

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CRIMINAL SESSION CASE NO. 0312 OF 2013

UGANDA ::: PROSECUTION

VERSUS

JACKLINE UWERA NSENGA ::: ACCUSED

BEFORE: HON. JUSTICE DUNCAN GASWAGA

JUDGMENT

[1] Jackline Uwera Nsenga (accused) stands charged with the offence of **murder contrary to section 188 & 189** of the **Penal Code Act**. The particulars of offence are that the accused on the 10th day of January 2013 at plot 6 Muzindalo road, Bugolobi, Nakawa Division in Kampala District, with malice aforethought caused the death of one Nsenga Juvenal. The accused denied the charges and the prosecution called 13 witnesses in a bid to prove its case beyond reasonable doubt. For her defence, the accused presented evidence from five (5) witnesses.

[2] Briefly, the case is as follows. On the night of 10th January, 2013 at about 09.00 pm the accused returned to their residence in Bugolobi where she parked outside the gate and waited. She pressed the bell and her husband, Juvenal Nsenga (hereinafter referred to as “Nsenga” or “deceased”), came to open the gate. It was during the process of opening the gate that the accused’s car knocked it open and overrun the deceased. The deceased was then dragged on the rough surface of the driveway for a distance of 10.3 metres. He sustained multiple injuries on his body. Immediately after the incident, the accused sought assistance from some people to put the deceased into the same vehicle and delivered him to Paragon Hospital in Bugolobi. About five

hours later, Nsenga was pronounced dead at the said hospital. The prosecution contends that the deceased was knocked intentionally given the marital acrimony between the deceased and accused. The defence case is that although the accused had admitted to overrunning her husband with the car she was driving, she didn't intend to kill him. It was her testimony that the car simply jerked and ended up knocking him. The couple had been married since 1994 and blessed with two children.

[3] It is important to state from the outset that its common knowledge that there is a civil suit filed in the **Family Division of the High Court** regarding the estate (property/ assets and liabilities) of the deceased involving the accused and some of the prosecution witnesses in this case. I must warn that the matter before me is not a civil case that will determine property and other rights. This court is sitting as a criminal court with a mandate to establish the culpability or guilt or innocence of the accused at bar, and nothing else!

Prosecution Case / Evidence

[4] I find it imperative to start by summarizing the evidence adduced in this case. **PW1 Dr. Moses Byaruhanga, is a pathologist by profession.** He is employed as a Commissioner of Police and Chief of Health Services by the Uganda Police Force. He testified that on the 12th of January, 2013 at 11.30 a.m., he carried out a post-mortem examination on the body of Nsenga which was identified to him by one Ahimbisibwe Bernard. The deceased had injuries all over his body including fractured ribs and damaged lungs. There was accumulation of blood in the chest and bleeding on the heart. He had fractures on his left wrist and the lower leg was broken. That other injuries included closed fractures of the thighs, spine and tibia, visible proximal skin tags or heaping of the skin at the distal end which signifies that the body was dragged and the skin peeled off, and linear friction abrasions indicating that the body was dragged over a rough surface on the back. There were more abrasions on the gastric

area, mouth, forehead and shoulders with destocking tags. It was also his evidence that he noticed patterned abrasions (tyre marks) on the body meaning that a vehicle had gone over the deceased's body. His left external ear (the pinna) was detached from the head and brought separately in a plastic bottle. The Doctor concluded in his post-mortem report (PE2) that the cause of death was multiple blunt force injuries. He was not cross-examined.

[5]PW2 Innocent Bisangwa, was an elder brother to the deceased. He told court that the accused had called him at about 09.30 pm on the 10th of January, 2013 to say that she had knocked Nsenga as he was opening the gate for her to enter their home. That she was crying and kept talking. That she also told PW2 that given that he knew their marital relationship, the world was going to misunderstand her and think she tried to kill her husband. PW2 advised the accused to stop judging herself and the conversation ended. He then called one of his young brothers, Joseph Kananura (PW4) and instructed him to immediately go to Paragon Hospital where Nsenga had been admitted. PW2 explained that his young brother (Nsenga) and the accused did not have a good relationship in their marriage and home at all. They did not talk very easily and tended to avoid each other. That they were living together in the same house but in different rooms although the husband provided for the family.

[6] It was also his evidence that the accused, in the presence of her sisters and one Faustin Mbundu, her brother -in-law, explained to them that the car had jerked as she was waiting for the gate to be opened. Further, that it was unintended for her to knock the gate and run over her husband. PW2 had observed that the car had no dent at all, not even at the front. He however noticed the bent bolt and the gate itself which looked intact.

[7] In cross-examination PW2 had said that he was close to the couple and was the best man at their wedding in 1994 and used to advise them whenever they had problems. That he had started receiving complaints of misunderstandings between

the accused and deceased five years after their wedding. The accused was the first to complain while the deceased lodged the last complaint two weeks before his death that the accused was not communicating with him, she was never at home most of the day and would come back late in the night. That she would never attend to domestic affairs, leaving everything to house helps who were incompetent with young children. On the other hand, the accused's complaint was that she never understood Nsenga's behaviour. That he could remain silent and not respond or act quickly to things.

[8]PW3DonatKananura,the father of the deceased, told court that he had been called to Paragon Hospitalby his son Joseph Kananura. On arrival he found Mrs Angella Kayihura seated with the accused at the reception and just bypassed them as he proceeded to the Emergency room where Nsenga was. That Nsenga told him that ***“Jackie (accused) had knocked him and not the gate”***. He said that the relationship between Jackie and her husband before that incident was very bad from way back. They used not to communicate; they had separated beds. That the wife was not listening to the husband. That his son used to go and tell him that his wife had defeated him. That he could not tell her anything and she listened. Further, that she used to come back at night yet she was not working. That PW3 used to sit with Nsenga and he could tell him all about his wife and everything was not good. He called the accused and talked to her not once, not twice, but several times. PW3 also told her that she had destroyed her marriage and advised her to listen to her husband. That when Nsenga told her not to go out at night she would just go. It was PW3's evidence that sometime back the accused chased away his other children (Nsenga's sisters) from her home. That when PW3 was operated on she never went to see him. Neither did she go to see his wife (mother-in-law) when she was admitted to NakaseroHospital for a month and underwent surgery. PW3had spent many years without seeing the accused.

[9] That while at home in the bedroom and in the presence of Mrs Kayihura, accused's elder sister Chantal, and Faustin Mbundu, PW3 said ***"have you seen what Jackie has done? I talked to her and she never listened. Jackie has killed my son and all she did showed that she would kill him"***. That at that point Jackie's sister Chantal (DW4) told her to ask for forgiveness whereupon she knelt down and said ***"Mzee, I am sorry"***. PW3 forgave her. In cross-examination, PW3 admitted having told Jackie at Nsenga's wedding not to separate his family because his other children were staying at Nsenga's home.

[10] **PW4 Joseph Kananura**, testified that at about 9.00 pm to 10.00 pm on the 10th of January, 2013 while at his hotel on Namirembe road he received a call from his brother, Innocent Bisangwa, instructing him to go to Paragon Hospital where Nsenga had been admitted. He found the accused sitting with Mrs Kayihura near the reception and just proceeded to where Nsenga was. That Nsenga was in deep pain and when he turned his head he noticed that one of the ears was missing. PW4 sent one of his brothers to go to the scene and retrieve the ear. It was brought by Saad Ndangiza in an envelope and handed over to the Doctors. That Donat Kanura (PW3) entered the room and as PW4 was explaining to him what had happened to Nsenga, as narrated to him by the accused that Nsenga had been hit by the gate, Nsenga said ***"no"***. He also said in Kinyarwanda that ***"my wife has killed me in my own home"***. It was also his evidence that he was on good terms with the accused and whenever he went to Nsenga's home the accused could greet him and just pass without greeting her husband. PW4 had also confirmed that none of their family members went to police to report this case but that it was the hospital administration that stopped them from taking away the body before the police came. And subsequently, the police came to them for statements after the burial.

[11] **PW5 Moses Kananura** told court that on the 10th of January, 2013 at about 9.00 pm while at his father's residence in Muyenga, Joseph Kananura called him to go to Paragon Hospital. That he found Nsenga in a pool of blood and his leg was twisted.

Upon asking Nsenga what had happened, he told him in Kinyarwanda that ***“my wife has killed me from my own home.”*** That since the room was small, PW5 stepped out to allow other people in. When he spoke to Nsenga again, Nsenga told him that ***“my own vehicle has knocked me from my own home”***. He also testified that, while in the emergency room, Nsenga asked him to get his car keys from the accused. But the accused said she did not have the keys.

[12] That PW5 knew Nsenga kept most of his valuables in his cars. He kept some of his confidential documents and money in his cars and not in his house due to lack of trust. PW5 returned to the accused several times but could not get the keys. Meanwhile Nsenga insisted that PW5 should remove the car keys from the accused. PW5 searched the accused’s car twice before recovering those keys from the door jacket. Nsenga also demanded that PW5 retrieves his phone from the accused who was at the time holding his torn trouser. His car keys and phone had been left in the torn trousers and Nsenga remembered this very well. The accused denied having the phone. PW5 advised her to check in her handbag wherefrom the phone was eventually found. It was returned to Nsenga and he switched it off. He directed PW5 on where to find the key for the van and the one for the BMW which was kept in the van. Nsenga then instructed PW5 to keep all those things. PW5 also said that they worked together with Nsenga, he used to go to his residence every day to discuss business and was always in charge of Nsenga’s things.

[13] It was his evidence that the accused and deceased didn’t speak for several years, or even greet, for about 5 years or 3 years. PW5 had lived with them in their home for some time. That their relationship hadn’t really gotten to that worst point but it wasn’t also good. That Nsenga had told PW5 that most of the time his wife was not around and he had to be there for the kids. He further testified that at the hospital, the accused never interacted with Nsenga and she was all the time outside the room sitting at the reception area with Mrs. Kayihura. That even when she tried

to assist Nsenga to ease himself (urinate), he (Nsenga) ordered her out of the room and said that he needed PW5 only in the room.

