

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT NEBBI**  
**CRIMINAL SESSIONS CASE No. 0005 OF 2017**

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

5 **VERSUS**

1. **ANYAO MILTON** }  
2. **ACWE STEPHEN alias IWUTING** } ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

10

The accused are jointly indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the two accused on the night of 6<sup>th</sup> January, 2015 at Jupanyarindi village, Padwot Parish, Kucwiny sub-county in Nebbi District murdered a one Rebecca Akumu.

15

The facts of the case as presented by the prosecution are briefly that on the night of on 2<sup>nd</sup> day of April 2013 the deceased went to the home of his estranged lover, Zalika, to collect his personal effect after they had fallen out. Instead, Zalika raised an alarm referring to the deceased as a thief, accusing him as well of having spread powdered pepper through her ventilator to her discomfort. A mob soon descended on the deceased, assaulting him severely as a result of which he died a few hours later from the injuries he sustained. The two accused, both of whom lived in the neighbourhood of Zalika, were arrested as some of the persons identified to have participated in assaulting the deceased. Both accused denied any participation. A1 set up an alibi saying he had not spent that night at home only to be surprised by an arrest the following morning while A2 said he was only an onlooker.

25

Since both accused pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against each of them beyond reasonable doubt. The burden does not shift to the accused persons and the accused can only be convicted on the strength of the prosecution case and not because of weaknesses in their respective defences, (see *Ssekitoleko v. Uganda [1967] EA* 30 531). The accused do not have any obligation to prove their innocence. By their respective pleas of not guilty, they put in issue each and every essential ingredient of the offence with which they

are charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure their 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  
5 that the accused are 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;

1. Death of a human being occurred.
- 10 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  
15 that they knew the deceased and attended the burial or saw the dead body. The prosecution adduced the post mortem report dated 12<sup>th</sup> April, 2015 prepared by P.W.6 Dr. Jeremy Oromcan a Medical Officer of Nebbi General Hospital, which was admitted and marked as exhibit P. Ex.8. The body was identified to him by P.W.2 D/AIP Choroom Kennedy as that of Rebecca Akumu. The autopsy was done after exhumation of the body. On his part, P.W.2 D/AIP Choroom  
20 Kennedy, testified that he saw the body of the deceased, at the scene on 14<sup>th</sup> January, 2015 and it was identified to him by P.W.3 Adubango John the L.C.1 Chairman as that of Rebecca Akumu. He later retracted that statement and said he was only shown where the body had been. P.W.3 (Adubango John), stated that it was on 6<sup>th</sup> January, 2015 at around 3.00 pm that he learnt Akumu Rebecca had died. He neither saw the body nor attended the burial.

25 However, P.W.4 Oyenboth Nester, a granddaughter of the deceased, testified that he saw the body at the home of P.W.5 Kezia Okello and later attended the burial at Acana village, Ndrosi in Parambo sub-county. P.W.5 Kezia Okello a sister if the deceased was the first to discover the body and caused its retrieval and transfer to her house. She too attended the funeral at Ndrosi. In  
30 his defence, A2 Acwe Stephen alias Iwutung, testified that he paid his last respects at the home of the a deceased a day after her burial. A1 Anyayo Milton, testified that on the morning of 6<sup>th</sup> January, 2015 he responded to the wailing of P.W.5 Kezia Okello, went to the scene and found

that the body of his grandmother Rebecca Akumu had already been moved from the scene to the house of P.W.5 which was about twenty metres away. 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 Rebecca Akumu died on the night of 5<sup>th</sup> January, 2015.

The prosecution had to prove further that the death of Rebecca Akumu 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.6 who conducted the autopsy established the cause of death as “asphyxia due to strangulation and brutal removal of organs, i.e. the tongue and private vaginal parts.” Exhibit P. Ex.8 dated 12<sup>th</sup> April, 2015 contains the details of his other findings which include; “N.B. the deceased is elderly and unable to defend herself (72 years old). Head decayed. Eyes, tongue were absent. Neck showed signs of strangulation. Viscera is decayed with rigor mortis. Private vaginal parts removed.”

