

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT NEBBI**  
**CRIMINAL SESSIONS CASE No. 0033 OF 2018**

**UGANDA** ..... **PROSECUTOR**

5 **VERSUS**

**OGEN CEASAR alias ONZIRI** ..... **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 at large on the 8<sup>th</sup> day of September, 2013 at Jupungor village, Pawong Parish, Nebbi sub-county in Nebbi District murdered one Akumu Haziena.

15 The facts of the case as presented by the prosecution are briefly that the deceased was a biological sister of the accused. The accused had a daughter suffering from epilepsy and he suspected the deceased to be responsible for his daughter's condition through witchcraft. In the early morning hours of the fateful day, he sent his three sons Omirambe, Wangoich and Komakech, pick the deceased from her home. They forcefully took her to the home of the accused where the accused joined them in subjecting her to prolonged torture by beating and  
20 burning with hot molten plastic demanding that she administers a cure for the sick daughter. They eventually killed her and dug a grave with the intention of burying the body but were intercepted by the police and fled from the scene. They were arrested later but the three sons of the accused secured bail pending trial and absconded.

25 In his defence, the accused denied any participation. On that day he returned from Church at around 11.30 am and found his sons, Omirambe now deceased, Wangoich and Komakech beating Akumu Haziena. He asked them what his sister had done to them. They asked him where he derived the power to intervene. They turned against him and beat him and his forefinger on the right hand is now paralysed. They asked him why he was antagonising them. He did not beat  
30 his sister the way the children of the deceased are alleging. It is him who brought her back from

where she was married. He went under a veranda across the road and squatted because of the pain. He heard the children of his sister say he ran away but he did, not. When the police came, they found him there.

5 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 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  
10 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  
15 *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 essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
- 20 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  
25 that they knew the deceased and attended the burial or saw the dead body. The prosecution adduced the post mortem report dated 8<sup>th</sup> September, 2013 prepared by P.W.2 Dr. Kisa Charles Kennedy, a Medical Officer at Nebbi General Hospital, which was admitted during the preliminary hearing and marked as exhibit P. Ex.2. He examined the body of Akumu Hazienna, which was identified to him my Oketh Christopher. He found the deceased to be of the apparent  
30 age of 60 years. It is corroborated by P.W.3 D/AIP Choorom Kennedy, who arrived at the scene at 11.20 am on 8<sup>th</sup> September, 2013 together with other police officers. They found a body of an elderly woman lying in front of the house of the accused. The body was identified to them as being that of Akumu Hazienna. They picked the body from the scene and brought it to Nebbi

Hospital for examination where it was examined by Dr. Khisa and he then took it back for burial. Defence Counsel did not contest this element as well in his final submissions. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Akumu Haziena died on 8<sup>th</sup> September, 2013.

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The prosecution had to prove further that the deaths of Akumu Haziena 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*). The post mortem report, which was admitted during the preliminary hearing and marked as exhibit P. Ex.2 indicates that P.W.2 Dr. Kisa Charles Kennedy examined the body of Akumu Haziena, and found external injuries which included "multiple hot plastic burn wounds on the chest (posterior and anterior) legs and hands, abrasions on the right breast." The body was soiled with mud on the back. Internal injuries included a "fracture (depression) on the right temporal bone, just above the right ear, brain damage." He commented that the deceased was tortured before she was killed. "The abrasion on the right breast is consistent with her being pulled on the ground." The cause of death was head injury.

P.W.3 D/AIP Choorom Kennedy, at the scene too saw that the body had burns caused by a partially burnt jerrycan found at the scene. It was a twenty litre jerrycan yellow in colour. It had burnt from the top where the lid and handle are and had burnt about half way. It was about ten meters away from the body. There were droplets of molten plastic leading from the body to the jerrycan. P.W.5 Okethi Christopher testified that on responding to the news that the deceased was being tortured, found the accused standing at his home and his three sons had tied a rope on the body of the deceased around the neck and were dragging the body away while the accused remained at his home. P.W.5 followed them and saw them dig a grave. He sent one of his children to go to the police and at the time they were attempting to bury the body he stopped them. One of the youths who was a bystander picked a huge stone when the body of the deceased appeared to be coming back to life, and hit the deceased on the head. The stone was weighing about five kilograms. The boys then ran away. Shortly after the police arrived and began to fire shots in the air to disperse the crowd.

P.W.7 Obedgiu Hebert testified that he saw the sons of the accused; Omirambe, Wangoich and Komakech, pick the deceased from her home. He followed her as they carried her to the home of the accused. They started beating her with all kind of items. They used pieces of wood, hands or fists and other items to assault her. They were joined by the accused who used pieces of wood, stones, his hands, and later on they got a plastic jerrycan and started burning her with molten plastic. That evidence as a whole proves that the injuries sustained by the deceased were as a result of a prolonged assault and that the death was a homicide. Not having found any lawful justification for the acts which caused her death, I agree with the assessors that the prosecution has proved beyond reasonable doubt that his death was unlawfully caused.

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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*).

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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 the weapons seen by P.W.3 D/AIP Choorom Kennedy and P.W.7 Obedgiu Hebert were never recovered and tendered in evidence. However, 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 P.W.3 and P.W.7 of the multiple items used which included pieces of wood, stones and hot molten plastic from a burning plastic yellow twenty litre jerrycan, in accordance with section 286 (3) of *The Penal Code Act* which defines deadly weapons as including instruments which, when used for offensive purposes, are likely to cause death, I find that the items identified as having been used in assaulting the deceased were deadly weapons.

