THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

CRIMINAL SESSION NO.0016 OF 2006

UGANDA ::PROSECUTION

=VERSUS=

AI. MANUELA AWACANGO ::::::::::::::::::::::::::::::::::::ACCUSED

AII NGAMITA GRACE

BEFORE:

HON. JUSTICE AUGUSTUS KANIA

JUDGMENT

Manuela Owachango and Ngamita Grace the accused who are herein under simply referred to as Al and A2 respectively in this Judgment are jointly indicted on one count of murder c/s 188 and 189 of the Penal Code Act. The particulars of the offence are that Al and A2 and others still at large on the 3l8t day of December 2002 at Oyeko village, Tango Kero Sub County, Okoro County in the Nebbi District murdered Oucha George.

Both Al and A2 denied the offence and pleaded not guilty to the offence. In our criminal justice system the onus of proving the guilt of the accused remains with the prosecution throughout the trial and it never shifts on to the accused to establish his innocence to secure the conviction of the accused the prosecution must prove the guilt of the accused beyond reasonable doubt. If at the end of the case there is a doubt as to the guilt or innocence of the accused such doubt must be resolved in favour of the accused leading to his/her acquittal. See **Woolmington vs. DPP [1935]AC 462.**

In proving the guilt of the accused beyond reasonable doubt the prosecution has to prove each and every essential ingredient of the offence with which the accused person has been charged. If one or any of the said ingredients is not proved the no conviction

can be secured. The essential ingredients of the offence of murder the prosecution must prove beyond reasonable doubt are the following;-

1. That the deceased is dead
2. That the death of the deceased was unlawfully caused.
3. That the death was caused with malice afore thought.
4. That the accused participated in causing the said death.

Concerning the fact of the death of the deceased there is the evidence of PWl Dr. Onzubo Paul on the 1st January 2003 he performed a postmortem examination on the body of the deceased which was identified to him by Chombe Rufino. PWI Dr. Onzubo Paul compiled a post mortem report in respect of the deceased comprised on P.F. 48 b which was tendered as an exhibit for the prosecution and marked exhibit P .1. still on the fact of the death of the deceased, his son Paul Onega George and his daughter in law PW3 Jerose Berocan testified to the deceased having been killed on their compound and buried. PW4 No. 23712 DIC Opar malo the Police officer who visited the scene gave evidence that he saw the body of the deceased in the compound of PW2 Onega George and PW3 Jerose Bercan helped to take it to Nyapea Hospital for the post mortem and returned it to the relatives for burial. Apart from the testimony of the above witnesses which was not challenged by the defence, Al and A2 in their unsworn statements refer to the deceased as he deceased, meaning they acknowledge the deceased is indeed dead. In view of this undisputed evidence of the death of the deceased, I find that the prosecution has proved beyond reasonable doubt that the deceased is dead.

With regard to the second ingredient which is that the death of the deceased was unlawfully caused there is a legal presumption that every homicide is unlawful unless it is accidental or justifiable in law.
See Busambizi s/o Wesonga = vs. = R [1948] 12 EACA 65 whether a homicide is unlawful or justifiable is decided from the circumstances under which the death is caused.

PW3 Jerose Bercan testified that a mob chased the deceased and he took refuge in her house but when one person from the mob set the house on fire, the deceased came out and collapsed on the compound. It was when there that one Ocir cut the deceased twice

on the neck with a panga. She also testified that another person Ogeny used a club and to beat the deceased in the chest and stomach while the rest of the mob stoned the deceased.

PWI Dr Onzubo who performed the post mortem found the following injuries on the body of the deceased:-

(a) A deep transverse anterior cervical cut wound about 6 cm long with severing of the left jugular and carotid vessels.

(b) Supra - orbital (frontal) deep cut wound with fracture of the skull and oozing of brain substance.

(c) Cut wound 4 CM long in the left deltoid region. He also concluded that the death of the deceased was due to hypovolaenic shock due to injury of the left carolid artery

From the evidence of the eye witness PW3 Jerose Bercan of the attack on the deceased it is clear that fatal wounds from which the deceased died were inflicted during the said attack. The conduct of the mob and their brutal attack on the deceased was neither accidental on justifiable. It was premeditated and Criminal and therefore unlawful. The death of the deceased was therefore caused unlawfully. The prosecution has proved this ingredient beyond reasonable doubt.

