

Hon. Mr. Justice  
J.M.N. Isukwa

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT SOROTI

Murder

CRIMINAL SESSION CASE NO. 237 OF 1993

UGANDA .....PROSECUTOR

VERSUS

SAM EKOLU alias OBOTE ..... ACCUSED

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

J U D G M E N T:

The accused is indicted on five counts for murder, contrary to sections 183 and 184 of the Penal Code Act.

In the first count, it is alleged that Sam Ekolu alias Obote and others still at large on or about the 24th day of October, 1990 at Ochomai village - Abango Parish, Asuret Sub-County in the Soroti District murdered Levi Emalu. 5

In the 2nd, 3rd, 4th and 5th counts, the particulars of the offence are the same except that David Oparo, Robert Aoru, Ogwang and Michael Otalal were murdered respectively on the same date in the same place as in the 1st count. 10

Evidence of PW1 is that on 24.10.90, he was arrested by N.R.A. soldiers on his way for fish at Abango landing site and the accused was in their group. The village people rounded up on that day including the witnesses were beaten with sticks of various sizes which the soldiers could lay their hands on and later the screening exercise took place in which children, old men and women were released. 15

The accused whom the witness knew as a notorious rebel who had killed many people before joining the N.R.A., participated in that screening exercise. Thereafter the witness in the company of Okaba Justine, Opolot Samuel and the five deceased persons were taken under arrest to a certain mabati house in Abango village. Beatings again continued on the people camped in that home before the second screening took place. The people were screened into two groups:- The first group consisted of suspected rebels in which the five deceased persons were put and the second group was of non-rebels. The latter group was transferred to the home of one Erau, 200 paces away but the alleged group of rebels including the deceased persons remained in the mabati home under guard. 20 25

The accused before leading the group of non-rebels to the home of the said Erau, made an order to a section of N.R.A. soldiers in Ateso language as follows: "Oloto oarasi ngul iyangari oni lu kwape suspects;" meaning: "Go and kill those, these ones shall be taken as suspects." 30

Indeed about 15 N.R.A. soldiers took the deceased persons towards a swamp but the witness and his group remained at Erau's home being guarded by the accused and other soldiers. The N.R.A. soldiers returned with their hands and clothes blood stained and the accused told PW2 to get some water for the group to wash their hands as some cassava was ready for them to eat. After eating, the accused ordered his soldiers to line up and taking with them the witness to Soroti Military barracks where he was detained for one month before his release in November, 1990. Most of the soldiers who carried out the operation on that day were Iteso from whom the witness learnt that the accused was the overall commander. He did not see any Munyankole or Muganda among that group.

On the night before the fatal incident, N.R.A soldiers including the accused and his colleague one Pendakula woke PW2 at her home at around 3 a.m. She was made to sit down when she got outside. Erau with whom she lives as husband and wife was in the second home of a co-wife at the time. She led the soldiers to the co-wife's home, a distance of about 200 paces away. She called for Erau who then got outside. Pendakula told him not to run because the whole home was besieged by the soldiers. Erau then sat down being guarded.

The witness and other soldiers then went to different homes in the village to collect people. All those found were brought and camped at her home for the remaining hours until morning. The five deceased persons were kept separate in another house of PW2 under guard. Three of the victims were tied with one rope and the other two were also tied in another rope. The accused and his friend the said Pendakula called the witness aside and asked for her birth place. She showed them the opposite village and she was further asked if she knew anybody from Ochomai village and she said her grandmother came from there.

After that discussion, the witness heard the accused order about 10 soldiers in Ateso language: "Oyangasi isibei ngul koloto koyarata," meaning: "Take those prisoners go and kill them." Immediately that order was made, the witness saw the soldiers remove the five victims from her house and led them towards the swamp where they were eventually killed. The soldiers returned with their hands full of blood and asked her to provide them with water and soap for washing. After washing their hands, the accused asked the witness to serve his boys with cassava which she had cooked and after that the soldiers who numbered about 40 left her home and the village at large taking with them PW1 and another boy called Opolot.