[14]PW6SaadNdangiza, a friend and business partner to Nsenga testified that he was informed about Nsenga being admitted in Paragon Hospital at about 09.40p.m. and he went there. That he found Nsenga in deep pain with wounds all over and broken bones on the left side. That he held Nsenga's arm as they continued talking. Nsenga told him in Kinyarwanda that ***"see what my wife has done to me"***. PW6 also testified that Joseph Kananura sent him home for Nsenga's ear which was missing. That when he entered the compound, he found two men whom he had seen earlier on at Paragon Hospital escorting and guarding the Police Commissioner's wife (Mrs. Kayihura). That the two men were already at the scene of crime claiming to be searching for the ear. He then searched the area and recovered the ear from a pool of blood in the corner of the driveway about 7 to 10 metres from the gate. He placed the ear in a paper bag and took it to Moses Kananura. That PW6 had also assisted with the pumping of Nsenga's chest (resuscitation) until shortly thereafter when they were told that he had passed on. They wrapped the body. Saad then drove the accused's vehicle back home from Paragon Hospital. He said that the exhaust pipe was not in its position because whenever he went over humps he could hear it crushing down. He had also noticed the color of the gate on the bumper of the car.

[15] PW7 Loretta Mutoni, a cousin to the deceased, testified that her deceased father had been a brother to Nsenga's father and shelived with the accused and the deceased for over 10 years (2000 to 2011). Nsenga was her guardian since her parents passed away, and used to pay her school fees before and at the University in Malaysia. She related that on the 29th of December 2012, Nsenga had called her at his residence to go and pick up money for her ticket to return to school. That while in the sitting room, talking normally with Nsenga and his children, the accused came and asked the children to go to the kitchen, **she then requested to talk to Nsenga and Lorreta.** That she was speaking to them in an angry tone saying that Nsenga and

Lorreta were no longer listening to her. That Lorreta was disrespectful to her and would come to her home and ignore her and not greet her. In her further evidence, Lorreta said that the accused's last words to her and Nsenga were, "***by the way, I am capable of doing very many things that I myself I'm scared of the length I can go.***" These threats were met with silence from both Nsenga and Lorreta. In addition, Lorreta stated that she had never disrespected, argued or fought with the accused, only that in 2011, a few days before she left for university in Malaysia, the accused had spoken to her in a rude way when she was angry and she decided to go and live with her sister for the remaining days. Lorreta told court that the couple's relationship was estranged; it was not a normal happy family or happy couple. The husband used to have his own room and they would not even say "hello" to each other for quite a while. They would all go out and come back separately and not interact.

[16] In cross-examination PW7 said she had left the accused's home on her own because the accused had become rude to her and denied having been sent away. Asked when she started getting problems with the accused, Lorreta answered that she hadn't realized that she had a problem with the accused until the accused started treating her in a rude way around 2009-2010. She denied having gone to Nsenga's bedroom or dressed skimpily while in Nsenga's house. Mutoni also specifically denied having had an intimate affair with Nsenga and or competing with the accused for a man. She said that the accused was not violent but has a short temper and would easily get angry, shout, quarrel and once almost slapped a maid.

[17]PW8 No. 40291 Detective Sergeant Munaku John Bosco the Scenes Of Crime Officer (SOCO) told court that on the 11th 2013 he received a call from Detective SP Bogere Ronald OC CID Jinja road at around 8pm telling him to respond to a crime scene of accident at Bugolobi. That together with his team, PW8 examined the motor vehicle Reg. No. UAL 933M Toyota Mark X, blue in color, and found that the left side of the bumper had greenish striation marks originating from the number plate. He

examined the scene (sketch plan PE5) and also the vehicle; took photographs of them (PE4) and prepared a report (PE3) of his findings. He noticed that the vehicle did not get any damage although it had hit the metallic gate. The witness had also led the court to the scene of crime where he took it through his report while pointing out the various salient points on the ground. He also made several demonstrations with the car at the gate.

[18] PW9 Detective AIP Nabalanyi Christine told court that she was in office when Inspector Onen OC Traffic asked her to go to Paragon Hospital where a victim of an accident had passed on. That while in the hospital she saw the deceased's body which bore multiple injuries and without the left ear. She then informed the OC CID Jinja road that they needed to take his body to Mulago for examination. It was her evidence that at the scene she saw a bent bolt and blue paint at the lower part of the green gate. She also marked the points where the vehicle and the victim rested after the incident. She interviewed the accused and recorded her first and second statements on the 11th January 2013 and 24th January, 2013 respectively.

[19] PW10 Prof. Jackson Mwakali, head of the team of engineers from Makerere University Kampala, told court that on 1st February 2013 the Uganda Police requested them to carry out some investigations relating to a gate in Bugolobi. He stated that, save for the horizontal bolt; the vertical bolts were not damaged meaning that the gate had not yet been opened when it got hit. He also opined that given the damage caused and bearing in mind the strength of the horizontal bolt and the weight of that car, the car must have been moving at a speed of between 41 - 61 Kph when it came into contact with the gate. For such speed could produce the requisite force to bend the bolt at an angle of 129 degrees.

[20] PW11 Mugimba Andrew the Inspector of Vehicles and his team examined the vehicle for any scratches and damages. They also carried out road testing to look for any strange noises or vibrations by touching or by feeling the vehicle. They noticed

that the vehicle has interior safety devices, four air bags and seat belts. It has exterior safety devices like obstacle sensors. In his expert opinion, none of the vehicle systems was found defective at the time of inspection and the vehicle was fit for road use.

[21] After the incident, the accused with the help of **PW12 Ouma Richard**, a security officer with protectorate SPC, the neighbour's gardener and the accused's house girl **Jessica Namwanjje DW4** carried the deceased into the car. The accused took him to Paragon Hospital. PW12 and DW4 heard the accused saying "*sorry sweet heart, sorry darling*" to the deceased who only kept groaning in pain.

Defence Case / Evidence

[22] **DW1, Jackie Uwera Nsenga**, the accused, stated that she was a business woman and met the deceased in Nairobi before getting married in 1994. That the accused and the deceased enjoyed a good marriage without secrets and often went out together. However, when the accused returned from the USA after giving birth to their second born child, she noticed a lot of changes in her husband's behaviour. That he was secretive and wouldn't go out together any more. He was no longer spending time with the accused as before which she found to be a challenge. The accused talked about it to Innocent Bisangwa who was their best man. That when she spoke to the father-in-law, he asked her whether Nsenga was not buying food at home and advised her to relax with the hope that things will get back to normal.

[23] That by 2003, 2004 and 2005, the number of times Nsenga was going out had increased from around two times a week to seven times a week. Mrs Bisangwa counselled the accused and advised her to pray and wait on God. That in 2005 the accused turned her life to Christ and used to fellowship with a group of women Mrs Bisangwa used to pray with but nothing changed at home. That since Nsenga's going out was worsening the accused reported the matter to her father-in-law. Be that as it may, the accused said that these were just challenges and nothing serious. Nsenga

had never fought her nor argued with her. And that if there was any issue they would sit down and discuss.

[24] She confirmed that Lorreta had lived with them from 2001 to 2011 and that by the time she left, her sister and brother-in-law, Kamikazi had come from Canada and were also living in their home. The accused also considered Lorreta as her own daughter given that her biological parents were deceased. That the accused ensured that Lorreta had everything she needed for school and took her to hospital when she fell sick. That by 2012 she was at university and would come back to their home for holidays. That one evening the accused heard a door open and when she checked, she saw Lorreta go down the stairs. She was dressed in skimpy shorts and a see-through blouse. After a while, the accused also went downstairs where she found Lorreta's cousin blaming her for dressing inappropriately, especially before Nsenga. It is the accused's evidence that Lorreta's response was, **"He doesn't mind"**. That this disturbed her cousin and the cousin slapped her. That the accused was equally in shock that Lorreta could give an answer like that. That from that point, Lorreta's attitude towards the accused changed. That she would just look at her and walk away whenever the accused talked to her and when asked to do something she would either slam the door or go and complain to the girls at home.

[25] In her further evidence, the accused said that when Lorreta left her phone on the table, a text message ("**SMS**") from her husband (Nsenga) came through. It read, **"I don't hate you. I am just a little bit tired. I love you"**. That in her wisdom, the accused did not think it was a problem to pick up Lorreta's phone and without her permission read the message. She later talked to Kamikazi who had already found a house, to take Lorreta, and in Kamikazi's presence, asked Lorreta to move out. Further, the accused also talked to Nsenga about it, who just kept quiet. The accused did not want Lorreta close to her children and also confronted Nsenga about it who again just kept quiet. She confirmed that sometime in 2012, when Lorreta had come on vacation and visited their home, the accused confronted her and Nsenga. She

asked the children to go to the kitchen then told Lorreta, in the presence of Nsenga, that she wasn't comfortable with her coming to their home. With regard to the issuance of threats to her husband and Lorreta as was intimated in Lorreta's testimony, the accused simply answered that "**she lied.**"

[26]That on the morning of the day of the accident, Alex, the shamba boy had asked for his salary to travel to the village to bury his sister. That when the accused returned from town at about 3.45 to 4.00 pm she found Nsenga having a late lunch and asked for the shamba boy's money which she passed on immediately to the shamba boy and he left. That the accused had later joined Nsenga in the living room where they talked about visiting their daughter in school in Kenya and also suggested to him that he could go together with Bisangwa whose daughter had also joined the same school. She then informed Nsenga that she was leaving for town to attend some meetings. While at the meetings she took some milk shake, water and biscuits before returning home. That all this time she had not communicated with Nsenga. While at the gate, the accused pressed the bell expecting one of the girls to open for her since the shamba boy was not present. She did not expect Nsenga to be around at that time. That he used to go out without telling her.

[27]She stated that when she finally saw the gate moving she returned to the car, sat with her left leg inside and as she was putting her right leg into the car and at the same time closing the door, the car jerked off! That while at the gate she had left the lights on and the engine running. That since the car had taken off so fast she reached for the steering wheel, fighting to take the car on her right side where she did not expect to find anybody. That she was in panic and could not tell how she got in or how she stopped.

