THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL SESSIONS CASE No. 0030 OF 2014

UGANDA …… PROSECUTOR

VERSUS

ABIKU JAMES …… ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

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 27th day of May 2013 at Odroko Trading Centre in Arua District murdered one Anguzu Simon.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the on the night of 27th May 2013, the deceased went to the accused's bar at Odroko Trading Centre in the company of his brother P.W.3 Asiku Julius. A brawl erupted between the deceased and his said brother which prompted the accused to push both of them out of the bar. The brawl continued from outside the bar and soon the accused joined in while armed with a knife. In the process he stabbed the deceased with the knife on the left side of the stomach. The deceased later returned home bleeding. The following morning the incident was reported to Ebia Police Post and he was referred to Ebia Health Centre. He was referred further to Arua Regional Referral Hospital from where he died on 30th May 2013. The accused handed himself over to the police, the knife was recovered from his shop and he was indicted. In his defence, the accused denied any participation in the brawl. He claimed that he stopped at pushing the deceased out of his bar and that it is the deceased who came with the knife and went away with it when he left the bar / shop.

Since the accused in this case pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against him 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*). The

accused does not have any obligation to prove his innocence. By his plea of not guilty, the accused put in issue 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 before it can secure his conviction. 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*).

For the accused to be convicted of Aggravated Defilement, 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
4. That it was the accused who caused the unlawful death.

Death 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. In the instant case the prosecution adduced a post mortem report dated 31st May 2013, prepared by Dr. Ambayo Richard, a Police Surgeon of Arua Regional Police Clinic, presented by P.W.7 SSP Dr. Madrama Charles (a Police Surgeon) and marked as exhibit P.Ex.6. The body was identified to him by P.W.3 Asiku Julius, a younger brother of the deceased, as that of Anguzu Simon. P.W.3 (Asiku Julius), a brother of the deceased, saw the body when it was handed over to the family at the hospital mortuary and he attended the burial. P.W.6 No. 313538 Francis Apidra, took photographs of the body before and during the post mortem examination. The photographs were tendered and marked as exhibits P. Ex.4 for the entry wound and P. Ex.5 after the body was opened. In his defence, the accused did not refute this element. Defence Counsel did not contest this element in his final submissions. In agreement with the assessors, I find that on basis of that evidence, the prosecution has proved beyond reasonable doubt that Anguzu Simon, died on 30th May 2013.

The prosecution had to prove further that the death of Anguzu Simon was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to have been

caused unlawfully unless it was accidental or it was authorized by law (see *R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*). P.W.2 Phillian Anguyi, a Clinical Officer at Aroi Health Centre, examined the deceased before his death on P.F 3A dated 28th May 2013 which was admitted during the preliminary hearing and marked as exhibit P.Ex.1. He found that the deceased had a cut wound on the left lumbar region measuring 3 cm x 3cm deep. He found the wound to be fresh, he opined that it was caused by a sharp object and classified it as dangerous harm. The deceased was in pain and had difficulty in walking and standing straight up. His shirt was stained with blood on the left side. The post mortem examination done by P.W.1 Dr. Ambayo Richard as recorded in exhibit P.Ex.6 dated 31st May 2013 indicates the cause of death as "Peritonitis following a penetrating abdominal injury resulting from an assault." His other findings include a "stab defect (wound) right lateral mid-abdomen widest in the middle and tapering at the end (oval shaped).....stab defect (penetrating injury) 2 x 0.5 cm right lateral mid-abdomen wound track 1.5 cm through the wall and penetrating anterior lateral ascending colon. Matted viscera with fibrous covering with serious peritoneal fluid." P.W.3 Asiku Julius testified that the injury was inflicted by stabbing. P.W.4 Onziru Celina witnessed the scuffle that preceded the stabbing and heard he deceased cry out that he had been stabbed. The knife was recovered and its photograph exhibited as P. Ex. 3. The shape of the wound as seen in exhibit P. Ex.4 appears to correspond to the shape of the knife.

