THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No. 0014 OF 2005; HELD AT KYENJOJO

UGANDA …… PROSECUTOR

VERSUS

NSABIMANA VARISTO ……. ACCUSED

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO.

JUDGMENT

The accused herein, Nsabimana Varisto, has been indicted before this Court for the offence of murder in contravention of sections 188 and 189 of the Penal Code Act. It is stated in the particulars of the offence that on the 2nd day of February 2004, at Ngangi village, in Kyenjojo District, the accused murdered one Sekamanya Samuel.

After responding that he had understood the statement, and particulars of the said indictment, read out and explained to him by Court, the accused denied the allegations contained therein. Court then entered the plea of "Not Guilty" for him; and a trial followed.

The offence of murder is comprised in four ingredients. These are:-

(i) Death of a human being.
(ii) Unlawful causation of that death.
(iii) The said unlawful causation having been done with malice aforethought.
(iv) The participation of the accused in causing the said death.

For Court to find that the accused is guilty as charged, and convict him, the prosecution is under duty to first prove, and this, strictly beyond reasonable doubt, each of the aforesaid ingredients. This being a capital offence, the proof required must – as stated in ***Andrea Obonyo & Others vs.***

R. [1962] E.A. 542; at p. 550, citing a passage from the judgment of DENNING, L.J. (as he then was), in ***Bater v. Bater [1950] 2 All E.R. 458***, and approved in ***Hornal v. Neuberger Products Ltd. [1956] 3 All E.R. 970,*** and, in our own Court, in ***Henry H. Ilanga v. M. Manyoka [1961] E.A. 705 (C.A.)*** - be to a standard of clarity that is commensurate with the enormity of the offence charged.

Before the prosecution called its witnesses, I carried out a preliminary inquiry in accordance with the provisions of section 66 of the Trial on Indictments Act; at which the prosecution and the defence agreed on certain facts; namely that:

(i) Samuel Sekamanya died on the 14th February 2004; and Dr John Kingori carried out a post mortem examination on the body, on the 16th February 2004. His findings were that the appropriate period between the onset and death was one month; and death was from cardiac arrest due to septicaemia arising from gangrenous left leg. The post mortem report was exhibited as CE1.

(ii) Medical examination carried out on the accused Nsabimana Varisto revealed that he was 20 years of age, and of normal mental condition. The report was exhibited as CE2.

The prosecution then adduced evidence from 4 (four) witnesses in an endeavour to discharge the above stated burden of proof. These witnesses were:

(i) No. 30349 P. C. Rugwisa Augustus – (PW1); a police officer who investigated the aforesaid death, and recorded a statement from the victim - now the deceased Sekamanya Samuel.

(ii) Nyanjura Kereri – (PW2); widow of the deceased Sekamanya Samuel, and aunt to the accused;

(iii) Dacroza Bagendana – (PW3); the L.C.1 Chairperson of the village of the accused and deceased;

(iv) Dr. Wilfred Ruhweza – (PW4); the medical officer who gave a professional interpretation of the findings contained in the aforesaid post mortem report (medical certificate of death) made by Dr. John Kingori who had examined the body of Sekamanya Samuel.

Although the family members, to date, do not know where the deceased was buried, owing to the fact that nobody collected the body from Mulago hospital, direct proof of the death of Sekamanya Samuel is given by PW2 who was his attendant at Mulago hospital; and, as well, contained in the evidence of post mortem report made by Dr. Kingori, disclosing that the deceased died from the theatre at Mulago hospital. This evidence satisfies the requirements in ***Kimweri vs. Republic [1968] E.A. 452***; which is authority for the proposition that proof of death can be established, amongst other means, by the evidence of an eye witness to the corpse. The defence did concede proof beyond reasonable doubt, by the prosecution, of this ingredient.

To prove the participation of the accused in causing the injuries that led to the aforesaid death, it was the direct evidence of PW2, that of the victim himself, and the circumstantial evidence of PW3 which the prosecution relied on. From the account given by the deceased as contained in his police statement, the assault on him took place around 6.00 o'clock; in the early evening. The accused had pounced on him and cut him four times – thrice on the left thigh, and once on the right thigh.