After the soldiers had left her home, PW2 followed the truck to the swamp where the victims were taken to and found all the five persons dead. Three of them were lying on their stomachs and the other two were lying on their sides. At the scene, she found several sticks and it appears some wounds were inflicted by use of bayonets. She picked courage and untied the dead bodies and made them to lie on their backs. She then sent a message to the relatives who came and took the bodies for burial.

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The behaviour and conduct of the accused during and after the operation gave her the impression that he was the commander. Whenever the accused <sup>called</sup> his soldiers before him and gave them instructions, they followed. The accused also introduced himself as Obote who could do this or that.

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Evidence of the Vice-Chairman R.C.3 of Ochomai village is that on 23.10.90 he was arrested by the N.R.A soldiers on his way to Soroti Town. He was led to the home of one Elizabeth Atigo where he found several people armed with guns but dressed in civilian clothes and had rounded and camped the village people there. He was led into a house and interrogated by Pendakula whether there were rebels in the village which he denied. After interrogation they came out but after about 15 minutes, the witness saw the accused in the company of soldiers come with about seven boys tied with a rope. He knew the boys as villagemates and they included the victims namely: Levi Emalu, David Oparo, Robert Aonu, Ogwang and Michael Otalal. The victims were put in the house and the soldiers sent the witness to look for millet flour for eating the goat which they came along with and he was under escort.

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Before they went in search of millet flour, the accused asked what position PW3 held in the society and after learning from him that he was an R.C. official, the accused threatened to kill him because wrong people were found in his area. Learning that the accused was also a rebel before, PW3 was frightened and thought he was going to be killed.

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After the soldiers had finished eating their goat at around sunset, the accused told the villagers that he was going to release them but warned that he was going to kill one of the boys who was tied. He got Emalu and tied with a rope. The accused then called for an axe and when it was brought, he ordered Emalu's father to axe him (Emalu) to death in the presence of people. Within moments, the accused showed some mercy and asked the village what next should be done to the boys.

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The people pleaded for mercy but the accused got a gund from one of the soldiers, moved ten paces backwards and pointed the gun at the crowd and said: "I as Obote, did you know what I did in Serere?" At that time, PW3 came to know the accused as Obote.

After all that, Emalu was returned inside the house where others were being held. The accused then warned the villagers that vehicles and properties were being looted and the footmarks were coming towards the village, should he meet such a person, he would kill. Immediately the villagers were set free but PW3 as an R.C. official was ordered to stay behind together with the seven boys. The group then left for Abango village at around 1 a.m.

On reaching the home of PW2, Pendakula called for her and when she got outside, she was asked for the whereabouts of her husband. The team traced her husband in the second home and many villagers were also collected that same night and camped at the home of PW2.

The next morning i.e. on 24.10.90 the witness heard accused order soldiers in Ateso language to take and kill the boys. He saw Emalu, Aoru and Oparo tied with one rope with their hands on their backs and the same was the style with which Ogwang and Otalai were tied with another rope. They were then escorted to the swamp by about 15 soldiers who made them run. Down the swamp, the witness could hear sounds like someone is cutting trees. After about 20 minutes or so, the soldiers returned. Some of them were sweating while others had blood stains on their clothes and bayonets. They asked PW2 to get soap and water with which they washed their hands.

The accused at that time was in the house of PW2 together with other soldiers and the witness saw one of the executioners go towards them. He faced the accused and bowed and said: "Tume maliza kaazi." meaning that "we have finished the work." Thereafter the accused ordered that soldier to ask the witness as an R.C. official to reveal the names of the boys who had just been killed which he disclosed because he was frightened.

After eating cassava, the accused started calling soldiers: "Fall-in, fall-in" and the witness went with the soldiers to the original mabati house where the victims were detained. PW1 and young Opolot joined the line of the soldiers but the witness was pushed back inside the house. Later the accused ordered all the people inside that house to run away before the soldiers could be counted ready for departure. So the witness ran to the home of PW2 and later the soldiers left the village.