Considering the evidence relating to causation as a whole, it appears that the immediate cause of death was not the stab wound but rather a resultant infection, Peritonitis, was the proximate cause. P.W.7 defined Peritonitis as is an inflammation of the peritoneum, the thin tissue that lines the inner wall of the abdomen and covers most of the abdominal organs. It resulted from infection due to perforation of the intestinal tract, the lateral ascending colon, by letting micro-organisms into the peritoneal cavity. In offences such as this, there may be a degree of remoteness between the act or omission of an accused and the result which is alleged to constitute an offence. Where the eventual result may be the product of additional factors which are more directly connected than is the conduct of the accused, the function of the law of causation is to identify the conditions under which the result may nevertheless be attributed to the accused. An intervening cause will break the chain of causation if it is independent of the acts of the accused and so potent in causing death.

For example in *Gichunge v. Republic [1972] 1 EA 546*, during January 1971, the appellant stabbed the deceased in the chest causing a collapse of the left lung. The deceased was on 22nd January discharged from hospital, but was readmitted a week later and on 7th February he died of pneumonia and tetanus. The doctor's report as to cause of death was admitted under the equivalent of our section 30 of *The Evidence Act* without the doctor being called as he had left the country and the statement had been made in the discharge of professional duty. It read "death was due to pneumonia and tetanus following a stabbing injury to the chest". On this evidence it was found that the appellant caused the deceased man's death and he was convicted of murder. On appeal, it was held that in view of the possibility that death had been caused by an intervening circumstance, it had not been proved that death was caused by the appellant. The appellate court opined;

> So far as this statement is considered as an expression of fact, it is correct. The pneumonia and tetanus followed, in point of time, the stabbing. But there is absolutely no evidence, anywhere in the record, that the pneumonia and tetanus were a direct result and consequence of the stabbing. It is most likely that they were, but we cannot exclude the possibility that, had he been cross-examined, Dr. Knights might have conceded the possibility that the pneumonia and tetanus supervened independently of the stabbing, in which case the appellant would not be responsible for the death.

Similarly in *R v. Jordan [1956] 40 Cr App Rep 152*, the appellant stabbed the victim, Beaumont, in the abdomen. Beaumont died eight days later. The stab wound had penetrated the intestine in two places but, by the time of death, both injuries had mainly healed. In the meantime, the medical staff administered an antibiotic, Terramycin, to Beaumont with a view to preventing infection. Beaumont's intolerance to the drug was discovered after the initial doses, at which time administration of the drug was stopped; however, another doctor ordered its resumption the following day. Evidence of two doctors called by the appellant was to the effect that the treatment of the patient in this way was "palpably wrong", as was the "intravenous introduction of wholly abnormal quantities of liquid", which led to pulmonary oedema then broncho-pneumonia, from which Beaumont died. The Court of Criminal Appeal drew a distinction between normal treatment and "palpably wrong" treatment, and accepted as correct the position that normal treatment causing death will not negate causation on the part of the person inflicting the original injury. Hallett J said:

> It is sufficient to point out here that this was not normal treatment. Not only one feature, but two separate and independent features, of treatment were, in the opinion of the doctors, palpably wrong and these produced the symptoms discovered at the post-mortem examination which were the direct and immediate cause of death, namely, the pneumonia resulting from the condition of oedema which was found.

On that basis, the Court was of the opinion that, if such evidence had been before the jury, the jury would have felt unable to be satisfied that the death was caused by the stab wound. In other words, Jordan's act did not cause Beaumont's death. From the two decisions it is clear that attribution of causal responsibility is a preliminary step towards the eventual attribution of criminal culpability to the accused. The court may use either the natural consequences test, the substantial cause test, or both. An accused will be held responsible for the final outcome that constitutes the offence if it is the natural result of what the accused said or did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he or she said or did. An accused will also be held responsible for the final outcome is a substantial and operating result of what the accused said or did, but not otherwise. If the subsequent event is so overwhelming as to make the act of the accused merely part of the history, a *novus actus interveniens*, the chain of causation will have been broken.

