

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0157 OF 2014

UGANDA **PROSECUTOR**

5 **VERSUS**

MAWA JOHN **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 The accused in this case is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 2nd day of January 2014 at Ewadromati village in Arua District murdered one Esaburu Florence Draleru. During the preliminary hearing, the evidence of P.W.1: Dr. Ambayo Richard, of Arua Regional Police Clinic was admitted. It was to the effect that he conducted a post mortem examination on 2nd January 2014 of the body of Asabaru
15 Florence Draleru at the scene. The body was lying on the back. There was loam soil around. The clothing was covered by soil. There were weapons, short pieces of wood (cut logs) on the side of the deceased. The superficial appearance of the body, there were multiple injuries, and widespread external marks of violence. The head was grossly normal, the trunk had multiple abrasions and bruises, the limbs had multiple and widespread bruises with a dislocated elbow
20 joint. The cause of death was multiple body injuries resulting from blunt force trauma. The weapons used were pieces of wood and the injuries were consistent with violence. He also examined the accused on P.F.24 on 3rd January of 2014. He was of the approximate age of 32 years. There were no injuries noted. The mental examination was normal.

25 **P.W.2 Marino Arile**, testified that he is the Vice Chairman L.C 1 and a neighbour of the accused with their homes are next to each other. The deceased was the wife of the accused. She died on the night of 2nd February 2014. On that day he was at home when Mawa fought with his wife at 3.00 am and he was surprised when the accused came to him and told him he had beaten his wife and she was down there at his home. The accused wanted him to go and talk to his wife
30 to return home because she had refused to return home. The accused insisted that he should go

with him. He went with him and on arrival he showed him where the victim was. She was lying down unconscious. He decided to call the chairman by phone. The Chairman told him the CID was on their way and that he should remain at the scene. The time was 5.00 am by then. By that time the accused had gone to the police after realising that the wife had died. When the CID
5 arrived they conducted a post mortem examination and prepared a report.

P.W.3, No. 27723 D/CPL Wadrif Sabino, testified that he came to know the accused on 2nd January 2014. On that day at around 7.30 am he was the duty officer and he had gone to check on the men who were on duty. As he arrived at the station he saw a man running towards the
10 police station. He was bare chest putting on a pair of shorts. He thought someone was chasing him. When he reached near the door he branched to the place where the national flag is hoisted. He held the pole on which the flag was and knelt down. He approached the accused and asked what the problem with him was. He replied, "I have killed a person." He repeated "I have killed my wife." He got hold of him and took him to the counter. He asked him what happened. He
15 asked him the name of his wife and place of residence and he opened up a case against him. He opened a file of murder against him and detained him. He then called the CID Arua. He later called the L.C of the village who said he would come and lead them there. They to the village called Ewadromati village. The police from Arua found them at the scene. The deceased was identified as Draleru Florence. They found one of the elders called Marion was around. Shortly
20 the police from Arua arrived with a doctor and they continued with the work. The suspect was collected and taken to Arua.

P.W.4, No. 313528 D/CPL Francis Apidra, testified that he is a Scene of Crime Officer by training and came to know the accused on 2nd January 2014. On that day he received a report
25 from Rhino Camp of a murder which had occurred in Oribo sub-county. He organised a team of detectives and together with Dr. Ambayo Richard proceeded to the scene at Ewadromati Rigbo sub-county. They examined the crime scene and the post mortem was done there. The accused had already reported to Rhino Camp and they picked him on their way and that is how he came to know him. They searched the crime scene and in the process he saw how the accused beat the
30 deceased. He saw the grass which had been clamped down during their struggle and there were

signs of struggle and broken sticks. The body of the deceased was soiled and he photographed the soiled parts, prepared a sketch plan of the area and then recorded his own statement.

P.W.5, D/AIP Emudu Patrick, testified that on 7th January 2014, he received the case papers from
5 District CID Officer Arua, with instructions to record a charge and caution statement of Mawa charged with the offence of murder. The allegation was that he murdered Drateru Florence. On receipt of the papers he called for D/CPL Eyoma Samuel to help me translate because the suspect was not fluent in English and he spoke the language of the suspect, Lugbara. When Eyoma came, he briefed him and asked him to bring the suspect to the office. He went and brought the suspect.
10 They were only three in the office; the suspect, Eyoma and himself. He introduced himself to the suspect and assured him that he should relax. He created a conducive environment. He read the charge to the suspect. He signed against the charge. The interpreter signed and he also signed. He cautioned him and read the words of caution. He signed, the interpreter signed and he also signed. He asked him if he had something to say and he confirmed he did. The accused then
15 freely expressed himself and he wrote the statement. At the end he read it back to him as Eyoma interpreted. The accused then acknowledged by signing. He was recording in English while Eyoma recorded in Lugbara.

