

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT NEBBI
CRIMINAL SESSIONS CASE No. 0166 OF 2016

UGANDA **PROSECUTOR**

5 **VERSUS**

YONINGOM DAVID **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 The accused is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused and others still at large on the 19th day of December, 2015 at Angeja village, Omoyo Parish, Zeu sub-county in Zombo District murdered one Nyatho Sika.

The facts of the case as presented by the prosecution are briefly that two or three years before her
15 death, the deceased had been accused of witchcraft and she had been forced to migrated to another village for her personal safety. On the fateful day, she had returned to the village to visit her children when she was spotted at around midday by the accused and other persons who pounced on her and began assaulting her indiscriminately with stones, sticks, beatings, kicking and they also twisted her neck. She managed to escape to the home of a one Manano in the
20 neighbourhood where his wife P.W.4 Ozelle Margaret provided her with cover inside her kitchen. The accused came after her in hot pursuit but P.W.4 concealed her. She later succumbed to her injuries before she could be taken to hospital after disclosing to her son P.W.3 Abelo William and P.W.4 that it was the accused and a one Ocircan who had assaulted her. The accused was arrested but Ocircan has since then gone into hiding.

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In his defence, the accused denied having participated in assaulting the deceased. He stated that on that fateful day he had left his home early in the morning to collect funeral contributions on behalf a group of youths known as Tholith. He went to the office of the group at Ogonju village. He sat in the office at around 8.00 am to wait for contributions. At around 1.00 pm approaching
30 2.00 pm the L.C1 went and told him that he was needed at his home in Angenja village. He

handed over the funds he had mobilised to a colleague who is now deceased. He was taken to the home of Manano before he could arrive at his home. At the home of Manano at around 1.00 pm he found the District Councillor. Many people had gathered there. The District Councillor who is also a CDO called him to sit near him and he sat near him. He took him aside and began
5 questioning him about Maggie who told him that he had participated in beating Nyatho Sika.

Since the accused 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
10 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
15 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 Murder, the prosecution must prove each of the following
20 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.

25 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. The prosecution adduced the post mortem report dated 20th December, 2015 prepared by P.W.2 Dr. Amiloaki Patrick, a Medical Officer of Waii Health Centre II, which was admitted during the preliminary
30 hearing and marked as exhibit P. Ex.2. The body was examined from the home of the deceased and was identified to him by a one Picho Charles as that of Nyatho Sika. P.W.3 Abel William a son of the deceased testified that he found his mother at the home of the neighbour of the accused, inside the house and she was in a bad condition; the ribs were all broken, the head could

turn in all directions, she had bruises and injuries all over her body. She was inside the house. He went to fetch a boda-boda to take her to hospital but by the time he returned, he found that she was dead. She was killed on a Saturday and was buried the following Monday and he attended the burial. Further evidence in this regard is that of P.W.5 No. 41584 D/Sgt. Oryema Christensen
5 who testified that when he rushed to the scene with other policemen from Alangi, he found the body of a woman called Nyatho Sika lying on its back, on a papyrus mat in Manano's kitchen.

In his defence, the accused said he knew the deceased because she had been taken back to her ancestral home in Atiak. She had been there for two to three years. She was no longer resident on
10 Ngume village, which is one mile away from his home. He did not know whether she is dead or not. 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 Nyatho Sika died on 19th December, 2015.

15 The prosecution had to prove further that the death of Nyatho Sika 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.2 who conducted the autopsy established the cause of death as “possible head injury, fractured rib that could have damaged the left lung causing respiratory
20 distress, internal bleeding and spinal cord injury at the cervical vertebrae.” Exhibit P. Ex.2 dated 20th December, 2015 contains the details of his other findings which include a “The soil around was intact. The clothes were soiled with blood. It had multiple bruises, dried blood on the face, ears and nostrils. There was a lacerated wound on the left ear. He found deep cut wounds on the face, extending to the temporal regions on both sides. On the head there was a swelling on the
25 right side of the head. the facial part had multiple cut wounds and bruises, the ear and nose were still bleeding and on the trunk the chest was depressed with one fractured ninth rib. Deep cut wounds on the face extending to the temporal regions, both sides. The left arm was swollen and bruised and the right one had multiple bruises. Bodily infirmity; the neck was strangulated, rotating in all directions without any restrictions. They were possibly caused by a blunt object.
30 The deceased was been severely beaten especially on the head and strangulated most likely as

evidenced by the rotation of the neck in all directions. Chest depressed with one fractured rib - 9th rib.”

