THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT TORORO

CRIMINAL SESSION CASE NO.33 OF 2000

UGANDA…… PROSECUTOR

VERSUS

OCHWO PATRICK……... ACCUSED

BEFORE THE RONOURABLE MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

The accused Ochwo Patrick was indicted for murder contrary to sections 183 and 184 of the Penal Code Act. It was alleged in the particulars of the indictment that the accused and another not before court on the night of 30/1/1999, at Puti B zone, Poyem parish, Iyolwa sub county, Tororo district, murdered Onderi Ofwono Appolo.

The accused pleaded not guilty to the charge. The burden to prove a charge against an accused rests on the prosecution. The burden is on the prosecution to prove each and every ingredient of the offence beyond reasonable doubt. This burden does not shift during the trial, except in a few statutory offences, of which murder is not one. Woolmington vs. The DPP [1935] AC 465, Ojepan Ignatius vs. Uganda (SC) Cr. App. No. 25 of 1995, (unreported). The accused should not be convicted on the weakness of his defence, but on the strength of the prosecution case. Oloya v Uganda [1977] HCB 4.

In the attempt to prove the charge against the accused, the prosecution produced a total of 7 witnesses. The accused gave testimony on oath. He called one witness. It was the prosecution case that the deceased Onderi Ofwono Appolo, together with two friends, Omondo Richard PW5, and Ochieng Anthony PW7, went to Iyolwa for a dance. The dance apparently ended prematurely and Ochieg Anthony went to get a girl for his friend Onderi, the deceased. He met the accused who was with other people. The deceased set upon him and assaulted him seriously.

During this process, the deceased arrived, and the accused attacked him also. Ochieng ran and hid a short distance away.

He watched as the accused rained blows on the deceased's head and stomach. The deceased fell down and the accused stepped on his chest. He then moved off triumphantly. The other friend, Omondo Richard who had remained behind realised that his colleagues were taking long in returning. He followed them and found Onderi on the ground where he had collapsed. Onderi complained of pains in the chest and abdomen. He told Omondo Richard that he had been assaulted by "Patti". Omondo carried both Onderi and Ochieng on his bicycle back to their respective homes. He left Onderi with the sister, Jessica Nyadoi.

Jessica Nyadoi nursed her brother who complained to her that he was suffering from chest and stomach pains after he was assaulted by Patrick. The assault took place at about 9.30 PM on Saturday night. Onderi's condition deteriorated on Sunday, and he was given some further treatment at home by his friend Omondo Richard. He did not recover, and on Monday evening, Onderi died. Both Omondo Richard and Ochieng knew the accused prior to this incident. They had been together in the dance earlier that night. The accused was arrested on 1/2/1999, by Omara Godfrey, the local administration policeman.

The accused, in his sworn testimony denied the offence. He set up an alibi. He told court that he was not at Iyolwa on the night in question. He never moved away from his home that night of 30/1/1999. He went about his routine chores all that day. These included digging and grazing cattle. He said that he did not know the deceased or any of the witnesses in this case. He was a married man who did not, for that reason go for dances. He had a child with his wife, though he had difficulties remembering that her name was Sabina. He had never been a "bodaboda" (hired) bicycle rider before.

Agulansi Apoya, the mother of the accused testified that her son did not leave1their home at all that day of 30/1/1999. He remained at home and they listened to the radio news together. They separated at about 9.00pm. And each went to sleep in their respective houses. She confirmed that the accused had a wife but that they had no child. Like the son, she also had difficulties remembering the name of her daughter in law.

In a charge for murder, the prosecution must prove beyond reasonable doubt that;

1) death occurred;
2) the death was unlawful;
3) the death was caused by the accused; and
4) there was malice aforethought

The defence did not contest the ingredient of the death of the deceased. That ingredient was conceded. I was satisfied from the evidence of Dr. Opiyo Lawrence who carried out the post mortem examination of the deceased, Nyadoi Jessica, the sister of the deceased, Omondo Richard who was around when the deceased was buried, that the deceased is indeed dead. That ingredient was proved by the prosecution beyond reasonable doubt.