This now takes me to the third ingredient of the offence of murder which is that the death of the deceased was caused with malice aforethought. Malice aforethought as defined in Section 191 of the Penal Code Act is the state of mind of the accused. Because it is mental disposition malice aforethought is not capable of being proved by direct evidence. It can only be inferred or gathered from the circumstances surrounding the commission of the offence or the causing of the death. Factors used by the Courts to infer the presence of malice aforethought include the following;-

(i) The weapons used.

(ii) The nature of the injuries inflicted on the victim.

(iii) The parts of the body on which the injuries are inflicted.

If the weapons used to inflict the injuries from which the deceased died are lethal or deadly weapons, the injuries are fatal or life threatening and inflicted on vital or vulnerable parts of the body malice afore thought will readily be inferred.

In the instant case the evidence given by PW3 Jerose Bercan is that one of the assailants of the deceased cut him on the face twice and on the neck twice with a panga and that another repeatedly beat the deceased on the chest and stomach with a club while the rest of the mob stoned the deceased. A panga being a weapon made or adapted for cutting is a deadly weapon within the context of Section 286(3) of the Penal Code Act. A club also falls with the same definition in that it was in this case used for offensive purposes and in a manner it was likely to cause death. So is the case with stones.

Again with regard to the nature of injuries PWI Dr, Onzubo Paul that the deceased had sustained a deep transverse anterior cervical cut wound about 6cms long which severed the left jugular and carolid vessels. He also found a supra - orbital deep cut wound with a fracture of the skull with oozing brain substances. Besides PWI Dr. Onzubo also found a 4 cm long cut around in the left deltoid region. These were very life there threatening injuries which were fatal as they resulted m the hypovolaenic shock from which the deceased died.

The injuries were concentrated around the head and neck region from the injuries on the head the deceased sustained a fracture of the skull as a result of which brain matter oozed out. As a result of the injuries in the neck region the jugular and the carolid vessels were severed. These are both very vital and vulnerable parts of the human body. The brain is the centre of all activities of the body. By fracturing the skull and injuring the brain the life of the deceased was destroyed. The neck is equally vital and more so the blood vessels which were severed whose function is to circulate blood from the heard to the brain. The injuries therefore affected very vital parts of the body.

In the result, because the assailants of the deceased used lethal and deadly weapons to inflict life threatening injuries on delicate and vulnerable parts of the body, malice aforethought easily flows, I find that the prosecution has proved beyond reasonable doubt that the death of the deceased was caused with malice aforethought.

I now turn my attention to the participation of the A I and A2 in causing the death of the deceased.

Al and A2 are implicated in the commission of the offence by the evidence of the sole identifying witness PW3 Jerose Bercan.

Her evidence which tends to implicate Al is that when the crowd that was chasing the deceased stormed her home Al was among them. When the deceased came out of her house where he had taken refuge, because the said house had been set on fire and collapsed on the compound, it was Al who handed a Panga to one Ocir which the latter used to cut the deceased on the face and neck. It is also the evidence ofPW3 Jerose Bercan that she saw Al among the crowd pelting the deceased with stones.

The evidence implicating A2 as given by PW3 Jerose Bercan is that on the fateful day at about 4.30 pm she heard an alarm being made in the direction of the home of the deceased. She testified that it was A2 who was making the alarm and saying "Thin Ogena con ipaco en" the Alur for "come and kill him at his home" and she saw A2 making the alarm. She testified that A2, Al Ocir Ogeny Amala and Muzee were the people chasing the deceased as he ran to her home. It was her evidence that A2 was present at her home and was one of those throwing stones at the deceased.

Though the evidence that links Al and A2 with the offence is that of a sole identifying witness, the identification was not made under any difficult condition. The incident took place during broad day light between 4.30 pm and 6.00 p.m. The two witnesses had known both Al and A2 for a period of eight years and the witness and the accused persons were all residents of the same village. Al is the wife of her brother in law while A2 is the aunt of her husband. In all these circumstances there could not be a case of mistaken identity.

Both Al and A2 made and gave unsworn statements in which they did not only deny participation in the commission of the offence but both raised the difference of alibi to the effect that they were at a clinic attending to a sick person when the offence was committed.