In the instant case, the deceased died two days after he was stabbed. During the cross-examination of P.W.7 SSP Dr. Madrama Charles, it was suggested that Peritonitis could have been caused by infection of the wound from an unhygienic environment during the two days following the stabbing. In his final submissions, defence counsel argued that had the deceased received immediate emergency treatment, his life would have been saved and that the immediate cause of death, Peritonitis, was possibly the result of an infection not associated with the stabbing.

In a case with more or less similar facts, *R v. Smith [1959] 2 QB 35,* the appellant was convicted of murder. One of the grounds upon which he appealed his conviction was that the jury had been misdirected on causation. The appellant had stabbed a fellow soldier, Creed, with a bayonet, causing one wound in the arm and one in the back. In respect of the latter wound, the bayonet had pierced the lung and caused a haemorrhage. Following the stabbing, another soldier

attempted to carry Creed to the medical station, but on the way dropped him twice. At the medical station, staff were trying to deal with a number of other cases, including two other serious stabbings. They did not appreciate the seriousness of Creed's injuries. He received some treatment, including oxygen and artificial respiration, which in the light of the piercing to the lung, turned out to be 'thoroughly bad' treatment. He died approximately two hours after the original stabbing. There was evidence that had Creed received immediate and different treatment he might not have died, and indeed that his chances of surviving were as high as 75 per cent. The case was decided on the principle that;

> If at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound

In contrast, in *People v. Lewis 57 Pac 470 (1899) (Cal SC*), the appellant from a manslaughter conviction had shot the deceased in the abdomen. The deceased, knowing that the wound was fatal, had then self-inflicted another fatal wound by cutting his throat with a knife. The argument on the appeal was that this was a case of suicide not homicide. The court played with the idea that the relationship between the two wounds might sustain the causal chain, even if the knife wound could be isolated as the operative cause of death. It concluded, however, that it was unnecessary to decide this, since the two wounds worked together in producing death. Hence, even if the second wound had been inflicted by a third party, the appellant would still have caused the death along with the third party.

Under the substantial cause test used in both cases above, the chain of causation is not broken unless the act of the accused is no longer a substantial and operating cause of death. That is, it is only if the subsequent event is so overwhelming as to make the initial wound "merely part of the history," that the chain of causation will be held to be broken. In other words, if the proximate cause is not independent of the accused then he or she is responsible for it, and if it is not potent in causing death, then it will not be so overwhelming as to make the original wound merely part of the history.

In the Australian case of *R v. Evans and Gardiner (No 2) [1976] VR 523*, the two appellants stabbed a fellow prisoner, Hamilton, in the stomach. The injury was inflicted in April 1974 and, after a bowel resection operation, Hamilton resumed normal activities, participating in sports activities at Christmas that year. On 15th March 1975 Hamilton became unwell, and he died on 23th March. The cause of death was a stricture in the bowel at the site of the resection operation, which is not uncommon. It was open to the jury at trial to find that the doctors should have diagnosed the condition and treated it. The Full Court of the Supreme Court of Victoria applied *R v. Smith [1959] 2 QB 3* and held that the real issue for the jury was whether the blockage of the bowel was due to the stabbing. The Court was of the view that there was sufficient medical evidence for the jury to support such a finding. It noted that there were features of the case that made it unusual, namely, that the stab wound was initially treated immediately and in a skilful way, and that the wound had "healed" and the victim had "recovered." However, it is apparent that these features of the case were not seen by the Court as being sufficiently "unusual." Both Evans and Gardiner were convicted of manslaughter.