[28]When the accused came out of the car she ran towards the house while calling Nsenga's name. But she heard somebody groaning in a hoarse voice from behind and thought she had knocked one of the girls. She then returned and found Nsenga lying

on the ground. Eventually the accused called **Jessica Namwanjje DW4** the maid and **Ouma Richard PW12**, the guard from the neighbourhood, to come and assist her to put Nsenga in the vehicle. That the accused kept apologizing to Nsenga as she drove him to Paragon Hospital who in turn said it was okay. At Paragon Hospital the accused noticed Nsenga's broken leg when she was removing his phone from the trouser pocket.

[29] Back at home, the accused's in-laws never spoke to her. At some point her father-in-law came to her room with some of his sons and daughters and accused her of not visiting them when he and his wife were sick. Her sister Chantal told her to ask for forgiveness and indeed the father-in-law, Donat Kananura, forgave her. That even the sisters-in-law forgave her, and just like the father-in-law, they announced it in church during Nsenga's requiem mass. But to her surprise, after the burial of Nsenga, the accused started receiving death threats and sought police protection. She was kept in police cells at a police facility in Kireka until formerly charged in court. During this time, the accused had also lodged a caveat on the application for letters of administration in respect of Nsenga's estate by Nsenga's father, Donat Kananura. She believes this act angered her in-laws who then pushed for her prosecution.

[30] It was the accused's evidence that communication between her and Nsenga had not broken down. If she was around she would serve him with food and they eat together. That they shared the same bedroom only that Nsenga would sleep in the guest room if he came home drunk. The evidence of the accused person is generally to the effect that this was an accident. She denied having intended to kill the husband. That she was only pinned by the family because of the estate (property) of her husband which was worth 50 billion Uganda Shillings. That she loved her husband and they were on good terms.

[31] **DW2 Musana John Geoffrey** is a Senior Commissioner of Police designated as the Deputy Director of CID in charge of criminal investigations. He testified that on

the 11th of January 2013 at 12:45p.m. he received a call from the OC CID Jinja road police station informing him that the previous night one Juvenal Nsenga had been knocked by a motor vehicle which was driven by his wife. That upon receiving that information he instructed Detective Assistant Commissioner of police Okalany William who heads the department of homicide investigations at CID headquarters to proceed to the scene and guide the investigations. He also informed court that he later took over the matter as the principal supervisor and lead investigator in this case. That as such, on the 23rd of January 2013, DW2 Musana, together with a team of engineers from the inspectorate of motor vehicles, mechanical engineers from the Uganda police, the Scenes of Crime Officer (SOCO), Detective Sergeant Munaku and Andrew Mubiru from the government analytical laboratory reconstructed the scene of crime. That this was also in the presence of the accused who had been asked by the police to drive the vehicle through the stages she had taken on the fateful night.

[32] DW2 also re-interviewed Namwanje Jessica the accused's maid, the neighbour's Shamba boy called Okurut and security guard Richard Ouma at the scene who narrated what they had seen immediately after the incident. It was his evidence that Richard Ouma narrated that at about 8:30 Pm on the 10th of January 2013 he heard a motor vehicle stop. That shortly thereafter he heard a loud bang then after some time he and the Shamba boy saw the accused person running to them for help while screaming. That they assisted lifting the deceased into the vehicle. He further said that Namwanje Jessica told them that she heard the bell ring twice but remained in her bed room thinking that her fellow maid was going to open the gate. That shortly thereafter she responded to the accused's screams and on coming out found Nsenga lying behind the motor vehicle with serious injuries. That the team also picked interest in the greenish striation marks which were on the left side (near side) of the bumper of the vehicle.

[33] That on further examination of the vehicle they saw stains of what was suspected to be blood on the back seat and on the right back tyre. DW2 Musana

requested for and got a team of engineers from the department of Civil and Environmental Engineering in Makerere University headed by Prof. Mwakali to examine the bent bolt at the gate. That a number of demonstrations were done with the motor vehicle at the gate from different angles and positions. That during the whole reconstruction process which included speed trials and acceleration of the vehicle at the scene DW2 Musana instructed the SOCO to take photographs and also video record the whole process. That he later received reports from the various experts commissioned. The one from the Inspector of vehicles concluded that the vehicle was fit for road use while that from the government analytical laboratory indicated that all the blood samples taken from the various spots belonged to Nsenga. The government analytical laboratory also concluded that the paint which was extracted from the gate was of the same component material with what was got from the striation marks on the motor vehicle.

[34] That he also got a report from the Director of Face Technologies that the accused had a valid permit which she had acquired in 2012 and was to expire in 2015. That DW2, according to the findings in his analysis, concluded that the motor vehicle in question knocked the deceased. That through the demonstrations that were carried out at the gate, those who were behind the gate at that point couldn't see what was right behind it. That at a certain point where the striation marks match both at the gate and at the bumper of the motor vehicle, the vertical bolts were disengaged and that if they were engaged they wouldn't move. DW2 also assembled and analyzed all the evidence and the file was submitted to DPP for perusal and legal advice but with the recommendation that the suspect be charged with man slaughter and not murder. That when accused was asked if she could recall whether by the time she got out of the vehicle the gear lever was engaged into drive or not, and whether the foot brake was disengaged, she could not recall.

[35] DW2 Musana also stated that in his own analysis along with the team was that the accused had not taken due care to know about the safety of the vehicle at that

time and they concluded that there was carelessness and negligence on the accused's part which as a result could have caused the vehicle to take her by surprise by not recalling the exact position she had left the hand brake as well as the foot brake. That the team had initially recommended that the suspect be charged with '*causing death by rash and negligent act*' but the DPP returned the file with instructions to charge her with murder. The accused was also examined by a police surgeon and she was found to be normal and of a sound mind.

[36] It was DW2's evidence that the first information to police in this case was given by Paragon Hospital and not family members of the deceased. He confirmed to court that he interviewed PW3 Donat Kananura but did not tell him about any confession by the accused person in respect of this crime. He also said that although they were guarding the scene of crime (home) where the accused was still staying, when the accused said she was being threatened by her in-laws the police made arrangements for her to stay under protection in a police facility at Kireka. DW2 Musana also talked to accused's father -in-law Donat Kananura, Innocent Bisangwa, Moses Kananura and Joseph Kananura about the accused's fears but they said they were not aware of those threats.

[37] In cross examination Musana DW2 confirmed that the accused was still being treated as a suspect while kept under police protection in a police cell for females from 2nd February to around 5th July 2013. When further grilled by the prosecution, Mr. Musana Geoffrey admitted that although the DPP had severally written ordering the police to charge the suspect with murder, the police replied suggesting that due to some technical issues in the evidence they would recommend another offence other than murder. That they also sought advice on the matter from the Attorney General. The witness clarified that by doing so, the police was not taking a decision to disagree with the DPP's instruction but they only wanted to iron out what he called 'some technical issues' and that is why they filed for judicial review in the High Court. With further grilling, DW2 Musana conceded that the police had no choice but to

comply with the instruction of the DPP and consequently the suspect was charged with murder. In re-examination, Musana stated that their communication to the DPP was regarding the lack of evidence to prove the ingredient of malice aforethought in a murder charge which was their main disagreement with the Principal State Attorney.

[38]DW3 Joseph Nsubuga is an operations manager with Uganda Funeral Services.

He testified that his company conducted funeral arrangements including videography and photography for the late Nsenga. Joseph Nsubuga screened the recording of the funeral (DE8) especially that part where Nsenga's sisters forgave the accused during their speech in church on 14th January 2013. In the same footage, PW3 Donat Kananura speaking on behalf of the Kananura family also forgave the accused and said that nobody should judge her apart from God because they were only the two of them when it happened.

[39]DW4Namwanje Jessica was working as a maid at the accused's home from December 2012 to April 2013.

She stated that on the 10th of January 2013 between 8:30 pm and 9:30 pm while sleeping she heard someone crying and calling for help at her window. That she recognized the voice as that of the accused who was calling her to assist and take Daddy Jermaine (Nsenga) to hospital. That she went out and found Nsenga in a lot of pain and bleeding. That she called the neighbours who assisted them to lift and put Nsenga into the car. That Nsenga was mourning in pain while the accused kept saying to him "***Am sorry darling.***" She also said that for the time she was in their home, she never witnessed any fights or quarrels between the couple. In cross-examination she said that Nsenga had spent 4 days without going out although he used to go out in the evenings.

[40] DW5Chantal Karungilsan elder sister to the accused and lives in Kigali,

Rwanda. That on hearing about the death of Nsenga, she came to Uganda the next day. She confirmed to court that while at Nsenga's home she took part in a meeting called by Donat Kananura PW3 and attended by the accused, Mrs.

Angella Kayihura and Joseph Kananura among others. That during the meeting, Donat Kananura started complaining about the accused and blaming her for not going to see them when they were sick and admitted in hospital. That the accused tried to relate her version of the story where upon Chantal told her to ask for forgiveness from her father-in-law, Donat Kananura. That the accused asked for forgiveness for not visiting her in-laws in hospital where upon Donat Kananura forgave her. She was not cross-examined and her evidence remained standing.

Analysis of Witnesses' Testimonies/ Evidence

[41] On the whole, although PW2, PW3, PW4 and PW5 were blood relatives with the deceased, in my view this did not in any way bolster or embellish their testimonies. Contrary to the defence belief, their evidence was credible and reliable. They were consistent and truthful. They knew a lot about the couple, some having lived in the home of Nsenga with both accused and deceased for a number of years. They were confident and their evidence withstood the cross examination by the defence. PW6 also was equally a truthful witness. PW5 was very close to the deceased. He knew some of his secrets including the marital problems.

