

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CRIMINAL SESSIONS CASE No. 175 OF 2017

UGANDA **PROSECUTOR**

5 **VERSUS**

L. R. **JUVENILE OFFENDER**

Before: Hon Justice Stephen Mubiru

JUDGMENT

10 The juvenile offender 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 juvenile offender on the 18th day of September, 2016 at Lukoto village, Binya Parish, Odek sub-county in Omoro District, murdered one Akongo Margaret.

15 The prosecution case is that on the morning of 18th September, 2016 the deceased was seen proceeding to her charcoal kiln near her home. Shortly after, the juvenile offender was seen going towards the same direction, after her. Within two minutes, the deceased was heard screaming calling out her husband's name for help. Her co-wife, P.W.2 Adong Nancy rushed to the scene where she found the deceased had fallen onto the ground, dead, and the juvenile
20 offender was holding a hoe. The juvenile offender charged at P.W.2 who fled screaming calling out her husband's name for help. P.W.3 Okello John Bosco, the husband of the deceased, rushed to the scene and met P.W.2 dashing from there. At the scene he found the body of his wife. He searched around and at a distance of about fifteen metres from the scene he spotted the juvenile
25 offender crouching behind some tall grass. The juvenile offender dashed in a bid to escape and he ran after him. He arrested the juvenile offender at a distance of about 100 metres from the scene, with the help of several other villagers who had responded to his alarm. The juvenile offender was handed over to the police when they came to the scene and took the body away for a post mortem.

In his defence, the juvenile offender denied having committed the offence. His version of events is that on the fateful morning he went to the garden with his father at around 7.00 am. They returned home at 10.00 am. At around 11.00 am he left home and went out into the bush to eat wild fruit called "Pwomo." Later on his way back home, a lady saw who was running along the road she saw him and she began raising an alarm. Her husband was following her. The juvenile offender did not run away and he was arrested. Many people began gathering and took him to the L.C. They called the police on phone who came to the scene. They took him to the scene of crime and began torturing him yet he had no prior information that anyone had been killed. The woman alleged that the juvenile offender was the one who had killed the deceased yet he did not kill the deceased. He told them he had no idea about what had happened. When he went to find "Pwomo" he was alone. He was over 400 metres from the scene when the woman began raising an alarm. The police put him on a motorcycle and took him to the police station.

Since the juvenile offender pleaded not guilty, like in all criminal cases the prosecution had the burden of proving the case against him beyond reasonable doubt. The burden does not shift to the juvenile offender and he can only be adjudged responsible on the strength of the prosecution case and not because of weaknesses in his defence, (see *Ssekitoleko v. Uganda* [1967] EA 531). The juvenile offender does not have any obligation to prove his innocence. By his plea of not guilty, the juvenile offender put in issue each and every essential ingredient of the offence with which he is charged and the prosecution had 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 juvenile offender, at its best creates a mere fanciful possibility but not any probability that the juvenile offender is innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

For the juvenile offender to be adjudged responsible for the offence of Murder, the prosecution must prove each of the following 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 juvenile offender who caused the unlawful death.

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 18th September, 2016 prepared by P.W.1 Dr. Olwedo Onen, a Principal Medical Officer in Gulu, which was admitted during the preliminary
5 hearing and marked as exhibit P. Ex.1. The body was identified to him by P.W.3 Okello John Bosco as that of Akongo Margaret. This is corroborated by the testimony of P.W.2 Adong Nancy, a co-wife of the deceased, who saw the body at the scene. P.W.3 Okello John Bosco, the husband of the deceased, too saw the body at the scene. P.W.4 No. 42321 D/Cpl Odong Simon Stewart, the investigating officer too saw the body at the scene, and arranged for its post mortem
10 examination. In his defence, the juvenile offender said he too saw the body when he was taken back to the scene after his arrest. Defence Counsel did not contest this element in her 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 Akongo Margaret died on 18th September, 2016.

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The prosecution had to prove further that the death of Akongo Margaret 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
20 death as “severe brain tissue damage due to depressed skull fracture. Crashed brain tissue and subdural haematoma.” Exhibit P. Ex.1 dated 18th September, 2016 contains the details of his other findings which include a “the deceased died of severe brain tissue damage due to depressed skull fracture following severe blunt force head trauma using a hoe. Deep wounds on the vertex and occiput scalp. Depressed commuted occiput skull fracture, crashed brain tissue and subdural
25 haematoma. Cut left index finger. Severe brain tissue damage.”