Lastly in *Cheshire v R. [1991] 3 All ER 670*, during early December 1987, the appellant shot the victim in the leg and stomach, causing serious injuries. The victim was operated on and placed in intensive care. While being treated in hospital, he developed respiratory problems and a tracheotomy tube was placed in his windpipe. The victim then developed several infections and it was not until early February 1988 that his condition began to improve. However, by 8th February, he was again having difficulty breathing and his condition thereafter deteriorated. He died early on 15th February. A post-mortem examination revealed that the victim had suffered from a rare complication of the tracheotomy, a narrowing of the windpipe to the extent that it caused asphyxiation. The pathologist who conducted the post-mortem gave evidence that the immediate cause of death was cardio-respiratory arrest due to a condition which was produced as a result of treatment to provide an artificial airway in the treatment of gunshot wounds of the abdomen and leg. The defence called its own medical witness to give evidence that, by 8th February, the wounds of the thigh and abdomen no longer threatened the life of the deceased and his chances of survival were good, which would seem consistent with the fact that the victim had shown some improvement. But, according to the Court, precedent established that the chain of causation will be broken by medical treatment only in "the most extraordinary and unusual

case." Ultimately, the Court concluded that, even if more experienced doctors had detected the complication in sufficient time to prevent death, the complication was a direct consequence of the appellant's acts, which remained a significant cause of his death:

> Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the accused unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.

Similarly in the instant case, I find that even with the remote possibility that the condition of the deceased could have been worsened by unhygienic conditions he may have been exposed to during the two days following the stabbing and the fact that had he received proper emergency treatment his life could have been saved, I have not found either to have been so overwhelming as to make the initial wound inflicted on the deceased as merely part of the history so as to constitute a break in the chain of causation of his death. Although in itself it was so potent in causing the death, Peritonitis was not so independent of the stabbing as to constitute a *novus actus interveniens*, that broke the chain of causation. I instead find that the immediate cause of death, Peritonitis, could reasonably have been foreseen as the consequence of the stabbing and as such the stabbing was a substantial and operating cause of the resultant death. Not having found any lawful justification for the act of stabbing as described by the witnesses, and in disagreement with the assessors, I find that the prosecution has proved beyond reasonable doubt Anguzu Simon's death was caused unlawfully.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice aforethought. 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. This may be deduced from circumstantial evidence (see *R v. Tubere s/o Ochen (1945) 12 EACA 63*).

Malice aforethought being a mental element is difficult to prove by direct evidence. The accused stated that he did not know what happened after pushing the deceased and P.W.3 out of his shop. There is no direct evidence of intention. Intention is based only on circumstantial evidence of the

injury and the circumstances in which it was inflicted. Courts usually consider first; the nature of the weapon used. In this case a knife was used. From its description, and from observing its photograph when it was exhibited in court as P. Ex. 3, considering the definition of a deadly weapon in section 286 (3) of *The Penal Code Act* as including an instrument made or adapted stabbing or cutting, the court to finds that the weapon used in stabbing the deceased was a deadly one.

The court also considers the manner in which it was used. In this case it was used by stabbing the deceased inflicting a penetrating wound on the stomach. The court further considers the part of the body of the victim that was targeted. In this case it was the side of the torso, which is a delicate and vulnerable part of the body considering that a number of the vital organs are located inside that region of the body. The ferocity with which the weapon was used can be determined from the impact. P.W.1 who conducted the autopsy found a "stab defect (wound) right lateral mid-abdomen widest in the middle and tapering at the end (oval shaped).....stab defect (penetrating injury) 2 x 0.5 cm right lateral mid-abdomen wound track 1.5 cm through the wall and penetrating anterior lateral ascending colon. Matted viscera with fibrous covering with serious peritoneal fluid."

Although the weapon used was deadly and the wound was inflicted on a delicate part of the body, the nature of the wound does not readily support an inference of malice aforethought. From its appearance as seen in exhibit P. Ex. 3, the knife had a blade approximately six inches long. The depth of penetration of the stab wound was determined by P.W.1 to have been only 1.5 cm. This is more or less the tip of the blade. The depth to which the knife was plunged is not consistent with an intention to kill considering the location of the wound, to the left side towards the back. By the nature of that location, it most improbable that a deeper depth was not possibly achieved by any defensive action on the part of the deceased. It is a wound consistent with an injury inflicted in the fray of the scuffle by a person armed with a knife but without the corresponding intention to inflict a fatal injury. No wonder death did not result from bleeding but rather a consequential infection.

Although the accused did not offer any evidence on this element, the facts disclose that there was a scuffle during which the deceased was hurt. The law is that the 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 (see *Okello Okidi v. Uganda, S. C. Criminal Appeal No. 3 of 1995*).