The second ingredient in the offence of murder, as I have outlined above, that the death was unlawful, was also conceded by the defence. The position of the law is well settled by the East African Court of Appeal decision in the case of Gusambizi Wesonga And Others vs. R. (1948) 15 EACA 63. It was there held that "a homicide unless accidental, will always be unlawful except if it is committed in circumstances which make it excusable. The medical examination report by Dr. Opiyo which was admitted in evidence stated that the cause of death was auto chemical poisoning due to infiltration of the bile into the ruptured tissue of the gall bladder and internal bleeding due to the lacerated liver as a result of the trauma on the chest. It was Doctor's opinion that the likely cause of this was several blows which appeared to have been used on the abdomen and chest, of the deceased.

There was no evidence before me to suggest that the death of Onderi was accidental or excusable and certainly not lawful. I therefore hold that the prosecution proved that ingredient beyond reasonable doubt.

The next issue for consideration is whether death was caused with participation of the accused person. The evidence in this regard revolved around a single identifying witness Ochieng Anthony, PW7 and statements made by the accused to various persons prior to his death. PW7 told court that he set off from the dance at which he, the deceased and Omondo Richard had gone to look for one Ngeri, a girlfriend of the deceased. While he was on that mission he met

the accused in company of other people. Re knew the accused as a bodaboda bicycle hire rider. He had seen him in the dance earlier that evening. The time now was about 8. 30 p.m. and there was bright moonlight. The accused set upon him. While this was going on, the deceased arrived and intervened. The accused turned on him and beat him up soundly with blows on the chest. He stepped on the deceased as he lay down. The accused then walked off satisfied with a job well done. All along Ochieng was cowering a short distance away watching after he had already received his share of the beating.

Ochieng was the only eye witness to the assault. The law regarding identification by a single witness is that while identification of an accused person can be proved by the testimony of a single witness the judge and the assessors must warn themselves to exercise great care in evaluating the evidence of such witness. This is more so especially where conditions which favour correct identification are difficult. Court must consider the circumstances which make correct identification favourable Such circumstances include the presence and nature of light, whether the accused person was known to the witness before the incident or not, the length of time and opportunity which the witness had to see the accused, and the distance between them. Uganda v George Wilson Simbwa (SC) Cr. App. No. 37 of 1995, Abdalla Nabulere & Others vs Uganda [1979] HCB 77. The reason for such caution being that a witness or any number of them may be truthful but yet be mistaken in their identifications. The true test, according to the cases above being whether the evidence can be accepted as free from the possibility of error.

During the summing up I warned the assessors as I warned myself to take great caution when considering the testimony of a single identifying witness. The need for such caution is even greater where the identification is made when conditions for a correct identification are difficult. In this case PW7 was the sole identifying witness. He knew the accused prior to the incident. He had seen him that evening in the dance which both attended. They were in close proximity as blows were exchanged and he took some considerable time watching as the accused hammered the deceased with blows. The night was bright with moonlight shining. Those were the conditions under which PW7 made the identification.

Mr. Kakungulu learned counsel for the accused invited me to find that those Conditions were not favourable for a correct and error free identification The Supreme Court in the case of Yowana

Sserunkuma vs Uganda (SC), Cr. App. No. 8 of 1989, (unreported), opined that the evidence of a single identifying witness at night may be accepted, but only after the most careful scrutiny, and then what is wanted is other evidence to confirm that the identification is not mistaken. The court said that a careful scrutiny is not the same thing as an elaborate justification accepting dubious evidence. See also Roria vs. Republic [1967] EA. 583. I have described above the conditions under which PW7 made the identification. They were favourable for a correct and error free identification.

Omondo Richard told court that when he arrived at the scene he found the deceased lying on the ground. He earned the deceased together with Ochieng who had also been beaten up on his bicycle. The deceased told him that he was assaulted by the accused. When the deceased was taken to his home he told his Sister Jessica Nyadoi that he had been assaulted by Patrick meaning the accused herein. Counsel Kakungulu for the defence attacked these statements and submitted that they did not amount to dying declarations. He argued that if this was accepted by court it left the evidence of PW7 the sole identifying witness uncorroborated thus entitling the accused to an acquittal.

