

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KITGUM

CRIMINAL SESSIONS CASE No. 0369 OF 2018

UGANDA

PROSECUTOR

5 **VERSUS**

OLWENY ALFRED

ACCUSED

Before Hon. Justice Stephen Mubiru.

JUDGMENT

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The accused was indicted with one count of Murder c/s 188 and 189 of *The Penal Code Act*. It is alleged that the accused on the 24th day of May, 2015 at Lamit Liba village, Akwang sub-county in Kitgum District murdered one Ayobu Filder.

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The prosecution case is that the accused and the deceased were husband and wife. They had a troubled marriage during which the accused was repeatedly violent toward the deceased. A few days before her death, the accused had picked her from her parents' home where she had taken refuge after the most recent episode, and returned her to his home. The deceased went missing on the evening of 23rd May, 2015. The accused began searching for her on 26th May, 2015 claiming

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that she had, against his advice, left his home on 23rd May, 2015 in his absence while he attended a party at his brother's home in the neighbourhood. She had told him that she would be going to visit her sister then admitted at Kitgum Mission Hospital. He had advised her not to leave that late as she had to cross a dangerous spot along the way where a number of fatal incidents had occurred in the past. His search at her parents' home, the hospital and Church not having yielded

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any results, he placed radio announcements on 27th May, 2015 and later that day her body was discovered partially submerged in Pagea Stream. He recognised the body and the post mortem later revealed that she could have died of acute respiratory arrest.

In his defence, the accused denied having committed the offence. His wife left home in the evening of 23rd May, 2015 headed to visit a patient at Kitgum Hospital but was never seen again until her body was on 27th May, 2015 in Pagea Stream. He had cautioned her not to leave that late but she had travelled against his advice and in his absence as he attended a function at a neighbour's. He began a search for her on 25th May, 2015 when he got concerned that she was not returning as expected. He searched at her parents' home, the Church, and the hospital but all in vain. He put out radio announcements on 27th May, 2015 before the body was discovered later that day. Upon discovery of the body, the relatives of the deceased suspected him to have caused her death, they descended upon his home, set fire on his houses and destroyed all his property. He fled to the police for personal safety.

Since of the accused 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 he can only be 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 indicted 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 are 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.

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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 28th May, 2015 prepared by P.W.1 Dr. Okwera Pope Paul the Medical Superintendent at Kitgum Government Hospital, which was admitted
5 during the preliminary hearing and marked as exhibit P. Ex.1. The body was identified to him by a one Nyero Anthony as that of Ayobu Filder. P.W.4 Alimo Kevin, son of the deceased and a step-son of the accused, attended the burial which took place at the home of the accused on 27th May, 2015. P.W.5 Ajara Evalyn, sister of the deceased and sister in law of the accused saw the body of the deceased in Pagea River and recognised it as that of his daughter Ayobu Filder. In
10 his defence, the accused admitted having seen the body of his wife, the deceased Ayobu Filder in Pagea River after it was discovered. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Ayobu Filder died is dead.

15 The prosecution had to prove further that the death of Ayobu Filder 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 authorised 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 “possibly due to frothing with acute respiratory arrest.” Exhibit P. Ex.1 dated 28th May, 2015
20 contains the details of his other findings which include a “bruise seen on the back with torn clothes torn behind neck soft excessively.” This evidence is suggestive of strangulation but is inconclusive. In the absence of direct explanation of the cause of death, the probability should be high enough to justify an inference in the favour of a finding of homicide. But if facts appear which reasonably explain the death in a manner involving no act or omission of a third party, the
25 foundation for the inference is excluded. I find in this case that the evidence establishes a very high probability, but not to the level of proof beyond reasonable doubt, that Ayobu Filder' death was unlawfully caused.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice
30 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 the deceased was assaulted and 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*).

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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 none was recovered. The court also considers the manner in which it was applied (in this case it is unknown) and the part of the body of the victim that was targeted (it is unknown but the neck is suspected). The ferocity with which the weapon was used can be determined from the impact (the neck was found to be soft excessively). P.W.1 who conducted the autopsy established the cause of death as “possibly due to frothing with acute respiratory arrest.” There is no direct evidence of intention yet on basis of the available circumstantial evidence, it is not possible to infer malice aforethought where the evidence relating to the cause of death is inconclusive. I therefore find that malice aforethought cannot be inferred from the available evidence. The prosecution has consequently not proved beyond reasonable doubt that Ayobu Filder’s death was caused with malice aforethought.

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Lastly, the prosecution had to prove that it is the accused who caused the death of the deceased. This is done by adducing direct or circumstantial evidence placing the accused at the scene of crime as perpetrator of the offence, or as an accessory thereto. The accused denied having committed the offence and stated that his wife left their home in his absence and the next time he saw her was after three or four days, when she was found dead and her body was partially submerged in Pagea Stream.

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To disprove that defence, the prosecution relies entirely on circumstantial evidence, woven together by the following strands; the accused and the deceased husband and wife with a troubled marriage; the accused had a history of violence against the deceased; when the deceased went missing the accused did not express any concern until much later on 26th May, 2015; the accused was more concerned with his property than the body of his wife after it was discovered; he admitted to the sister of the deceased, P.W.5 Ajara Evalyn, that he had killed his wife. In her testimony, she stated that; "I asked the accused; "Olweny is this what you have done?" and he

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told me that "it has happened like that." He denied having killed the deceased. I asked him "you have killed my daughter?" and he said "yes I have." In his defence, the accused stated that; " I have never been on good terms with Ajara. She wants to control me. She is my sister in law."

5 In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for
10 the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Simon Musoke v. R* [1958] EA 715, *Mwangi v. Republic* [1983] KLR 327, *R v. Kipkering Arap Koske and another* (16) EACA 135 and *Sharma Kooky and another v. Uganda* [2002] 2 EA 589 (SCU) 589 at 609). Circumstantial evidence must always be narrowly examined.

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Having considered the quality of circumstantial evidence adduced against the accused, I find that the degree of probability attained in favour of the explanation by the prosecution has not produced moral certainty, to the exclusion of every reasonable doubt. The circumstances do not exclude every exculpatory hypothesis leaving only one rational conclusion to be drawn, of the
20 guilt of the accused. Having found earlier that evidence relating to the cause of death was inconclusive, and that it is uncertain as to whether the death was unlawfully caused and with malice afterthought, I find that the circumstantial evidence as well only raises a strong suspicion against the accused, and nothing more. His conduct after the deceased went missing is queer and suspicious but it is not inconsistent with a cold and insensitive character. He chose to go about
25 his daily activities, including going to the garden and back to the party, showing no concern at all for his missing wife. The accused though cannot be convicted based only on his odd or queer character. I agree with the opinion of the assessors that his alleged admission is more likely that not to have been a retort in anger or a misinterpretation of his response. It has not been proved beyond reasonable doubt that he is the perpetrator of the offence. I find him not guilty and he is
30 accordingly acquitted of the offence of Murder c/s 188 and 189 of *The Penal Code Act*. He should be set free forthwith unless there are other lawful reasons for keeping him in custody.

Dated at Gulu this 5th day of December, 2018

Stephen Mubiru

Judge,

5th December, 2018.