

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT
FORT PORTAL
FPT-00-CR-SC-109 OF 2019**

5 **UGANDA:.....:PROSECUTOR**
VERSUS
MONDAY DAVID:.....: ACCUSED

BEFORE HON. JUSTICE VINCENT WAGONA

10 **JUDGMENT**

1.0. Introduction

The indictment in this case has 3 Counts. Count 1 is murder c/s 188& 189 of the Penal Code Act. It is alleged that Monday David the accused, on the 3rd day of February 2018 at Ihamba Trading Centre, Mabaale Parish, Nyantungo sub County in the Kyenjojo District, murdered Bwerindwa Bosco. Count 2 is attempted Murder c/s 204 of the Penal Code Act. It is alleged that Monday David the accused, on the 3rd day of February 2018 at Ihamba Trading Centre, Mabaale Parish, Nyantungo sub County in the Kyenjojo District, attempted to cause the death of Busobozi Julius. Count 3 is attempted Murder c/s 204 of the Penal Code Act. It is alleged that Monday David the accused, on the 3rd day of February 2018 at Ihamba Trading Centre, Mabaale Parish, Nyantungo sub County in the Kyenjojo District, attempted to cause the death of Kakyö Dolika.

2.0. Summary of the Facts

25 The deceased Bwerindwa Bosco, was the husband of PW1 Kajumba Edesi. On the

night of 3/2/2018 at 8:00pm the deceased and his wife PW1 were sitting in their bar, with some customers. They saw Kakyo Dolika who came running from outside and entered the bar. She was being chased by the accused who was armed with a panga. She was bleeding from her fingers that had been cut. The deceased immediately stood up to intervene and asked the accused to go away; whereupon, the accused raised the panga and cut the deceased on the head. The deceased later died from the injuries. The accused thereafter ran away. He was later arrested and charged with the offences herein. The investigations revealed that the accused and Kakyo Dolika were estranged lovers at the time. On the night of 3rd February 2018 at about 8:00pm the two met on the way as Dolika was returning home. In an ensuing quarrel and fight, the accused, armed with a *panga* cut Kakyo Dolika on the hand and injured her fingers. She made an alarm to which Busobozi Julius responded. The accused turned on Busobozi and cut him on the head. In the process, Dolika run to seek refuge in the deceased's bar where the accused followed her and killed the deceased in the process. In his defence the accused denied the offences. He stated that on that day he was at home sleeping, when police arrested him alleging that he had killed Bwerinda Bosco and injured Dolika and Busobozi.

20 **3.0. The Burden and Standard of Proof**

The burden of proof is always on the prosecution. The prosecution has the duty to prove each of the ingredients of the offences and generally this burden never shifts onto the accused, except where there is a specific statutory provision to the contrary. (see *Woolmington vs D.P.P. [1935] A.C. 462*, and *Okethi Okale & Ors. vs Republic [1965] E.A. 555*). This is not one of those cases where the burden of proof shifts to the accused to prove his innocence.

The standard of proof is proof beyond reasonable doubt. All the essential ingredients of the offence are to be proved beyond reasonable doubt. This standard does not mean proof beyond a shadow of doubt. The standard is achieved if having considered all the evidence, there is no possibility that the accused is innocent.

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In *Miller vs Minister of Pensions [1947] 2 All E.R. 372* at page 373 to page 374, Lord Denning stated that: –

10 *"The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence: 'of course it is possible but not in the least probable', the case is*
15 *proved beyond reasonable doubt; but nothing short of that will suffice."*

Evidence is evaluated as a whole. The Court considers evidence of both the prosecution and the defence relating to each of the ingredients before coming to a conclusion. The Court should not consider the prosecution evidence in isolation of
20 the evidence presented on behalf of the accused.

In *Abdu Ngobi vs Uganda, S.C.Cr. Appeal No. 10 of 1991*, the Supreme Court expressed itself as follows, with regard to treatment of evidence:

25 *"Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden*

of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted; but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged.”

4.0. The Ingredients Of The Offences

4.1. Murder

On a charge of murder, the Prosecution has to prove the following essential ingredients:

1. That the death of a human being occurred.
2. That the death was caused unlawfully.
3. That death was caused with malice aforethought.
4. That the accused participated in the crime.

4.2. Attempted Murder

Section 204(a) of the Penal Code Act, provides that any person who attempts, unlawfully, to cause the death of another person commits a felony; and is liable to imprisonment for life.

Section 386(1) of the Penal Code Act defines an attempt as follows: –

"When a person, intending to commit an offence, begins to put his or her intention into execution by means adapted to its fulfillment, and manifests his or her

intention by some overt act, but does not fulfill his or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offence.

5 (2) *It is immaterial—*

(a) *except so far as regards punishment, whether the offender does all that is necessary on his or her part for completing the commission of the offence, or whether the complete fulfillment of his or her intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of his or her intention;*

(b) *that by reason of the circumstances not known to the offender, it is impossible in fact to commit the offence."*

Attempted murder has been defined as *“the failed or aborted attempt to murder another person. It consists of both action and intention. A person must take a direct step towards killing and must have the specific intent to kill that person”*

There must be an overt act manifesting the intention, that is *“an act directed toward another person that indicates an intent to kill or harm and that justifies self Defence”*. – ***Refer to Marriam – Webster Legal Dictionary.***

20

It has been established by case law that *“one may harbor at the same time, both an intent to cause serious physical injury and an intent to cause death”*. – ***Refer to People vs. McDavis 97 AD 2/302.***

25 The ingredients of the offence of attempted murder as gathered from the above are:

(i) Malice aforethought (Intention to cause death).

