

UGANDA / JUDGMENT

Uganda v Kapere & Ors (Criminal Case No. 0013 of 2013) [2016] UGHCCRD 71 (31 August 2016) [2016] UGHCCRD 71

COURT

HC: Criminal Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Criminal Case No. 0013 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0013 OF 2013

UGANDA PROSECUTOR

VERSUS

A1 KAPERRE JUMA }

A2 OVANI BRIAN }

A3 KUMAKECH MEN GILBERT CANPARA } ACCUSED

A4 ANEK EVALYENE GENESI }

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused in this case is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the three accused on 21st March 2012 at Kiyaya East village in Nebbi District murdered one Onencan Dan.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that the deceased, then aged 18 years old, dropped out of school at primary seven level. He asked his mother P. W. 2 (Rose Akumu) to buy her a motorcycle to operate as a boda-boda rider and earn a living. P. W. 2 sent the deceased's elder brother P. W.10 (Too-Timo Justin) to Gulu where he bought a motorcycle, Bajaj-Boxer red in colour, registration number UDP 742 R from PW. 11

(Opoka Rommy) on 21st August 2011 at the price of shs 1,900,000/= He made part payment of shs 1,730,000/= and was given photocopies of the log-book, the third party insurance payment receipt, and the agreement of sale. The deceased began operating the motorcycle as a boda-boda rider based in Nebbi Town.

On the morning of 21st March 2012, the deceased left home for work as usual but never returned home. He and his motorcycle went missing. His relatives searched for him and the motorcycle in vain and reported to Nebbi Police which joined the search but without success until 21st June 2012 when PW.7 (Mohamed Suleiman) and other game rangers while on patrol along the Pakwach – Kauma Falls stretch of the Murchison Falls National Park at around 11.30 pm attempted to stop a suspicious man (later identified as a one Okumu Justin) riding a motorcycle without a number plate. The unidentified man jumped off the motorcycle and disappeared into the bush. The game rangers picked the abandoned motorcycle and took it to Pakwach Police Station. Subsequent investigations led to the discovery that it was the motorcycle which the deceased was riding when he was last seen by his relatives.

The accused persons were variously implicated as persons who claimed ownership of the motorcycle after its recovery or were involved in the transaction that led to its recovery from where it was abandoned by the fleeing Okumu Justin. On arrest, A1 and A2 led the police at Kiyaya East village in Nebbi District where skeletal the remains of the deceased were found. A charge and caution statement was recorded from A2 which implicated A1 in a conspiracy to rob the motorcycle together with a one Munguriek Julius Angoo Bob Faustino, still at large, which ended in the killing of the deceased. At the trial, A2 entered into a plea bargain with the prosecution. He pleaded guilty and was sentenced in accordance with the plea agreement. The rest of the accused denied the indictment and made unsworn statements in their respective defences.

In his defence, A1 acknowledged having been at the scene where the deceased met his death but only as an innocent bystander and passenger on the motorcycle on his way to Wang Kado in Panyimur to fish, where he was invited by Munguriek Julius Angoo Bob Faustino. He said it is Bob Faustino who killed the deceased by holding a handkerchief doused in some white substance tightly against the nose of the deceased. A3 on his part stated that he had been hired by A1, A2, A4 and Okumu Justin to help them sail the motorcycle on his canoe across the river from Pakwach side to Nwoya side in order to avoid traffic police along the road since the motorcycle did not have a number plate. A4 stated that she at one time heard a motorcycle hoot outside her home but did not bother to find out who it was since her home is near the road. She said she had no knowledge of the robbery that led to the death of the deceased.

The prosecution has the burden of proving the case against the each of the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in their respective defences, (See **Ssekitoleko v. Uganda [1967] EA 531**). Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The 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 v Minister of Pensions [1947] 2 ALL ER 372*).

For the accused to be convicted of murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

The first ingredient the prosecution must prove is that of death of a human being. Death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. In proof of this ingredient, there is a post mortem report prepared by PW1 (Dr. Jakor Oryema) which was admitted during the preliminary hearing as Exhibit P. E.1 dated 11th August 2012. The doctor confirmed that the skeletal remains were of a human being but the body was totally decomposed and the identity could not be determined. However, PW2 (Rose Akumu) the mother of the deceased, was able to recognise the skeletal remains by the shirt the deceased was last seen wearing on the day he disappeared. This was corroborated by the evidence of PW3 (Ongiertho Patrick) the nephew of the deceased who last saw him wearing a white shirt of Pakwach Secondary School and recognized his skeletal remains by that attire. These witnesses attended the funeral. What remained of the attire after decomposition of the deceased was tendered in evidence as Exhibits P. E. 8 (the white short sleeved shirt with a school badge) and P. E. 9 (the white checked jumper) and the corresponding exhibit slip as P. E. 7. In his defence DW1 (Kapere Juma) admitted having been one of those who last saw the deceased alive and led the police to the place where his skeletal remains were recovered from. The other two accused persons did not address this element in their respective defence. On basis of the evidence available, I find that the prosecution has proved beyond reasonable doubt that Onencan Dan is dead.

