THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT MOROTO

CRIMINAL SESSIONS CASE No. 0161 OF 2015

UGANDA …… PROSECUTOR

VERSUS

ADEI JOHN …… 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 30th day of October 2014 at Loboyea Ward, Katabok Parish, Morulem sub-county in Abim District murdered one Angura Paul.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the fateful day at around 11.00 am, the deceased who was with a few other people under a tree drinking alcohol picked a quarrel with his wife, whom she directed to return home and prepare food for the children. The accused intervened and reprimanded the deceased for belittling his own wife with such condescending directives. Displeased with the accused's intervention, the deceased picked a quarrel with the accused and two other people who were drinking with him. This quarrel was quelled. At around 2.00 pm, the quarrel erupted again and the deceased rose up tp assault the accused. The accused ran away with the deceased in hot pursuit while holding a broken burnt brick with the intention of hurling it at the accused. When the accused became exhausted, he stood and when the deceased caught up with him, the accused threw the deceased onto the ground, held one of his legs up practically turning him upside down, slapped him once on the face and walked away. The deceased collapsed unconscious. He was rushed to a clinic where he died at around 7.00 pm. When the accused at around 11.00 pm received information of the death of the deceased, he reported himself to the police on grounds that he was the last person to be involved in an altercation with the deceased before his death. In his defence, he testified that he only slapped the deceased and therefore is not responsible for his death. The body was subjected to an autopsy but the doctor who did it did not testify.

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 did not adduce any post mortem report. According to P.W.1 Florence Awor, a daughter in law of the deceased, she on 30th October 2014 at around 2.00 pm participated in finding means of transport to take the deceased to hospital after he was assaulted only to receive news later at around 7.00 pm that he had died. She attended his burial which took place the following day at 4.00 pm. P.W.2 Moses Ogwang, the L.C.1 Chairman of the village testified that at around 3.30 pm he received a report of a fight that had taken place involving the deceased. He rushed to the scene and found the deceased lying on the ground with blood oozing from his nose and mouth. He found a boda boda and took him to Morulem Health Centre. P.W.3 Ochap Mario, on hearing the news that Angura had been assaulted severely, rushed to his home. He saw blood oozing from his nose and mouth. The deceased was rushed to Morulem Health Centre where he died at around 7.00 pm. He was present as the doctor performed a post mortem examination of

the body. In his defence, the accused admitted having received the news of the passing of the deceased at 11.00 pm that day. Defence Counsel 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 Angura Paul is dead.

The prosecution had to prove further that the death of Angura Paul 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*). In order to establish the death as a homicide, direct or circumstantial evidence must sustain a causal link between an unlawful act attributed to another human being and the eventual death of the deceased. The evidence must establish attribution of causal responsibility for the resultant death to the unlawful act of another human being as a preliminary step towards the eventual attribution of criminal culpability to that person. The evidence should rule out the possibility of an accidental, suicidal or natural death.

There is no post mortem report in this case. The prosecution relies instead on the testimony of P.W.1 Florence Awor, a daughter in law of the deceased, who testified that the deceased, who was drunk at the time, attacked the accused who ran away as the deceased ran after him holding a broken piece of a burnt brick. When the accused got tired, he stood. The deceased approached him. The accused threw the deceased down and got hold of one of the legs of the deceased, effectively turning him up-side down. The accused then slapped the deceased once on the cheek while he held one of his legs in the air, let go of him and walked away. As she and other people helped to carry the deceased to his home, she saw that the deceased was unconscious and that his tongue appeared to have slipped down his throat.

On the other hand, P.W.2 Moses Ogwang, the L.C.1 Chairman of the village testified that at around 3.30 pm he received a report of a fight that had taken place involving the deceased. He rushed to the scene and found the deceased lying on the ground with blood oozing from his nose and mouth. He saw some injuries in the mouth of the deceased. The deceased appeared to have been drunk. There was a burnt brick at the scene that had broken into two which he was told the accused had used to hit the deceased with (this aspect is based on inadmissible hearsay). P.W.3

Ochap Mario, on hearing the news that Angura had been assaulted severely, rushed to his home. He saw blood oozing from the mouth, nose and ears of the deceased. The tongue was not visible, it had slipped down his throat. There was a dent on his head and he saw some white substance which appeared to him to have been brain matter. He was told that it is the accused who had kicked the deceased, stamped on him three times and hit him with a burnt brick. The deceased was unconscious. He was present as the doctor undertook a post mortem examination of the body from Morulem Health Centre. Blood had dripped inside the brain. The Doctor told them that death was caused by internal bleeding (this aspect is based on inadmissible hearsay). The court further observes that the allegations of a kick, stamping and hitting with a broken brick made by this witness too are based on inadmissible hearsay.

In his defence, the accused testified that it is the deceased who carried the broken brick as the deceased ran after him. He admitted having slapped the deceased once on the cheek. He denied being responsible for the grave injuries seen on the deceased. An accused will be held responsible for the final outcome that constitutes the offence if it is the natural result of what the accused said or did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he or she said or did. An accused will also be held responsible for the final outcome is a substantial and operating result of what the accused said or did, but not otherwise. If the subsequent event is so overwhelming as to make the act of the accused merely part of the history, a *novus actus interveniens*, the chain of causation will have been broken. Under the substantial cause test, the chain of causation is not broken unless the act of the accused is no longer a substantial and operating cause of death. It is only if the subsequent event is so overwhelming as to make the initial act "merely part of the history," that the chain of causation will be held to be broken. In other words, if the proximate cause is not independent of the accused then he or she is responsible for it, and if it is not potent in causing death, then it will not be so overwhelming as to make the original act merely part of the history.

