THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

HCT-00-CR-SC-0195-2019

UGANDA ..... PROSECUTOR

VERSUS

ADAKUN ZADOKI
MUNYALO PETER aka MULALO ..... **ACCUSED**
MUTENZA NASSSAR

BEFORE: THE MR. JUSTICE MICHAEL ELUBU

JUDGEMENT

The accused persons **Adakun Zadoki**, **Munyalo Peter a.k.a Mulalo** and **Mutenza Nassar,** are indicted with the offence of Murder contrary to sections 188 and 189 of **the Penal Code Act**.

It is alleged in the particulars of offence that on the 2nd day of September 2018, at Agenda Olulinga stage in Namugongo Division in Kira Municipalty in Wakiso district, the accused persons with malice aforethought unlawfully killed **Oponya Hope Mwa** (the deceased).

All three accused persons pleaded 'not guilty' thus bringing the elements of this offence into issue. The prosecution called 7 witnesses to prove its case, while the defence had two.

The brief case for the prosecution is that the deceased was a university student. On the 1st of September 2018 his mother, PW 1, Rosemary Anek, sent him to her sister to get a car so that they could carry food for an Uncle who was hospitalised.

Hope's phone went dead leading to a frantic search for him. That night the first accused person is said to have heard a scream coming from the direction of the Northern bypass. At the time he was with a friend and they went in the direction of the scream and found the deceased running in the opposite direction. That they apprehended the deceased and started assaulting him. They were joined by A2 and A3. The deceased died as a result of the assault and his body was taken to the KCC Mortuary.

Meanwhile a report of a missing person had been made by PW 1 at Kira Road Police station. Eventually she went to the mortuary where she found and identified the body of the deceased.

A1 then started using the phone of the deceased. He was tracked down and arrested in possession of the phone. He led the police to the arrest of both A2 and A3. He also admitted to both PC Bahati Abdul and Detective Sargent Ochom Denis, that he participated in the commission of the offence.

In their defence, A2 and A3 chose to keep quiet. A1 called two witnesses. The wife of the LC Chairman and himself.

A1 denied committing the offence. It was his evidence that he picked the phone along the road as he jogged. That he attempted to take it to the LC 1 Chairman but found him away from home. He informed the chairman's wife whom he found at home that morning (DW 2). She confirmed this in her testimony to Court. That when he was arrested, he told the police and led them to the spot where he had picked the phone.

A1 also denies knowing A2 and A3 or that he told the Police that all three of them participated in the beating and murder of the deceased. He said PW 6 Detective

Sargent Ochom gave him papers to sign and assured him that all would be well. He learnt later the papers were an admission which he denies making.

As this is a criminal case it is trite law that the burden of proof rests with the prosecution and never shifts (**Okethi Okale vs R 1965 E.A 555**). The standard of proof is beyond reasonable doubt (see **Kamesere Moses vs Uganda S.C.C.A 8/1997** (unreported).

The representation was Mr Wanamama Mics Isaiah, Senior State Attorney, as Counsel for the Prosecution while Ms Sarah Awelo represented all the accused person on a state brief.

With regard to charges of Murder contrary to sections 188 and 189 of **the Penal Code Act** the essential elements are:

i. There was a death
ii. The death was caused unlawfully
iii. With Malice aforethought
iv. The accused participated.

The prosecution bears the burden of proving all four elements to a standard beyond reasonable doubt.

i. There was a death

The defence does not dispute the death of the deceased.

PW 4, Rosemary Anek is the mother of the deceased. She is the one who reported to Kira Road Police Station that he was missing. She was then referred to the mortuary in Mulago where she found the body of the deceased.

PW 6, the investigating had earlier gone to Mulago hospital mortuary where he also saw the body of the deceased.

A post mortem was conducted and the report tendered as PE 2.

It is my finding that all the outlined evidence proves to a standard beyond reasonable doubt that Oponya Hope Mwa is dead.

ii. The death was caused unlawfully

The position of the law is that all homicides are presumed to be unlawful unless authorized by law or proved to have been accidental or excusable (see **Gusambizi s/o Wesonga [1948] 15 EACA 63)**. This finding is an inference to be drawn from the facts of a particular case.

A homicide is the killing of one human being by another.

I shall consider this element jointly with the next.

iii. With Malice aforethought

The post mortem shows injuries to the head. Blood flowed from the nose and the left cheek was swollen. The brain was also swollen. The deceased suffered fractures of the skull. The right hand of the deceased was swollen. The cause of death was the head injury and blunt force trauma.

PW 6 stated that he saw a big wound from the head and the limbs were broken.

