

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
SITTING AT ENTEBBE**

**CRIMINAL SESSION CASE NO.351 OF 2013
CRIMINAL CASE NO.032 OF 2012
CRB NO.707 OF 2012**

UGANDA ::
::::::::: PROSECUTOR
VERSUS
DRAZUA
EMMANUEL::
ACCUSED

Before: HON JUSTICE WILSON MUSENE MASALU

JUDGMENT

Domestic violence is one of the greatest social problems Uganda is faced with today. There are an increasing number of reported incidences of domestic violence, many of which are dangerous and have resulted into loss of lives. This case is one of such instances of domestic violence whereby the accused, Drazua Emmanuel and the deceased Amaite- Erina had been married for 9 years and has 3 children.

They were both employed as prison warders at Sentema Prison in Wakiso District. Drazua Emmanuel had previously reported to his employer/prison administration that he suggested his deceased wife to be having an extra marital affair with a boda boda cyclist and businessman one Sadiq.

On the 13th day of August, 2012 at Sentema prisons premises, Drazua Emmanuel shot and killed the deceased, prison wardress

No.12344 Amaite Erina. When he was arraigned he pleaded as follows:-

“I am the one who killed my wife but I had no malice aforethought.”

This court entered a plea of not guilty on the charge of murder. By that plea, the duty under the law was cast on the prosecution to prove all the essential elements of the offence of murder beyond reasonable doubt. This is because an accused person bears no duty to prove his innocence since he is presumed innocent until proved guilty. This principle of the law has been embodied in a number of cases including **Sekitoleko versus R. (1967) East Africa 531**. It has also been embodied or entrenched in **Article 28 (3)(a) of the Constitution of Uganda**.

The prosecution case in this matter was handled by **M/S Basute Cate**, Resident State Attorney Entebbe, while the accused was defended by Mr. Aggrey Bwire a Kampala based Advocate.

The essential elements of the offence of murder which the prosecution is obliged to prove beyond reasonable doubt are;

- a. That the person alleged to be murdered is dead.
- b. That the deceased died as a result of the unlawful act or omission.
- c. That whoever killed the deceased did so with malice aforethought.
- d. That the accused was the one who participated directly or indirectly in causing the death of the deceased.

The above elements were restated in the case of **Uganda versus Aramanzani Mubiru (1996) H.C.B 35.**

In an effort to discharge the burden of proof cast on it by the law, the prosecution called evidence of 5 witnesses. These were Ogwang Isaac, the Assistant supritendant of prisons, previously in-charge of Sentema prison (PW1), No. 6187 chief Grade III Warder Osege Charles (PW2), No.9913 warder Obwoya Junior (PW3), Kateme Viola a house wife of one of the prison officers at Sentema prison (PW4) and Dipio Angella, also house wife within Sentema prison (PW5).

The accused on the other hand gave evidence on oath as (DW1) and called one witness Turyatunga Medard (DW2).

As to the first ingredient of the offence as to whether prison wardress No.12344 Amaite - Erina is dead? There was overwhelming evidence in proof thereof. First and foremost was the post mortem report which was admitted in evidence at the beginning of trial under Section 66 of the Trial on Indictment Act. The examination was done by Dr Kalungi .S. of Mulago Hospital who described the death as instant due to hemorrhage as a consequence of gunshot wounds. All the prosecution witnesses alluded to the fact of death of the deceased. Even the accused and defence witness conceded to the fact that the deceased died. It is therefore my conclusion that this ingredient of the offence has been proved by the prosecution beyond all reasonable doubt.

On the second ingredient of the offence, the position of the law is that all homicides are presumed unlawful unless caused accidentally or justifiably either in defence of property or person or by an act of **God. R. Vs. Gusambizi S/O Wesonga (1948) EACA 65** is a case in point among a host of others.

The prosecution's case is that the death of Amaite was unlawfully caused. Counsel for the state referred this court to the post mortem report PF 48, which as already noted was tendered in court under **Section 66 of the Trial on Indictment Act**. The report stated that the death was instant caused by gun wounds. Counsel for prosecution's contention was that the death of the deceased was as a result of the injuries she sustained from gunshot wounds and that the evidence of PW1, PW2, PW3, PW4 and PW5 all point to gruesome death of the deceased after sustaining gunshot injuries.