The deceased was the maternal uncle of the accused; and as stressed by PW2 the accused was regarded in her home as a member of the family. The evidence of the deceased was admitted as secondary evidence. Section 30 of the Evidence Act (Cap 6 Laws of Uganda Revised Edition 2000) provides as follows for the admission, in evidence, of secondary evidence:

"***30. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.***

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be produced without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases-

(a) when the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the

statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question; …"

I did warn the assessors that the statement in the instant case, not having been made in a situation of extremity or in expectation of death, did not amount to a dying declaration; hence, it was not safe to act on it, in the absence of supportive evidence, to found a conviction.

In ***Kabateleine s/o Nchwamba (1946) 13 E.A.C.A. 164***, the deceased had earlier reported a threat by the appellant to burn her; and indeed she was later burnt in her hut. On the admissibility in evidence of that report of threat, the Court held at p. 165, that it was admissible under section 32 (1) of the Indian Evidence Act (similar in provision to section 30 of the Uganda Evidence Act, cited above). It cited the Privy Council case of ***Pakala Narayana Swami v. Emperor (1939) A.I.R. 47,*** and quoted a passage therein at p.50, which had held that:

'The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction'.

In ***Okethi Okale and Others v. Republic [1965] E.A. 555,*** at p. 558 (E) to p. 559 (A): the Court cited with approval the judgment of the Court in ***Jasunga Akumu v. R. (1954) 21 E.A.C.A***. and pointed out that the circumstance under which the statement was made, was not so done in immediate expectation of death, and therefore the Court had to approach that statement:

"…with that circumspection that the law enjoins with regard to dying declarations."

In ***Uganda vs. George Wilson Simbwa, S.C. Crim. Appeal No. 37 of 1995,*** Supreme Court clarified that it is only when a statement by the person who later dies, regarding the cause of death, is made in a condition of extremity, when all hope of life is gone and the maker is in expectation of imminent death, is corroboration of such evidence not a requirement.

Otherwise any other statement regarding the transaction that eventually ends up in death is admissible, but it is not safe to act upon it unless there is corroboration of such evidence. On evidence of identification, such as this one, it is the inculpatory facts of identification presented in

Court by the victim of the act complained of, which offers the best evidence on the matter – see ***Badru Mwindu vs Uganda; C.A. Crim. Appeal No. 1 of 1997.***

In the instant case before me, however, the inculpatory facts of identification were adduced only by the direct evidence of PW2 who partly witnessed the wrongful act being committed; and circumstantial evidence of PW3 who found the accused with a weapon in hand at the scene of the crime, and disarmed the latter of the weapon, believing it was the one used in the assault. The evidence of the victim – Sekamanya Samuel, only came before Court as secondary evidence, as he was dead by the time the matter came up for trial.

Court is under duty to proceed with caution in handling evidence of identification, before it can arrive at any conclusion that the accused was correctly identified and placed at the scene of the crime. I accordingly warned the assessors of this need. This is the authority contained in numerous cases, chief amongst which are: ***Abdulla bin Wendo & Another v. R (1953) 20 E.AC.A. 166, Roria vs. Republic [1967] E.A. 583, Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978, [1979] H.C.B. 77***; and ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997.***

In the ***Nabulere*** case (supra) the Court stressed, in a passage which I quote here in extenso, that:

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.*
>
> *The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused.*
>
> *All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger…*

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

The cases of ***Yowana Sserunkuma vs Uganda, S.C. Crim. Appeal No. 8 of 1989***, ***George William Kalyesubula vs. Uganda – S.C. Crim. Appeal No. 16 of 1997***, ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981 - [1992-93] H.C.B. 47***; all emphasised the need for Court to exercise caution, and to test with the greatest care evidence of identification; especially when conditions for correct identification are not favourable.

The advice contained in them is that in such circumstance Court should look for other evidence, whether direct or circumstantial, pointing to the guilt of the accused, and thereby supporting the correctness of identification; and from which it can safely be concluded that the evidence of identification was free from the possibility of error, or mistake of identity. In the cases of ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** and ***Remigious Kiwanuka vs. Uganda Crim Appeal No. 41 of 1995,*** the Supreme Court of Uganda clarified that where the identification is made during broad day light, by a witness who fully knows the accused, the conditions for proper identification would be favourable.

