

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**HCT-00-CR-SC-0077 OF 2012**

**UGANDA .....**  
**PROSECUTOR**

**VERSUS**

**VINCENT KAMAU & ANOTHER .....**  
**ACCUSED**

**BEFORE: Hon. Lady Justice Monica K. Mugenyi**

**JUDGMENT**

The accused persons, Vincent Kamau (A1) and Hellen Naiga (A2), were indicted on 2 counts each - murder contrary to sections 188 and 189 of the Penal Code Act and aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. The prosecution case on count I is that on or about 20<sup>th</sup> July 2009 at Kansanga in Kampala district the accused persons murdered a one Nagira Robert, the deceased. Under count II it is the prosecution case that at the same time and place the accused persons robbed the deceased of motor vehicle registration No. UAG 882A and in the course of the said robbery murdered him. Both accused persons denied the charges and they each gave unsworn evidence in their defence. While A1 denied knowledge of the deceased, denied robbing or killing him and attributed his indictment to a vendetta against him by PW2; A2 admitted that she did have a relationship with the deceased but denied either killing him or robbing him of the vehicle in question.

At the trial the State was represented by Ms. Margaret Nakigudde while the accused persons were represented by Mr. Duncan Ondimu and Mr. Hillary Nzige respectively. In his defence submissions Mr. Ondimu did concede to the offence of murder having been duly proved only contesting the participation of A1 therein. Nonetheless, this court is under a duty to evaluate the evidence on record and arrive at its own independent findings

on whether or not the offences with which the accused persons were indicted have, indeed, been proved to the required standard.

It is well settled law that the burden of proof in criminal proceedings lies squarely with the Prosecution and generally, the defences available to an accused person notwithstanding, that burden does not shift to the accused at any stage of the proceedings. Furthermore, the prosecution is required to prove all the ingredients of the alleged offence, as well as the accused's participation therein beyond reasonable doubt. See **Woolmington vs. DPP (1993) AC 462** and **Okale vs. Republic (1965) EA 55**.

The standard of proof required of the prosecution does not entail proof to absolute certainty. The prosecution's evidence should be of such standard as leaves no other logical explanation to be derived from the facts save that the accused committed the crime, thereby rebutting such accused person's presumption of innocence. If a trial judge has no doubt as to the accused's guilt, or if his/ her only doubts are *unreasonable* doubts, then the prosecution has discharged its burden of proof. It does not mean that no doubt exists as to the accused's guilt; it only means that the court entertains no *reasonable* doubt given the evidence adduced before it.

It is trite law that in the event of reasonable doubt, such doubt shall be decided in favour of the accused and a verdict of acquittal returned. Further, inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be ignored if they do not affect the main substance of the prosecution's case; save where there is a perception that they were deliberate untruths. See **Alfred Tajar vs Uganda EACA Criminal Appeal No. 167 of 1969** and **Sarapio Tinkamalirwe vs. Uganda Supr. Court Criminal Appeal No. 27 of 1989**.

I propose to address the offence of murder prior to a determination of the offence of aggravated robbery. The prosecution is required to prove the following ingredients of murder, as well as the participation of the accused persons beyond reasonable doubt: first, the incidence of death; secondly, that the death was unlawful, and finally, that the death was caused with malice aforethought.

At the preliminary hearing that preceded trial the prosecution and defence agreed to the admission of the post mortem report and medical examination (PF24) forms in respect of A1 and A2. These documents were admitted on

the court record as exhibits P1, P2 and P3 respectively. While exhibits P2 and P3 conclusively proved that both accused persons were adults of sound mind when they were examined on 30<sup>th</sup> July 2009; the admitted post mortem report did conclusively establish the deceased's death. The deceased was identified by his uncle, a one Juma Seiko. I am therefore satisfied that the Prosecution has proved the fact of death in this case beyond reasonable doubt.

The post mortem did also report numerous external injuries including an amputated left arm and 4 skull deep cut wounds, and attributed the deceased's death to 'neurogenic shock following open head injury.'