P.W.3 Abelo William, a son of the deceased, testified that before she died, he told him that her
5 assailants had labelled her as a witch. She said they used stones to hit her on the chest, they also
hit her with stones in the face, they used sticks, a piece of wood, kicking and twisted her neck
backward. He saw some of these items at the scene. He saw stones, a piece of wood about a
metre long and the size of my fore-arm in thickness. P.W.4 Ozelle Margaret testified that on 19th
10 December, 2015 at about 12.00 pm as she was roasting flour to brew alcohol she saw the victim
coming and sat down near her kitchen but her condition was bad. She asked her who beat her
because she had seen injuries on her body. She had injuries on the head. Her neck was twisted
and she was facing to the right and she could not turn to the left. She had plaited her hair but it
was evident she had been beaten. She had multiple cuts over the head. The head appeared
abnormal. She was bleeding from the top of the head. P.W.5 No. 41584 D/Sgt. Oryema
15 Christensen testified that there was a wound on the left ear. The neck was very flexible. The left
arm was full off bruises. Scratches on the left arm. The clothes were blood stained. Determine
whether it has been proved that this was a homicide. That evidence as a whole proves that the
injuries sustained by the deceased were as a result of assault and that the death was therefore not
natural, suicidal, excusable or justifiable and thus a homicide. Not having found any lawful
20 justification for the acts which caused his death, I agree with the assessors that the prosecution
has proved beyond reasonable doubt that his death was unlawfully caused.

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
25 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*).

30 Malice aforethought being a mental element is difficult to prove by direct evidence. Courts
usually consider; the nature of the weapon used. In this case the weapons used were never

recovered. In any event 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*). On basis of the description made by the deceased in her dying declaration that stones and sticks were used and on basis of the injuries they inflicted, in accordance with section 286 (3) of *The Penal Code Act* which defines deadly weapons as including instruments adapted to stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death, I find that the pieces of wood and stones used in assaulting the deceased were deadly weapons.

The court also considers the manner in which such weapons were used. In this case they were used to inflict multiple fatal injuries by way of broken ribs and neck. The court further considers the part of the body of the victim that was targeted. In this case it was mainly the neck and head, which is a vulnerable part of the body. The ferocity with which the weapon was used can be determined from the impact. The accused did not offer any evidence on this element. 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 weapons, on vulnerable parts of the body, inflicting severe injuries leading to death. The prosecution has consequently proved beyond reasonable doubt that Nyatho Sika'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 did not know anything concerning that allegation since he had left his home early in the morning to collect funeral contributions on behalf a group of youths known as Tholith. He went to the office of the group at Ogonju village. He sat in the office at around 8.00 am to wait for contributions. At around 1.00 pm approaching 2.00 pm the L.C1 went and told him that he was needed at his home in Angenja village. He handed over the funds he had mobilised to a colleague who is now deceased. He was taken to the home of Manano before he could arrive at his home. At the home of Manano at around 1.00 pm he found the District

Councillor. Many people had gathered there. The District Councillor who is also a CDO called him to sit near him and he sat near him. He took him aside and began questioning him about Maggie who told him that he had participated in beating Nyatho Sika.

- 5 To refute that defence, the prosecution relies on dying declaration of the deceased as made to P.W.3 Abel William a son of the deceased who testified that before she died, he told him that her assailants were Yoningom David and Ocircan. The two had labelled her as a witch, assaulted her with stones on the chest, in the face, and used sticks, a piece of wood, kicking and twisted her neck backward. He saw some of these items at the scene. They also took her money.
- 10 Furthermore, P.W.6 AIP Onek Christopher testified that when the accused was brought before him for a charge and caution statement on 22nd December, 2015 where the accused said that "I only participated in slapping the deceased.... later on I heard she was beaten to death."

Under section 30 of *The Evidence Act*, a dying declaration is a statement made by a person who
15 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
20 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 *R. v. Eligu S/o Odel and Epangu S/o Ewunya (1943) 10 EACA 90*; *Pius Jasunga v. R. (1954) 21 EACA 331* and *Mande v. R. [1965] EA 193*).