The tragic assault in issue herein took place in the evening, during daytime; the victim was uncle to the accused who virtually lived in the former's home, and was considered a member of that family. Therefore, the conditions favoured correct identification. In the circumstances then, the possibility that the identifying witnesses – the deceased, PW2, and PW3 – committed an error, or were suffering from mistaken identity, would be minimal or altogether non–existent. After exercising the necessary caution I find this to be one of those cases where the evidence of identification, unlike in the cases contemplated in the ***Moses Kasana***, and ***Bogere*** cases (supra), would suffice and make it safe to found a conviction thereon without the need to look for evidence in support.

If corroboration were necessary, there is, here, ample supportive evidence. It is uncontroverted evidence that there was no known grudge or any form of bad blood between the victim and the accused; and this is corroborated by the accused in his testimony. If anything, the victim came

out strongly, even when he was undergoing treatment for the injuries inflicted on him by the accused, to vouchsafe for the abandonment of the pursuit of criminal proceedings against the accused; and instead instructing his wife – PW2 that the accused be released. Further evidence in support of the evidence of identification by the deceased and PW2 is the circumstantial evidence provided by PW3 who found the accused at the scene still holding the panga which the victim and PW2 said was the weapon used in the assault; and for which reason he arrested the accused.

If this evidence of identification were exclusively circumstantial, I would have had to establish whether the inculpatory facts thereof are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. Further, I would have had to also establish that there are no co–existing circumstances that would negative the inference of guilt. However, in the light of the evidence of PW2 and the admitted statement of the deceased, both of which identify the accused as the assailant, the circumstantial evidence here does not stand alone. It therefore stands out as an exception to the principle enunciated above.

In ***Barland Singh v. Reginam (1954) 21 E.A.C.A. 209;*** the trial Court had convicted the appellant on circumstantial evidence which had not wholly been inconsistent with his innocence. Nonetheless, the Court of Appeal held at p. 211, that:

> *"…circumstantial evidence, although not wholly inconsistent with innocence, may be of great value as corroboration of other evidence. It is only when it stands alone that it must be inconsistent with any other hypothesis other than guilt."*

Moreover, as pointed out in the ***Bogere*** and ***George William Kalyesubula*** cases (supra), the 'other evidence' required for support of that of identification need not be the type of independent corroboration such as is necessary for support of accomplice evidence, or in sexual offences. Any evidence which tends to confirm or show that the eye witness identification is credible may suffice even if it is from that eye witness himself or herself; as long as it is admissible.

I am satisfied that the weight of evidence in support of evidence of identification, has greatly minimised if not removed altogether, any possible danger of error of identification or mistaken identity, that would have otherwise rendered it unsafe to found a conviction basing thereon. I find support in this contention from the advice of the Court in the ***Abudalla Nabulere*** case (supra), where it stated as follows:-

"If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered."

The defence of alibi set up by the accused, is that he had the whole of that fateful day been at a market, away from the scene of the incident. He only came back to find people gathered at his home, and learnt therefrom that there had been a fracas between his uncle and his mother, and that his uncle had been injured. He could not see his mother amongst the many people gathered. He then asked for the whereabouts of his uncle, and went to the latter's home; but PW2 barred him from having access to his uncle, advancing the reason that it was his mother who had injured her (PW2's) husband. I find this account a lame fabrication of the defence of alibi; and, therefore, unacceptable in view of the adverse cogent evidence adduced by the prosecution placing him at the scene of the crime. Instead, this fabricated alibi served only to corroborate the evidence of identification on the authority of the ***Moses Kasana*** case (supra).