It is trite law that every homicide is presumed to be unlawful unless circumstances make it excusable. See **R. Vs. Busambiza s/o Wesonga 1948 15 EACA 65** and **Akol Patrick & Others vs Uganda (2006) HCB (vol. 1) 6**. The term 'homicide' has been invariably defined as the killing of a human being by another human being. See **'Dictionary of Law', Oxford University press, 7<sup>th</sup> Edition, 2009, p.264**. Conversely, what would amount to excusable or justifiable circumstances would include circumstances like self defence or when authorised by law. See **Uganda vs Aggrey Kiyingi & Others Crim. Sessn. Case No. 30 of 2006**.

*Excusable homicide* has been defined as '**the killing of a human being that results in no criminal liability because it took place by misadventure or an accident not involving gross negligence.**' On the other hand, *lawful or justifiable homicide* is deemed to occur '**when somebody uses reasonable force in preventing a crime or arresting an offender, in self defence or defence of others, or in defence of his property, and causes death as a result.**' See **'Dictionary of Law', Oxford University press, 7<sup>th</sup> Edition, 2009, pp.216, 264**.

In the present case no evidence was adduced before this court as would suggest that the deceased's death was excusable, justifiable or accidental. Both accused persons simply denied responsibility for the deceased's death. Further, the injuries observed on the deceased were so deep and extensive as to rule out the possibility of their having been self inflicted or arisen from natural causes. I am therefore satisfied that the deceased's death was unlawful and do so hold.

Having established that the deceased's death was unlawful, this court must establish whether or not the said death was caused with malice

aforethought, and whether the accused participated in the present offence as alleged or at all. I propose to address these issues concurrently.

Section 191 of the Penal Code Act provides as follows on malice aforethought:

**“Malice aforethought may be established by evidence providing either of the following circumstances:**

- (a) an intention to cause the death of any person ...**
- (b) knowledge that the act or omission causing death will probably cause the death of some person, although such act is accompanied by indifference whether death is caused or not ...”**

Malice aforethought in murder trials can be ascertained from the weapon used, that is, whether it is a lethal weapon or not; the manner in which it is used, that is, whether it is used repeatedly or the number of injuries inflicted; the part of the body that is targeted or injured, that is, whether or not it is a vulnerable part, and the conduct of the accused before, during and after the incident, that is, whether there was impunity. See **R. vs Tubere (1945) 12 EACA 63, Akol Patrick & Others vs. Uganda** (supra) and **Uganda vs. Aggrey Kiyingi & Others**(supra).

It is well recognised that the head is a vulnerable part of the body which, if targeted by an accused, imputes malicious intent on his part. See **Okello Okidi vs Uganda Supreme Court Crim. Appeal No. 3 of 1995**. Further, in **Nanyonjo Harriet & Another vs. Uganda Criminal Appeal No. 24 of 2002** (SC) it was held:

**“For a court to infer that an accused killed with malice aforethought it must consider if death was a natural consequence of the act that caused the death, and if the accused foresaw death as a natural consequence of the act.”**

What a trial judge has to decide, so far as the mental element of murder is concerned is whether the accused intended to kill. In order to reach that decision the judge is required to pay regard to all the relevant circumstances, including what the accused said and did. See **R v Nedrick (1986) 1 WLR 1025** and **R v Hancock [1986] 2 WLR 357**. The existence of malice aforethought is not a question of opinion but one of fact to be determined from all the available evidence. See **Nandudu Grace & Another vs. Uganda Crim. Appeal No.4 of 2009** (SC) and **Francis Coke vs. Uganda (1992 -93) HCB 43**.

In the present case all the prosecution witnesses attested to witnessing the recovery of the deceased's decomposing body from Katugo forest in Nakasongola district. PW4, the scene of crimes officer, presented pictures of the body, as well as a *panga* that was recovered from the scene of crime. These items were admitted on the court record as Exh. P7 and P5 respectively. The description of the external injuries stipulated in the post mortem report denoted the hacking of the deceased repeatedly on the head and the amputation of his left arm. The post mortem report detailed the head injuries as follows: '2 cuts wounds in the occipital region measuring 9cm x skull deep and 17 x skull deep. 2 skull deep cut wounds on left temporal region measuring 5cm and 6cm.'