P.W.5 Kezia Okello a sister of the deceased testified that when she discovered the body, it had a polythene bag pushed into the mouth and there was blood on the mouth, the house looked like it had been broken into by forcing the door open and the household items were scattered inside the house. P.W.4 Oyenboth Nester testified that when she saw the body at the home of P.W.5, it had a wound on the mouth and on the neck. It appeared like someone had pricked her neck and there was a little blood on the mouth and the neck. P.W.2 D/AIP Choroom Kennedy, testified that when he saw the body at the scene, it had a swollen neck, was bleeding from the private parts and had bruises on the mouth. He formed the opinion that the most likely cause of death was strangulation. He later swore an affidavit on basis of which court granted an order of exhumation. The body was exhumed and the post mortem done in his presence.

In his defence, A2 Acwe Stephen alias Iwutung, testified that he never saw the body and only went to the homestead to pay his last respects a day after the burial. A1 Anyayo Milton, testified that he was not aware of any illness the deceased might have had before her death. He did not see anything unusual on the body. Defence Counsel did not contest this element. The evidence as a

whole proves that the death was a homicide since the deceased had no known fatal illness before her sudden death and the injuries seen on her body are consistent with the cause of death certified by P.W.6. 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 her death  
5 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  
10 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  
15 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  
20 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 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.

25

In order to determine whether or not death was a natural consequence of the voluntary act of the assailant, the circumstances in which the injury was inflicted must be clear. In the circumstances of this case, the evidence suggests a deliberate, targeted attack with the corresponding intention to inflict a fatal injury. Malice aforethought can be inferred readily in a situation like this where  
30 the circumstances in which the injury was inflicted can be deduced from their very nature. Any perpetrator who strangles a victim to the point of cutting off air supply to the lungs and blood to

the brain must have foreseen that death would be a natural consequence of his or her act. All doubt is removed by the fact that the body was thereafter mutilated by removal of the tongue and private parts. 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  
5 use of a deadly force, on a vulnerable part of the body, causing asphyxia due to strangulation. The prosecution has consequently proved beyond reasonable doubt that Rebecca Akumu's death was caused with malice aforethought.

Lastly, there should be credible direct or circumstantial evidence placing each of the accused at  
10 the scene of the crime as an active participant in the commission of the offence. Each of the accused denied having participated in killing the deceased. A1 Anyayo Milton testified that he spent the fateful night at home and only responded to the wailing of P.W.5 Kezia Okello the following morning, only to discover that the deceased was dead. On his part, A2 Acwe Stephen alias Iwutung testified that he spent the fateful night at the home of his first wife and only learnt  
15 about the death the following morning when he received a telephone call from a brother of his second wife, P.W.4 Oyenboth Nester, notifying him of the death. His alibi is supported by his father, D.W.3 Rwingwegi Charles who testified that he saw A2 come from the direction of the home of his first wife and he then announced that he had received bad news that the grandmother of his first wife had died. He did not attend the burial because P.W.4 Oyenboth Nester called to  
20 stop them. He only facilitated A2c to pay his last respects at the home of the deceased, a day after the burial. D.W.4 Orwoltho Alex Acwe, the elder brother of A2 testified that a day after the burial, he accompanied A2 to the home of the deceased to pay his last respects.

To refute these defences, the prosecution relies entirely on circumstantial evidence against each  
25 of the accused. In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accuseds' responsibility for  
30 the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Simon Musoke v. R [1958] EA*

715, *Mwangi v. Republic* [1983] KLR 327, *R v. Kipkering Arap Koske and another* (16) EACA 135 and *Sharma Kooky and another v. Uganda* [2002] 2 EA 589 (SCU) 589 at 609). Circumstantial evidence must always be narrowly examined..

5 Against A1 Anyayo Milton, the circumstantial evidence relied on by the prosecution is woven together by the following strands; P.W.2 D/AIP Choroom Kennedy stated that his investigations revealed that the accused bore a grudge against the deceased over land, he wanted to take the land away from the deceased and he had previously issued her with threats; after the death of the deceased, he went missing from his home and was arrested three months later at Agwok; P.W.3  
10 Adubango John, stated that three or four days after the burial the accused had in his possession SAGE cards the property of the deceased which he had handed over to Ayugi.

