THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CR-SC-332 OF 2019

UGANDA…….....PROSECUTION

VERSUS

MUCHUNGUZI GODFREY……..……ACCUSED

BEFORE HON. JUSTICE VINCENT WAGONA

JUDGMENT

1.0. Introduction

The accused is indicted for murder c/s 188 & 189 of the Penal Code Act. It is alleged that the accused Muchunguzi Godfrey on the 24th day of January 2019 at Irubata II Village, Kyakarafu Parish, Busiraba Sub County in the Kamwenge district, with malice aforethought caused the death of Tulyatunga Gidion

2.0. Summary of the Facts

The deceased was the elder brother of the accused. There was a grudge between the accused and the deceased arising from the accused's belief that the deceased had bewitched and killed his (accused's) child. The accused vowed and threatened that he would kill the deceased to avenge the death of his child and the accused abandoned his house and left the village; the accused continued making the threats when he returned to the village. On 22/1/2019 at around 4.00am PW1 Kyompire Stedia the wife of the deceased woke up and found the door open. She saw the accused inside their house, but he moved out. On 24/1/2019, the deceased left home at around 4:00pm and went to the Trading Center and he never returned. The

next morning, he was found dead on the way. The accused was arrested and in the course of the investigations, he made a Charge and Caution Statement admitting to the killing and revealed that he was motivated by the reason that the deceased bewitched his child and also that the deceased refused to allow him share in the land left by their parents. In his unsworn statement the accused stated that he knew nothing about the death of the deceased; that he just saw the police coming to arrest him and that he never told the police anything.

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

> *"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 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 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:

"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:

(i) That the death of a human being occurred.

(ii) That the death was caused unlawfully.

(iii) That death was caused with malice aforethought.

(iv) That the accused participated in the crime.

5.0. The Evidence in this Case

1. Whether death of a human being occurred

It was agreed under Section 66 of the TIA that the deceased is dead. The postmortem report in respect of the deceased was tendered as part of the agreed facts as Prosecution Exhibit PE1. PW1 Kyompire Stedia the wife of the deceased testified that the deceased was buried on the 25/1/2019. PW2 Banyenzaki Erick the paternal grandfather of the accused and the deceased testified that the deceased died and that he attended the burial. PW3 Tumusiime Jenesita testified that he went to Virika Hospital and found the deceased dead and that he was buried the following day. PW4 Asiimwe Denis testified that the deceased was taken to hospital and he later died and that he attended his burial. The defence does not dispute the proof of this ingredient. I am satisfied that the Prosecution has proved beyond reasonable doubt that the deceased is dead.

2. *Whether the death was caused unlawfully*

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

It was agreed under Section 66 of the TIA that the deceased is dead. The

postmortem report (Prosecution Exhibit PE1) revealed the following: **External injuries:** Bruises over the face and the scalp with probable scalp tractions. **Internal injuries**: Fractured skull with cerebral hematoma. **Cause of death**: Injury due to repeated high impact trauma on the head. PW1 Kyompire Stedia the wife of the deceased testified that she went to the scene and saw the deceased with a wound on the head and he was lying in a pool of blood. The deceased was taken to hospital and she was later informed that he had died. PW2 Banyenzaki Erick testified that he went to the scene and saw that the deceased's body had blood coming from the head. PW4 Asiimwe Denis testified that that at the scene, they found the deceased lying in a pool of blood; he was bleeding from the nose and mouth and his head was swollen. There is no evidence suggesting that the injuries leading to death were lawfully caused. The defence does not dispute the proof of this ingredient. I am satisfied that the Prosecution has proved beyond reasonable doubt that the death of the deceased was caused unlawfully.

3. ***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 Tuberes/o Ochieng[1945]EACA 63)**.The head has been established to be a vulnerable part of the body; and injuries deliberately and repeatedly 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 (**Mwathi vs. Republic [2007]2 EA 334).**

The postmortem report (Prosecution Exhibit PE1) revealed the following: **External injuries:** Bruises over the face and the scalp with probable scalp tractions. **Internal injuries**: Fractured skull with cerebral hematoma. **Cause of death**: Injury due to repeated high impact trauma on the head. PW1 Kyompire Stedia saw a wound on the head and the deceased was lying in a pool of blood. PW2 Banyenzaki Ericksaw blood coming from the head of the deceased. PW4 Asiimwe Denis found the deceased lying in a pool of blood; he was bleeding from the nose and mouth and his head was swollen.

The above evidence shows that the injuries were repeatedly inflicted upon the head, a vulnerable part of the deceased's body. It shows that the assault on the deceased was intended to cause his death or was accompanied by knowledge that the acts would probably cause death. The defence does not dispute the proof of this ingredient. 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.

4. Whether the accused participated in the crime

This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime as the perpetrator of the offence.

4.1. Evidence of a Confession

The prosecution relies on the confession of the accused, prior threats of the accused to kill the deceased, and the conduct of the accused.

PW5 D/IP NUWE HENRY testified that he recorded a Charge and Caution Statement of the accused on 31/1/2019. When the Prosecution applied to tender the statement, the Defence Lawyer objected on the grounds that his instructions from the accused were that the accused admits to signing on the statement but that he did not understand it and that he had been in police custody for some days and then he was just called to sign a statement. At that stage, a trial within a trial was conducted where the Prosecution called 3 witnesses, namely D/IP Nuwe Henry, D/AIP Magezi Joseph, and D/Sgt. EngoruTolm. It transpired on 26/1/2019 after the accused was received at Kamwenge Police Station from Kasojo Police Post, D/Sgt. EngoruTolm interviewed and recorded his plain statement where he admitted committing the offence; whereupon he took the accused to D/AIP Magezi Joseph who recorded his Charge and Caution Statement on 28/1/2019 in English only, where the accused confessed to the committing the offence. The Resident State Attorney advised that the statement be recorded in the language spoken by the accused. That is when the accused was taken before D/IP Nuwe Henry on 31/1/2019, who recorded the accused's Charge and Caution Statement in both the Runyankore/Rukiga and English versions.

