THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL SESSIONS CASE No. 0064 OF 2014

UGANDA …… PROSECUTOR

VERSUS

ADRIKO ALFRED alias ONDIA …… 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 26th day of August 2013 at Lorr-Ora village in Zombo District murdered one Mulongo Moses.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the fateful day at around 7.00 pm, the deceased had gone to a phone repairer on that village to retrieve his phone. The accused who happened to have been standing nearby, intervened sarcastically and a quarrel erupted between the accused and the deceased. The accused said he would die with people that day. At about 7.45 pm after the deceased had returned to his home, he was heard screaming that he had been shot him with an arrow. His brother, PW5 and his cousin PW6 responded to the scream and found the deceased bleeding from a wound on the left side of the stomach. The intestines had protruded through the wound. They asked him what had happened and the deceased said the accused had shot him with an arrow for no reason. They obtained a stretcher from Zeu Health centre and rushed him to that health centre. He was referred to Nyapea Hospital where he died on the same day. The accused had in the meantime handed himself over to PW7 at Zeu Police Station at around 8.00 pm for protection saying that he had shot his brother. The following day the arrow suspected to have been used in shooting the deceased together with other arrows were recovered from the vicinity of the scene of crime.

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 1st April 2013 prepared by P.W.1 Dr. Ambayo Richard, a Medical Officer at the 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 Asua Timone, brother in law of the deceased as that of Mulongo Moses. It ia supported by the testimony of P.W.2 Drani Victoria, an elder brother of the deceased, who saw the body when it was returned from Arua Regional Referral Hospital where he had been rushed for emergency treatment. He attended the funeral the following day. P.W.4 Bako Baifa, a younger sister of the deceased, too attended the funeral. The accused in his defence did not contest this element. Counsel too did not contest this element. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Mulongo Moses died on 1st April 2013.

The prosecution had to prove further that the death of Mulongo Moses 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 "Haemorrhagic shock resulting from a cut vein. Manner of death unnatural" Exhibit P.Ex.1 dated 1st April 2013 contains the details of his other findings which include a "stab defect middle lateral side of the left neck, 4cm track length, 3 cm passing through stenocelidomastoid muscle (the long neck muscle that serves to turn and nod the head) and jugular vein, creating a defect of 1 cm in the blood vessel." Exhibits P. Ex 7A and B show the cut wound by the neck.

The accused in his defence suggested that the injury was caused accidentally when the deceased was pierced by a piece of stick used as part of the frame on which the papyrus matting constituting the make-shift disco enclosure was hang. He said this followed a fight in which he himself innerved to stop it. P.W.2 Drani Victoria, an elder brother of the deceased, and P.W.4 Bako Baifa, a younger sister of the deceased who were dancing with him at the fateful moment attributed the wound to deliberate stabbing and refuted the claim that there was any fight involving the deceased prior to the fight. Both witnesses instead stated that the deceased was attacked for advising his sisters to return home. P.W.3 No. 20387 D/Cpl Atayo Amati Victor who visited the scene that morning indicated the location and it was not close to any of the fencing (see exhibit P. Ex. 3 the sketch map of the area shows it was near the space reserved for the DJ.) This was confirmed by P.W.6 No. 31358 D/Cpl Apidra Francis, the SOCO who visited the scene too. The point of altercation was some distance away from the fencing. The evidence as a whole shows that this was not a natural or accidental death but a homicide. I find the version of the accused inconsistent with what the police found at the scene within a matter of hours after the occurrence of the incident. The testimony of the tow eyewitnesses proves that the injuries sustained by the deceased were as a result of deliberate act of stabbing rather than a prick by a stick. Not having found any lawful justification for the act of stabbing as described by the two eyewitnesses, I agree with the assessors that the prosecution has proved beyond reasonable doubt Mulongo Moses's death was unlawfully caused.

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

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. Courts usually consider first; the nature of the weapon used. In this case a handmade or fabricated pocket size knife was tendered, but to the extent that there was no record of its being handed over to the police store-man, there was a break in the chain of evidence. As a general rule, it is always a good practice to have the chain of custody of exhibits whatever their nature, clearly established in order to rule out the possibility of adulteration or switching such as would affect the identify or quality of the exhibit in a manner that would materially impact on the outcome of the case. Having regard to the frailty of human nature, this requirement is meant to address the possibility that evidence may be shaped or even fabricated to meet the trial difficulties. Therefore, where there is a break in the chain of custody there should be some reasonably sufficient explanation for the occurrence. In the absence of such explanation or where the break is of such a nature that there is a very probable likelihood that the evidence may have been manufactured, tampered with or shaped to pervert the course of justice, then such an exhibit should be excluded.