As for the cause of the death in issue, it is an established presumption in law that any incident of homicide is unlawful. This presumption may however be rebutted by the accused providing proof that the homicide was committed under any of the excusable circumstances; namely that: either it was accidental, or in defence of person or property, or upon provocation, or was committed in execution of a lawful order; (See ***R. vs. Gusambizi s/o Wesonga (1948) 15 E.A.C.A. 65; Uganda vs. Bosco Okello alias Anyanya, H.C. Crim. Sess. Case No. 143 of 1991, [1992 - 1993] H.C.B. 68; Uganda vs. Francis Gayira & Anor. H.C. Crim. Sess. Case No. 470 of 1995, [1994 - 1995] H.C.B. 16).***

The standard required for proof of a rebuttal where an accused raises one, is, according to ***Festo Shirabu s/o Musungu vs. R (22) E.A.C.A. 454,*** merely on the balance of probabilities. As explained by Dr. Ruhweza – PW4, the post mortem findings were that the immediate cause of the death which occurred on the 14th February 2004, was cardiac arrest; and that this was due to septicaemia which resulted from gangrenous left leg; and that the appropriate interval between onset and death was one month. PW4, with manifest wealth of experience, gave an explanation of these medical terms contained in the certificate of death as follows:

(i) Cardiac arrest – means the heart stopped completely to pump blood.

(ii) Septicaemia – means a case of overwhelming infection throughout the body, inclusive of the blood.

(iii) Gangrene – means death of an organ due to lack of blood; and this happens when an artery is cut and blood does not reach that part which is then affected. In the instant case, the reference to 'gangrenous left leg' in the medical certificate of cause of death meant that the left leg was dead.

The witness explained that while cardiac arrest cannot result in septicaemia or gangrene, the converse is true that septicaemia can result in cardiac arrest; and gangrene can result in septicaemia, and thereby cause cardiac arrest from infection and loss of blood level. Since there was an interval of a fort night between the infliction of the multiple cut wounds and death, and the immediate causation of the said death were other intervening factors, it is important to resolve whether this death was directly linked to the event of 31st January 2004 when the deceased was subjected to the said wounds, for purposes of determining causation. Section 198 of the Penal Code Act provides as follows:

198. Limitation as to time of death.

(1) A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.

(2) ……

(3) When the cause of death is in part an unlawful act and in part an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the last unlawful act was done or the day on which the omission ceased, whichever is the later.

The intervening factors were not remote from, but a direct consequence of, the unlawful act of inflicting the wounds to which the victim later succumbed. There is no evidence before me that there was any omission or laxity on the part of the medical personnel either of Mubende or Mulago hospitals. Mubende hospital did what they could and referred the victim to Mulago hospital. The reasonable inference I can therefore draw here is that the injuries simply defied medical attention, with the ultimate fatal consequence.

In the premises then, the person who inflicted the injuries cannot, due to the intervening medical factors named above, be absolved from responsibility for the causation of the death in issue. Unfortunately however, there was no medical report to guide Court on the extent or gravity of the injuries the deceased sustained. The evidence available on the nature of the injuries inflicted on the victim – Sekamanya Samuel, and leading to his admission in hospital, can be garnered from the testimonies of PW1 and PW2; both of who saw those injuries.

At Mubende Hospital, PW1 saw the victim with three cut wounds on the lower part of the thigh. The statement made by the victim – and admitted at the trial as secondary evidence, owing to his subsequent death – only discloses that on the 31st January 2004, he was cut three times with a panga. It does not describe the extent of the injuries. It is only PW2 who describes the cut wounds as having been deep; with one of the bones having been cut off, leaving only the flesh. The description of the cut wounds, as given by PW2, is however not dependable in view of her vacillation in her testimony with regard to whether she witnessed the wounds being inflicted, and as to what injuries were inflicted on either side of the thigh; given that her testimony on the matter, during examination in chief and in cross examination, were not consistent.

The Mubende Hospital personnel could not offer any pointer to the nature of the injuries beyond the revelation that the patient would be referred to Mulago Hospital, as indeed he was. This however, by itself, does not necessarily mean the injuries were deadly, as the referral could simply be suggesting that his condition was beyond the capacity of Mubende hospital to handle. What is uncontested is that the cut wounds sustained by the victim had however not resulted in instant or immediate death; as death occurred a fortnight later. From the account given by the deceased as contained in his police statement aforesaid, he had had an altercation with his own sister – the mother of the accused – who appeared to be drunk and had assaulted him; and in turn he had hit her with a small stick.

