent.

Section 62 of the Trial on Indictment Act cap 23 in regards to **Refusal to plead** is to the effect that;

***"…**If any accused person being arraigned upon any indictment stands mute of malice, or neither will, nor by reason of infirmity can, answer directly to the indictment, the court if it thinks fit, shall enter a plea of not guilty on behalf of the accused person, and the plea so entered shall have the same force and effect as if the accused person had actually pleaded not guilty; or else the court may if it has reason to believe that the accused person is of unsound mind or cannot be made to understand the nature of the proceedings act in accordance with either section 45 or 49 as the circumstances may require…"*

Burden and standard of proof

Since the accused persons pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against them beyond reasonable. The burden doesn't shift to the accused persons and they can only be convicted on the strength of the prosecution case and not on of weakness in their defence. **(**See ***Ssekitoleko V Uganda (1967) EA531*****).**

The accused persons do not have any obligation to prove their innocence. By their plea of not guilty, the accused persons put in issue each and every essential ingredient beyond reasonable doubt before the prosecution could secure their conviction.

The following ingredients ought to be proved in an offence of murder

1. Death of a human being occurred.
2. The death was caused by some unlawful act
3. That there was malice aforethought
4. That is was the accused who caused the unlawful death.
5. Where there is more than one accused person, it ought to be proved that there was a common intention among them to execute an unlawful purpose.

In a bid to prove its case, the prosecution relied upon the evidence of four witnesses. **PW1** Agaba John, a biological brother to the deceased and eye witness, **PW2** Ms. Katusiime Annet who was apparently the second eye witness, **PW3** Alituha Jullius the PISO of Buchuni village by the time the incident happened and first at the scene of crime and **PW4** NO 26731 Alindula Francis who was the first police officer on the scene and took the deceased to hospital for post mortem.

Death of a human being;

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 evidence of **PW2** Annet Katusiime the witness who stated that she was in the garden digging that day when she saw Agaba john **PW1** running and the accused persons chasing him. They later came back to Agaba's

compound and started beating up the deceased as PW2 was watching from around 50 meters away. She had earlier on attempted to rescue Agaba's children who were following their father as he ran from the assailants. Being a relative to **PW1** and the deceased, she testified that she later saw the dead body and even attended the burial.

The second person that testified about seeing the deceased shortly before he died was **PW4**. He testified that by the time he arrived at the scene of crime, the deceased was barely talking so they rushed him to hospital as he tried to talk to him but he died on the way to hospital so they just proceeded to hospital for the post mortem examination.

Pexh1 the post mortem report elaborates that the body was examined on 26th March 2016. It was identified by Alindula Francis as that of Bright Adolf. The body was 80% burnt and the cause of death was suffocation, electrolyte imbalance leading to multiple organ failure and death.

An Electrolyte is a physiology meaning is the ionized or ionizable constituents of a living cell, blood, or other organic matter and **Electrolyte imbalance**, or heat-**electrolyte imbalance**, is an abnormality in the concentration of **electrolytes** in the body. **Electrolytes** play a vital role in maintaining homeostasis in the body. They help to regulate heart and neurological function, fluid balance, oxygen delivery, acid–base balance and much more.

Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Bright Adolf died on 26th March, 2016.

Death caused by 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 a situation where it is however shown that the homicide was committed under circumstances that was either accidental, or was in defence of person or property, or in execution of a lawful Court order, it is excusable. This proposition of law is well established and restated in amongst others, ***R. vs. Gusambizi s/o Wesonga (1948) 15 E.A.C.A. 65; Uganda vs. Bosco Okello alias Anyanya, H.C. Crim. Sess. Case No. 143 of 1991 - [1992 - 1993] H.C.B. 68.***

The presumption of unlawful homicide may therefore be rebutted by showing that the killing is covered under any of the excusable circumstances. The standard of proof for such rebuttal is on the balance of probabilities; see the case of ***Festo Shirabu s/o Musungu vs. R (22) E.A.C.A. 454.***

In this instant case, the circumstance and manner in which Adolf was burnt, leading to his death, and his dying declaration to **PW4** the police officer who went to his rescue strengthens the presumption of unlawful homicide.

The post mortem report dated 26/03/2016 reflects the details of death as explained by the medical officer at Kyenjojo General Hospital indicated that the body was identified by D/cpl Alindula Francis as that of Bright Adolf. On examination of the external injuries, the body was found to have been burnt to an 80% percentage coverage. The cause of death was suffocation, electrolyte imbalance which led to multiple organ failure and eventual death.

