

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
CRIMINAL SESSIONS CASE No. 0151 OF 2018

UGANDA **PROSECUTOR**

5 **VERSUS**

MULEMA GYAVIIRA **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The two accused in this case are jointly indicted with one count of Murder c/s 188 and 189 of the
10 *Penal Code Act*. It is alleged that the accused on the 23rd day of September, 2014 at Kazo Central
Zone in Kawempe Division, Kampala District murdered one Atulinda Lillian.

The prosecution case is that the accused and the deceased were lovers and cohabited in a house
rented by the deceased at Kazo Central Zone, Kawempe Division in Kampala District. The
15 deceased was a businesswoman, she operated a bar in that area and occasionally travelled to
South Sudan on her business trips. In her absence, the accused would manage and run the bar
business. She subsequently bought him a motorcycle to enable him engage in boda-boda rising
as his own business. At the time of her death, the deceased had a pregnancy in its first trimester.

20 The relationship between the accused and the deceased became stormy over time as a result of
the accused's suspicion that another man was responsible for the deceased's pregnancy and
because of wrangles over ownership and control of the business property. From time to time,
P.W.4 Kiyimba Nathan Bogere, the Secretary for Defence of Kazo Central L.C.1 would be
called on to mediate between them. On the fateful night, just before day break, P.W.3 Musiimire
25 Jonardson, one of the neighbours of the deceased, was alerted by another neighbour who heard
strange sounds coming from the deceased's house. Upon responding to the scene, P.W.3 found
the door bolted from inside but not locked. After calling out but not receiving any response from
the occupants, he pushed his hand through an opening in the metallic door designed for that
purpose and un-bolted the door only to see the deceased lying on the floor in a pool of blood just

behind the door. In fright, he bolted the door again and alerted P.W.4 who in turn notified the police. When the police arrived at the scene, they entered the room, found the body of the deceased and later the accused in a corner behind the bed, leaning against the wall with his out-stretched legs bound by one loop of black cello tape, his hands bound at the back with a sisal
5 rope with two loose loops around the wrists and two others in-between the wrists. His lips were bound with one band of cello tape. P.W.4 cut the ropes, the accused was draped in a bed sheet and he together with the body were taken to Mulago Hospital. Within half an hour, the accused had returned to the scene in a hired special hire taxi intending to take the household property away but the mob which had gathered at the scene became suspicious and attempted to lynch
10 him. P.W.4 rescued him and whisked him away in the special hire taxi to Kawempe Police Station from where he was charged with the offence of murder.

In his defence, the accused denied having committed the offence. His version of events is that on the fateful evening, he fell asleep while watching television with the deceased sometime after
15 10.00 pm. Later in the night, he awoke to find himself bound and blindfolded. He could hear voices demanding for a motorcycle and cash from the deceased. Later there was silence and suddenly he was hit with something on the head and he passed out. He regained his consciousness much later only to find himself admitted in hospital and on drip. The doctors there referred him to either Mengo or Nsambya Hospital for a scan where upon the youth who was
20 attending to him secured a special hire taxi that took him home where he intended to get some cash and clothes only to be accosted by a mob and later taken to Kawempe Police Station.

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
25 person and he can only be 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 do 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
30 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 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
5 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.

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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. In the instant case the prosecution adduced a post mortem report dated 24th September, 2014 prepared by P.W.1 Dr. Alele David a Medical Officer at Kampala Capital City Mortuary, which was admitted during
15 the preliminary hearing and marked as exhibit P. Ex.1. The body was identified to him by a one Akampurira Agnes as that of Atulinda Lillian. P.W.3 Musiimire Jonardson, a neighbour of the deceased, who saw the body at the scene. P.W.4 Kiyimba Nathan Bogere, the Secretary for Defence of Kazo Central L.C.1, who was called to the scene and found the body still laying in the house. In his defence, the accused said he did not allude to having seen the body of the
20 deceased at all. He therefore did not refute this element. Defence Counsel did not contest this element too 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 Atulinda Lillian died on 23rd September, 2014.

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The prosecution had to prove further that the death of Atulinda Lillian 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.1 who conducted the autopsy established the cause of death as “blunt force trauma.” Exhibit P. Ex.1 dated 24th September, 2014 contains the details of his
30 other findings which include a “4 cm forehead laceration, congested cerebral vessels with generalised narrowing of the sulci and flattening of the gyri. Elongation of the cerebral tonsils.” These are symptoms of brain swelling consistent with a head wound.

Elongation of the cerebral tonsils is a life-threatening condition as it causes increased pressure on the medulla oblongata which contains respiratory and cardiac control centres. No wonder upon conducting the autopsy the doctor found "right lung congested" and "peticheal haemorrhage" (a tiny pinpoint red mark that is an important sign of asphyxia caused by some external means of obstructing the airways. Their presence often indicates a death by manual strangulation, hanging, or smothering), with "congested parenchyma" (pooling of blood in capillaries and veins in a dependent part due to the effect of gravity). Both P.W.3 Musiimire Jonardson, a neighbour of the deceased, and P.W.4 Kiyimba Nathan Bogere, the Secretary for Defence of Kazo Central L.C.1, saw the body at the scene lying in a pool of blood which is corroborative of the medical report.