The accused, who had responded to the alarm sounded by his said mother, pounced on him as he tried to flee, and cut him four times – thrice on the left thigh, and once on the right thigh. In the circumstance, and although the accused did not raise it, the evidence on record discloses a possibility of the defence of provocation available to the accused; and I have to consider and dispose of this defence. Otherwise it would be wrong to make any finding that the prosecution has discharged the onus that lies on it to prove that the action of the accused in inflicting the several injuries on the deceased was murder; and nothing else.

Section 192 of the Penal Code Act provides for the defence of provocation. In sum it states that a killing which would otherwise amount to murder would be regarded as manslaughter instead; as long as the killing is done in the heat of passion caused by sudden provocation, and before there is time for such passion to cool. Provocation is defined in Section 193 of the Act to include any wrongful act or insult to a person to whom the person provoked stands in conjugal, parental, filial, or fraternal relation. The provocation must be such as to deprive the person relying on it as defence, from the power of self control; and to induce him or her to commit an assault on the one who has caused the provocation.

It is well known that there is the human – if not generally animal – instinct or inclination, and propensity to rise to the protection or defence of a relative, especially the female one, who is in real or perceived danger, risk, or helplessness. Anything done, which abuses the honour of, or is seen to thrive on the apparent vulnerability of a woman, and worse still if that woman is one's mother, would provoke one to intervene. This in my view is the type of situation covered by the stipulation of the Act above.

Even if it is established that indeed in the instant case the accused, due to the emotional attachment to his mother which is only universally human, was provoked by what he found the deceased had done to her upon responding to her distress call – for that is what in fact the sounding of the alarm was – I am still duty bound to determine whether the response by the accused was commensurate with the nature of provocation. In ***Mushibi s/o Muhinguzi v. Rex (1946) 13 E.A.C.A. 139;*** the appellant had gone to collect his wife from a drinking place, and had carried along a spear for possible protection against wild animals. At the drinking place two persons assaulted him; the first threw him out, and the second insulted and beat him with a piece of firewood; he had then responded to this by fatally stabbing the latter with the spear; and he was convicted.

The Court of Appeal quashed the conviction and explained, at p. 140, that:

> *"…it must be borne in mind that this question of 'provocation' in East Africa is a matter of specific legislation and not of common law. … the specific legislation on the subject makes the English common law inapplicable in an important respect.*

Under the English common law, to enable an accused person to take advantage of provocation to reduce a killing from murder to manslaughter the 'mode of resentment' employed by the accused must bear a reasonable proportion to the provocation offered. That stipulation – to some minds most reasonable –finds no place in the specific enactments in the East African legislation.

As long as there is a wrongful act or insult of such a nature as to be likely when done to an ordinary person to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered, then provocation is established. A slap with the open hand is an 'assault'.

If the wrongful act is of such a nature as to be likely to cause an ordinary person to lose his self-control and slap the provoker, then legal provocation is established, and any act whatever causing death, whether done with or without lethal weapon, if done in the heat of passion caused by such provocation, and before there is time for the passion to cool, is manslaughter and not murder in the East African colonies.

Provocation which under English law might for this branch of the law excuse only a slap with the open hand, in East Africa excuses a fatal attack with a lethal weapon to the extent of reducing the fatal attack to manslaughter, however savage, brutal and unbridled such attack may be."

The Court cited the case of ***Juma Mafabi v. Rex; Crim. Appeal No. 20 of 1945***; whose facts were that the deceased had inflicted two cuts on the little finger of the accused with a walking stick; and in response, the 'mode of resentment' exhibited by the accused was a murderous attack in which he belaboured the deceased on the head and body causing multiple injuries including fractures of three ribs and the cheek bone and a fractured dislocation of the axis bone of the neck. The Court at p. 141 quoted a passage from the ***Juma Mafabi*** case (supra) as follows:

"We are however of the opinion that the two blows the accused received from the deceased were of such a painful kind as to be likely to deprive an African of accused's class of his power of self-control and we think it was to that loss of self-control and not to any independent malice or desire for revenge that is to be attributed accused's repeated use of the big stick he had in his hand to inflict serious and fatal injuries on the deceased. We

accordingly allow the appeal but mark our disapproval of the excessive violence of the fatal assault by sentencing the accused to serve ten years imprisonment with hard labour."