The plain statement that was recorded by D/Sgt. EngoruTolm was tendered within the Trial within a Trial, as part of the circumstances surrounding the making of the Charge and Caution Statements. In his plain statement, the accused had stated as follows:

> ***"I know the deceased one Turyatunga Gideon of same place who has been my elder brother. We have been staying in the same compound where I***

have my grass thatch home near the deceased home. We had some problem with the deceased Turyatunga Gideon which made me to go away to Bunyoro where we have some relatives and I finish there three years I came back from Bunyoro in December 2018 and our domestic problem had not got finish. Then I stated planning to have him killed. And I have been sleeping at my ground mother's place called Kazidida. It was on the 24/1/2019 at about 2100 hrs I was from Kinoni drinking and I was drunk. I went and the way laid the deceased Turyatunga Gideon on the way going to his home. I had along stick dry one. When I was there the deceased come while riding his bicycle so I had to hit him on the head with the stick and he fell down only once. The deceased Turyatunga Gideon never made any noise I left him there down with his bicycle and I had thrown away the stick in the bush under the tree. I went to the home of one Asiimwe Denis where I slept without telling him what had happened. Then on 25/01/2019 at about 07:00am I got up and went at the same scene then I went back and informed Asiimwe Demis that I have found my brother lying on the way with his bicycle. Asiimwe Denis called neighbours who came and the deceased was taken to the hospital in critical condition. At about 0900 hrs I was arrested suspect of assaulting Turyatunga Gideon taken and detained at Kahunge Police station. At about 1900 hrs I got information that my brother TuryatungaGedeon has died. Thats all I can state the statement is made by me read back to me found true and correct."

In his testimony in the Trial within a Trial, the accused alleged that he was assaulted prior to the recording of the statement, by policeman at the police station. That on 28/1/2019 when he made his first statement, he was not assaulted. That he was arrested on 25/1/2019. In cross examination the accused said he recorded 3

statements and signed on all of them. That he was beaten in Kamwenge police station after he had been arrested.

I reviewed the evidence and surrounding circumstances relating to the recording of the accused's Charge and Caution Statements in the Trial within a Trial and found that the making of the said Charge and Caution Statements in my view were not caused by any force, threat, inducement or promise calculated to cause an untrue confession to be made. I found that any impression that may have existed in the mind of the accused that he was being made to record an untrue confession was fully removed by the recording witnesses complying with the necessary procedure and safe guards that they administered. I therefore found that accused made the statements voluntarily.

Subsequently, in the resumed main trial, the English and Runyankore/ Rukiga versions of the Charge and Caution Statement of the accused recorded by D/IP Nuwe Henry were admitted in evidence as Prosecution Exhibit PE3 (a) and (b) respectively. The Charge and Caution Statement recorded by D/AIP Magezi Joseph in English only, was also admitted in evidence, with no objection from the Defence, as Prosecution Exhibit PE4.

In the Charge and Caution Statement recorded by D/IP Nuwe Henry (Prosecution Exhibit PE3 (a) and (b)), the accused stated as follows:

"That I know Turyatunga Gideon now the late he is my elder brother. When our parents died my elder brother Turyatunga Gideon decided to take all the land left behind by our parents alone and this annoyed me so I had a conflict with him (Turyatunga). As if that was not enough, when my son died, people started telling me that my late son was sacrificed by

Turyatunga Gideon my elder brother so this made me to fear so I decided to go and stay with my grandmother in Kyangwali in Bunyoro district. On 5/1/2019 I came back to Kyakarafu village, Busumba S/ county, Kamwenge district and I decided to stay with another grandmother. On 24/1/2019 at around 2100/c I left home and went to Kinoni trading center where my friends bought me crude waragi which I took (drunk). I became drunk and went back home at around 1000/c. On the way I met my elder brother Turyatunga Gedeon when I asked about sharing our land left behind by late parents but instead Turyatunga Gideon decided to reply me rudely which made me get annoyed and I picked a stick and hit him with it on his head and he fell down then I threw away the stick to a nearby bush and went and slept at my Denis my friend's home but never told Denis the incident of hitting my elder brother with a stick. The following day on 25/1/2019 at around 0700/c as I was going to Kyakaarafu to dig in the garden on the way I found my elder brother Turyatunga Gideon still lying at same place where I hit him with a stick and he was in critical condition so I went back and informed Denis about the condition of my elder brother Turyatunga Gideon who was lying half way dead on the way. Denis also informed neighbours around who went and to see Turyatunga Gidion and neighbours mobilized and Turyatunga Gideon was taken to Virika Hospital in Kabarole for treatment but unfortunately Turyatunga Gideon died later in the evening from Virika Hospital in the evening and I was already arrested by police of Kisojo Police Post and detained in police cells then later on transferred to Kawmenge Police Station where I was detained in police cells. That is all I can state

Statement read over back to me and it is true and correct"

In cross examination during the main trial, PW5 D/IP NUWE HENRY stated that the accused had been in custody for a week before he took the Charge and Caution Statement. That he is aware that he should have been produced in court within 48 hours; that the 48 hour rule was not followed because of some reasons. That he accepts that violated the rights of the accused by not having him produced in court in within 48 hours. That the accused told him that he had taken alcohol but that he did what he did knowingly; that however, he did not record this. The witness accepted that indeed he did not record all the information that the accused gave him in his Charge and Caution Statement; that whatever he was asking and the accused was replying, was what he recorded. In clarification sought by court, the witness said that he only recorded information that was going to assist in the investigation and that he did ignore some information and did not record it.

