

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

**CRIMINAL SESSIONS CASE No. 148 OF 2017**

**UGANDA ..... PROSECUTOR**

5 **VERSUS**

1. **AOYO ROSE }  
2. **ABER DIANA } ..... ACCUSED****

**Before: Hon Justice Stephen Mubiru**

10 **JUDGMENT**

The accused in this case 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 and others still at large on the night of 5<sup>th</sup> April, 2017 at Awalaboro village, Palaro sub-county in Gulu District murdered a one Kidega Nelson.

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The prosecution case is that during the night of to 4<sup>th</sup> April, 2017 the deceased went out with P.W.3 Okot Stephen to drink alcohol at Vicky Amony's bar. They parted company late into the night, the latter leaving the deceased at that bar. The following morning the body of the deceased was found near that bar. His head had been crushed with a stone lying nearby. The two accused  
20 had spent a night in a house belonging to Vicky Amony, a few meters from where the body of the deceased was found lying. Blood stains were found in the house where the two had slept, and on the floor by the doorway. There were blood stains on the stone used to close the door to the house in which the two slept. A pool of blood was found on the ground next to the second house in the same compound, covered with a papyrus mat. Blood stained clothes of A2 were recovered  
25 from the house. A1 was later arrested at her home area in Palaro, 3 kms away. Both caucused denied having participated in killing the deceased.

In her defence, A.1 Aoyo Rose stated that she spent the fateful night sleeping in the house of Vicky Amony. A2 Aber Diana returned from where she does her business. She entered the house and we went to bed at around 10.00 - 11.00 pm. A2 moved out twice during that night, to ease herself. Towards morning, the children of Amony left for school at Lukore and found the body of the deceased along the road. They came back and informed the mother. She said that he could be a drunkard because the previous day was market day. The mother escorted them and found that the person had died. Their mother called the name of the bar owner Angee Kevin. She said someone had killed Nelson. People began gathering and discovered he had died. They found a blood stain around the buttocks area of the clothes Aber Diana was wearing.. She answered that it was menstrual flow. They asked her whether on the two occasions she moved out she saw the body and stones but she said she did not see but urinated. Diana was asked which man she slept with in the house. She said she had slept with A1 and the two children of Vicky Amony. They were arrested and taken to Palaro Police Post.

In her defence, A.2 Aber Diana stated that she worked as a bar attendant at Vicky's bar but during the night of 5<sup>th</sup> April, 2017 she developed pain and entered the house to sleep at around 8.00 pm. She found A1 sleeping in the house. Angee Kevin had asked them to look after the children of Amony Vicky in the house of Amony Vicky where A1 was sleeping. She moved out and vomited because she was not feeling well. She went back to sleep. She went out a second time to urinate and noticed the bar was still open. She had gone to bed at 9.00 - 10.00 pm because of pain. She had removed contraceptives inserted in her arm and as a result she began bleeding that evening and it persisted in the night. She had removed them because they had been causing a lot of pain. She slept and the following morning the children were going to school when they returned and told her and A1 that there was a man by the roadside. She told them to continue to school thinking he was a drunkard. They went to their mother who woke up and began waking up the neighbours because Nelson was dead. People began gathering to see the body. They waited for police officers. She returned from the borehole where I had gone to fetch water. She was asked who had killed the deceased and she told them she did not know. They asked her about the blood and she told them it was menstrual. She was told to go to the police to make a statement. The police gave her cotton wool and medicine to stop the bleeding. She was

later brought to court and remanded to prison. The bleeding stopped while she was on remand in prison.

5 Since both accused pleaded not guilty, like in all criminal cases the prosecution had the burden of proving the case against both of them beyond reasonable doubt. The burden does not shift to the accused and they 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 531). The accused do not have any obligation to prove their innocence. By their respective pleas of not guilty, the accused put in issue each and every essential ingredient of the offence with which  
10 they are jointly charged and the prosecution had 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 that the accused are innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER  
15 372).

For the accused to be convicted 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.
- 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 6<sup>th</sup> April, 2017 prepared by P.W.1 SSP Dr. Ndiwalana Bernard, the Police Surgeon of Aswa Region, which was admitted during the preliminary hearing and marked as exhibit P. Ex.1. The body was identified to him by a one Otema Joel, a brother to the deceased, as that of Kidega Nelson.