The Court also cited its decision in the case of ***Rex v. Theodori (Criminal Appeal No. 201 of 1945)*** which had also dealt with the issue of disproportion on the 'mode of resentment'; and quoted, at p. 141, a passage from the judgment of that case as follows:

"*Juma Mafabi's case aptly illustrates the interpretation to be put upon the provocation sections with regard to the point under consideration, for in that case the retaliation was definitely disproportionate to the provocation, yet this Court altered the conviction from murder to manslaughter."*

In the instant case, the accused responded to the alarm sounded by his mother for protective intervention. He found that the reason his mother had sounded out the summons (alarm) was not due to an encounter with a fellow woman or someone against whom she could fairly hold her own; but instead with a man, albeit her own brother, against whom she stood no chance.

The accused, it must be understood, found the beating to which his uncle had subjected his mother, a provocative act; notwithstanding that this was a quarrel between brother and sister, and that the assault committed by the one against the other, was relatively minor, and ought not to have attracted, and could not have warranted the reaction and response of the magnitude exhibited in this case. On the authorities cited above, this is one of those exceptions when the excusable defence of provocation would be available to the accused, in rebuttal of the charge of murder.

With regard to the ingredient of malice aforethought, section 191 of the Penal Code Act defines malice aforethought, in the causation of death as an ingredient of murder, as follows:

"191. Malice aforethought.
Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances-

(a) an intention to cause the death of any person, whether that person is the person killed or not, or

(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused."

In ***R. v. Sharmal Singh s/o Pritam Singh; & Sharmal Singh s/o Pritam Singh v. R. [1962] E.A. 13,*** a combined appeal, the Privy Council applied the principle enunciated in ***D.P.P. v. Smith [1961] A.C. 290,*** to the effect that the knowledge referred to in the establishment of existence malice aforethought is one a reasonable man would have of the probable consequences of his acts and omissions. The Court held at p. 16 (G - H) that malice aforethought is established where, inter alia, there is:

'knowledge that the act or omission causing the death will probably cause the death of or grievous harm to another person."

Therefore, only where the perpetrator of the homicide has expressly stated the intention to cause the death of a person, will evidence of malice aforethought be direct. Otherwise it is always a mental element; and it can only be established by inference, arrived at from the facts or circumstances of a given homicide. The Court has the duty to review the whole circumstance under which the injury was inflicted, and determine whether or not there are any excusable factors, or whether it can be said that the perpetrator of the assault had knowledge that the act of inflicting injury could probably cause death, before making any conclusive inference that malice aforethought existed at the time of causing the injury.

The case of ***R. vs. Tubere s/o Ochen (1945) 12 E.A.C.A. 63***, cautioned against laying down any hard and fast rule to determine the existence of malice aforethought; but that some of the factors from which such inference can be made are: the weapon used, the manner it was used, and the part of the body targeted. The Court pointed out that:

"it will be obvious that ordinarily an inference of malice will flow more readily from the use of say, a spear or knife than from the use of a stick; that is not to say that the Court take a lenient view where a stick is used. Every case has of course to be judged on its own facts."

Other cases, such as ***Uganda vs. Fabian Senzah [1975] H.C.B. 136; Lutwama & Others vs.Uganda, S.C. Crim. Appeal No. 38 of 1989; Uganda vs. John Ochieng [1992 - 1993] H.C.B. 80, Uganda vs Turwomwe [1978] H.C.B.16,*** have applied this principle, and expanded the considerations to include whether or not the weapon used was lethal, vulnerable parts of the victim were targeted, injuries were intended to cause grave damage, and the conduct of the accused before, during, and after the attack, points to guilt.

In ***Siduwa Were v. Uganda [1964] E.A. 596,*** the medical evidence had not ruled out, but instead opened up the possibility of a co-existing circumstance of the death; and this was equally consistent with accident or manslaughter, as it was with murder. The Court stated that the onus of proof of malice aforethought was high; and cited the passage in ***Sharmpal Singh*** *(supra)* reproduced herein above, on establishment of malice aforethought in the perpetration of the transaction from which death eventually results.