In the Charge and Caution Statement recorded by D/AIP Magezi Joseph in English only (Prosecution Exhibit PE4), the accused stated as follows:

> ***"I know very well Turyantunga Gido (deceased) as my elder brother. When our parents all of them died, my elder brother decided to take all the lands alone; from there we had some conflicts with deceased. Even when my son died people where telling me that my son was being sacrifice by my elder brother. Then I went to stay with grandmother in Kyangwali, when I came back, I never stayed with him as used to be in the same compound; I was staying with another grandmother in Kyakarafu village. Then on day of 24/01/2019, I went to Kinoni trading centre and some booze; I became drunk and went back homo; On the way I met my elder brother deceased whom I stated asking about sharing our land; But the deceased decided to reply me rudely and became annoyed; That's when I told him how was going to beat him. I picked a stick and hit him on the head; Then after I***

threw away the stick in eucalyptus tree just near I left my elder brother lying. I went and slept at Denis home; I came in the morning and found him in critical condition There many people came and took him in hospital where he dead

That's all I can wish to state statement made by me read back found truly and correct."

In the main trial, PW6 D/AIP Magezi testified that he and the accused were communicating in Runyankore Rukiga but that he was writing the statement in English; that he read it back to the accused, in Runyankore/Rukiga and he understood what was read back to him. In cross examination, the witness stated that the Charge and Caution Statement that he recorded lacked the Runyankore/Rukiga version. The witness said that he understands Runyankore/Rukiga only that he cannot write it. In answer to court, the witness said that he understands Runyankore/Rukiga but could cannot write, and also that he speaks the language. In further cross examination, the witness said that he used a question and answer approach; that he knows that this approach limits the accused's answers and that he would get what was favorable to his case and not the entire confession. The witness said that the accused had been in custody for 2 days when he recorded his Statement.

During his defence in the main trial, in his unsworn statement, **DW1 Muchunguzi Godfrey** the accused testified that he knows nothing about the death of his elder brother the deceased. That he just saw the police coming to arrest him. That he never told the police anything.

In **Mumbere Julius versus Uganda, SCCA No. 15/2014**, the Supreme Court held that:

> ***"Regarding its admissibility, the appellant in the course of his trial denied having made the charge and caution statement. He also denied that the signature on the charge and caution statement was his although his counsel claimed that he was forced to sign a pre-prepared statement the contents of which he did not know. This Court in Matovu Musa Kassim v. Uganda, Criminal Appeal No. 27 of 2002 reiterated the law governing retracted and repudiated confessions as succinctly stated in Tuwamoi v. Uganda that:***
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> > ***"A trial Court should accept any confession which has been retracted or repudiated with caution and must before finding a conviction on such a confession be fully satisfied in all circumstances of that case that the confession is true.""***

It was further held that:

> ***"We note from the onset that counsel for the appellant contended that the charge and caution statement was made by the appellant in breach of the 48 hours rule which rendered the statement a nullity. We do not agree with this contention. While a breach of the 48 hours rule should be deprecated, we wish to reiterate our decision in CPL Wasswa and another Vs. Uganda (supra) that a delay in recording a charge and caution statement will not result in the nullification of the statement unless the court finds that the delay was designed to force the appellant to make an involuntary statement. In this case, the trial Court conducted a trial within a trial and found that the appellant's statement was made voluntarily and this was confirmed by the Court of Appeal. We find no reason to disagree***

with the courts below about the manner in which the appellant made the statement."

In the case **of Festo AndroaAsenua and Anor. Versus Uganda, SCCA No. 1/1998,** the Supreme Court laid down the following procedure for recording Extra Judicial Statements and guided that the same procedure should be followed with necessary modifications when recording the Charge and Caution Statements:

"The following procedure shall be adopted:

(1) it must be remembered that the prisoner is not on trial. It follows that such statement must not be taken in any court as part of court proceedings.

(2) No police officer should be present in the chambers of Magistrate. The police officer escorting the prisoner should leave after informing the Magistrate of the reason for taking the prisoner before him, that is, the offence with which he is charged or the offence he is suspected of having committed, as the case may be. The police officer should then wait outside the chambers out of sight.

(3) The Magistrate should inquire of the prisoner the language which he understands. If it is one which the Magistrate does not know he should send for an interpreter.

(4) The charge, if any, or the nature of the suspicion for which he has been arrested, shall then be explained to the prisoner.

(5) The prisoner should be asked if he wishes to say anything about the charge or the offence he is suspected to have committed, and should be told that HE IS FREE TO MAKE, OR NOT MAKE, ANY STATEMENT.

(6) The Magistrate must satisfy himself by all reasonably possible means that the statement about to be made to him is entirely voluntary. It

must not be assumed that he is going to make a confession. The document containing the statement should be prefaced by a memorandum containing notes of the foregoing and the steps which the magistrate takes to satisfy himself that the statement is voluntary. This prefatory part will enable the magistrate to refresh his memory, in the event of his being called at the trial to prove the statement.

(7) It is advisable that a Magistrate who is about to take a statement should administer a caution the normal form:

> ***"You need not say anything unless you wish but whatever you do say will be taken down and may be given in evidence at your trial".***

(8) The person wishing to make a statement should not be asked whether he wishes to be sworn or affirmed; but if he requests the magistrate without suggestion from the Magistrate, to place him on oath or affirmation, this may be done but the prefatory memorandum must clearly state so.

(9) The statement should be recorded in the language which the prisoner chooses to speak. This may be done through an interpreter or the magistrate may himself, if he is fully conversant with the vernacular being used, record it in the same language. The prisoner is not to be cross-examined when he is making the statement. Any question put to the prisoner must be designed to keep the narrative clear, and the question so asked must be reflected in the statement. It must be understood that the role of the Magistrate simply is to record accurately the prisoner's story, if he chooses to make a statement.

(10) The vernacular statement should be read back to the prisoner incorporating any corrections he may wish to make.

(11) The prisoner should certify the correctness of the statement by signing or thumb-printing it. The Magistrate and the interpreter, if any, should counter-sign it. If the statement covers more than one sheet of paper all sheets should be so signed or thumb-printed by the prisoner.