[42] PW2 Innocent Bisangwa was not cross-examined on the most crucial aspects of the damning evidence which he adduced. Where evidence is not challenged in cross-examination, it must be admitted as true and this refers to cross-examination on evidence in chief. The purpose of cross examination is to test the veracity of the witness on his / her evidence in chief. Indeed I find cross-examination to be the most effective tool ever invented by man to establish the truth in court from the witness testimonies. It was held in Kabengevs Uganda UCA Cr App. No. 19 of 1977 (Unreported), and James Sowoabm & Anor vs Uganda (SC) Cr App No. 5 of 1990 (Unreported) by the then Uganda Court of Appeal and the Supreme Court respectively, that:

“Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross - examination it must follow that he believed that the testimony given could not be disputed at all therefore, an omission or neglect to challenge the evidence-in-chief on a material or essential point by cross- examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible.”

See also Eladam Enterprises Ltd vs. SGS (U) Ltd & Ors. Civil App. No. 05 of 205, reported in [2007] HCB Vol 1 and Sakaar on Evidence Vol. 2, 14t Edition, 1993 by Sudipto Sarkar & V.R Manohar Pg. 2006 -2007.

[43]Further, the defence had particularly submitted that PW3 Donat Kananura was ***“a schemer, untruthful and un credible”*** and that his evidence should be rejected. A closer scrutiny of his testimony reveals that he forgave the accused for chasing away his children from Nsenga’s home, and for not coming to see him and his wife in hospital when they were sick, but not for murdering Nsenga. This became very clear during cross - examination. The accused’s testimony, as well as that of her sister,Chantal (DW4), corroborate this version. Be that as it may, Donat Kananura did not appear to the court as a person who was out to tell lies deliberately. What I made out of his testimony regarding this particular aspect was that his mind was not on the same page as that of the accused. He seemed to think that the apology was in respect of the accused’s conduct towards her in-laws, and Nsenga as well as her action of killing Nsenga.

[44]This reasoning is fortified with his testimony when he said during the meeting that ***“have you seen what Jackie has done? I talked to her and she never listened. Jackie has killed my son and all she did showed that she would kill him”***and immediately after which Chantal (DW5), told Jackie (accused) to kneel down and ask for forgiveness from Mzee, which she did. PW3 Mzee Donat Kananura forgave her.

So, the forgiveness was not in respect of the accused killing Nsenga as Donat Kananura may have thought.

[45]The other thing is that some of the properties which may actually appear to be part of the estate of the late Nsenga were registered in the names of a company called "**Katraco**" in which Donat Kananura (PW3) and Nsenga were some of the shareholders. Donat Kananura had even paid for the renewal of the lease of the Nsenga matrimonial home. These facts were confirmed by the accused herself during cross - examination.

[46] Like I have already stated before, matters of Nsenga's property/ estate will be dealt with by the Family Court. But for purposes of PW3's testimony in this case, and in light of the facts on record, it would be unfair by the defence to refer to DonatKananura as a "**Schemer.**" On the whole, he was a credible and truthful witness whose evidence this court will rely on.

[47]The defence has urged the court to find the evidence of PW3, PW4, PW5 (accused's in-laws) and PW6 not worth any consideration because they were motivated by the struggle for property (Nsenga's estate) to prosecute the accused. Further, that if the accused had not lodged a caveat on the application for letters of administration (**AC No. 189 of 2013**) in respect of Nsenga's estate by his father DonatKananura (PW3), she would not have been prosecuted. Indeed defence counsel Mr. Nsubuga Mubiru had categorically submitted that this trial was about property and nothing else. DW2 Godfrey Musana stated that the police force is mandated to investigate all crimes, whether reported or not. According to DW2 Godfrey Musana's further evidence, in this case the first information was entered on 11/01/2013 by the O.C Traffic as a 'fatal accident' before the file being forwarded to O.C CID of Jinja Road Police Station for investigation on whether there was a crime committed by the accused.

[48]It should be remembered that the incident had just happened on the night of 10/01/2013. PW4 Joseph Kananura said that when they went to pick Nsenga's body, the Paragon Hospital management refused to release it to the family until the police authorized them to do so. This tallies with what PW9 Detective AIP Nabalanyi Christine said that the police had been called in that morning by the management of Paragon Hospital. Joseph Kananura had also testified that none of the family members ever reported the matter to police. Further, that it was the police that requested them to make statements immediately after returning from the burial in the village. For instance, Donat Kananura PW3 made his statement (DE1) on 6/02/2013 while that of Ndizeye Moses Kananura (DE2) was made on 20/01/2013. This evidence was not contradicted by the defence. According to the accused's own testimony the caveat to PW3's application for letters of administration was lodged by M/S Kabega, Tumusiime & Co. Advocates after an advert for the said letters appeared in the '**Daily Monitor**' Newspaper of Friday, 29th March, 2013 (DE5).

[49]It now becomes apparent that this case is a result of the State (the Government of the Republic of Uganda [See Art.250(4)Constitution. Also see Uganda vs. John Texas Tibesigwa Crim. M/A No. 2 of 2001- arising from Mbarara 00-CR-0-0259-2001 before Kibuuka-Musoke, J]) carrying out its duty of preventing and prosecuting crimes by acting through the police force and the Directorate of Public Prosecutions (DPP), which organs work independently of each other. For the DPP is mandated by the Constitution (See Art.120(3)(a)) to direct the police to investigate any information of a criminal nature and report to him or her expeditiously. Perhaps I should say a little bit more given the background of this case as reflected on the record. Only the DPP, and nobody else, enjoys the powers to decide what the charges in each file forwarded to him or her should be. Although the police may advise on the possible charges while forwarding the police file to the DPP, as explained by DW2 Godfrey Musana to court and in his various letters to the DPP (DE6), such opinion is merely advisory and not binding on the DPP See Art.120(6), Constitution. Unless invited as

witnesses or *amicus curiae* (friend of the court), the role of the police generally ends at the point the file is forwarded to the DPP.

[50]The Kananura family members were called in as mere State witnesses. There is no evidence on record whatsoever suggesting that the accused's in-laws (the Kananuras) initiated the charges or pushed for the prosecution herein. In fact they have no powers to stop or discontinue this case, even if it were in exchange for the removal of the caveat by the accused as intimated by the defence. That is a function exercised by the DPP exclusively. **See Arts.120 (3) (d) and (4) (b), Constitution.** From this evidence, it would be totally wrong for the defence to take the view that this case is about property. This is not only misconceived but also misleading and diversionary. What appears to be a struggle for Nsenga's property started much later after the death of Nsenga, when a caveat was lodged against the application for letters of administration as indicated above. Even the accused's in-laws who gave evidence against her never said anything regarding property; they stuck to their evidence as recorded in the police statements they offered way before the alleged fight for property started. Actually this aspect of the struggle for property only came up during the defence case. It never even featured in cross-examination of the prosecution witnesses.

[51] The statements (DE1 & DE2) sought to be tendered by the defence counsel indeed corroborated the testimonies of PW3 and PW4 respectively. Their testimonies in court are substantially the same as the contents of their said statements which were made to the police who are the authority legally competent to investigate the facts of the murder circumstances. **Section 156 of the Evidence Act** is instructive. It states:

“In order to corroborate the testimony of a witness, any former statement made by the witness relating to the same fact, at or about the time when the

fact took place, or before any authority legally competent to investigate the fact, maybe proved”.

[52] Meanwhile, the State (police) on its own picked interest in this case immediately Nsenga passed on. I wish to categorically state that Nsenga’s property is not what this court is dealing with in this case. This is a criminal trial for the accused regarding her actions of driving and knocking down Nsenga. The court is concerned with those events that unfolded at the gate on 10th January, 2013, with the main question to be determined being: whether the accused knocked and killed Nsenga intentionally or accidentally. Therefore, as to whether the accused knowingly or unknowingly executed powers of attorney before Advocate Sam Bitangaro authorizing Donat Kananura to take out letters of administration for Nsenga’s estate is not a question for this court to answer but for the Family Court to determine. As such, I find no evidence to support the submission that the accused’s in-laws were induced to prosecute her because of the struggle for property or because she had lodged a caveat against her father in-law’s application for letters of administration.

[53] In the same vein, the defence case was also based on the theory that the accused’s in-laws had publically forgiven her but due to the struggle for property, especially when the accused lodged a caveat on Donat Kananura’s application for letters of administration, the in-laws decided to press for her prosecution. This is clear from the defence’s line of cross-examination and the kind of evidence they adduced. Indeed considering the evidence of Donat Kananura and the video footage (DE8) presented by DW3 Nsubuga of Uganda Funeral Services as well as the prosecution’s submissions on the matter, there is no doubt that the accused’s in-laws forgave her. The video footage screened in court showed Nsenga’s sisters hugging and embracing the accused after forgiving her in their speech during the church service. Speaking on behalf of Nsenga’s family, the recording shows Donat Kananura forgiving the accused and ***“said no one should judge her apart from God”***. As stated during the prosecution’s final submissions, the Kananura family still maintains their forgiveness.

[54] It should however be remembered that this is a case for the State and not the Kananura family. Most modern criminal justice systems focus on a crime, a lawbreaker and a punishment. As such, neither individual nor family forgiveness will diminish or erase the accused's criminal responsibility. This is not uncommon even in other jurisdictions. For example, in the famous case of Mehmet Ali Ağca, although Pope Paul John II sincerely forgave his would-be assassin and prayed for him severally even when in prison, the wheels of the Italian and Turkish criminal justice systems continued turning until he was convicted and served his sentences in both jurisdictions (see **judgement of 22 July 1981 of the First Petition Court in Rome**). Therefore, the defence's insistence on the forgiveness of the accused by her in-laws cannot be of much help to the accused's case. Neither can it serve as a bar to the ongoing trial. The pardon was simply a family gesture to their daughter and sister-in-law.

[55] I had the opportunity of observing the demeanour of PW7, Lorreta Mutoni and also assessing her testimony. In Jonathan Barindava v UG S.C.Crm App 5/89, it was observed that "***evidence of likelihood of a grudge ought to be weighed and taken into consideration.***" Therefore caution must be taken while evaluating the evidence of PW7, given that by the time she left Nsenga's home, she was not on good terms with the accused. As such, one could easily be tempted not to expect her to speak the truth or favourably about the accused. Be that as it may, I found her to be a credible and reliable witness. She testified truthfully and confidently and was not shaken by the vigorous cross-examination mounted by defence counsel, Mr. Walukaga. On a consideration of the entire evidence on record, especially that of DW1, the accused, who stated that Lorreta had lied about the threats, I believed Lorreta's testimony. It was cogent. I did not see any reason for her to lie when she denied having an intimate affair with Nsenga. Moreover, the evidence shows that Nsenga was not only her guardian but also her cousin.

