

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
CRIMINAL SESSION CASE NO. 194 OF 2011**

UGANDA

=====PROSECUTION

VERSUS

BONGOMIN KENNEDY=====

ACCUSED

BEFORE: JUSTICE WILSON MASALU MUSENE

JUDGMENT

Domestic violence is one of the greatest social problems in Uganda today. There are 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, Bongmin Kennedy was a husband to the deceased Awachi Doreen.

The brief facts of the case were that on 21/10/2010 at Kirombe, Zone A, Butabika Parish Nakawa Division, the Accused engaged in a serious domestic fight with the deceased, Awachi Doreen for several hours. And that further on 27/10/2010, the accused again fought the deceased seriously, causing her serious injuries. On 28/10/2010, the deceased was taken to a nearby clinic and then referred to Mulago Hospital where she consequently died on 30/10/2010.

When the accused was arraigned in Court, on a charge of murder of Awachi Doreen, he pleaded not guilty. By that plea, the duty was under the law cast

on the prosecution to prove all the essential elements 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 cardinal principle of criminal law has been upheld in a number of cases including **Sekitoleko Vs. R. [1967] E.A. 531**. The same principle has also been entrenched in **Article 28 (3) (a) of the Constitution of Uganda**.

The Prosecution in this case was handled by Mr. Julius Tuhairwe, Principal State Attorney Nakawa, while the Accused was defended by M/S Sylvia Namaweje on State brief.

The essential elements of the offence of murder which the Prosecution is obliged to prove beyond reasonable doubt are:-

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

The above elements were re-stated in the case of **Uganda Vs. Aramanzani Mubiru [1996] HCB. 35**.

In an effort to discharge the burden of proof cast on it by law, the Prosecution called evidence of five witnesses. These were PW1, Akello Proscovia, a senior five student of Crane High School Kitintale, who was staying with the Accused and the late Awachi Doreen, her Aunt, PW2, Nyeko Patrick Sunday, a close relative of the deceased, PW3, Winfred Mutonyi, wife of PW2, PW4, Flavia Labol, a relative of the Accused and PW5, No. 31523, Detective Corporal Oloka, the investigating Officer.

The Accused on the other hand gave evidence on oath as DW1 which was a total denial and called two witnesses, DW2, Agnes Achieng, his daughter and DW3, Biratu Onika Muliketa, a Pathologist. With regard to the first ingredient of the offence, there is no dispute that the deceased, Awach Doreen is dead. All the Prosecution witnesses alluded to the fact of death of the deceased. The Post-mortem report, which confirmed death and the cause of death was admitted in evidence at the beginning of the trial under S.66 of the trial on indictment Act. The Accused in his defence admits that the deceased died. In the circumstances, I find and hold that the Prosecution has proved the first ingredient or element of the offence beyond reasonable doubt.

On the second ingredient of the offence, it is now settled law that in Homicide cases, death is always presumed unlawfully caused unless it was accidentally caused in circumstances which make it excusable. Such circumstances include an act of God, accident or in defence of a person or property. The case of **Akol Patrick and Others Vs Uganda [2006] HCB Vol. 1 page 6 is in point.**

In the present case, the post-mortem report summarized the cause of death as increased intracranial pressure and blunt force trauma. Blunt force trauma was neither accidental nor lawful. PW1, who was living with the deceased at the time narrated to this Court several incidences of assault and/or beatings of the deceased by the Accused, including the fatal incident one Sunday when Accused seriously assaulted the deceased to the point of no talking. The same evidence was closely corroborated by PW3 and PW2. In such circumstances, I find that the death of the deceased was neither natural nor excusable. The deceased died after being assaulted, hence unlawful cause. The Prosecution has in my view proved the 2nd ingredient of the offence beyond reasonable doubt.

The third ingredient is whether whoever killed the deceased had the necessary malice aforethought. Malice aforethought is defined under S.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 not be caused. It is clear from the above definition that malice aforethought is the 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 **RV. Tubere S/O Ochen [1945] E.A.C.A.63.**

The other cases where surrounding circumstances of the offence were considered to determine whether there was malice aforethought or not are **Akol Patrick & Others Vs Uganda**, quoted here in above, and **Uganda Vs Aggrey Kiyingi & 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)
- d) The conduct of the assailant before, during and after the attack (whether with impunity or not).

