

PW 6 MORRIS NGAGENO a clinical officer at Nebbi Hospital, a holder of a certificate in Pharmacology, Diploma in Clinical Medicine with experience in post-mortem examinations, examined the dead body identified to him as that of ARUA CHARLES by Kerwegi Florence. He observed multiple cut wounds on the face, the head and a broken skull. He assessed the cause of death as the severe head injury with circulatory fracture. The Postmortem report was admitted as prosecution exhibit P.IV.

PW 1 TABU HASSAN knew the deceased as a workmate at the same boda boda transport stage or station and that on 18th April 2008 he saw the deceased alive, left the stage at 8.00pm to transport the accused. The next thing is that he was among the people that went to the scene where a dead body was reported. He identified the body as that of Arua Charles. He saw the body lying on its back, it had a cut wound on the central front part of the head.

PW.2 Onencan Sadik also observed the wounds and identified Arua Charles' dead body.

The above evidence of PW.1, PW.2 and PW.6 leaves no doubt that Arua Charles died on 18th April, 2008 as stated in the particulars of the offence.

It is a settled principle in our Criminal Law that every homicide is presumed unlawful unless there is evidence to show that it was caused accidentally, or under excusable circumstances. See **R Vs BUSAMBIZA s/o Wesonga [1948] 15 EACA 65.**

PW.1 and PW.2 testified that the deceased left them at their station of work at 8.00 pm on the 18th day of April, 2008 when he was well. He was next seen the next day when he was dead. The wounds that were found on his body were fatal injuries that had been inflicted on him. The weapon used was found near the body. This was a small hoe with a sharp edge. He was found, by PW.6 to have died from the severe head injuries which included a broken skull. The nature of injuries and the presence of the weapon or implement used to kill the deceased when considered together, it is clear that this was an unlawful homicide.

It is not every criminal homicide that amount to murder. Malice aforethought must be proved by the prosecution.

Malice aforethought is a state of mind which must be established from the circumstances and the evidence as a whole that establishes how the offence was committed.

The court of Appeal in **AKOL PATRICK & ANOTHER Vs UGANDA [2006] 1 HCB** held that in determining the presence of malice aforethought the court must consider the weapon used, the manner in which the weapon was used

and the part of the body injured. Similar holding is found in **Uganda Vs Ochieng [1992 – 1993] HCB 80** and **Uganda Vs Okello [1992 – 1993] HCB 68.**

The test is that once a deadly weapon is used, excessive violence is used, and injuries are inflicted on the most vulnerable parts of a human body such as the heart, head, neck and stomach, and once it is proved that multiple injuries were inflicted, it will lead to one conclusion that the assailant intended to cause death of the deceased.

In the instant case, the deceased suffered severe multiple injuries on the head. The fractured skull must have been due to use of severe violent assault on the head to lead to the broken skull. The weapon recovered at the scene, a hoe adds to the circumstantial evidence of use of a lethal weapon in the assault that led to the deceased's death. The assault concentrated on the head, a very sensitive part of a human being that contains the brain a vital organ.

The above evidence clearly proves to the satisfaction of this court that whoever assaulted the late Arua Charles intended to cause his death and therefore had malice aforethought.

Having found that Arua Charles died on 18th April 2008 and that his death was caused unlawfully and with malice aforethought, this court has a duty to examine the evidence as a whole to establish whether or not the accused person is responsible for the murder.

The accused person pleaded not guilty and throughout the trial he maintained that he did not participate in or have anything to do with the murder of Arua Charles.

In his sworn evidence as DW 1, OLAR JAMES (Accused). He testified that on 18th April 2008, he was at Adupare village in Paidha. He left the home at 8.30 am to Paidha to book a bus ticket to go to Kampala after which he went to Nyapea and at 5.30 pm he returned to Paidha. That he spent a night at Paidha police barracks until 5.00pm when he left for Kampala by bus. He returned from Kampala on 20th April 2008 and on reaching Nebbi he was arrested. He denied knowledge of the deceased. He denied participation in the murder. That he spent the night of 18/4/2008 at Nyapea. That he spent the night of 17/4/2008 at Paidha and booked a bus ticket on 18/4/2008 at 8.30 am.