- (ii) Manifestation of the intention by an overt act.
- (iii) Participation of the accused.

5.0. The Evidence In This Case

5 The evidence on each Count should prove each of the above elements beyond reasonable doubt. The Prosecution called only 2 witnesses in this case. Under the law, no particular number of witnesses is required for the proof of any fact. (See *S.133 Evidence Act*)

5.1. The Evidence Of Murder: Count 1:

Whether death of a human being occurred

10 The Prosecution relies on the evidence of PW1 Kajumba Edesi, the postmortem report in respect of the deceased and the photograph of the dead body of the deceased. PW1 Kajumba Edesi, the wife of the deceased, testified that the deceased Bwerindwa Bosco died on 4/2/2018 and that the body was taken to the
15 mortuary in the hospital and later taken for burial. The postmortem report in respect of the deceased was tendered under S. 66 of the Trial on Indictments Act as Agreed Facts (Prosecution Exhibit P1), together with a photograph of the dead body of the deceased. I am satisfied that the Prosecution has proved beyond reasonable doubt that the deceased Bwerindwa Bosco is dead.

20

Whether the death was caused unlawfully

Unless accidental or authorized by law, homicide is always unlawful. (See **Gusambizi s/o Wesonga Versus Rep. [1948] 15 EACA 65**). The Prosecution contends that this was a homicide. The defence of the accused on the other hand is
25 a denial. **PW1 Kajumba Edesi** the wife of the deceased testified that the deceased

was cut on the head with a panga that went through the head .Prosecution Exhibit P1, the postmortem report, revealed the external injuries on the body of the deceased as deep cut wound onto the frontalis extending from the right eye to the left side of the frontal bone. The internal injuries were a hashed skull, bleeding into the brain matter with hematoma formation. The cause of death and reason for the same was stated to have been extensive external and internal injuries with injuries to the brain matter causing impairment of normal body functions and hence death. External and internal hemorrhage caused severe anemia. There is no evidence suggesting that the injuries that caused the death of the deceased were lawfully caused. I am satisfied that the Prosecution has proved beyond reasonable doubt that the death of the deceased was caused unlawfully.

Whether the death was caused with malice aforethought

In Criminal Law, malice aforethought is deemed to be established from evidence of circumstances of the intention to cause the death of any person or of the knowledge that the act or omission causing death will probably cause the death of some person (See S. 191 Penal Code Act). In order to determine whether there was an intention to cause death or that the person knew that his act will probably cause death, the Court can consider the weapon used, the part of the body targeted, the degree of injury and the conduct of the accused before and after the act. (See **R. Versus Tubere s/o Ochieng [1945] EACA 63**).

PW1 Kajumba Edesi, the wife of the deceased, testified that the deceased was cut on the head with a panga that went through the head. She said that when the accused came holding a panga, her husband the deceased stood up and asked him to go back. Then he raised the panga and cut him on the head. After that he ran away before he was later arrested. The postmortem report showed a deep cut

wound onto the frontalis extending from the right eye to the left side of the frontal bone, with injuries to the brain

A *panga* is a deadly weapon because it is made or adapted for cutting or stabbing and when used offensively on a person it can cause death (*See Supreme Court, Kwesimba Vs Uganda SCCA NO. 14/95*). The head has been established to be a vulnerable part of the body and injuries deliberately inflicted upon the head have been held to be intended to cause death or to be accompanied by knowledge that they would probably cause death. (*See Mwathi vs. Republic [2007]2 EA 334*).

10

I am satisfied that the Prosecution has proved beyond reasonable doubt that the person who caused the death of the deceased did it with malice aforethought; that is, with intention to cause death; or with knowledge that his acts would probably cause death.

15

Whether the accused participated in the crime

The Prosecution evidence in regard to participation of the accused is based entirely on the evidence of PW1 the wife of the deceased. There was one eye witness to the incident and the incident happened at night. I have to consider the evidence of the Prosecution together with the defence of the accused, which in effect is a denial.

20

I warned the Assessors, and hereby warn myself, that corroboration is required as a matter of practice when relying on the testimony of a single identifying witness. Such identification evidence should be considered with caution. There is need to find other independent evidence confirming the commission of the crime and connecting the accused to the crime.

25

In the case of *Jamada Nzabaikukize SCCA No, 01/2015*, it was held that:

“The law on identification by a single witness has been laid out in several cases. The leading authority is that of **Abdullah Bin Wendo and another vs. R (1953) 20 EACA 583**. The law was further developed in the authorities of **Abdulla Nabulere vs. Uganda Criminal Appeal No.9 of 1978** and **Bogere Moses vs. Uganda (supra)**. The principles deduced from these authorities are that-

i) Court must consider the evidence as a whole.

ii) The court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were favourable or difficult.

iii) The court must caution itself before convicting the accused on the evidence of a single identifying witness.

iv) In considering the favourable and unfavourable conditions, the court should particularly examine the length of time the witness observed the assailant, the distance between the witness and the assailant, familiarity of the witness with the assailants, the quality of light, and material discrepancies in the description of the accused by the witness.”

Corroboration means additional independent evidence connecting the accused to the crime. In **R. v. Baskerville [1916] 2 K.B 658**, it was held that:

“We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is,

which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.”

