

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO.  
CRIMINAL SESSION CASE NO. 68 OF 2000

UGANDA .....PROSECUTION

Versus

A1. OMAGOR STEVEN]

A2. ESTHER ONZIA ]..... ACCUSED

**BEFORE: HON. MR. TUSTICE V. A. R. RWAMISAZI—KAGABA**

**JUDGMENT**

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Omagor Stephen and Esther Onzia, who I shall refer to as accused No.1 (A1) and accused No.2 (A2) respectively in the rest of my judgment are jointly charged with Murder contrary to sections 188 and 189 of the Penal Code Act. The facts in support of the charge are that Omagor Stephen and Esther Onzia on about the 15th day of June 2001 at Nakivubo village, Kayunga District, murdered Kapulyaka Badru.

Both accused denied the charge and were represented by Simon Wankandya, while the prosecution was led by Mr. Ndamurani, a Senior State Attorney.

The prosecution called nine witnesses to prove its case. The accused lived in the premises of the second accused who was an absent landlady of the land and house occupied by the first accused.

The first accused lived in the same village as the deceased, ten metres apart. At about 8.00 p.m. on Friday 15/6/2001, the deceased, accompanied by his wife, Safina Amoding (Salaama) (DW6) and his son Ojongole, went to the house of Omagor to be treated for chest pains. Amoding and Ojongole went home leaving the deceased with the accused at the latter's house.

Next day, 16/6/2001, Amoding went to Omagor's house but was not at home and the doors to his house were shut. The dead body of Badru was discovered in the bush land of the second accused near the swamp. Near to the swamp were gardens owned by the first accused. The body was half-buried. It had cut wounds.

A report was made to Kitimbwa Police Post. D/C Otai Ameru (**PW5**) together with Cpl. Okidi (**PW8**) and Dr. Kiyingi (PW1) visited the scene of murder. Dr. Kiyingi examined the body of the deceased and put his findings on exhibit P1.

The two police officers (**PW5** and **PW8**) visited the shrine of accused No.1 and recovered from there a blood-stained panga and a soiled hoe, which were identified as being the property of the deceased. The accused was nowhere to be seen at his house.

The deceased had gone to Omagor's house with a panga (Exh. P.4) while the same Omagor had borrowed the hoe (exh P5) which he had been using, from the deceased. The hoe was bearing the same type of loamy soil as that found in the area where the deceased's body was found buried.

As a result of information from the radio broad cast, D/C Godfrey Omoro (PW9) proceeded to Kitoko village which was some thirty miles from Kitimbwa, where the murder had taken place. The bush was surrounded and Omagor arrested after trying unsuccessfully to run away. D/C Omoro arrested A1 and took him to Ntimba Police Post and later to Kayunga Police Station.

D/C Omoro proceeded to Bukungu Island, some forty miles from Kikota Island. He found A2 hiding in one of the huts at the landing site. He arrested her and brought her to Kayugna Police Station.

The panga and hoe which were recovered from the hut of A1 were later exhibited in court by P.C. Ngeyambe (Pw7) as exhibits P4 and P5 respectively.

This being a criminal case, the burden of proving every ingredient of the offence of murder, for which the two accused are indicted, rests on the prosecution.

The prosecution must discharge that legal burden by proving the ingredients of murder beyond reasonable doubt. The accused has no burden to prove his innocence. If there is any reasonable doubt created by the evidence on record, that doubt must be resolved in favour of the accused.

I explained to the assessors what the burden of proof, the test to be applied to the prosecution case and the reasonable doubt mean in law and fact. In the same vein, I also warn myself of the three legal requirements.

*See* : (1) *Woolmington vs. the D.P.P. (1935) A. C 462*

(2) *R vs. Israel Epuku s/o Achietu (1934) IRA CA 166*

(3) *Okethi Okale and 2 others vs. Uganda (1965) EA 555*

I also explained to the assessors the meaning of the doctrine of Common Intention under the provisions of sections 19 and 20 the Penal Code Act. This doctrine becomes relevant, when in particular; the court has to consider role played by the second accused in this case. For the doctrine of Common Intention.