It appears the head of the deceased was targeted and severely injured in the beating. It was those blows that led to death.

Malice aforethought is provided for in S. 191 of **the Penal Code Act** and is deemed to be proved by evidence showing a positive intention, by the accused, to cause death although such knowledge is accompanied by an indifference whether death is caused or not.

It is also true that malice aforethought is not easily proved by direct evidence, as intention resides in the mind. For that reason, the High Court and superior courts have held in a long line of decisions, that malice aforethought can be inferred

from: the type of weapon used; the nature of the injuries inflicted; the part of the body affected or targeted; and the conduct of the perpetrator before and after the attack. (See **Amis Katalikawe & 2 Ors V Ug SCCA 17/94** Unreported).

I have considered that the injuries seen in the post-mortem which show the most vulnerable part of the human body, that is the head was targeted for bludgeoning.

The nature of the injury rules out accident. There can be no lawful excuse for such an act.

In such circumstances this court finds and holds that this was an intentional homicide.

For the above reasons I find that the second and third elements of the offence have been proved.

iv) Whether the accused person participated in the commission of the offence

The accused persons all pleaded not guilty to the commission of the offence. As stated the onus is on the prosecution, to prove to a standard beyond reasonable doubt that they participated in the commission of the murder of the deceased.

There are three aspects on which the prosecution case stands.

The first piece evidence is the phone. The Oponya's phone, a Techno, which was lost on the day he was beaten. It was later realized that the phone was on there was a different set of SIM cards in use.

PW 4 Detective Police Constable Rebecca Katisi was detailed to tracked the use of the deceased persons phone after his death. It was her testimony that she established the phone was in operation in the Naalya area while the person most frequently called was one Kenneth. She tracked down Kenneth and through him

the accused person who was found with the phone in his possession. He was arrested immediately.

It was stated that on arrest, Adakun told PW 4 that he had picked the phone near the gate about 180 meters from the scene of crime. The accused showed her the spot where he picked the phone.

It was also the evidence of Adakun in his defence that he had picked the phone during an early morning jog. That at the time he went to report to the LC 1 chairman but did not find him at home. Instead it was DW 2, the wife, who received A1. She confirms in her evidence to this court that indeed the accused came to her home looking for the chairman around that time.

In his evidence PW 6 testified that the accused told him that he had picked the phone and took him to the spot where he picked it. PW 6 inquired from the LC 1 chairman whether the accused came to report he had picked a phone but the LC I responded that he had did not. PW 6 does not appear to have interviewed the chairman's wife, to confirm A1's allegations. A1 had told PW 6 that it was the Chairman's wife that he spoke to.

The principle is that evidence of recent possession of stolen property if proved raises a very strong presumption of participation in the stealing, so that if there is no explanation of possession, the evidence is even stronger and more dependable than eye witness identification in a nocturnal event (See **Bogere Moses & Anor Vs Uganda S.C.C.A 1/1997**).

It was also observed by the Supreme Court in **Magidu Musisi vs Uganda SCCA 3 of 1998** that according to the particular circumstances, it is open to a court to hold that an unexplained possession of recently stolen articles is incompatible with innocence. On finding of possession of property recently stolen, in the absence of any reasonable explanation by the appellant to account for his possession, a presumption does arise that the appellant was either the thief or a

receiver. Everything must depend on the circumstances of each case. Factors such as the nature of the property stolen, whether it is of a kind that readily passes from hand to hand; and the trade to which the accused person belongs can all be taken into account (See ***Andrea Obonyo V R (1962) E.A. 542***)

In the instant case the accused is said to have given an explanation and even taken the officers who arrested him to the spot where he picked the phone. There were no circumstances raised to rebut the explanation that the phone was picked and a report made to the LC Chairman's wife. I also note that the accused maintained this explanation right from the moment of initial arrest up to his defence testimony here in Court.

The doctrine of recent possession is an extension of the principle of circumstantial evidence. Although very often circumstantial evidence is the best evidence it must always be narrowly examined because evidence of this kind may be fabricated to cause suspicion on another. Consequently, before inferring the guilt of an accused person from circumstantial evidence, it is necessary to ensure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Magidu Musisi** [supra]).

Generally, in a criminal case, for circumstantial evidence to sustain a conviction, the circumstantial evidence must point irresistibly to the guilt of the accused (**Mureeba Janet and Others** SCCA 13 of 2003).

In **R.Vs. Kipkering Arap Koske and Another** (1949) 16 EACA.135 and **Simon Musoke Vs. R.** (1958) EA 715 it was held that in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

In this case, the accused has offered an explanation for the possession of the phone. The prosecution has failed to completely rebut or negative that

explanation by showing that it is not possible that the accused could have picked the phone. For that reason, there is a plausible alternative explanation for his possession of the phone. Where there are multiple credible explanations for the facts presented as circumstantial evidence, such as happened here, then the certainty of a guilt is missing and a reasonable doubt has been established.