The EACA adopted the definition in the context of accomplice evidence in **R v. Manilal Ishwerlal Purohit (1942) 9 EACA 58 (p.61)** as follows:

“The corroboration which should be looked for is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. It is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and whilst the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime. Corroboration may be found in the conduct of the accused.”

I can proceed to rely on the evidence of a single identifying witness even without corroboration, if I am satisfied that the witness was truthful and there is no possibility of error in the identification of the perpetrator. (See **Abdala bin Wendo & Anor v. R (1953) 20 EACA 166**).

PW1 Kajumba Edesi the wife of the deceased testified that she knew the accused because he was a neighbour; they were village mates; she had known him for about 2 years. In cross examination she said that she saw the accused clearly, cutting her husband. The incident took place inside the house. There was solar light that

enabled her to see him clearly. I have considered this evidence together with the defence of the accused, which in effect is a mere denial. In his defence the accused denied the offences. He stated that he used to reside at his uncle's home, Basaija John and on that day he was at the same home sleeping when police arrested him 5 alleging that he had killed Bwerinda Bosco and injured Dolika and Busobozi. I am satisfied that PW1 was truthful and also that there is no possibility of error in the identification of the accused as the perpetrator.

The conduct of the accused can provide corroboration. For example, if the conduct 10 of the accused indicates a sense of guilt on his part; such as escaping from arrest or running away, it can add strength to the prosecution case and to his responsibility. (See: *Bogere Charles Vs Uganda Crim. Appeal No. 10/98 S.C;* *MuhamedMukasa & anor vs. Uganda-Criminal Appeal 27/95 (S.C.); Telesfora Alex &Anor vs. Republic (1963) EA 140*). In this case, the conduct of the accused 15 is material. PW1 testified that when Monday came holding a panga, her husband the deceased stood up and asked him to go back. He did not go. Instead, he raised a panga and cut him on the head. After that he ran away, before he was later arrested. The conduct of the accused in the circumstances of this case was not that of an innocent person.

20

I am satisfied that the Prosecution has proved beyond reasonable doubt, that it is the accused Monday David that caused the death of the deceased Bwerindwa Bosco with malice aforethought.

5.2. The Evidence of Attempted Murder: Count 3

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5.2.1. Malice Aforethought

I have already discussed the law on malice aforethought while dealing with Count

1 (Murder). The victim in this Count 3 (Attempted Murder) did not testify. It was reported by the Prosecution that she could not be traced. The court can rely on other evidence to determine the case.

5 The evidence of malice aforethought relating to this Count is intertwined with that on manifestation of intention to kill; the two issues will therefore be resolved together hereafter.

5.2.2. Manifestation of Intention by Overt Act

10 **PW1 Kajumba Edesi** testified that while in their bar with her husband, the victim Kakyö Dolika came running from outside and entered where they were. Her fingers had been cut and she was bleeding. She was being followed by the accused who was holding a *panga*. The only inference is that the accused had just cut the victim's fingers with a *panga*, before going on to chase her with the said *panga*.
15 The medical examination report in respect of the victim was tendered under S. 66 of the TIA as Agreed Facts (Prosecution Exhibit P3) together with a photograph showing the injuries on the fingers of the victim. The report showed amputated middle left finger with severe bleeding; cut wound in the second left finger with extensive tissue loss; and cut wound in the second last left finger.

20
I am satisfied that the acts of being armed with a *panga*, chasing the victim who had already sustained injuries from the *panga* by the accused, and the nature of the injuries, were all overt acts being the manifestation of the intention to kill the victim Kakyö Dolika. The ingredients of malice aforethought (intention to kill) and
25 the manifestation of the said intention by overt act(s) have thereby been proved beyond reasonable doubt.

5.2.3. Participation of the Accused

There was no eye witness to the assault on the victim Kaky Dolika. The Prosecution case is founded on purely circumstantial evidence. Accordingly, this Court must find, before deciding upon conviction, that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. (See *Simon Musoke V R (1956) EA 715*). See also *Taylor on Evidence 11th Edition page 74* which provides as follows: "*The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt.*"

10 **PW1 Kajumba Edesi** testified that while in their bar with her husband, the victim Kaky Dolika came running from outside and entered where they were. Her fingers had been cut and she was bleeding. Soon, the accused arrived holding a panga. The only inference is that the accused had just cut the victim's fingers with a panga, before going on to chase her with the said panga.

15 PW1 said that when Monday came holding a panga, her husband the deceased stood up and asked him to go back. Then he raised a panga and cut him on the head.

20 I have already considered and resolved the matters of evidence of a single identifying witness, corroboration, and the defence of the accused, while dealing with Count 1 (Murder).

25 It is the finding of this Court, that in the circumstances of this case, the evidence is incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is the further finding of this

5 Court, that the intention of the accused, who had already injured the victim by cutting her fingers with a panga, in going on to chase the victim with the said panga, into the bar, where she was seeking refuge, before using the same panga to kill the deceased Bwerinda Bosco who had attempted to intervene, could only be interpreted as direct steps towards killing, with the specific intent to kill the victim Kakyo Dolika.

10 I am satisfied that the Prosecution has proved beyond reasonable doubt that there was malice aforethought (Intention to cause death of the victim); that there was a manifestation of the said intention by an overt act or acts; and that it was the accused person Monday David who committed the offence in Count 3.