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. 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. Under section 193 (1) of the *Penal Code Act*, the standard for judging the capability of an act or insult to cause sudden heat of passion is that of an ordinary person. Any individual idiosyncrasy, for instance such as the accused being a person who is more readily provoked to passion than the ordinary person, is of no avail. The facts relied upon as provocation though need not be strictly proved so long as there is evidence to raise a reasonable probability that they exist. The onus is on the prosecution to prove beyond reasonable doubt that provocation does not apply. There is no burden on the accused to satisfy court that he was provoked.

The court must determine whether there is evidence that could raise a reasonable doubt about whether the accused was faced with a wrongful act or insult sufficient to deprive an ordinary person of self-control. To determine how the "ordinary" person would react to a particular insult, it is necessary to take the relevant context and circumstances into account, including the history and background of any relationship between the victim and the accused. I have not found evidence of any act or insult by the deceased that was capable of having deprived the accused of self control during that scuffle. This defence is not available to him.

The other possible defence suggested by the facts is that of self defence. The defence of self defence derives from section 15 of *The Penal Code Act*. Lawful self-defence exists when (1) the

accused reasonably believes that he or she is in imminent danger of an attack which causes reasonable apprehension of death or grievous hurt; (2) the accused reasonably believes that the immediate use of force is necessary to defend against that danger, and (3) the accused uses no more force than is reasonably necessary to defend against that danger. In no case does it justify the inflicting of more harm than it is necessary to inflict for the purpose of defence. It is accepted proposition of law that a person cannot avail himself of the plea of self-defence in a case of homicide when he was himself the aggressor and wilfully brought on hint without legal excuse, the necessity of killing. An accused person raising this defence is not expected to prove, beyond reasonable doubt, the facts alleged to constitute the defence. Once some evidence is adduced as to make the defence available to the accused, it is up to the prosecution to disprove it. The defence succeeds if it raises some reasonable doubt in the mind of the court as to whether there is a right of self defence.

Giving the accused the benefit of the doubt and taking the facts from the perspective as narrated by him in his defence that he saw the deceased armed with a knife during the scuffle with his brother P.W.3 and that he intervened only with the intention of disarming him, the circumstances do not suggest that the accused reasonably believed that he was in imminent danger of an attack which caused reasonable apprehension of death or grievous hurt. There is nothing to suggest that the accused reasonably believed that the immediate use of force was necessary to defend himself against that danger. He did not demonstrate that he was prepared to temporise and disengage and perhaps to make some physical withdrawal which is a necessary feature of the justification of self defence (see *Selemani v. Republic [1963] E.A., at p. 446*). The situation that existed right before the confrontation as explained by the accused is not one where it can be said that he was faced with such a danger that he could not show his unwillingness to fight. Lastly, the accused did not show that he used no more force than was reasonably necessary to defend against that danger. Obviously the accused cannot be expected to weigh in "golden scales" and use only such force as is exactly sufficient to ward off a particular danger, but in the circumstances of this case, I do not consider stabbing the deceased at the abdomen to have been force than was reasonably necessary to defend himself against any danger posed by the deceased. It was clearly excessive force. Thus, I am satisfied that in stabbing the deceased, the accused exceeded his right of self defence. This defence too is not available to him.

On basis of the available evidence considered as a whole, in agreement with the assessors, I find that although a deadly weapon (a knife) was used on a vulnerable part of the body (the left side of the torso), inflicting such a degree of injury that caused a wound through the wall and penetrating anterior lateral ascending colon, resulting in Peritonitis and eventual death, the prosecution failed to prove an intention to kill. Malice aforethought cannot be inferred readily from the circumstance in which the injury was inflicted. Consequently, in agreement with the assessors, I find that the prosecution has failed to prove beyond reasonable doubt that Anguzu Simon's death was caused with malice aforethought.