The aspect of a pre-existing grudge between the deceased and A1 Anyayo Milton was never proved by direct evidence. the sources of information to that effect given to P.W.2 D/AIP  
15 Choroom Kennedy were never disclosed and their reliability cannot be ascertained. As regards having been in possession of SAGE cards of the deceased, there is no evidence to prove that they went missing at or around the time of death of the deceased. P.W.5 Kezia Okello testified that he discovered these items were missing, only after returning from the burial. This was long after the scene had been tampered with and property of the deceased moved to her residence. She also  
20 admitted having seen the accused skimming though some documents inside the house of the deceased after the body was removed and only warned him to be careful lest they contain some important documents. On the other hand, the accused stated he picked them from the compound of the deceased, apparently dropped as the household items were being ferried to the home of the sister of the deceased. I find that the accused's explanation as to how he came into possession of  
25 these documents is a reasonable hypotheses that has not been disproved by the prosecution. The allegation by P.W.4 that he participated in demolition of the house is only surmise based on her observation that he was near the scene, covered in dust and holding a hoe. The accused denied having held a hoe but rather a stick to aid him as he walked. I do not find any direct evidence implicating him in the demolition. Overall, the evidence against A1 is very weak circumstantial  
30 evidence that is incapable of sustaining a conviction. He is accordingly acquitted of the offence of Murder c/s 188 and 189 of the *Penal Code Act* and should be set free.

Against A2 Acwe Stephen alias Iwutung, the circumstantial evidence relied on by the prosecution is woven together by the following strands; P.W.2 D/AIP Choroom Kennedy stated that during his investigations the wife of A2 revealed to him her suspicions; P.W.4 Oyenboth Nester testified that her husband, the accused, did not spend the fateful night at home; he left  
5 home at around 10.00 pm claiming to be proceeding for a safari but never disclosed his destination; he returned at around 5.00 pm and forced the door to his house open with a metallic object instead of asking his wife, whom he knew to be inside at the time, to open; he carried a bag which he concealed under a cushion and lay on it; he began speaking like a haunted person about the smell of blood and what his wife should do to take care of his children in case he was  
10 in trouble; he provided sugar for tea that was contaminated with particles of blue bar soap; she had given sugar with similar contamination a few weeks before upon her return from Juba; while at the funeral, she received calls from the accused threatening to kill her for having revealed that he was responsible for the death of her grandmother; he avoided going for the funeral by making a false claim that it is her who had stopped him.

15

The defence of alibi put up by the accused accounts for his whereabouts starting from around 8.00 am. His father, D.W.3 only saw him come from the direction of the home of his first wife but he could not say for certain that he had spent the night there. As to his conduct after receipt of the news of the death, he was the one relaying the information to both D.W.3 and D.W.4.  
20 None of them could independently verify that indeed the accused received the calls he said he did from his in-laws. Court though is mindful of the fact that the accused does not bear the burden of proving his alibi. It lies on the prosecution to disprove it.

The prosecution relies on mainly on the testimony of P.W.4 Oyenboth Nester in destroying that  
25 defence. This is a witness who had cohabited with the accused for about three months, living as husband and wife. There is no evidence to suggest that she had any motive for framing the accused. Her testimony revealed that the accused left her home late at night under unexplained circumstances. He returned in the wee hours of the morning and both in conduct and speech revealed a deeply troubled mind. He was the first to break the news of the death of the deceased  
30 to D.W.3 at 8.00 am even before the body had been discovered alter at 10.00 am. He had in his possession a kilogram of sugar contaminated by particles of blue bar soap which P.W.4

recognised as sugar she had carried from Juba a few weeks before, which had been contaminated in transit dies to the manner of storage on the bus. He made repeated calls on phone threatening her with dire consequences for implicating him in the murder even before she had reported to the police. Although the accused said he paid his lads respects, this appears to have occurred before  
5 P.W.4 made sense of the cumulative circumstantial evidence.