5.3. The Evidence of Attempted Murder: Count 2

5.3.1. Malice aforethought

15 The victim did not testify. No direct or circumstantial evidence was adduced in court, regarding how the victim sustained the injuries referred to in the medical report - Prosecution Exhibit P2.

5.3.2. Manifestation of the intention by an overt act

20 No direct or circumstantial evidence was adduced, regarding whether the incident resulting in the injuries sustained by the victim, could be interpreted as direct steps towards killing, with the specific intent to kill the victim Busobozi Julius.

5.3.3. Participation of the accused

25 No direct evidence was adduced in court, regarding the participation of the accused. PW2 No. 3591 D/CPL Bwambale Sezi's testified as to how Busobozi

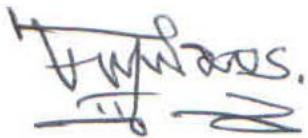
sustained the injuries he had, based on his inquiries. This evidence is hearsay evidence that cannot be relied upon to determine the participation of the accused.

The Court finds that the Prosecution did not present sufficient evidence to prove the accused's participation in the assault against Busobozi to the required standard.

6.0. Conclusion

The Prosecution has proved each of the ingredients of the offence of Murder (Count 1) beyond reasonable doubt. The Prosecution has also proved each of the ingredients of the offence of Attempted Murder (Count 3) beyond reasonable doubt. The Prosecution has failed to prove beyond reasonable doubt, the offence of Attempted Murder brought against the accused in Count 2. In agreement with the Lady and Gentleman Assessors, I find the accused Guilty of the offence of Murder as indicted in Count 1 and I convict him accordingly. I also find the accused Guilty of the offence of Attempted Murder as indicted in Count 3 and I convict him accordingly. I find the accused Not Guilty of the offence of Attempted Murder indicted in Count 2 and I acquit him accordingly.

Dated at Fort portal this 15th day of February 2022.



Vincent Wagona

JUDGE

15.02.2022

submits that the sentences run concurrently and proposes a sentence of 20 years' imprisonment.

5 Under the Penal code act, the maximum punishment for murder is death and the maximum punishment for attempted murder is life imprisonment. I am also guided by the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.

10 Under Paragraph of the Sentencing Guidelines¹⁷, the court may only pass a sentence of death in exceptional circumstances in the “rarest of the rare” cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate. Under Paragraph¹⁸, the “rarest of the rare” cases include cases where— (a) the court is satisfied that the commission of the offence was planned or meticulously premeditated and executed; (b) the victim was-- (i) a law enforcement officer or a public officer killed during the performance of his or her functions; or (ii) a person who has given or was likely to give material evidence in court proceedings;(c) the death of the victim was caused by the offender while committing or attempting to commit-- (i) murder; (ii) rape; (iii) defilement; (iv) robbery;(v) kidnapping with intent to murder; (vi) terrorism; or 15 (vii) treason; (d) the commission of the offence was caused by a person or group of persons acting in the execution or furtherance of a common purpose or conspiracy;(e) the victim was killed in order to unlawfully remove any body part of the victim or as a result of the unlawful removal of a body part of the victim; or (f) the victim was killed in the act of human sacrifice. I have found no extremely 20 grave circumstances as would to justify the imposition of the death penalty.

Under The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, the sentencing starting point for murder is 35 years and the sentencing range is from 30 years' imprisonment up to death sentence.

- 5 Under Paragraph 19 regarding the sentencing ranges in capital offences: (1) The court shall be guided by the sentencing range specified in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence; (2) In a cases where a sentence of death is prescribed as the Maximum sentence for an offence, the court shall, consider the factors in paragraphs 20 and 21 to determine
10 the sentence in accordance with the sentencing range.

Under Paragraph 20, in considering imposing a sentence of death, the court shall take into account— (a) the degree of injury or harm; (b) the part of the victim's body where harm or injury was occasioned; (c) sustained or repeated injury or
15 harm to the victim; (d) the degree of meticulous pre-meditation or planning; (e) use and nature of the weapon;(f) whether the offender deliberately caused loss of life in the course of the commission of another grave offence; (g) whether the offender deliberately targeted and caused death of a vulnerable victim; (h) whether the offender was part of a group or gang and the role of the offender in the group, gang
20 or commission of the crime;(i) whether the offence was motivated by, or demonstrated hostility based on the victim's age, gender, disability or other discriminating characteristic;(j) whether the offence was committed against a vulnerable person or member of a community like a pregnant woman, child or person of advanced age; (k) whether the offence was committed in the presence of
25 another person like a child or spouse of the victim; (l) whether there was gratuitous degradation of the victim like multiple incidents of harm or injury or sexual abuse; (m) whether there was any attempt to conceal or dispose of evidence; (n) whether

there was an abuse of power or a position of trust; (o) whether there were previous incidents of violence or threats to the victim; (p) the impact of the crime on the victim's family, relatives or the community; or (q) any other factor as the court may consider relevant.

5

Under Paragraph 21, in considering imposing a sentence of death, the court shall take into account the following mitigating factors— (a) lack of premeditation; (b) a subordinate or lesser role in a group or gang involved in the commission of the offence; (c) mental disorder or disability linked to the commission of the offence; 10 (d) some element of self-defense; (e) plea of guilt;(f) the fact that the offender is a first offender with no previous conviction or no relevant or recent conviction; (g) the fact that there was a single or isolated act or omission occasioning fatal injury; (h) injury less serious in the context of the offence; (i) remorsefulness of the offender; (j) some element of provocation; (k) whether the offender pleaded 15 guilty;(l) advanced or youthful age of the offender; (m) family responsibilities; (n) some element of intoxication; or (o) any other factor the court considers relevant.