[56] Even the accused's allegation of a love affair between Nsenga and Lorreta was a mere suspicion as opposed to a fact. The text message which she alleged to have read

off Lorreta's cellphone, without Lorreta's permission, could therefore be considered of no consequence in the circumstances. It is inconclusive of a love affair between the two. With those suspicions, the accused's mind was already directed to finding evidence or proof of intimacy between the two, to the extent that any words or actions by Nsenga or Lorreta could be construed to support such a conclusion. In any case, with that state of mind it mattered less whether indeed the relationship existed or not.

[57] I therefore believed Lorreta when she said that the accused had issued threats to her and Nsenga moreso in light of the prevailing circumstances under which the threats were made; the serious marital challenges the accused was facing, suspicion of betrayal by Lorreta having an affair with Nsenga, the accused's character-short-tempered and easy to anger...etc. One cannot say that she testified against or framed the accused because she had a grudge against her. This was even further demonstrated when she was asked whether the accused intentionally killed Nsenga, her guardian and cousin, and she said she did not know otherwise she would have rushed to say 'yes.'

[58] PW11 Mugimba was a truthful witness. He had examined and also road-tested the vehicle and found none of the vehicle systems defective. Indeed, after the incident, the accused drove it as did Mugimba Andrew and Saad Ndangiza and they encountered no problems at all. However, much as the obstacle sensors were found to be fully functional the accused claimed not to have realized that there was someone under the vehicle as she parked. I did not believe her when she said that she only noticed that she had overrun somebody after she heard the groaning.

[59] Moreover, on this matter, the accused had contradicted herself when she said in her first statement, PE6, made to the police on the 11 January 2013 at 11:30a.m. that: *"when the car stopped, I came out and started running to the house, calling my husband's name for help ... before I could get into the house, I heard somebody*

groaning. The noise was like a male voice. I became suspicious and went back to find out what had exactly happened and that is when I saw my husband lying down injured". However, in the second statement made on 24 January 2013, the accused said: "*when the vehicle stopped, at the time I was opening the door, I heard someone groaning and I knew I had knocked someone but I did not know who that person was, out of fear I came running to the sitting room calling my husband's name, when I reached on the verandah, the groaning became louder and I went back, only to see my husband lying.*" But that is not all. Further contradictions in her evidence are noticed when in her first statement (PE6) she said that, "*The shamba boy who normally comes to open was not there; he had left that morning for the sister's burial*" yet in her testimony in court she stated that, "*...the shamba boy told me in the morning that he had lost a sister and I got money from my husband at 3:45 pm and gave him and he left.*"

[60] The prosecution evidence as adduced by all the 13 witnesses was credible and cogent. The court had carefully observed these witnesses' demeanour and found them to be consistent, confident and not contradictory. They were sure of what they testified about and their evidence remained strong after being tested by cross-examination.

Ingredients of Murder

[61] The burden to prove a charge against an accused person is on the prosecution. The Supreme Court held in Ojegan Ignatius vs. Uganda Cr. App. No. 25 of 1995 (unreported), that the onus was on the prosecution, as it is always on the prosecution in all criminal cases except a few statutory offences, to prove the guilt of the accused beyond any reasonable doubt. See also Abdu Ngobi v. Uganda Cr. App. No 10 of 1991, (SC), (unreported), and Woolmington v. DPP [1953] AC 462. The accused person has no duty to prove his or her innocence. The burden of proof does not shift from the prosecution throughout the trial except in a few statutory offences of which

murder is not one. The prosecution is bound to prove to the required standard each of the ingredients of the offence charged. Per Justice Rugadya Atwoki in **Uganda vs. Nkurungira Thomas alias Tonku HCT-00-CR-SC-0426-2010.**

[62] In a charge of murder, the prosecution must prove the following ingredients.

1. ***THAT there was death;***
2. ***THAT the death was unlawful;***
3. ***THAT the death was caused with malice aforethought; and***
4. ***THAT the accused person participated in or caused the death of the deceased.***

It is important to note that ingredients 1 and 4 are not contested in this case. Be that as it may, it is trite law that the court has to make specific findings on all ingredients of the offence charged. As such, I shall start by discussing ingredients 1 and 4, then 3 and 2.

Death of Nsenga

[63] On the first ingredient of whether there was death, evidence of **PW1 Dr. Byaruhanga Moses** who performed a Post-mortem examination on the deceased is crucial. He prepared a report in respect of his findings on **Police Form 48b-(PE2)**. **PW3, PW4, PW5 and PW6** were all at Paragon Hospital when the deceased passed on. The defence does not contest this ingredient as the accused person was also present at the hospital when Nsenga died. In addition, these witnesses attended the burial of Nsenga. Prosecution has proved the first ingredient beyond reasonable doubt.

Participation of the Accused

[64] The fourth ingredient is that the accused participated in or caused the death of Nsenga. The accused does not deny having knocked down the deceased. Upon knocking down Nsenga, she called the security guard of the neighbour, Ouma (PW12) and the Gardener who together with her maid, Jessica Namwanjje (DW4) helped her carry him off the ground into the car. She then drove him to Paragon Hospital where

he died of the injuries he had just sustained. This ingredient is also proved beyond reasonable doubt.

Malice Aforethought

[65] **The third and most contested ingredient is whether the death of Nsenga was caused with malice aforethought.** A number of factors are considered when establishing malice aforethought in homicide cases. For perpetrators of crimes rarely voice out their intention when committing offences. Malice aforethought is therefore a state of mind. The intention and or knowledge of the accused person at the time of committing the offence is rarely or hardly ever proved by direct evidence. The courts usually deduce or make inference of the intention or knowledge from the circumstances surrounding the killing such as the type of weapon used, the mode of killing, nature of the injuries inflicted, the part of the body affected; whether vulnerable or not, and the conduct of the accused before, during, and after the attack. See Tubere v. R. (1945) 12 EACA 63, Uganda vs Turwomwe (1978) HCB 182 and Nanyonjo Harriet and Anor v. Uganda (S.C). Criminal Appeal No. 24 of 2002. In addition, before inferring malice aforethought, the court must determine if death was a natural consequence of the act(s) that caused the death and if the accused saw it as a natural consequence of the act.

[66] **Section 191 of the Penal Code act cap 120** defines "malice aforethought" as follows:

"Malice aforethought shall be deemed to be established by evidence proving either of the following circumstances: -

- a) An intention to cause the death of any person, whether such person is the person actually 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”.

Both prosecution and defence counsel have adduced evidence and also presented arguments in respect of each of the above two limbs (a) and (b) of Sec. 191. It was submitted by the prosecution that indeed the evidence adduced could establish malice aforethought on each one of those circumstances. As such, it is imperative that the court pronounces itself on each of the two limbs, starting with the first one.

Intention to cause death of any person as per sec 191(a) of the PCA

[67] The Prosecution has submitted that the evidence of the deceased’s dying declaration forms an intention to cause death as required by Sec 191(a) PCA. The Defence has vehemently disputed this submission. It is their contention that the statements uttered by Nsenga, immediately before his death, do not amount to dying declarations.

Dying Declaration

[68] Evidence was led to the effect that shortly before his death at Paragon Hospital, Nsenga spoke to various people as follows:

to PW3: Donat Kananura, **“Jackie (accused) knocked me and not the gate”**.

to PW4: Joseph Kananuratwice that, **“My wife has killed me in my own home”**.

to PW5: Moses Ndizeye Kananura, **“It was my first time to open a gate for my wife and my wife has killed me from my own home”**. **“My own vehicle has killed me from my own home”**, and

to PW6: Saad Ndangiza, **“See what my wife has done to me”**.

[69]Section 30 of the Evidence Act, Cap 6, reads as follows:

“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 procured 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."

[70] The admissibility of a dying declaration in evidence is founded on the principle of necessity. A dying declaration is not given on oath nor subjected to cross-examination. But as a piece of evidence, it stands on the same footing as any other piece of evidence. If found reliable, a dying declaration can form the basis of a conviction. Generally, a dying declaration would require no corroboration as it has to be judged and appreciated in light of the surrounding circumstances and its weight. In addition, murders are usually committed in secrecy, with no third person present to be an eye-witness to the fact. As such, the court is cognizant of the fact that dying declarations are not always true vide Carver vs. United States, 164 US. 694, 697 (1897), and in some cases have been found to be contradictory see. Moore vs. State, 12 Ala. 764, 46 AM. Dec. 276 (1848) or even unsafe to be relied upon on the ground of incompleteness. See. Pius Jasunga s/o Akum vs. R [1954] 21 EACA. Dying declarations have however been admitted as an exception to the hearsay rule because of an historical belief in their reliability, and because of necessity.

A dying declaration is based on the maxim, "*Nemo moriturus praesumitur mentire*" i.e. "*a man will not meet his maker with a lie in his mouth*". It had long been believed that a man about to die and meet his Maker would be unwilling to die with a lie on his lips. See W. Shakespeare, King John, Act V, Scene 4. However, if a dying declaration suffers from infirmities such as would render it so infirm that it pricks the

conscience of the court, the same may not be accepted to form the basis of the conviction. The deceased's statements quoted above were clear and complete. They were not given on oath and Nsenga was not therefore cross-examined as he had died shortly after uttering them.

[71] Case law suggests that corroboration is not essential but it is prudent to have it, in order to strengthen the evidentiary value of the dying declaration. For independent witnesses, just as is the case at hand, may not be available for cross examination hence the need for proper care and caution in case of acceptance of such statements as trustworthy evidence. In Okethi Okale and Ors vs. Republic 1965 (EA) 555, the court held that it is generally speaking very unsafe to base a conviction on a dying declaration of a deceased person... unless there is satisfactory corroboration. See also Sabiiti Vincent and Ors vs. Uganda Criminal Appeal No. 140 of 2001 (reported in [2001-2005] HCB 46, at 47), Uganda vs. Benedicto Kibwami alias Ben [1972] II ULR 28, Tindigwihura Mbahe vs. Uganda Cr. Appeal (S.C) No. 9 of 1987 (unreported), State of Rajasthan, India vs. Shraavan Ram & Anor, Criminal Appeal No. 427 of 2007 (Decided on 01.05.2013).