In his defence, the accused stated that on 1st January 2014 he was at his home, he has two wives
20 living in different homes. Normally on such days they gather and celebrate the day in the home of the first wife and he runs some business there of selling alcohol. That day they gathered together with the deceased in the home of the first wife. They stayed there up to 9.00 pm and the deceased left the place for her home. The accused remained behind with people who had come to drink alcohol and after some time they all dispersed. The accused started his journey to the
25 home of the second wife, the deceased, at around 2.30 am. As he was entering his compound, he met the L.C of the place Marino Arile. Immediately the accused asked him where he was coming from at that time. He answered that he was from nearby. The accused then entered his home and began calling his wife. He found the door was locked from outside. He then opened the door. He entered the house and I did not find his wife. He then went out and searching for her. He took the
30 direction of the latrine. He found her body on the way to the latrine. She was already dead. He called and touched her and found she was already dead. Immediately he went back and followed

Marino. When he reached his home he found him there. Then he told him that when he was going to his home he met him and now he had found his wife dead, what happened to her? He told him that he did not know. He told him that if he did not know he was proceeding to report to the police. When he was about to leave and go to the police he called him back and told him that
5 he should first sit down and listen to him. He turned back. He said that it was true they had met and if such an incident had happened he should not report to the police. The accused asked him why he should not report to the police. He said the accused should disappear and he would give him transport since the incident would affect him. The accused told him that he could not accept any money from him to run away since he had never been to Kampala or Sudan and he was
10 instead going to report to the police. He said that the accused should tell the police that he do not know who killed his wife. When he reported to the police he told them he had found his wife dead and he did not know who had killed her. The police then detained him.

In his final submissions, the learned Resident State Attorney Mr. Emanuel Pirimba argued that
15 there is a post mortem report and evidence of P.W.1, P.W.2 and P.W.4 to prove the death of the deceased. This element was admitted by the accused in his defence. As to unlawful cause; all homicides are presumed unlawful. There was no justification advanced. It was not accidental nor a suicide. The body had marks consistent with violence. She was assaulted indiscriminately. As to malice aforethought, reliance is based on circumstantial evidence; the weapon and the part of
20 the body attacked. This was a result of violence on the deceased. Scene of crime officer found signs of broken pieces of wood and the body was soiled. There were multiple and widespread external marks of violence. The marks are an indication of intention to kill. The injuries being multiple indicate intent. On participation, the evidence of P.W.2 is to the effect that it is the accused who woke him up. The wife was unconscious. P.W.3 to whom the accused reported and
25 his conduct was self incriminatory. P.W.5 recorded his charge and caution statement. In his defence, the accused implicates the L.C but this should not be believed. It is an afterthought. He did not report death caused by an unknown person but by himself. He prayed that he is convicted as indicted.

30 In his final submissions, defence counsel on state brief, Mr. Oyarmoi Okello argued that the only ingredient he was challenging is that of malice aforethought. At the scene there were several

pieces of broken sticks alleged to have been used in the beating of the deceased. The evidence of the doctor showed multiple injuries but not on the vital parts like the head. Not a single broken piece was brought for the court to see the size of the sticks. Malice cannot be assumed from multiple injuries. It must be proved and cannot be assumed. The charge of murder cannot stand
5 and it can only be manslaughter. In the alternative the charge and caution statement of the accused raised the defence of provocation. When he returned he found the wife was nowhere to be seen. It was a reasonable suspicion by a husband. It does not matter what kind of relationship it was. By conduct they were husband and wife. The provocation reduces it to manslaughter.

10 In this case, the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v. Uganda [1967] EA 531*). By his plea of not guilty, the accused put in issue
15 each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

20 For the accused to be convicted of murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
25 4. That it was the accused who caused the unlawful death.

Death of a human being may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. There is the post mortem report dated 2nd January 2014 prepared by P.W.1 Dr. Ambayo Richard a Medical Officer at Arua Regional Police Clinic, which was admitted during the preliminary
30 hearing and marked as exhibit P.Ex.1. The body was identified to him by a one Ejoma Paul as

that of Esaburu Florence Draleru. P.W.2 Marino Arile, a neighbour and the L.C.I Vice Chairman, saw the body at the scene. P.W.3 No. 27723 D/CPL Wadrif Sabino, one of the first police officers to arrive at the scene found the body lying on the ground. P.W.4 No. 313528 D/CPL Francis Apidra, the Scene of Crime Officer too saw the body at the scene and took
5 photographs of the body (exhibits P. Ex. 3 and 4). In his defence, the accused said he touched and saw the body of his wife at the scene. Defence Counsel did not contest this element. On basis of all that evidence, I am satisfied that it has been proved beyond reasonable doubt that Esaburu Florence Draleru is dead.