Under paragraph 23 Imprisonment for life is the second gravest punishment next to the sentence of death. Under paragraph 24 in capital offences, the court shall 20 consider imposing a sentence of imprisonment for life where the circumstances of the offence do not justify a sentence of death. In determining whether the circumstances of an offence or offender justify imposing a death sentence or imprisonment for life, court shall consider the factors aggravating or mitigating a death sentence.

25

The sentencing guidelines have to be applied bearing in mind past precedents of courts in decisions where the facts have a resemblance to the case under trial (see *Ninsiima v. Uganda Crim. C.A Criminal Appeal No. 180 of 2010*).

5 **Cases of murder that were reviewed:**

In *Kaddu Kavulu Lawrence Vs Uganda, Criminal Appeal No. 72 of 2018*, the appellant went to the house of the deceased and fatally cut the deceased with a *panga* because the deceased had taken up a woman who had earlier cohabited with the appellant but they had since separated. He was convicted and sentenced to death. The Court of Appeal substituted his death sentence with life imprisonment which sentence was up held by the Supreme Court.

In *Ssekawoya Blasio v. Uganda SCCA 24/2014* the Supreme Court upheld concurrent life imprisonment terms for murder of 3 children aged 12, 10, and 8 years respectively.

In *Rwalinda John v. Uganda SCCA 3/2015* the Supreme Court upheld a sentence of life imprisonment in a case of murder. The Supreme Court observed that the trial Court had considered the aggravating and mitigating factors like having been a first offender and took into account the one year and three months she spent on remand, the age of 67 years and prayer for leniency. That the trial Judge considered the seriousness of the offence, the death of a toddler, the way the murder was carried out which culminated in the death among others.

In *Mwesigye Richard & Another Vs Uganda, Criminal Appeal No. 246 of 2010*, the Court of Appeal maintained the sentences of life imprisonment meted out to the appellants for murder.

5 In *Bukenya v. Uganda C.A Crim. Appeal No. 51 of 2007*, 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.

I have reviewed the following 2 cases that were cited by the prosecution: *Aharikundira Yusitina v. Uganda SCCA 27/201* and *Ndyomugenyi*
10 *Patrick v. Uganda SCCA 57/2016*

In *Aharikundira Yusitina v. Uganda SCCA 27/2015*, cited by the prosecution, the Supreme Court substituted a death sentence with a sentence of 30 years' imprisonment after observing that the appellant was a first offender with no
15 previous criminal record, was of advanced age, did not bother court on second appeal regarding her conviction, and displayed remorsefulness; and she was the surviving spouse and mother of six children.

I observe that the mitigating factors in the above case were significant.

20

In *Ndyomugenyi Patrick v. Uganda SCCA 57/2016*, cited by the prosecution, where the Supreme Court maintained a sentence of 32 years' imprisonment, the Supreme Court observed as follows:

25 *“The re-sentencing Judge whose decision was confirmed by the Court of Appeal went to great length to consider all the mitigating and aggravating*

factors available at pages 1 & 2 of the Judgment before re-sentencing the appellant to twenty years' imprisonment. The Court noted thus:

The convict is a first offender with no previous record of conviction. He is a family man with six children aged between twelve and twenty-three years. He has been in touch with his family and they are ready to accept him back. His counsel submitted that the convict initiated a reconciliation process with the deceased's family in a letter written on 1/12/2011. The deceased's relatives responded in a letter of 12/2/2012 and accepted to forgive him. The local council executives of his area attest to his good conduct in a letter of 3/10/2011. He committed the offence at twenty-eight years which falls within the bracket of a youthful age as defined by the Sentencing Directions 2013. He is living with HIV and there is a medical certificate on record to that effect. The Pre-sentence and social inquiry report on the court record indicated that he was aged twenty-eight years at the time he committed the offence. He pursued various courses while in prison in the area of theology, HIV/AIDS counseling, peacemaking among others. The report of the head teacher indicated that the convict is on the process of self-rehabilitation, reformation and transformation. I consider the foregoing to be factors mitigating a sentence of death under clauses 21(f)(i)(l)(m) & (o) of the Sentencing Directions, 2013."

I observe that the mitigating factors in the above case were very significant.

Cases of attempted murder that were reviewed:

In Syson Muganga Vs Uganda, Court of Appeal Criminal Appeal No. 33 of 2005,

the Court of Appeal upheld a sentence of life imprisonment for the offence of

attempted murder. The appellant had splashed a corrosive substance that inflicted burns on the victim.

5 In *Opolot Justine and Agamet Richard alias Acment Richard Vs Uganda, Court of Appeal Criminal Appeal No. 155 of 2009*, the Court of Appeal maintained a sentence of 15 years meted out to the appellant for the offence of attempted murder.

10 In *Anthony Okwanga Vs Uganda, Court of Appeal Criminal Appeal No. 45 of 1999*, the Court of Appeal upheld a sentence of 15 years for the offence of attempted murder.