On cross examination he stated that he spent the night of 18/4/2008 at Paidha and left for Kampala on 19/4/2008. He confirmed that among the prosecution witnesses he was well known to TABU (PW.1) with whom they had a pending assault case hence a grudge.

DW 2 ODAGAWUN ALFRED testified that he knew the accused. He saw him on 17/4/2008 at 9.30 pm when he went to change clothes in the house of one LUPINYI. The accused was sleeping and he talked to him. The following morning at 6.20 am he did not find the accused. On 18/4/2008 he was on night duty up to next morning at 6.00 am.

The effect of the accused person's defence is that he was not near the scene of crime between 18th April, 2008 8.00 pm and the next morning when he left for Kampala at 6.30 am, he left on 19th April 2008. This is a defence of ALIBI.

The accused person has no duty to prove his ALIBI. The duty is upon the prosecution to adduce evidence that puts the accused person at the scene of crime. However, once the accused person, on his own offers evidence to support his ALIBI, that evidence must be closely and critically examined to determine its credibility. Once evidence to support the ALIBI is on record it must be examined together with the evidence in the case as a whole without shifting the burden of proof upon the accused.

As stated in **Bogere Moses and Another Vs Uganda [1976] HCB 5**, the principal is that in criminal cases, apart from certain limited exceptions the burden of proof throughout the trial is on the prosecution.

This was earlier stated in **R Vs SIMS [1946] 1 KB 5** that the moment the accused person pleaded not guilty to a criminal charge the burden of proof entirely falls on the prosecution to adduce evidence to prove beyond reasonable doubt that the offence was committed by the accused person.

I will proceed to examine the evidence of the accused person's participation. There is no direct evidence that proves the participation. The prosecution seeks to rely purely on the circumstantial evidence based on the testimonies that the accused person is the person who was last seen with the deceased alive at 8.00 pm on the fateful night.

PW1 TABU Hassan testified that he knew the accused person before and he saw him on 18th April 2008 while he negotiated with the deceased to take him to NYIBOLA. It was at 8.00 pm but this was at GAPCO Petrol station which was lit and there was street electric light so he was able to see the accused talk to the deceased.

The deceased took the accused on his motorcycle at 8.00 pm and he never came back. He never heard of the deceased until next morning when he was found dead, PW1 further testified that at the scene of crime he saw a hoe, a shirt and a jumper. He recognized the shirt and the jumper as those he knew belonged to the accused. The accused denied ownership of items. He alleged he had a grudge with PW1 over a case of assault in court and that PW1 was telling lies due to the grudge.

PW2 Onencan said accused was a common person in Paidha town. He worked with the deceased, he had last seen the deceased on 18/4/2008. He went in the team that to recover the body of the deceased, he saw a hoe in form of a hummer near the dead body which was lying in a pool of blood. He saw a shirt and jumper which were blood stained at the scene. After postmortem the body was given to the family members for burial while it was dressed in the shirt and the jumper. The family members rejected the clothes that they did not belong to the deceased. PW2 took the clothes to the police from the deceased's home. PW2 confirmed that on 18/4/2008 he had not seen the accused anywhere. He confirmed the recovery team which included PW1 dressed the body in the very clothes found at the scene since the body was found naked.

PW 3 Ocangiu, custom check-point attendant, testified that he knew both the deceased and the accused. That on 18/4/2008 at 8.00 pm he stopped a boda boda rider at the crossing point between Congo and Uganda. He recognized the rider as Arua Charles (deceased) he did not recognize the passenger. They crossed the boarder and after about 30 minutes he saw a motorcycle at a high speed which refused to stop and came into Uganda. He did not recognize this motorcycle or its rider. The next day he called the boda boda rider's leader to tell him of a report that a person was found dead. He confirmed that he knew both Arua Charles and the accused for over 4 years. When he stopped the motorcycle he recognized Arua Charles and did not recognize the passenger.