This evidence was supported by the testimony of **PW3** Alituha Julius who was the PISO of Buchuni ward by the time this incident happened. He

stated that when the chairman LC1 called Musebere Vincent called him that Adolf Bright and Agaba John were in danger of being lynched by villagers, he quickly went and reported to Kyenjojo Police station. He was given police officers and a van to go the scene of crime. On arrival, they found Adolf in the trading centre abandoned in smoke. He had been burnt and his hands were still tied up. Together with NO 26731 D/CPL Alindula Francis, **PW4**, they picked up the deceased and put him on the police van to try and save him since he was still alive. **PW1** being a suspect and a brother to the deceased testified that he saw the deceased before he was burnt to death, that the accused persons went to his home that fateful morning and called him out of his house. When he reached where they were, he saw the deceased was wrapped in a blanket, terribly bleeding and they asked him to come close and identify him. It was at that point that he was also attacked and he ran off to save himself from being lynched. He later learnt that his brother, the deceased was later burnt from the trading centre and they buried him. Not having found any lawful justification for the act of burning up the deceased to death, I agree with the assessors that the prosecution proved beyond reasonable doubt that Bright Adolf's death was unlawfully caused.

Presence of malice aforethought

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice aforethought. Malice aforethought is described 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 is difficult to prove by direct evidence. Courts usually consider first the nature of the weapon used and mechanisms that actualised the death.

In this case, **Pexh1** elaborated that the body was burnt to 80%. **PW3** and **PW4** had mentioned that his hands were still tied up. The cause death being suffocation due electrolyte imbalance means that whoever set the deceased ablaze knew what exactly the flames would do to him. Tying him up and wrapping him in a blanket rendered the deceased defenceless, there was no way he could save himself from the fire.

It has been held before that 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 arm. (See ***S Mungai vs Republic (1965) EA 782*** at page 78 and ***Kooky Shema and Another V Uganda 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& PSebugwawo Vs Uganda (1995) HCB 239.***

The deceased was burnt to death, the perpetrators who inflict such an act must have foreseen that death would be natural consequence of their acts. **PW2** mentioned that the accused had spears and pangas while chaining the deceased. Malice was also cast through the nature of assault that occasioned the deceased which included cutting him, tying him up and burning him.

The accused did not adduce any evidence capable of casting doubt on this element neither did defence cause contest this element.

On the basis of this evidence, I find in agreement with assessors that malice aforethought can be inferred. The prosecution has consequently proved beyond reasonable doubt that Bright Adolf's death was caused with malice aforethought.

Participation of accused persons;

There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as the perpetrator of the offence.

The accused by virtue of their silence denied participation and the assessors opined that there was no body who put the accused persons to the scene of crime because **PW1** was called by a gang of people to identify the body but he took off to the forest, **PW3** arrived at the scene when everyone had deserted it and only saw the deceased. **PW2** also said that she saw a gang of people carrying something and she ran to the bush, **PW4** who was taking Bright to hospital did not attach the accused to the crime so they suggested that the accused persons be acquitted.

Before making any conclusions on this ingredient, court needs to remind itself of the cause of the death to able to relate the same with participation of any. The deceased in this matter is reported to have died due to suffocation and electrolyte imbalance leading to multiple organ failure and death. By the time of the post-mortem, the deceased's body was burnt up to 80%.

P.W.1 Agaba John testified that on that fateful day he was home preparing food for his children when he heard someone calling him. When he reached outside, he found the three accused persons and other people holding the

deceased in a blanket. He was terribly bleeding so they asked him if he could recognise the person in the blanket. As he drew nearer, A2 cut him with a panga on the left hand and one of the fingers completely fell off, to save himself, he started running away and they chased him into the spear grass. That during the chase, A1 got closer to him and threw a panga that cut his right hand. The scars from these cuts were seen by court. He made an alarm and people came including **PW2** and another lady called kahula who was not brought to testify. That A3 had ever accused Agaba of assault but the chief magistrate dismissed the case. He said that he knew the accused persons very well since they were village mates and it was around11:00am in the morning so the day was bright enough for him to identify them.

Meanwhile, **PW2** Annet Katusiime testified that on the 26th day of March 2016, she was working in Ategeka's garden near Agaba's home when she saw Agaba running while the accused persons were chasing him. She was like 50 meters away. She saw Agaba's children following their father and went to rescue them. In the course of rescuing them A3 chased her with stones. She later saw them beating up the deceased in **PW1'**s compound and she was gripped with fear and went and hid under her bed.

PW3 Alituha Julius testified that he was the PISO of Buchuni ward and that he knew all the accused persons. That on that day he received a call from the LC1 chairman that Adolf Bright and Agaba John were in trouble. He went to police and came with a police van to rescue them but only found Adolf in the trading centre burning away. He however introduced a twist in this case when he mentioned that he knew **PW1** because he once approached him to arrest Begumya, Magezi and Nkuruzi as people who had killed the deceased and that he never mentioned any of the three

accused persons in the dock. The only reason he did not arrest them was because Agaba failed to pay him the agreed amount for the arrest. He said that he was also aware that **PW1** had ever assaulted all the three accused persons and when they were pursuing that case against him before the chief magistrate when they were arrested at the court premises for this current case two years later the incident had happened.

PW3 further mentioned that he is also aware that **PW1** stole a goat belonging to William Begumya and roasted it in the forest with his deceased brother hence the cause of this scuffle. That Begumya, William and Magezi were mentioned by **PW1** so that he can exonerate them from this case since they had earlier paid him off as compensation for killing his brother and even left the village two years ago.

