

UGANDA / JUDGMENT

Uganda vs Ekinu Julius (Criminal High Court Session 125 of 2018) [2023] UGHC 29 (3 January 2023) [2023] UGHC 29

COURT

High Court of Uganda

BEFORE

Adonyo, J

CASE / FILE NUMBER

Criminal High Court Session 125 of 2018

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The Republic of Uganda In the High Court of Uganda Holden at Soroti High Court Criminal
Session Case No 0125 of 2018

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Uganda ::::::::::::::::::::::::::::::

Versus

Ekinu Julius :::::::::::::::::::::::::::

Before: Hon. Justice Dr Henry Peter Adonyo

Judgement

Ekinu Julius is charged with the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act Cap 120. 20

The indictment indicates that the accused between the \$6th\$ and \$7th\$ day of January, 2018 at Oimai village, Lwala Parish, Otuboi sub-county in Kaberamaido district with malice aforethought caused the death of Epiu Ronald.

The prosecution case is that one Odade John (PW1) the father of Epiu Ronald, (now the deceased) and a neighbor to both the accused Ekinu Julius and the deceased Epiu Ronald on 07/01/2018 was concerned with the delay exhibited by the deceased to go his home for lunch as usual with 30 this delay making Odade to proceed to the deceased's home to find out what was wrong only to be shocked when he found that the deceased's

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house had its door ajar and a radio playing inside loudly yet no one seemed \$\mathsf{S}\$ to be around.

However, upon Odade entering into the house, he saw the deceased lying on his bed with his face up as if sleeping and when he tried to wake him up the deceased was unresponsive. This comprehension made Odade to suspect that Epiu Ronald could be dead.

Odade John ran to Ekinu Julius (PW2) who is the LC1 Chairman of the area to inform him what he had found and he together with PW2 and others quickly went back to the scene and after evaluating the situation decided to report the situation to the police which came the next day of 08/01/2018 during which the body of the deceased was examined by a medical personnel with the deceased being pronounced dead with the cause of death being a broken neck.

No person was found or seen to have killed the deceased Epiu Ronald but a white cover of a phone was stated to belong to the deceased was recovered from his house. That cover matched that of a phone recovered from the accused by police who concluded that since the accused had no sufficient reason as to why he was having the deceased's phone without its cover, then he was the killer of the deceased. The accused was arrested and subsequently charged with the murder of the deceased.

The particular phone retrieved from the accused person's home was said by Ochen James (PW3) that the accused had shown him a phone without 30 a cover which he, the accused said belonged to the deceased who had taken it to him so that it could be charged and that the accused wanted Ochen to go and collect it but Ochen refused insisting that Ekinu Julius (PW2), the

LC1 chairman of area be the one to do so. The LC1 Chairman refused to \$\mathsf{S}\$ pick it the phone but told Ochen to call and tell the police about the phone and only later heard that the accused had been arrested by police while in possession of the phone and was subsequently charged with the murder of the deceased.

Ekinu Julius (PW2) told court that he was not aware whether the accused was arrested while in possession of the phone and neither was he aware of that the accused engaged in commercial charging of people's phones.

In proving its case, the prosecution adduced the evidence of four (4) 15 witnesses. These are Odade John (PW1), Ekinu Julius (PW2), Echoku James Ochen (PW3) and No. 23818 D/CPL Emou Patrick. Before the commencement of the hearing, the prosecution and the defence agreed on two documents namely the; Police Form 48C – the Post-Mortem Report in respect of Epiu Ronald (PEX1), Police Form 24 - the Medical 20 Examination of Persons Accused of Serious Crime in respect of Ekilu Julius (PEX2).

The prosecution also tendered a post mortem report in respect of Epiu Ronald and a Police Form 24 in respect of the accused.

A prima facie case was found against the accused person pursuant to section 73(2) of the Trial on Indictment Act, Cap 23 after the prosecution completed its case by a ruling of court delivered on 13th October, 2022. The accused was then put to his defense. He opted to give a sworn testimony and did not call any witness. He testified as DW1 denying the charges levied against him.

- In criminal cases, the burden of proof lies on the prosecution to prove that S it was the accused who committed the offence he is charged with beyond reasonable doubt. That burden does not shift to the accused except in a few cases as provided for by law.
- Where an accused person raises a defence, the onus will still be on the prosecution to prove that the offence was committed by the accused person.

See: Woolmington Vs. DPP (1935) A. C 322; Ssekitoleko Vs. Uganda [1967] E. A 531 and R. Vs. Johnson [1961] 3 ALL E. R. 15 969.