He sent a message to the relatives of the victims and also reported the matter to the sub-county chief of the area. He also attended the burials of the victims in Ochomai village. He holds the accused responsible for all the orders made during and after the operation from the time of his arrest.

In his defence, the accused admits that on 24.10.90, he was among the sixty soldiers who carried the operation in that village. The purpose of the operation was to trace people robbing vehicles and property and to check also on the rebels who might still be in the village. They reached the village in the evening and spent a night on the verandah, but did not say for certain on whose verandah. However, he admitted that during day time he was assigned the duty of guarding PW3 and a certain small child in the mabati house in the company of two other soldiers. He did not know what his fellow soldiers were doing in different parts of that village. He denied ordering soldiers to kill the alleged five victims because he was not in command of the operation. He said he was a mere private and did not know why the prosecution witnesses singled him out when senior officers were there including 2nd Lt. Pendakula.

By about midday the following day, when they were about to leave the village on the orders of Lt. Situma, they were ordered to release PW3 who was the R.C. official and a small boy which they did, but took along with them to Soroti one suspected rebel.

On the question of being involved in rebel activities, the accused said that he was also arrested and taken to the bush by rebels against his will for a period of about seven months being guarded. In the bush with rebels, they used to move very much and that explains why people from the village in question knew his names. The rebels nicknamed him Ekolu Sam alias Obote otherwise his real name is Richard Byenzi. He denied killing any of the alleged people and denied also that he ever introduced himself as Obote to the villagers or that he threatened to kill one of the children in public. He says PW3 manufactured the story against him because he had put him under guard and PW2 also lied when she said that the five victims were detained in the mabati house on his orders because an army officer/boss does not keep prisoners.

In light of the above evidence from both sides, in a charge of murder under sections 183 and 184 of the Penal Code Act, the prosecution is required to establish the following ingredients beyond reasonable doubt:-

In the first place, it must be established that the victim(s) actually died. Evidence of PW1 and PW3 is that they knew the five deceased persons very well before the incident as their villagers.

Both witnesses saw the accused and other soldiers bring the victims to the home of PW2 with their hands tied on the back with ropes and they looked very much tortured. PW2 in whose mabati house the victims were detained overnight supported PW1 and PW3 in that regard. PW1 and PW3 gave the names of the five deceased persons as Levi Emalu, David Oparo, Robert Aoru, Ogwang and Michael Otalai. On the fateful day, they were taken away by about 15 soldiers and killed somewhere in the swamp. PW2 checked the execution place and found the bodies of the five deceased persons. The bodies bore some tortures and stab wounds. The soldiers returned from the execution place with blood on their hands, clothes and bayonets and PW2 gave them soap and water to wash. Later PW3 attended the burials of the five deceased persons.

The defence denied having knowledge of the five people driven and later killed at the swamp and that Medical evidence is not before court to prove death and its cause. However, death can be proved by other evidence other than medical evidence. In the instant case, the prosecution witnesses said the deceased persons were alive and were driven to the execution place still alive. They never returned alive except only their dead bodies and the 15 soldiers or there about reported that their work was over. PW3 who knew the victims well before informed court that he attended their burial in Ochomai village. In the circumstances, I have no doubt in my mind that the five victims actually died.

The second element for consideration is whether the victims' death was unlawfully caused with malice aforethought. The prosecution relies on the evidence of PW1, PW2 and PW3 who heard the orders from the accused that "Take those people and kill them," and according to PW3, when the 15 soldiers or so returned from the execution place, one of them went to the accused and bowed and said: "Tume maliza kaazi," meaning: "we have finished the job." The witnesses said the deceased persons were badly tied when being led away to the swamp and they had been tortured earlier and it was alleged that they were rebels who were enemies of the N.R.A soldiers. The amount of tortures described by PW2 that sticks and bayonets were used, it is submitted, shows that the killers had the intention to kill the deceased persons brutally and in fact killed them. In the circumstances, the violence used with the weapons used were dangerous and prove malice aforethought.

