

UGANDA / JUDGMENT

Uganda v Mateo (Criminal Sessions Case No. 0157 of 2014) [2017] UGHCCRD 405 (4 August 2017) [2017] UGHCCRD 405

COURT

HC: Criminal Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Criminal Sessions Case No. 0157 of 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL SESSIONS CASE No. 0157 OF 2014

UGANDA PROSECUTOR

VERSUS

JOHN MATEO alias NOKA ACCUSED

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 accused on the 26th day of August 2013 at Lorr-Ora village in Zombo District murdered one Mulongo Moses.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the fateful day at around 7.00 pm, the deceased had gone to a phone repairer on that village to retrieve his phone. The accused who happened to have been standing nearby, intervened sarcastically and a quarrel erupted between the accused and the deceased. The accused said he would die with people that day. At about 7.45 pm after the deceased had returned to his home, he was heard screaming that he had been shot him with an arrow. His brother, PW5 and his cousin PW6 responded to the scream and found the deceased bleeding from a wound on the left side of the stomach. The intestines had protruded through the wound. They asked him what had happened and the deceased said the accused had shot him with an arrow for no reason.

They obtained a stretcher from Zeu Health centre and rushed him to that health centre. He was referred to Nyapea Hospital where he died on the same day. The accused had in the meantime handed himself over to PW7 at Zeu Police Station at around 8.00 pm for protection saying that he had shot his brother. The following day the arrow suspected to have been used in shooting the deceased together with other arrows were recovered from the vicinity of the scene of crime.

Since the accused in this case pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against him beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (see *Ssekitoleko v. Uganda [1967] EA 531*). The accused does not have any obligation to prove his innocence. By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure his conviction. 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 Aggravated Defilement, 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.

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 the instant case the prosecution adduced a post mortem report dated 26th August 2013 prepared by P. W.2 Dr. Okwairwoth Justin a Medical Officer of Holy Family Hospital, Nyapea, which was admitted during the preliminary hearing and marked as exhibit P. Ex.2. The deceased is said to have died at that hospital. P. W.4 Ringe Muzamil Morris, a cousin of the accused, saw the body at the Nyapea Hospital. P. W.5 Abineno Sisto Mulongo, a brother of the deceased, helped in rushing him to hospital where he died. He attended the burial of this deceased in his compound. P. W.6 Uch Genaro, a cousin of the deceased, assisted with rushing the deceased to hospital but on return home later in the evening he received the news that the deceased had died. The accused did not offer any evidence on this element and defence Counsel did not contest it. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Mulongo Moses died on 26th August 2013.

The prosecution had to prove further that the death of Mulongo Moses was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or it was authorized by law (see *R v. Gusambizi s/o

Wesonga (1948) 15 EACA 65*). P. W.1 who conducted the autopsy established the cause of death as “cardiopulmonary failure due to haemorrhage from small gut laceration from penetrating abdominal injury.” Exhibit P. Ex.2 dated 26th August 2013 contains the details of his other findings which include a “laceration, left hypochondrium with protruding small gut about 30 cms out, active bleeding. Laceration, small gut 4 x 4 cm wide at about 20 cm from the stomach, haemoperitoneum, approximately 20 cm.” P. W.4 Ringe Muzamil Morris testified that when he rushed with a stretcher from Zeu Health Centre to the scene, he found the deceased with his intestines protruding. P. W.6 Uch Genaro too testified that he saw the intestines were out as they rushed the deceased to hospital. In his dying declaration heard by the two witnesses, the deceased said he had been shot by an arrow. The following morning, P. W.7 No. 27057 Cpl Kertho Peter recovered arrows from near the scene, some of which were tendered in evidence as P. Ex. 4A and B. The evidence has established that the injuries sustained by the deceased were as a result of deliberate a deliberate shot by an arrow. Not having found any lawful justification for that act, I agree with the assessors that the prosecution has proved beyond reasonable doubt Mulongo Moses's death was unlawfully caused.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice aforethought. 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. This may be deduced from circumstantial evidence (see *R v. Tubere s/o Ochen (1945) 12 EACA 63*).