Also an accused person does not have to prove his innocence and can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence. This is stipulated by section 101 of the 20 Evidence Act, Cap 6 which provides that;

Whoever desires any court to give judgement as to any legal right or $\mathsf{(1)}$ liability dependent on the existence of facts which he or she asserts must prove that those facts exist. 25

When a person is bound to prove the existence of any fact, it is said $\mathsf{(2)}$ that the burden of proof lies on that person.

The standard of proof required in a criminal case is one that is beyond 30 reasonable doubt. This standard is satisfied once all evidence suggesting the innocence of the accused, at its best, creates a mere fanciful possibility but not any probability that the accused is innocent.

See: Miller vs Minister of Pensions [1947] 2 ALL ER 372. S

For an offence of murder, the following ingredients must be proved by the prosecution. (See: *Uganda vs Bosco Okello [1992-93] HCB 68.*)

- a. Death of a person. Death may be proved by production of a post-mortem report or evidence of witnesses at the burial.
- b. The death was caused unlawfully. It is trite law that any homicide is presumed to have been caused unlawfully unless it was accidental or it was authorised by law as was held in the case of R vs Gusambuzi s/o Wesonga (1948) 15 EACA 65.

- c. The death was occasioned with malice aforethought. In malice aforethought, court takes into account the number of injuries inflicted, the part of the body where the injury was inflicted, nature of the weapon used and the conduct of the killer before and after the attack.
- d. The accused participated in causing the death. There must be credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence.
- e. The prosecution must prove that the actions of the accused person caused the death of the deceased.

The evaluation of the evidence in relations to the offence of murder by court takes into account those ingredients.

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In relations to the instant case, the following is considered;

Death of Person: \$a)\$ \$\mathsf{S}\$

The death of a person may be proved by the production of a post mortem report or evidence of witnesses who stated that they knew the deceased had died and attended the burial or saw the dead body.

In the instant case, Odade John (PW1), the father of the deceased testified 10 that he found his son lying on his bed with his face facing up and he was unresponsive and that he called his brother Owicha Charles to witness the situation which forced them to inform police which later carried a post mortem and confirmed that the deceased was dead. Odade, together with other relatives also carried out the burial of his son. 15

The post mortem report (P. E. X 1) authored by one Euny Raphael presented in court confirmed the death of the deceased with the cause stated as resulting from a broken cervical neck bones which lead to suffocation and the eventual traumatic death.

Ekinu Julius who testified as (DWI) and who is the accused also confirmed the death of the deceased as stated that he attended the burial of the deceased.

All the above evidence confirms the death of the Epiu Ronald meaning that the death of Epiu Ronald is not disputed.

Arising from that none dispute, I would accordingly find that Epiu Ronald died. The first ingredient in regard to murder is thus satisfied.

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The death was unlawful: \$b)\$ 5

The next ingredient is whether the death of Epiu Ronald was unlawful. It is the law that any killing of a human being by another is presumed to have been caused unlawfully unless it was either accidental or was authorized by law. See: R V Gusambizi s/o Wesonga (1948) 15 EACA 65.

In relations to the instant matter, it is the prosecution's duty to prove that the death of Epiu Ronald was unlawfully caused. Odade John (PW1) told court that when he found his son lying on the bed with his face up he tried to shift the body of the deceased but realised that the deceased's neck was not firm as it kept on rotating possibly indicating that it was broken. These facts were confirmed by Ekinu Julius (PW2).

Further, the post mortem report (PEX1) indicated that the deceased died as a result of a broken cervical neck bones which led to suffocation and the eventual traumatic death.

There was no evidence led to suggest that there was a lawful order that the deceased be killed and neither was it proposed and found that the deceased caused the injuries which led to his death by himself.

It is true that the doctor who performed the post mortem was not called to by the prosecution to testify. This lapse did not give the court the opportunity to get his professional opinion in this regard.

However, eye witnesses such as Odade John (PW1) and Ekinu Julius 30 (PW2) told court that inside the house of the deceased things were scattered and there were signs of a struggle. Given this piece of testimony, I am inclined to accept their evidence that the deceased could been

killed after a struggle rendering his death to be unlawful for the reason \$\mathsf{S}\$ that that circumstance is not compatible with any lawful death or selfinflicted injury.

I would thus find that the second ingredient has been proved and hold that the death of Epiu Ronald was unlawful. \$10\$

\$c)\$ The death was occasioned with malice aforethought: The Prosecution is required to prove that the cause of death was actuated by malice aforethought.