As to whether that death was caused by an unlawful act, it is the law that any homicide (the
10 killing of a human being by another, is presumed to have been caused unlawfully unless it was accidental or it was authorised by law. P.W.1 who conducted the autopsy established the cause of death as “multiple body injuries resulting from blunt force trauma.” Exhibit P.Ex.1 dated 2nd January 2014 contains the details of his other findings which include the fact that pieces of wood were found near the body and that the injuries seen on the body were consistent with violence.
15 Photographs of the body taken at the scene reveal these features (exhibits P. Ex. 3 and 4). Defence Counsel did not contest this element. This evidence taken as a whole has proved that this was a homicide. For that reason, since there is nothing to suggest that it was caused lawfully, I am satisfied that Esaburu Florence Draleru’s death was caused unlawfully.

20 Malice aforethought is defined by section 191 of the *Penal Code Act* as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. Malice aforethought is a mental element that is difficult to prove by direct evidence. Courts usually consider weapon used
25 (in this sticks are suspected to have been used) and the manner in which it was applied (multiple injuries inflicted) and the part of the body of the victim that was targeted (all over the body). The ferocity with which the weapon was used can be determined from the impact (the nature of the injuries is not classified or specified in this case). P.W.1 who conducted the autopsy established the cause of death as “multiple body injuries resulting from blunt force trauma.” In his defence,
30 the accused suspects it was P.W.2 responsible but did not offer any explanation for the injuries seen on the body of the deceased.

There is no direct evidence of intention. Intention is based only on circumstantial evidence of the injuries. Defence Counsel contested this element. The intention of the accused being based entirely on circumstantial evidence, in order to find that the accused was actuated by malice aforethought at the time he assaulted his wife, it is necessary that in a case depending exclusively upon circumstantial evidence, one must find before deciding upon conviction that the exculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. I have examined the facts closely and have not found the inference that the accused was actuated by malice aforethought inevitable where the nature of the injuries, their severity and area of the body on which they are concentrated is unknown. It appears to me rather to have been an indiscriminate assault rather than one targeted at causing death. In the circumstances this ingredient of the offence has not been proved beyond reasonable doubt.

Counsel for the accused argued in the alternative, based on the claim made by the accused in his charge and caution statement (exhibits P. Ex. 6A and B), that he was provoked when he found his wife naked returning from an undisclosed place and suspected her of involvement in illicit sex. Firstly, the two exhibits contradict the version that the deceased was found naked. The photographs show that the deceased was wearing a whitish laced blouse and a blue skirt.

The law is that court is required to investigate all the circumstances of the case including any possible defences even though they were not duly raised by the accused for as long as there is some evidence before the court to suggest such a defence. According to section 192 of *The Penal Code Act*, when a person who unlawfully kills another under circumstances which, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his or her passion to cool, he or she commits manslaughter only. Provocation in the legal sense, must have involved an insult or act of a nature capable of causing temporary loss of self control and the reaction must have been in the heat of passion without any lapse of a period sufficient enough to allow the accused to regain his self

control. According to *Sowed Ndosire v. Uganda S. C. Criminal Appeal No. 28 of 1989*, the defence of provocation requires the satisfaction of the following elements;

- i. A wrongful act or insult sufficient to enrage an ordinary person of the class to which the accused belongs;
 - 5 ii. The accused, because of the wrongful act or insult, attained a mental state referred to as a sudden heat of passion,
 - iii. The killing of the victim was sudden with no cooling off; and
 - iv. There was a causal connection between the provocation, the heat of passion, and the killing.
- 10 The wrongful act or insult by the victim should be one that was capable of depriving an ordinary person, such as the accused, of the power of self-control and to induce him to commit an assault of the kind which the accused committed upon the person by whom the act or insult is done or offered. Not every provocation is a defence to have the effect of reducing murder to manslaughter. Under section 193 (1) of the *Penal Code Act*, the standard for judging the
- 15 capability of an act or insult to cause sudden heat of passion is that of an ordinary person. The prosecution did not lead evidence regarding the social status and environment of the accused and the habits and customs of the community to which he belongs. However, the assessors opined that the circumstances constituted provocation. I respectively disagree with that opinion. The test to be applied in order to determine whether homicide would either be murder or manslaughter by
- 20 reason of provocation is whether the provocation was sufficient to deprive a reasonable man of his self-control not whether it was sufficient to deprive a particular person charged with murder of his self-control. This defence is not available to the accused in this case.