Malice aforethought being a mental element is difficult to prove by direct evidence. Courts usually consider first; the nature of the weapon used. In this case a broken arrow was tendered, It fits the definition of a deadly weapon in section 286 (3) of *The Penal Code Act* being an instrument made or adapted for shooting, I therefore find that the weapon used in shooting the deceased was a deadly one.

The court also considers the manner it was applied. In this case it was used to inflict a penetrative wound. The court further considers the part of the body of the victim that was targeted. In this case it was stomach, which is a delicate and vulnerable part of the body. The ferocity with which the weapon was used can be determined from the impact. In the instant case it perforated the stomach and lacerated the small gut causing bleeding. P. W.1 who conducted the autopsy established the cause of death as “cardiopulmonary failure due to haemorrhage from small gut laceration from penetrating abdominal injury.” The accused did not offer any evidence on this element. Despite the absence of direct evidence of intention, on basis of the circumstantial evidence, I find, in agreement with the assessors that malice aforethought can be inferred from use of a deadly weapon (an arrow), on a vulnerable part of the body (the stomach), inflicting such a degree as perforation of the stomach and laceration of the small gut causing bleeding and eventual death. The prosecution has consequently proved beyond reasonable doubt that Mulongo Moses's death was caused with malice aforethought.

Lastly, there should 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. The accused denied participation in the commission of the offence. He stated that he was arrested on 25th August 2013 at night as he was attending to his hotel business. He opined that he is implicated only because of the grudge arising from a dispute over land subsisting then with P. W.4 Ringe Muzamil Morris and P. W.5 Abineno Sisto Mulongo.

To rebut this defence, the prosecution relies on two pieces of evidence; Firstly, the dying declaration made by the deceased to both P. W.4 Ringe Muzamil and P. W.6 Uch Genaro when they rushed to his aid after he screamed for help. To both witnesses, he named the accused as the person who had shot him with an arrow.

As one of the exceptions to the rule against hearsay, under section 30 of *The Evidence Act*, a statement made by a person who believes he is about to die in reference to the manner in which he or she sustained the injuries of which he or she is dying, or other immediate cause of his or her death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them, is admissible as a dying declaration. Dying declarations however, must always be received with caution, because the test of cross examination may be wanting and particulars of violence may have occurred under circumstances of confusion and surprise. Although corroboration of such statements is not necessary as a matter of law, judicial practice requires that corroboration must always be sought for. I have considered the circumstances prevailing at the time the deceased was shot. It was after 7.00 pm and therefore visibility is likely to have been relatively poor, depending on the distance between the deceased and the assailant. Although the accused was known to the deceased before, the distance from which the arrow was shot is unknown, and the span of time for which he observed him is unknown. On its own, this piece of evidence is un-reliable.

However, corroboration of the declaration is to be found in the second piece of evidence relied upon by the prosecution. Within an hour of the incident, the accused had reported to Zeu Police Station where he arrived at around 8.00 pm and found PW7 No. 27057 Cpl Kertho Peter at the counter. He asked for police protection from his brothers who he said were after his life for shooting the deceased. He did this before anyone else, apart from the deceased, had accused him. There is no evidence that he was at the scene at the time the dying declaration was made for him to have known that he had been implicated. This conduct is not consistent with his innocence and cannot be explained on any other reasonable hypothesis other than his guilt. I have not found any coexistent circumstances that would weaken the inference of his guilt. This conduct points irresistibly to his guilt and taken together with the dying declaration, the conclusion that he is the perpetrator of the offence is inescapable. In agreement with the assessors, I find that the defence of the accused has been disproved and that the prosecution has proved beyond reasonable doubt that he is the perpetrator of the offence.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby find the accused guilty and convict him accordingly for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Arua this 3rd day of August, 2017.