Malice aforethought is the intention to commit a crime without just cause or provocation, particularly in cases involving first-degree murder.

The term *"malice"* refers to a person's intent to injure or kill another person. Malice can either be "expressed" or "implied." Malice is expressed 20 when someone deliberately intends to take someone else's life. Malice is implied when a person is killed, yet no proof exists that the killer was provoked. Implied malice may also exist when a crime is committed by someone who is said to have a "depraved" or "malignant" heart.

"Intent to kill" is another way of saying malice aforethought, or mens rea.

Mens rea is a Latin term that refers to a defendant's intention to commit a crime, as opposed to the actual crime itself. *Mens rea* is concerned only with the defendant's mind set, not with his ultimate actions.

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An intent to kill does not need to be specifically expressed by the killer. It can be inferred based on the killer's actions. For example, malice aforethought can exist if someone shoots another person with a gun.

However, just because someone shoots another person, that does not mean that he necessarily had an intent to kill. Perhaps he was just trying to defend himself, or to stop the person he shot from harming someone else, and he accidentally killed that person in the process.

An intent to kill may be actual or implied. An actual intent to kill refers to a situation wherein the defendant deliberately wanted to kill another person. An implied intent to kill refers to a situation wherein the defendant either wanted to cause the victim significant bodily harm, or acted with a blatant disregard for the victim's safety, which ultimately resulted in the victim's death. Malice aforethought can occur in situations of either actual and implied intent to kill.

Section 191 of the Penal Code Act defines malice aforethought as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person.

When a crime is committed with "malice aforethought," this means that the crime was premeditated, and the perpetrator held malice for the victim. Put another way, malice aforethought can be defined as a crime being planned in advance, with the intention to kill or grievously harm another individual. Originally, proof of malice aforethought was a requirement in certain jurisdictions in order to convict someone of first-degree murder.

- The prosecution must prove one of four mental states existed at the time of the death, in order to effectively prove the defendant had malice aforethought. Those mental states are:
- The intent to cause death
- The intent to inflict great bodily injury
- The intent to commit a felony
- A demonstrated "depraved indifference" to human life

In *R v Tubere s/o Ochen* (1945) 12 EACA 63, the court set out circumstances which the trial court should consider in deciding whether there was malice aforethought in the killing of a person.

These are:

- The type of weapon used.
- The nature of injury or injuries inflicted. 20 $\overline{}$
- The body part affected. $\overline{a}$
- The conduct of the attacker before and after the attack.

The question which arises then is whether whoever killed Epiu Ronald intended to cause his death. 25

PW1, PW2 and the post mortem report (PEX1) all confirmed that the deceased's neck was broken. The neck refers to the collection of structures that connect the head to the torso. It is a complex structure composed of many bones, muscles, nerves, blood vessels, lymphatics, and other 30 connective tissues. The cervical spine is the bony part of the neck. Its primary function is to provide support for the skull, while still allowing for movement. A broken neck can be a simple break like any other bone in

your body or it can be very severe and can cause paralysis or death. When S the bones in your neck break, the nerves of your spinal cord can also get damaged. When this happens, it's referred to as a spinal cord injury.

A broken neck causes very serious injury meaning that the neck of a person is a delicate part of the body as it links the brain, which integrates 10 sensory information and directs motor responses, to the rest of the body and other vital bodily organs. The breaking of the neck would delink such vital bodily organs from the brain which is indicates malice aforethought.

In this case, there is no dispute that there occurred "breaking of the neck" 15 of the deceased which resulted into his death. Since the neck is a delicate part of the body and once broken can lead to death, as in the instant case, then it can well be concluded that that act was orchestrated by malice aforethought as contended by the prosecution. Accordingly, malice aforethought is proved. 20

d) The accused participated in causing death

The law recognises a variety of ways in which a person may involve him/herself in crime. One may, for example strangle someone to death 25 with one's own hands, stone someone to death jointly with one or more others, keep a lookout while others rob and kill someone, hire someone to kill for you, incite others to commit murder, loan someone a gun with which to kill another, or assist someone to dispose of the dead body, amongst other things. 30

Socii criminis is the term used to refer vaguely to both perpetrators and accomplices, except those offenders that could be regarded as principal

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offenders (also called actual/main/direct perpetrators). The term means S "partners in a crime". Each *socii criminis* is a *socius criminis* (singular). The term relies on the distinction between principal offenders and other participants, which is a distinction that is at least difficult to draw. It also does not distinguish between perpetrators and accomplices, which is an important distinction. 10

In order to conceptualise the degree of the participation in crime, the law distinguishes three categories of offenders:

- a. Participants (involved before or during the crime): 15
 - i. Perpetrators;
 - ii. accomplices; and
- b. Non-Participants (involved after the crime):

A Perpetrator is an offender whose conduct (which may be imputed to him according to the doctrine of common purpose or agency) and mens rea (wrongful mental state) satisfies all the requirements of the definition of the crime.

