THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 73/94

UGANDA :: PROSECUTION

VERSUS

A1: NO. 3450 P.C. SILVESTERI ISABIRYE

A2: NO. 3461 P.C. GODFREY WAKAHATI :::::::::::::::::: ACCUSED

BEFORE: THE HONOURABLE JUSTICE C. M. KATO

J U D G M E N T

The 2 accused persons P.C. Silvesteri Isabirye (A1) and P.C. Godfrey Wakahati (A2), hereinafter to be referred to as A1 and A2 respectively, are each indicted for murder contrary to section 183 of the Penal Code Act.

The Indictment alleges that on 3/5/1993 at Walumbe District Administration police in the district of Iganga, the 2 accused persons murdered one Godieon Ojokoit. Both accused pleaded not guilty to the indictment.

The case for prosecution was briefly that on 2/5/1993 the deceased Gideon Ojokoit also known as Ojulong was arrested at a place called Butaleba tse-tse control camp for assaulting and threatening to kill his wife (PW5). He was then escorted to Walumbe District Administration police post where he was handed to the 2 accused persons who detained him. He later on escaped from the detention but he was chased and re-arrested by A1 and one man called Byona. After he had been re-arrested he was placed under a tree while he was tied, the 2 accused persons together with Byona started assaulting him. A1 was armed with a rubber stripe and A2 was armed with a stick. The reason for assaulting him was that the 2 accused persons wanted to discipline him. Later on the same evening he was removed from the tree and taken to the cell where both A1 and A2 continued to assault him until he died during the night.

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The case for A1 who gave his evidence on oath was that on that particular day he was on duty and he received the deceased after he had been assaulted, the deceased then escaped from his detention. He was chased by the villagers who re-arrested and beat him badly then they brought him to the police post when he was in a bad condition; those who had been beating him included Byona and Mobwire, on seeing A1 they started running away. This accused denied ever having beaten the deceased and it is his case that the deceased was assaulted by the villagers.

As for A2 who also testified on oath, his case is imply that he was not present when the deceased was brought to the station, he had by then gone to a nearby trading centre to have his bicycle repaired. On his return he found the deceased at the police post when he had been badly assaulted, his condition was so bad that he (A2) could not have assaulted him again. The only time he touched the deceased was to assist him (deceased) to the cell where he was to be detained. Both accused persons carried him from the tree to the place of detention but later on at night the man died and on larming of his death he (A2) went to Ikulwe to report the death.

It is the law of this land that in all criminal cases, with the exception of a few statutory offences, the burden is upon prosecution to prove the guilt of the accused beyond reasonable doubt, the accused has no burden of proving his innocence: Sekitoleko v. Uganda (1967) EA 531 at page 534 and Woolington v. DP.P. (1935)AC 462. It is also part of our law that an accused person should not be convicted on weakness of his defence but should only be found guilty on the strength of the case as proved by prosecution: Israil Epuku s/o Achietu v. R. (1934)1 EACA 166 at page 167.

This being a charge of murder, prosecution is enjoined to prove beyond reasonable doubt, inter alia, that a human being was unlawfully killed; that the killing was with malice aforethought and that the accused persons took part in that killing. (see section 183 of the Penal Code and the case of: Uganda v. Kassim Musa Obura (1981) HCB 9 at page 10).

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It is not being seriously disputed that a human being by the name of Gideon Ojokoit also known as Ojulong died at Walumbe Local Administration police post on 3/5/1993. The evidence as adduced by both sides points to one fact and that fact is that Gideon is dead. What appears to be in dispute is whether or not his death was unlawfully caused. The evidence on record from both sides shows that during the day before the deceased met his death he had been assaulted first at Bukaleba tse-tse control camp then at the police post at Walumbe. The doctor's evidence which was admitted under section 64 of T.I.D did not conclusively state what caused the deceased's death but the resport was clear that the deceased's body was bearing some marks of the cane on the chest, on the abdomen, on the buttocks and hands. Judging from the evidence on record my considered conclusion is that the deceased died as a result of the beatings inflicted upon him during the day by different people at different places. In my view these beatings were unlawfully administered upon the deceased. His death must therefore have been caused unlawfully. It was pointed out in the case of: Gusambizi Wesonga v. R. (1948)15 EACA 65 at page 67 that death is said to be unlawfully caused if it is not accidential or if it is not authorised by law. In this case it cannot be said that the deceased's death was accidentally caused or was justified in any way.

The next point to be considered is who caused the death of this man. The prosecution is insistent that the deceased was killed by the 2 accused persons by beating him. But each of the 2 accused persons is quite adamant that he had no hand in causing the deceased's death. The prosecution relied on the evidence of David Echimu (PW2), that of Badiru Munya (PW3) both of whom said they were present when the deceased was being beaten. According to Echiumu (PW2) he saw the deceased being beaten by both accused persons after he had escaped and then had been re-arrested. According to his evidence A1 was armed with a rubber stripe while A2 was armed with a stick. The reason for beating him was that they wanted to discipline him for having escaped from a lawful custody. PW3 Badiru Munya said he also saw the deceased being beaten but according to him it was Isabirye (A1) who beat him twice with a small stick. He did not see A2 beating him.

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On his part A1 denied ever having beaten the deceased although he says he received him after he had been beaten by the villagers who included Wabwire and Byona who had chased the deceased after he had escaped from the cell where he had been detained. A2 says he was not present when all these things happened. He returned from the trading centre and found the deceased already beaten and he together with A1 removed the deceased from the tree where he had been sitting and placed him in the cell.

One of the two sides must be telling the truth and one must be telling lies. To find out the truth the evidence as given by the two sides must be examined carefully.

