

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0061 OF 2017

UGANDA **PROSECUTOR**

5

VERSUS

OMONY PATRICK alias PIUS **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*
10 *Act*. It is alleged that the accused on the 20th day of February 2013 at Padigo village in Nebbi
District murdered one Evalyn Margaret Amma.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are
briefly that on 20th February 2013 at around 1.00 pm, a quarrel erupted between the accused and
his wife, the deceased, at their home. The accused demanded for his identity card to enable him
15 register his sim-card and the deceased did not oblige. The deceased slapped the accused twice
and the accused struck back with one might blow to the neck which severed the neck bones of
the deceased resulting in instant unconsciousness and eventual death on arrival at a nearby clinic
where she had been rushed for treatment. On realising she was dead, the accused attempted to
escape but was arrested and prosecuted. In his defence, the accused denied having assaulted the
20 deceased and instead stated that the deceased was epileptic and was sickly throughout the night.
She died the following day at a clinic where he had taken her for treatment.

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
25 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
30 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*).

- 5 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
 - 10 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 21st February 2013, prepared by P.W.1 Dr. Ajal
15 Paul of Pakwach Health Centre IV, which was admitted during the preliminary hearing and marked as exhibit P.Ex.1. The body was identified to him by a one Pimundu Charles as that of Evalyn Margaret Ama. P.W.2 Adoko Sauda, the maternal Aunt of the deceased, saw the body and attended her burial. P.W.3 Pimundu Charles, a brother of the deceased, saw her body and attended the burial as well. In his defence, the accused admitted that Evalyn Margaret Ama died
20 at a clinic. Defence Counsel did not contest this element. In agreement with the assessors, I find that on basis of that evidence, the prosecution has proved beyond reasonable doubt that Evalyn Margaret Ama, died on 20th February 2013.

The prosecution had to prove further that the death of Evalyn Margaret Ama was unlawfully
25 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.1 who conducted the autopsy established the cause of death as “a broken neck resulting in severed spine from blow to the neck as a result of beating.” P.W.2 Adoko Sauda testified that when she received a report that the deceased was
30 fighting with the accused, she rushed to their home and when she arrived at the scene, she found the deceased lying unconscious on the ground. The accused was standing next to her and when she asked him what had happened he said they had been fighting over a phone. The accused in

his defence said she had died of an illness that had afflicted her during the night. I find the cause of death has been established by medical evidence to be consistent with the prosecution rather than the defence version of the events. The deceased died as a result of assault. There is nothing to suggest that the assault was lawful and moreover Defence Counsel did not contest this element.

5 In agreement with the assessors, I find that on basis of that evidence, the prosecution has proved beyond reasonable doubt that Evalyn Margaret Ama, 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
10 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*).

15 Malice aforethought being a mental element is difficult to prove by direct evidence. Courts usually consider first; the nature of the weapon used. In this case none was used. In situations where no weapon is used, for a court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act that caused the death and whether the accused foresaw death as a natural consequence of the act. The court should consider; (i)
20 whether the relevant consequence which must be proved (death), was a natural consequence of the accused's voluntary act and (ii) whether the accused foresaw that it would be a natural consequence of his act, and if so, then it is proper for court to draw the inference that the accused intended that consequence (see *R v Moloney [1985] 1 All ER 1025; Nanyonjo Harriet and Another v. Uganda S.C. Cr. Appeal No.24 of 2002*). In this case therefore, court has to determine
25 whether death is a natural consequence of the ferocious hit on the neck and whether the accused foresaw that death would be a natural consequence of his act.

Although the accused did not offer any evidence on this element, the facts disclose that there was some kind of altercation between the accused and the deceased before she sustained the fatal
30 injury. In his charge and caution statement (exhibit P. Ex. 1) the accused stated as follows;

On the fateful day, I wanted my identity card which I had kept with my wife, the deceased, but she never wanted to give it to me. I had wanted the said identity card for the registration of my mobile phone with the company who were at the sub-county that day. The deceased told me that she was first going to her sister in the neighbourhood and indeed she started going whereby I had to follow her on the way and got her by her hand and asked her again about my identity card but still the deceased refused to hand over to me my identity card. I tried to force her to go back home with me but she just collared me and slapped me. I kept looking at her. She repeated the slap whereby I grew annoyed and slapped her once to unconsciousness and I had to rush her to a nearby clinic where she died immediately on arrival

That statement raises the possibility of the defences of accident, self-defence and provocation. 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*). The court should consider any defence that on the evidence has "an air of reality." The threshold test is met when there is an evidentiary basis for the defence which, if believed, would allow a reasonable court properly directed, to acquit. A trial judge has a duty to consider defences which are raised on the evidence, even where the accused or his or her counsel does not raise them.

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.

In *Regina v. Palmer (1990) 12 Cr App R(S) 585*, in the course of an argument with his wife the appellant fetched a knife from the kitchen to frighten her; the argument turned into a fight in the

course of which his wife received a fatal stab wound. The appellant claimed that the wound was inflicted accidentally, without any intent to kill or cause grievous bodily harm. The jury rejected the defence of accident, but found that the appellant was guilty of manslaughter rather than murder because his intention did not extend to an intent to cause death or really serious bodily harm.

In *The Queen v. Kuzmack*, [1955] S.C.R. 292, the respondent was convicted of the murder of a woman. He and the deceased were alone in a house when the occurrence took place. His defence was accident or self-defence in a struggle over a knife said by the respondent to have been in the hand of the victim. Apart from his evidence, there was nothing to show the particulars of what took place. There was evidence that the respondent and the deceased had agreed upon marriage and that there had been prior dissension between them over the mode of life led by the deceased. Shortly before the fatal act, they were heard quarrelling. The Supreme Court of Canada held that the circumstances were sufficient to call for the trial judge to charge the jury with respect to manslaughter. If the jury concluded upon the evidence that the homicide was culpable, it was necessary for them to decide as a fact, with what intent the respondent had inflicted the fatal wound. If they had a reasonable doubt that he possessed the intent required, the prisoner must be given the benefit of that doubt, and the jury should then consider the offence of manslaughter.

