

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT NEBBI
CRIMINAL SESSIONS CASE No. 0101 OF 2015

UGANDA **PROSECUTOR**

5 **VERSUS**

NYINGALING DAVID alias ABETHE **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 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 and others still at large on the 7th day of December, 2014 at Ajigo village, Jupandindo Parish, Jangokoro sub-county in Zombo District murdered one Ronald Kayomtho.

15 The prosecution case is that on the fateful evening at around 9.00 pm, a fight broke out at the home / bar of D.W.2 Okethi when the accused attacked P.W.4 Vaweka Ezekiel and P.W.3 Okwaimungu Alfred accusing them of lording it over him as crime preventers when they go around arresting people for playing cards and smoking banghi. The two managed to escape and the accused turned his wrath against the deceased for having been in the company of the two. He
20 inflicted a head injury on the deceased and he became unconscious. The deceased was carried back to the home of D.W.2 still unconscious. Later during the night after P.W.4 Vaweka Ezekiel and P.W.3 Okwaimungu Alfred had returned to the scene, the deceased regained his consciousness and told them it was the accused who had assaulted him as he followed them in their escape from the bar. A few days later, the accused was arrested on charges of assault. Two
25 weeks later, the deceased succumbed to his injury and died as a result of intra-cranial haemorrhage arising from that assault.

In his defence, the accused denied having caused the fatal injuries. Although he admitted having
30 been at D.W.2 Okethi Lambert's bar when a fight broke out, he only intervened to separate the people fighting. One of them was in the process hit with a bottle in the eye and ran away. He also

saw a bruise on the left side of the face of the deceased and blood was flowing from his nostrils. The bar owner said he was free to go since the man had sustained the injury from a fall. He was surprised when days later he was arrested on allegations that he had assaulted the deceased.

5 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
10 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
15 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.
- 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. In the instant case the prosecution adduced a post mortem report dated 2nd January, 2015 prepared by P.W.2 the District Medical Officer at Paidha Health Centre III in Zombo. He examined the body of Ronald Kayomtho identified to him by Ogor Anthony. It is corroborated by the testimony of P.W.3 Okwaimungu Alfred who testified that his younger brother Ronald Kayomtho died two weeks
30 after he was assaulted and he attended the burial. In his defence, the accused did not offer any evidence on this element. Defence Counsel did not contest this element. In agreement with the assessors, I find that on basis of that evidence, the prosecution has proved beyond reasonable doubt that Ronald Kayomtho, died on 2nd January, 2015.

The prosecution had to prove further that the death of Ronald Kayomtho 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 the District Medical Officer at Paidha Health Centre III
5 in Zombo District examined the body of Ronald Kayomtho and found that the body was well nourished. He was male and of middle age. Externally he found the left orbital hematoma. Left oricular hematoma. Internally the head had hematoma on the left orbital area / supensor. Viscera had intra-abdominal haemorrhage and torn spleen. The cause of death and reasons was "intra-cranial haemorrhage secondary head injuries." Exhibit P. Ex.2 dated on 2ndJanuary, 2015
10 contains the details of his other findings which include "the head injuries leading to intra-cranial haemorrhage and eventual death were likely due to injuries inflicted sometime. Intra-abdominal haemorrhage, torn spleen."

The circumstances that led to these injuries were explained by P.W.3 Okwaimungu Alfred who
15 testified that around 9.00 pm a fight broke out between the accused and P.W.4 Vaweka at the bar of D.W.2 Okethi Lambert but they managed to disengage and escape from the accused. Later At around 11.00 pm after the noise caused by the fight had subsided, they returned to the drinking place. They found Kayomtho Ronald in a critical condition. He was lying inside the house of Okethi. He saw a depression on the forehead and the blood was flowing from his nose. Deep in
20 the night the deceased regained consciousness and told them that he had been assaulted. The following day they took him to Nyapea Hospital but his condition worsened after two weeks. He died the day before he was supposed to return to the hospital for review. P.W.4 Vaweka Ezekiel testified that while at D.W.2 Okethi's bar, the accused began to fight him. The accused attacked him, accusing him of thinking that because he is a police crime preventer he has the freedom to
25 arrest people smoking bhang and playing cards. P.W.4 managed to disengage from him and escape but on returning to the bar later, he found the deceased had sustained an injury on the forehead and a swelling on the side of the eye. The face was swollen and there was a deep cut across the head. He was bleeding. There were bruises on the arms. He was admitted for two weeks and then discharged. He was advised to return for review. He died the day before he could
30 return for review. The evidence of these witnesses suggests the death was as a result of assault.