Defence submission is that the accused admits having been a member of about sixty soldiers who carried out the operation in the village. The operation was done in order to trace some people who were ambushing vehicles on the roads and looting property and also to trace some rebels alleged to be hiding in that village.

The accused was a mere private without any rank and Lt. Situma was the commander of that operation. There is no evidence to enlighten the court about the position of the accused during the alleged operation.

During the operation, the accused was assigned to keep three people only who were not among the five deceased persons. He guarded PW1, PW3 and a young boy called Opolot. He denied having knowledge of the five victims driven and later killed at the swamp. He gave a list of senior soldiers and it was not possible for him to give an order to execute the deceased persons. He also denies emphatically having knowledge of Ateso language which language it is alleged he used in giving execution orders. No reason is given why about fifteen soldiers who took and executed the deceased persons are not charged with the present offences. The accused, it is submitted, never went to the execution place according to the prosecution evidence.

The circumstances under which the alleged offences were committed are that the five victims were tortured and tied with ropes from the time of their arrest. They were suspected to be rebels who were enemies of the N.R.A soldiers at the time. The purpose of the alleged operation was to trace those people who were ambushing vehicles on the roads and looting property and also to trace some rebels allegedly were hiding in that village.

The screening exercise which took place put the deceased persons among the rebel group who were detained in the mabati house of PW2. The second group of non-rebels was not tortured and were camped in the second home of PW2. In fact PW3, an R.C. official and the young Opolot were put in the latter group and were allowed to eat cassava which was only meant for the soldiers. Besides, PW1 though tortured was put in the group of non-rebels together with one Samuel Opolot and were taken to Soroti military barracks simply as mere suspects which resulted into their release a month later.

Emalu, one of the five victims, was threatened with death by use of an axe in public. He was one of the deceased persons driven to the swamp and later killed. Beating sounds could be heard from the swamp and when PW2 checked the place of execution, she found sticks abandoned at the scene and also saw stab wounds on some bodies. The executioners returned with their clothes, hands and bayonets blood stained. In my humble view, sticks and bayonets are deadly weapons capable of causing death and in fact the deceased persons died. The only inference one can draw in a brutal act like that is that the killers had intended to kill the victims which goal was achieved.

The third element requires the prosecution to establish that the accused was a party to the murder in this case.

In<sup>his</sup> defence, the accused admitted having been a member of about sixty soldiers who carried out the operation in that village. He said he was a mere private without any rank and that Lt. Situma was the commander of that operation.

During the operation, the accused said he was assigned to guard PW1, PW3 and a young boy called Opolot. He denied having knowledge of the five victims driven and later killed at the swamp. He gave a list of senior soldiers and said it was not possible for him to give an order to execute the deceased persons. He strenuously denied having knowledge of Ateso language which language it is alleged he used in giving execution orders. It is submitted that there is no evidence to enlighten the court about the position of the accused. The accused never went to the execution place according to the prosecution evidence.

As to whether the accused was a party to the murder in question, the prosecution relies on the evidence relating to the conduct of the accused since the arrest of the deceased persons. The accused led the victims already tied and had them detained in a mabati house belonging to PW2. He addressed the people gathered of what he could do to people who were causing insecurity in that area. He asked the villagers what could be done to the victims after threatening to kill one of them but the villagers pleaded for mercy. The deceased persons were guarded throughout the night. It was the accused who physically separated the deceased persons from the rest of the people. All the prosecution witnesses heard the accused order the soldiers in Ateso language to take and kill the victims.

All the circumstances of the case, it is submitted, show that the accused had common intention to kill the deceased persons right from the beginning. He released those he did not want to murder and ordered the murder of those he had wanted to kill. One of the fifteen soldiers reported to him that they had already done the job but the accused did not disassociate himself from those acts. After the killing and the eating of the cassava, it was the accused who also gave an order for the soldiers to leave the village. All along, it is submitted, the accused was in command of those soldiers and through the way he conducted himself, the witnesses came to know his name as Obote. The two captives, PW1 and Opolot, were taken to Soroti military barracks on the orders of the accused. Although the accused did not physically execute the deceased persons, but they died on his orders which make him also a principal offender within the meaning of section 21 of the Penal Code Act.