(12) An English translation of the vernacular statement including the prefatory memorandum, should then be made by the magistrate or the interpreter, as the case may be.

(13) After the foregoing has been complied with the prisoner should be handed back to the police officer who has been waiting outside the Chambers.

(14) The originals of the statement - vernacular and its English translation - should also be handed over to the police.

(15) Section 24 speaks of "immediate presence of a magistrate". Any Magistrate is competent to take a statement in the manner aforesaid. It must beunderstood that the qualification of a Magistrate to take an extra-judicial statement is a personal one, and is not tied to his territorial jurisdiction.

(16) Whereas it is expected that the police will take prisoners before a magistrate for this purpose during the usual working hours, he may nevertheless be called upon at any time to take such statements. Should this be after office hours the Magistrate should, move to his official chambers, or, alternatively, sit at any other private place (excluding the police premises) and, after procuring any -Civilian interpreter, should one be necessary, and taking note of his name, profession and address in the prefatory memorandum proceed to record the statement in accordance with the procedure set out above.

(17) Care should be taken that as far as possible the magistrate who takes such a statement does not subsequently try the prisoner".

We suggest that pending the making of Rules by the Minister as required by s.24 (2) of the Evidence Act the Police should with necessary modifications follow these guidelines when recording statements from suspects."

In this case, the accused was received from Kasojo Police Post on 26/1/2019 and on the same day, D/Sgt. Engoru interrogated him and recorded his statement where he was admitting to the offence. On 28/1/2019, D/AIP Magezi recorded his Charge and Caution Statement where he was confessing to the offence. He recorded the statement in English but they were communicating in Runyakore/ Rukiga and the statement was translated and read back to the accused in Runyankore/Rukiga, although the Runyankore/Rukiga version of the statement was not written down. Arising from the directions of the Resident State Attorney requiring that the statement be recorded in the language spoken by the accused, on 31/1/2019, D/IP Nuwe recorded the Charge and Caution Statement of the accused in Runuankore/Rukiga with the English translation availed. It was irregular for PW5 D/IP Nuwe and PW6 D/AIP Magezi to have left out some information given by the accused when they were recording the statements and for PW6 D/AIP Magezi to have adopted question and answer approach without writing down the questions. I find that delay in recording the Charge and caution Statement(s) of the accused was not designed to force the appellant to make an involuntary statement. The accused remained consistent and unwavering in his desire to confess from the time he was brought into the custody of Kamwenge Police Station. The recording of the Statements complied substantially with the procedure laid down in the case ***FestoAndroaAsenua and Anor*** and any irregularities did not prejudice the accused or occasion any miscarriage of justice. The chronology and details contained in the

Statements of the accused could have only come from the accused. After reviewing all the evidence and all the surrounding circumstances of the case, I am satisfied that the confession of the accused in this case is true.

In the case of **Andrew Walusimbi& 3 others Criminal Appeal No. 28 of 1992 S.C.U** ***(unreported) at page 12 the principle was repeated and added that the essence of section 25 of the Evidence Act "is not simply whether the statement is apparently true. Attention should be paid to the manner in which statement was made: Whether the circumstances made it likely that an untrue confession would be made, or whether the statement was voluntarily made and gave some grounds for believing it to be true. <u>But even if admissible the usual safeguards should still be observed. The rules concerning corroboration … are still to be acted upon</u>.*** **Kenyarithi s/o Mwangi Vs R [1956] 23 EACA 422.*" (Emphasis added).***

In this case, the confession statement of the accused is corroborated in material particulars. The reference in the accused's statement to a grudge arising from the belief of the accused that the deceased bewitched and killed his child following which the accused abandoned his house and left the village and went to Bunyoro, is corroborated by the evidence of PW1 &PW2 Kyompire Stedia the wife of the deceased and Banyenzaki Erick the paternal grandfather of both the deceased and the accused. The statement of the accused that he went and slept at the home of Denis is corroborated by the evidence of PW4 ASIIMWE DENIS.

4.2. <u>Evidence of a Prior Threats to Kill the Deceased</u>

PW1 KYOMPIRE STEDIA testified that the accused was the brother of her husband the deceased. There was a grudge between the accused and the deceased

arising from the accused's belief that the deceased had bewitched and killed his (accused's) child about 2 years prior to the deceased's death. The accused had vowed and threatened to avenge the death of his child and he abandoned his house saying he was going to Bunyoro. In re-examination, the witness stated that the accused spent about 3 months alleging that the deceased and his wife killed his child then he left the village. In answer to the assessors, the witness said that the accused made the threats or allegations many times. **PW2 BANYENZAKI ERICK** the paternal grandfather of the accused and the deceased testified that prior to his death, the accused had said that he wanted to kill the deceased because he suspected him to have bewitched and killed his child. The witness said that after the death of his child, the accused left the village and went to Bunyoro where he had a grant mother; and he lived there for about a year. That later, the grandmother sent him away from Bunyoro and he returned; that every time the accused would visit the witness, he would be armed with a panga and threatened that he would kill the deceased any time, to avenge the death of his child. In cross examination, the witness said that the accused came to his home 3 times in one month, after he had returned from Bunyoro, when he made the threats, following which, he heard that the deceased had died.

In **Kifamunte Henry versus Uganda, SCCA No. 10/1997**, the Supreme Court held that:

> ***"The trial Court believed the evidence of P.W.2, PW.4 and P.W.5 regarding the previous threat by the appellant to kill the deceased, despite denials by the appellant that he had made such threats. The learned trial Judge had the advantage of seeing those witnesses testify. We have no reason to doubt his findings that they were truthful witnesses. Evidence of***

previous threats is relevant and, as was pointed out by the Court of Appeal for East Africa in Okecha s/o Olilia v R (1940) Vol. 7 E.A.C.A. 74, as such evidence shows an expression of intention, it goes beyond mere motives and tends to connect the accused person with the killing. Also see Waibi and Another v. Uganda (1968) E.A. 228."

