

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT NEBBI**  
**CRIMINAL SESSIONS CASE No. 0143 OF 2015**

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

**VERSUS**

**MUSA KAMBALE alias KLEPA OIKANE** ..... **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 on the 3<sup>th</sup> day of June, 2015 at Ogwaronen village, Jupadindho Parish, Jangokoro sub-county in Zombo District murdered one Munguromo David.

The facts of the case as presented by the prosecution are briefly that on the fateful day at around  
15 4.00 pm, the deceased who was by then a five year old boy, went with other children to the well fetch water. The accused collected him from there, took him to his home and assaulted him by repeatedly stamping on his stomach. The neighbours later found the boy at the veranda of the accused in great pain, covered in his excreta, vomiting blood and passing out blood-stained urine. He told them he had been assaulted by the accused for no apparent reason. He was bathed  
20 and rushed to a nearby Awasi Clinic from where he was referred to Holy family Hospital at Nyapea where he died a few hours later. The accused was subsequently arrested. In his defence, the accused denied any participation. He did not know the deceased and he was at home cleaning cassava when he was surprised by an arrest. He attributes the false accusation to envy because he has accumulated a lot of land in the area.

25 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  
30 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  
5 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 essential ingredients beyond reasonable doubt;

- 10 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.

15 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 4<sup>th</sup> June, 2015 presented by P.W.4 Dr. Jamie Omara, as one made by Dr. Okwairwoth Justin who was a medical Officer at Holy family Hospital at Nyapea. The body was identified to him by a one Owinja Robert as that of Munguromo David.  
20 P.W.2 Owinja Robert testified that he was among the people who rushed the deceased to Nyapea Hospital from Awasi Clinic, and at Nyapea the child died. The child was buried on 4<sup>th</sup> June, 2015 at Awasi at his home and he attended the burial. P.W.3 Okwaimungu Roselyn, a neighbour, found the boy in poor shape outside on the veranda of the house of the accused. His private parts were swollen and was covered in his own faeces and blood-stained vomit. She picked him up  
25 and bathed him before he was taken to Awasi Clinic nearby. She later heard he had been taken to Nyapea and had died there. The body was brought back home and they buried him the following day. She too attended the burial. The accused denied having known the deceased. He only know the father of the deceased Cwinya-ai who was his labourer. Defence Counsel did not contest this element. Having considered the evidence as a whole, and in agreement with the assessors, I find  
30 that the prosecution has proved beyond reasonable doubt that Munguromo David died on 3<sup>th</sup> June, 2015.

The prosecution had to prove further that the deaths of Munguromo David 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*). Dr. Okwairwoth Justin who was a medical Officer at Holy family Hospital at Nyapea until November, 2015 conducted the autopsy and established the cause of death as “haemorrhagic shock.” His report, exhibit P. Ex.2, contains the details of his other findings which include “abrasion right maxillary area of 2 x 3 cm wide. Massive haemoperitoneum, with sub-capsular splenic laceration, ruptured abdominal aorta” P.W.2 Owinja Robert, testified that he found the five year old boy crying and he told him that Musa had kicked him a lot but for no reason. On the victim's body he saw that his private parts were swollen and also part of the thighs had bruises and were swollen. He also had blood in the mouth and he was also urinating blood. P.W.3 Okwaimungu Roselyn, a neighbour, found the boy in poor shape outside on the veranda of the house of the accused. She picked him up and he told her that Musa took him inside the house and stepped on him. She asked him why and he replied he did not know. 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 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 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. The presence of malice aforethought is rarely susceptible of direct proof, and must instead be established by legitimate inferences from circumstantial evidence. These inferences are based on the common knowledge of the motives and intentions of persons in like circumstances. Where no weapon is used, for a court to infer that an accused killed with malice aforethought, it must

consider if death was a natural consequence of the act that caused the death and whether the accused foresaw death as a natural consequence of the act. The court should consider; (i) whether the relevant consequence which must be proved (death), was a natural consequence of the voluntary act of another and (ii) whether the perpetrator foresaw that it would be a natural  
5 consequence of his or her act, and if so, then it is proper for court to draw the inference that the perpetrator intended that consequence.

