

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL SESSIONS CASE No. 0152 OF 2015**

**UGANDA** ..... **PROSECUTOR**

5 **VERSUS**

**NANSAMBA ROBINAH** ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

10 The accused in this case is indicted with one count of Murder c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused and another still at large, during the night of 9<sup>th</sup> June, 2014 at Nawabango village, Zirowe sub-county in Luwero District murdered one Erima Ivan.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are  
15 briefly that on the fateful day, the deceased and his cousin P.W.2 Kayanja Mike spent the day at school. The deceased had earlier confided in P.W.2 that he had stolen some money from the accused and they had spent part of it at school. After school, they went to visit a friend. While there the uncle of the deceased, a brother to the accused, arrested them and tied their hands behind their backs with ropes on suspicion that the deceased had stolen money from the accused.  
20 He led the two boys to the home of the accused from where he subjected them to corporal punishment which on occasion was administered in an indiscriminate manner. Their uncle used a total of three sticks in administering the corporal punishment on them after which he told them to return to the home of their grandmother P.W.1 Ms. Edinodio Oliver. Along the way, the deceased collapsed with his hands still tied to the back. Shortly after he felt thirsty and asked  
25 P.W2 to give him some water. P.W.2 left him behind but was afraid of the dark and spent the night in hiding. In the morning he learnt that the deceased was dead and he saw his body about twenty metres away from the spot where he had collapsed the previous evening. The accused

was arrested in connection with the death. At her trial, she opted to remain silent and not to call any witnesses in her defence.

5 Since the accused in this case pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against her beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in her defence, (see *Ssekitoleko v. Uganda* [1967] EA 531). The accused does not have any obligation to prove her innocence. By her plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which she is charged and the  
10 prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure her conviction. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

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For the accused to be convicted of murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
2. The death was caused by some unlawful act.
- 20 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 that they knew the deceased and attended the burial or saw the dead body. In the instant case the  
25 prosecution did not adduce any post mortem report in evidence. It instead relies on the testimony of P.W.1 Ms. Edinodio Oliver, the grandmother of the victim saw the body at the scene, and attended his burial. It also relies on the testimony of P.W.2 Kayanja Mike, a cousin of the deceased, was the last person to see him alive and he too saw the body at the scene by the roadside. The accused did not offer any evidence. This evidence was not controverted in their  
30 cross-examination. In agreement with the assessors, I find that on basis of that evidence, the prosecution has proved beyond reasonable doubt that Kayanja Mike, died on 30<sup>th</sup> May 2013.

The prosecution had to prove further that the death of Kayanja Mike 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*). Attribution of causal responsibility is a preliminary step towards the eventual attribution of criminal culpability to the accused. The court may use either the natural consequences test, the substantial cause test, or both. An accused will be held responsible for the final outcome that constitutes the offence if it is the natural result of what the accused said or did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he or she said or did. An accused will also be held responsible for the final outcome is a substantial and operating result of what the accused said or did, but not otherwise. If the subsequent event is so overwhelming as to make the act of the accused merely part of the history, a *novus actus interveniens*, the chain of causation will have been broken.

It is often the practice that in proving the death of a deceased person in homicide cases, prosecution adduces evidence as to the cause of death of the deceased by presenting medical evidence as to the cause of death and also call on expert witness (usually the pathologist who carried out the autopsy) to testify as to the cause of death of the deceased person. This is because in a murder trial, the prosecution must show conclusively that death was caused by the act of the accused. In other words, there must be a nexus between the act of the accused and the death of the victim. That notwithstanding, it is now settled that medical evidence though desirable in establishing the cause of death in a case of murder, is not always essential. Where the victim dies in circumstances in which there is abundant evidence of the manner of death, medical evidence can be dispensed with, e.g. where the victim died on the spot by gunshots (see *Enewoh v. State (1990) 4 NWLR (Pt. 145) 46* and *Idemudia v. The State, (1999)5 SCNJ 47* decisions of the Supreme Court of Nigeria). In the latter case there was abundant evidence from eye-witnesses that the appellant shot and killed deceased instantly. In such cases where the fatality of the injuries inflicted is established, the position of the law is that the cause of death can properly be inferred that the injuries caused the death. In other words, where cause of death is obvious, it is not a vital component of proof to have medical evidence to establish it. Such a situation arises where death was instantaneous or nearly so.