Regarding the second ingredient, it is the law that any homicide is presumed to have been caused unlawfully unless it was accidental or authorized by law. PW1 (Dr. Jakor Oryema) who examined the remains could not establish the cause of death due to complete decomposition of the body that only parts of the skeleton remained and were recovered. This is disclosed in Exhibit P. E.1 dated 11th August 2012. The cause of death can be deduced from the charge and caution statement of A2 (Ovani Brian) which was tendered in evidence as Exhibit P. E. 2B in which explained that the deceased died as a result of a suspected overdose of a white substance suspected to be chloroform administered by a one Munguriek Julius Angoo Bob Faustino, still at large. This is corroborated by DW1 (Kapere Juma) in his unsworn statement he made in his defence. He saw Bob Faustino pull out a handkerchief from the bag on which was a white substance which he held tightly against the nose of the deceased leading to his instant collapse. There is nothing from that explanation to suggest any lawful excuse for such an act. It was a deliberate act and was not accidental. Lastly, consider the defences of all the accused and determine whether this element

is contested. Evaluate all the evidence and determine whether the cause of death was an unlawful act.

The next ingredient requires proof of malice aforethought in the death of the deceased. Malice aforethought is defined by section 191 of the *Penal Code Act* 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. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. Malice aforethought is a mental element that is difficult to prove by direct evidence. Courts usually consider weapon used, the manner in which it was used and the part of the body of the victim that was targeted. In this case no weapon was used but rather a substance suspected to have been chloroform. Where no weapon is used, court must consider if death was a natural consequence of the act that caused the death and whether whoever did it foresaw death as a natural consequence of the act.

In this case, evidence relating to how the death was caused can be found in the unsworn statement of DW1 (Kapere Juma) made in his defence. He said he saw Bob Faustino pull out a handkerchief from the bag on which was a white substance which he held tightly against the nose of the deceased leading to his instant collapse. In his charge and caution statement tendered as Exhibit P. E.2B, A2 said "...Bob pushed his hand in the pocket and picked a handkerchief and used it to cover the nose and face of the rider and shortly the rider became unconscious and paralysed...I asked whether the chloroform he had used to paralyse the boda-boda would not kill him..." Although the chemical composition of this substance was never established, that it was capable of causing death can be gathered from the observations the two accused made of its impact and the concern of A2 of its propensity to cause death. Voluntary performance of any act, with reasonable foresight that it is likely to cause death, but with such a reckless disregard for the probability of the death of another human being ensuing, is the equivalent of an expressed intent to kill. This evidence considered together with evidence of how the body was disposed of and the apparent motive of robbery, leaves no doubt in my mind that the death of the deceased was caused with malice aforethought.

Lastly, the prosecution must prove that each of the accused participated in causing the unlawful death of the deceased. There should be credible evidence placing each of the accused at the scene of the crime as an active participant or linking them to a common plan to kill Onencan Dan in the process of robbing him of his motorcycle. The prosecution relies on the charge and caution statement of A2 (Ovani Brian) to implicate D. W.1 (Kapere Juma) and his own admission in his unsworn statement which he made in his defence. It relies on the doctrine of recent possession to implicate D. W. 2 (Kumakech Men Gilbert Canpara) and D. W. 3 (Anek Evalyene Genesi).

Regarding D. W.1 (Kapere Juma), the charge and caution statement of A2 (Ovani Brian) which was tendered in evidence as Exhibit P. E. 2B implicates him as having been part of the plan to rob Onencan Dan of his motorcycle. Under the doctrine of common intention, when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. In "twin crime"

situations such as where members of a group agree on their main goal to commit a primary criminal act (e.g. rob property) but did not share the intention of one of the members to also commit a collateral criminal act (e.g. killing) which was incidental to the main goal, if the collateral criminal act were such as the participants in the primary criminal act knew to be likely to be committed in the attempt to commit the primary criminal act, or in the commission of the first primary criminal act, or in consequence of the commission of the primary criminal act, each of such persons is liable for that collateral criminal act in the same manner as if the act were done by him alone. I have considered his defence that he was an innocent by-stander. This contradicts the charge and caution statement of the accused where he is named as an active participant in the plan to rob the motorcycle. I am satisfied that the charge and caution statement of A2 would be sufficient, by itself, to justify the conviction of A2 (Ovani Brian). Nevertheless, being a confession by a co-accused, it cannot on its own sustain a conviction but can corroborate other evidence.

Although mere presence at the scene of crime is not incriminatory, failure to disassociate oneself may create an inference of participation. His conduct after the incident is not compatible with his innocence. He migrated to Entebbe to the extent of hiding in the bush there when he learnt there were people looking for him. He never reported to any person in authority at any time during the several months both the deceased and the motorcycle were missing. Curiously, PW. 3 (Ongiertho Andrew) and A3 name him as one of the persons who hired them to assist in crossing the river with the motorcycle. In those circumstances, he could not have been an innocent passenger on the motorcycle the day it was robbed. His defence has been completely destroyed. This circumstantial evidence not only corroborates the admission made by A1 in his unsworn statement of having been present when the deceased met his death but also the fact that the accused D. W.1 (Kapere Juma) was part of the unlawful plan that led to causation of the death of Onencan Dan and I therefore find that it has been proved beyond reasonable doubt that he was an active participant in the commission of the offence of murder.