Corroboration of dying declarations

[72] Having assessed the evidence herein the court hereby takes caution by generally examining the circumstances under which the dying declarations were made. See Sabiiti Vincent (supra). The court will also establish whether the evidence on record could be used to offer corroboration to these dying declarations.

The bad Marital Relationship

[73] One of the factors to be considered together with the others discussed herein below, and therefore offering corroboration to the dying declaration, is that regarding the bad relationship between accused and deceased in their marriage. Well corroborated evidence has been adduced to the satisfaction of the court by prosecution witnesses PW2, PW3, PW4, PW5 and PW7 that the couple had lived an

estranged life. They lived in same house but slept in separate bedrooms, did not greet each other nor discuss or do things together as husband and wife although the deceased provided for the accused and family.

[74] On the other hand, the accused tried to paint a very good and rosy picture of their marriage that they slept in the same bedroom save for when the deceased was drunk, communicated to each other and did things together as husband and wife. I did not believe the accused on this matter but the prosecution witnesses. There is abundant evidence on record to support my decision. The accused, while acknowledging the existence of tensions and problems in the marriage, down-played the seriousness of the situation by referring to these problems as mere challenges. For sure this was an under-statement as the evidence does not support her view. It cannot be said that this was a manifestation of the ordinary wear and tear typical in marriages. In my opinion, these were very grim marital problems that had gone on for over ten years, had become chronic and life-changing, leading the accused to search for solutions including counselling with family members, prayer, etc.

[75] It is the accused's testimony that she turned to God and became saved in 2005. However her situation never improved but escalated. The marital life further deteriorated with the deceased virtually going out every night and at times returning to the marital home after days. It is clear from accused's testimony that all these had a negative impact on her life. She was very unhappy although well-catered for in material terms. The accused yearned for the love which she did not get by the time she returned from giving birth to their second child in the United States of America. The gravity of these "**challenges**" is further illustrated and acknowledged by the accused herself when she stated to Bisangwa PW2 that given that he knew their marital relationship the world was going to misunderstand her and think she tried to kill her husband. Moreover, Bisangwa PW2 had described that marital relationship as follows, "**... but in terms of relationship, it was dead.**" On these very material aspects, Bisangwa was not cross-examined hence leaving his evidence standing.

[76] Further, the strained relationship was also evident while at Paragon Hospital where the deceased was insistent upon keeping the accused away from his room. The accused sat at the reception area most of the time with Mrs. Kayihura. When she attempted to access the room and assist the deceased ease himself (urinate), the accused was ordered out by Nsenga. Much as the accused drove the deceased to hospital while begging his forgiveness and professing her love for him, the deceased's attitude towards the accused remained unfriendly.

[77] From the foregoing, it is very clear that the marriage in question was characterized by mistrust, hatred, frustration and threats just like in the case of see **Uganda vs. Dr. Aggrey Kiyingi, High Court Criminal Session Case No. 0030 of 2006**. An accumulation of these elements over a long period of ten years resulted in the formation of a tinderbox, which constituted the bedrock of the accused's intention or malice aforethought to kill Nsenga. Given the evidence on record, what was pending at this point in time was an event (Lorreta's unwelcome visit as it turned out) and the opportunity (the incident at the gate) to ignite the tinderbox. The court believes that the deceased's insistence on identifying the accused as his assailant was based on his awareness of the state of affairs between them. His repetition that the accused, his wife, had killed him, in his compound, with his car, in addition to the suspicious and hostile treatment immediately after the incident point to Nsenga's belief in the accused's ill-intention. Nsenga could not therefore have been accidentally run over by his wife. Even the accused herself was aware of this situation and the plausible conclusion to follow therefrom when she told Bisangwa that given their marital relationship, the world would think she tried to kill her husband.

Threats to Nsenga and Lorreta

[78] Corroboration of the dying declaration is also found in the testimony of PW7 Lorreta Mutoni who stated that on the 29th of December, 2012 the accused issued threats to her and Nsenga. The accused had warned that ***"by the way am capable of***

doing many things that I myself am scared of the length I can go.” These were not innocent words that one could just take lightly and sweep under the carpet especially considering what followed shortly thereafter on the 10th of January, 2013. Evidence clearly shows that the accused was very suspicious that Nsenga was having an affair with Lorreta which prompted her to utter those words in an angry tone. In this regard, it is immaterial whether indeed Nsenga was having a love or intimate affair with Lorreta or not. The accused seemed to be wallowing in this suspicion and therefore so sure about it. She was already disturbed and unhappy with this state of affairs. Moreover, the accused had a short temper and could easily get angry and shout. The law is that past threats on the deceased by his or her assailant can be good evidence leading to conviction. However, there must be sufficient proximity between the threats and the occurrence of the death in order to form a transaction. See Dr. Aggrey Kiyingi (supra) per Aweri Opio, J (as he was then).

[79] The accused did not dispute the fact that she had confronted the two in the living room to talk to them about her suspicions and the behaviour of Lorreta towards her. Nsenga remained quiet just like Lorreta did as the accused confronted them. From these circumstances, it is apparent that the accused had a grudge against Lorreta and not vice versa as suggested by the defence because the accused thought Lorreta was sexually relating with her husband Nsenga while in their marital home. It was her testimony that she had even asked Lorreta to leave their home and also stop interacting with her children although Lorreta said she had left on her own. It cannot therefore be said with certainty that Lorreta was motivated by the alleged grudge to frame the accused, and the case of Siraje & Anor vs. Uganda (S.C) Crim. Appeal No. 7 of 2004 cited by the defence would therefore not be applicable to the instant facts. There was no reason given as to why Lorreta would be motivated to frame the accused.

[80] When asked about the threats she uttered the accused only said that “*Lorreta lied.*” As already narrated herein above, I did not believe her. Instead I believed

Lorreta that the accused had issued the threats. It should be remembered that during this time, the accused and Nsenga were angry at each other as they were going through some marital problems. Nsenga had even lodged a complaint against the accused to Innocent Bisangwa and needed assistance. This was two weeks before his death. Twelve days after the threats, the accused overran Nsenga with a car. Could this be a coincidence? The threats need not be exactly what finally happens, neither do they have to be so remote or far-fetched. Looking at those words, murder could also perfectly fit in as one of the many things the accused said she was capable of doing. And indeed this is what happened. She was also scared of the length she could go in doing so, and it is known that committing murder is not for the faint-hearted. It was therefore not surprising for Nsenga to tell his father that he was knocked down by the accused's car and not the gate as was being narrated to him (the father) by Joseph Kananura, and to PW4, 5 and 6 that his wife had killed him. This clearly indicates the accused's intention as having been formed a few days before the incident. The opportunity to execute that intention only presented itself on that fateful night.

[81] Court takes cognizance of the finding in Uganda vs. Dr. AggreyKiyingi (Supra) regarding the temporal proximity of threats. In that case, the court rejected the prosecution's inferences as to what amounted to threats spanning a period of two (2) years in the following terms, ***"I think those threats offered during the above period were too remote to constitute a transaction in the death of the deceased. They were not proximate in view of the time lag."***

[82] The facts in the present case are somewhat similar to those in the case of Janet Mureeba and Others Vs Uganda Crim. Appeal No. 13 of 2003, where the Supreme Court accepted the threats made to the deceased over a period of time and reported by her to various people (witnesses) as amounting to dying declarations and thereby upheld the murder conviction. In that case, the deceased was having an affair with Janet Mureeba's husband which relationship resulted into a child being born. Janet

Mureeba procured the services of the second and third appellants to kill both the deceased and her baby.

[83] The court finds that these threats could not be found idle and disregarded when evaluating the state of the accused's mind before and during the incident moreso, given the proximity in time of their utterance on 29th December 2012 and the unfortunate events of 10th January 2013 (**12 days later**). The manner in which the accused drove the vehicle is indicative of a depraved indifference to human life yet she was in full control of her mental faculties. The only deduction the court could make here is that the accused intended to execute the threats earlier issued by running over the deceased immediately an occasion to do so availed itself.

Conduct of the accused person

[84] The accused's conduct before, during and after knocking down Nsenga too offers corroboration to the dying declarations. It has already been discussed herein above that the accused was experiencing a bad marital relationship. She was unhappy with the deceased and twelve days before the incident had issued threats to the deceased and Lorreta. In the same period, the deceased complained to Bisangwa PW2 about the accused not communicating with him, her absence from home and returning late. During the incident, the accused rammed into the gate while it was still being opened and thereby knocked down the deceased, dragging him for 10.3 metres on a rough surface. PW12 Ouma Richard and DW4 Namwanje Jessica confirmed to court that in the course of putting the deceased into the vehicle, the accused kept saying to the deceased, "***I am sorry darling, I am sorry sweetheart, I love you.***" But that the deceased did not respond as he only continued groaning in pain.

[85] The accused also stated that on their way to hospital, Nsenga forgave her, saying that it was okay and that she should concentrate on the driving. However what transpired upon reaching hospital would go totally contrary to this testimony. This is

illustrated by the deceased's hostility towards the accused at the hospital and his persistence in pinpointing the accused as the perpetrator of the unfortunate circumstances. He did not want her anywhere near him, so she kept in the reception area. Neither did he trust her or want her to be in possession of his valuables like the car keys and cellphone. At the hospital, it is not in dispute that the accused, for no apparent reason, repeatedly denied possession of and refused to hand over Nsenga's car keys and cellphone to Moses Kananura, PW5. With this kind of conduct by the accused towards the deceased, the only logical conclusion one can draw is that the deceased was not wrong in averring or maintaining to his father and brothers when they entered his room that the accused ***"had killed him."***

[86] Besides, it should not be forgotten that the accused and Nsenga were the only people at the scene of crime at the material time. Although the latter was in deep pain, he could remember well what had just happened and related it to his brothers and father before he died. He even corrected his brother who was telling their father that Jackie had told him it was the gate that had hit Nsenga when Nsenga himself quickly interjected that ***"no, it was Jackie."*** The accused confirmed that indeed she was the one that knocked him and as such Nsenga's words should not be taken lightly. He was still in full control of his mental faculties although he died a few hours later. Nsenga was in very deep pain struggling for his life and about to meet his Maker. There was no time or reason for him to concoct stories and frame the accused. Given the prevailing circumstances, I do not think he wanted to die with a lie on his lips.