In **Chemonges Fred versus Uganda, CACA No. 138/1999**, the Court of Appeal of Uganda held that:

"We find that the learned trial judge properly appraised the evidence regarding the prior threat to kill Kuka. The appellant had travelled eight kilometers from his home to the Cheminy market where Kuka had a shop. The threat was uttered on 6.1.96, almost a month prior to the attempted murder. We consider this period proximate enough to make the threat relevant as the learned judge so rightly held relying on Waibi and Another v Uganda (1968) EA 278."

In **Henry Francis Rubingo versus Uganda, CACA No 18/1977**, the Court of Appeal of Uganda held that:

"We have given this matter anxious thought and have reached the conclusion that if the chief was a truthful witness and this evidence of a previous threat was brought out during his cross—examination it could not but be true. Just as such evidence of a previous threat to kill the deceased may corroborate a confession on the authority of Waihi And Another v. Uganda (1968) E.A. 278, we strongly feel that it can equally provide other evidence necessary for accepting the evidence of a sole

identifying witness provided the standard set out in <u>Waihi</u> (supra) is satisfied. We do not know the circumstances in which the threat was made but it was apparently serious enough for the deceased to report his son to the chief. The chief also did not take it lightly and warned the appellant<u>. It was made some two months previously and was due to the deceased's refusal to give the appellant land. Those who have had to deal with land matters will realise that such a desire to acquire land or disputes concerning land are seldom if ever at all forgotten. The interval of time between the utterance and the killing of about two months in the circumstances is not long enough in our opinion to make the utterance irrelevant</u>. This is another factor by way of other evidence to provide support for the identification made by P.W.4."(Emphasis added).

In this case, the evidence of PW1 and PW2 shows that the accused made repeated threats to kill the deceased. The evidence of PW2 shows that the threats were proximate enough to make the threats relevant. PW2 stated that every time the accused would visit the witness, he would be armed with a panga and threatened that he would kill the deceased any time, to avenge the death of his child. The witness said that the accused came to his home 3 times in one month, after he had returned from Bunyoro, when he made the threats, following which he heard that the deceased had died. The statement of the accused discloses that one of his grudges with the deceased related to land matters. In this case, the evidence of prior threats by the accused to kill the deceased is relevant. It shows an expression of the accused's intention to kill the deceased, and went beyond mere motive, tending to connect the accused person with the killing.

4.3. <u>Evidence of the Conduct of the Accused</u>

PW1 KYOMPIRE STEDIA testified that on 22/1/2019 at around 4.00am she woke up and found the door open. She saw the accused inside the house, and then he later moved out. Her husband was in bed. In the morning she informed her husband. In cross examination, the witness said that she recognized the accused inside the house with the aid of solar lights that had remained switched on; that she had not switched off her lights. In answer to court, the witness said that she had last seen the accused for about 2 weeks before the night when she saw him in the house and that before that, the accused had left for Bunyoro. **PW4 ASIIMWE DENIS** testified that the accused was hisneighbor. That on 24/1/2019, the accused came to the home of the witness at 10:00 pm when he was already in bed. That the accused told him that his house was leaking and it was about to rain so he could not sleep in the house. That it had not yet rained. That he made a bed for the accused and he slept. In re-examination, the witness said that the accused never used to spend nights at the home of the witness; that he stayed there only on that night; that it was the first time.

The evidence of PW1 and PW2 shows that the accused had recently returned on the village from Bunyoro before the offence was committed. In the night of 22/1/2019 he stealthily entered the house of the deceased whom he had been vowing to kill, but left the house when PW1 the wife of the deceased woke up and saw him. After the time of the commission of the offence, the accused went and spent the night elsewhere, in the house of PW4, which he had never done before. This conduct tends to connect the accused to the offence by way of demonstrating premeditation or intention to kill and participation of the accused in the killing of the deceased.

4.4. *The Defence of the Accused*

In his unsworn statement the accused testified that he knows nothing about the death of his elder brother the deceased. That he just saw the police coming to arrest him. That he never told the police anything.

Although in his defence in court, the accused did not offer any evidence on this element, there is evidence from PW5 D/AIP Nuwe Henry that the accused told him at the time of recording his Charge and Caution Statement, that he had taken alcohol before committing the offence. This is also stated in the Charge and Caution Statement of the accused. The law is that the court is required to investigate all the circumstances of the case including any possible defences even though they were not duly raised by the accused for as long as there is some evidence before the court to suggest such a defence (see *OkelloOkidi v. Uganda, S. C. Criminal Appeal No. 3 of 1995*).

Under section 12 of *The Penal Code Act*, for intoxication to constitute a defence to a criminal offence, it must be shown that by reason of the intoxication, the accused at the time of the act or omission complained of, did not know that the act or omission was wrong or did not know what he or she was doing and the state of intoxication was caused without his or her consent by the malicious or negligent act of another person, or that the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission. Since in the instant case there was no suggestion that the condition of intoxication the accused was labouring under was caused without his or her consent by the malicious or negligent act of another person, it was necessary to adduce evidence to show that at the time of the act, he did not know that the act was wrong or did not know what he or she was doing since by reason of that intoxication he was insane, temporarily or otherwise.

The law was summarized by the House of Lords in ***Director of Public Prosecutions v. Beard [1920 AC 479]***in the following words:

> ***"There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act."***

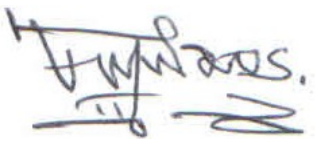
The defence of intoxication can be availed only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about the reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him. In the instant case, the accused bore the evidential burden of adducing some evidence creating the possibility that he was labouring under such a degree of drunkenness that he was rendered incapable of forming the specific intent essential to constitute the crime of murder. Once he

adduces such evidence, then the persuasive burden is on the prosecution to disprove it by showing that the evidence of intoxication adduced by the accused falls short of proving such incapacity. The onus is on the prosecution to prove that an accused person was not so drunk as to be capable of forming an intent to kill. In the present case, although there is some evidence that the accused had been drinking before this incident, there is no evidence that he was so drunk that he did not know what he was doing within the meaning of section 12of *The Penal Code Act.* I therefore find that the defence of intoxication is not available to the accused in this case.