10 The coexistence of these symptoms is suggestive of a violent death.

Considered together with the version of the accused that the deceased went silent at the hands of violent assailants, the possibility of a natural death has been ruled out. The version stated by the accused is an oblique admission that the deceased died a violent death at the hands of another human being. In the absence of direct explanation, the probability is high enough to justify an inference in favour of a finding of homicide. No co-existing facts appear which can reasonably explain the death in a manner inconsistent with a homicide. In his defence, the accused did not refute this element and neither did Defence Counsel contest it in his final submissions. Not having found any lawful justification for the assault on the deceased, I agree with the assessors that the prosecution has proved beyond reasonable doubt that Atulinda Lillian's 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 no weapon was recovered or

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produced in court. Nevertheless, 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*). Where there is no evidence to suggest that any weapon was used in inflicting the fatal injury, 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 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 evidence has shown that a fatal injury was inflicted on the head of the deceased in circumstances of a violent attack. The ferocity of the attack can be determined from the impact (a laceration and trauma leading to death). P.W.1 who conducted the autopsy established the cause of death as “blunt force trauma.” Although there is no direct evidence of intention, malice aforethought can be inferred readily in a situation like this where the circumstances in which the injury was inflicted can be deduced from the very nature of the fatal injury. Any perpetrator who strikes another on the head with such ferocity as to cause a laceration and trauma to the internal organs, especially the brain, must have foreseen that death would be a natural consequence of his or her act. The accused did not adduce any evidence capable of casting doubt on this conclusion and neither did Defence Counsel contest this element. On basis of the circumstantial evidence, I find, in agreement with the assessors that malice aforethought can be inferred. The prosecution has consequently proved beyond reasonable doubt that Atulinda Lillian’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. In his defence, the accused denied having committed the offence. His version of events is that on the fateful evening, he fell asleep while watching television with the deceased sometime after 10.00 pm. Later in the night,

he awoke to find himself bound and blindfolded. He could hear voices demanding for a motorcycle and cash from the deceased. Later there was silence and suddenly he was hit with something on the head and he passed out. He regained his consciousness much later only to find himself admitted in hospital and on drip. The doctors there referred him to either Mengo or
5 Nsambya Hospital for a scan where upon the youth who was attending to him secured a special hire taxi that took him home where he intended to get some cash and clothes only to be accosted by a mob and later taken to Kawempe Police Station.

To refute these defences, the prosecution relies entirely on circumstantial evidence against the
10 accused. "It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial," (see *Taylor Weaver and Donovan v. R 21 Cr App R 20 at 21*).

15 In a case depending exclusively upon circumstantial evidence, the court is concerned with probabilities, not with possibilities. Something is "probable" when it is verifiable and more likely to have happened than not, whereas something is "possible" where it could happen in similar situations, some form of acknowledgement that although it is not impossible, yet it is unlikely to have happened in the circumstances of the case. Just because something is possible does not
20 mean it is probable. There should be material upon which it can be found that there is such probability in favour of the explanation or hypothesis presented by the prosecution that the contrary one must be rejected. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the fact to be proved is so high that the contrary cannot reasonably be supposed. The burden
25 of proof lies upon the prosecution, and if the accused has been able by additional facts which he has adduced through cross-examination or his defence to bring the mind of the Court to a real state of doubt, the prosecution has failed to satisfy the burden of proof which lies upon it.

In a case depending exclusively upon circumstantial evidence, the court must find before
30 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 accused's responsibility for 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 5 715, *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.

The prosecution relies on circumstantial evidence woven together by the following strands; the 10 accused and the deceased were lovers and cohabited in a house rented by the deceased; they also operated a bar business together; all household property, a motorcycle and business stock belonged to the deceased; the deceased had a pregnancy in its first trimester which the accused suspected to be the responsibility of another man; the pregnancy had strained their relationship; they also had misunderstandings over business property with the accused striving to obtain a 15 share. Against this first batch of circumstantial evidence, none of the prosecution witnesses who testified to it was shaken in cross-examination and neither did the accused offer any alternative facts that weakened or controverted it.

The second batch of circumstantial evidence comprises the fact that; the accused and the 20 deceased were the only occupants of the house that night (the accused states they were attacked by intruders late in the night); there is no sign that the accused attempted to defend himself or the deceased (he stated that he was asleep and woke up only to find himself bound); the manner in which the accused was bound appears to have been stage-managed and there was no sign of breakage or forceful entry (he blacked out at some point and regained his senses much later to 25 find himself in hospital, on drip); none of the household property was taken (he stated in his defence that the robbers were only interested in his motorcycle and cash); he was taken away from the scene feigning a poor state of health only to return within thirty minutes (he stated that he planned to get cash and clothes from the house since he had been referred to either Mengo Hospital or Nsambya hospital for a scan); he returned by special hire not ambulance (the special 30 hire was obtained by a youth who was attending to him; he had no sign on any of his hands such as would have been expected of a person who had been on drip less than an hour before; he

showed no concern for the whereabouts or condition of the deceased but was only interested in property (he was proceeding to hospital for treatment).