In answer to court, he once again mentioned that he was PISO and he was paid by government to eradicate crimes, that it was true that **PW1** gave him money to arrest Begumya, Magezi and Nkuruzi as the people who killed his brother but when he did not meet the money wanted, **PW3** also refused to arrest the said suspects. His demands were transport to Kakabare and Kampala, this was one year after the deceased had been killed.

When **PW4** NO 26731 Alindula Francis testified, he said that he was among the police officers that arrived at the scene before the deceased died but was in terrible pain and could hardly speak.

However, he was able to talk to the deceased who told him that he and his brother Agaba John had stolen a goat belonging to Begumya William. As they were roasting the goat in the forest, the owners caught them and they started fighting. That the owners over powered them and caught him but Agaba ran away and for him he was brought to the centre and burnt. That

he gave the names of the people who had burnt him as Atangazire, William, Ahabwe, Ngurusi, Kagaba, Paulino and Begumya and others. That he then died 30 minutes later on the way to hospital.

On cross examination, he said that there was an old woman whom he had found in the trading centre that was aiding the deceased to mention the names of the people that had burnt him since the deceased could barely speak.

Putting an accused to the scene of crime means proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone must base itself upon the evaluation of the evidence as a whole. It is incumbent on the court to evaluate both versions judicially give reasons why one and not the other version is accepted. The only dilemma in this scenario is that there is virtually one version from which to determine this since he accused persons through their counsel Mugisha Vincent declined to put up any defence.

I am aware that a conviction can only be based on the strength of prosecution case not the weakness of defence. This is applicable in the instant case.

From the evidence of the prosecution witnesses above, none of them seems to have seen any of the accused persons light a fire to burn the deceased. It was a mob justice situation where anyone could have burnt the deceased.

The major evidence that the prosecution relies on is that of **PW1**, **PW2** and the dying declaration given to **PW4** in regards to participation of the accused persons.

PW4 narrated that 30 minutes before the deceased died, he told **PW4** that "…he (the deceased) and john, **PW1** had stolen a goat and the owners found them roasting it in the bush so they started fighting, the owners over powered them and they brought to the trading centre but PW1 managed to run away…that the people who assaulted him and set him on fire were Ataganza Robert, Ahebwa, Ngurusi, kagaba, Kevina, Paulino, Begumya and others.

A dying declaration is admissible as evidence as decided in numerous cases. In ***Uganda vs. Tomasi Omukono & Others - H.C. Crim. Session Case No. 9 of 1977; [1977] H.C.B. 61,*** the Court pointed out that a dying declaration is evidence of the weakest kind since it cannot be subjected to cross examination.

Under **Section 30 of *The Evidence Act***, *a dying declaration is 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.*

In the case of ***Tindigwihura Mbahe vs. Uganda S.C. Crim. Appeal No. 9 of 1987***, the Court summed up the law on dying declaration, as follows:-

"…evidence of dying declaration must be <u>received with caution</u> because the test of cross examination may be wholly wanting; and the particulars of the violence may have occurred under circumstances of confusion and surprise;

the deceased may have stated his inference from facts concerning which he may have omitted important particulars, for not having his attention called to them… It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross examination, unless there is satisfactory corroboration: Also see ***Okethi Okale & Others vs. Republic [1965] E.A. 555, and Tomasi Omukono & Another vs. Uganda, CAU (1978) Judgments part I***.*"*

It must be noted that although corroboration of such statements is not necessary as a matter of law, judicial practice requires that corroboration must always be sought for **(see *R. v. Eligu S/o Odel and Epangu S/o Ewunya (1943) 10 EACA 90*; *Pius Jasunga v. R. (1954) 21 EACA 331* and *Mande v. R. [1965] EA 193*).**

In my view, the deceased's dying declaration was not satisfactorily corroborated by any other evidence. First to note is that none of the prosecution witnesses saw the accused persons light the fire that burnt the deceased. Secondly, **PW4** first stated that the deceased was weak, could hardly talk but his words were understandable. During cross examination, **PW4** stated that he found the deceased with an old woman who participated in giving the names. PW4 did not ask who the old woman was and the said old woman was never brought to testify.

The above pieces of evidence cast doubt as to the actual participation of the accused persons in making the fire that actually led to his suffocation and eventual death. It may not be in dispute that the accused persons

participated in beating the deceased but his eventual death was reportedly caused by the fire. I find that this ground has not been proved by the prosecution to the required standard.

Having found as above, it is immaterial to go ahead to determine whether the accused persons had the common intention to kill the deceased.

I find that the prosecution has not proved all the essential ingredients of the offence of murder beyond reasonable doubt and I hereby acquit the accused persons of the offence of murder.

Dated at Fort Portal this 28th day of October 2022.

Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties

Vincent Emmy Mugabo

Judge

28th of October 2022.