Conclusion

I am satisfied that the evidence of the prosecution, namely, the Confession of the accused, the evidence of prior threats to kill the deceased, and the evidence of the conduct of the accused before and after the commission of the offence, places the accused at the scene as the perpetrator of the crime; and the evidence proves beyond reasonable doubt that it was the accused who killed the deceased with malice aforethought. In agreement with the Gentleman Assessor, I find the accused Guilty of the offence of Murder as indicted. I convict him accordingly.

Dated at Fort portal this 23 day of March 2022.



Vincent Wagona

JUDGE

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CR-SC-332 OF 2019

UGANDA…….....PROSECUTION

VERSUS

MUCHUNGUZI GODFREY……..……ACCUSED

BEFORE HON. JUSTICE VINCENT WAGONA

SENTENCE AND REASONS FOR SENTENCE

In sentencing the convict, the following factors have been considered:

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

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

(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 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.

Under Paragraph19 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 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 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

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 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.

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; (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 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 23Imprisonment for life is the second gravest punishment next to the sentence of death. Under paragraph 24in capital offences, the court shall

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.

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*).**

I have reviewed the following cases: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**.**

I have also reviewed the following cases: *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. In ***Ndyomugenyi Patrick v. Uganda SCCA 57/2016***, the Supreme Court maintained a sentence of 32 years' imprisonment. In ***Aharikundira Yusitina v. Uganda SCCA 27/2015***, 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 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. In ***Hon. Akbar Hussein Godi Vs Uganda***, Criminal Appeal no. 62/2011, the Court of Appeal upheld a sentence of 25 years' imprisonment against the appellant who murdered his wife.In **Odongo Sam Vs Uganda, Criminal Appeal No. 0088 of 2014**, the Court of Appeal upheld a sentence of 19 years' imprisonment for the offence of Murder. In **Kimera Zaveria vs Uganda, Criminal Appeal No. 427 of 2014**, the Court of Appeal substituted a sentence of life imprisonment with a sentence of 17 years for the offence of murder.

In the present case, I have considered the aggravating and mitigating factors advanced by the prosecution and the defence. The prosecution has proposed a sentence of 35 years saying that the offence is serious; a life was lost – the convict

failed to observe the sanctity of life that cannot be regained once lost, the convict turned on his wife and mother of his children and killed her in cold blood when he ought to have been her protector; the convict requires institutional reform so that he will learn to control his temper; he needs a sentence during which he will learn to rethink his actions and reform; the sentence should send a signal to other would be perpetrators of such crimes especially against their spouses. In mitigation, the defence submitted that the convict is a first offender; he is young at 30 years and can reform; he was a care giver to his 2 children; he is very remorseful and sorry about what happened; he should serve his punishment but not be made to suffer as an example to others who in any event may never hear about him; he has been in custody since 17/02/2019 making 3 years and 16 days. The defence proposes 18 years. The defence cited the cases of: ***Uganda versus Ajionzi & others CSC No. 2018/2019*** where the accused was sentenced to 18 years for murder; ***Byaruhanga versus Uganda Court of Appeal Criminal Appeal No 0144/2010*** where the Court of Appeal reduced a sentence of 30 years to 20 years in a case of murder***; Kasaija versus Uganda Court of Appeal Criminal Appeal No. 128/2008*** where the Court of Appeal reduced a sentence of 30 years to 18 years. In allocutus, the convict said he sick with HIV but had no medical evidence; that his father died and he has the responsibility to care for his siblings and old mother. I have considered all these factors. Additionally, there appears to have been some element of provocation.

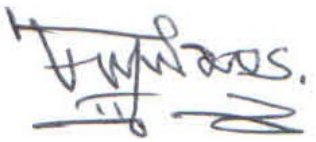
Under Article 23 (8) of the Constitution and Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. I observe that the

convict was arrested on 25.1.2019 therefore he has been on remand for 3 years, 1month, 29 days.

After considering the totality of the circumstances of this case I consider a sentence of 15 years to be appropriate to the culpability of the convict in this case. After deducting the period of 3 years and 1month and 29 days being the period spent on remand, the convict shall thus serve a custodial sentence of 11 years, 10 months and 2 days with effect from today.

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

Dated at Fort portal this 23 day of March 2022.



Vincent Wagona

JUDGE

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CR-SC-332 OF 2019

UGANDA…….....PROSECUTION

VERSUS

MUCHUNGUZI GODFREY……..……ACCUSED

NOTES OF SUMMING UP TO THE ASSESSORS

1.0. Introduction

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 on both sides of the case. Your duty is to assess that evidence and advise me whether the accused persons should be acquitted, found responsible as indicted or of some other minor and cognate offence.

2.0. The Indictment

The accused is indicted for the offense of murder c/s 188 & 189 of the Penal Code Act. It is alleged that the accused Muchunguzi Godfrey on the 24th day of January 2019 at Irubata II Village, Kyakarafu Parish, Busiraba Sub County in the

Kamwenge District, with malice aforethought caused the death of TulyatungaGidion

3.0. The ingredients of the offence

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

(i) That the death of a human being occurred.

(ii) That the death was caused unlawfully.

(iii) That death was caused with malice aforethought.

(iv) That the accused participated in the crime.

4.0. 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 offence and generally this burden never shifts onto the accused.

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. It is achieved if you are satisfied that having considered all the evidence from a perspective that is most favourable to the accused, you are satisfied that all evidence in favour of or pointing to the innocence of the accused, at best creates a mere fanciful possibility but not any probability that the accused is innocent. In other words, 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. 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.

5.0. The evidence in this case

(i) Whether death of a human being occurred.

