

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0152 OF 2016

UGANDA **PROSECUTOR**
VERSUS
PICHO BERNARD **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is charged 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 September 2012 at Lee village in Nebbi District murdered one Ocircan David.

The prosecution case is that the deceased borrowed shs. 500/= from the accused and pledged his shirt to him as security. Sometime after midnight on 27th September 2012 while on their way home from watching a video at a friend's home, a quarrel erupted between the deceased and the accused. The accused then slit the deceased's neck with a knife. The cut was so vicious that the handle broke off the blade which he left stuck in the throat of the deceased and fled to his home leaving a trail of blood on the grass along the path leading to his home. When he arrived home, he told his wife to flee back to her parent's home for he had done something bad but did not tell her what he had done. The accused later fled to the home of his paternal uncle. Early in the morning, some women who were proceeding to the well stumbled upon the body of the deceased. They raised an alarm and when the villagers responded, the body was recognised as that of Ocircan David. The police was notified and when they followed the trail of blood it led them to the home of the accused where they found blood smears on the door jamb and knob. There was no one at home. When the house was searched, blood-stained clothes were found and exhibited. Relatives of the deceased became enraged and attacked the home of the accused's paternal uncle killing him and burning down all the houses in the process including those of the accused. The accused fled and reported to a police station from where he was charged.

In his defence during the trial, he said death of the deceased dies accidentally during the fight when the deceased fell down onto the knife which pierced his neck. He said the fight broke out when the deceased suddenly flashed a knife demanding a loan from him with menaces. He fought back in self defence and it is during the fight that the accident occurred. At the conclusion of the trial the State Attorney Mr. Emmanuel Pirimba submitted that the accused should be convicted since the prosecution had proved all the ingredients of the offence beyond reasonable doubt. Defence counsel on state brief Ms. Wifred Adukule in response argued that it was only the element of malice aforethought that was contested. The deceased had died accidentally as the accused exercised his right to self defence. He should therefore be acquitted. In their joint opinion, the assessors advised the court to convict the accused as indicted since his defence was unbelievable.

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 each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove the ingredients of the offence 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 are innocent, (see *Miller Vs Minister of Pensions [1947] 2 ALL ER 372*).

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
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. In this case, there is a post mortem report prepared by P.W.5 the Senior Clinical Officer at Nebbi

Hospital Mr. Opio Nicholas Pitua which was exhibited as P.Ex.2 dated 28th September 2012. The body was identified to him by a one Wokorach C. Paul as that of Ocircan David. It is corroborated by the evidence P.W.3 Adimola Onencan the L.C.1 General Secretary who saw the body at the scene and identified it as that of the deceased. P.W.4 Alirach Paul, the father of the deceased saw the body of his deceased son and attended his burial. P.W.7 AIP Tela Isaac one of the first police officers to arrive at the scene saw the body the deceased and called for reinforcement. P.W.6 D/AIP Chorom Kennedy one of the police officers called to the scene saw the body the deceased and arranged for its post mortem. The accused, Picho Benard admitted that the deceased died in his presence at the scene during a fight that broke out between the two of them. Defence Counsel did not contest this element. Considering the available evidence on this element in its entirety and in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that Ocircan David is dead.

The prosecution is further required to prove that the death was unlawful. 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. In this regard, P.W.5 the Senior Clinical Officer at Nebbi Hospital Mr. Opio Nicholas Pitua who conducted the autopsy established the cause of death as “Severe anaemic haemorrhage sustained during assault.” Exhibit P.Ex.2 dated 28th September 2012 contains the details of his other findings which include “deep cut wound on the left zygotic region, cut wound on the neck and throat, multiple cut wounds on the left shoulder, right biceps muscle, left clavicle, right ulna.” In his defence, the accused stated the injuries were inflicted as he defended himself from an attack by the deceased who was holding a knife. In the process the deceased fell onto the knife accidentally. The accused demonstrated to court the manner in which he held the deceased at the time both fell down. His demonstration showed he held the deceased from the back but to the right of the deceased. The deceased was holding the knife in his right hand above the shoulder, more to the right side of the head.

The defence of accident arises from section 8 of *The Penal Code Act* which provides that a person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will or for an event which occurs by accident. An event occurs by accident if it is an outcome which was not intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person. In other words, death may result from a deliberate act,

such as a punch, but could be such an unlikely consequence of that act, that an ordinary person could not reasonably have foreseen that death would result. An accused that relies on this defence only has to raise a reasonable probability of its existence. Then the prosecution must prove, beyond reasonable doubt that the death was not accidental.