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This report is corroborated by the testimony of P.W.3 Okot Stephen, who on the morning of 5<sup>th</sup> April, 2017 saw the body near the house of Vicky. P.W.4 Odongtwo Justin, testified that at around 7.30 am he got information that Kidega had been killed near the military barracks. He went to the scene and found police officers and the body was near the house where Aber Diana sleeps, about three to four metres from the house. P.W.5 AIP Susu Peter, the first police officer to arrive at the scene testified that he found the scene cordoned off by the army. There was a body lying in a pool of blood. It was a body of a male adult. It was next to a hut of the two accused.

10 In her defence, A.1. Aoyo Rose stated that on that fateful morning, the children of Amony Vicky left for school at Lukore and found the body of the deceased along the road. They came back and informed the mother. She said that he could be a drunkard because the previous day was market day. The mother escorted them and found that the person had died. Their mother called the name of the bar owner Angee Kevin. She said someone had killed Nelson. People began gathering and discovered he had died. A.2 Aber Diana stated that on the fateful morning, the children were going to school when they returned and told them there was a man by the roadside. She told them to continue to school thinking he was a drunkard. They went to their mother who woke up and began waking up the neighbours because Nelson was dead. People began gathering to see the body. They waited for police officers. Defence Counsel did not contest this element in her  
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20 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 Kidega Nelson died on 5<sup>th</sup> April, 2017.

The prosecution had to prove further that the death of Kidega Nelson 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 to the head (intracerebral haemorrhage / lacerated brain).” Exhibit P. Ex.1 dated 6<sup>th</sup> April, 2017 contains the details of his other findings which include a “body of a male  
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30 adult in early stages of decomposition (rigor mortis) moderately pale head soiled with blood. Bleeding from ear, mouth and eyes. Has left black eye, swollen left side of the face, crackling

sound from the head, lacerated left ear lobe 4 x 3 cms, haematoma, fractured scalp, depression fracture left parietal temporal region. Chip fracture left parietal temporal region, lacerated brain, subdural, subarachnoid intracerebral haemorrhage, contused anterior chest muscles.”

5 P.W.3 Okot Stephen, last saw the deceased healthy, drinking alcohol at Amony Vicky's bar the previous night. The following morning he found him dead at the scene and the body had a swelling on the head and the eye. He saw a stone nearby with blood stains. It was about half a foot in diameter. It was about one metre away from the body. The head was the nearest part of the body to this stone. P.W.5 Opira Jimmy too saw that the body had wounds on the head. They  
10 were fresh, open, cut wounds. Next to the body was a big stone with blood stains. 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 their defence, none of the accused offered any evidence in relation to this ingredient and their  
15 counsel did not contest it in her final submissions. Not having found any lawful justification for the assault on the deceased, I agree with the assessor that the prosecution has proved beyond reasonable doubt that Kidega Nelson's death was unlawfully caused.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice  
20 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 the suspected stone 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  
30 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*). The weapon suspected to have been used was a stone found near the body of the deceased. The description given by P.W.3 Okot Stephen, as this stone having been about half a foot in diameter, suffices. Considering the definition of a deadly weapon in section 286 (3) of *The Penal Code Act* as including an instrument which when used  
5 for offensive purposes is capable of causing death, I find that the weapon used in hitting the deceased was a deadly one.

In determining the existence or otherwise of malice aforethought, . Courts usually consider weapon used (in this a big stone is suspected) and the manner they were applied (blunt force  
10 trauma) and the part of the body of the victim that was targeted (the head). The ferocity with which the weapon was used can be determined from the impact (intracerebral haemorrhage / lacerated brain). P.W.1 (SSP Dr. Ndiwalana Bernard) who conducted the autopsy established the cause of death as “blunt force trauma to the head.” The accused did not offer any evidence on this element. There is no direct evidence of intention, it is based only on circumstantial evidence  
15 of the injuries. Any perpetrator who strikes another on 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 accused 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 assessor  
20 that malice aforethought can be inferred. The prosecution has consequently proved beyond reasonable doubt that Kidega Nelson’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 the perpetrators of the offence. In their respective defences, both accused denied  
25 having committed the offence. To refute these defences, the prosecution relies entirely on circumstantial evidence. 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 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 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 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 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 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.

