**THE REPUBLIC OF UGANDA**

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

**CRIMINAL SESSIONS CASE No. 0172 OF 2015**

**UGANDA …… PROSECUTOR**

**VERSUS**

**NAKIRYOWA ZAMU …… ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**SENTENCE AND REASONS FOR SENTENCE**

When this case came up on 3rd January, 2018, for plea, the accused was indicted with the offence of murder c/s 188 and 189 of the *Penal Code Act*. She pleaded not guilty and the case was fixed for commencement of hearing on 31th January, 2018. Today, there is one prosecution witness in attendance ready to testify but the accused has chosen to change her plea and plead guilty to the amended indictment of Doing a Rash or Negligent act Causing Death c/s 227 of *The Penal Code Act*. It is alleged that on 6th October 2014 at Kiteme village in Nakaseke District, through a rash or negligent act, the accused caused the death of Katushabe Kisha, a girl aged one year by failing to take her to hospital for treatment. When the amended indictment was read to her, the accused pleaded guilty.

The learned Resident State Attorney, Ms. Beatrice Odongo has narrated the following facts of the case; the mother of the deceased was a younger sister to the accused. The mother of the deceased was resident at Katale Zone Semuto. The accused was resident at Mabale Zone in Luwero Town Council. In August 2014 the accused went to her sister's home in Semuto town and requested her sister to give her the one year old baby claiming that she was so lonely. The mother of the deceased accepted and gave her the child. After one week the accused began demanding for money for maintenance. The mother of the deceased sent her shs. 20,000/= by mobile money. After a few days she demanded for more money. The mother of the deceased was

displeased and demanded that the baby should be returned. The accused replied that they were at a distant place. On 28th September 2014 the victim's mother in the company of Kigozi travelled to Luwero to look for the accused. She was told by the neighbours that the accused for some time relocated without leaving a forwarding address. On 6th October, 2014 the husband of the accused rang the mother of the deceased informing her that the baby was dead and they were on their way to Semuto to return the body. On arrival the residents found the left hand of the child was broken and the body had bruises. The matter was reported to the police and the accused was charged with murder. The body of the deceased was examined on 6th October, 2014 at Semuto Health Centre IV by Dr. Kakeeto. It had multiple bruises on the face, on the right cheek, fractured arm, and the anterior chest wall, bruises on the thighs with multiple burn wound on the gluteal region (a group of three muscles which make up the buttocks) and the probable cause of death was neurogenic shock due to intensive pain and profuse bleeding resulting from fracture of the humerus leading to haemorrhagic shock. He signed the form and stamped it. The accused herself was examined on P.F 24A on 10th October, 2014 at Luwero Health Centre IV by Snr. Medical Clinical Officer Obbo James. Her age was determined to be 45 and the mental status was normal. She said she had left the baby with a neighbour's child aged 14 and when she returned at 1.00 pm the girl returned the baby she was crying and when she checked the hand was loose, she adopted hot cow dung for massaging the hands and that was the treatment she used for about a week when the condition worsened and she died on the way to hospital. Both police forms; P.F. 48C and P.F 24 A were tendered as part of the facts.

Upon ascertaining from the accused that the facts as stated were correct, she has been convicted on her own plea of guilty for the offence of Doing a Rash or Negligent act Causing Death c/s 227 of *The Penal Code Act*. Submitting in aggravation of sentence, the learned State Attorney has stated that although she has no previous record of the accused and that she has been on remand for about three years, it is her negligence that led to loss of life of the victim who was still a baby. The convict was in the position of a mother of the victim as an elder sister of the victim's mother. She should have cared for the baby. She was the one who requested the victim's mother for the baby but she turned out to be negligent. The maximum punishment is seven years' imprisonment but the convict deserves a deterrent sentence to prevent others from committing a similar offence. She proposed five years' imprisonment.