Counsel for the accused person submitted that none of the prosecution witnesses who testified in court saw the deceased die. Counsel submitted that PW1's testimony was that after the deceased was found dead in his 30 house, it was realised that his phone was missing but only the cover of that phone being recovered from the house.

- Counsel for the accused submitted that PW2 told court that on 9th S January, 2018, he got a phone call from Ochen John that the accused went to him with a phone belonging to the deceased and he Ochen John requested PW2 to go and pick the phone.
- Counsel for the accused person submitted that PW4 Emou Patrick the 10 investigating officer told court that he went to Oimai "B" village and recovered the phone from the accused person, arrested and took him to Otuboi Police Station where he was detained. That PW4 testified that he exhibited the phone which was white in colour.
- Counsel for the accused submitted that during cross examination of PW4, PW4 could not explain to court why he was not in court with the phone but only alleged that he was transferred to Kateta in Serere district.
- That PW4 testified that the said phone in issue was not brought and 20 tendered in evidence as a prosecution exhibit yet according to PW4's testimony it was in possession of Police kept at Kaberamaido C. P. S exhibit store.

- Counsel for the accused submitted that PW4's testimony was a mere 25 fabrication against the accused.

The accused person denied all the allegations levied against him regarding possession of the deceased's phone, recording a statement at the police and he contended that the police made him sign on a document "police statement" for which he did not understand the contents which he denied.

Counsel of the accused contended that the circumstantial evidence that S the prosecution is relying on of the accused having been with the deceased's phone and that it was recovered from him is totally lacking as the burden of proof was on the prosecution to produce the phone in court and link it with the accused person which the defence contends that the prosecution failed to do. 10

The defence contended that the prosecution has not proved that the accused person participated in the murder of Epiu Ronald upon which counsel cited the case of *Uganda vs Wadri Farouk Criminal* Sessions Case No. 0039 of 2014 wherein His Lordship, Justice 15 Stephen Mubiru held that the accused can only be convicted on the strength of the prosecution case and not because of weaknesses in his defence. Counsel for the accused therefore invited the court to dismiss the charges of murder against the accused, acquit, discharge and set him free.

The prosecution submitted that the identity of the accused person is based on circumstantial evidence.

The state further submitted that the prosecution placed the accused at the scene of crime because he was found in the possession of the deceased's 25 phone without giving any reasonable account on how he came to possess the deceased's phone.

Prosecution submitted that PW1 stated that after the deceased was found dead in his house, it was realised that his phone was missing and it was only the cover of the phone that was recovered from the house.

Prosecution stated that during the conduct of the burial, announcements S were made for anybody who could be in possession of that phone to produce it but nobody showed up.

Prosecution submitted that in the defence of the accused, the accused stated that he was at the burial for \$3\$ days and that it is possible that the 10 accused heard the announcements.

However, the state submitted that PW2 told court that on 9th January, 2018, he got a phone call from Ochen John that the accused went to him with a phone belonging to the deceased and he Ochen John was requesting PW₂ to go and pick it.

PW2 told Ochen John that the Police would pick it and indeed he called PW4, a police officer from Otuboi Police Station who picked the said phone.

PW4 confirmed having recovered the phone from the accused. PW4 confirmed to court that he exhibited the phone which was white in colour for which the exhibit slip was tendered in court (marked PEX1).

In this case, none of the Prosecution witnesses witnessed the deceased being killed. The prosecution solely relies on circumstantial evidence.

In the case of **Nankwanga Fauza and Others vs Uganda CSC No* 243 of 2015*, Lady Justice Eva Luswata followed the decision of the 30 Supreme Court of Nigeria in *Tajudeen Illiyasu v The State SC 241 of 2013* where court held that;

"...circumstantial evidence is evidence of surrounding circumstances which by undersigned coincidence, is capable of proving a proposition with the accuracy of $\mathcal{L}$ mathematics..., this is so for in their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person, caused the death of the deceased person. Simply put, it meant that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence.

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She went ahead to say that the court cautioned that such circumstantial evidence must point to only one conclusion, namely that the offence had been committed and that it was the accused person who committed it."

