

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0190 OF 2014

UGANDA **PROSECUTOR**

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VERSUS

OBE ZAYIO BOSCO **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 15th day of September 2014 at Awia village in Arua
District murdered one Adabo Francis.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are
briefly that on the on the night of 15th September 2014, the deceased went to the house of the
accused to ask for some tobacco leaves for smoking. At the home of the accused, the deceased
15 was beaten as a result of which he cried out for help. His wife together with other neighbours
respondent and found him lying down on the ground in paid in the compound of the accused. As
he was being carried back to his house, he complained that his ribs were broken as a result of
being beaten with a stick by the accused. The following morning he was taken to a nearby clinic
from where he was referred to the Arua Regional Referral Hospital from where he died shortly
20 after. The post mortem examination of his body revealed he had died from excessive internal
bleeding as a result of a ruptured spleen. In his defence, the accused denied having assaulted the
deceased and stated instead that when the accused went to his home that night while hurling
insults at him, kicked the door to his house in and fell inside the house. He was picked from there
and taken back to his home. The following morning the accused went out to find a hammer for
25 repairing his door and later in the day while he was at the Trading Centre, he learnt from a
passerby that he was suspected for having caused the death of the deceased. He went into hiding
at a neighbouring village to escape mob justice and the following day reported to the police.

Since the accused in this case pleaded not guilty, like in all criminal cases the prosecution has the
30 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
5 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*).

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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.
- 15 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
20 prosecution adduced a post mortem report dated 16th September 2014, prepared by P.W.1 Dr. Tabu Geoffrey of Arua Regional Referral Hospital, which was admitted during the preliminary hearing and marked as exhibit P.Ex.1. The body was identified to him by a one Adebo Kerebino as that of Ogondo Francis. P.W.2 Candiru Rose, the widow of the deceased, saw the body when it was handed over to her after the post mortem examination and she attended his burial. P.W.3
25 Bosco Ofuti, a nephew of the deceased, saw the body too and handed it over to the family for burial. P.W.4 No. 31538 DC Francis Apidra, the investigating officer too saw the body before its burial, and arranged for its post mortem examination. In his defence, the accused said he did not see the body but was told by someone riding by on a bicycle that the deceased was dead. D.W.2 Janet Adakuru, testified that she too saw the body of the deceased. Defence Counsel did not
30 contest this element. In agreement with the assessors, I find that on basis of that evidence, the prosecution has proved beyond reasonable doubt that Adabo Francis alias Ogondo, died on 15th September 2014.

The prosecution had to prove further that the death of Adabo Francis 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.1 who conducted the autopsy established the cause of death as “extensive intra-abdominal haemorrhage due to ruptured spleen.” In his dying declaration to P.W.2 Candiru Rose and P.W.3 Bosco Ofuti he said he had been assaulted with a stick by hitting on the side of the ribs. P.W.2 testified that she heard the sound of something being hit twice, before the deceased cried out for help. When the deceased called out for help and they responded, he was found lying down in pain, in the compound of the accused.

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The accused in his defence denied having assaulted the deceased but said instead that the deceased fell onto the floor after kicking the door to the house of the accused in. 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*).

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P.W.2 Candiru Rose testified that the deceased told him he had been hit with a pestle and as they lifted him from the ground she saw it lying beside the deceased. Ample corroboration is found in the fact that when P.W.6 No. 41442 DC Asua Ronald together with P.W.4 No. 31538 DC Francis Apidra visited the scene the following day they recovered a pestle (exhibit P. Ex. 7) from the veranda of the accused, which was suspected to have been used in hitting the deceased. Although DW2 Janet Adakuru, a sister of the accused, refuted the claim that the pestle belonged to the accused, It did not have to belong to the accused for him to use it in the assault. I find the version of the accused inconsistent with the findings made during the post mortem examination.