In the present case, the Prosecution relied on the evidence of PW1, Akello Proscovia who was living with the deceased by the time of her death. PW1 narrated to this Court incidences of assault or beatings of the deceased by

the Accused, notably twisting her neck and slapping the face when demanding for money from the deceased. PW1 testified about another incident when the deceased returned from work in Entebbe and how she was heavily assaulted by the Accused inside the bedroom till she screamed, **“Sunday, Sunday, come and help me. Bongmin wants to kill me.”** PW1 added that Sunday intervened and stopped the beating of deceased by Accused. PW1, who used to breakdown in the dock and cry uncontrollably from time to time added that at around 11:00 p.m. in the night, the Accused again assaulted the deceased till she went to Kirombe to call Sunday with whom they returned and saved the situation.

However, PW1,s testimony was that by the time the deceased came out of the bedroom, she was not able to talk and could not bathe. She added that the deceased had a swollen face; and could hardly eat anything. The testimony of PW1 was corroborated by PW2, Nyeko Patrick Sunday. PW2’s testimony was that on 24/10/2010, when he visited the deceased his aunt, he found when she had gone to Entebbe but she shortly returned. PW2 was with his wife, PW3, Winifred Mutonyi. PW2’s testimony was that no sooner had the deceased entered the bedroom followed by the Accused than he heard cries from deceased that:-

“Sunday help Bongomin is killing me”.

PW2 added that when he entered the bedroom, he found Accused, holding the deceased, squeezing her neck against the wall, and that he stopped Accused. Before I delve into further testimonies of prosecution witnesses, note with concern that it was not the first time the Accused was reportedly squeezing the neck of the deceased. PW1 had talked of an earlier incidence where Accused squeezed the neck of the deceased. This Court’s finding is whether by design or Omission, the constant attacks and assaults of the deceased by Accused, and squeezing of the neck were not actions of an innocent person. There is no doubt that the neck is one of the vulnerable

parts of the body. And squeezing it from time to time can result in Bizarre consequences. No wonder PW1's testimony was that deceased could hardly eat or even bathe after the battering by Accused. And in my view, when an Adult person cries for help that so and so is killing me, in this particular incident, that **"Sunday, Sunday, help Bongomin is killing me"**, it was no joking matter. It meant she was being hurt and feeling pain. And to make matters worse, according to PW1, PW2 and PW3, Accused repeated the assault later on in the night between 11:00 p.m and Mid-night, till PW2 forced the door open after being called from his house by PW1. After being called from his house by PW1. After forcing the door open, and asking Accused if the deceased died as a result of those constant beatings, Accused is reported to have told PW2 that he knew what he was doing and he walked away on PW2. PW2 added that the following morning, the deceased was unable to take drugs as the jaw was completely swollen and broken. PW1 added that she could not open her mouth, corroborating PW1 who had earlier told Court that the deceased was not able to talk. In my view, the circumstances of repeated assault of the deceased by the Accused, moreover on vulnerable parts of the body such as the neck and jaw, to the extent of breaking the said jaw were not matters this Court can take lightly. These were clear manifestations of malice aforethought. And even when the deceased was admitted in Mulago where she consequently died, Accused, according to PW2 did not do anything and did not even visit the deceased at Mulago Hospital, his wife who was in a critical condition. And PW2 added that even after informing Accused, he consequently switched off his phone. In my view, those were circumstances of malice aforethought, particularly when Accused rudely told PW2 that he knew what he was doing. In other words, what can be discerned from such rude remarks is that Accused did not care whether deceased died or not as stated under S.191(2) of the Penal Code Act. And that was indeed malice aforethought. The conduct of the Accused in the premises was not conduct expected of any person by all standards who had a sick wife admitted in a Hospital and on death point.