Although the knife recovered from the scene was exhibited in court and marked as exhibit P. Ex. 4, because the scene had not been preserved intact before the arrival of the police thus increasing the risk of adulteration of the scene of crime, coupled with the fact that the court was not offered any reasonably sufficient explanation for the failure to record it in the exhibits register at the police station, I consider the exhibit as un-reliable. It will therefore not be relied on as proof of the murder weapon. Nevertheless, It has been held before that there is no burden on the prosecution to prove the nature of the weapon used in inflicting the harm which caused death nor is there an obligation to prove how the instrument was obtained or applied in inflicting the harm (see *S. Mungai v. Republic [1965] EA 782 at p 787* and *Kooky Sharma and another v. Uganda S. C. Criminal Appeal No.44 of 2000*). It is enough if through the witnesses, the prosecution adduces evidence of a careful description to enable the court decide whether the weapon was lethal or not (see *E. Sentongo and P. Sebugwawo v. Uganda [1975] HCB 239*). Both P.W.2 Drani Victoria and P.W.4 Bako Baifa described it as a short knife with a black handle. From that description, the court considers the definition of a deadly weapon in section 286 (3) of *The Penal Code Act* as any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death, to find that the weapon used in stabbing the deceased was a deadly one.

The court also considers the manner it was applied. In this case it was used to inflict a relatively deep stab wound. The court further considers the part of the body of the victim that was targeted. In this case it was the neck, which is a delicate and vulnerable part of the body. The ferocity with which the weapon was used can be determined from the impact. In the instant case a muscle and major blood vessel in the neck were severed. P.W.1 who conducted the autopsy established the cause of death as "Haemorrhagic shock resulting from a cut vein. Manner of death unnatural" Exhibit P.Ex.1 dated 1st April 2013 contains the details of his other findings which include a "stab defect middle lateral side of the left neck, 4cm track length, 3 cm passing through stenocelidomastoid muscle and jugular vein, creating a defect of 1 cm in the blood vessel."

Although the accused did not offer any evidence on this element, defence counsel suggested intoxication as negating malice aforethought since the accused was too drunk to form the specific

intention required. 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*).

Under section 12 of *The Penal Code Act*, for intoxication to constitute a defence to a criminal offence, it must be shown that by reason of the intoxication, the accused at the time of the act or omission complained of, did not know that the act or omission was wrong or did not know what he or she was doing and the state of intoxication was caused without his or her consent by the malicious or negligent act of another person, or that the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission. Since in the instant case there was no suggestion that the condition of intoxication the accused was labouring under was caused without his or her consent by the malicious or negligent act of another person, it was necessary to adduce evidence to show that at the time of the act, he did not know that the act was wrong or did not know what he or she was doing since by reason of that intoxication he was insane, temporarily or otherwise.

Intoxication can provide a defence for offences of specific intent but not for offences of general intent. For offences such as murder which require a particular intent or knowledge, a person who performs the act causing death while in a state of intoxication is liable to be dealt with as if he or she had the same knowledge as he or she would have had if he or she had not been intoxicated, unless it is shown that the substance which intoxicated him or her was administered to him or her without his or her knowledge or against his or her will. Alternatively, that by reason of intoxication he or she was insane, temporarily or otherwise to the extent of not knowing what he or she was doing or that it was wrong. The law was neatly summarized by the House of Lords in *Director of Public Prosecutions v. Beard [1920 AC 479]* in the following words:

> There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime

> should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act.

The defence of intoxication can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about the reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him. In the instant case, the accused bore the evidential burden of adducing some evidence creating the possibility that he was labouring under such a degree of drunkenness that he was rendered incapable of forming the specific intent essential to constitute the crime of murder. Once he adduces such evidence, then the persuasive burden is on the prosecution to disprove it by showing that the evidence of intoxication adduced by the accused falls short of proving such incapacity. The onus is on the prosecution to prove that an accused person was not so drunk as to be capable of forming an intent to kill.

Although the accused adduced evidence that he had been drinking before this incident, there is no evidence that he was so drunk that he did not know what he was doing within the meaning of section 12 of *The Penal Code Act.* In such a state the individual loses contact with reality and the brain is temporarily dissociated from normal functioning. The individual has no awareness of his or her actions when he or she is in such a state and will likely have no memory of them the next day. To the contrary, in his defence the accused gave a detailed account of his version. He narrated how a fight broke out and he went to the rescue of the deceased. He also explained how on realising that the deceased had been hurt he helped in carrying him from the scene to safety outside and eventually to a clinic. That conduct is not consistent with a person so drunk as to have lost the capacity of moral judgment. He carried out purposeful actions both before and after the stabbing. His conduct before and after the stabbing demonstrated an awareness of the consequences of what he was doing. This demonstrates that he in fact foresaw the consequences of what he was doing immediately before and after the stabbing. Even by his own version, in

having still the capacity to realise that the deceased was in danger and that he needed his help, the accused therefore still had the capacity of moral judgment.