It is essential to inquire with the most scrupulous attention what other hypotheses there may be
5 which may agree wholly or partially with the facts in evidence. I have considered the explanations and hypotheses advanced by the accused to explain away the various incriminating elements in the prosecution circumstantial evidence. I find that there is no evidence to suggest that there was any breakage or forceful entry into the house that night. Although this does not rule out the possibility of a stealth entry into the house by someone who opened an unlocked
10 door from outside, in light of the circumstances found to have obtained inside the house by P.W.3 and P.W.3 I find this to be a fanciful theory. There is no material upon which it can be found that there is such probability in favour of the explanation or hypothesis presented by the accused. Instead, the material available supports the theory advanced by the persecution for the following reasons;- he claimed to have fallen deep asleep as he watched television to the extent
15 of being bound later without him sensing what was going on which according to the common course of human affairs, the degree of probability of that happening is very remote. There is no evidence that he attempted to free himself, raise an alarm or otherwise attempt to protect himself or the deceased against the intruders yet the manner in which his mouth and legs were bound does not suggest that this was impossible. He claimed to have had his hands bound at the back
20 with a sisal rope yet the manner of the loops are consistent with a stage managed situation than binding by violent robbers of the type he described, most especially since the loose ends of the rope had not been tied into a knot of any sort.

The hypotheses advanced by the accused, although not impossible, yet they are unlikely to have
25 happened in the circumstances of this case. Their probability is low enough so as to not bear mention in a rational, reasonable argument. The hypotheses advanced by the accused being improbable, the degree of probability attained in favour of the explanation by the prosecution has produced moral certainty, to the exclusion of every reasonable doubt, such that the contrary hypotheses must be rejected. The circumstances exclude every exculpatory hypothesis leaving
30 only one rational conclusion to be drawn, of the guilt of the accused. Not having found any

reasonable hypothesis consistent with the innocence of the accused, I find that it has been proved beyond reasonable doubt that he is the perpetrator of the offence for which he stands indicted.

Despite my findings above, I note with concern the absence of forensic evidence. None of the police officers involved in the investigation of this case testified during the trial, yet a proper processing of the scene of crime would have made the prosecution of the case much more easier. It is necessary for the Directorate of Public Prosecution to engage those in charge of criminal investigations, in order to devise means of ensuring more efficient investigations, retrieval, preservation and production of evidence in court, in cases of this nature.

That notwithstanding, in the final result I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby find the accused guilty and convict him for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Kampala this 26th day of June, 2018.

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Stephen Mubiru
Judge.
26th June, 2018.

Later.

4.43 pm

Attendance

Court is assembled as before.

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; this case has manifested a serious degree of wickedness involved in the commission of the crime. The deceased was a girlfriend of the convict. She was the one supporting him in all aspects of life, accommodating him, feeding him and starting a business for him by buying a boda-boda. She ended up dead. The deceased was three months pregnant at the time she was murdered. It is not only one person affected by the act. The three months foetus died as a result of the act. the offence is rampant within this jurisdiction where so many innocent women are victims in the hands of arrogant men, e.g the cases of Nansana neighbouring Kawempe where the offence was committed. The offence causes great

social disapproval, mothers are supposed to be treated with dignity and respect. The convict was not remorseful at all from the time he was arrested and found in the house together with the deceased up to now. It is the duty of the court to protect and uphold the dignity of the women of this country from the hands of selfish people like the convict. This is a first degree murder where
5 the prosecution seeks the death penalty as he does not deserve going back to the public to commit similar crimes.

In mitigation, counsel for the accused sought lenience on grounds that the convict is a first time offender. He is 27 years old, still a young man and it goes without saying that he has been in
10 detention since September, 2014 and thus has been in custody since he was 23. At the time of his arrest he had a four year old son Katongole Yona whom he has not seen since then. The crime for which h has been convicted is heinous but I pray that he is shown some lenience by imposing a sentence that will rehabilitate him. Hopefully one day he shall be able to return to society a free and changed man and still be a father to his son.

15 In his *allocutus*, the convict prayed for lenience on grounds that it is his first time to come to court. He is still a youth and he can contribute to this nation. He never went to school if he is released and gets his son, he wants to give him the opportunity he did not get. He prayed for release or a light sentence which he can serve and go back to society.

20 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.

25 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
30 have considered the aggravating, most particularly the fact that the offence was motivated by greed and jealousy committed by a person against someone who worked so hard to support

herself and had had gone out of her way to provide for the welfare of the convict as well, she was pregnant at the time resulting in the death of the foetus as well. Accordingly, I have adopted a starting point of forty five years' imprisonment. I have considered the mitigation, most particularly the fact that the convict is a first offender and relatively youthful, and for that reason
5 consider a reduction to a period of thirty seven (37) years' imprisonment to be an appropriate 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
10 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 has been in custody since September, 2014 and I hereby take into account and set off three years and nine months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of thirty three (33) years and three (3) months, to be served starting today.

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

Dated at Kampala this 26th day of June, 2018.

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Stephen Mubiru
Judge.
26th June, 2018.

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