[87] This court has no reason to doubt or disbelieve what he said. Had he forgiven the accused during that short drive to hospital he would have said so. There was nothing to stop him from forgiving her in the presence of other people, especially family members. He would not have reported her to his father and brothers nor treat her with such hostility, distrust and suspicion upon reaching the hospital. Till his death, the bad blood was still flowing between the two. She had refused to hand over

the deceased's car keys and cell phone. I am in agreement with the prosecution that the accused's expressions of remorse, and alleged forgiveness by Nsenga on the way to hospital, amidst such an acrimonious marriage, was a mere cover up to provide her with a defence. The accused presented herself as this person who is born-again and God-fearing, enjoying a good marriage where the couple discusses any arising issues or challenges together, share the same bed room and eat meals together yet the evidence on record regarding the marriage suggests otherwise.

[88] The court finds that Nsenga was not happy with the accused's suspicious conduct before, during and immediately after the incident, which is a reflection of his belief of her intention to get rid of him. The suspicious conduct is further illustrated by the manner in which she drove the vehicle with reckless abandon, hitting the gate while the accused was still in the process of opening it and thereby injuring him. That is why Nsenga insisted that his wife had killed him. It would have been expecting too much of Nsenga as a lay-person in those circumstances to further elaborate on his statements and distinguish the intention of the accused from the act she had committed as required -in-law.

Examination of the scene, Car, Injuries Sustained and Explanation by the Accused

[89] Further corroboration of the dying declarations is found in the evidence of PW8 Munaku John Bosco, the SOCO, and PW10 Professor Mwakali, regarding the scene of crime generally, as well as PW11 Mugimba Andrew, who examined the vehicle in issue, PW1 Dr. Byaruhanga and the accused. When the accused came out of the vehicle, she realized that the person she had knocked and heard groaning was her husband. She sought assistance from Richard Ouma PW12 and Jessica Namwanje DW4 to help her place the deceased into the vehicle. All this happened along the driveway in the compound of their matrimonial home. PW1 Dr. Byaruhanga, stated that the cause of death was multiple blunt force injuries. He had found patterned abrasions or tyre marks on the waist of the deceased's body which also had skin tags

signifying dragging of the body on a rough surface. Detective Sergeant Munaku, SOCO examined the scene and established the point of impact between the vehicle and the green gate. Just like PW11 Mugimba Andrew, the Inspector of Vehicles, Munaku, the SOCO, examined the vehicle and found green striation marks on the left side of the front bumper.

[90] These experts brought the vehicle to the gate and their teams reconstructed the scene. On examining the gate, Munaku, found that the horizontal bolt was bent and the blue paint marks on the gate were a result of the car hitting the gate. When the court visited the *locus in quo*, Munaku illustrated on the ground the various points from the gate which are indicated in **fig. 25** of his report, **PE3**. He also showed the court the point at which the body finally rested, **10.3 metres from the gate** where also Nsenga's blood stains had been found. This would be a distance equivalent to approximately one and a half times the length of a standard football goalpost. PW10 Prof. Mwakali who examined the gate and most especially the horizontal bolt explained that for that car weighing 1,575 Kg to have caused the effect it did, it must have moved at a speed of 45 and 61 km/h. PW11 Mugimba Andrew, stated that the vehicle was in good mechanical condition after the collision and was fitted with modern gadgets, including obstacle sensors and automatic braking system. There is no evidence to suggest that the vehicle was defective before the incident. The above evidence is not contested. The accused stated that while at the gate, the car jerked, hitting the gate open, and thereby dragging the deceased along the driveway. Munaku said that the car finally stopped at a point 17.5 metres into the driveway, a distance equivalent to two and a half times the length of a standard football goalpost.

[91] The accused's explanation of what happened at the gate is simply the easiest way out of the whole situation; **that the car jerked and she does not remember what happened thereafter. She however goes ahead to say that she struggled to control the car by steering it to the right to avoid knocking the person who had opened the gate for her and she did it successfully and the car stopped 17.5 metres into the**

driveway. I wonder how she again recalls all that. By that time, the deceased had been knocked, overrun and dragged for 10.3 metres. The accused wants this court to believe that she had no idea at all that she had knocked a human being until she came out of the car, ran towards the house and then heard the groaning.

[92] This court is not inclined to believe this version of the story for the following reasons. One does not even have to be an expert on motor vehicles to know that a car with a low suspension like the Mark X which the accused was driving cannot knock, let alone overrun an object the size of an adult human being and the driver fails to detect the object. She saw the gate being opened and therefore knew that somebody was in the middle of the driveway, still in the process of opening the gate. She was familiar with the manner in which that gate opens. In his report PE8 (at P.16), Prof. Mwakali and his team noted that from the literature available, although there have been reports of unintended acceleration in selected Toyota models such as Camry, Avalon, Corolla etc. in the United States of America, the Toyota Mark X 300 G premium is not amongst the reported cases of unintended acceleration. This was not contradicted by the defence.

[93] It cannot be that the car jerked on its own without the accused doing anything to it. Why couldn't it jerk the first time the accused returned from ringing the bell and sat in it waiting for the gate to be opened? Moreover, the lights were on and the engine was running. Generally the vehicle was still in the same condition. Though in not very straight terms, the defence put across a case of a faulty or mechanically defective vehicle that could accelerate on its own. This version of the accused's story is unsustainable. Had the car jerked on its own the accused would not have trusted it and drive Nsenga in it to hospital immediately after the incident when she clearly had options of other vehicles at her disposal parked in the compound. As was submitted by the prosecution, she could have called for help from Bisangwa's home located just nearby along Bandari Rise. Further, given the force and speed at which the car jerked off and continued moving with the door not yet closed and one leg still outside, the

accused would have inevitably been ejected from the car upon knocking the gate or sustained some injuries. Surprisingly this never happened.

[94] According to accused's testimony she was sober having consumed water, a milk shake and biscuits at Nakumatt shopping centre before returning home. PW13 Tukahirwa Clare of Face Technologies, the company that issues driving licenses, said the accused is an experienced driver of 12 years' standing. The police surgeon had examined and found her to be normal and mentally stable. The evidence shows that the accused knew very well everything that she was doing. This was a killer vehicle that had just badly injured her husband. If I am to go by her story for a moment, it had unintendedly accelerated on its own and she failed to control it thereby hitting the gate and Nsenga, a man she says she loved so much. What assurances did she have or get all over a sudden to gain confidence and drive it again thereby putting her own life, after surviving the initial incident, that of her husband and other road users to great risk?

[95] All these actions point to one thing; that the accused intended to harm and or kill Nsenga. She had driven and rammed into the gate at a high speed of 45/61 km/h in such a place not minding about the person who was opening the gate for her to enter. According to the Inspector of vehicles, PW11 Mugimba, the parking brake holds the vehicle still in one position and does not move until or unless accelerated. The court observed the scene of crime as a generally flat area though slanting a little bit to the right as you enter the gate. It is only logical in the circumstances that the accused must have accelerated the car for it to be able to move, gain momentum and attain that speed (force). Instead of stopping the vehicle using the brakes, which is the most obvious and normal thing to do in the circumstances, the accused says she used the steering wheel. This cannot be true.

[96] What is believed to be true as deduced from the evidence on record is that the accused accelerated the vehicle, crushed into the gate thereby knocking and

draggingNsenga along the concrete pavement. The overrunning and dragging of a body of Nsenga's size for such a distance of 10.3 metres would require some consistent and considerable acceleration otherwise the car would have rested immediately after knocking the gate, if indeed it had accelerated on its own. Moreover, the accused had all it takes to control the speed or stop the vehicle using the brakes. The brake pedal was at her disposal to engage. Notably, all through her testimony the accused said nothing about the brake pedal and or accelerator. The immediate thing one would have been expected to do was applying the brakes and stop the vehicle from further moving and not to accelerate or struggle with the steering wheel only.

[97] I wish to stress that cars are not built to cause death or grievous bodily harm when used in their ordinary and usual manner as intended by their manufacturers. The manner in which the car is used determines how it impacts on other road users and property. Notably, a car is a machine, just like an aircraft, and as such can be manipulated by humans to achieve some desired ends. At this point, I wish to draw an analogy to the well-known **September 2011(9/11)** incidents in the United States of America, where the attackers used the aircrafts, as the more convenient weapons of death and destruction, to crash into the buildings thereby killing the passengers on board and people on the ground. The facts in the present case also indicate that the accused used her car as a weapon of death. It is worth noting that it is immaterial at what stage the accused had formed the intention to kill (*with or without prior planning as in the aforementioned 9/11 incident*). What the facts show is that the opportunity to execute the intention presented itself that evening at the gate and the available and convenient weapon was the vehicle the accused was driving. She used it effectively by dragging Nsenga on the ground, resulting in fatal injuries to him. Generally the manner in which the accused drove the car was extremely dangerous, consistent with a finding that she did so with callous disregard to human life. It is apparent that the accused drove the car with reckless abandon in a familiar place and

at a time (night) where and when she was expected, as a seasoned driver, to go at a very low speed and exercise extra care.