See the cases of:

(1) *Solomon Mugai & others vs. Republic (1965) EA 123*

(2) *Dracaku vs. R. (1958) EA 121*

(3) *Wanjero Wamiero vs. R (1955) 22EACA 521*

(4) *Yusufu Sebuguzi vs. Uganda — Criminal Appeal 6/1989.*

I also explained to the assessors as I direct myself on the law and meaning of circumstantial evidence upon which this case mainly rests. As it was pointed out in *R vs. Taylor Wear and Donovan (1928) 21 Criminal Appeal Reports 20 quoted also in Tumuheirwe vs. Uganda (1967) E.A 328.*

“Circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial”.

However, circumstantial evidence must be approached with caution because evidence of this kind may be fabricated as to cause suspicion on another person. It is necessary, before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other existing circumstances which would weaken or destroy the inference.

*Teper vs. R. [1952] A. C. 489*

Where the circumstantial evidence is inconsistent with innocence of an accused person and cannot be explained upon any other reasonable hypothesis than that of guilt, then the accused is to be convicted.

*See: (1) Simon Musoke vs. R (1958) EA 715*

(2) *Charles Kayemba vs. Uganda (1985) HCB 0 (CA)*

(3) *Waibi vs. Uganda (1978) HCB 218 (CA.)*

(4) *Uganda vs. Richard Baguma (1988-90) HCB 74.*

The accused is indicted for murder where the prosecution must prove beyond reasonable doubt, that:

a) Badru Kapulyaka is dead

b) He was killed through an unlawful act or omission.

c) The person who inflicted the injuries that caused his death must have acted with malice aforethought.

d) It was the accused in the indictment who, either alone or with others sharing a common intention, that killed the deceased.

*See: Uganda vs. Kassim Obura & another (1981) HCB 9.*

There is no doubt that Badru Kapulyaka is dead. His body was viewed by his wife Safina Amoding (**PW6**) SPC Wegulo Mohamed (PW3) Yusufu Ndogole (PW4) and Cpl. Okudi (PW8). Finally on this issue, Dr. Kiyingi (PW1) conducted the postmortem examination on the body of the deceased as his report, exhibit P1, shows.

Every homicide is unlawful unless authorised by law. There is no evidence to suggest that the killers of the deceased were executing a lawful order. Hence their acts are unlawful.

*See: (1) Uganda vs. Okello (1992-3) HCB 68.*

(2) *Uganda vs. Kulabako Night Jennifer – C.S.C 61/1991*

Mens rea in murder cases like other cases is a state of mind with which the accused does an act or makes the omission constituting the offence. But court can deduce the required *mens rea* from the surrounding circumstances, such as:

a) the type and gravity of the injuries inflicted on the victim.

b) the weapon used to inflict the injuries.

c) the part of the body on which the injuries are inflicted.

d) the conduct of the accused before and after inflicting those injuries.

*See: (1) John Ochieng (1992-3) HCB 80*

(2) *R. vs. Tubere s/o Ochen (1945)12 EACA 63*

According to the eye witness who viewed the body of the deceased, the deceased's body had severe cut wounds which could be seen though the body was beginning to peel off and was partly buried. The cuts were inflicted on the vulnerable parts of the body, namely the neck and scalp (head). These observations are confirmed by Dr. Kiyingi in his report - exh. P.1. Although the panga which was blood-stained was not sent to the Government Chemist for blood analysis, it is more likely that it was the panga (Exh. P4) which the killer used to inflict the injuries found on the deceased. It follows from the above, that whoever inflicted the injuries on the deceased and later buried him, must have done all those with malice aforethought as defined in section 191 of the Penal Code Act.