On the other hand, A1's only reference to the murder in his unsworn evidence was his averment that on the date it is alleged to have occurred he was in custody at 'cells of analysis' in CMI headquarters, and that he was present at the site where the body was recovered but had been driven there after a brutal beating that left him unconscious, only regaining consciousness on the way to the site. A1 did also allude to a grudge being PW2's motivation for testifying against him. A2, similarly, gave unsworn evidence stating that while she knew the deceased she did not participate in his murder; neither had she procured anyone to murder him. She denied prior knowledge of A1.

The defence evidence did not shed light on the question as to whether or not the deceased's death was caused with malice aforethought. It simply consists of denials by the accused person. I do note, nonetheless, that in her denial A2 referred to the deceased's death as a murder. She stated:

*"My lord I wish to inform this Honourable Court that I did not participate in the murder of one Robert Nangira, neither procure any person to kill him."*

Be that as it may, this court does find sufficient proof of malicious intent in the medical evidence admitted on the court record. The length and depth of the skull-deep cut wounds described in the post mortem report are indicative of an attack on the deceased using a large, sharp weapon. That evidence was agreed to by the parties and therefore is not in contention. A *panga* recovered from the scene of crime with rusted blood stains on it serves to corroborate the medical evidence that indeed a large, sharp weapon had inflicted the injuries observed. Certainly a *panga* or machete is capable of causing death and is, therefore, a lethal weapon. Given the number of similar skull-deep cuts observed in the post mortem report it is reasonable to conclude that the lethal weapon was used repeatedly. A part of the body as vulnerable as the head was targeted by this weapon. Undoubtedly, whosoever inflicted 4 skull-deep cut wounds to the deceased's head and chopped off his arm did so in the full knowledge that his/ her actions would result in death and did foresee death as a natural

consequence of these actions. I therefore find that the prosecution has proved beyond reasonable doubt that the deceased's death was procured with malice aforethought.

On the question of the accused persons' participation, clearly the prosecution sought to rely upon circumstantial evidence. There was no eye witness to the deceased's murder. It was the prosecution's case that a plan was hatched between the 2 accused persons to murder the deceased. PW1 testified that while A1 admitted his participation in the deceased's death and led them to the forest where the body and murder weapon were recovered; A2 was the master-mind of the murder plan following what she perceived as the deceased's attempt to cheat her of a car barter trade transaction and participated in chopping off his hand. This court did observe that the evidence of PW1, PW2 and PW5 on how the plan to kill the deceased was hatched and executed largely relied on alleged admissions by each of the accused persons.

In **Siragi & Another vs. Uganda Criminal Appeal No.7 of 2004** (SC) the admissibility of oral evidence in respect of alleged confessions or admissions to a witness by the appellants and their co-accused was considered doubtful and the said allegations were duly ignored. Nonetheless, their lordships addressed the evidential worth of these allegations as follows:

**“However, the fact of the statement being made to her may be taken into account in considering the consistency of the evidence on the investigations.”**

This court's understanding of the above decision is that the allegations of confessions or admissions, in the absence of the written confessions themselves, are inadmissible and should not be relied upon by trial judges. Such allegations may, however, be useful in the evaluation of the prosecution evidence for purposes of determining its consistency and cogency.

In the present case all 3 witnesses - PW1, PW2 and PW5 - attested to having been present during the interrogation of the accused persons, and they each testified that A2 admitted hiring A1 to threaten the deceased into ceding ownership of a white Toyota ipsum to her, but denied ordering his murder or participation in the same. However, they contradicted each other on whether it was the police or military that instigated the investigations; the date the interrogation took place; how the interrogation transpired for instance who was present in the interrogation room; how and

where the alleged confessions were recorded - whether at CMI or otherwise. It would appear to me that all the contradictions in issue pertain primarily to the interrogation leading to the alleged confessions by the accused persons. This court stands respectfully guided by the treatment of similar offences in **Siragi & Another vs. Uganda** (supra) and hereby rejects the prosecution evidence on the alleged confessions. Consequently, the inconsistencies arising from the impugned evidence are equally redundant.

