

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

CRIMINAL SESSION CASE NO. 32 OF 2011

5

UGANDA.....

PROSECUTOR

VERSUS

10

NAMBOIRA

MIRIA.....ACCUSED

BEFORE: THE HONOURABLE JUSTICE NAMUNDI GODFREY

15

JUDGMENT

20 The accused person NAMBOIRA MIRIA was indicted for Murder c/s 188
and 189 of the Penal Code Act.

The prosecution alleges that the accused person on the 7th day of
October, 2010, at Nabutende, Namavundu LC.1 village, Bumanya sub-
25 county in Kaliro District, murdered Wotali Rosemary.

The accused denied the charge.

The prosecution case was based on the evidence of 4 witnesses. At
the preliminary hearing, the following documents were admitted under
30 section 66 T.I.A. The post mortem report of the deceased – Exhibit P₁
and the medical examination report of the accused – Exhibit P₂.

Both the prosecution and the defence agree that, it is the law that the
burden of proof is upon the prosecution to prove the guilt of the accused

person beyond all reasonable doubt. The burden never shifts to the defence even where a defence of alibi is raised. It is still up to the prosecution to prove that despite the alibi, the offence was committed by the accused person. **Woolmington Vs. DPP (1935) AC 462**
5 followed in **Millers Vs. Minister of Pensions [1947] ALL ER 372 & Luboga Vs. Uganda [1967] EA 440.**

Refer also to Section 101 of the Evidence Act which provides that ***“He who alleges must prove”***.

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The ingredients that must be proved in a case of murder and which are not disputed by the prosecution and the defence are the following:

- (1) Death of a person.
- (2) The death was unlawfully caused.
- 15 (3) The death was with malice aforethought.
- (4) The accused participated in or caused the death of the deceased.

Death:

To prove this first ingredient of the offence, the prosecution relied upon
20 the evidence of PW1 Dr. Katumba Allan who carried out the post mortem on the body of the deceased and wrote Exhibit P₁ the report on 08.10.10.

The body was identified by one Fred Isanga as that of Wotali Rosemary.
25 It had a deep cut wound on the occipital aspect of the scalp, and a cut on the lateral medial aspect of the right hand. The cause of death was found to be massive haemorrhage leading to anemia.

From this evidence which was not disputed by the defence, there is no doubt that Rosemary Wotali is dead. I accordingly find that this ingredient was proved beyond all reasonable doubt.

5 The next issue/ingredient to determine is whether the death was unlawful.

As submitted by the prosecution and agreed by the defence decided cases have established that ***“In law every homicide is presumed to be unlawful unless it was accidental or excusable.”*** Refer to **Uganda Vs. Okello [1992-93] HCB 68** and the case of **Gusambizi s/o Wesonga Vs. R. (1948)15 EACA 65.**

15 Exhibit P₁ referred to above indicated the wounds sustained by the deceased on the head and the right hand, that resulted into massive bleeding, that led to her death.

Without any evidence to indicate that the wounds were accidentally sustained or the circumstances were excusable I accept the prosecution evidence and find that the killing of the deceased was unlawful. The Defence also accepts that the killing was unlawful.

25 As pointed out by the prosecution and agreed by the defence, the elements of malice aforethought are set out under Section 191 of the Penal Code Act. Malice aforethought is deemed to be established where there is:

- an intention to cause the death of any person, whether such person is the one actually killed or not or
 - where there is knowledge that the act or omission will probably
- 30 cause death of some person.

- Refer to the case of **Bukenya & Others Vs. Uganda [1972]1 EA 549 (CAK) and Mugao & Another Vs. Republic [1972]1 EA 543.**

5 To determine whether the prosecution has proved malice aforethought, court has to look at the circumstances surrounding each case. These include the nature of the wounds inflicted, the part of the body injured, the type of weapon used; the conduct of the accused person immediately before and after the injuries were inflicted; the manner in
10 which the weapon was used whether repeatedly or not - See **R Vs. Tubere (1945)12 EACA 63.**

In the present case, the prosecution Exhibit P₁ - Post mortem report indicates the kind of wounds sustained by the deceased and where. The
15 wounds were confirmed by PW3 D/Sgt. Wor-Okongo Richard the Police Officer who together with Inspector Kunya visited the scene of crime.