However, according to D.W.2 Okethi Lambert, the deceased told him he had sustained the injuries from a fall at the home of Manano. The accused denied having inflicted the injuries.

5 In offences such as this where there is a 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 (see
10 *Gichunge v. Republic* [1972] 1 EA 546 and *R v. Jordan* [1956] 40 Cr App Rep 152).

The version presented by the defence of an a accidental fall at the home of Manano does not sit well with the nature of the injuries sustained by the deceased, especially the intra-abdominal haemorrhage and torn spleen. It also does not make sense that a person hurt at Manano's home
15 (said to be over 100 metres away from that of Okethi) would be returned to that of Okethi, except as confirmation of the fact that it is where the entire incident had started. Finally, D.W.2 Okethi was evasive and inconsistent when explaining the gravity of the injuries that the deceased sustained. Although he painted a picture of fairly light injuries, he could not explain why it was necessary for the deceased to spend that night at his home. His version of the dying declaration is
20 thus coloured with falsehood. Considering the evidence relating to causation as a whole, it appears that the immediate cause of death was as a result of assault and not an accidental fall.

Attribution of causal responsibility is a preliminary step towards the eventual attribution of criminal culpability to the accused. The court may use either the natural consequences test, the
25 substantial cause test, or both. 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
30 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. That is, it is only if the subsequent event is so overwhelming as to make the initial wound "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
5 responsible for it, and if it is not potent in causing death, then it will not be so overwhelming as to make the original wound merely part of the history.

In the instant case, the deceased two weeks after he was assaulted. The cause of death was established to be intra-cranial haemorrhage secondary head injuries. "Primary" and "secondary"
10 injuries are ways of classifying the injury processes. Primary injury occurs as a direct effect of physical trauma. Secondary injury occurs gradually as an after-effect on the cellular processes. Although secondary injuries can result from primary injuries or be independent of it, there is no evidence in this case that the secondary injuries seen by the doctor who conducted the post mortem examination were not caused by mechanical damage by way of the direct traumatic blow
15 to the head that occurred two weeks before.

I have therefore not found any cause that intervened in a manner so overwhelming as to make the initial or primary injury inflicted on the deceased as merely part of the history so as to constitute a break in the chain of causation of his death. I instead find that the immediate cause of death,
20 intra-cranial haemorrhage, could reasonably have been foreseen as the consequence of the trauma to the head and as such the trauma to the head was a substantial and operating cause of the resultant death. Not having found any lawful justification for the traumatic injury as described by the witnesses, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt Ronald Kayomtho's death was caused unlawfully.

25

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
30 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
5 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
10 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.

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
15 of this case, the deceased in his dying declaration did not disclose whether or not any object was used in inflicting the injuries that he sustained or whether or not it was a deliberate targeted attack or simply a random strike in the fray of a scuffle without the corresponding intention to inflict a fatal injury. It is only when that distinction is made that the facts on basis of which malice aforethought may be inferred can be ascertained.

20

On basis of the available evidence considered as a whole, I find that although a deadly injury was inflicted on a vulnerable part of the body (the head) resulting in intra-cranial haemorrhage and eventual death two weeks later, the prosecution failed to prove an intention to kill. Malice aforethought cannot be inferred readily in a situation where the circumstances in which the injury
25 was inflicted are unknown. It is not possible to tell whether or not the perpetrator foresaw that death would be a natural consequence of his or her act. The facts from which such an inference can be made are lacking. Consequently, in disagreement with the assessors, I find that the prosecution has failed to prove beyond reasonable doubt that Ronald Kayomtho's death was caused with malice aforethought.