Be that as it may, it is common ground in the evidence of PW3 and PW4 that on the 24<sup>th</sup> July 2009 they travelled to Nakasongola under the direction of A1 and recovered the deceased's decomposing body, as well as a new panga. The same witnesses testified that the following day - 25<sup>th</sup> July 2009 - they travelled to a place called Bweyale and recovered a green Toyota corolla registration number UAG 822A.

In **Siragi & Another vs. Uganda** (supra) the following decision in the case of **Simoni Musoke vs. R. EA 715, at p.718** was cited with approval:

**"... in a case depending exclusively upon circumstantial evidence, (the judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."**

In the same case, the court also cited with approval the following principle stated in **Teper vs. R. (2) (1952) A.C. 480**:

**"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

In the present case the evidence of PW3 and PW4 depicted A1 as the person that led a team of investigators to a forest where the deceased's body and murder weapon was recovered. It was their evidence that he used a map to locate the place. Whether it was A1 that drew the map or it was simply given to him, his possession of it would make him party to whatever purpose it was intended to serve. In the present case, it would appear that it was conscripted in pursuit of an unlawful purpose. The prosecution evidence was not controverted by the accused's unsworn evidence. Indeed their evidence was not impugned by cross examination or otherwise. This court observed it to have been consistent, cogent and credible. On the contrary, the accused persons' evidence was fraught with lies and inconsistencies on material aspects of the present murder that were undoubtedly controverted by the prosecution evidence. I shall cite but a few.

A1 testified that he was brutally tortured into unconsciousness immediately prior to being driven to the scene where the body was recovered, and averred that he only regained consciousness on the way to the scene. This evidence was rebutted by the evidence of PW3 and PW4 who testified that they observed A1 closely and he appeared to be well with no visible sign of torture. Surely a person that would have been subjected to beatings as brutal as was alleged by A1 would have bore some form of evidence of such torture a few hours later. It is, therefore, doubtful that A1 was incarcerated in the 'cells of analysis' at the CMI headquarters at the material time of the deceased's murder as he stated in his unsworn testimony. A1 did also allude to the evidence by PW2 having been precipitated by a grudge between them arising from A1 allegedly preventing PW2 from killing LRA child soldiers who had been arrested in Congo.

In the case of **Haji Musa Sebirumbi v Uganda Crim. Appeal No.10 of 1989** (SC) the court reiterated its earlier decision in **Bumbakali Lutwama & others v. Uganda Crim. Appeal No. 35 of 1989** (SC) where it held:

**"In view of the evidence of both sides it is evident that there were serious grudges between the Appellants and some of the prosecution witnesses and Ssentongo... with respect, our view is that the learned trial Judge did not appear to have given due consideration to the appellant's allegations of grudges with the prosecution witnesses and the important role Ssentongo appears to have played in this case. ... Had the learned trial Judge given proper consideration to the allegations of grudges, as we think he should have done, he might not have so easily concluded that the prosecution witnesses were not influenced by the grudges in question."**

It would appear to me that proper proof of the allegation of grudge would entail the presence on the record of evidence by both parties supporting the existence of such grudge. A mere allegation by the defence or an accused person of a pre-existing grudge would not in itself be proof of the existence of the alleged grudge. In the present case neither PW2 nor any other prosecution witness alluded in any way to the existence of the alleged grudge between PW2 and A1. Neither indeed did A1 call any further evidence in proof of the allegation beyond his sole averment. I do, therefore, disregard this allegation.