According to PW2, when he traced Accused through Ojera's phone to inform him that his wife had died, the Accused did not appear aggrieved at all and he shortly again went into hiding. That was not conduct of an innocent person and in the circumstances amounted to malice aforethought. And that was further confirmed by the testimony of PW1 during the rigorous cross-examination by Defence Counsel. She stated:-

"Sometimes she used to confide in me. She would tell me **"Bongmin beats me a lot. One day he will kill me."** Despite emotional breakdown and crying from the dock three or four times, PW1 was steady throughout and never faltered. She withstood the cross-examination and gave straight answers. She was a witness of truth. And her testimony was ably corroborated by PW2, who was equally consistent, and PW3. According to PW3, when she returned to the home of deceased at night after being called by PW1 that mummy was being killed, they found the deceased badly beaten after PW2 had forced the door open.

PW3 testified as follows:-

"The deceased was badly beaten with swollen face and chinks. We administered First Aid to the deceased. The Accused had not even bothered to pour water on her. Blood was coming out of deceased's mouth."

And during cross-examination by defence Counsel, PW3 reiterated that the deceased was brought out into the sitting room when she was in a critical condition. PW4, Flavia Labol who calls Accused uncle on maternal side, also confirmed what other prosecution witnesses had stated. She testified that when the deceased was calling for help from the bedroom, she entered the bedroom with Sunday, (PW2) and they found the Accused squeezing the

neck of the deceased. PW4 added, **“we separated. Then I heard Accused say “if you don’t release the money, I will beat you till you die” thereafter, I went to my home leaving Sunday behind”**

And indeed that was the night Accused assaulted the deceased into a critical condition till she was admitted and died in the Hospital. The post-mortem report summarises it all. The same was signed by Dr. Olwa Francis, a medical Officer and it described the external injuries as left pair bital heamatuma, cervical subcutaneous heamatuma, stiff neck and locked jaws, bruises in the cheeks and forearms. The cause of death was increased intraconial pressure with underlying myfacial vigility and blunt force trauma. Even DW3, Biratu Onika Mulu Geta, a pathologist called as a defence witness testified that the cause of death was assault with a blunt object on the head and that if one is pushed on a rough surface that was assault. DW3 concluded that he was in total agreement with the post-mortem report. In the premises, I find and hold that the circumstances under which the Accused repeatedly assaulted the deceased on vulnerable parts of the body from time to time, and the carefree attitude of the Accused who did not even attend to his deceased wife when she was in a comma at Mulago Hospital were all clear manifestations of malice aforethought.

My conclusion is that the 3rd ingredient of the offence has been proved by the Prosecution beyond reasonable doubt.

The last ingredient is whether it was the Accused who directly or indirectly caused the death of the deceased. The Prosecution relied mainly on the evidence of PW1, PW2, PW3 and PW4. The constant assault and battering of the deceased from time to time was witnessed by PW1 who was all along living with the Accused and deceased. She was living with the Accused and saw it all. PW1 even told this Court that the deceased had confided in her that because the Accused was beating her from time to time, he would one day kill her. The evidence of PW1 was not only consistent and truthful, but was ably corroborated by the testimonies of PW2, PW3 and PW4, and the Post mortem report. And more specifically the evidence with regard to the last heavy assault of the deceased by the Accused which resulted into her admission to Mulago Hospital while in a critical condition where she subsequently passed on. All the Prosecution witnesses PW1, PW2, PW3 and PW4 knew the Accused and so there was no mistaken identity. Even the Accused in his defence stated that he knew the Prosecution witnesses and had no problems with any of them. And in view of their straight forward and consistent testimonies about the events as they unfolded, particularly about the last fateful assault and battery of the deceased by Accused, whereby she sustained a swollen face, broken jaws, twisted and injured neck among other injuries, to the extent that she could hardly eat or talk, this Court finds and holds that they had no motive to tell lies against Accused. They were all witnesses of truth. To crown it all was the testimony of PW5, D/Corporal Benjamin Oloka, the Investigating Officer. His testimony was that from his

investigations, the circumstances were that the cause of death of the deceased was as a result of assault by the Accused. PW5 added that Accused admitted fighting the deceased and that he pushed her and she fell on the floor of the house. And during cross-examination, PW5 stated that his findings revealed a prima facie case of murder. The Accused's defence of denial was therefore diversionary and meant to confuse this Court and divert the course of Justice. This Court found that Accused even lied on oath that he attended to the deceased wife at Mulago Hospital when he was never there and even after being told of her critical condition by PW2, Accused switched off his phone and went into hiding. This Court was not amused when Accused in his defence told this Court that PW1 mistook his playing with deceased for a fight. That was impunity of the highest order.