The next question is with regards to the admission allegedly made by Adakun Zadoki to PW 5 and PW 6 saying that committed the offence.

PW 5 was Detective Constable Bahati Abdul Basiti while PW 6 was Detective Sargent Ochom Denis.

It was the evidence of Bahati that on the 1st of October 2018, Sargent Ochom had told him that the A 1 had admitted committing the offence. Ochom asked Bahati to come and listen in on the admission. In cross examination however this police officer said he did not indicate this particular piece of information in his self-recorded police statement which he made during the inquiries in 2018. That statement was tendered in evidence as **DE 1.**

PW 6 on the other hand stated that the Adakun admitted arresting the deceased but not beating him. PW 6 in his evidence uses statements like 'we interviewed A1…' and 'he told us ...' meaning a group of persons were always present when interview was conducted. I agree with the submission of defence Counsel that Police interrogations cannot be a public affair.

There was no Police statement, either referred to or exhibited, capturing the alleged admission. The accused is alleged to have made a charge and caution statement but even that was not exhibited or relied on by the prosecution. But even if the statement had been admitted, the fact that it was elicited by a group of officers would make still make it inadmissible. All in all the court has nothing to make reference to.

Statements to police officers are regulated by a very strict regime of rules. This becomes even more stringent when there are admissions allegedly made. It is mandatory that such statements must be received by officers of the Rank of Assistant Inspector of Police and above. Secondly there should be proof that the circumstances under which the statement was extracted showed no violence, force, threat, inducement or promise made to the person making the statement (see Section 23 and 24 of **the Evidence Act**). These rules relate to confessions but are relevant here where it is said by the prosecution that A1 admitted committing the offence.

In his defence, Adakun told the court that he was told by PW 6 that everything would be well. This sounded like an inducement. The witness was no challenged on this aspect.

That aside, the statement on its own would still be of no benefit to the prosecution, because according to PW 6 the accused denied participating in the commission of the offence. This would probably explain why the Prosecution did not seek to tender any statement from A1.

The defence has submitted that the conduct of the accused is not that of a guilty person. That he was cooperative with the police right from the beginning. That he did not go into hiding but stayed at his home throughout, he openly used the phone until the date of his arrest, that he was cooperated with the police throughout the investigation phase.

In **Rex vs. Tubere s/o Ochen (1945) 12 EACA 63,** the East African Court of Appeal held that the conduct of an accused person before or after the offence in question might sometimes give an insight into whether he or she participated in the crime.

Needless to say such conduct must not be examined in isolation of the rest of the evidence on record. The court should be mindful to examine it in context.

Here although it is disputed by the prosecution, the accused has already stated that he picked the phone. He said in his defence testimony, that it would have been utterly irrational on his part to use the phone, if he knew that the owner had just been killed.

In my view the conduct of the accused does not impute guilt from the manner of his conduct before arrest.

I have carefully examined the evidence in respect of A1 bearing in mind that the prosecution bore the burden to prove the case to a standard beyond reasonable doubt. Having weighed the evidence on both sides in its totality, I find that the prosecution has not been able to discharged its burden to prove participation to a standard beyond reasonable doubt. The statement relied on was not tendered, nor did it amount to a confession, the evidence of recent possession of the phone did not point exclusively to the guilty of the accused and lastly his conduct did not point to a guilty mind.

A2, Munyalo Peter, chose to keep quiet in his defence.

The prosecution relies on a statement allegedly made by A1 to incriminate the A2 and A3. I have already found that the statement is of no help principally because it was never produced in Court. It is PW 5 and PW 6, the Police officers who arrested A2. They state it was A1 who told them about A2.

Apart from these two officers, there is no other evidence adduced implicating the A 2. On its own the evidence is worthless and cannot sustain charges against A2.

A3 made a charge and caution statement in which he denied committing the offence. As it stands there is no other evidence against him. therefore the only evidence the prosecution has against A 3 is his denial.

In result I find that the prosecution has not been able to prove the participation of all these accused persons to a standard beyond reasonable doubt.

In their joint opinion, both assessors advised this court to acquit all the accused persons.

In agreement with them I find **Adakun Zadoki**, **Munyalo Peter a.k.a Mulalo** and **Mutenza Nassar**, *not guilty* on the offence of Murder Contrary to Sections 188 and 189 of the PCA and are hereby *acquit* them.

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Michael Elubu

Judge

13.4.2023