The prosecution places the accused at the scene of the crime because he 20 was found in possession of the deceased's phone which it states he got under unclear circumstances.

However, the accused testified in court that the deceased gave him the said phone for charging. 25

This fact was not rebutted by any concrete evidence which would show otherwise that the accused was not in the business of charging phones for others though some of the prosecution's witnesses testified that he was not aware that the accused was in such business.

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- For an accused to be related to a crime, there should be credible direct or S circumstantial evidence placing the accused at the scene of crime as an active participant in the commission of the offence.

- The nexus which could place the accused with the committal of the crime is the testimony of the police officer (PW4) who testified that he recovered 10 a white alcatel mobile phone without a cover from the accused. This witness told court that the said phone was exhibited at the police station. A white cover of a phone (PEX2) was brought in court but the actual phone itself was not brought in court so that it can be verified the cover fitted the phone and matched the phone recovered by PW4 from the accused. This 15 was clearly break in the chain of the prosecution evidence.

PW4 did not furnish any reason as to why the said phone was not exhibited in court. He told court that since he was subsequently transferred from Kaberamaido district to another district, he could bring the phone to court 20 as he had left it exhibited at Kaberamaido police station. This slovenliness of not bringing the phone to court such thast it can be verified broke any connection of the accused to the murder of Epiu Ronald given the fact that the accused's alleged possession of the questioned phone was not clear.

As was held in **Engonu Cornelius v Uganda Criminal Appeal No.* 518 of 2015* items not exhibited in court cannot be taken as evidence and the court cannot have regard to the same.

It must be noted and recalled that the cardinal principle of the Ugandan 30 criminal law as envisaged in the Uganda Constitution, 1995 As amended is that an accused person bears no duty to prove his innocence, neither can he be convicted owing to the weakness or even absence of his defence.

A conviction of an accused person must be based on the strength of the prosecution case as was pointed out in **Muhizi Godfrey vs Uganda* HCCR Appeal No. 11 of 2013*.

From the evidence adduced before this court in respect of this instant case, 10 it is clear that the accused's participation in the death of the deceased, Epiu Ronald, depended on circumstantial evidence.

Circumstantial evidence is indirect evidence. It is distinguished from direct evidence, which, if believed, proves the existence of a particular fact 15 without any inference or presumption required. It relates to a series of facts other than the particular fact sought to be proved.

Circumstantial evidence is evidence that relies on an inference to connect it to a conclusion of fact—such as a fingerprint at the scene of a crime. It 20 supports the truth of an assertion indirectly—i.e., with need for additional evidence or inference.

n its own, circumstantial evidence allows for more than one explanation. Different pieces of circumstantial evidence may be required, so that each 25 corroborates the conclusions drawn from the others. Together, they may more strongly support one particular inference over another. An explanation involving circumstantial evidence becomes more likely once alternative explanations have been ruled out.

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Circumstantial evidence allows a court to infer that certain fact exists. In criminal law, the inference is made court of that particular fact to support the truth of an assertion (of guilt or absence of guilt).

Reasonable doubt is tied into circumstantial evidence as that evidence relies on inference. It was put in place because the circumstantial evidence may not be enough to convict someone fairly. Reasonable doubt is described as the highest standard of proof used in court and means that a court can find the defendant guilty of the crime to a moral certainty. Even when circumstantial evidence is not sufficient to convict or acquit, it can contribute to other decisions made about the case.

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The prosecution herein relies heavily on unproven circumstantial evidence of a white alcatel phone to place the accused to the scene of 15 crime. That phone was not tendered in court for verification. It was the only alleged connection between the accused and the crime. No any other evidence connected the accused to the killing of the deceased.

- In this case, there has been ample failure to connect by circumstantial 20 evidence that the accused person committed the offence of murder as no direct evidence pointed to that fact. Even the circumstantial evidence adduce which could connect him to the committal of the offence is scanty. That scantiness leaves this Honourable Court with no option but to find that while it is indeed true the deceased died, no proof beyond reasonable 25
- doubt has been adduced that it was the accused before me who killed Epiu Ronald.

That being the case, the accused cannot be held responsible for the death of Epiu Ronald given the scarcity of evidence which would make the court 30 to conclude that it was the accused who murdered Epiu Ronald.

Consequently, the accused would be found not guilty and forthwith $\$$ acquitted of the charges of murder levied against him.

Consequently, the accused is ordered immediately released from custody unless he is being held for any other lawful charges.

I so order.

Dr. Henry Peter Adonyo Judge 3rd January, 2023

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