In the present case, I have considered that these are very serious offences whose maximum penalties are a death sentence for murder and life imprisonment for attempted murder. I have considered the brutal manner in which the offences were
15 committed against the victims who were completely innocent and defenseless, without any regard to the sanctity of life. PW1 Kajumba Edesi, the wife of the deceased, testified that the deceased was cut on the head with a *panga* that went through the head. The postmortem report showed a deep cut wound onto the frontalis extending from the right eye to the left side of the frontal bone, with
20 injuries to the brain. I have further considered the following aggravating factors: the death of the victim in Count 1 was caused by the convict while attempting to commit the murder in Count 3 – that is, the convict deliberately caused loss of life in the course of the commission of another grave offence; use and nature of the weapon being a *panga* which is a deadly weapon; the offences were committed
25 against vulnerable persons or member of the community, in this case a woman, and a man of advanced age of 52 years old; the offence of attempted murder was

motivated by, or demonstrated hostility based on the victim's gender as a woman; the offence of murder was committed in the presence of the spouse of the victim; the impact of the crime of attempted murder on the victim, who sustained an amputated middle left finger with severe bleeding, cut wound in the second left
5 finger with extensive tissue loss, and cut wound in the second last left finger– the medical report classified the injuries as grievous harm; the impact of the crime of murder on the family of the victim that lost a husband and a father; premeditation in arming himself with a panga before attacking the victims; and the lack of display of any kind of remorse by the convict – in allocutus, he maintained that he
10 does not know why he was arrested and that he should be released to go and take care of his family. I have considered the following mitigating factors: the fact that the convict is a first offender with no previous conviction; youthful age of the convict now aged 27 years – he is a young man capable of reform; the allocutus of the convict who stated that he should be released to go and attend to his family
15 responsibilities. The aggravating factors by far outweigh the mitigating factors.

Under Article 23 (8) of the Constitution and Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, the court should deduct the period spent on remand from the sentence considered
20 appropriate, after all factors have been taken into account. I observe that the convict was arrested on or about 5.2.2018 has been in custody for 4 years and 12 days.

However, the Supreme Court in the case of *Kaddu Kavulu Lawrence v. Uganda*
25 *SCCA 72/2018* has also held as follows: “*Article 23(8) of the Constitution provides as follows:- "Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in*

lawful custody in respect to the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment".
Emphasis added.

5 *In Magezi Gad vs Uganda, (Supra), this Court stated:*

10 ***'We are of the considered view that like a sentence for murder, life imprisonment is not amenable to Article 23(8) of the Constitution. The above Article applies only where sentence is for a term of imprisonment i.e. a quantified period of time which is deductible. This is not the case with life or death sentences.'***

15 The prosecution has asked the court to impose sentences of 40 years and 15 years that run consecutively on the ground that the murder was committed against the victim who tried to stop the convict from killing his wife; it means that the convict would serve a total or aggregate term of imprisonment of 55 years. The defence contends that the grounds advanced by the prosecution are not good enough.

20 Whether a judge opts for a consecutive or a concurrent running of sentences, what is key, is that the total sentence must be proportionate to the culpability of the offender (See *Magala Ramathan v. Uganda, SCCA 01/2014*).

25 I have observed that the circumstances leading to the sentences in the cases of *Aharikundira Yusitina v. UG SCCA* and *Ndomugenyi Patrick v. UG*

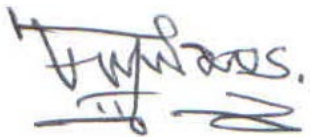
5 *SCCA 57/2016* cited by the prosecution to justify the proposed sentences of 40 years for murder and 15 years for attempted murder, are not comparable to the grave aggravating factors weighed against the mitigating factors in the present case. In the present case, the aggravating factors by far outweigh the mitigating factors.

After considering the totality of the circumstances of this case I consider a sentence of life imprisonment for the offence of Murder in Count 1 to be appropriate to the culpability of the convict in this case. I therefore sentence the convict to imprisonment for life on Count 1 (Murder), meaning that he is sentenced to spend the rest of his natural life in prison.

I sentence the convict to 15 years' imprisonment in Count 3 (Attempted Murder). After deducting the period of 4 years and 12 days spent in custody, I sentence the convict to serve a sentence of imprisonment of 10 years, 11 months and 18 days for the offence of attempted murder in Count 3, starting today.

The sentences are to run concurrently.

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



Vincent Wagona

JUDGE

17.02.2022

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT
FORT PORTAL
FPT-00-CR-SC-109 OF 2019

5 **UGANDA:::PROSECUTOR**
VERSUS
MONDAY DAVID::: ACCUSED

10 **BEFORE HON. JUSTICE VINCENT WAGONA**
NOTES OF SUMMING UP TO THE ASSESSORS

INTRODUCTION

15 Lady and Gentleman Assessors, you sat through the trial as the law requires you to do. You listened to all the evidence given by the witnesses for the Prosecution and you also heard the evidence of the accused. Your duty is to assess that evidence and advise me on each Count, whether the accused should be acquitted, found responsible as indicted or of some other minor and cognate offence.

20 **THE INDICTMENT**

The indictment in this case has 3 Counts. Count 1 is murder c/s 188& 189 of the Penal Code Act. It is alleged that Monday David the accused, on the 3rd day of February 2018 at Ihamba Trading Centre, Mabaale Parish, Nyantungo Sub County
25 in the Kyenjojo District, murdered Bwerindwa Bosco. Count 2 is attempted Murder c/s 204 of the Penal Code Act. It is alleged that Monday David the accused, on the 3rd day of February 2018 at Ihamba Trading Centre, Mabaale

Parish, Nyantungo Sub County in the Kyenjojo District, attempted to cause the death of Busobozi Julius. Count 3 is attempted Murder c/s 204 of the Penal Code Act. It is alleged that Monday David the accused, on the 3rd day of February 2018 at Ihamba Trading Centre, Mabaale Parish, Nyantungo sub County in the Kyenjojo District, attempted to cause the death of Kakyodolika.