In circumstances such as this, where there is a significant degree of remoteness between the act or omission of an accused and the result which is alleged to constitute an offence, where the eventual result may be the product of additional factors which are more directly connected than is the conduct of the accused, the function of the law of causation is to identify the conditions

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

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

In absence of a post mortem examination report in respect of the body of the deceased in the instant case, I have to determine the cause of death on basis of other available evidence. In this I have to consider evidence of observations made by the various witnesses who saw the condition of the deceased before his death and determine whether; (i) the cause of death has been established beyond reasonable doubt and, (ii) whether the prosecution has established a causal link between the cause of death and an unlawful act attributable to the accused. The available evidence suggests two possible proximate causes of death; brain damage or internal bleeding inside the brain as a result of an external traumatic injury to the head and / or suffocation by a dislodged tongue.

The first theory of a traumatic injury to the head leading to internal bleeding inside the brain is based on the testimony of P.W.3 Ochap Mario who testified that there was a "dent" on the head of the deceased and he as well saw some white substance which appeared to him to have been brain matter. During the autopsy which was done in his presence, he saw that blood had dripped inside the brain and he was told by the doctor conducting the autopsy that the death was caused by that internal bleeding. This theory has two material weaknesses; of all the witnesses who saw the extent of injuries sustained by the deceased, he is the only one who testified to an injury of this magnitude. It is not immediately evident how the rest of the witnesses missed an injury so grave and could only recall a comparatively a less serious injury of a dislodged tongue. Secondly, the theory of causation based on this injury is based on inadmissible hearsay.

Section 59 of *The Evidence Act*, requires that oral evidence must, in all cases whatever, be direct; that is to say if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it; if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner. If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. A statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible (see *Myers v. DPP [1964] 2 All ER 881, Patel v. Comptroller of Customs [1965] 3 All ER 593, Magoti s/o Matofali v. R (1953) EACA 232* and *Tenywa v. Uganda [1967] EA 102*). In the result, the statement by P.W.3 that he was told that it is the accused who had kicked the deceased, stamped on him three times and used a burnt brick to hit him with, and that he was told by the doctor conducting the autopsy that that death was caused by internal bleeding in the brain, is all inadmissible hearsay. Without the hearsay evidence the court cannot make a finding that the cause of death of the deceased was due to internal bleeding in the brain.

Furthermore, the skull is reputed to be one of, if not the strongest bone in the human skeleton. Unless the deceased was a "thin skull" case, without the hearsay evidence it is not immediately clear how a slap to the left cheek in the circumstances explained by the only eye witness to the

assault, P.W.1, could have caused the a "dent" on the head of the deceased and the white substance which appeared to P.W.3 to have been brain matter. This situation required the expertise of the doctor who conducted the autopsy to throw some light on whether the deceased could have sustained such a grave injury from a slap to the cheek in light of the fact that such a grave injury is not the ordinary, natural and foreseeable result of a slap to the cheek. Without the hearsay evidence, P.W.3 who does not qualify as an expert under section 43 of *The Evidence Act*, is incompetent to opine that the blood he saw in the brain during the autopsy, was the result of traumatic injury to the head, more especially since all witnesses noticed that the deceased appeared to have been drunk.

The second theory of cause of death is suggested by P.W.1 Florence Awor who testified that as she helped with carrying the deceased from the scene from where he was assaulted to his home, she saw that the deceased was unconscious and that his tongue appeared to have slipped down his throat. P.W.2 Moses Ogwang, the L.C.1 Chairman of the village saw blood oozing from the nose and mouth of the deceased. He also saw some injuries in the mouth of the deceased. P.W.3 Ochap Mario, saw blood oozing from the mouth, nose and ears of the deceased. The tongue was not visible, it had slipped down his throat. The evidence supporting this theory is inconclusive considering that death occurred approximately three hours after the assault. This situation too required the expertise of the doctor who conducted the autopsy to throw some light on whether indeed the tongue had slipped down the throat and as to whether such a state of affairs arose from the slap to the left cheek and as to whether it was potent in causing the death.

In the final result, the prosecution evidence suggests two possible causes of death none of which the available evidence establishes conclusively. When the cause of death is not proved beyond reasonable doubt, the evidence does not rule out the probability of an accidental death or a cause not associated at all with the impugned act of the accused. The evidence has fallen short of establishing attribution of causal responsibility for the resultant death to the slap the accused was seen to have landed on the left cheek of the deceased as a preliminary step towards the eventual attribution of criminal culpability to the accused. I therefore agree with the assessors that the prosecution has not proved beyond reasonable doubt that her death was unlawfully caused.

Consequently, I find that the prosecution has not proved one of the essential ingredients of the offence beyond reasonable doubt. It becomes academic to consider any of the other elements of the offence and I therefore hereby find the accused not guilty and accordingly acquit him of the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

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 it was held that the provision 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. 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.

It is not in doubt that the accused assaulted the deceased by slapping him on the cheek. Chapter 21 of *The Penal Code Act* provides for offences endangering life or health. I considered the possibility of the accused having caused the deceased grievous harm by that slap and thus to have contravened section 219 of *The Penal Code Act*. According to section 2 (f) of *The Penal Code Act*, grievous harm means any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense. In the instant case, although P.W.3 testified that he saw a "dent" on the head of the deceased and the white substance which appeared to him to have been brain matter, the

evidence before court has not established that those injuries were a result of any act of the accused. In any event, classification of injuries as grievous would require medical evidence which is lacking in this case. Since the accused cannot be convicted of this offence either, he should be set free forthwith unless he is being held in custody for other lawful cause.

Dated at Moroto this 29th day of September, 2017.

……..
Stephen Mubiru
Judge.
29th September, 2017.