The postmortem report in respect of the deceased was tendered as part of the **Agreed Facts** as Prosecution Exhibit PE1. PW1 Kyompire Stedia the wife of the deceased testified that the deceased was buried on the 25/1/2019. PW2 Banyenzaki Erick the paternal grandfather of the accused and the deceased testified that the deceased died and that he attended the burial.PW3 Tumusiime Jenesita testified that he went to Virika Hospital and found deceased dead and that he was buried the following day. PW4 Asiimwe Denis testified that the deceased was taken to hospital and he later died and that he attended his burial. The defence does not dispute the proof of this ingredient. You will have no difficulty in determining whether the deceased is dead.

(ii) Whether the death was caused unlawfully.

Homicide, unless accidental or authorized by law is always unlawful. The Prosecution contends that this was a homicide. Unless accidental or authorized by law, homicide is always unlawful. The Prosecution contends that this was a homicide. The defence of the accused on the other hand is a denial.

It was part of the **Agreed Facts**the deceased is dead. The postmortem report (Prosecution Exhibit PE1) revealed the following: **External injuries:** Bruises over

the face and the scalp with probable scalp tractions. **Internal injuries**: Fractured skull with cerebral hematoma. **Cause of death**: Injury due to repeated high impact trauma on the head. PW1 KyompireStedia the wife of the deceased testified that she went to the scene and saw the deceased with a wound on the head and he was lying in a pool of blood. The deceased was taken to hospital and she was later informed that he had died. PW2 Banyenzaki Ericktestified that he went to the scene and saw that the deceased's body had blood coming from the head. PW4 Asiimwe Denis testified that at the scene, they found the deceased lying in a pool of blood, he was bleeding from the nose and mouth and his head was swollen. There is no evidence suggesting that the injuries leading to death were lawfully caused. The defence does not dispute the proof of this ingredient. You have to advise me whether the death of the deceased was caused unlawfully.

(iii) <u>Whether the death was caused with malice aforethought.</u>

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.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. The head has been established to be a vulnerable part of the body; and injuries deliberately and repeatedly 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.

The postmortem report (Prosecution Exhibit PE1) revealed the following: **External injuries:** Bruises over the face and the scalp with probable scalp tractions. **Internal injuries**: Fractured skull with cerebral hematoma. **Cause of death**: Injury due to repeated high impact trauma on the head. PW1 Kyompire Stedia testified that she saw a wound on the head and the deceased was lying in a pool of blood. PW2 Banyenzaki Erick saw blood coming from the head of the deceased. PW4 Asiimwe Denis found the deceased lying in a pool of blood; he was bleeding from the nose and mouth and his head was swollen. You need to be satisfied that the evidence available proves beyond reasonable doubt that the death was caused with malice afore thought

(iv) Whether the accused persons participated in the crime.

There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence.

Evidence of a Confession

The English and Runyankore/ Rukiga versions of the Charge and Caution Statement of the accused recorded by D/IP Nuwe Henry were admitted in evidence as Prosecution Exhibit PE3 (a) and (b) respectively. The Charge and Caution Statement recorded by D/AIP Magezi Joseph in English only, was also admitted in evidence, with no objection from the Defence, as Prosecution Exhibit PE4.

In the Charge and Caution Statement recorded by D/IP Nuwe Henry (Prosecution Exhibit PE3 (a) and (b)), the accused stated as follows:

"That I know Turyatunga Gideon now the late he is my elder brother. When our parents died my elder brother Turyatunga Gideon decided to take all the land left behind by our parents alone and this annoyed me so I had a conflict with him (Turyatunga). As if that was not enough, when my son died, people started telling me that my late son was sacrificed by Turyatunga Gideon my elder brother so this made me to fear so I decided to go and stay with my grandmother in Kyangwali in Bunyoro district. On 5/1/2019 I came back to Kyakarafu village, Busumba S/ county, Kamwenge district and I decided to stay with another grandmother. On 24/1/2019 at around 2100/c I left home and went to Kinoni trading center where my friends bought me crude waragi which I took (drunk). I became drunk and went back home at around 1000/c. On the way I met my elder brother Turyatunga Gedeon when I asked about sharing our land left behind by late parents but instead Turyatunga Gideon decided to reply me rudely which made me get annoyed and I picked a stick and hit him with it on his head and he fell down then I threw away the stick to a nearby bush and went and slept at my Denis my friend's home but never told Denis the incident of hitting my elder brother with a stick. The following day on 25/1/2019 at around 0700/c as I was going to Kyakaarafu to dig in the garden on the way I found my elder brother Turyatunga Gideon still lying at same place where I hit him with a stick and he was in critical condition so I went back and informed Denis about the condition of my elder brother Turyatunga Gideon who was lying half way dead on the way. Denis also informed neighbours around who went and to see Turyatunga Gidion and neighbours mobilized and Turyatunga Gideon was taken to Virika Hospital in Kabarole for treatment but unfortunately Turyatunga Gideon died later in the evening from Virika Hospital in the evening and I

was already arrested by police of Kisojo Police Post and detained in police cells then later on transferred to Kawmenge Police Station where I was detained in police cells. That is all I can state

Statement read over back to me and it is true and correct"

In the Charge and Caution Statement recorded by D/AIP Magezi Joseph in English only (Prosecution Exhibit PE4), the accused stated as follows:

"I know very well TuryantungaGido (deceased) as my elder brother. When our parents all of them died, my elder brother decided to take all the lands alone; from there we had some conflicts with deceased. Even when my son died people where telling me that my son was being sacrifice by my elder brother. Then I went to stay with grandmother in Kyangwali, when I came back, I never stayed with him as used to be in the same compound; I was staying with another grandmother in Kyakarafu village. Then on day of 24/01/2019, I went to Kinoni trading centre and some booze; I became drunk and went back homo; On the way I met my elder brother deceased whom I stated asking about sharing our land; But the deceased decided to reply me rudely and became annoyed; That's when I told him how was going to beat him. I picked a stick and hit him on the head; Then after I threw away the stick in eucalyptus tree just near I left my elder brother lying. I went and slept at Denis home; I came in the morning and found him in critical condition Their many people came and took him in hospital where he dead

That's all I can wish to state statement made by me read back found truly and correct."