25 Lastly, the prosecution had to prove that it is the accused that caused the unlawful death. There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence. The accused denied any participation. He instead implicated P.W.2 as the possible perpetrator of the offence. The accused denied participation in the commission of the offence. He had no duty to prove lack of participation. The burden lay on the prosecution to disprove his defence by adducing evidence which proves that he

30 was the perpetrator of the crime. The prosecution relied on his own confession in the charge and caution statement (exhibit P. Ex. 6A) where he admitted having assaulted the deceased and his conduct as observed by P.W.3 when he reported himself to the police post where he was seen by

holding onto the flag-post crying and saying that he had killed a person. His own admission to P.W.2 that he had assaulted his wife who as a result had refused to return home is additional evidence. I am satisfied that the prosecution has disproved his defence and proved beyond reasonable doubt that it is the accused that killed the deceased.

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All in all, due to the prosecution's failure to prove beyond reasonable doubt that the killing of the deceased was actuated by malice aforethought, the accused is acquitted of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. According to section 87 of *The Trial on Indictments Act*, when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it. In the instant case, the facts establish the offence of manslaughter. In agreement with the joint opinion of the assessors, I accordingly convict the accused for the offence of Manslaughter c/s.187 of the *Penal Code Act*.

15 Delivered at Arua this 27th day of June 2017.

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Stephen Mubiru
Judge
27th June 2017

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28th June 2017
9.07 am
Attendance

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Ms. Mary Ayaru, Court Clerk.
Mr. Emmanuel Pirimba, Resident State Attorney, for the Prosecution.
Mr. Okello Oyarmoi, Counsel for the accused person on state brief is present in court
The accused is present in court.

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SENTENCE AND REASONS FOR SENTENCE

The convict was found guilty of the offence of Manslaughter c/s. 187 and 190 of the *Penal Code Act* after a full trial. In his submissions on sentencing, the learned Resident State attorney prayed for a deterrent sentence on the following grounds; the maximum punishment is life imprisonment under section 190 of *The Penal Code Act*. The act of the accused beating the wife

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indiscriminately was bad. Very many women are dying under similar circumstances. The conduct deserves punishment. He has not been remorseful throughout the trial and he deserves a deterrent punishment to rethink his conduct and send out a message to would be offenders.

5 Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender. He is now 34 years, the bread winner of his family consisting of four children. He has been on remand for three years and twenty days. He is remorseful for his conduct. A long custodial sentence will be bad for his family. He had no intention to cause the death. He deserves a lenient sentence that will enable him re-unite with the family which is now suffering at his
10 home. The convict chose not to say anything in his *allocutus*.

The offence of manslaughter is punishable by the maximum penalty of life imprisonment under section 190 of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of such cases. I do not consider this to be a case falling in the
15 category of the most extreme cases of manslaughter. I have for that reason discounted life imprisonment.

The starting point in the determination of a custodial sentence for offences of manslaughter has been prescribed by Part II (under Sentencing range for manslaughter) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as
20 15 years' imprisonment. Courts are inclined to impose life imprisonment where a deadly weapon was used in committing the offence. In this case, there is no evidence that the convict used such a weapon. I have excluded the sentence of life imprisonment on that ground.

I have taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Livingstone Kakooza v. Uganda, S.C. Crim. Appeal No. 17 of 1993*,
25 where the Supreme Court considered a sentence of 18 years' imprisonment to have been excessive for a convict for the offence of manslaughter who had spent two years on remand. It reduced the sentence to 10 years' imprisonment. In another case of *Ainobushobozi v. Uganda, C.A. Crim. Appeal No. 242 of 2014*, the Court of Appeal considered a sentence of 18 years' imprisonment to have been excessive for a 21 year old convict for the offence of manslaughter
30 who had spent three years on remand prior to his trial and conviction and was remorseful. It

reduced the sentence to 12 years' imprisonment. Finally in the case of *Uganda v. Berustya Steven H.C. Crim. Sessions Case No. 46 of 2001*, where a sentence of 8 years' imprisonment was meted out to a 31 year old man convicted of manslaughter that had spent three years on remand. He hit the deceased with a piece of firewood on the head during a fight. I have considered the
5 aggravating factor in the case before me being that by his assault, the convict caused several injuries that resulted the death to his wife. Gender based violence ought to attract a deterrent sentence. Accordingly, in light of those aggravating factors, I have adopted a starting point of twelve years' imprisonment.

I have considered the fact that the convict is a first offender, a relatively young man at the age of
10 34 years when he committed the offence. I for that reason regard the period of ten (10) years' imprisonment as justified in light of the mitigating factors. In accordance with Article 23 (8) of the Constitution and Regulation 15 (2) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, to the effect that the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into
15 account, I observe that the convict was charged on 10th January 2014 and been in custody since then. I hereby take into account and set off a period of three years and five months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of six (6) years and seven (7) months, to be served starting from today.

The convict is advised that he has a right of appeal against both conviction and sentence within a
20 period of fourteen days.

Dated at Arua this 28th day of June, 2017.

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Stephen Mubiru
Judge.
28th June, 2017.

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