Counsel for the accused on the other hand, submitted that the death was not unlawful because the accused acted in self defence. In **Uganda versus Sebastian Otti (1994-95) HCB 21, Okello J** as he then was held:-

“Death is excusable when caused in self defence. To constitute self defence, there must have been an unlawful attack on the accused who as a result reasonably believed that he was in eminent danger or serious bodily harm and it was necessary for him to use force to repel attack made on him.”

Counsel for the accused's further submissions, while quoting the case of **Byabagambi Gabriel versus Uganda (2004) KARL 7** was that the accused acted in self defence and is therefore entitled to immediate acquittal. The accused gave detailed evidence of how he has had misunderstandings with the deceased because she loved a boda boda man called Sadiq.

DW1 testified that he got information about the love affair from Nyakato wife of the boda- boda man. To the extent that he found his wife red-handed in a house with Sadiq, but left Sadiq to escape and borrowed clothes for his wife the deceased to wear

and go home. DW1 testified as to how on 13/08/2012, the deceased went to the window of the gate lodge and threatened or warned him and told him to stop joking with her.

All the above pieces of evidence was meant to support the defence of provocation and self pity but the real questions rotate on the actions of the accused on the fateful day of 13/08/2012. The accused's testimony was that he continued shooting at his deceased wife to scare her and that he was also scared of his life. DW1's testimony was that the deceased pulled a trigger but the bullet did not come out and he did not know whether it was the gun of the deceased which was faulty or the deceased herself.

The question this court would ask is why did the accused continue to fire or shoot at his wife 4 times when he knew very well that his wife had pulled a trigger and the bullet had not come out? And when DW1 was asked by the Assessor why he kept the gun at the counter instead of returning it to the amoury, no satisfactory explanation was given by the accused. And his witness, DW2 Turyatunga Medard whose testimony was that he saw the deceased pointing a gun at the accused instead turned to add that accused turned, shot the deceased on the shoulder and then shot again till deceased fell down. DW2 concluded that accused then ran away as he remained watching the deceased dying.

During cross examination by Counsel for state, DW2 stated categorically that he did not at any one time see the deceased shoot. He added that the door had earlier been opened by the accused when he got outside and he had left it open. DW2 also added contrary to what DW1 had stated, that he did not see the deceased addressing the prisoners. The testimony of DW2 in my view all along supported the prosecution case. It was to the effect that it was the accused who put the deceased at gun point, and that although the deceased was armed, she did not retaliate.

PW1, got information while at Kakiri to return urgently to the station as accused had shot Amaite dead. And upon return, he found Amaite dead in a pool of blood at the gate. PW1, who was the Sentema prisons boss also testified that the accused was not meant to have a gun at that time.

PW2, Charles Osege was the supervisor of Sentema prison at the time. His testimony was that on 13/08/2012 at around 3:00pm/3:30pm, he entered his office. He added that lady wardress Amaite was standing outside talking to the accused through the window. PW2 told this court that wardress Amaite told the accused that she could not enter inside the prison as she was holding a gun. And that the deceased told the accused to stop joking and playing with her. The deceased, PW2 testified warned the accused that he could get a problem and then she walked towards the direction of the sentry point.

PW2, further testified that at that juncture, he saw the accused picking the gun under the counter and ran outside the gate as accused mentioned **“let me go and kill myself.”** PW2 added that he also ran out of his office and as he stood at the gate, he saw when the accused had put the deceased (Amaite) at gunpoint. He added that the accused has pointed a gun at the deceased. And that the deceased was also holding a gun sideways. PW2 added that he shouted at accused - **“Emma stop what you are doing”**.

PW2’s testimony was that immediately the deceased ran towards where he was standing and the accused shot a bullet behind her, which bullet hit the wall. And that as he jumped off the gate, the accused shot a second bullet as the deceased was entering the gate. PW2 added that the accused followed and stood at the gate, shooting at the deceased direct. And that after shooting twice,

accused turned and ran away with the gun. PW2 further testimony was that he had hidden himself at the concrete of the pavement which was very high and so he was seeing everything and that there were some women outside the compound.