In the same vein, A2 testified that she was arrested around 23<sup>rd</sup> July 2009, incarcerated at the Joint Anti-Terrorism (JAT) offices in Kololo until 31<sup>st</sup> July 2009 when she was produced in court and subsequently transferred to



Luzira women's prison. However, PW3 testified that he had seen her in the cells at Katwe Police Station after the recovery of the deceased's body and car, which would have been any time after 25<sup>th</sup> July 2009. Under cross examination, PW5 corroborated this evidence when he attested to having seen A2 at Katwe Police Station one day after the recovery of the deceased's body. This would have been about 25<sup>th</sup> July 2009.

The truthfulness of PW3 and PW4's evidence rebutting the untruths peddled by the accused persons was tested in cross examination and not found wanting. The same cannot be said of the accused persons' unsworn evidence. It is trite law that in assessing the evidence in order to arrive at a verdict, a trial judge can take into account the fact that an accused person did not give evidence on oath but this right must be exercised with caution and must not be used to bolster up a weak prosecution case or be taken as an admission of guilt on the part of the accused. See **Lubogo v Uganda (1967) EA 440**. However, in **Chesakit Matayo v Uganda Criminal Appeal No. 95 of 2004** (CA) the court upheld the principle applied by my brother Rugadya J. who, citing the case of **Juma Ramadhan Vs Republic Crim. Appeal No. 1 of 1973** (unreported), held that lies by the defence were inconsistent with innocence. I do respectfully agree with the principle advanced in that case. Such inconsistencies are, at best, oversights attributable to the passage of time but, more often than not, are deliberate untruths that are intended to mislead court and avert the course of justice. To that extent they would point to the culpability of an accused person.

It is, therefore, reasonable to conclude that the circumstantial evidence of the present case points to A1 having known exactly where the deceased's body was because he was party to the deceased's murder. I therefore find that the circumstantial evidence in the present case is incompatible with the innocence of A1, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. I do so hold.

With regard to A2's participation this court found pertinent circumstantial evidence on this issue from the evidence of CW1. This witness was called by this court as provided for under section 39(1) of the TIA. CW1 attested to a wrangle between A2 and the deceased. The wrangle had arisen from the deceased's impounding of a car (pearl white Toyota ipsum registration number UAL/V series) that he had traded with A2 and accused her of failing to pay for. The witness testified that when the wrangle deepened there was an attempt to kidnap the deceased, and A2 filed a complaint against him for allegedly stealing the impounded car. CW1 further testified that the deceased had no enemies that he knew of or other conflict save for that with A2, describing the deceased as a very jolly person that kept no grudges.

Finally the witness testified that the last time he saw the deceased alive was on Friday 17<sup>th</sup> July 2009 when the deceased showed them a newspaper article that reported that he had been permitted to auction the impounded car. CW1's evidence was corroborated in material aspects by PW5. PW5 testified that in the course of his investigations he was shown a file in respect of a case filed by A2 at Jinja Road Police Station (which he referred to interchangeably as CPS Jinja Road); the complaint related to the alleged theft of her vehicle - a white toyota ipsum UAL/V series by the deceased, and A2 alleged that there had been Ushs. 45 million in the said car at the time of its purported theft. He further testified that in the records at Jinja Road Police Station A1 was entered as the husband to A2, who was recorded as Naiga Sylvia; and A2 was always in the company of A1 whenever she went to the station to follow up on her complaint.

On their part the accused persons denied prior knowledge of each other, each of them stating that s/he first got to see the other at CPS when A2 followed up a complaint. As this court observed earlier, the truthfulness of their evidence was not tested in cross examination. On the other hand, far from being bolstered by the accused person's unsworn evidence, the prosecution's evidence on A2's role in the deceased's murder was strong, cogent and credible. PW5's findings on the prior dealings between A2 and A1 was corroborated by CW1's evidence on the case filed against the deceased by A2. CW1 attested to a wrangle between the deceased and A2 that was exacerbated by the impounding of the Toyota ipsum by the deceased for failure of A2 to complete payment therefor; this wrangle was also alluded to by A2 in her oral evidence. Finally, CW1 attributed the deceased's death to that wrangle. It is quite telling that the deceased went missing shortly after the media report that he had been permitted to auction the car at the centre of his dispute with A2.