Lastly, 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. In his defence, the accused only denied participation. He said that it is the deceased who came with the knife and went away with it when he left the bar / shop. The accused does not deny being at the scene he only denied having stabbed the deceased. The accused was examined on 31st May 2013 by P.W.1 Dr. Ambayo Richard and in the admitted evidence, P. Ex. 2, the doctor found "bruises on the face and nose" which he classified as "abrasion wounds; fore face 3 x 0.5 cm, nasal bridge 4 x 0.5 cm and left nasal opening 1 cm long." These wounds are consistent with his involvement in a scuffle as witnessed by P.W.5 Afedra Manase. It is this witness who during that scuffle heard the deceased scream, "you have stabbed me. You have stabbed me." He also the following day witnessed the accused bring out the murder weapon out of the shop. P.W.4 Onziru Celina as well heard the deceased scream that the accused had stabbed him.

The law applicable to dying declarations is section 30 of *The Evidence Act*. It is a statement made by a person who believes he is about to die in reference to the manner in which he or she sustained the injuries of which he or she is dying, or other immediate cause of his or her death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them. Dying declarations however, must always be received with caution, because the test of cross examination may be wanting and particulars of violence may have occurred circumstances of confusion and surprise. Although corroboration of such statements is not necessary as a matter of law, judicial practice requires that corroboration must always be sought for (see *Okale v. Republic [1965] E.A 555* and

Tuwamoi v. Uganda [1967] E.A.84). In the instant case, I find that the deceased knew the accused before his death. He was assaulted from the vicinity of the accused's bar after the accused had pushed him out. The accused was in close proximity since they were engaged in a scuffle with him. The scuffle took some prolonged time. This provided ample opportunity for the deceased to see and recognise his assailant. It was witnessed by P.W.5 Afedra Manase. I find that the dying declaration is amply corroborated and coupled with the eye-witness account of P.W.5, the defence of the accused has been effectively disproved. With the defence disproved, there is no doubt in my mind that it is the accused who stabbed the deceased. In agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt.

If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the accused, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the accused is entitled to an acquittal (see *Woolmington v. Director of Public Prosecutions, [1935] AC 462*). Culpable homicide is not murder if the offender was not actuated by malice aforethought. For that reason, the prosecution having failed to prove beyond reasonable doubt that the accused killed the deceased with malice aforethought. The accused is accordingly acquitted of the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

However, 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 (see also *Uganda v. Leo Mubyazita and two others [1972] HCB 170; Paipai Aribu v. Uganda [1964] 1 EA 524* and *Republic v. Cheya and another [1973] 1 EA 500*). The minor offence sought to be entered must belong to the same category with the major offence. The considerations of what constitutes a minor and cognate offence were set out in *Ali Mohamed Hassani Mpanda v. Republic [1963] 1 EA 294*, where the appellant was charged together with others with obstructing police officers in the due execution of their duty contrary to s. 243 (b) of *The Penal Code Act.* The magistrate found the appellant not guilty of the offence charged but convicted him of the minor offence of assault occasioning actual bodily harm, contrary to s.241 of *The Penal Code Act*. On appeal it was considered whether the magistrate had power to substitute a conviction of the lesser offence

and whether that offence must be cognate with the major offence charged. The High Court of Tanganyika held that;

> s. 181 of *The Criminal Procedure Code* (similar to section 87 of *The Trial on Indictments Act, Cap 16*) can only be applied where the minor offence is arrived at by a process of subtraction from the major charge, and where the circumstance embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted.

Section 87 of *The Trial on Indictments Act* envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence. In the instant case, the only distinction between the offence of Murder c/s 188 and 189 of the *Penal Code Act* and Manslaughter c/s 187 and 190 of *The Penal Code Act,* is that the former requires proof of malice aforethought which the latter does not. Therefore by a process of subtraction, the offence of Manslaughter c/s 187 and 190 of *The Penal Code Act* is minor and cognate to that of Murder c/s 188 and 189 of the *Penal Code Act,* and a person indicted with the latter offence and facts are proved which reduce it to the former, he or she may be convicted of the minor offence although he or she was not indicted with it. The circumstances embodied in the major indictment necessarily and according to the definition of the offence imputed by that indictment constitute the minor offence too. The indictment under sections 188 and 189 of *The Penal Code Act* gave the accused notice of all the circumstances constituting the offence under sections 187 and 190 of *The Penal Code Act* for which he can be convicted.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence of Manslaughter c/s 187 and 190 of *The Penal Code Act* beyond reasonable doubt and I hereby find the accused guilty and convict him for the offence of Manslaughter c/s 187 and 190 of *The Penal Code Act*.