It was argued by counsel for the accused that the sugar ought to have been exhibited in court failure of which that piece of evidence should not be taken into account. Although it is most desirable that such items are recovered and tendered in evidence, the law is when there is failure  
10 to produce during trial such items, a careful description will suffice (see *E. Sentongo and P. Sebugwawo v. Uganda*, [1975] H.C.B. 239). I find the description of the sugar in question that was given by P.W.4 to be so vivid that it makes up the failure by the prosecution to recover and tender that item in evidence.

15 That being the case, the accused was a few hours after the death of the deceased, seen in possession of an item that was peculiarly in the possession of the deceased before her death, giving rise to the applicability of the doctrine of recent possession to the facts of this case. In doing so, Court is mindful of the fact that it is not the law that proof of possession of recently stolen articles will necessarily or in every case justify an inference of guilt. What constitutes  
20 "recent possession" depends upon the nature of the property and the circumstances of the particular case (*Singh v. R. (2) (1953)*, 20 E.A.C.A. 283 at p. 286). Factors such as the nature of the property stolen, whether it be of a kind that readily passes from hand to hand, and the trade or occupation to which the accused person belongs can all be taken into account.

25 In absence of any explanation by the accused to account for his possession, being found in possession of property recently stolen supports the presumption that the accused is either the thief or a guilty receiver of that property. The right inference from recent possession may be that the accused himself has stolen the property, or where property has been stolen and there is nothing in the circumstances to point to the accused having himself committed the crime of theft,  
30 the proper inference may be that he received the property knowing, not merely that it had been unlawfully obtained, but knowing that it had been stolen. Whenever the circumstances are such



as to render it more likely that the party found in possession did not steal it the presumption is that he received it.

5 However, where it is sought to draw an inference that a person has committed another offence (other than theft) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt; and if a finding that he stole the articles depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the articles has been excluded (see *Andrea Obonyo and Others v R* [1962] 1 EA 542). In the present case the stolen property was a kilogram of sugar contaminated  
10 by particles of blue bar soap in a polythene bag, easily identifiable and therefore an article which a thief might experience some difficulty in disposing of by sale. That it was seen in the possession of the accused A2 Acwe Stephen alias Iwutung within hours of the death of the deceased, supports the inference that he is the thief rather than an a guilty receiver of this item. This items places him squarely at the scene of murder, inside the house of the deceased and  
15 destroys his alibi. Coupled with the rest of the circumstantial evidence which cannot be explained on the basis of any other reasonable hypothesis, it irresistibly points to the fact that it is the accused who killed the deceased.

In the final result, I find that the prosecution has proved all the ingredients of the offence as  
20 against A2 Acwe Stephen alias Iwutung. 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.

25

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

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

11.01 am.

Attendance.

30

Ms. Sharon Ngayiyo, 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  
5 deterrent sentence on the following grounds; the offence carries a maximum of death. The convict violently brought the life of the victim to an end and deserves no mercy. It was a pre-meditated killing. The victim left dependants behind suffering without support and she cannot be replaced. The life of the victim was precious and should not have been taken by him. He proposed a long custodial sentence of not less than fifteen years.

10

In his *allocutus*, the convict prayed for lenience on grounds that he is currently serving a sentence of twenty four years' imprisonment. He has ten children and two lost their mother. Two are not in school. His parents died in a motorcycle accident the previous day as he followed up his case. In prison as he was going to work he fell off the vehicle and his waist is weak. He  
15 prayed to court as a sinner who sins and repents is forgiven. He prayed for a short custodial sentence so that he can go out and educate his children to become good citizens.

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 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  
25 - 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 and accordingly, I have adopted a starting point of thirty years' imprisonment. I have considered the mitigation and for that reason consider a reduction to a period of twenty six (26) years' imprisonment to be an appropriate sentence in light of the  
30 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 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 6<sup>th</sup> 5 January, 2015 and has been in custody since then, I hereby take into account and set off three years and four months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of twenty two (22) years and eight (8) months, to be served concurrently with the one he is already serving, starting today. The sentence is to run concurrently with the earlier one the convict is serving meted out on 2nd February, 2016 in Arua 10 Criminal Session Case No. 0082 of 2012.

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.

15

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