[98] Generally, it is now beyond the ground of contention that the accused corroborated the deceased's statements to PW3, PW4, PW5 and PW6 that he had been knocked with his own vehicle in his own compound by his wife. The forensic evidence of the expert witnesses, PW8, PW10, PW11 and PW1 places the accused and her vehicle on the scene and further strengthens the above evidence. This is the essence of the dying declarations herein. It is therefore inconceivable how the defence would seek to fault the prosecution that the prosecution failed to produce independent witnesses such as the medical personnel of Paragon Hospital to testify as to the words said by the deceased to PW3, PW4, PW5 and PW6. First of all, all these witnesses, although family members and closely acquainted, their evidence was tested on the touchstone of cross-examination and found to be credible and reliable. Secondly, the statements were made in Kinyarwanda and one cannot be sure whether the medical personnel understood what was being said. Thirdly, unlike in other jurisdictions like India, in Uganda, the law on this issue does not provide for who can specifically record or receive a dying declaration, nor is there any prescribed time, form, format, or procedure for the same.

[99] Fourthly, from the foregoing, the court is satisfied that the prosecution has adduced sufficient evidence on this aspect and is therefore in agreement with the holding in **Bukenya&Ors vs. Uganda 1972 EA 549**, that the DPP does not have to call a superfluity of witnesses on a matter in which he has already adduced adequate evidence. I will perhaps reiterate and stress at this juncture that the DPP should have personal conduct of his case and independently determine the number and type of witnesses to call as well as the order in which to call them. What matters, in my view, is not a surplusage of witnesses but ensuring that the witnesses called are credible and reliable, and prove all the ingredients of the offence to the legally required standard. Otherwise, under the general law of evidence, the court can draw an

inference that the evidence of a crucial or indispensable witness not called would have tended to be adverse to the prosecution case. Further, I wish to add that the defence should be at liberty to present before court witnesses who were listed though not summoned by the prosecution. See NalongoNazziwa Josephine vs. Uganda Criminal Appeal Number 0088 of 2009, and D.M.N alias Wvs. Republic, Criminal Appeal 327 of 2013.

[100] It is my considered view that the statements or words spoken by the deceased to the four witnesses qualify as dying declarations or statements admissible in evidence under section 30(a) of the Evidence Act. As dying declarations, therefore, they form an exception to the general hearsay rule and constitute circumstances of the transaction leading to the death of Nsenga. Moreover, there was sufficient proximity of only twelve (12) days between the threats and the knocking down and subsequent death of Nsenga to form a transaction of events. Further, unlike in the Mureeba case (supra), in the present case, the threats by the accused were relayed to court by one of the direct recipients thereof (Lorreta).

[101] Direct evidence creating a link between the incident, accused's conduct, and the marital acrimony and threats from which to infer malice aforethought may not always be easy to come by. As I have already stated, homicide is often a secret crime with the dying declarant as often the only witness and the guilty person may easily escape punishment. Perpetrators of crime will rarely voice out their intention. The accused person is the only living person who witnessed this whole incident and yet, at the same time, she is the person indicted for the murder herein. Therefore, as such, her version of the story should be treated with extra caution. Since direct evidence of intent (for example, an admission from the accused) is very rare, in the vast majority of cases, litigants must attempt to prove intent by inference through circumstantial evidence. Circumstantial evidence is about the cumulative effect of the totality of the evidence and therefore the different pieces of evidence should not be looked at in isolation of each other. See Criminal Evidence by Richard May, 4th Edition (1999).

[102] This leaves the court with various pieces of evidence which on their own or individually cannot stand to offer a basis for an inference of malice aforethought or guilt. In Dhatemwa alias Waibi Criminal Appeal no. 23/1977, the court of appeal stated that, *“It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which is capable of proving facts in issue quite accurately; it is no derogation of evidence to say that it is circumstantial”*. It was held in R vs. Kipkering Arap Koske and Anor. (1949) 16 EACA.135 that *“in order to justify, on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt”*. See also Mureeba (supra), Simon Musoke vs. R (1958) EA 715, Bogere Charles vs. Uganda (Supreme Court of Uganda Certified Criminal Judgement 1996/2000), and Dr. Aggrey Kiyingi & 2 others Vs Uganda Criminal Session Case No. 0030 of 2006.

[103] Proving intent is usually a matter of piecing together different tidbits of evidence. An amalgamation of all the above factors as discussed herein forms a solid foundation of circumstantial evidence from which the court can infer that the accused person knocked down and killed Nsenga with malice aforethought. It was not accidental, she intended it. I see no other co-existing circumstances which would weaken or destroy this inference. See Teper vs. R(1952) A.C. 480 and Simon Musoke vs. R [1958] E.A 715. Further, basing on the manner in which Nsenga was overran with a vehicle (and the resultant injuries inflicted) death was a natural consequence of that act and the accused must have seen it (death) as a natural consequence. This finding is further fortified by the accused herself who had foreseen that the natural consequence of her knocking Nsenga was death when she said to Bisangwa PW2 immediately after the incident, but before the certainty of Nsenga’s death that, *“... given that he knew their marital relationship the world was going to misunderstand her and think she tried to kill her husband”*.

[104] Therefore, the defence's contention that there was no malice aforethought as the accused, in a bid to save his life, had immediately driven the deceased to hospital while saying "*I am sorry darling, I am sorry sweetheart, I love you*", cannot hold because according to the injuries inflicted on Nsenga she had already known that he was going to die. This is again in line with what she had expressed to Bisangwa. I believe her taking the husband to hospital was an afterthought upon realizing the consequences of what she had done.

[105] Additionally, in light of both the prosecution and defence evidence, the court is also persuaded by the prosecution's submission that the accused actually knew that it was Nsenga who was opening the gate for her on that fateful night. The prosecution had reasoned that it is not normal for persons opening the gate at night not to enquire who was on the other side of the gate, lest one invites robbers and criminals. Indeed PW8, the SOCO, testified that it was 130% not possible for the person outside to see who or what was inside. Similarly, it was not possible for one inside to see who or what was outside. Identification would be necessary, either by opening the pedestrian door at the gate to confirm who is outside or through oral speech or the small viewing window on the sentry dock.

[106] Had Nsenga not ascertained the identity of the person who was outside the gate, by whatever means, it is only logical and or unlikely that he would not have disengaged the 2 vertical bolts, as deposed by Prof. Mwakali in his report (PE 8), to enable both leaves of the gate to open for the car to enter. I believe this is one of the reasons why Nsenga insisted that the accused had knocked him and became hostile to her. With due respect, the example given by the defence of one being accidentally run into by their father while opening the gate at home for him to enter is not analogous to the facts at hand. With nothing more said, the illustration is totally in a different context and circumstances as opposed to the current case which was not accidental. The accused and Nsenga had serious marital differences.

[107] In the context of this case, Nsenga's words that "*my wife has killed me*" yet he was still alive, would be taken to mean that he wanted the people around to know that it was not the gate but the accused who had knocked him and therefore responsible for his death or the resultant consequences. He was very keen at stressing the role his wife had played in his predicament. Given that the words were said in vernacular (Kinyarwanda) and in the prevailing circumstances of matrimonial acrimony and threats, and the fact that Nsenga did not utter any words of forgiveness at the hospital, one would be right to conclude that the deceased believed the accused's actions to have been occasioned in bad faith. That they were committed knowingly and intentionally, and not accidentally. It should not be forgotten that only the two of them were at the scene of crime. Whether they talked before the incident, that evidence is not before the court. But actions speak louder than words. Nsenga was able to narrate what he saw and what he went through at the hands of the accused while at the scene.

[108] From the foregoing, and in the absence of further explanation or any explanation at all as to how exactly the car jerked and knocked Nsenga, the court had evaluated all, and the only evidence on record to reach its decision. I took proper care and caution in accepting these statements as trustworthy evidence. This court is satisfied that the dying declarations made by Nsenga are consistent with the prosecution evidence adduced and they are amply corroborated and strengthened to offer a concrete foundation for the court to base a conviction. See Okethi Okale (Supra). For the reasons given, I find the accused's story, especially regarding what happened at the scene of crime to be untrue. Considering the surrounding factors and in light of the entire evidence adduced, the accused's story is found not to be credible and it is rejected. The prosecution's evidence on the matter is believed by court.

Unlawful Death

[109]With regard to the second ingredient of the unlawful nature of the death, it has now been established that the death of Nsenga was caused with malice aforethought, i.e. that it was willingly and knowingly caused by the accused. For it is trite that every homicide is presumed unlawful unless it is accidental or excusable (caused under justifiable circumstances like self-defence, defence of property or person when authorized by law). Gusambizi Wesonga and Others v. R. (1948) 15 EACA 63. The accused's defence that she accidentally caused Nsenga's death has been rejected and reasons given herein above by the court. The prosecution has proved this ingredient beyond reasonable doubt.

[110]In their joint opinion, the Lady and Gentleman assessors said that the prosecution had proved beyond reasonable doubt that (1) Nsenga is dead (2) that his death was caused unlawfully, and (3) that the accused person participated in his death. However, the Assessors opined that the prosecution had failed to prove beyond reasonable doubt the fourth ingredient that the accused caused the death of Nsenga with malice aforethought. Their reasoning was that the circumstances surrounding the couple's marriage, their business, and accused's actions after knocking down the husband - of calling for help, calling the in-laws and rushing him to the hospital had left them unable to conclude that she intended to kill him. As such, both Assessors have advised me to find the accused guilty of the lesser offence of man slaughter.

[111]I respectfully differ with the Assessor's opinion for the reasons I have already assigned herein above. Further, while determining malice aforethought in a case of this nature, merely looking at what the accused did after the incident is not sufficient. Establishing intention or malice aforethought is not always obvious. There are all indications that the act of the accused taking Nsenga to hospital and calling his relatives etc. was an afterthought, upon realizing the consequences of her actions. These factors needed to be carefully assembled and diligently considered together in

light of the surrounding circumstances of what happened before and during the incident for malice aforethought to be inferred. Had the assessors directed their minds properly to these pieces of evidence, I am sure, they would have advised me differently.

[112] From the above discourse, I am satisfied that the prosecution has proved all the ingredients of the offence herein beyond reasonable doubt. The accused is found guilty and convicted as charged.

Right of Appeal explained.

**Judgment read and signed in open court at Kampala this
22ndDay of September, 2014.**

**Duncan Gaswaga
JUDGE**