I am, therefore, satisfied that the circumstantial evidence of the present case points to the accused persons having had prior knowledge of each other, and worked together in pursuit of a common interest in retrieving the impounded car and monies allegedly left therein. It is reasonable to conclude that faced with the impending auction of the car that interest subsequently extended to the present offence. I find no other co-existing evidence as would point to the innocence of A2. I therefore find that the circumstantial evidence in the present case is incompatible with the innocence of A2, and incapable of explanation upon any other reasonable hypothesis than that of her guilt.

Section 20 of the Penal Code Act clearly outlines the legal position with regard to joint offenders in prosecution of a common unlawful purpose - each such offender is deemed to have committed the offence arising from such unlawful purpose.

Further, in the case of **Ismael Kisegerwa & Another vs. Uganda Criminal Appeal No. 6 of 1978** (CA) the doctrine of common intention was enunciated upon as follows:

**“In order to make the doctrine of common intention applicable it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter. It is now settled that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault.”** (*emphasis mine*)

In the present case the accused persons' actions prior to the deceased's death, namely their joint follow up of A2's complaint against the deceased at Jinja Road Police Station, revealed a common intention. That the purpose that joined them was unlawful is clearly manifested by the deceased's murder. I do, therefore, find that the prosecution has proved the participation of both accused persons in this case beyond reasonable doubt. In the result, I find that the prosecution has proved the offence of murder against Vincent Kamau and Hellen Naiga beyond reasonable doubt.

I now revert to the offence of aggravated robbery. The prosecution is required to prove the following ingredients of aggravated robbery, as well as the participation of the accused persons beyond reasonable doubt: first, the incidence of theft; secondly, the use or threat of violence in the course of the theft, and finally for present purposes, causing death at, immediately before or immediately after the said theft.

It was the prosecution case that the deceased's car reg. No. UAG 882A was recovered from A1's mother's home in Bweyale. This was attested to by all

the prosecution witnesses, save for PW4. In their oral evidence on this ingredient, the accused persons both denied having stolen anything from the deceased.

The legal definition of theft is set out in section 254(1) of the Penal Code Act. It entails the fraudulent dispossession of another of something that is capable of being stolen, and which item the dispossessor has no claim of right over.

PW5 testified that the deceased was in possession of a green Toyota corolla vehicle but could not remember its registration number beyond UAG 8-something. A2 did testify in great length about the circumstances under which the deceased came to be in possession of a green Toyota corolla registration number UAG 882A. I am satisfied that the deceased was in possession of the said car shortly before his death and A2 had ceded her rights to the same car following their barter transaction. Undoubtedly, a motor vehicle is an item capable of being stolen. The question then is whether indeed the deceased was fraudulently dispossessed of the car.

It was testified by CW1 that he and his colleagues instructed a one Edwin Shikori to check if the deceased's car was at the place where he was known to park it but the said Shikori reported that the vehicle was not there. On the other hand, A1 simply denied knowledge of the allegedly stolen car. A2's evidence was silent on the issue of the missing car.

In the case of **Sula Kasiira v Uganda Criminal Appeal No.20 Of 1993** (SC) the following legal position from **Halsbury's Laws of England, Vol. 10, 3<sup>rd</sup> Edition, paragraph 1484** was cited with approval with regard to the act of taking or carrying away as an element of theft:

**"There must be what amounts in law to an asportation (that is carrying away) of the goods of the prosecutor without his consent; but for this purpose, provided there is some severance, the least removal of the goods from the place where they were is sufficient, although they are not entirely carried off. The removal, however short the distance may be, from one position to another upon the owner's premises is sufficient asportation, and so is a removal or partial removal from one part of the owner's person to another. ... The offence of larceny is complete when the goods have been taken with a felonious intention, although the prisoner may have returned them and his possession continued for an instant only."** (*emphasis mine*)

I find no reason to disbelieve CW1's evidence that both the deceased, as well as his car were found missing when a search was mounted for him by his colleagues. The deceased was later found murdered, with his car nowhere in the vicinity. Quite clearly, the car had been removed from the place where it was ordinarily parked by the deceased. Its number plates had been removed and placed inside its body. It would be reasonable to conclude therefore that the deceased had been dispossessed of the missing car under circumstances that denote a felonious intent. I am therefore satisfied that the prosecution has proved the ingredient of theft beyond reasonable doubt.

