

IN THE HIGH COURT OF UGANDA AT SOROTI

CRIMINAL SESSION CASE NO. 22 OF 2012

UGANDA V A1 OLUPOT STEPHEN

A2 ILEJU CHRISTINE

A3 ODIATUM DAVID

A4 ODIATUM JOHN

JUDGMENT BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

The four accused persons are charged with murder c/s 188 and 189 of the penal code Act. It is alleged that the four accused persons in October 2011 at Damasiko village in Katakwi district with malice aforethought caused the death of Aisu John Paul.

Prosecution was led by Mr. Noah Kunya, Senior State Attorney while the accused persons were represented by Mr. Isodo on private brief.

Prosecution had to prove that a death occurred as a result of the intentional acts or omissions of the accused persons. In other words, the prosecution had to prove malice aforethought on the part of the accused person and that death occurred as a result.

Proof of death

Prosecution relied on Pexh.5, a post mortem report to show that death occurred. Although the body is not identified in Pexh. 5, PW1 Aporu John Bosco testified that he identified a body at Okolodoi landing site ,recovered from a lake on 26.10. 2011 after police had examined it earlier on 25.10.2011

when it was still on the lake. The body was identified as that of Aisu John Paul, his son. On the basis of this evidence and the post mortem report, death of the deceased has been proved.

Whether the death was unlawfully caused

Pexh. 5, indicates that it was difficult to ascertain cause of death because the head, trunk, limbs, could not be established as the body was decomposed. But the clinical officer observed that

‘it appears the deceased was first murdered and dropped in water in view of the following. If the deceased the deceased had drowned, the following would have been evident. Over bulging of the eyes and over distension of the abdomen.’

PW 5 Ochole Paul the clinical officer who carried out the post mortem confirmed his observations in Pexh.5 but added that the body was decomposing but not totally decomposed. He further added the body was in such a state it could not permit a proper analysis.

Pexh. 6, a photograph of the body was tendered by PW3 Det. Cpl. Opolot David. His evidence is that on 25.10.2011, he was detailed to visit a murder scene to where he proceeded accompanied by a clinical officer on a canoe. Further in the water away from the landing site, he found a body hidden in water lilies. Pexh. 6 shows a body floating on lilies in water. After the clinical officer examined the body, it was left behind and retrieved on 26.10.11.

The body was found in water lilies on the lake which means it was placed there and the expert evidence suggest strongly that the deceased met his

death as a result of unlawful acts . I therefore find that his death was unlawfully caused.

Participation of the accused persons

Prosecution relied on PW1 Aporu, father of the deceased, PW2 Winyi in charge of management of the beach, and PW4 Atukor Tabitha to prove participation.

The key evidence is that of PW4 Atukor Tabitha aged eight years to whom a voire dire was administered and she was found of sufficient intelligence to understand the importance of taking the oath. She therefore gave sworn evidence.

Although PW4 was about five years old at the time of the offence, she had a good memory and spoke clearly about what happened to her father, Aisu. She testified that her lived in his own home and one day, she was at home with her grandmother and other children when her father came to the home of the old man (she referred to A4 as old man) while riding a bicycle. That this was during the day and later her mother, A2, who was not at home, returned.

That when A2 returned and entered the house, A1 Olupot, whom she says she knew, followed her.

In the night, when people who had been drinking local brew left, A1 Olupot and A3 whom she referred to as Idiya, looked for pangas which A2 sharpened. According to PW4, A1 and A3 began beating her father, while A2 her mother and A4 the old man were seated. That the two stopped beating her father, then took him to a lake, while pulling him in a polythene sack. The witness however later said she did not know where the two took her father.

She never saw her father alive after the beating and she attended the burial. After the burial she told the old man Edau, what had happened. (she was referring to PW2 Aporu who was not in the court room as the audience had been asked to leave to enable the witness testify freely).

In cross examination, PW4 testified she did not share with the neighbours' children what had happened to her father as her mother had threatened to beat her if she did so. The witness was clear that she was on the verandah during the assault on the father and earlier, she had said there was bright moonlight.

The defense in cross examination, tried to make out that there were inconsistencies in the two statements made by the child witness to police, i.e Dexh. 4 recorded on 6.11.2011 and Dexh. 5 recorded on 18.11.2011. However, I find no inconsistencies in the two statements which all emphasize that she saw A1 Olupot and A3 Idiya beat her father. In the police statements, she says after the beating, her father walked away and Olupot A1 took the same route.

In **Susan Kigula and anor v Uganda, Supreme Court criminal Appeal 1 of 2004**, the 2nd appellant was a housemaid of the Sserembas, and lived with the couple in the same house. The murder occurred during the night of 9th July 2000 at around 2.30 am while the family was sleeping in their flat. According to PW6 who was aged 3-4 years, he saw the 1st appellant cut the neck of the deceased while 2nd appellant was holding the legs of the deceased. Relying in the identification by the child as single identifying witness, the High Court convicted the appellants. On appeal, the Supreme Court held

'The law relating to identification by a single witness is that subject to certain well known exceptions, a fact may be proved by a single witness, and there is generally no requirement for a plurality of witnesses. However where a conviction is based on the evidence of a single witness, the court is required to exercise extreme caution in examining the evidence of a single witness to ensure that the conditions favouring correct identification were present, and that there was no possibility of error on the part of the witness. It is acknowledged that a witness may be honest and yet mistaken.'

PW 4 Atukor was the only eye witness during the assault on her father. She stated it was at night but there was moonlight and was seated on the verandah during the assault.