PW2 added that he then went and picked the gun of the deceased which had fallen outside the gate and upon checking the gun, there was no bullet in the chambers of the deceased's gun. This court is in the circumstances inclined to believe the testimony of PW2 because if the gun of the deceased had been cocked and she had tried to shoot at the accused then the bullet would have come out. But the bullet could not come out when there was no bullet in the chambers. PW2 added that the deceased had fallen inside and was bleeding. PW2 concluded that by the time accused picked the gun, he could not remove it from him as the counter was outside his office and a bit far.

PW2 confirmed that the deceased was shot at a close range when she had entered the gate lodge and that her gun fell at the gate entrance. PW2 reiterated that the first and second bullets missed the deceased. I have had to reproduce the testimony of PW2 in details because he was the eye witness who saw the events as they unfolded on the fateful day. PW2 also impressed this court as a sincere, simple and straight forward person who was stating the truth. PW2 was not shaken by the rigorous cross examination of Counsel for the accused. I found PW2 a witness of truth.

PW3, Warder Obwoya Junior corroborated the testimony of PW2 that accused used the gun signed out by Warder Alemut Emmanuel to shoot his deceased wife. The accused did not deny that he had signed the gun from Warder Alemut Emmanuel.

PW4, Kateme Viola was in the prisons compound on the fateful day. She told this court how accused came outside the small gate and put the deceased at gunpoint while the gun of the deceased

was downwards. PW4's testimony like that of PW2 was that when the accused shot the first bullet, the wife (deceased) turned and ran towards the inside of the prison. And that as deceased ran, the accused fired another bullet which never caught her and that the deceased threw her gun as she, PW4 and PW5 came closer raising an alarm and telling the accused, Emma to leave the wife.

PW4's testimony was that as the deceased entered the gate, she heard other bullets and thereafter, accused came out with a gun running. And that since the door was open, they saw the deceased lying in a pool of blood. PW4 added that she was with Angella (PW5). This court noted on court record that the witness, PW4 was very steady during cross examination by Counsel for the accused and confirmed that the accused shot the deceased inside the prison. The testimony of PW4 was corroborated in all material particulars by that of PW5, Dipio Angella who was also present and witnessed the events leading to the shooting of the deceased by the accused, first outside (2 bullets) and then other bullets inside. PW5 concluded that when Osege (PW2) came out, they (PW5 and PW4) knew the lady had died.

I now turn to the law. In the case of **Yhefusa K. Mamali versus Uganda, Supreme Court Criminal Appeal No.29 of 1989**, it was held:-

“Under English law there is a broad distinction made where questions of self defence arise. In cases of self defence where no violent felony is attempted, a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury provided he does all that he is able in the circumstances, by retreat or otherwise to break off the fight or avoid assault, he may use such force,

including deadly forces as is reasonable in the circumstances.”

That was also echoed in the case of **Uganda versus Charles Oligo (1973) HCB 54**, quoted by Counsel for the accused. And all that is because **Section 15 of the Penal Code Act** provided that in considering the defence of self defence, the principles of English law shall apply.

In the present case however, and given the consistent and clear testimonies of prosecution witnesses PW2, PW4 and PW5 as summarized herein above, and who were at the scene of crime, it was the accused who put the deceased at gun point. The deceased was also armed but she did not retaliate. She kept her gun down without also aiming or shooting at the accused at all.

The prosecution witnesses were elaborately clear that the deceased ran away from the accused who followed while shooting. As the deceased dropped her gun and entered the gate lodge, that is when the accused fired the third and fourth bullets which killed her. In such circumstances, the life of the accused was not in danger at all, because it was the accused who put the deceased at gun point, chased her while shooting twice and missed and went on to shoot third and fourth time till she fell down and bled to death.

This court in the circumstances finds and holds that the chasing and shooting of the deceased several times by the accused was not in self defence at all. It was in my view deliberate and unlawful. The submissions by Mr. Aggrey Bwire for the accused that it was a gun for a gun does not stand and is hereby rejected as there was no spontaneous shooting by the deceased at the accused at all. Instead it was the accused who in a cruel-some and uncalled for manner shot at his retreating wife four times till

he gravely injured her resulting into instant death. This court therefore finds and holds that the second ingredient of the offence has been proved by the prosecution beyond reasonable doubt.