An order of a senior officer, if carried, does not exonerate him from illegal order, all are principal offenders, it is submitted.



The accused was properly identified as the incident took place in broad day light and PW1 moreover knew the accused before the incident. Mistaken identity, therefore, could not arise.

From the above arguments, it is submitted that the accused was a member of about sixty soldiers who carried out the operation in that village. What remains now the issue, is the role played by the accused in that operation and whether the orders allegedly made by him also make the accused one of the principal offenders. From the evidence on record stated elsewhere in the judgment, needless to repeat, during and after that operation, puts the accused on the command. There is no evidence to show that Lt. Situma was the commander of the operation. Although the said Pendakula was in the team of soldiers, there is no evidence either to point a finger at him as the alternative commander of the operation. There is nothing also on the record to indicate that the Intelligence Officer Rukunda attached to 310 Brigade was the commander, or a senior officer who participated during that operation. All that evidence was not put to the prosecution witnesses and the only inference one can draw is that the story is concocted and amounting to an afterthought.

It is clear from the evidence that the accused with other soldiers took the victims to the home of PW2 tied with ropes and there were signs of torture on them. They were detained in the house the whole night. The accused addressed the people weilding a gun at them. He threatened to kill one of the deceased persons in public but the villagers pleaded for mercy on them. He and Pendakula called PW2 aside and asked her if she knew anybody from Ochomai village. Her answer was that her grandmother came from that village. All the prosecution witnesses heard the accused make an order to the soldiers to take and kill the victims. The orders were made in Ateso language which language the witnesses knew because they are Iteso and the accused is known as an Etesot.


The five victims were driven to the swamp where the beatings could be heard. The soldiers returned with their clothes, hands and bayonets soaked in blood. PW2 gave them water and soap to wash their hands before being served with cassava. A report was made to the accused that the job was done. After eating, it was the accused who ordered the soldiers to leave the village. PW1 and Opolot were taken captives to Soroti military barracks on the orders of the accused.

The accused did not ask the soldiers where the victims had remained. Evidence leads to the irresistable inference that the accused had a common intention with the soldiers to kill the deceased persons.

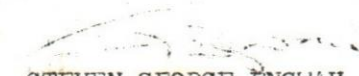
In fact he was the mastermind. It is immaterial that he was not physically present when his soldiers shot the victims dead. Clearly they were acting on his orders: AUGUSTINE MUSANA AND MOSES MWAI Vs. UGANDA, CRIMINAL APPEAL NO. 25 OF 1985.

The verbal instigation made by the accused was within section 21 of the Penal Code Act, and the accused is a principal offender. Under section 21 of the Penal Code Act, one who counsels another to commit an offence may himself be convicted as a principal offender. In this case the prosecution witnesses impressed me as truthful persons and I am abundantly satisfied that the words used can bear only one implication, and that was to take the deceased persons and kill them: ONDIMU s/o ONDIMU & GESIMBA s/o ONDIMU V. R (1952) 19 EACA 239.

In the end result, I am in agreement with the gentlemen assessors that the accused is guilty of murder in all the five counts, contrary to sections 183 and 184 of the Penal Code Act and he is accordingly convicted.


  
STEVEN GEORGE ENGWAU  
JUDGE  
11.5.94.

19.5.94: The accused is before court.  
Mr. Kakembo for accused on State brief present.  
Ms Nandawula for the State present.  
Judgment delivered in open court.

  
STEVEN GEORGE ENGWAU  
JUDGE

SENTENCE: There is only one penalty for a charge of murder under sections 183 and 184 of the Penal Code Act.

In the premises, the accused is to suffer death on the first count in a manner prescribed by law and shall have suspended sentences in the 2nd, 3rd, 4th and 5th counts respectively.

  
STEVEN GEORGE ENGWAU  
JUDGE  
19.5.94.