A dying declaration by a person who is dead as to the cause of his death is admissible in evidence under section 30(a) of the Evidence Act. In the case of George Wilson Simbwa (supra) the Supreme Court pronounced the principles upon which a dying declaration is admissible. it held as follows, “The general principle on which the evidence of dying declarations is admitted is that they are declarations made in extremity when the party is at the point of death, and when every hope of this World has gone when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful, which is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered by a court of justice.”

The result of the principle is that there must be settled hopeless expectation of eminent death. That means that the declarant must have abandoned all hope of living.

It must be shown for the prosecution that the deceased, when he made the statement was under the impression that death was impending not merely that he had received an injury from which

death must ensue, but that he then believed that he was at the point of death. Archbold Criminal Pleading Evidence and Practice l3th Ed, Paragraph 1294.

In the case before me the deceased Onderi told his friend Omondo Richard that he had been assaulted by Patti meaning the accused only minutes after the assault took place. Onderi knew the accused before. They had been together in a dance earlier that evening. The assault took place between 8.30 and 900 p.m. on Saturday evening on the 30/1/1999. Onderi was taken to his home. He stayed in his house with his sister Jessica Nyadoi. According to her he was complaining of chest and abdominal pains. He spent the night at home. The following morning on Sunday his friend Omondo Richard came to check on him and found that his condition had not improved. He went and bought medicine for him which he administered. Onderi remained at home, he never went to the clinic until Monday evening when his condition deteriorated to such an extent that he passed away. The question then to be asked is whether when the accused made the statement about the person who attacked him in the evening of 30/1/1999, there was a settled hopeless expectation of eminent death. In other words, had the deceased abandoned all hope of living. He was carried on a bicycle from the scene of assault. He was taken not to the hospital but home. He remained at home. He was given medication the following morning. It was not until the evening of a yet other day that he passed away. From the principles enunciated in the authorities cited above, I am not satisfied that the statement of the deceased to Omondo Richard and Jessica Nyadoi amounted to a dying declaration. It was stated in the case of Simbwa(supra), that the fact that the deceased told different persons that the accused was the assailant is evidence of the consistency of his belief that such was the case; it no guarantee of accuracy.

From what I have decided above I agree with counsel for the defence that there was no dying declaration. That brings back the issue whether the testimony of PW7 was corroborated. The Dr.'s report was to the effect that the deceased died from blows inflicted on him in the chest and stomach. This was consistent with the testimony of Ochieng. The Dr.'s testimony would offer corroboration to the prosecution evidence. I said that I found the testimony of Ochieng to be truthful and I accept it.

I therefore find that the prosecution proved beyond reasonable doubt the ingredient of the participation of the accused in the unlawful death of Onderi.

The last ingredient is that the death was caused with malice aforethought. This is a state of mind which is hardly ever proved by direct evidence. The court has set down the circumstances which ought to be considered before deciding whether or not malice aforethought has been made out. Tubere vs R (1945) 12 EACA 63. The court must consider the type of weapon used, the nature of the injuries inflicted, the part of the body affected; whether vulnerable or not, and the conduct of the accused before, during, and after the attack. Uganda vs. Turwomwe (1978) HCB 182.

The accused in this case attacked Ochieng PW7 at first. The deceased came and intervened. He was then also attacked. The deceased and Ochieng were following up a girl. This was a girlfriend of the deceased, according to Ochieng. The deceased was attacked as he was following his friend PW7, who had gone to collect his girlfriend for him. The attack was using bare arms. The blows were inflicted on the head, chest, and stomach. This would tend to show random hitting. Whatever was the cause of the fight, it comes out that this was not a planned fight. The people who were with the deceased did not join in the attack. This was a scuffle in which the accused appears to have got the better of the situation. A death resulted there from. I am not satisfied that malice aforethought was made out from the evidence. On that score the prosecution failed to prove beyond reasonable doubt that the death was caused with malice aforethought.