I have examined the explanation and demonstration made by the accused in court and I have found there are no probabilities to support the defence of accident, particularly when relations between the deceased and the deceased were not harmonious. The nature and position of the injuries on the body of the deceased are not consistent with his version of how they were inflicted rendering the defence theory of an accidental fall onto the knife during the fight resulting in death very improbable. Furthermore, the accused said the accused flashed a knife and pointed it at him as he demanded menacingly for a loan. Therefore, before the accused reacted, he was aware that the deceased was armed with a knife. In those circumstances, it was reasonably foreseeable by the accused that either of them falling onto the knife in the ensuing fight was a probable occurrence. He nevertheless ran the risk and hence when it occurred, he can't plead that it was accidental. The circumstantial evidence of the nature and position of the injuries is more consistent with the deliberate action of the accused than an abrupt unintended occurrence against the will of the accused. Although defence counsel contested this element, considering the available evidence, I find that the prosecution has proved beyond reasonable doubt that the death was not accidental.

The other defence relied on by the accused is that of self defence as a justification or excuse for the death. 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 that the deceased brandished a knife, the circumstances would suggest that the accused reasonably believed that he was in imminent danger of an attack which caused reasonable apprehension of death or grievous hurt. However, I have not found any evidence to suggest that the accused reasonably believed that the immediate use of force was necessary to defend himself against that danger. There brandishing of the knife was followed by a verbal exchange between them as they stood separated by some space between them. It was not a sudden attack that required immediate repulsion on grounds that he had been cornered without an opportunity of escape. The deceased held a short kitchen knife as seen by court when it was exhibited as part of exhibit P.Ex. 5. The accused did not demonstrate that it was not possible to escape from that kind of situation and that direct physical confrontation was the only means of defence available to him. In *R. v. Julien* [1969] 2 *ALL.E.R.* 856, the learned Lords made the following observations:

The sturdy submission is made that an Englishman is not bound to run away when threatened, but can stand his ground and defend himself where he is. In support of this submission no authority is quoted, save that counsel for the appellant has been at considerable length and diligence to look on the subject, and has demonstrated to us that the text-books in the main do not say that a preliminary retreat is a necessary pre-requisite to the use of force in self defence. Equally, it must be said that the textbooks do not state the contrary either; and it is, of course, well known to us all that for very many years it has been common form for judges directing juries where the issue of self-defence is raised in any case (be it a homicide case or not) that the duty to retreat arises. It is not, as we understand it, the law that a person threatened must take to his heels and run in the dramatic way suggested by counsel for the appellant; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal; and to the extent that that is necessary as a feature of the justification of self-defence, it is true, in our opinion, whether the charge is a homicide charge or something less serious. Accordingly, we reject counsel for the appellant's third submission.

It is recognised in the above passage that though a person threatened need not take to his heels and run in a dramatic way, but he must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal and this is necessary as a feature of the justification of self defence. A similar position was taken in *Selemani v. Republic* [1963] E.A., at p. 446):

Under English law there is a broad distinction made where questions of self defence arise. If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case there is no duty in law to retreat, though no doubt questions of opportunity of avoidance of disengagement would be relevant to the question of reasonable necessity for the killing. In other 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 break off the fight or avoid the assault, he may use such force, including deadly force, as is reasonable in the circumstances. In either case if the force used is excessive, but if the other elements of self defence are present there may be a conviction of manslaughter.

In his defence, the accused did not indicate having had such a disposition of mind of retreating or otherwise breaking off the fight or avoiding the assault. The situation that existed right before the confrontation as explained by the accused is not one where it can be said that the accused 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 slitting the throat of the deceased to have been force than was reasonably necessary to defend himself against that danger. It was clearly excessive force. Thus, I am satisfied that in slitting the throat of the deceased with a knife, the accused exceeded his right of self defence. Consequently, although defence counsel contested this element, considering the available evidence, I find that the prosecution has proved beyond reasonable doubt that the death Ocircan David was unlawfully caused.