With regard to the use or threat of violence, the term 'violence' may be defined as behaviour involving physical force intended to hurt, damage, or kill someone or something. The present theft entailed physical force that resulted in death. It therefore follows that there was use of violence. Accordingly, I find that this ingredient has been proved beyond reasonable doubt. Similarly, having proved the death of the deceased alongside the theft of his car, the third ingredient of the offence of aggravated robbery has been proved beyond reasonable doubt *See section 286(2) of the Penal Code Act*. In the result, I find that the prosecution has proved the offence of aggravated robbery beyond reasonable doubt.

Having established proof of the offence aggravated robbery I revert to a determination of the accused persons' alleged participation in the said robbery. It was the evidence of PW1, PW2, PW3 and PW5 that the missing car was, under A1's guidance, recovered from his mother's home in Bweyale on or about 24<sup>th</sup> July 2009. CW1 on his part testified that when he last saw the deceased, he had travelled with him in the now missing car. This was on 17<sup>th</sup> July 2009. On his part, A1 denied his mother or any other relative of his having been resident in Bweyale. He did admit, however, that his mother was alive and aged 62 years. Again, A2's evidence was silent on this issue.

In the case of **Bogere Moses & Anor vs Uganda Cr. Appeal No. 1 of 1997** (SC) it was held:

**"It ought to be realised that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing so that if there is no innocent explanation of possession, the evidence is even stronger and more dependable**

**than the eye witnesses evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable while the later solely depends on the credibility of the eye witness.”**

In the later case of **Siragi & Another vs. Uganda** (supra) the doctrine of recent possession was further clarified:

**“The doctrine of recent possession of stolen goods is an application of the ordinary rule relating to circumstantial evidence. The fact that a person is in possession of goods soon after they are stolen raises a presumption of fact that that person was the thief or that that person received the goods knowing them to be stolen, unless there is a credible explanation of innocent possession. It follows that the doctrine is applicable only where the inculpatory facts, namely the possession of the stolen goods, is incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must also be sure that there are no other co-existing circumstances that weaken or destroy the inference of guilt. The starting point for the application of the doctrine of recent possession, therefore, is proof of two basic facts beyond reasonable doubt; namely, that the goods in question were found in possession of the accused and that they had been recently stolen.”** (*emphasis mine*)

In the present case, the missing car was not found with A1 himself. Save for the testimonies of the prosecution witnesses, there was no evidence adduced to prove that indeed the homestead where the car was recovered from belonged to A1’s mother so as to infer a nexus with him. This court cannot presume the existence of that relationship as far as the occupants of that homestead are concerned. I therefore find that the prosecution has not proved the accused persons’ participation in the alleged robbery of the deceased’s car to the required standard.

In the final result, I would depart from the joint opinion of the assessors. I find the accused persons - Vincent Kamau and Hellen Naiga guilty of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and convict them of the said offence as charged. I do, however, acquit them of the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. Accordingly A2’s bail is hereby cancelled.

**Monica K. Mugenyi**

**Judge**

29<sup>th</sup> April, 2013

Judgment delivered in the presence of:

Ms. M. Nakigudde for the State

Mr. D. Ondimu & Mr. H. Nzige for A1 and A2 respectively.

**Monica K. Mugenyi**

**Judge**

29<sup>th</sup> April, 2013

### **SENTENCE**

I carefully listened to both sets of counsel on mitigation of sentence, as well as aggravating circumstances in respect of each convict. I did also hear from each convict on the same subject.