The suspected weapon used was a hoe found near the body of the deceased. P.W.3 who saw the body described the injuries as including blood at the back of the head towards the neck and an injury on one of the hands. P.W.4 checked the body at the scene and found a deep cut on the
30 head. There was a blood stained hoe near the body. In the absence of direct evidence of causation, the probability established by the available circumstantial evidence 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 juvenile offender did not refute this element and neither did Defence Counsel contest it in her final submissions. Not having found any lawful justification for the assault on the deceased, I
5 agree with the assessors that the prosecution has proved beyond reasonable doubt that Akongo Margaret's 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
10 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*).

15 Malice aforethought being a mental element is difficult to prove by direct evidence. Courts usually consider first; the nature of the weapon used. In this case the suspected hoe found at the scene was not 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
20 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*).

In determining the existence or otherwise of malice aforethought, Courts usually consider weapon used (in this case a bloodstained hoe was found near the body) and the manner it was
25 applied (a fatal injury inflicted to the back of the head) and the part of the body of the victim that was targeted (the back of the head). The ferocity with which the weapon was used can be determined from the impact (a crashed skull and damaged brain tissue). P.W.2 who conducted the autopsy established the cause of death as “severe brain tissue damage due to depressed skull fracture. Crashed brain tissue and subdural haematoma.” Any perpetrator who strikes another on
30 the back of the head with such ferocity as to cause severe brain tissue damage due to depressed skull fracture, must have foreseen that death would be a natural consequence of his or her act.

The juvenile offender did not adduce any evidence capable of casting doubt on this conclusion and neither did Defence Counsel contest this element in her final submissions. 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 Akongo
5 Margaret's death was caused with malice aforethought.

Lastly, there should be credible direct or circumstantial evidence placing the juvenile offender at the scene of the crime as the perpetrator of the offence. In his defence, the juvenile offender denied having committed the offence. He relied on the defence of alibi. He was with his father in
10 the garden that morning. He later went into the bush about 400 meters from the scene of crime to find "pwomo" for eating. His father, D.W.2 Odong John Bosco, partly corroborated his alibi for the period they were together in the garden up to around 10.00 am. He however could not vouch for his whereabouts thereafter.

15 To refute these defences, the prosecution relies entirely on circumstantial evidence against the juvenile offender. This 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*).

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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
25 have happened in the circumstances of the case. Just because something is possible does not 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
30 by the fact to be proved is so high that the contrary cannot reasonably be supposed. The burden of proof lies upon the prosecution, and if the juvenile offender 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.

I have scrutinised the evidence and considered the contradictions and inconsistencies in the prosecution evidence alluded to by defence counsel and the assessors. It is trite law that grave contradictions unless satisfactorily explained may, but will not necessarily result in the evidence being rejected and minor contradictions and inconsistencies, unless they point to a deliberate untruthfulness, will usually be ignored (see *Alfred Tajar v. Uganda*, EACA Cr. Appeal No.167 of 1969, *Uganda v. F. Ssembatya and another* [1974] HCB 278, *Sarapio Tinkamalirwe v. Uganda*, S.C. Criminal Appeal No. 27 of 1989, *Twinomugisha Alex and two others v. Uganda*, S. C. Criminal Appeal No. 35 of 2002 and *Uganda v. Abdallah Nassur* [1982] HCB). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

The contradictions highlighted in this case are; whether the juvenile offender was wearing a grey T-shirt or a green shirt; whether the police arrived at the scene 7.30 am or 2.00 pm; whether the juvenile was beaten upon arrest or not; whether the juvenile offender was seen at 7.30 am or 10.00 am; and that P.W.2 was reluctant to admit that she was the wife of P.W.3. I have considered the range and character of the contradictions so highlighted. Those relating to time have either been or may be satisfactorily explained as mere estimates and not based on accurate reckoning of time based on chronometer readings. The marital status of P.W.2 relates to a matter of a private, personal nature. I have found the rest to be grave in so far as they relate to matters which are not central to the key elements to be determined in the case. They are not suggestive of deliberate untruthfulness on the part of the witnesses to whom they are attributed. They appear to be the result of mere lapse of memory as a result of the passage of time.