The third ingredient of the offence is whether the death of the deceased was caused with malice aforethought. Malice aforethought is defined under **Section 191 of the Penal Code Act** to mean;

1. An intention to cause death of any person, whether such person is the one actually killed or not.
2. Knowledge that the act or omission causing death will probably cause death of a person, whether that person is the one killed or not, though such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may be caused.

Malice aforethought is therefore a mental element of the offence of murder which in many cases is difficult to prove by direct evidence. However, it can be inferred from the surrounding circumstances of the offence as was held in **R vs. Tubere (1945) 12 E.A.C.A 63, Akol Patrick & Others versus Uganda (2006) H.C.B (Vol.1)6 and Uganda versus Aggrey Kiyinji & Others Kampala High Court Criminal Session Case No.30 of 2006.**

The circumstances are:-

- a) The weapon used, whether lethal or not.
- b) The part of the body targeted (whether vulnerable or not);
- c) The manner in which the weapon was used (whether repeatedly or not); and

d) The conduct of the assailant before, during and after the attack. (Whether with impunity or not.

In summary, in arriving at a conclusion as to whether malice aforethought has been established, the court must consider the weapon used, the manner in which it was used and the part of the body injured.

In the present case, it is not disputed by either side that the weapon used was a gun, an AK 47. The accused himself conceded that he shot at the deceased with a gun; albeit that it was in self defence which has already been discussed and rejected by this court given the circumstances under which the offence was committed. In the case of **Uganda versus Robert Rwanyakiro (1991) HCB 31** quoted by Learned Resident State attorney, **Byamugisha J.** (as she then was) held:-

“There was no doubt that a gun was a deadly weapon and anyone using it to shoot another would be deemed to have intended to cause the death of the victim.”

I entirely agree with the holding in the above case. I add that in the instant case, the prosecution evidence on record indicates that the accused shot four times. The first two bullets missed and the 3rd and 4th bullets hit the deceased leading to instant death as per medical report. In his defence and the submissions of Counsel for accused, it was stated that the first bullet was intended to scare the deceased and the second bullet was accidental.

The question to be asked by this court is if the first bullet was to scare, and the second was accidental, then why did

the accused continue to shoot at the deceased by the third and fourth bullets if the intention was not to kill the deceased?

And moreover as PW2, PW4 and PW5 testified, after the first bullet, the deceased turned and ran towards the gate while holding a gun which she never used. Why on earth would a man continue shooting at his wife 1, 2, 3 and 4 times even when she was retreating? Even the ordinary person on the streets of Entebbe Municipality. How could he/she perceive such acts of the accused if not intended to kill.

It is the finding and holding of this court in the circumstances that the way the accused used a deadly weapon (gun) against the deceased, and the manner in which the gun was used, shooting 1,2,3 and 4 times without any reply from the deceased, was a clear manifestation of malice aforethought on the part of the accused. The accused's explanation that deceased was also pointing a gun at him and that she fired but the bullets never came out cannot even convince a primary seven pupil in an upcountry primary school of any part of Uganda. In any case it was an assertion which was effectively refuted by the prosecution witnesses and was therefore not borne out in evidence.

The other piece of evidence which clearly brings out malice aforethought on the part of the accused was the part of the body targeted. PW1 told this court that when she examined the dead body, it was shot around the breast. PW2 Osege who witnessed the shooting testified that the accused shot the 3rd and 4th bullets directly at the deceased while the safety catch of the deceased's gun had not been opened.

The submissions by Counsel for the accused that accused shot at the shoulders which was not a fatal part of the body cannot be

accepted by this court. Shooting using a gun on any part of the body is very dangerous particularly the upper part of the body which was targeted by the accused. Why didn't the accused aim at the legs/lower part of the body? One could ask if not the intention to kill. This is where I disagree with the opinion of the gentlemen Assessors that the shooting at the shoulders was to disable the deceased. This is particularly when the same court assessor had in the same opinion blamed the accused for using excessive force.