- 25 In addition, a retracted confession too by practice requires corroboration. It is a matter of practice or prudence that the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but the court may proceed to rely on it if fully satisfied in the circumstances of the case that the confession must be true (see *Tuwamoi v. Uganda [1967] E.A 84*; *Omiat Joseph v. Uganda, C. A. Criminal Appeal No.141 of 1999* and *Kedi Martin v. Uganda, S. C. Criminal Appeal No.11 of*
30 *2001*). In the instant case, that dying declaration retracted confession of the accused is

corroborated by the testimony of P.W.4 Ozelle Margaret who testified that when the deceased took refuge at her home, she was saying that Yoningom and Ocircan are the people who had beaten her. In a space of about two minutes after her arrival, she saw Ocircan and Yoningom coming, and when she told the deceased she had sighted them, the deceased asked her to close the door but she assured her they would not do anything to her. The emergence of the accused in what appeared to be hot pursuit of the deceased based on her reaction when she saw him, is inconsistent with the innocence of the accused and confirms that both the dying declaration and inculpatory admission made in his charge and caution statement are true.

I have considered the fact that in his charge and caution statement, the accused only admitted to having slapped the deceased. Section 19 (1) (b) and (c) of the *Penal Code Act*, lists persons who are deemed to have taken part in committing an offence and to be guilty of the offence and who may as a consequence be charged with actually committing it. This includes every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence and every person who aids or abets another person in committing the offence.

Under section 19 of *The Penal Code Act*, there are different modes of participation in crime; direct perpetrators, joint perpetrators under a common concerted plan, accessories before the offence, etc. Each of the modes of participation may, independently, give rise to criminal responsibility. If the accused was only aware of the criminal intent of the mob and he gave it substantial assistance or encouragement in the commission of the crime then he was only an aider and abettor but if he shared the intent of the mob, then he is criminally responsible both as a co-perpetrator and as an aider and abettor. It has been shown that his participation substantially contributed to, or had a substantial effect on the consummation of the crime. By virtue of section 19 (1) (b) and (c) of the *Penal Code Act*, he is deemed to have taken part in committing an offence and to be guilty of the offence. In the final result, I find that the prosecution has proved all the ingredients of the offence as against the accused. He is therefore found guilty and consequently convicted of the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Nebbi this 15th day of May, 2018.

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Stephen Mubiru
Judge.
15th May, 2018.

16th May, 2018,
3.10 pm
Attendance

Mr. Cannyutuyo Michael, Court Clerk.

5 Mr. Muzige Amuza, Senior 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.

Both Assessors are in court

10 **SENTENCE AND REASONS FOR SENTENCE**

The convict was found guilty of the offence of Murder c/s 188 and 189 of the *Penal Code Act* after a full trial. In her submissions on sentencing, the learned State attorney prayed for a deterrent sentence on the following grounds; the degree of injury involved a twisted neck and
15 broken rib. Both are on vulnerable parts. The victim suffered several injuries. She was vulnerable. She was of advanced age. The convict was part of a gang. He exhibited hostility toward the deceased. She had earlier been banished from the village and when they saw her again she was killed. The deceased was related to the convict. He could not sympathise with a relative and hence is more dangerous to strangers. There was total loss of life. Hanging would be
20 the equivalent. He propose life imprisonment.

Counsel for the convict prayed for a lenient custodial sentence the following grounds; he is s first offender. He is youthful at the age of 21 years old, capable of reforming. He has spent three years and three months on remand. Although murder is a serious offence, Para 21 (b) of the
25 sentencing guidelines requires court to take into account that he was just an abetter. He is a remorseful young man. He was in school in Arua Prison Primary school. His future should not be completely ruined. In his *allocutus*, the convict prayed for lenience on grounds that he was in school, Arua Prison Primary school in P.6 at the time he was arrested. His age was written as eighteen years. He was beaten by the police. He does not know what happened to him that day.
30 He has pain in his head, hernia, and is carrying a cross. He does not have a child yet and is carrying a cross. He wants to continue going to school. He did not want to get involved but it is someone who told him get involved. He was told to tie the legs because he was a thief.

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 case does not fit that description and I have for that reason discounted the death sentence.

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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

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have considered the aggravating factors in this case being; the degree of injury inflicted on the victim since upon examination he was found to have deep cuts on the head. Accordingly, in light of those aggravating factors, I have adopted a starting point of thirty five years' imprisonment. I have considered the fact that the convict is a first offender, a young man at the time at the age of 18 years who played only an accessory role in the murder. I for that reason consider the period of

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twenty eight (28) years' imprisonment to be an appropriate reformative sentence in light of the mitigating factors.

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

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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 during December, 2015 and has been in custody since then, I hereby take into account and set off two years and six 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 six (6) months, to be served

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starting today.

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

Dated at Nebbi this 16th day of May, 2018.

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Stephen Mubiru
Judge.
16th May, 2018.