In the premises, and in view of what I have outlined, I find and hold that the Accused, Bongomin Kennedy was responsible for the death of his wife, Awach Doreen. The Prosecution has therefore proved the fourth ingredient of the offence beyond reasonable doubt.

Having found and held that the Prosecution has proved all the essential elements of the offence beyond reasonable doubt, and as advised by the Assessors, I find the Accused guilty and do hereby convict him with the offence of murder contrary to Section 188 and 189 of the Penal Code Act.

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W. M. MUSENE

JUDGE

13/06/2014

Accused present

Elima Doreen for State

Sylvia Namaweje for Accused

Assessors present

Betty Lunkuse, Court Clerk present

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W. M. MUSENE

JUDGE

Court: Judgment read out in open Court.

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W. M. MUSENE

JUDGE

M/S Elima Doreen:

This is a true case of Domestic violence. Domestic violence is rampant and responsible for breakage of marriages and has resulted into loss of life. It is not justified as flimsy reasons are involved. The causes can be handled in civilized fora. The deceased was a wife to the convict. He chose to unleash terror on someone he should have loved, cared for and protected. His actions were premeditated to get rid of the deceased. The acts were cruel and inhuman. The Constitution under Article 44 prohibits torture, cruel and degrading treatment. There was no just mal-treatment of deceased and should be heavily punished. The convict is and was never remorseful. He behaved with impunity. He does not deserve leniency and should not be at liberty. His actions have had a negative impact on the family of the deceased, including witnesses. So I pray for imprisonment for life.

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W. M. MUSENE

JUDGE

M/S Sylvia Namawejje in mitigation:

I recognize and sympathise with loss of life. Issues of domestic violence are as a result of high emotions and punched on accusations by either side. The Accused was married to deceased for 24 years. What happened is unfortunate. Considering the nature of assault, no weapon was used. The circumstances were what normally happen in homes. Society does not

indicate abnormal and normal situations. I pray that the convict be given an opportunity to live a changed life, and continue being a father of the 3 children.

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W. M. MUSENE

JUDGE

SENTENCE AND REASONS:

Offences of Domestic violence are on the increase, particularly violence against women. There is a lot of Public outcry and so there is need to halt or reduce such instances of gruesome torture and battery of women. God was not at fault to create a woman to live alongside man, not only for purposes of social harmony, but also for purposes of procreation. Domestic violence distorts family values in Society and affects the proper upbringing of children in a home. In the present case, even if the couple did not have a child of their own, they had adopted children who were living in the home. Such children were psychologically tortured and traumatized and will live to hate the convict forever. This could be seen from what happened to PW1, Akello Proscovia who kept on breaking down in the witness stand and crying uncontrollably. What the convict did was very sad and unforgivable. The courts in this country will therefore not shy away from giving such perpetrators of domestic violence very harsh penalties so as to serve as a

general lesson to members of the general public not to take the law into their hands. There has to be respect for and observance of family values in Ugandan Society. Family values mean respect for husband, wife, children and relatives in the context of the African extended family. Everyone has to love the other and live for each other. All has been correctly and elaborately submitted by Ms. Doreen Elima for the State. Counsel for the convict Ms. Sylvia Namawejje has on the other hand submitted that Domestic violence is as a result of high emotions and can be caused by either party. While that may be true, Courts are now discouraging constant battering of wives by their husbands or vice versa, and what is normally referred to as **“normal wear and tear of marriage life”**. There is nothing normal about the brutal assault and battery of one’s spouse. Be that as it may, and in the circumstances of this case, while the convict has children to look after, this Court would rather direct that the Government through Ministry of Labor Gender and Youth assists such children other than giving a light sentence to the Convict whose brutal high handed actions led to the death of deceased. He does not deserve mercy. I therefore do hereby sentence Convict to 30 years imprisonment.

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W. M. MUSENE

JUDGE