He stated;

“According to the facts on record, accused used excessive force. This was confirmed by DW2. He testified that the deceased had crocked the gun but did not fire any bullet. But the accused fired 4 bullets of which 2 resulted into death.”

Having found as quoted, it surprised me when the same gentleman Assessor concluded that the accused killed his wife without malice afore thought and advised court to convict accused of manslaughter.

This court cannot agree that there was no manslaughter in the circumstances. This court cannot allow anyone having a gun to test it on a human being as if he was on a hunting spree in Queen Elizabeth National Park or Murchison Falls National Park at Karuma. This court therefore finds and holds that the shooting of the deceased around the breast, or any upper part of the body (vulnerable parts) was indeed another manifestation of malice aforethought.

Lastly, the conduct of the accused before and after the commission of the offence also proved malice aforethought beyond reasonable doubt. PW1, while answering questions from

Assessors told this court that by the time he returned, he found the dead body of Amaite lying in a pool of blood. The accused he added that he had ran away with the killer gun.

PW2 witnessed the shooting by the accused also testified that the accused ran away with the gun immediately. PW4 and PW5 also confirmed that after shooting the deceased from inside, accused came out of the gate with a gun and ran away.

In his defence, the accused purported to cry crocodile tears which tears did not even come out. After realizing that he had shot his wife and she was bleeding profusely, the question is why didn't he give a helping hand to stop the bleeding or call for assistance so that she is rushed to hospital for possible treatment instead, he chose to run away with the killer gun leaving the deceased to die a painful death. Can one conclude in such circumstances that there was anything less than malice aforethought? No in my view, the accused acted with malice aforethought when he shamelessly shot his deceased wife to death and immediately thereafter ran away at the speed of lightening. The accused also pleaded provocation as a defence.

However, the law on provocation was summarised by the Supreme Court in **Sowedi Osire versus Uganda, Supreme Court Criminal Appeal No.28 Of 1989**. The Supreme Court held that for a charge of murder to be reduced to manslaughter on a plea of provocation, the death must have been committed in the heat of passion before there is time for the passion to cool down. In the present case and as the prosecution witnesses stated, the whole episode lasted 30 minutes. So there was no heat of passion in view of the events as they unfolded.

In the premises and in view of what I have outlined, I find and hold that the accused killed the deceased out of malice aforethought.

Finally, this court finds and holds that the action of the accused of keeping the gun which was supposed to be returned to the armory was nothing short of a deliberate, planned and pre-meditated intention to kill the deceased, hence malice aforethought. The gun was left in the counter intentionally. Even the uttering of the words that he was going to kill himself must have been in my view, to confuse Osege. And within no minute, prosecution witnesses testified that he rushed out of the gate lodge to where the deceased was deployed, put her at gun point.

The witnesses, particularly Osege testified that as the deceased turned to ran away as already noted, accused followed her, shot twice but missed then moved at a closer range and hit on the target. Had he shot once, one would be inclined to believe that it was not intentional but not twice, thrice and fourth! The third ingredient of the offence has therefore been proved by the prosecution beyond reasonable doubt.

Turning to the fourth ingredient of the offence, whether it was the accused who killed the deceased, there was overwhelming evidence to that effect. Even from the beginning, the accused himself admitted that he is the one who shot and killed Amaite Erina. That was echoed in his defence as DW1 and even his witness DW2. Facts which are admitted therefore need not be proved.

In any case all the prosecution witnesses have testified that it was the accused who fired all the bullets in their presence or within their hearing and were not in any way contradicted or at all. In the premises, I find and hold that the fourth ingredient of the offence has been proved beyond reasonable doubt.

Having found and held that the prosecution has proved all the ingredients of the offence beyond reasonable doubt, I do hereby convict the accused with the offence of murder C/S 188 and 189 of the Penal Code Act.

Signed by:

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WILSON MASALU MUSENE
JUDGE

15.1.2014;

Accused present

Basutte Cate for the state

Aggrey Bwire for the accused.

Assessors present

Betty Lunkuse, C/C present

Signed **W. M. MUSENE**
JUDGE

Court:

Judgment read out in open court.

Signed **W. M. MUSENE**
JUDGE

M/S. CATE BASUTTE, R/S/A.