The evidence of both P.W.2 and P.W.3 being in the nature of visual identification, court has to determine whether or not these identifying witnesses were able to recognise the juvenile offender. In circumstances of this nature, the court is required to first warn itself of the likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made which is free of error or mistake (see *Abdalla Bin Wendo v. R* (1953) 20 EACA 106;

Roria v. R [1967] EA 583 and *Abdalla Nabulere and two others v. Uganda* [1975] HCB 77). In doing so, the court considers; whether the witnesses were familiar with the juvenile offender, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the juvenile offender and the proximity of the witnesses to the juvenile offender at the time of observing him.

As regards familiarity, the two identifying witnesses knew the juvenile offender prior to the incident. He is the son of their neighbour. In terms of proximity, the juvenile offender was very close to the P.W.2 and even exchanged greetings with her, and shortly thereafter was close when he ran after her with a hoe, while P.W.3 ran after him and actually arrested him. In terms of light, it was during day time and their vision was not obstructed. As regards duration, all those interactions took a reasonable period of time, that was long enough a period to aid correct identification. None of the witnesses was motivated by malice or grudge to implicate the juvenile offender, since none was advanced in his defence. I find that he was properly recognised.

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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 juvenile offender 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 juvenile offender'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 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).

25 Circumstantial evidence must always be narrowly examined.

The prosecution relies on circumstantial evidence woven together by the following strands; P.W.2 Adong Nancy, a co-wife of the deceased, saw the deceased walk past towards the direction of her charcoal kiln. Shortly after the juvenile offender followed. Shortly after she heard a scream from the deceased. She rushed to the scene and found the juvenile offender holding a hoe. The juvenile offender charged at her with a hoe. P.W.3 Okello John Bosco, the

husband of the deceased, on searching around the scene saw the juvenile offender hiding under some tall grass about 15 meters from the scene. He ran after the juvenile offender and arrested him at a distance of about 100 meters from the scene.

5 It is essential to inquire with the most scrupulous attention what other hypotheses there may be which may agree wholly or partially with the facts in evidence. I have considered the explanations and hypotheses advanced by the juvenile offender to explain away the various incriminating elements in the prosecution circumstantial evidence. I find that there is no evidence to suggest that it was by coincidence that the juvenile offender was arrested in those
10 circumstances. 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 juvenile offender. Instead, the material available supports the theory advanced by the persecution.

The hypothesis advanced by the juvenile offender, although not impossible, yet is unlikely to
15 have happened in the circumstances of this case. Its probability is low enough so as to not bear mention in a rational, reasonable argument. The hypothesis advanced by the juvenile offender 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
20 hypothesis leaving only one rational conclusion to be drawn, of the responsibility of the juvenile offender. Not having found any reasonable hypothesis consistent with the innocence of the juvenile offender, in disagreement with the opinion of the assessors, I find that this element too been proved beyond reasonable doubt that the juvenile offender before court is the perpetrator of the offence for which he stands indicted.

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In the final result I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby adjudge the juvenile offender responsible for the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

Dated at Gulu this 26th day of September, 2018.

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.....
Stephen Mubiru
Judge.
26th September, 2018.

Later.
4.00 pm
Attendance

Court is assembled as before.

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DISPOSITION ORDER

The juvenile offender has been adjudged responsible for the offence murder c/s 188 and 189 of the *Penal Code Act* after a full trial. In his submissions regarding the appropriate disposition order, the learned Resident State attorney has prayed for a deterrent order on the following grounds; the offence of murder is prevalent. The juvenile offender brutally ended the life of Margaret Akong. There is no evidence of provocation. There is evidence of pre-meditation by following the deceased to where she was making charcoal and ending her life. Being a juvenile, the maximum detention is three years. He has so far been on remand for two years since, 22nd 15 September, 2016. He prayed that the court considers the circumstances of the case and orders him to be in custody for three years from which the two years should be deducted.

In mitigation, counsel for the juvenile offender sought lenience on grounds that; the juvenile offender is now 17 years old. He was in P.5 at Lukoto primary School. He is a first offender. His biological parents are in court. He has been two years on remand. That time should be considered long enough under s. 94 of *The Children Act* and in the alternative, the period left should be non-custodial so that it is rehabilitative in nature to enable the parents to guide him. In addition to the two years, he may be given six months under supervision of a probation officer. In his *allocutus*, the juvenile offender prayed for lenience and asked for forgiveness because a wrong has already 25 happened. He did not hit the deceased. He was just moving along the road. He prayed to be allowed to go back to school.