PW4 said the deceased was beaten with pangas and axes so it can be argued that the body ought to have had these marks. However, the witness uses the word 'beat' and not cut in most of her testimony. The clinical officer Ochole said the body was in such a decomposed state it did not permit proper analysis but that the deceased did not die from drowning rather the body was taken to the spot it was found.

That the body did not bear cuts is not material because PW4 said her father was 'beaten' with pangas and an axe. What is important is that she never saw her father alive after the attack. It therefore follows, that PW4 properly identified her father's attackers as A1 Olupot and A3 Idiya.

Being a child of tender years, although she gave sworn evidence, her evidence requires corroboration.

The Supreme Court held in **Kigula and anor v U (supra)** , that

‘Corroboration of a material part of the evidence of the child witness is corroboration of the whole because the corroboration of a material part being a guarantee of the truth of this evidence as a whole’.

The evidence of A1 Aporu John Bosco is that A2, Ileju was a wife the deceased but they were undergoing divorce while A3 was father of A2 Ileju and A3 Odiatum John alias Idiya was son to A4 Odiatum John. A4 was therefore father of A2 and A3. PW1 Aporu brought up the deceased Aisu and it was him who identified the body when it was recovered.

The evidence of PW1 Aporu is that PW4 Atukor told him she saw A1 Olupot and A3 Odiatum alias Ideya kill the deceased. In his evidence, PW1 testified that his son, Aisu left the home of the witness on 16.10.2011 to visit his wife Ileju and children. By this time, the deceased and A2 Ileju were separated. Four days later, he had not returned so a search was mounted in Serere where the mother of the deceased lived while PW1 went to the home of the in laws but he was told the deceased had not visited the home. At the home of the in laws, PW1 found A2 Ileju, A3 Odiatum A4 , and children. The body of the deceased was found a few days later.

The defense suggested in cross examination that PW1 was a liar because what he testified in court is different from his police statement, Dexh. 1. In particular, PW1 did not mention to police what Atukor told him and he did not mention he had visited the home of the in laws in search for his son. In response, PW1 testified that he made the statement after burial while Atukor was still at his home and that if he didn't tell police what Atukor had said, it

was an omission on his part. While what Atukor told him is not mentioned in the statement, it is the evidence in court that is material.

In any case, PW4 testified that she informed PW1 about the attack on her father.

Even without what Itukor informed him, the evidence of PW1 corroborates PW4 in a material aspect, namely, she was living with her mother A2 at the time of the incident and that explained why the deceased left the home of the witness on 16.10. 2011 to visit her and the children.

I accordingly find PW1 Aporu a credible witness and i believed his testimony.

Further corroboration of PW4's testimony is that of PW2 Winyi Joseph who chairman of Beach management Unit. His evidence is that on 23. 10.2011 at about 6 a.m, he was at the landing site when Odiatum David, A3 arrived with his sister who was carrying him on a bicycle . A3 informed him that he was going to Kampala as he was wanted urgently. A3 was taken across the lake in a canoe but at 11 a.m, A3 returned on the same canoe and informed PW2 Winyi that he had received a telephone call to post pone the journey.

On 25. 10.2011, PW2 Winyi received information from a fisherman , one Ebaju that a body was floating on the lake. The matter was reported to police and the body of Aisu was identified and buried. The witness testified that he had heard from Atukori PW4 that her father was beaten to death with a panga by A2 Odiatum and A1 Olupot.

In cross examination of this witness, the defense tried to make out that the witness was unreliable because he made two different statements at the police. Dexh. 2 was recorded on 6.11.2011 from the witness as a suspect and

he gave this as a reason for the contents. Dexh. 3 was recorded from the witness on 6.3.2012 and the information in this statement is similar to his evidence in court. It was recorded from PW2 as a witness. I am inclined to believe that the circumstances under which both statements were recorded explains the different contents.

The fact that the home of the accused persons is about 2 km from the landing site and therefore the lake where the body was dropped and the conduct of A1 on 23.10.2011 before the body was discovered is circumstantial evidence of a guilty mind. For him to set off for Kampala at 6 a.m by canoe then return shortly after at 11 am the same day is suspicious conduct given that the deceased was found floating on the lake on 25.10.2011, only two days after A3's suspicious movements.

I accordingly find that PW2 was a reliable witness and his evidence with regard to suspicious conduct of A3 corroborates the evidence of PW4 Atukor that A3 participated in the death of the deceased.

In defense, all four accused persons denied the offence and denied that the deceased visited their home.

Based on the above analysis of evidence, I find that A1 and A2 caused the death of the deceased with malice aforethought. The fact that the body of the deceased was hidden in the middle of the lake is evidence of malice aforethought.

With regard to A2, the evidence of her participation in the death of the deceased is limited to her sharpening the pangas according to PW4 and watching while the deceased was being beaten. This is evidence of tacit

approval of what was happening and she too bears responsibility for the death of the deceased as an accessory after the fact.

A4 also watched as the deceased was being beaten, according to PW4. He too is responsible for the death of the deceased as an accessory after the fact.

I am in agreement with the two assessors that A1, A3 are guilty of murder c/s 188 of the penal code. I am in disagreement with the two assessors that A2 is guilty of murder for the reasons i have given. I am in agreement with the two assessors that A4 is not guilty of murder.

I accordingly find that the state has proved beyond reasonable doubt that A1 and A3 with malice aforethought caused the death of Aisu John Paul and i convict them of murder c/s 188 of the penal code.

I find that the prosecution has not proved beyond reasonable doubt the charges of murder against A2 and A4 and they are acquitted of murder.

I find that the two are guilty of cognate offence of being accessories after the fact of murder and both are convicted of being accessories c/s 206 of the penal code.

DATED AT SOROTI THIS 03rd DAY OF JULY 2014.

HON. LADY JUSTICE H. WOLAYO