Both the prosecution and the defence agreed that the wounds were indicative of an intention to cause death.

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Indeed, the head is a vulnerable part of the body and by striking the deceased on the head, the assailant must have intended to cause death or ought to have known that the injury would result into death.

25 Prosecution Exhibit 3 - The sketch plan of the scene of crime also shows point "E" where a blood stained hoe was found lying about 40-50 metres away from the deceased's body.

The hoe was the weapon suspected to have been used to strike the deceased. That the hoe was used repeatedly is not disputed as the deceased had both an injury on the scalp and on the right hand.

5 The hoe that was recovered at the scene was identified by PW3 in court. It had blood stains on the back and on the cutting edge it was exhibited as P₅B and the exhibit slip as P₅B, in that when it was recovered from the scene, it was handed over to the GISO and was only taken from him 4 days later. But this issue was not raised in cross examination. But
10 even if the hoe were to be disregarded the position of the injuries on the head would still be an indicator of malice afore thought.

And defence did not dispute malice aforethought and I agree that normally such injuries as led to the death of the deceased point to
15 malice aforethought. However, I will return to this point later in my Judgment.

Court now proceeds to determine whether it was the accused person who killed the deceased.

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There was no eye witness to the crime. The prosecution case depended solely on the charge and caution statement made by the accused upon her arrest, plus other circumstantial evidence. The statement was admitted in evidence as Exhibit P₄ after a trial within a
25 trial decided it was voluntarily made.

In the said statement presented by PW4, the accused admitted cutting the deceased with a hoe at the back of the head. She however stated that, this was after a quarrel and a fight that was provoked by the

deceased. When the deceased fell down, the accused left the small hoe and her shoes at the scene and ran away.

5 In her defence, the accused denied ever having admitted that she killed the deceased. She added that she went to Iganga to do shopping on the date in question and never saw the deceased who was then at her home. Further that, she was arrested from her home by one Sajja and taken to police. But she again admitted that PW4 recorded a statement from her.

10

Court is aware of the requirement of accepting a rejudiated or retracted statement with caution. And the principle established by decided cases that ***“Before court can find a conviction on such confession, it must be fully satisfied in all the circumstances of the case that***
15 ***the confession is true. Court will only act on the confession if it is corroborated by independent evidence accepted by the court”*** - **Tuwamoi Vs. Uganda [1967] EA 84** relied upon in **Festo Androa Asenwa & another Vs. Uganda SC. Appeal 01/88.**

20 It should be noted thought that, the Justices of the Supreme Court emphasised in the **Asenwa case (supra)** that ***“corroboration is not necessary in law and court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that a confession cannot but be***
25 ***true”***.

As already mentioned earlier in this Judgment, the court finds that the statement –Exhibit P₄ was made by the accused person and that it was voluntarily made. Court therefore accepts it as a true recount of what

transpired in the garden on the date in question and that it's the accused person who inflicted the injuries that killed the deceased.

5 The body of the deceased was recovered from the garden and so was the said blood stained hoe which the accused admitted she had been using and which she thereafter abandoned in the garden.

10 That there was a fight between the deceased and the accused was confirmed by the evidence of PW3 the Investigating officer, who told court that there were signs of a struggle at the scene between the freshly ploughed place and where the deceased fell.

15 The evidence available and all the circumstances surrounding the case indicate that the accused was upset as a result of her husband marrying a younger wife and providing for her using her hard earned proceeds from the sale of her crops. Her garden was also divided and the ploughed portion was given to the deceased.

20 The accused and the deceased went out to work in their respective gardens adjacent to each other. A quarrel ensued between the two and it degenerated into a fight. In her charge and caution statement - Exhibit P₄ the accused insists it's the deceased who provoked the fight in which the accused inflicted the injuries that led to her death.

25 This brings me back to the issue of malice aforethought. The injuries such as were sustained by the deceased are normally evidence of malice aforethought. But considering the circumstances of this particular case the issue is whether the accused actually, intended to kill the deceased, more so taking into account the provisions of Section
30 193 (1) P.C.A.