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The prosecution relies on circumstantial evidence woven together by the following strands; the two accused spent a night in a house belonging to Vicky Amony, a few meters from where the body of the deceased was found lying the following morning; the deceased had been drinking at a bar within the same compound the previous night; blood stains were found in the house where the two had slept, on the floor by the doorway; there were blood stains on the stone used to close the door to the house in which the two slept; a pool of blood was found on the ground next to the

second house in the same compound, covered with a papyrus mat; the blood covered by the mat was estimated to have been a cup-full, which is not consistent with menstrual flow; blood stained clothes of A2 were recovered; none of the prosecution witnesses saw the blood stain on her buttocks which A1 claimed in her defence to have seen; A1 disappeared from the scene of crime and was arrested at her home area in Palaro, 3 kms away.

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 accused to explain away the various incriminating elements in the prosecution circumstantial evidence, which run as follows; the two only happened to have spent the night in a house that shared the same compound with Vicky's Bar; blood stains found in the house where they spent the night, by the doorway and on the stone used to close the door to the house were as a result of an unusually heavy menstrual flow of A2 following the removal of her contraceptives; A2 has consistently since arrest explained the blood stained clothes recovered from the house as being the result of that flow; there is no established connection between the pool of blood found on the ground next to the second house in the same compound, covered with a papyrus mat, that blood found where the body was and the few blood spots found inside the house; A1 did not disappear from the scene of crime back to her home in Palaro, 3 kms away, but remained at the scene and was arrested from there.

The occurrences as explained by the version presented by both accused establish a series of co-existing circumstances the probability of which weakens or destroys the inference of guilt. The prosecution has been unable to disprove the probability that the blood spots found inside the house and on the dress of A2 did not come from the deceased. Whereas the volume of blood found outside the house is more consistent with bleeding following a violent attack, the nature of the blood spots found inside the house favours the explanation or hypothesis presented by the accused. There were no traces of blood found leading from the house to either of the two spots outside the house where the bigger volume of blood was found. Although proof of a motive is not necessary for establishing the guilt of an accused in a criminal trial, yet the absence of one in the circumstances of this case cannot be ignored. The investigation was so poorly done that even though blood samples were said to have been gathered from the scene and submitted for analysis, the results were not availed to court. The investigating officer and the arresting officers too never



testified, creating gaping holes in the prosecution version as to the implication of the clues gathered and the circumstances surrounding the arrest of A1. As matters stand, there is no evidence to establish that the conduct of either accused, before or after the discovery of the body is inconsistent with their innocence. they did not flee from the scene.

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The hypotheses advanced by the accused are not only possible, but the likelihood of their occurrence in the circumstances of this case is quite high, to the level of probability. Their probability is high enough so as to carry weight in a rational, reasonable argument. The hypotheses advanced by the accused being that probable, they have cast a reasonable doubt on the prosecution version.

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As a result, the degree of probability attained in favour of the explanation advanced by the prosecution has not produced moral certainty, to the exclusion of every reasonable doubt, such that the contrary hypotheses of the accused must be rejected. Instead, the circumstances upon which they seek to rely to secure a conviction do not exclude every exculpatory hypothesis leaving only one rational conclusion to be drawn, of the responsibility of the accused. Having found the hypotheses advanced by the accused not only reasonable but also consistent with their innocence, in agreement with the opinion of the assessor, I find that this element has not been proved beyond reasonable doubt. It has not been proved to the required standard that any of the two accused before court is the perpetrator of the offence for which she stands indicted.

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In the final result I find that the prosecution has not proved the offence beyond reasonable doubt and I hereby acquit each of the two accused, A.1 Aoyo Rose and A2 Aber Diana, of the offence of Murder c/s 188 and 189 of the *Penal Code Act*. Each of them is to be set free forthwith unless she is being held in custody for some other lawful reason.

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Dated at Gulu this 15<sup>th</sup> day of October, 2018.

Stephen Mubiru

Judge.

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