In response, the learned defence counsel Mr. Gastone Kamugisha prayed for a lenient custodial sentence on grounds that; the accused has not wasted court's time, she is remorseful and is sorry for what happened and is capable of reforming. The mother of the victim could not afford to look after the child and the accused offered to look after the victim. That is an indicator that she is a caring parent. She can still be useful to her family. He prayed that this court passes a lenient sentence and suggested that she is cautioned or in the alternative she is fined so that she goes back to her normal life of fending for herself. In her *allocutus*, the convict prayed for forgiveness because nobody can pay the fine for her. She was preparing to take the child to hospital when she died. She treated her for four days because they lived in a remote area. She was told by the person who was massaging the child that the child was involved in an accident when they were riding a bicycle. The arm was swollen but did not appear to be broken. She prayed for forgiveness pledging never do this again.

It is a cardinal principle of sentencing that the punishment must not only fit the crime but also the offender. Two dimensions of wrongdoing figure most prominently in its gravity: the magnitude of the harm or wrong inflicted or risked, and the culpability of the offender for bringing it about or risking it. The resultant principle of proportionality requires that a sentence should not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence. It is with such consideration that in *Uganda v. Ali Katumba [1974] HCB 117*, it was observed that there is a judicial practice of treating first offenders with lenience by granting them the option to pay a fine rather than imposing a custodial sentence in exercise of judicial discretion. This option though is more readily afforded a convict of a misdemeanour or a minor felony. As the level of culpability goes from purpose and knowledge through recklessness to negligence, it becomes progressively harder to justify a custodial sentence for a first offender.

Under section 15 of *The penal Code Act*, subject to any express provisions in the Act or any other law in force in Uganda, criminal responsibility in respect of rash, reckless or negligent acts, is determined according to the principles of English law. According to section 227 of *The penal Code Act*, any person who, by any rash or negligent act not amounting to manslaughter, causes

the death of another person is liable to imprisonment for a term not exceeding seven years or to a fine not exceeding seventy thousand shillings or to both such imprisonment and fine.

A rash act is essentially an over hasty act as opposed to a deliberate act. Rashness means doing an act with the consequences of a risk that evil consequences will follow but with the hope that they will not happen. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. On the other hand, negligence is a breach of duty imposed by law. It is the omission to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable person would not do. Negligence may either be civil or criminal negligence and the distinction depends upon the nature and gravity of the negligence. To amount to criminal negligence, it must be gross in nature. The test is whether the conduct of the accused was so bad in all the circumstances as to amount to a criminal act or omission (see *R v. Adomako [1994] 3 WLR 288*). The concept does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It applies where such death is caused neither intentionally nor with the knowledge that the act of the offender is likely to cause death. There must be proof that the rash or negligent act of the accused was the proximate cause of the death. There must be a direct nexus between the death of a person and the rash or negligent act of the accused. The rash or negligent act should be the direct or proximate cause of the death.

The severity of punishment will then depend on the level of culpability of the convict. Culpability is the measure of the degree to which the convict can be held morally or legally responsible for action or inaction. At this stage the court must judge the culpability of the act rather than the general attributes of the convict. In doing so, I perceive the facts of this case as gravitating more toward negligence than to a rash act. I have considered the four levels of culpability, (from highest to lowest): purposely, knowingly, recklessly, and negligently. A person acts purposely when he or she has a conscious object to cause the result. A person acts knowingly if he or she does not hope for the result but is practically certain that his or her conduct will cause it. A person acts recklessly if he or she is aware only of a substantial risk of causing the result but nevertheless runs it. It requires a person to consciously disregard a

substantial risk. Criminal negligence on the other hand involves gross deviation from the standard of care that a reasonable person.