The section defines provocation to include any wrongful act of such nature as to be likely:

- (a) When done or offered to an ordinary person
- 5 To deprive him or her of her power of self control and to induce him/her to commit an assault of the kind, which the person charged committed upon the person by whom the act or **insult** is offered.

In the circumstances of this case already described, provocation of the
10 accused by the deceased cannot be ruled out.

It has been established that ***“When a person unlawfully kills another under circumstances which, but for this section would constitute murder, does the act which causes death in the heat
15 of passion caused by sudden provocation as defied under Section 193 P.C.A, and before there is time for his or her passion to cool, he/she commits manslaughter only”.***

Since the accused’s evidence of provocation was not rebutted by the
20 prosecution, court finds that she acted on the spur of the moment in a fit of anger and fatally injured the deceased after which she abandoned the hoe and ran back to her parent’s home.

Court accordingly acquits her of the charge of murder and finds her
25 guilty of manslaughter c/s 187 of the Penal Code Act and she is convicted of the same.

For the reasons I have stated herein, I do not agree with the opinion of the assessors that she be acquitted totally.

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Flavia Senoga Anglin

JUDGE

02.10.13

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02.10.13:

Accuse before court

Katami Lydia for state present

10 Ngobi Balidawa holding brief for Bwenene Victoria for the accused present.

Both assessors in court

Counsel for State: Matter is for Judgment.

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Court:

Judgment delivered in open court. The accused is acquitted of murder and found guilty of manslaughter c/s 187 PCA and she is convicted of the same.

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Flavia Senoga Anglin

JUDGE

02.10.13

25 Counsel for State:

The offence of which accused has been convicted carries a maximum sentence of life imprisonment.

The accused person took away a life unlawfully and denied the country the contribution of the deceased to development. Crimes of this nature

are rampant within the jurisdiction of this court and there is need for deterrence.

It is for these reasons that I pray for a heavy deterrent and reformatory sentence. I would propose that 10 years imprisonment would serve the
5 interests of justice.

Counsel for the convict:

We have 6 factors in mitigation.

Prosecution agrees that the convict is a first offender with no past
10 criminal record. The sentence passed by this court should be one aimed at rehabilitation and treatment of the convict than incarceration.

We pray that the punishment given should not expose her to hard core criminals in prison where she may learn other methods of committing crime.

15 The convict has been on remand for 3 years having been imprisoned in October 2010. The period should be taken into account as a mitigating factor.

The convict is a married woman with a family of a husband and 5
20 children. We pray that this be taken into account so that the accused can rejoin her family at the earliest opportunity to manage her home.

The convict has exhibited remorse and repentance during the trial she therefore deserves leniency.

It is not true as submitted by prosecution that offence was committed
25 unlawfully, because the convict had no malice aforethought.

We pray court exercises its discretion to pass a sentence that will not ruin the life of the convict but will help to improve her.

Court should take the period spent on remand as sufficient and cautions the convict.

30

Accused:

I pray court to consider the period spent on remand and release me so that I can go back and take care of my children.

5 Court: Sentence: 11.30am.

Flavia Senoga Anglin

JUDGE

02.10.13

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Later: 11.25am

Court constituted as before.

15 Counsel for the State: Matter is for sentence.

Court: Sentence: The accused is sentenced to imprisonment for 2 years.

Though accused is a first offender and has been on remand for 3 years.

20 She took away a life in circumstances of a domestic nature which could have been solved amicably.

The degree of injury occasioned and the weapon, plus the degree of force used were unjustified in the circumstances.

25 While the accused may have felt insulted that did not justify the death of the deceased.

However, considering that the convict is a first offender appears repentant and is also a primary care giver court finds that the sentence of 2 years will suffice to meet the ends of justice more so as the accused has been on remand for 3 years.

Court will like to send out a message that domestic violence is never justified under any circumstances and people ought to learn to settle disputes amicably. The accused ought to have used the experience of her age and found better means to discipline her co-wife.

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Right of Appeal against sentence and conviction explained to the accused person.

10 **Flavia Senoga Anglin**

JUDGE

02.10.13

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