THE BURDEN AND STANDARD OF PROOF

The burden of proof is always on the prosecution. The prosecution has the duty to prove each of the ingredients of the offences and generally this burden never shifts onto the accused, except where there is a specific statutory provision to the contrary. This is not one of the cases where the burden shifts to the accused to prove his innocence.

The standard of proof is proof beyond reasonable doubt. All the essential ingredients of the offence are to be proved beyond reasonable doubt. This standard does not mean proof beyond a shadow of doubt. The standard is achieved if you are satisfied, having considered all the evidence, that there is no possibility that the accused is innocent.

Evidence is evaluated as a whole. You consider evidence of both the prosecution and the defence relating to each of the ingredients before coming to a conclusion. You should not consider the prosecution evidence in isolation of that of the accused.

THE INGREDIENTS OF THE OFFENCES

Murder

On a charge of murder, the Prosecution has to prove the following essential ingredients:

- (i) That the death of a human being occurred.
- 5 (ii) That the death was caused unlawfully.
- (iii) That death was caused with malice aforethought.
- (iv) That the accused participated in the crime.

Attempted Murder

10

Section 204(a) of the Penal Code Act, provides that any person who attempts, unlawfully, to cause the death of another person commits a felony; and is liable to imprisonment for life.

15 Section 386(1) of the Penal Code Act defines an attempt as follows: –

"When a person, intending to commit an offence, begins to put his or her intention into execution by means adapted to its fulfillment, and manifests his or her intention by some overt act, but does not fulfill his or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offence.

20

(2) It is immaterial–

25 *(a) except so far as regards punishment, whether the offender does all that is necessary on his or her part for completing the commission of the offence, or whether the complete fulfillment of his or her intention is prevented by*

circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of his or her intention;

- 5 (b) *that by reason of the circumstances not known to the offender, it is impossible in fact to commit the offence."*

The ingredients of the offence of attempted murder as gathered from the above provisions are: –

- 10 (i) Malice aforethought (Intention to cause death).
(ii) Manifestation of the intention by an overt act.
(iii) Participation of the accused.

THE EVIDENCE IN THIS CASE

15

The evidence on each Count should prove each of the above elements beyond reasonable doubt.

It is recalled that the Prosecution called only 2 witnesses in this case. It should be
20 made clear that under the law, no particular number of witnesses is required for the proof of any fact. Even one witness can prove a fact.

THE EVIDENCE OF MURDER: COUNT 1:

25 **Whether death of a human being occurred.**

The Prosecution relies on the evidence of PW1 KajumbaEdesi, the postmortem report in respect of the deceased and the photograph of the dead body of the deceased. **PW1 Kajumba Edesi**, the wife of the deceased, testified that the deceased Bwerindwa Bosco died on 4/2/2018. That the body was taken to the mortuary in the hospital and later taken for burial. The postmortem report in respect of the deceased was tendered under S. 66 of the TIA as Agreed Facts (Prosecution exhibit P1), together with a photograph of the dead body of the deceased. You will have no difficulty in determining and advising me, whether the deceased is dead.

10

Whether the death was caused unlawfully.

Unless accidental or authorized by law, homicide is always unlawful. The Prosecution contends that this was a homicide. The defence of the accused is a denial. **PW1 KajumbaEdesi** the wife of the deceased testified that the deceased was cut on the head with a *panga* that went through the head. Prosecution exhibit P1, the postmortem report, revealed the external injuries on the body of the deceased as deep cut wound onto the frontalis extending from the right eye to the left side of the frontal bone. The internal injuries were a hashed skull, bleeding into the brain matter with hematoma formation. The cause of death and reason for the same was stated to have been extensive external and internal injuries with injuries to the brain matter causing impairment of normal body functions and hence death. External and internal hemorrhage caused severe anemia.

15

20

There is no evidence suggesting that the injuries causing death were lawfully caused. You have to advise me whether the death of the deceased was caused unlawfully.

25

Whether the death was caused with malice aforethought.

The next ingredient for consideration is whether there was malice aforethought. Malice aforethought in this case is established when you form an opinion that there was an intention to cause death; or that the person knew that his act will probably cause death. In order to determine whether there was an intention to cause death or
5 that the person knew that his act will probably cause death, you can consider the weapon used, the part of the body targeted, the degree of injury and the conduct of the accused before and after the act. **PW1 KajumbaEdesi**, the wife of the deceased, testified that the deceased was cut on the head with a *panga* that went through the head. She said that when Monday came holding a panga, her husband
10 the deceased stood up and asked him to go back. Then he raised a panga and cut him on the head. After that he ran away before he was later arrested. The postmortem report showed a deep cut wound onto the frontalis extending from the right eye to the left side of the frontal bone, with injuries to the brain. A panga is a deadly weapon because it is made or adapted for cutting or stabbing and when used
15 on a person it can cause death. The head is a very vulnerable part of the body because it even houses a number of vital body parts including the human brain.