There are no previous criminal records. The offence in question is rampant and grave in nature. This is a case of Domestic Violence and in most cases women are the victims. The deceased was a law enforcement officer killed in the performance of her duties. The commission of the offence was premeditated. The deceased died at the hands of her husband, a trained prisons officer meant to protect life. The right to life is inherent and nobody has the right to take it away, considering the manner in which the offence

was committed even after warning, he did not give a helping hand. So I pray for a deterrent sentence.

MR. AGGREY BWIRE IN MITIGATION

Before court is a convict who is a first offender. From the beginning of the case, he did not waste much of court's time as he willingly admitted 2 ingredients of the offence. He is barely 30 years of age. He has 3 children, 2 of which are in court and of very tender age. He is the only surviving parent. The circumstances under which this offence was committed have a chequered History. In sentencing the convict I request that court looks at where the deceased was found dead. I pray for leniency in the circumstances.

Signed **W. M. MUSENE**
JUDGE
15/01/2014

SENTENCE AND REASONS:

This court is at cross road. Counsel for the state has raised serious issues relating to Domestic Violence and the manner in which the offence was committed and the fact that in most cases, women are victims. Whereas this court has to maintain neutral stance as to whether most victims of Domestic Violence are men or women, this court cannot run away from the fact that the victim in this case was a woman. She was indeed a law abiding

citizen on duty and faced a cruel-some death at the hands of the recklessness of the convict.

As already stated, the court is at cross roads because of the mitigating factors raised by Mr. Bwire for convict in mitigation. The issue of children has been raised but the children belong to both convict and the deceased. At such a tender age, they even needed the motherly love and care more than ever before. And the convict cannot go unpunished, whatever the circumstances because court does not want to send wrong signals to the public at large. Everyone is equal before the law and protection of the due process of the law. The due process of the law must not only be followed, but it must be seen to be followed and justice must be seen to be done in all circumstances.

Article 126(1) of the Constitution of Uganda provides that Judicial Power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the law and with values, norms and aspirations of the people. The aspiration of the people of Uganda are a quest for a peaceful society, where law and order reigns and where the safety of people's lives is guaranteed and protected. And that is why the same Constitution provides for sanctity of life.

And no one is allowed to take away one's life unless authorized by law. The courts are therefore mandated to ensure that whoever breaks the law and especially do away with the lives of others like

the convict, using very dangerous and deadly weapons such as the gun are heavily punished.

The courts will not hide their heads under the cover of Human Rights in general to pass lenient sentences to such perpetrators of the most heinous crimes in recent times such as the one committed by the convict in this case. To make matters worse, the convict a trained prisons warder at the expense of the Ugandan tax payer and using the very guns bought by the people of this country, turned the very gun on the people he was trained to guard and protect. Further still, convict used the peoples' gun against his own wife of 3 children and in broad day light.

In my view, such an action was not only barbaric, cruel and inhuman, but it reflected the actions of one of the most dangerous persons in Uganda today.

It is therefore necessary in such circumstances for the courts to come up boldly and decisively handle such high handed criminals with harsh penalties as a way of protecting the population and also to serve as a general lesson for members of the general public not to take the law in their hands.

The aggravating factors in this case was that the convict meticulously planned the murder the whole day, first by keeping the gun with him at the counter when he was supposed to keep it in the armory. The convict further went on to confuse and mislead

his boss by claiming or purporting that he was going to kill himself. Then he went on to put the deceased at gun point and executed her or ruthlessly shot her 4 times, the last 2 bullets sending her to her creator. That was done in a manner typical of firing squads under the past regime of Idi Amin, a regime of murder and terror.

The courts will therefore not sit back and allow perpetrators of such uncivilized and barbaric acts to go unpunished or walk away with a lenient sentence. A harsh penalty is in the circumstances called for.

Taking into account all the circumstances of the offence as court lined and the application of the law, I am left with no option but to sentence the convict to the maximum penalty. Convict is hereby sentenced to suffer death in a manner prescribed by the law.

Signed **W. M. MUSENE**
JUDGE
15/01/2014

Court:

Right of Appeal explained.

Signed by:
WILSON MASALU MUSENE
JUDGE
15/01/2014