Dated at Arua this 3rd day of August, 2017.

……..
Stephen Mubiru
Judge.
3rd August 2017

4th August 2017
10.26 am
Attendance

Ms. Sharon Ngayiyo, Court Clerk.
Mr. Emmanuel Pirimba Resident State Attorney, for the Prosecution.
Mr. Oyarmoi Okello, Counsel for the accused person on state brief is present in court
The accused is present in court.
Both Assessors are in court

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 her submissions on sentencing, the learned Senior Resident Resident State attorney prayed for a deterrent sentence on the following grounds; the maximum penalty is life imprisonment. The deceased lost his life under unfortunate circumstances. If the convict had acted more responsibly the death would not have occurred. The deceased was a young man.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender. He has no previous record. He is 26 years old with the most productive years ahead of him. He never had the intention to take the life. He has expressed the willingness to reconcile. He has spent 3 years and 2 months on remand. He was married and was a father. The maximum punishment is life imprisonment but under Part II of the Sentencing guidelines, the sentencing range is 3 years to life. The court is implored to be lenient. In his *allocutus,* the convict stated that he suffers from hernia. His arm broke and it was not cemented well and he cannot do heavy work. He has been in prison for four years and two months. His family is now suffering like refugees. He prayed for lenience to bring back his family together. The relatives of the deceased burnt ten houses in his home following the incident. The two children he had are suffering. He needs to take care of them. He prayed that he is released to do so. He prayed for mercy to be released so that he reconciles the two clans. The time he was in prison, the relatives of the deceased came to him and proposed to settle the issue. It is the reason he attempted to plea bargain but the state could not amend the indictment to manslaughter.

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 category of the most extreme cases of manslaughter. I have for that reason discounted life imprisonment.

At sentencing, the court should look beyond the cognitive dimensions of the convict's culpability and should consider the affective and volitional dimension as well. It may as a result consider extenuating circumstances, which are; those factors reflecting on the moral blameworthiness, as opposed to the legal culpability of the convict. It is for that reason that the principle of proportionality operates to prohibit punishment that exceeds the seriousness of the offending behaviour for which the offender is being sentenced. It requires that the punishment must fit both the crime and the offender and operates as a restraint on excessive punishment as well as a prohibition against punishment that is too lenient. The principle of parsimony on the other hand requires that the court should select the least severe sentencing option available to achieve the purpose or purposes of sentencing for which the sentence is imposed in the particular case before the court.

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 15 years' imprisonment. Courts are inclined to impose life imprisonment where a deadly weapon was used in committing the offence. In this case, although the convict used a kitchen knife to assault the deceased, the circumstances were extenuating and 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*, 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 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 aggravating factors in the case before me and in light of those aggravating factors, I have adopted a starting point of five years' imprisonment.

The court had the opportunity to observe the convict in the manner he went about his defence to the indictment as an indication of the degree of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of the sanctity of life manifested by him. He came across as a person who deeply regrets the result of his actions. He made an intimation of the desire to plead guilty only that he it was not clear to the prosecution at the time that there were circumstances capable of reducing the indictment to one of Manslaughter. I have considered the fact that the convict is a first offender, a young man at the age of 26 years. In light of the mitigating factors, the proposed term ought to be reduced to a period of four (4) years' imprisonment. 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 account, I observe that the convict has been in custody since May 2013, a period of four years and two months. Having taken into account and set off that period, I therefore sentence him to "time served" and he should be set free upon the rising of this court unless he is being held for other lawful reason.

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

Dated at Arua this 4th day of August, 2017.

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Stephen Mubiru
Judge.
4th August, 2017