It emerges from those decisions that the threshold for considering the defence of accident must be evidence sufficient to permit a reasonable inference that the accused did not in fact foresee the consequences of his or her act. The ultimate issue is whether the court is satisfied beyond a reasonable doubt that the accused actually intended the consequence of his or her act, whether the accused, at the time of the offence, actually foresaw the natural consequences of his or her act, i.e., the death of the victim. The essence of his defence of accident is that, notwithstanding that the act of hitting the deceased was willed and deliberate, the fatal consequences of the act were by reason of the fight unforeseen by the accused, and hence he lacked the subjective foresight of death required for the offence of murder. The question in this case then is whether there is sufficient evidence to permit a reasonable inference that the accused might not have known that hitting the deceased with such force as he did on the neck was likely to result in her death. If there is, then if the court entertains a reasonable doubt about this element of the offence

and it must acquit the accused of murder and find him guilty of the minor and cognate offence of manslaughter instead.

From the charge and caution statement, it is clear that the accused's act of hitting the deceased was willed and deliberate. I have carefully considered the nature of the injury and come to the conclusion that it rules out accident as a plausible explanation. Exhibit P. Ex. 1 indicates "bruises on the neck" as the only external injury found on the body of the deceased. It is curious that despite the injury having been inflicted within the context of an alleged fight, no other part of the body of the deceased was found to have indications of a scuffle. The isolated external injury is suggestive of a deliberate targeted attack on the neck of the deceased rather than an aimless fling of the hand in the heat of a fight. Viewed in the context of the accused's intentional and purposive conduct at the time of hitting the deceased, the notion that he might not have known what the consequences of that act were by reason of a fight, has about it an air of unreality. These facts tend to belie the notion that, at the time he hit the deceased with such force on her neck as severed her neck bones, the accused did not know that such force when applied to her neck would be likely to kill her. The prosecution has proved beyond reasonable doubt that the injury was intentionally inflicted. I have searched in vain for any evidence which would indicate that despite his purposive actions proximal to hitting the deceased, he failed to foresee the consequences. In short, there is nothing on the facts of this case which lends an air of reality to the defence that the appellant lacked the necessary *mens rea* for the offence of murder, rendering the defence an accidental hit during the fight resulting in death very improbable. When the accused deliberately targeted the neck of the deceased, he ran the risk of causing death 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 for consideration in favour of 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 him 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 charge and caution statement that the deceased just "collared" him and slapped him twice, 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. It was not a sudden attack that required immediate repulsion on grounds that he had been cornered without an opportunity of escape. 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 hitting the deceased on the neck with such force as severed the spine 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 hitting the deceased, the accused exceeded his right of self defence. This defence too is not available to him.

Lastly, the accused in his charge and caution statement said that he was annoyed by being slapped twice by the deceased and he hit back in a fit of anger, thereby raising the possibility of the defence of provocation. 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. Therefore, for an act or insult to constitute provocation in the legal sense, it must have been 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. Provocation was explained by Lord Goddard L CJ, in the case of *R v Whitfield (1976) 63 Cr App R 39* as meaning:

Some act or series of acts done or words spoken which would cause in any reasonable person and actually caused in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for a moment not master of his mind.

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;
- 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.

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-
5 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.

The standard required is that the wrongful act or insult must be of such a nature as would likely
10 to deprive an ordinary person of the class to which the accused belongs the power of self control. The ‘reasonable man’ is the normal man of the same class or community as that to which the accused belongs. The man who normally leads such life in the locality and is of the same standard as others, including the accused, of the same class as the accused, with the same past personal experiences as the accused. The gravity of the provocation cannot be correctly assessed
15 in isolation from the manner of life of the community of which the accused is a member, or in isolation from the present effect (if any) on the accused of any previous provocation which he received.

The test to be applied in order to determine whether homicide would either be murder or
20 manslaughter by 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. From the objective perspective, 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-
25 control. Since the standard should not be adapted to accommodate a particular accused’s innate lack of self-control; a necessary consequence of this is that a person of excitable temperament who is peculiarly susceptible to provocation or is unusually excitable or pugnacious cannot rely on provocation which would not have led an ordinary person to act as he did. Provocation must be such as will upset not merely a hasty and hot-tempered or hypersensitive person, but one of
30 ordinary sense and calmness. In the instant case, the provocative act is said to have been two slaps by the deceased. This act may have been annoying but was not of sufficient gravity to

cause a loss of self control. The act although annoying, does not constitute provocation in that particular community. This defence is not available to the accused in this case.

At the hearing of the case, the accused retracted the charge and caution statement (exhibit P. Ex. 2). A retracted confession as a rule of practice requires corroboration. I find corroboration in the conduct of the accused when he attempted to escape upon realising that his wife had died. That conduct is not consistent with his innocence. In conclusion, although defence counsel contested this element, and having discounted all the possible defences after a careful consideration of the available evidence, I find that the prosecution has proved beyond reasonable doubt that the death of Evalyn Margaret Ama 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 admitted though being present at the clinic when the deceased died from an illness that had afflicted her the previous night. He admitted having spent the night with the deceased and to have escorted her to the clinic where she died the following morning. Having rejected his defence, there is no doubt in my mind, based on the evidence referred to earlier in this judgment, that it is the accused who delivered the fatal blow. In agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby find the accused guilty and convict him for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Arua this 31st day of July, 2016.

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Stephen Mubiru
Judge.
31st July 2017