PW4 Odongo Kizito also recognized accused from the boda boda stage on 18/4/2008 and saw the accused and deceased ride off at about 8.00pm. He testified he participated in recovering Arua's body from the scene. At the scene he saw a whitish shirt and a reddish jumper about 1 meter from the body. The body was dressed up at the scene with the clothes. But the relatives removed them at the burial that they did not belong to the deceased. He said he saw the accused put them on on 18/4/2008 at 8.00pm.

PW 5 D/Cpl John Onencan, testified on 19/4/2008 he was at the police station when a dead body was delivered by a group of boda boda riders, it was dressed up then. PW 6 P/C Drani Alfred the store man at the police received and kept:-

- 1) A small hoe looking like a hummer P.3
- 2) A blue long sleeved shirt P.1
- 3) A red jumper P.2
- 4) Unregistered motorcycle.

Circumstantial evidence is very often the best evidence, it is evidence of surrounding circumstances which must be intensively examined and before drawing inference of accused's guilt from the circumstantial evidence, court must be sure that there are no other circumstantial which would weaken or destroy the inference. The circumstances must produce moral certainty to the exclusion of every reasonable doubt. See **Taper Vs R. [1952] A.C 489.**

To convict the accused person in this case would depend on the truthfulness of the evidence of witnesses who allegedly saw the accused go away with the deceased and in addition the circumstances must rule out a possibility that anyone else could have killed the deceased after 8.00 pm on the 18th day of April 2008.

PW.1 and PW.4 testified that they saw the accused talk to the deceased at 8.00 pm and they left together at about that time.

PW.3 Ocangiu testified that at 8.00 pm on 18/4/2008 while at the boarder crossing point he stopped a motorcyclist whom he recognized as Arua Charles, the deceased. He did not recognize the passenger he carried. He testified that he knew the accused person for four years before. This creates a presumption that if the accused person had been the passenger, PW.3 would have recognized him like he recognized the deceased.

He allowed the deceased and his passenger to cross into Congo. The deceased was found the following day dead, on the Congo side of boarder. There is no evidence to prove that the motorcycle he saw riding into Uganda after that meeting is the same he saw the deceased on. There is no evidence that the rider who crossed into Uganda was the passenger the deceased had or was in anyway connected with the deceased.

The prosecution evidence talks of a recovered motorcycle sometime much later on the Ugandan side of the river Nyibola. There is no proof that it was the deceased's motorcycle or that the accused had anything to do with it. The accused was arrested on 20th April 2008 as he came from Kampala. The motorcycle was found 5 miles away from the scene by undisclosed person and on undisclosed date.

Apart from the questionable movement of the clothes attributed to the accused their existence and value is doubtful. PW.1 and PW.4 who recovered the body participated in dressing the deceased in these clothes, delivered the body to police in the clothes, took the body for post-mortem in these clothes, delivered the body to the relatives for burial. It is alleged the relatives rejected these clothes as not belonging to the deceased and up to this point these witnesses who knew the deceased very well had not noted this. They claim to have known the accused very well and to have known

his clothes very well and surprisingly they were prepared to burry their friend in these clothes they knew belonged to the suspect! This is unbelievable.

These clothes were an attempt to link the accused to the scene of crime. There is no independent or credible proof of ownership of those clothes.

I have examined the accused person's defence of ALIBI together with the prosecution evidence, notwithstanding the weak nature of the accused person's ALIBI in that not all the hours of the night of 18/4/2008 are fully accounted faor, the prosecution evidence does not squarely put the accused person at the scene of crime.

The accused person cannot be convicted on the weakness of his defence, it must be on the strength of the prosecution evidence. The Assessors advised me to convict the accused person. However, from my appreciation of the evidence as examined above, I am unable to agree with their advice. The accused person is hereby acquitted and set free.

J.W. KWESIGA

JUDGE

28/10/2010