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The ruptured spleen is more consistent with the application of a blunt force directly to the body than injury from a fall. I find that the injury was occasioned by assault rather than a fall. Not having found any lawful justification for the act of beating as described by the deceased in his dying declaration, I agree with the assessors that the prosecution has proved beyond reasonable
5 doubt Ajedra Isaac'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
10 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. Courts
15 usually consider first; the nature of the weapon used. In this case a pestle was used. From its description, and from observing it when it was exhibited in court, considering the definition of a deadly weapon in section 286 (3) of *The Penal Code Act* as including any instrument which, when used for offensive purposes, is likely to cause death, the court to finds that the weapon used in hitting the deceased was a deadly one.

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The court also considers the manner in which it was used. In this case it was used by hitting the deceased twice in a manner that inflicted an internal injury, a ruptured spleen. 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
25 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 established the cause of death as “extensive intra-abdominal haemorrhage due to ruptured spleen.” It was applied with such force that it caused a fatal injury to a vital organ of the body.

30 Although the accused did not offer any evidence on this element, the facts disclose that before the attack, the deceased was heard uttering vulgar insults against the accused. 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*).

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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
10 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:

15 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
20 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,
- 25 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
30 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.

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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. Some insults are so crude that they have been found by courts to have had the capacity of depriving an accused of self control. For example in *Ainobushobozi v. Uganda, C. A. Cr. Appeal No. 242 of 2014*, the victim insulted the accused with the words, ‘Kuma nyoko’. The accused was acquitted of murder and instead was convicted of manslaughter on account of provocation. A different conclusion was reached in *Rajabu Salum v. The Republic [1965] 1 EA 365*, where an appellant convicted of murder argued on appeal that the victim had used expressions in abusing him which constituted provocation and in retaliation hit him with a stick. The words were “Kuma nina” and “Kuma nyoko.” The court held that the expression alleged to have been used by the deceased in abusing the appellant, though obscene, did not constitute provocation in that particular community. Similar utterances were made by the deceased in the instant case. In his charge and caution statement (exhibit P. Ex. A), the accused stated as follows;

Adabo Francis came to my house while drunk and abusing me that with my hard stomach and I fuck my mother. He started knocking my door and said he was going to break the door if I did not open and give him cigarettes. He continued and broke my door. With annoyance I came out with a club and beat him twice on the right rib. He did not fall down. Then my sister Adaku Janet came out and told me not to beat him. So I left him and he went to his house.

The standard required is that the wrongful act or insult must be of such a nature as would likely 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 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.

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The post mortem report (exhibit P. Ex. 1) indicates that one of the observations made by P.W.1. during the autopsy was that the deceased had a "bruise on the left big toe" which injury is consistent with accused's claim that the deceased kicked his door in. In the circumstances, the insults uttered by the accused were by themselves sufficient to enrage an ordinary person of the class to which the accused belongs. Although it appears the neighbourhood had become used to such insults coming from the accused whenever he was drunk, they were aggravated this time by the contemporaneous wrongful act of the deceased kicking in the door to the house of the accused. He reacted suddenly in the heat of passion by picking a pestle and hitting the deceased twice on the right side of the torso thereby inflicting the fatal injury from which the deceased died a few hours later. Therefore there is a causal connection between the provocation, the heat of passion, and the killing.

On basis of the available evidence considered as a whole, in disagreement with the assessors, I find that although a deadly weapon (a pestle) was used on a vulnerable part of the body (the right side of the torso), inflicting such a degree of injury that caused a rupture of an internal organ, the spleen, resulting in internal haemorrhage and eventual death, the prosecution failed to disprove the defence of provocation. Malice aforethought cannot be inferred readily from the circumstance in which the injury was inflicted. Consequently the prosecution has failed to prove beyond reasonable doubt that Adabo Francis alias Ogondo'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 when the accused kicked his door in and fell down, he b did not touch him. The accused does not deny being at the scene he only denied having delivered the fatal blow. 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 blows. In agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt.

5 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 prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal (see *Woolmington v. Director of Public Prosecutions*, [1935] AC 462). Culpable homicide is not murder if the offender, while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who caused the provocation. 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*.

15 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;

30 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.

5 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
10 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
15 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.

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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*.

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

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Stephen Mubiru
Judge.
31st July 2017