The defence consisted of sworn testimony of the accused. He denied the offence. He set up an alibi. He told court that he was at home all that day. He did not go anywhere and certainly not to the dance, and not anywhere near Puti, where the offence was allegedly committed. His mother testified on his behalf. She more or less confirmed what he said, with the exception that while the accused said that he had a child with his wife Sabina, the mother categorically denied the existence of such a child

In the case of Uganda vs George Wilson Simbwa Cr. App. No. 37 of 1995, (unreported), it was held that the court must examine both the prosecution evidence and the defence evidence before coming to a decision. Prosecution evidence ought not to be examined in isolation of the defence evidence. The accused, when he sets up an alibi as a defence, he or she does not thereby assume any responsibility of proving the alibi. The prosecution is under a duty to negative the alibi by evidence. Kibale Ishma vs Uganda (supra). The prosecution must produce evidence which places the accused squarely at the scene of crime. In Bogere Moses & another vs. Uganda Cr. App No 1

of 1997 (SU) (unreported) the court gave what amounts to putting the accused at the scene of crime. It held that this “must mean 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, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable.”

The accused stated that he was at home with his mother and his wife, Sabina. He said that he had a child with that wife. His witness, his mother told court that the accused was at home with her and with accused’s wife Sabina. She denied that Sabina had a child with her son, the accused. I found this a serious inconsistency in the defence case. It was inconceivable that the mother would not know of the existence of her own grandchild from her daughter in law who was staying with her son in a house which was in the same compound as her own. This was an obvious lie which seriously undermined the credibility of the defence evidence. Such an obvious lie was inconsistent with the defence evidence to show that the accused was at home on the material day, and not at the scene of crime as alleged by the prosecution. The accused denied that he was a bodaboda bicycle hire man.

The prosecution evidence was from the testimony of Ochieng. He stated that he was following up on the girlfriend of the accused. He was attacked by the accused. The deceased came following him and he intervened. The accused attacked him also. Ochieng escaped and hid nearby and watched as accused continued pummeling away at the deceased, with blows on the head and stomach. The deceased fell down and accused stepped on his chest. All this happened as Ochieng watched. He knew the accused as a bodaboda bicycle hire man. They had been together in the dance earlier that evening. The accused attacked him first and hit him with blows before the deceased arrived at the scene which gave Ochieng the chance to escape, as accused’s attention turned on the deceased. Omondo arrived at the scene soon after the fight, and found the

deceased on the ground where he had fallen. He stated that he knew the accused prior to this incident as a bodaboda bicycle hire man.

I had a chance to observe the witnesses as they gave their testimonies. Ochieng was consistent throughout even under the understandably intense cross examination. I found him to be an honest and truthful witness. His identification of the accused was made in circumstances which favoured a correct and error free identification I accept his evidence even in the absence of corroboration. I however found further corroboration in the lies of the defence evidence. I was not impressed by the defence witnesses. The mother, like the son, had difficulties remembering the name of their relative Sabina, daughter in law and wife respectively. They were not truthful witnesses. I found it hard to accept their evidence, and I reject it.

In view of the above analysis of the evidence of both the prosecution and the defence, I found the accused's alibi to have been broken. The prosecution evidence squarely placed the accused at the scene of crime. I rejected the accused's alibi.

I did not find inconsistencies in the prosecution case which went to the root of the case, and I accordingly ignored them. The gentlemen assessors in their individual opinions, advised me to find that the ingredient of malice aforethought had not been proved beyond reasonable doubt by the prosecution and that I should acquit the accused of the charge of murder, but convict him of the offence of manslaughter. For the reasons I have given above, I have no reasons to differ from their opinion.

I therefore find the accused not guilty of the offence of murder contrary to sections 183 and 184 of the Penal Code Act, and I acquit him of that charge. I find him guilty of the offence of manslaughter contrary to section 185 of the Penal Code Act., and convict him accordingly.

RUGADYA ATWOKI

JUDGE

20/03/01