30

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. In his defence, the accused denied having caused the fatal injuries. Although he admitted having been at D.W.2 Okethi Lambert's bar when a fight broke out, he only intervened to separate the people fighting. One of
5 them was in the process hit with a bottle in the eye and ran away. He also saw a bruise on the left side of the face of the deceased and blood was flowing from his nostrils. The bar owner said he was free to go since the man had sustained the injury from a fall. He was surprised when days later he was arrested on allegations that he had assaulted the deceased.

10 To refute that defence, the prosecution relies on the dying declaration of the accused as recounted by P.W.3 Okwaimungu Alfred and P.W.4 Vaweka Ezekiel. The law applicable to dying declarations is section 30 of *The Evidence Act*. It 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 which he or she is dying, or other immediate cause of his or her death, and in reference to the
15 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
20 must always be sought for (see *Okale v. Republic [1965] E.A 555* and *Tuwamoi v. Uganda [1967] E.A.84*).

In the instant case, I find that the deceased knew the accused before his death. The accused had shortly before engaged in a scuffle with P.W.3 Okwaimungu Alfred and P.W.4 Vaweka Ezekiel
25 in his presence. The scuffle took some prolonged time. The eventual attack on the deceased did not occur in a situation of confusion and surprise. This initial scuffle provided ample opportunity for the deceased to see and recognise the accused. There was light at the home / bar of D.W.2 Okethi Lambert that aided his identification. I find that the dying declaration is amply corroborated by the accused in his defence having admitted being in the vicinity of the incident
30 that night, the defence of the accused has therefore been effectively disproved. With the defence disproved, there is no doubt in my mind that it is the accused who assaulted the deceased. In

agreement with the assessors, I find that this ingredient has been proved beyond reasonable doubt.

It is trite that if at the end of and on the whole of the case, there is a reasonable doubt, created by
5 the evidence given by either the prosecution or the accused, as to whether the prisoner killed the
deceased with a malicious intention, the prosecution has not made out the case and the accused is
entitled to an acquittal (see *Woolmington v. Director of Public Prosecutions*, [1935] AC 462).
Culpable homicide is not murder if the offender was not actuated by malice aforethought. For
that reason, the prosecution having failed to prove beyond reasonable doubt that the accused
10 killed the deceased with malice aforethought. The accused is accordingly acquitted of the offence
of Murder c/s 188 and 189 of the *Penal Code Act*.

However, 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
15 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
20 EA 294, where the appellant was charged together with others with obstructing police officers in
the due execution of their duty contrary to s. 243 (b) of *The Penal Code Act*. The magistrate
found the appellant not guilty of the offence charged but convicted him of the minor offence of
assault occasioning actual bodily harm, contrary to s.241 of *The Penal Code Act*. On appeal it
was considered whether the magistrate had power to substitute a conviction of the lesser offence
25 and whether that offence must be cognate with the major offence charged. The High Court of
Tanganyika held that;

s. 181 of *The Criminal Procedure Code* (similar to section 87 of *The Trial on*
Indictments Act, Cap 16) can only be applied where the minor offence is arrived at
by a process of subtraction from the major charge, and where the circumstance
30 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.

Section 87 of *The Trial on Indictments Act* envisages a process of subtraction: 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. In the instant case, the only distinction between the offence of Murder c/s 188 and 189 of the *Penal Code Act* and Manslaughter c/s 187 and 190 of *The Penal Code Act*, is that the former requires proof of malice aforethought which the latter does not. Therefore by a process of subtraction, the offence of Manslaughter c/s 187 and 190 of *The Penal Code Act* is minor and cognate to that of Murder c/s 188 and 189 of the *Penal Code Act*, and a person indicted with the latter offence and facts are proved which reduce it to the former, he or she may be convicted of the minor offence although he or she was not indicted with it. The circumstances embodied in the major indictment necessarily and according to the definition of the offence imputed by that indictment constitute the minor offence too. The indictment under sections 188 and 189 of *The Penal Code Act* gave the accused notice of all the circumstances constituting the offence under sections 187 and 190 of *The Penal Code Act* for which he can be convicted.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence of Manslaughter c/s 187 and 190 of *The Penal Code Act* beyond reasonable doubt and I hereby find the accused guilty and convict him for the offence of Manslaughter c/s 187 and 190 of *The Penal Code Act*.