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The court also considers the manner in which such weapons were used. In this case they were used to inflict a fatal injuries by way of a fracture (depression) on the right temporal bone, just above the right ear, leading to brain damage. The court further considers the part of the body of the victim that was targeted. In this case it was mainly the 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. Defence Counsel did not contest this element too. Despite the absence of direct evidence of intention, on basis of the available circumstantial evidence, I find, in agreement with the assessors that malice aforethought can be inferred from use of deadly weapons, on a vulnerable part of the body, inflicting severe injury leading to brain damage and death. The prosecution has consequently proved beyond reasonable doubt that Akumu Hazienna'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 returned from Church at around 11.30 am and found his sons, Omirambe now deceased, Wangoich and Komakech beating Akumu Hazienna. He asked them what his sister had done to them. They asked him where he derived the power to intervene. They turned against him and beat him and his forefinger on the right hand is now paralysed. They asked him why he was antagonising them. He did not beat his sister the way the children of the deceased are alleging. It is him who brought her back from where she was married. He went under a veranda across the road and squatted because of the pain. He heard the children of his sister say he ran away but he did, not. When the police came, they found him there.

To refute that defence, the prosecution relies on the evidence of P.W.4 D/IP Okee Billy Boss who recorded a charge and caution statement of the accused on 8<sup>th</sup> September, 2013 (exhibit P. Ex.4). The accused confessed to the offence charged. He explained that his daughter Wadambe Manuela had fallen sick and he suspected his sister to have bewitched his daughter. The accused retracted this confession during the trial. A retracted confession 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 2001).

5 It is corroborated by P.W.5 Okethi Christopher who testified that he found the accused standing at his home while his three sons tied a rope the body of the deceased around the neck pulling the body away while the accused remained at his home. P.W.6 Night Rachiu, a daughter of the deceased, too testified that upon arriving at the scene, she heard the accused tell his sons Omirambe, Wangoich and Komakech that; "since she came back home did she come back to  
10 finish my children." He said "you children, a wizard is just killed. Don't leave her alive." He also said that "once you have killed her you tie a rope around her neck and drag her back to her home." He also participated in the beating. He used a stone big enough to require two hands to pick it up and hit the deceased with it as well as a piece of wood. The stick was about the size of her wrist and about the length of her arm long. It was a stick from a Banyan tree and it was fresh.  
15 He was hitting the mouth area with the stick and the stone on the chest saying that she was using the mouth to eat human flesh. The accused together with his sons Omirambe, Wangoich and Komakech then embarked on digging a grave and they only dispersed after the police came to the scene. They saw the police coming and they ran away. I have considered the factors unfavourable to correct identification and find that they are far outweighed by those in favour of  
20 correct identification. His defence of being a mere onlooker at the scene is disproved by the testimony. The witnesses saw him hit the deceased.

In his charge and caution statement, he admitted having "got annoyed, picked a log and hit her down unconscious and later on was joined by one Omirambe Hudson and Wayu Innocent and  
25 killed her off. We did this in revenge of my daughter who is bewitched by the said woman Akumu and now my daughter is helpless waiting for her death only." 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  
30 enabling or aiding another person to commit the offence and every person who aids or abets another person in committing the offence. Furthermore, according to section 20 of *The Penal*

*Code Act*, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.

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In the final result, I find that the prosecution has proved all the ingredients of the offence 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*.

10 Dated at Arua this 17<sup>th</sup> day of May, 2018.

.....  
Stephen Mubiru  
Judge.  
17<sup>th</sup> May, 2018.

17<sup>th</sup> May, 2018.

15 3.51 pm.

Attendance.

Ms. Sharon Ngaiyo, Court Clerk.

Mr. Emmanuel Pirimba, Resident State Attorney, for the Prosecution.

Counsel for the accused person on state brief is absent.

20 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 her submissions on sentencing, the learned State attorney prayed for a deterrent sentence on the following grounds; life was lost in a most brutal manner by injuries and burns intentionally inflicted. Life is precious and should not have been taken in that manner. He should have considered the consequences of his act. He should have led by example but he acted irresponsibly and he did not see the effect of his action on his family and thus he cannot plead that his family is suffering. The family of the deceased too is suffering and they miss her. They will not see her again but the accused may return to society. He proposed a custodial sentence of fifteen years.

In his *allocutus*, the convict prayed for lenience on grounds that it is true children cause problems for their parents. He is weak. He suffers from hernia that was supposed to be operated

on. He also suffers from rectal prolapse. He had two children in the UPDF who died in Somalia and left children. He has not received benefits yet. They died last year. Lastly, he has some children who are studying at Makereere and one of his sons who participated in the incident, Omirambe died and left two children for him to look after. The deceased was his biological sister and he is sad about what the children did.

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.

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 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. The accused killed his own sister over an allegation of witchcraft. He deserves a deterrent sentence. Accordingly, in light of those aggravating factors, I have adopted a starting point of thirty years' imprisonment.

I have nevertheless considered all aspects of his mitigation as submitted in his allocutus. I for that reason consider the reduced period of twenty five (25) years' imprisonment to be an appropriate deterrent 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 during September, 2013 and has been in custody since then, I hereby take into account and set off four years and eight months as the period the convict has already spent on remand. I therefore



sentence the convict to a term of imprisonment of twenty (20) years and four (4) months, to be served starting today.

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

5 Dated at Arua this 17<sup>th</sup> day of May, 2018.

.....  
Stephen Mubiru  
Judge.  
17<sup>th</sup> May, 2018.