The post mortem report indicates the cause of death as “haemorrhagic shock.” In his dying declaration to P.W.2 and P.W.3 the deceased stated that for no apparent reason, the accused took  
10 him into his house and stepped on his stomach. The accused denied knowledge of the deceased and stated he was framed out of envy. Although there is no direct evidence of intention, any adult who steps onto or kicks the fragile body of a five year old boy around the stomach, must be deemed to foresee the probability of causing severe injury to the victim's vital internal organs and eventual death. On basis of the circumstantial evidence, I find, in agreement with the  
15 assessors that malice aforethought can be inferred from an assault of that nature, on a vulnerable part of the body, inflicting severe injury leading to internal bleeding and death . The prosecution has consequently proved beyond reasonable doubt that Munguromo David’s death was caused with malice aforethought.

20 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 the deceased and he was at home cleaning cassava when he was surprised by an arrest. He attributes the false accusation to envy. To rebut that defence the prosecution relies on the dying declaration of the deceased supported by circumstantial evidence  
25 of his having been found at the veranda of the accused in that state of extreme physical distress and pain.

Under section 30 of *The Evidence Act*, a dying declaration 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  
30 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 *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*).

The attack on the deceased occurred during broad day light. He knew the attacker since his father worked for him as an aide in his practice of native medicine. There is no possibility of mistaken identification and at his age, the deceased was most unlikely to bear a grudge against the accused over his claimed rapid accumulation of tracts of land. The dying declaration of the deceased is further corroborated by the fact that the deceased was found in a state of extreme physical distress on the veranda of the accused. I find it therefore to be reliable and that it effectively disproves the defence raised by the accused.

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*.

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.

3.49 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.

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; the victim was only five years old. He had done nothing wrong. Had it not been for the acts of the accused he would be alive now. Life is precious and should not be taken by any other person. The pain inflicted on the victim was quite much. He bled, vomited and urinated blood. This was a bad action by the convict and should be  
5 punished severely. If the victim had done anything wrong the convict should have acted lawfully. He attacked sensitive parts of the body. The court should not be lenient to the convict for he caused a lot of pain to the parents who still have to come to terms that their son was killed. He suggested a long custodial sentence, from twenty years up to life imprisonment.

10 In his *allocutus*, the convict prayed for lenience on grounds that he had three wives and since his arrest all of them left him and left behind his children in school. He has twenty children in all and eight of them died when he was in prison and he now has twelve. One is in a seminary and there is no way of paying his fees. Ten houses of his were burnt and his home is now deserted. He suffers from illnesses. He is diabetic and suffers from high blood pressure and hernia which is  
15 swollen. His chest was scanned and found damaged, the heart has wounds in it. He was stopped from eating posho and doing heavy work and too much talking.

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  
20 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 next option in terms of gravity of sentence is that of life imprisonment. A sentence of life imprisonment may as well be justified by extreme gravity  
25 or brutality of the crime committed, or where the prospects of the offender reforming are negligible, or where the court assesses the risk posed by the offender and decides that he or she will probably re-offend and be a danger to the public for some unforeseeable time, hence the offender poses a continued threat to society such that incapacitation is necessary (see *R v. Secretary of State for the Home Department, ex parte Hindley [2001] 1 AC 410*). Where there is  
30 a deliberate, pre-meditated killing of a victim, but in circumstances not justifying the death penalty, courts are inclined to impose life imprisonment.

There are cases where the crimes are so wicked that even if the offender is detained until he or she dies it will not exhaust the requirements of retribution and deterrence. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required (see *R v. Edward John Wilkinson and Others (1983) 5 Cr App R (S) 105 at 109*). I have  
5 considered the aggravating factors in this case. In light of the fact that the convict murdered a toddler in such a brutal manner, and considering the rest of the aggravating factors outlined by the learned Resident State Attorney, the convict deserves to spend the rest of his natural life in prison. The convict is hereby sentenced to Life imprisonment.

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

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

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

15