Dated at Arua this 17th day of May, 2018.

.....
Stephen Mubiru
Judge.
17th May, 2018.

17th May, 2018.

11.01 am.

Attendance.

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 Manslaughter c/s. 187 and 190 of the *Penal Code Act* after a full trial. In her submissions on sentencing, the learned Resident State attorney prayed
5 for a deterrent sentence on the following grounds; the conduct of the convict led to a loss of life much as he never intended. It was an indiscriminate assault which may be termed as mob justice. It is a common practice in the community causing loss of life. He acted carelessly in not contemplating the actions on the deceased and the community. The offence carries a maximum of life imprisonment and in order for other people to learn from it. He proposed a deterrent
10 sentence of at least ten years' imprisonment.

In his *allocutus*, the convict stated that he regrets what happened. He should not have come to this because he is a single child and his mother who died when he was two months old and grew up with his grandmother. Punishment teaches people. He prays for lenience because he heard
15 that his grandmother is now paralysed and cannot move. He has siblings who now have no one to guide them. After his arrest they refused to go to school. He prayed for a short custodial sentence. He proposed five years' imprisonment so that he can teach his siblings thereafter.

The offence of manslaughter is punishable by the maximum penalty of life imprisonment under
20 section 190 of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of such cases. I do not consider this to be a case falling in the category of the most extreme cases of manslaughter. I have for that reason discounted life imprisonment.

25 That punishment must fit both the crime and the offender is a principle that operates as a restraint on excessive punishment as well as a prohibition against punishment that is too lenient. The principle of parsimony on the other hand requires that the court should select the least severe sentencing option available to achieve the purpose or purposes of sentencing for which the sentence is imposed in the particular case before the court.

30

The starting point in the determination of a custodial sentence for offences of manslaughter has been prescribed by Part II (under Sentencing range for manslaughter) of the Third Schedule of

The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 as 15 years' imprisonment. Courts are inclined to impose life imprisonment where a deadly weapon was used in committing the offence. In this case, I have excluded the sentence of life imprisonment on ground that it was not proved that a weapon was used in assaulting the
5 deceased.

I have taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Livingstone Kakooza v. Uganda, S.C. Crim. Appeal No. 17 of 1993*, where the Supreme Court considered a sentence of 18 years' imprisonment to have been
10 excessive for a convict for the offence of manslaughter who had spent two years on remand. It reduced the sentence to 10 years' imprisonment. In another case of *Ainobushobozi v. Uganda, C.A. Crim. Appeal No. 242 of 2014*, the Court of Appeal considered a sentence of 18 years' imprisonment to have been excessive for a 21 year old convict for the offence of manslaughter who had spent three years on remand prior to his trial and conviction and was remorseful. It
15 reduced the sentence to 12 years' imprisonment. Finally in the case of *Uganda v. Berustya Steven H.C. Crim. Sessions Case No. 46 of 2001*, where a sentence of 8 years' imprisonment was meted out to a 31 year old man convicted of manslaughter that had spent three years on remand. He hit the deceased with a piece of firewood on the head during a fight. I have considered the aggravating factors in the case before me and in light of those aggravating factors, I have
20 adopted a starting point of fifteen years' imprisonment.

I have considered the fact that the convict is a first offender, a young man at the age of 23 years. In light of the mitigating factors, the proposed term ought to be reduced to a period of twelve (12) years' imprisonment.
25

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 9th
30 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 accused to a term of imprisonment of eight (8) years and eight (8) months, to be served starting today.

5 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 17th day of May, 2018.

.....
Stephen Mubiru
Judge.
17th May, 2018.