Parents are primarily responsible for meeting their children's medical needs. Neglect occurs when necessary health care is not sought in a timely manner, or not at all. Where a parent, or a person in the position of a parent, such as the convict was in this case, fails to obtain needed medical care for a child and as a result the child dies, the parent may have been purposeful, knowing, reckless, negligent, or faultless as to allowing the resulting death. The parent may have failed to get medical care because she desired to cause the child's death; or, she may not have desired to cause the death, but she may have been practically certain that her omission would result in the death; or, she may have been aware only of a substantial risk; or, she may have been unaware of a substantial risk but should have been aware. Generally, the culpability requirements apply to omissions in the same way that they do to commissions. While negligence represents a lower level of culpability than, and is qualitatively different from, recklessness and for that reason recklessness is considered the norm for criminal culpability, negligence is punished only in exceptional situations, as where a death is caused. While disregard of a specific risk is reckless, failure to perceive a specific risk is negligence only if the disregard or failure to perceive involves a gross deviation from the standard of care that a reasonable person would observe in the convict's situation.

If it never occurred to the convict, as the facts of this case suggest, that her conduct created a risk of causing death, she can at most be held negligent in causing the death. Negligent culpability cannot be elevated to recklessness where the convict is only cognisant of a risk of causing lesser injury. Absent a special rule, causing death while being aware of a risk of injury, but not death, will result in liability for negligent homicide, but not reckless homicide. The crux of negligent culpability is the failure to perceive a risk of which one should be aware while doing either an act or failing to perform a legal duty.

Although the nature of the offence under section 227 of *The Penal Code Act* is classified at the lowest level of culpability, the convict's mode of perpetration justifies a punitive, deterrent sentence in that the child was of a very tender age, she was in obvious physical distress as a

result of physical trauma and yet for four days, the convict never made an attempt to obtain proper medical care for her. Refusing or denying a child access to medical care in an emergency or acute illness, without good reason cannot be taken lightly. The convict failed to seek appropriate and timely medical care for the child resulting in her death. Children are entitled to protection and often that protection comes from their parents, guardians or other persons with parental responsibility. When they fail, then the law must step in to punish the offenders at least in part, as a way of sending a message of condemnation or censure for what is believed to be a wrongful act or omission.

The maximum punishment for the offence is seven years' imprisonment. Although there is judicial practice of treating first offenders with lenience by granting them the option to pay a fine rather than imposing a custodial sentence where the law provides for the option of payment of a fine, considering the long period of pre-trail remand that the convict has already been subjected to, this option is not advisable. Considering the convict's level of culpability, I have fixed a starting point of six years' imprisonment.

Against this, I have considered the fact that the convict has pleaded guilty. The practice of taking guilty pleas into consideration is a long standing convention which now has a near statutory footing by virtue of regulation 21 (k) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. As a general principle (rather than a matter of law though) an offender who pleads guilty may expect some credit in the form of a discount in sentence. The requirement in the guidelines for considering a plea of guilty as a mitigating factor is a mere guide and does not confer a statutory right to a discount which, for all intents and purposes, remains a matter for the court's discretion. However, where a judge takes a plea of guilty into account, it is important that he or she says he or she has done so (see *R v. Fearon [1996] 2 Cr. App. R (S) 25 CA*). In this case therefore I have taken into account the fact that the convict has pleaded guilty, as one of the factors mitigating her sentence but because it has come on a day fixed for hearing and not at the earliest opportunity, I will not grant the convict the traditional discount of one third (two years) but only a quarter (one year and six months), hence reduce it to four years and six months.

I have considered further the submissions made in mitigation of sentence and in her *allocutus* and thereby reduce the period to three years and three months' imprisonment. 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 has been in custody since 13th October, 2014, a period of three years and three months. Having taken into account that period, I therefore sentence her to "time served" and she should be set free upon the rising of this court unless she is being held for other lawful reason.

Having been convicted and sentenced on her own plea of guilty, the convict is advised that she has a right of appeal against the legality and severity of this sentence, within a period of fourteen days.

Dated at Luwero this 31st day of January, 2018

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Stephen Mubiru
Judge,
31st January, 2018.