Stephen Mubiru

Judge.

3rd August 2017

4th August 2017

10.33 am

Attendance

Ms. Sharon Ngaiyo, Court Clerk.

Mr. Emmanuel Pirimba Resident State Attorney, for the Prosecution.

Mr. Oyarmoi Okello, Counsel for the accused person on state brief is present in court

The accused is present in court.

Both Assessors are 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 his submissions on sentencing, the learned State attorney prayed for a deterrent sentence on the following grounds; the offence is serious and carries a maximum of death. Although the convict has no previous criminal record, the action was deliberate. As a result of the death the deceased left orphans. the convict is a retired trained soldier and knew the effect of his action. The case springs from a land dispute. The community lives in fear. The convict scared the family of the accused. There is a possibility of revenge either way. Life is precious yet the deceased met his death in a brutal murder. The convict planned and warned the victim earlier. He deserves a deterrent sentence.

Counsel for the convict prayed for a lenient custodial sentence on the following grounds; he is a first offender of an advanced age of 59 years. He has a family and has been on remand for a period of two years and three months. He has learnt a lot when on remand. He is now humbled and prays for lenience. In his *allocutus*, the convict said he had forgiven all those people whatever they have done to him. He cannot do anything bad again at home. All his properties were destroyed and the children chased and houses burnt. He has forgiven all that and now prays to God. He is bothered by the death of the deceased up to now and prays that God should help his soul.

Sentencing is a reflection of more than just the seriousness of the offence. The court at this stage is guided by the principle of proportionality which operates to prohibit punishment that exceeds the seriousness of the offending behaviour for which the offender is being sentenced. It requires that the punishment must fit both the crime and the offender and operates as a restraint on excessive punishment as well as a prohibition against punishment that is too lenient. The principle of parsimony on the other hand requires that the court should select the least severe sentencing option available to achieve the purpose or purposes of sentencing for which the sentence is imposed in the particular case before the court.

Murder is one of the most serious and most severely punished of all commonly committed crimes. The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. In cases of deliberate, pre-meditated killing of a victim, courts are inclined to impose the death sentence especially where the offence involved use of deadly weapons, used in a manner reflective of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of the sanctity of life. This maximum sentence is therefore usually reserved for the most egregious cases of Murder committed in a brutal, gruesome, callous manner. This case is not in the category of the most egregious cases of murder committed in a brutal, callous manner, 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 *Bukonya 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. Similarly in *Sunday v. Uganda* *C. A Crim. Appeal No. 103 of 2006*, the Court of Appeal upheld a sentence of life imprisonment for a 35 year old convict who was part of a mob which, armed with pangas, spears and sticks, attacked a defenceless elderly woman until they killed her. In *Byaruhanga v. Uganda, C. A Crim. Appeal No. 144 of 2007*, where in its judgment of 18th December 2014, the Court of Appeal considered a sentence of 20 years' imprisonment reformatory for a 29 year old convict who drowned his seven months old baby. The convict had failed to live up to his responsibility as a father to the deceased who was victimized for the broken relationship between him and the mother of the deceased.

In light of the aggravating factors outlined by the learned State Attorney, I consider a starting point of forty years' imprisonment for the convict. Against this, I have considered the submissions made in mitigation of sentence, mainly his relatively advanced age, and the *allocutus* of the convict. I conclude that the aggravating circumstances in this case outweigh the mitigating factors. I consider a deterrent sentence to be appropriate for the convict. I for that

reason deem a period of thirty (30) years' imprisonment to be appropriate as the minimum sanction necessary to sufficiently punish the convict without imposing an unnecessary burden on public resources. In accordance with Article 23 (8) of the Constitution and Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, to the effect that the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. The convict has been in custody since 30th August 2013. I hereby take into account and set off a period of three years and eleven months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of twenty six (26) years and one (1) month to be served starting today. 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 4th day of August, 2017.

Stephen Mubiru

Judge.

4th August, 2017

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