If a deadly weapon is used on a person, the intention to cause or knowledge that death would occur is deemed to be established. Further, the body part targeted and
20 the nature of injuries caused is material for consideration. If a vulnerable part of the body is targeted, then the intention to cause death is inferred. The conduct of the accused is also material. For example, PW1 testified that when Monday came holding a panga, her husband the deceased stood up and asked him to go back. He did not go. Instead, he raised a panga and cut him on the head. After that he ran
25 away, before he was later arrested.

You have to advise me whether the person who caused the death of the deceased did it with malice aforethought; that is, with intention to cause death; or with knowledge that his acts would probably cause death.

5 **Whether the accused participated in the crime.**

You also have to advise me whether the accused was the one that caused the death of the deceased in this case. The Prosecution evidence in regard to participation of the accused is based entirely on the evidence of PW1 the wife of the deceased.

10 There was one eye witness to the incident and the incident happened at night. You should consider the evidence of the Prosecution together with the defence of the accused, which in effect is a denial.

I should warn you that this being an offence involving a single identifying witness
15 of an incident that took place at night, corroboration is required as a matter of practice. Such identification evidence should be considered with caution. Corroboration means additional independent evidence connecting the accused to the crime. However, you can advise me to proceed to rely on the evidence of a single identifying witness even without corroboration, if you are satisfied that the
20 witness was truthful and there is no possibility of error in the identification of the accused. That is, if you are satisfied that the evidence of PW1 the wife of the deceased was truthful and that there is no possibility of error in the identification of the accused, then you can advise me to act on her evidence, even if that evidence is not corroborated. You should address the evidence as a whole and consider factors
25 like: whether the conditions under which the identification was made were favourable; the length of time the witness observed the assailant; the distance between the witness and the assailant; familiarity of the witness with the

assailant; and the quality of light available. **PW1 KajumbaE desi** the wife of the deceased testified that she knew the accused because he was a neighbour; they were village mates; she had known him for about 2 years. In cross examination she said that she saw the accused clearly, cutting her husband. The incident took place
5 inside the house. There was solar light that enabled her to see him clearly. You should consider this evidence together with the defence of the accused, which in effect is a mere denial.

You should advise me whether or not, in your opinion, the prosecution has proved
10 the case of murder against the accused beyond reasonable doubt and advise me whether to convict or acquit him on this Count.

THE EVIDENCE OF ATTEMPTED MURDER: COUNT 2:

15 **Malice aforethought (Intention to cause death); Manifestation of the intention by an overt act; Participation of the accused:**

The only admissible evidence on record is the medical examination report in respect of the victim that was tendered under S. 66 of the TIA as Agreed Facts
20 (Prosecution exhibit P2) together with a photograph showing the injuries on the victim. No direct evidence was adduced in court, regarding the participation of the accused. You will have no difficulty in advising me whether or not, in your opinion, the prosecution has proved the case of attempted murder against the accused beyond reasonable doubt on this Count.

25

THE EVIDENCE OF ATTEMPTED MURDER: COUNT 3:

Malice aforethought (Intention to cause death); Manifestation of the intention by an overt act; Participation of the accused:

Malice aforethought in this case is established when you form an opinion that there was an intention to cause death. In order to determine whether there was an intention to cause death, you can consider the weapon used, the part of the body targeted, the degree of injury and the conduct of the accused before and after the act.

It is recalled that the victim in this case did not testify. The evidence of the victim would have been desirable. It was reported by the Prosecution that she could not be traced. The court can rely on evidence of other witnesses to determine the case. **PW1 Kajumba Edesi** testified that while in their bar with her husband, the victim KakyoDolika came running from outside and entered where they were. Her fingers had been cut and she was bleeding. The medical examination report in respect of the victim was tendered under S. 66 of the TIA as Agreed Facts (Prosecution exhibit P3) together with a photograph showing the injuries on the fingers of the victim. The report showed amputated middle left finger with severe bleeding; cut wound in the second left finger with extensive tissue loss; and cut wound in the second last left finger.

PW1 Kajumba Edesi testified that while in their bar with her husband, the victim Kakyo Dolika came running from outside and entered where they were. Soon, the accused arrived holding a panga. A panga is a deadly weapon because it is made or adapted for cutting or stabbing and when used on a person it can cause death. The inference is that the accused had just cut the victim's fingers with a panga, before going on to chase her with the panga.

PW1 said that when Monday came holding a panga, her husband the deceased stood up and asked him to go back. Then he raised a panga and cut him on the head. What would be the intention of a person who has already injured the victim by cutting her fingers with a panga, but goes on to chase the victim with the said
5 panga, into someone else's premises, before using the same panga to kill another person who attempted to intervene? Are the acts of the accused in chasing the victim with the panga, into someone else's premises where she entered in trying to save herself and the act of using the same panga to kill another person who attempted to intervene, a manifestation of his intention to kill the victim or not?

10

I have already given you directions regarding the treatment of the evidence of a single identifying witness regarding an incident that took place at night. You should now be able to advise me whether there was malice aforethought (Intention to cause death of the victim); whether there was a manifestation of the intention by
15 an overt act or acts; and whether there was participation of the accused. You should advise me whether or not in your opinion, the prosecution has proved the case of attempted murder against the accused beyond reasonable doubt and advise me whether to convict or acquit him on this Count. You may now retire to consider your opinion and advise me in due course.

20

Vincent Wagona

A handwritten signature in black ink, appearing to read 'Vincent Wagona', with a horizontal line underneath.

JUDGE

25 25.01.2022