As to whether that the unlawful act was actuated by malice aforethought, section 191 of *The Penal Code Act* defines it 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. Having discounted the two defences advanced by the accused, what is left is for the court to consider the circumstantial evidence of the weapon used (in this case a blade of a knife was recovered embedded in the neck of the deceased and exhibited as part of P. Ex. 5); the manner it was applied (a fatal injury of a slit throat was inflicted); the part of the body of the victim that was targeted (the neck and throat); and the ferocity can be determined from the impact (the handle broke off the blade and the bent blade remained stuck in the throat). P.W.5 who conducted the autopsy established the cause of death as “Severe anaemic haemorrhage sustained during assault.” Exhibit P.Ex.2 dated 28th September 2012 contains details of his other findings which include “deep cut wound on the left zygotic region, cut wound on the neck and throat, multiple cut wounds on the left shoulder, right biceps muscle, left clavicle, right ulna.” Having ruled out accidental death, the circumstances conclusively point to the inference whoever inflicted the injuries observed on the body of Ocircan David either an intended to cause his death or knew that the acts would probably cause his death. Consequently, although defence counsel contested this element, considering the available evidence and in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that the death Ocircan David was caused with malice aforethought.

Finally, the prosecution had to prove that it is the accused who 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. In his own defence, the accused admitted having been involved in a fight with the deceased during which the deceased accidentally fell onto the knife the deceased had used to threaten him with. The accused by his own admission placed himself at the scene of crime as an active participant in the causation of the death. His admission is supported by the circumstantial evidence of droplets and smears of blood on the overgrown grass along the path which both P.W.7 AIP Tela Isaac and P.W.6 D/AIP Chorom Kennedy tracked from the scene of the murder right to the door of his house. Blood

stained clothes were found in his house and exhibited as P.Ex. 4. His wife P.W. 2 testified that on the fateful night the accused returned home at around 4.00 am and instructed her to return to her parents' home immediately as he had committed a bad act the nature of which he did not disclose to her. Defence counsel did not contest this element and considering the evidence as whole relating to this element, in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that it is the accused that caused the death of Ocircan David.

That being the case, I find the accused guilty and hereby convict him of the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Arua this 8th day of February, 2017.

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Stephen Mubiru
Judge.

10th February 2017

9.20 am

Attendance

Ms. Ngaiyo Sharon, Court Clerk.

Ms. Jamilar Faidha, State Attorney, for the prosecution.

Mr. Samuel Ondoma for the convict on State Brief.

The convict is present in Court.

SENTENCE AND REASONS FOR SENTENCE

The convict was found guilty of the offence of Murder c/s 188 and 189 of the *Penal Code Act* after a full trial. In her submissions on sentencing, the learned State attorney prayed for a deterrent sentence on the following grounds; the offence carries the maximum penalty of death. The deceased was butchered like an animal. The convict adopted an unlawful way for settling the grudge he had with the deceased. He has not been remorseful and therefore deserves a long custodial sentence.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender. He is 40 years old and has been on remand for four years and six months. As a result of the offence, his father was killed in a reprisal attack and all their houses, property and

gardens were destroyed. In his *allocutus*, the convict prayed for lenience since his entire family disintegrated as a consequence of this offence.

The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of the worst cases of Murder. Although this is one of such cases, I have considered the subsequent killing of the convict's uncle and destruction of the entire family's livelihood in reprisal attacks that followed this offence. An additional death by hanging will only cause further suffering to the family. I have for that reason discounted the death sentence.

Where the death penalty is not imposed, the starting point in the determination of a custodial sentence for offences of murder has been prescribed by Item 1 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35 years' imprisonment. I have taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Bukenya v Uganda C.A Crim. Appeal No. 51 of 2007*, where in its judgment of 22nd December 2014, the Court of Appeal upheld a sentence of life imprisonment for a 36 year old man convicted of murder. He had used a knife and a spear to stab the deceased, who was his brother, to death after an earlier fight. Similarly in *Sunday v Uganda C.A Crim. Appeal No. 103 of 2006*, the Court of Appeal upheld a sentence of life imprisonment for a 35 year old convict who was part of a mob which, armed with pangas, spears and sticks, attacked a defenceless elderly woman until they killed her. In *Byaruhanga v Uganda, C.A Crim. Appeal No. 144 of 2007*, where in its judgment of 18th December 2014, the Court of Appeal considered a sentence of 20 years' imprisonment reformatory for a 29 year old convict who drowned his seven months old baby. The convict had failed to live up to his responsibility as a father to the deceased who was victimized for the broken relationship between him and the mother of the deceased.

Where there is a deliberate, pre-meditated killing of a victim, courts are inclined to impose life imprisonment especially where the offence involved use of deadly weapons in committing the offence. In this case, there is direct evidence that the convict used a knife, to slit the throat of the

deceased, at such a youthful apparent age of nineteen years. Accordingly, in light of those aggravating factors, the convict deserves to spend the rest of his natural life in prison. The convict is hereby sentenced to Life imprisonment.

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 10th day of February, 2017.

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Stephen Mubiru,
Judge.