The evidence taken as a whole clearly shows that the drink the accused had consumed had not impaired his judgment in any way. Society is entitled to punish those who of their own free render themselves so intoxicated as to pose a threat to other members of the community. The fact that an accused has voluntarily consumed intoxicating amounts of alcohol cannot excuse the commission of a criminal offence unless it gives rise to a mental incapacity within the terms of section 12 of *The Penal Code Act.* Mere drinking alcohol does not count in law otherwise many killers would get off by arming themselves with alcohol before they go on their murderous missions (see *Feni Yasin v. Uganda, C. A Criminal Appeal No.51 of 2006*). The defence of intoxication is therefore not available to him.

Despite the absence of direct evidence of intention, on basis of the circumstantial evidence, I find, in agreement with the assessors that malice aforethought can be inferred from use of a deadly weapon (a knife), on a vulnerable part of the body (the neck), inflicting such a degree of injury that severed a muscle and a major blood vessel causing profuse bleeding and eventual death. The prosecution has consequently proved beyond reasonable doubt that Mulongo Moses'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. The accused denied any participation. He instead said he went in to separate people who were fighting and shortly thereafter responded to help when the deceased cried out for help. He assisted in taking the deceased out of the shelter and that is where his role ended. The accused does not deny being at the scene he only denied having delivered the fatal blow.

He was identified at the scene as the person who stabbed the deceased. This being evidence of visual identification which took place at night, the question to be determined is whether the identifying witnesses were able to recognise the accused and his actions. In circumstances of this nature, the court is required to first warns itself of likely dangers of acting on such evidence and

only do so after being satisfied that correct identification was made which is free of error or mistake (see *Abdalla Bin Wendo v. R (1953) 20 EACA 106*; *Roria v. R [1967] EA 583* and *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*). In doing so, the court considers; whether the witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the accused and the proximity of the witnesses to the accused at the time of observing the accused.

As regards familiarity, both P.W. 2 and P.W.4 knew the accused as a village-mate. In terms of proximity, each of them was less than two feet from the deceased when he was stabbed. As regards duration, the stabbing was preceded by an altercation between the accused and the deceased and they had ample opportunity to recognise him. Lastly, there were electric bulbs not too far away from the scene of the crime which provided light sufficient enough for them to see the small knife with which the accused stabbed the deceased and thereafter describe it in sufficient detail . In any event, the accused and defence counsel contested only the aspect of participation but not the presence of the accused at the scene. Having considered the evidence as a whole, I have not found any possibility of mistaken identification by any of the identifying witnesses. In agreement with the assessors, I am satisfied that their evidence is free from mistake or error. Consequently I find that it is the accused that stabbed Mulongo Moses thereby causing his death.

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 10th day of July, 2016.

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Stephen Mubiru
Judge.
10th July 2017

24th July 2017
2.45 pm
Attendance

Ms. Sharon Ngayiyo, Court Clerk.
Mr. Emmanuel Pirimba, Resident State Attorney, for the Prosecution.

Mr. Ronald Onencan, Counsel for the accused person on state brief is present in court
The accused 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 his submissions on sentencing, the learned State attorney prayed for a deterrent sentence on the following grounds; although the convict is a first offender, the maximum punishment is death and the convict has no right over the life of another and his life is sacred. He has not been remorseful. He deserves a deterrent sentence which should be above fifteen years.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; the convict is a first offender, he is 22 years old who can still reform and deserves a lighter sentence. The period he has spent on remand should be considered. He was in primary seven in Ombadereko Primary School and is still desirous of going to school. He suffers from Typhoid and asthma. He pray for as lenient sentence and proposed six years' imprisonment. In his *allocutus*, the convict stated that he is very sorry for what happened. He did not know it would reach this far. He was in P7 and now his future is spoilt. He can still be useful to government. He suffers from Hepatitis, Asthma, Typhoid and a sharp pain in the chest. His father died in 2007 and left two of them with his brother. He was paying fees for his brother. His mother is married to another man. His brother is suffering. He prayed for lenience.

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. This is not one of such cases. 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, the accused used a sharp knife to stab the deceased in the neck without any provocation. The deceased died in cold blood, at the youthful age of only 18 years old. I have though excluded the sentence of life imprisonment due to the comparatively youthful age of the convict at the time, he was of the same age as the deceased. I have nevertheless considered the aggravating factors in this case being; it was a vicious strike at the neck of the deceased, he was stabbed in the presence of his siblings and for no apparent reason. Accordingly, in light of those aggravating factors, I have adopted a starting point of forty years' imprisonment.

I have considered the fact that the convict is a first offender, is still a young man who has expressed remorse for what he did. I consider a reformative sentence to be appropriate for him. I for that reason deem a period of thirty (30) years' imprisonment to be an appropriate reformative sentence in light of the mitigating factors in his favour. 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 was charged on 5th April 2013 and been in custody since then. I hereby take into account and set off a period of four years and three months as the period the

convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of twenty five (25) years and nine (9) months, to be served starting today.

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

Dated at Arua this 24th day of July, 2017.

……..
Stephen Mubiru,
Judge.
24th July, 2017