Regarding D. W.2 (Kumakech Men Gilbert Canpara) and D. W. 3 (Anek Evalyene Genesi), the prosecution seeks to rely on the doctrine of recent possession of the robbed motorcycle to implicate them in the murder. Under this doctrine, a court may presume that a man in possession of stolen goods soon after the theft is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession. Where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witnesses evidence of identification in a nocturnal event.

Recent possession is relative and depends on the nature of the item in question. The motorcycle was robbed in March 2012 and it was recovered in June 2012 (a period of three months). It is my view that in relation to such an item, the passage of three months cannot be defined as recent. Secondly, where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved

beyond reasonable doubt; and if a finding that he stole the articles depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the articles has been excluded.

I do not believe any of the two accused when they claim to be innocent receivers of the motorcycle but they cannot be convicted merely because they lied in their respective defences. The evidence suggests that at the least they were aware that the motorcycle was stolen. But in order to convict any of them on that account for murder, the prosecution had to rule out the possibility that they were only guilty receivers as opposed to being the actual thieves. Since the possibility of being guilty receivers was never ruled out, the inference that they are part of the plan to rob cannot be readily made in which event the additional inference of complicity in the murder cannot be sustained. Possession by an accused person of property proved to have been very recently stolen may support a presumption of murder if all the circumstances of a case point to no other reasonable conclusion. In order to do this, court must first ensure that from the evidence available, the possibility that both accused were mere receivers has been excluded. Since it has not been excluded in this case, I find that the prosecution has failed to prove beyond reasonable doubt that D. W.2 (Kumakech Men Gilbert Canpara) and D. W. 3 (Anek Evalyene Genesi) participated in committing the offence.

In the final result, I find both D. W.2 (Kumakech Men Gilbert Canpara) and D. W. 3 (Anek Evalyene Genesi) not guilty and hereby acquit each of them of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. Each of them should be set free forthwith unless they are being held for other lawful reason.

I find that all ingredients of the offence have been proved in respect of A1 (D. W.1 Kapere Juma) and find him guilty as indicted. I hereby convict Kapere Juma of the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Arua this 25th day of August, 2016.

Stephen Mubiru

Judge.

31st August 2016

3.00 pm

Attendance

Ms. Andicia Meka, Court Clerk.

Ms. Harriet Adubango, Senior Resident State Attorney, for the prosecution.

Counsel for the convict is absent.

The convict is present in Court.

SENTENCE AND REASONS FOR SENTENCE

The convict was found guilty of the offence of murder c/s 188 and 189 of the *Penal Code Act* after a full trial. In her submissions on sentencing, the learned Senior Resident State attorney prayed for a deterrent sentence on the following grounds; the offence carries the maximum penalty of death. Life is sacred and ought to be respected but in this case was taken away motivated by greed. The convict was part of a carefully planned and executed murder. He therefore deserves a long custodial, deterrent sentence.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender and still a young man at the age of 25 years. He has been on remand since June 2012. In his *allocutus*, the convict prayed for a lenient sentence that he can manage.

The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the most egregious cases of Murder. I do not consider this to be a case falling in that category. I have considered that he is a first offender and still a young man at the age of 25 years. He has been on remand since 21st August 2012. I have for those reasons discounted the death sentence.

Where the death penalty is not imposed, the starting point in the determination of a custodial sentence for offences of murder has been prescribed by Item 1 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35 years' imprisonment. I have taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Bukenya v Uganda C. A Crim. Appeal No. 51 of 2007*, where in its judgment of 22nd December 2014, the Court of Appeal upheld a sentence of life imprisonment for a 36 year old man convicted of murder. He had used a knife and a spear to stab the deceased, who was his brother, to death after an earlier fight.

Where there is a deliberate, pre-meditated killing of a victim, courts are inclined to impose life imprisonment especially where the offence involved use of deadly weapons. I have considered the aggravating factors in this case being; the offence was the outcome of meticulous pre-meditation or planning. The convict was part of a deliberate plan to cause the death of the deceased in the course of the commission of another grave offence of robbery. He targeted a very vulnerable youthful boda-boda rider trying to earn a decent living after dropping out of school. He as a result has caused a lot of anguish to the immediate family of the deceased. The body of the deceased was disposed of in a very inhuman and degrading manner, left in an isolated bushy place in the wilderness, open to the elements and for animals in the wild to feed on. The immediate family of the deceased was subjected to the misfortune of having to identify his skeletal remains and was denied the opportunity of giving him a decent burial. Offences of this type targeting boda-boda riders and killing them for their motorcycles are rampant. They are offences motivated by greed and a callous disregard for life in pursuit of material property.

In light of those considerations, the convict deserves to spend the rest of his natural life in prison. I therefore hereby sentence the convict, A1 Kapere Juma, to life imprisonment.

The convict is advised that he has a right of appeal against both conviction and sentence within a period of fourteen days.

Dated at Arua this 31st day of August, 2016.

Stephen Mubiru.

Judge.

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