The last issue is who killed the deceased. There is unrebutted evidence from the wife of the deceased Safina Amoding (PW6) that:

- a) the deceased remained at A1's house when she and her son Ojongole returned to their house.
- b) that the deceased had gone with his panga (exh. P4) to A1's house.
- c) the hoe Exh. P5 which was found covered with the same soil and as that where the body of the deceased was found buried belonged to the deceased though that soil was not subjected to Government analyst or soil expert for examination.
- d) that the hoe — exh. P5 had been lent to A1 for use as a neighbour.
- e) the last person to be seen with the deceased alive was A1 and in A1's house.
- f) that the first accused vanished from his house in the night after he was left with the deceased in his house/shrine and was later arrested at Kikota, thirty miles from Kitimbwa by D/C Omoro (PW9) on the 21/6/2001.
- g) that D/C Omoro found A1 hiding in the bush. A1 tried to run away but he surrendered because he was overwhelmed by the number of people who had come to smoke him out of the bush.
- h) both the panga (blood-stained) and the hoe were recovered from A1's shrine by Cpl. Okidi **(PW8)**
- i) A1, had, six months prior to the death of the deceased told the deceased and Safina Amoding that the second accused had approached him with a request that he kills the deceased, but according to A1, (Omagor) he had refused to carry out the deadly mission because Kapulyake was his friend.

It was the evidence of Amoding (PW6) that the boundary dispute between the deceased and the second accused had taken place a long time before Kapulyaka met his death and that the dispute had been settled amicably. The same views and sentiments were expressed by the second accused who stated the boundary issue between her and the deceased had long been settled and the two were on the best of terms. To illustrate their good relationship, the second accused told court that she assisted the deceased with timber when the later was constructing his house.

It was also the testimony of Amoding (PW6) that about six months before the death of the deceased, the first accused had come to the house of Kapulyaka and told them that the second accused had asked him to kill the deceased. The first accused told the Kapulyaka that he had turned down Onzia's request or plan because Kapulyaka was his friend.

The questions that arise from the above events are whether:-

- a) whether the first accused killed the deceased?
- b) whether the first accused killed the deceased as a hired killer by the second accused to kill the deceased?
- c) whether the killing was in revenge for Kapulyaka's trespass to Onzia's land?
- d) whether the statements of the first accused were genuinely made or they were made to save his face and give a false sense of security to the Kapulyaka family?

Under section **8(3)** of the Penal Code, it is provided:

“(3) unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility”

But the presence of a motive can be relevant and strong circumstantial evidence tending to prove that an accused did or did not do a certain act for which he is charged.

Sections 9, 10 and 13 of the Evidence Act discuss the situations where evidence before and after the event becomes relevant to determine the occurrence of a subsequent event which may be in issue. Such facts may include the motive for the killing or the arrangement (conspiracy) of the plotters to the killing.

*See: (1) j B. Stenhouse vs. Uganda (1971)2 ULR. 14*

*(2) Charles Ben on Bitwire vs. Uganda (1986) HCB.5*

In order to decide that Kapulyaka was killed for a motive, it is necessary to prove that the first and second accused were co-conspirators working for a common purpose of killing Kapulyaka.

Conspiracy is defined as an agreement between two or more persons to commit a crime. This concept is closely related to the doctrine of Common Intention. An agreement to conspire may be deduced from any acts with the presumption of a Common plan. All persons to this plan, at any stage, become responsible for the acts of fellow conspirators.

*See: (1) R. vs. Gokaldas Kanyi Karia & anor (1964) J6EACA. 116*

*(2) Stanley Musinga & others vs. R. (1951) 18 EA CA 211.*

What one may deduce from the evidence of Amoding and Onzia (A2) is that there was a boundary dispute between the land of Onzia and Kapulyaka. This matter appeared settled on the surface but remained smoldering. It was a dormant volcano which erupted on the 15/6/2001 when the Kapulyaka's had forgotten all about the dispute.

As to the swearing that he would not kill Kapulyaka as a friend when he was asked to do so by Onzia, the first accused was simply wearing a false mask of love and friendship to blackmail and deceive the Kapulyaka family that he was a genuine friend. In fact, Omagor was a wolf in sheep's clothing during his dealings with the innocent Kapulyaka family. He was a Judas Iscariot who hid intentions until the day he saw it opportune to betray his master (Jesus).