You should look for corroboration of the confession. Examples of corroboration:

(1) The reference in the accused's statement to a grudge arising from the belief of the accused that the deceased bewitched and killed his child following which the accused abandoned his house and left the village and went to Bunyoro, is referred to in the evidence of PW1. PW2 KyompireStedia the wife of the deceased and Banyenzaki Erick the paternal grandfather of both the deceased and the accused.

(2) The statement of the accused that he went and slept at the home of Denis is also referred to by the evidence of PW4 ASIIMWE DENIS.

During his defencein his unsworn statement, **DW1 Muchunguzi Godfrey** the accused testified that he knows nothing about the death of his elder brother the deceased. That he just saw the police coming to arrest him. That he never told the police anything.

<u>Evidence of a Prior Threats to Kill the Deceased</u>

PW1 KYOMPIRE STEDIA testified that the accused was the brother of her husband the deceased. There was a grudge between the accused and the deceased arising from the accused's belief that the deceased had bewitched and killed his (accused's) child about 2 years prior to the deceased's death. The accused had vowed and threatened to avenge the death of his child and he abandoned his house saying he was going to Bunyoro. In re-examination, the witness stated that the accused spent about 3 months alleging that the deceased and his wife killed his child then he left the village. In answer to the assessors, the witness said that the accused made the threats or allegations many times. **PW2 BANYENZAKI ERICK** the paternal grandfather of the accused and the deceased testified that prior to his death, the accused had said that he wanted to kill the deceased because he suspected him to have bewitched and killed his child. The witness said that after

the death of his child, the accused left the village and went to Bunyoro where he had a grandmother; and he lived there for about a year. That later, the grandmother sent him away from Bunyoro and he returned; that every time the accused would visit the witness, he would be armed with a panga and threatened that he would kill the deceased any time, to avenge the death of his child. In cross examination, the witness said that the accused came to his home 3 times in one month, after he had returned from Bunyoro, when he made the threats, following which, he heard that the deceased had died.

In this case, the evidence of prior threats by the accused to kill the deceased is relevant. The evidence of PW1 and PW2 shows that the accused made repeated threats to kill the deceased. The evidence of PW2 shows that the threats were proximate to the time of the offence. PW2 stated that every time the accused would visit the witness, he would be armed with a panga and threatened that he would kill the deceased any time, to avenge the death of his child. The witness said that the accused came to his home 3 times in one month, after he had returned from Bunyoro, when he made the threats, following which he heard that the deceased had died. The statement of the accused discloses that one of his grudges with the deceased related to land matters.

Evidence of the Conduct of the Accused

PW1 KYOMPIRE STEDIA testified that on 22/1/2019 at around 4.00am she woke up and found the door open. She saw the accused inside the house, and then he later moved out. Her husband was in bed. In the morning she informed her husband. In cross examination, the witness said that she recognized the accused inside the house with the aid of solar lights that had remained switched on; that she had not switched off her lights. In answer to court, the witness said that she had

last seen the accused for about 2 weeks before the night when she saw him in the house and that before that the accused had left for Bunyoro.**PW4 ASIIMWE DENIS** testified that the accused was hisneighbor. That on 24/1/2019 the accused came to the home of the witness at 10:00 pm when he was already in bed. That the accused told him that his house was leaking and it was about to rain so he could not sleep in the house; that it had not yet rained. That he made a bed for the accused and he slept. In re-examination, the witness said that the accused never used to spend nights at the home of the witness; that he stayed there only on that night; that it was the first time.

The evidence of PW1 and PW2 shows that the accused had recently returned on the village from Bunyoro before the offence was committed. In the night of 22/1/2019 he stealthily entered the house of the deceased whom he had been vowing to kill, but left the house when PW1 the wife of the deceased woke up and saw him. After the time of the commission of the offence, the accused went and spent the night elsewhere, in the house of PW4, which he had never done before. What do you make of the conduct of the accused? Is this the conduct of an innocent person?

The Defence of the Accused

In his unsworn statement the accused testified that he knows nothing about the death of his elder brother the deceased. That he just saw the police coming to arrest him. That he never told the police anything.

Although in his defence in court, the accused did not offer any evidence on this element, there is evidence from PW5 D/AIP Nuwe Henry that the accused told him

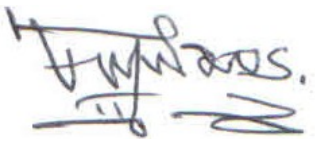
at the time of recording his Charge and Caution Statement, that he had taken alcohol before committing the offence. This is also stated in the Charge and Caution Statement of the accused. The law is that the court is required to investigate all the circumstances of the case including any possible defences even though they were not duly raised by the accused for as long as there is some evidence before the court to suggest such a defence (see *OkelloOkidi v. Uganda, S. C. Criminal Appeal No. 3 of 1995*).

Under section 12 of *The Penal Code Act*, for intoxication to constitute a defence to a criminal offence, it must be shown that by reason of the intoxication, the accused did not know that the act was wrong or did not know what he was doing and the state of intoxication was caused without his consent by the malicious or negligent act of another person, or that he was by reason of intoxication insane, temporarily at the time of his acts.

In this case there was no suggestion that the accused committed the offence under the influence of intoxication; or that the condition of any intoxication was caused without his consent by the malicious or negligent act of another person. The accused testified that he knows nothing about the death of his elder brother the deceased. That he just saw the police coming to arrest him. That he never told the police anything.

Do you think prosecution has proved this ingredient beyond reasonable doubt that any of the accused participated in this crime? I invite you to advise me accordingly.

Dated at Fort portal this 22 day of March 2022



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Vincent Wagona

Judge