The injuries in the instant case before me, from which the victim later died, were occasioned with a panga. The inference that readily comes to mind is that the accused was seized by malice aforethought in perpetrating the deed. But, the Court has to look at the entire circumstance surrounding the cause and infliction of the injuries, before conclusively determining whether or not it establishes beyond reasonable doubt that indeed such malice did exist at the time.

The evidence on record is that both the victim and his wife PW2 could find no reason to explain the use of the panga by the accused on his own uncle. PW2 testified that her husband had instructed that no one should follow up the case against his nephew; and the nephew should be released as there was no grudge between him and his nephew. Manifestly still at a total loss due to this inexplicable occurrence; the reality of which, up to the time of testifying in Court, still perplexed her, PW2 believing that what had happened was the work of the devil said, of the accused, as follows:

> *"I knew him quite well. He was like a child in our home. It was like a devil had visited our home when he cut my husband. There was no grudge between the accused and the deceased. … My husband told me from Mubende hospital that no one should follow up the case against the accused."*

It is reasonable therefore to draw the inference that the accused only acted rather impetuously on responding to his mother's alarm and finding that his uncle had harmed her. First, there was no quarrel between the deceased and the accused. Second, the injuries while repeatedly inflicted, all targeted the thighs of the victim; and these are ordinarily not vulnerable parts of the body. Further, in the unfortunate absence of clear and persuasive evidence as to the extent or gravity of those cuts, and the fact that the victim survived for a fortnight subsequent to the date he sustained the injuries – and this allowed for other intervening factors to play a hand on the injuries – it would be unsafe to reach any inference that the inflicting of the injuries were accompanied by malice aforethought.

Finally, the evidence on record is that after cutting the victim, the accused remained standing at the scene with the panga in his hand, but never used it again on the victim; despite the fact that his victim was sounding the alarm which attracted people, including the Chairman L.C.1 of the area who disarmed him of the panga, and arrested him. This is circumstantial evidence from which it can be inferred that in his mind, the injuries he had inflicted on his uncle – albeit uncalled for – either were not such as would turn fatal, or they stunned him as he may have acted without second thought; and not have intended that his uncle sustain such serious injuries.

In this regard therefore, I am unable to agree with the views expressed by counsels on both sides, and the assessors, that the existence of malice aforethought in this unfortunate transaction has been proved by the prosecution. The evidence adduced before me has failed to pass that high premium imposed by law, and requisite for the establishment of that ingredient; this being a capital offence. There is good reason to harbour serious doubt as to whether the assailant in the present circumstance intended that the victim should die; or was aware that the injuries could occasion death.

In the premise then, it is only the ingredients of death of the victim, and participation of the accused which the prosecution have proved beyond reasonable doubt. Since the ingredient of malice aforethought, as was the case with unlawful causation, was not proved, I find that the prosecution has failed to prove beyond reasonable doubt, that the accused murdered Sekamanya Samuel as alleged in the indictment. I therefore – and here I am in disagreement with the assessors – acquit him of the charge of murder for which he has been indicted and has stood this trial.

However, owing to the fact that the evidence adduced proved that the accused assaulted the deceased, but on provocation, and without malice aforethought, the unlawful causation of death was not murder, but manslaughter. The prosecution has therefore, instead, proved beyond reasonable doubt that the accused by his acts for which he has stood trial committed the lesser offence of manslaughter; contrary to sections 187 (1), and 190, of the Penal Code Act.

In ***Funo & Ors. vs. Uganda; H.C. Crim. Appeals Nos. 62 – 69 of 1967; [1967] E.A. 632,*** Court held that an accused person can be found guilty and convicted of a minor cognate offence to the one with which he or she has been charged; even though the accused was not charged with that minor cognate offence. Section 87 of the Trial on Indictments Act, (Cap 23), provides as follows:

"87. Persons charged may be convicted of minor offence.

When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it."

Since the evidence adduced in this case has proved facts which fits with the provision of the law set out above, and reduces the offence charged from murder to manslaughter, I find the accused guilty of the minor cognate offence of manslaughter, in contravention of sections 187 (1), and 190, of the Penal Code Act, notwithstanding that he had not been charged with it; and accordingly do hereby convict him of that lesser offence.

Chigamoy Owiny – Dollo
JUDGE
11 – 05 – 2009