The Sentencing Guidelines, 2011 provide for 3 categories of offenders based on the harm inflicted upon a victim and the culpability of the offender. *See p. 24 of the said Guidelines.* In the present case, the prosecution evidence clearly proved that the deceased died from grave injuries inflicted upon him. The culpability of each convict was proved by circumstantial evidence. The 1<sup>st</sup> convict's knowledge of the location of the deceased's body would place greater culpability on him than the 2<sup>nd</sup> convict. Nonetheless, the 2<sup>nd</sup>

convict's culpability is not much less given her role in pre-planning the entire unlawful incident. This would classify the present case in the first category of offences, which are characterised by grave harm and high culpability. With regard to the applicable sentencing ranges, there are 3 classifications within the category of offenders that the present convicts lie. *See p. 26 of the Guidelines.* In my view, the present case would not fall within the ambit of the rarest of the rare cases that is deserving of the first classification therein. This view is informed by the evidence adduced at trial which appeared to suggest that the pre-arranged plan hatched by the convicts had initially been one of kidnap and torture but subsequently degenerated into the present murder. Be that as it may, neither in my view would the present case warrant the leniency in the third classification of penalties given the pre-meditated felonious intent of the convicts, as well as the gruesome manner in which the murder was executed. Therefore, the applicable ranges to the present convicts would be that of 30 years to life imprisonment, with a starting point of 35 years imprisonment.

I quite agree that both convicts being first offenders deserve a degree of leniency to distinguish their penalty from repeated offenders. I do also agree with defence counsel that the 2<sup>nd</sup> convict appears remorseful and both convicts do have demonstrated family responsibilities. These considerations serve as mitigating factors.

Be that as it may, I do agree with Learned State Counsel that the sanctity of life must be preserved and upheld. Furthermore, it is unacceptable for any citizen to seek to settle a dispute already presented to law enforcement agents through unlawful, brazen means such as the present convicts sought to do. The pre-planned kidnap with torture was a felonious solution to a legal dispute. The minds that fabricate such a solution are inherently criminal and must be penalised as such. That the present 'plan' degenerated into a murder was always a very real possibility.

In **Odoki, B. J. 'A guide to Criminal Procedure in Uganda', LDC Publishers, 2006 (3<sup>rd</sup> Edition) at p.164**, retribution was advanced as one of the objectives of sentencing. According to the retributive theory as stated therein '**punishment is also said to be an expression of society's disapproval of the accused's conduct.**' In the same literature (at p.165) reformation is also advanced as another objective of sentencing. In that sense '**punishment is believed to bring remorse, repentance and reform.**' Furthermore, deterrence is posited as another objective of sentencing.



In the present case I am very alive to the fact that the convict was at the time he committed the present offence a serving security official; a soldier whose core function was to secure citizens' life and property. He was depicted at trial as a former combatant affiliated to the LRA (Lords Resistance Army) that had already benefitted from overtures of reform and rehabilitation. Therefore the impudence with which he curtailed the deceased's life is inexcusable. On the other hand, the second convict was a person that had related very closely with the deceased as his girl friend. Therefore, however scornful she perceived his actions towards her, that she resorted to pre-meditated felonious plans to settle her scores with him bespoke of a warped sense of justice that cannot and should not be condoned in a civil community. While I am alive to the ever altruistic possibility of reformation by convicts, given the circumstances of this case, I am hard-pressed to find any plausible reason to endanger the lives of other law abiding citizens by having persons with such inherently criminalist mind-sets released back into the community in the near future.

I do take into account the constitutional duty upon me to consider the period spent in lawful custody when imposing a term sentence. In the present case the first convict has spent close to 4 years on remand; while the second convict spent 3 years on remand before she secured bail.

In the premises, and with due regard to the Guidelines cited above, I do hereby sentence the first convict - Vincent Kamau to life imprisonment or, to be specific, imprisonment for the rest of his natural life. I sentence the second convict, Hellen Naiga, to 30 years imprisonment; both sentences to run from the date hereof.

**Monica K. Mugenyi**

**JUDGE**

30.04.2013

Right of appeal explained.

**Monica K. Mugenyi**

**JUDGE**

30.04.2013

Present:

Ms. M. Nakigudde for the State.

Mr. D. Ondimu and Mr. H. Nzige for the defence.