As to whether the conspiracy to kill still existed between the first and second accused, I have found the connecting evidence very scanty.

The second accused had relocated to Galilaya, far away, from Nakivubo where she left the first accused in occupation of her land. There was no evidence that the two accused were seen together, anywhere, planning or talking before the deceased was killed.

This sequence of events, considered together with the evidence of Amoding and the second accused, leave me in doubt whether Onzia participated directly indirectly or remotely in the killing of the deceased.

The evidence of any conspiracy is weakened by the evidence of Amoding and the second accused.

However as observed above, the prosecution need not prove the motive for the commission of the offence unless the law makes it an essential component for the commission of that offence.

In this particular instance, the requisite ingredients for the offence of murder do not include motive, whether the killing of Kapulyaka was for the land boundary motive or not, the prosecution can succeed without establishing a motive for killing, though the existence of such motive is very strong circumstantial evidence that may implicate the accused in the death of the deceased.

On the basis of the facts and circumstances I have listed at pages 9 to 11 ((a)-(I)), I find the first accused is directly and circumstantially implicated in the killing of the deceased. His running from his home to a place thirty miles away and hiding in the bush are clear pointers to the guilt of the first accused.

As was observed by the Supreme Court in *Uganda vs. Simbwa - Criminal Appeal No. 37/1995*, the disappearance of the accused from his home and village soon after the incident was corroboration of the evidence of Amoding (PW6) that the deceased was last person seen with the accused and at his house.

The sum total of all the direct and circumstantial evidence is that the first accused cut and killed the deceased with a panga and later buried him from where his body was exhumed.

In his defence the first and second accused put up the defence of alibi, thereby denying the charge. Where an accused person put up the defence of alibi, it is the prosecution's legal duty to negative or discharge that burden. This may be before or after the accused has given evidence. It is however preferable that such evidence of rebuttal should be given before the accused gives defence.

If the alibi is not negated or a reasonable doubt is left in the mind of the court, that doubt must be resolved in favour of the accused.

*See: (1) Mohamed Mukasa & another vs. Uganda - Criminal Appeal 27/1 995 (S. C)*

*(2) Abdu Ngobi vs. Uganda - Criminal Appeal No. 10/91 (S. C)*



(3.) *R. vs. Chemulon Were Olango (1937) 4 EACA 46.*

I must point out that the prosecution has not negated the alibi of the second accused. However there is both direct and circumstantial evidence which placed the first accused at the scene thereby negating his alibi.

The evidence of Amoding (PW6) who left the deceased with Omagor for the last time and found the accused's house abandoned, that of Wegulo, Ndogole, and the Police officers who exhumed the deceased from the accused's garden, that of D/C Otai and Cpl. Okidi who recovered the blood-stained panga and soiled hoe from the accused's shrine (hut) and that D/C Omoro who arrested him from a bush thirty miles from the accused's home after he tried to run away, all leave no room for doubt that the accused No.1 was at the scene of crime and did kill the deceased. I therefore reject his alibi as lies.

After considering all the evidence for the prosecution and defence, I find the prosecution has proved the guilt of the first accused for the offence of murder.

I have addressed myself to any defence such as provocation, insanity, intoxication, defence of property or person and found none is raised or available, from the evidence, for the benefit of the accused.

The prosecution has, however, failed to prove the guilt of the second accused for the offence of murder or any minor and cognate offence thereto. In agreement with the opinions of both assessors, I acquit the second accused, Esther Onzia for murder and she is set free forthwith unless liable to be held further for some other lawful excuse.

As I have said above, the prosecution has proved the charge of murder against the first accused beyond reasonable doubt. In agreement with the opinions of both assessors, I find the first accused, Philip Omagor, guilty of the offence of Murder. The said Philip Omagor is convicted as indicted under sections **188** and **189** of the Penal Code Act.

**V. A. R. Rwamisazi-Kagaba**

**Judge**

**5/1/2001**