The offence for which the juvenile has been adjudged responsible is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. However, according to section 104 (A) (1) of *The Children Act*, a death sentence is not to be pronounced on or recorded 30 against a person convicted of an offence punishable by death, if it appears to the court that at the time when the offence was committed the convicted person was below the age of eighteen years.

The alternative is provided for by section 94 (1) (g) of *The Children Act*, which states that in such instances the maximum period of detention is to be three years.

On account of children's diminished culpability and heightened capacity for reform, by statute
5 children are different from adults for sentencing purposes. Sentencing a juvenile offender to three years in a children detention facility is the most severe criminal penalty available. Whereas the maximum punishment for a juvenile offender found responsible for an offence punishable by death is three years' detention, section 94 (1) (g) of *The Children Act* provides that detention shall be a matter of last resort and shall only be made after careful consideration and after all
10 other reasonable alternatives have been tried and where the gravity of the offence warrants the order.

In arriving at an appropriate disposition order, the court will take into account the aggravating and mitigating factors relevant to the offence charged, the character of the offender, including
15 but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, the offender's record while on remand, the offender's ability to appreciate the risks and consequences of the conduct, the degree of criminal sophistication exhibited by the offender, the degree of responsibility the offender was capable of exercising, the offender's chances of being rehabilitated, the physical, psychological and
20 economic impact of the offense on the victim and the community, and such other factors as the court may deem relevant. Orders imposing the maximum period of detention should normally be reserved for the worst offenders and the worst cases.

Orders of that kind may be justified where the offence was committed with brutality, or where
25 the prospects of the juvenile offender reforming through non-custodial interventions are negligible, or where the court assesses the risk posed by the juvenile offender and decides that he or she will probably re-offend and be a danger to the public for a considerable time to come. In such cases, maximum incapacitation is desirable. In cases of a grave nature but where the court forms the opinion that they were only the consequence of unfortunate yet transient immaturity of
30 youth, from that maximum point the sentence should be graduated and proportional to the offender and the gravity of the offence, with a view to strike a balance between the need for

public safety and that of rehabilitating the juvenile offender. A distinction must be made between the juvenile offender whose crime reflects unfortunate yet transient immaturity of youth from the rare juvenile offender whose crime reflects a deep-seated depravity.

5 In the instant case, the juvenile offender murdered for which reason the gravity of the offence warrants an order of detention. Although section 94 (1) (g) of *The Children Act* provides that detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order, I find that detention is unavoidable in the circumstances of this case. The
10 offence was committed with extreme brutality, with pre-meditation and without any apparent motive, for which reason the court assesses the risk posed by the juvenile offender as high. He is a danger to the public such that maximum incapacitation is desirable and I thus consider three (3) years' period of detention to be appropriate for this offender. I have considered the submissions in mitigation and his *allocutus* but they are unpersuasive considering the circumstances in which
15 the offence was committed.

In accordance with section 94 (3) of *The Children Act*, to the effect that where a child has been remanded in custody prior to an order of detention being made in respect of the child, the period spent on remand shall be taken into consideration when making the order, I note that the juvenile
20 offender has been in custody since 22nd September, 2016. I hereby take into account and set off two years as the period each of the juvenile offender has already spent on remand. Having taken into account that period, I therefore impose an order of one (1) year's detention, to be served by the juvenile offender, starting today.

The juvenile offender is advised that he has a right of appeal against both being adjudged
25 responsible and the disposition order, within a period of fourteen days.

Dated at Gulu this 26th day of September, 2018.

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Stephen Mubiru
Judge.
26th September, 2018.

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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN
AT GULU**

TO:

**The in-charge,
Juvenile Detention Centre**

WARRANT OF COMMITMENT

WHEREAS on the **26TH** day of **SEPTEMBER** 2018, **L. R.** the **Juvenile Offender** in Criminal Session Case No. **0175** of the Calendar Year for **2018** was adjudged a Juvenile Offender before me: Honourable Justice **MUBIRU STEPHEN. A Judge of the High Court of Uganda**, for the offence of **MURDER CONTRARY TO SECTION 188 & 189** of the Penal Code Act and ordered to serve a period of detention of **ONE (1) YEAR'S DETENTION.**

THIS IS TO AUTHORISE AND REQUIRE YOU, the in-charge of the Juvenile Detention Facility to receive the said **L. R.** into your custody in the said Juvenile Detention Facility together with this **Warrant** and there carry the afore said order into execution according to Law.

GIVEN under my Hand and the Seal of the court this **26TH day of SEPTEMBER, 2018.**

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JUDGE