What is involved is the question of identification of the 2 accused. Although the witnesses both for prosecution and defence are not definite about the time when the beating of the deceased took place, according to the evidence from both sides it is certain that the deceased was beaten between 5.00p.m and 7.00p.m which means it was not yet dark. The 2 accused persons were not strangers to the 2 prosecution witnesses who witnessed them beating the deceased, the beating took quite a long time and the accused persons were not far from the 2 witnesses. Judging from these facts I am satisfied that there were conditions favouring correct identification.

It is true to say that at the time the deceased was received from the tse-tse control camp A1 was alone at the police post because even PW3 (Badiru Munya) and PW6 (Odongo) maintain that at the time the deceased was handed at the station only A1 was present. In fact A1 himself told the court that at the material time he was alone which means that A2 was not present at the initial stage of this incident.

The evidence from both sides however does suggest that when the deceased escaped and was re-arrested and brought back to the police post both accused persons were present. The beating was after the re-arrest of the deceased not before according to the evidence of PW2, PW3 and that of A1. The beating according to the evidence of PW2 was in two stages, under the tree then at the office. PW3 says

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that he saw A2 when taking the deceased to the cell, both accused agree that they took the deceased together to the cell which means in fact A2 was present when the beating of the deceased took place, his defence of alibi cannot be sustained. PW2 who was present most of the time was in a position to see the 2 accused persons beating the deceased. PW3 says he only saw A1 beating the deceased. I do not accept that story of his, he was not a truthful witness on this point because he had his own interest to protect since the deceased was beaten in his presence and he did nothing to save his life as the Ag. Chairman RCI of the area. I have found him not to be an open witness in this matter. Although it was stated by A2 that PW2 had a grudge against both of them because they had caused his arrest 3 times; 1st when he was caught catching immature fish, the 2nd time was when he broke the curfew rules by moving at night and 3rd when he was arrested for sending young children who were too young to go fishing. I find these allegations of the grudge not to be true because the assessor asked this man (PW2) whether he had any grudge with the accused persons but he catagorically denied ever having any grudge with any of them; even if these grudges ever existed in my view they were not serious enough so as to warrant the witness (PW2) implicating the 2 accused persons in the commission of this heineous crime.

I must state here that it is common knowledge in this country that when an accused person or a suspect escapes from lawful custody of security personnel when re-arrested these security personnel can not take his escape lightly, they usually try to tame him by assaulting him although by so doing they commit a crime. I agree with PW2 when he says that when the accused persons were beating the deceased they sayd they were trying to discipline him. It would be a surprise if these fellows (the accused persons) received the deceased after his re-arrest and did nothing to discipline him. There is one other point which must be taken into account here and that point is that if the deceased had been so badly assaulted by out siders and he was in the condition described by both accused they would not have received him in such a state knowing that he would eventually die at their hands and they would be blamed for his death. The only reason why they accepted him was because his condition was not so serious and it became serious after they had severely assaulted him. I must however say that although the accused persons did beat the

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deceased they were not the only ones, people like Chuka, Byona and Wabwire might have also had their share in the beating according to the evidence available.

In all these circumstances I find that prosecution has proved beyond reasonable doubt that the 2 accused persons in fact took part in the beating of the unfortunate man Gideon Ojulong Ojokoit.

The next matter to be considered is whether the accused had common intention when they beat the deceased to death. According to the evidence of PW2 these people said they were beating the deceased so as to discipline him which means they were really having a common intention of assaulting the deceased and as I have said earlier the assault was unlawful. I have no doubt in my mind over the fact that the 2 accused shared a common intention of unlawfully assaulting the deceased. Since they had a common intention it is immaterial as to who among them beat the deceased where.

Having found that the deceased was unlawfully killed by the 2 accused persons, the next issue which comes up for consideration is whether or not the 2 accused had malice aforethought. The law as stated in the case of: Lokoya v. Uganda (1968)EA 332 at page 334 and in section 186 of the Penal Code Act is that in a murder case prosecution has a duty of proving malice aforethought before a safe conviction can be secured. It was stated in the case of: R. v. Tubere s/o Ocheni (1945)12 EACA 63 that in deciding whether or not malice aforethought has been established by prosecution court must have regard to such things as the nature of weapon used, the manner in which it was used, the number of injuries inflicted and the part of the body injured. In the present case injuries on the body of the deceased were described by the doctor as cane marks and they were to be found on the buttocks, chest, hands and abdomen. Although the accused persons say the condition of the deceased was serious it is not clear as to the real nature of injuries which were inflicted upon the deceased. According to the evidence of PW2 and PW3 among the weapons used were a stick and rubber stripe but the sizes of these weapons were never determined. The parts of the body which have been said to have been injured were not vital parts of the body. In his testimony PW2 says that the reason why the deceased was being assaulted was to discipline him. I accept that piece of evidence as being truthful.

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I have considered all these facts and I am satisfied that the intention of the accused persons was never to kill the deceased but punish him for his mischief when he escaped away from a lawful custody. In these circumstances I find that prosecution has not proved to my satisfaction that there was malice aforethought in this case. The position being what it is I find that the accused persons did not commit murder and I do acquit them of that offence. In partial agreement with the opinion of one gentleman assessor (the 2nd assessor was discharged after he had failed to attend court) I find the accused guilty of manslaughter and I do convict them of the offence under section 182 of the Penal Code Act and section 86 of Trial on Indictment Decree. The gentleman assessor advised me only to find A1 guilty of manslaughter and acquit A2 altogether, I have not followed the last part of his advice because he did not seem to have seriously addressed his mind to all the evidence on record.

C.M. KATO
JUDGE
9/12/1994