It is now trite that where an accused person advances the defence of alibi, he does not bear the burden to prove that his alibi is true. It is rather the prosecution which assumes the duty to displace the alibi by adducing evidence to dislodge the alibi and to place the accused suare1y at the scene of crime. **See Uganda=vs. = Sebyala [1967] EA 204 Leonard Aniseth vs. R [1967] EA and Sekitoleko vs. Uganda [1967] EA553.**

In the instant case prosecution adduced eye witness evidence through PW3 Jerose Bercan that she heard and saw A2 making an alarm and inviting people to go and kill the deceased.

When the mob chased the deceased as he ran to the home of the witness A2 was among the mob pursuing the deceased. And PW3 Jerose Bercan further gave evidence that when the deceased was then being assaulted A2 participated by pelting the deceased with stones.

PW3 Jerose Bercan also testified that Al was among the mob that chased the deceased to her home. She was also the one the witness saw giving to Ocir the panga the latter used for cutting the deceased. On the head (face) and the neck. It was also the evidence of the witness when the deceased was being cut and beaten with a club; Al was among the people throwing stones at him. The substance of PW3 Jerose Bercan's evidence in this regard was not at all challenged and after finding that the conditions under which PW3 Jerose Bercan identified the accused Al and A2 as having participated in assaulting were favourable for correct identification, I find Al and A2 were correctly identified and squarely put at the scene of this crime. Their alibi is an after thought and without merit and it is accordingly rejected.

Having established that the two accused persons Al and A2 were at the scene of crime the next issue to resolve is whether they are guilty of the offence.

Mr. Anguzu Lino submitted that from the prosecution evidence adduced Al and A2 are caught by the doctrine of common intention. The doctrine of common intention as contained in section 20 of the Penal Code Act states as follows;-

> "when two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

For the doctrine of common intention to operate against an accused person, that the accused entered into an agreement the offence. That an accused was a party to the common intention is inferred from his/her conduct his/her presence or actions or from his/her failure to distance or disengage himself/herself from the commission of the offence. It is sufficient to show by the actions conduct and omission that the accused is acting in concert with others in the prosecution of such unlawful purpose to infer that he/she has formed a common intention with such other persons. If in pursuing such a common intention violence is used and death results there from each of the participants will be held to be guilty of murder. **See Andrea Obonyo vs. R [l962] EA 542 James Semwogrere vs. Uganda (l979) HCB 71 and Antonio Baitwa Bubo vs. Uganda SCCr. Appeal No. 8/96.**

The prosecution evidence adduced by PW3 Jerose Bercan on the participation of Al and A2 is that on the fateful day at 4.30 pm she heard and saw A2 calling the residents of the village to go to the home of the deceased and kill him there. This was followed by the deceased being chased to the home of the witness by a crowd which included Al and A2 when the mob started assaulting the deceased. Al handed to one of the assailants a panga which the latter used for cutting the deceased in the head and the throat. And in the course of the assault Al and A2 took part by stoning the deceased.

From the evidence as adduced by PW3 Jerose Bercan which was not challenged it is clear that Al ands A2 were party to the assault on the deceased which led to his death. A2 is the person who called upon people of the area to kill the deceased. Both Al and

A2 pursued the deceased until he took refuse in the house ofPW3 Jerose Bercan until he was literally smoked out. On coming out of his refuge and collapsing in the compound Al handed a panga to Ocir with which the deceased was hacked and as this assault went on, Al and A2 joined the rest of the mob in stoning the deceased.

From what transpired it is easy to infer that that mob of which A I and A2 were part formed a common intention to assault the deceased with one another which was an unlawful purpose and that at no stage of the prosecution of this unlawful purpose did the accused persons disassociate or distanced themselves from the prosecution of this unlawful purpose and they unlawful purpose and they are therefore guilty of the murder of the deceased. Their participation in the commission of the offence has been proved beyond reasonable doubt.

In the result the prosecution having proved beyond reasonable doubt all the essential ingredients of the offence of murder in agreement with the unanimous opinion of the assessors, I find the accused persons A 1 and A2 guilty of the murder of Ouch a George C/S 188 and 189 of the Penal Code Act and convict them accordingly.

Signed
Justice Kania
2/2/2007
Judge