For example in *Abbas Muhammad v. The State (2017) LPELR-42098 (SC)*, a decision of the Supreme Court of Nigeria, the Appellant struck the deceased on the head. He fell down unconscious, never regained consciousness until he died a few hours later in hospital. Medical evidence was found to be unnecessary to determine the cause of death in the circumstances of the case. It was held that it could properly be inferred that the wound inflicted caused the death of the deceased. The court opined that medical evidence though desirable in establishing cause of death in a case of murder, is not essential provided that there are facts, which sufficiently show cause of death to the satisfaction of the Court.

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Similarly in *Enewoh v. State (1990) 4 NWLR (Pt. 145) 46*, the deceased's shouts of "Ukwa Egbe is killing me," brought his wife, PW1, to the scene where she saw appellant hitting him with a rod. The appellant's son, PW4, pleaded with his father to stop hitting the deceased. But he kept on, and the deceased later died in hospital. The person, who identified the corpse to the doctor, died before trial. The issue was whether the prosecution proved beyond reasonable doubt the identity of the body of the deceased notwithstanding its failure to call as witness the person who identified the body of the deceased to the doctor who performed the autopsy. The Supreme Court of Nigeria held that where medical evidence is essential as to the cause of death, it is invariably also essential that the person, who allegedly identified the corpse of the deceased to the Doctor, is called to testify as to identification, unless identity of the deceased can be inferred. From the circumstances of the case, the totality of the evidence showed unmistakably that the body on whom a doctor performed a post mortem examination was that of the deceased, a separate witness, though desirable, was not a necessity.

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The position is different where there is a degree of remoteness between the act or omission of an accused and the result which is alleged to constitute an offence. Where the eventual result may be the product of additional factors which are more directly connected than is the conduct of the accused, the function of the law of causation is to identify the conditions under which the result may nevertheless be attributed to the accused. An intervening cause will break the chain of causation if it is independent of the acts of the accused and so potent in causing death.

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For example in *Gichunge v. Republic* [1972] 1 EA 546, during January 1971, the appellant stabbed the deceased in the chest causing a collapse of the left lung. The deceased was on 22<sup>nd</sup> January discharged from hospital, but was readmitted a week later and on 7<sup>th</sup> February he died of pneumonia and tetanus. The doctor's report as to cause of death was admitted under the equivalent of our section 30 of *The Evidence Act* without the doctor being called as he had left the country and the statement had been made in the discharge of professional duty. It read "death was due to pneumonia and tetanus following a stabbing injury to the chest". On this evidence it was found that the appellant caused the deceased man's death and he was convicted of murder. On appeal, it was held that in view of the possibility that death had been caused by an intervening circumstance, it had not been proved that death was caused by the appellant. The appellate court opined;

So far as this statement is considered as an expression of fact, it is correct. The pneumonia and tetanus followed, in point of time, the stabbing. But there is absolutely no evidence, anywhere in the record, that the pneumonia and tetanus were a direct result and consequence of the stabbing. It is most likely that they were, but we cannot exclude the possibility that, had he been cross-examined, Dr. Knights might have conceded the possibility that the pneumonia and tetanus supervened independently of the stabbing, in which case the appellant would not be responsible for the death.

Although medical evidence is not essential in establishing the cause of death where the deceased was attacked with lethal weapon and died instantly, in the instant case the evidence has not established that the sticks were thick and lethal. P.W.2 described them as having been about one inch in diameter and about one metre long. They were also not applied very forcefully as to cause instant death. The fatality of the injuries inflicted, if any is not established by the available evidence. It is not known whether the beating inflicted any external or internal injuries on the deceased whose degree of severity was such as was capable of causing death. The death was instantaneous or nearly so. Where the circumstantial evidence does not establish specifically that the cause of death was due to an unlawful act, the cause has not been proved. Unexplained deaths are not unusual and not rare in medical history. The mere fact that the deceased died hours after corporal punishment being inflicted on him with the assistance the accused does not

eliminate completely the possibility of other factors contributing substantially to the cause of death and this makes it mandatory to medically examine the *corpus delicti*.

5 The circumstantial evidence must unequivocally established the cause of death and also provide the necessary nexus between the death of the victim and the act of the accused. The circumstantial must establish the cause to a moral certainty, and to the exclusion of every other reasonable hypothesis. 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  
10 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 *Shubadin Merali and another v. Uganda* [1963] EA 647; *Simon Musoke v. R* [1958] EA 715; *Teper v. R* [1952] AC  
15 480 and *Onyango v. Uganda* [1967] EA 328 at page 331).

Considering the evidence relating to causation as a whole, it appears that it cannot be decided with moral certainty that the immediate cause of death was corporal punishment. The exact time when the deceased died is unknown, increasing the possibility that the proximate cause of death  
20 is not associated with the stabbing. There is a reasonable doubt created by the available evidence as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the accused is entitled to an acquittal (see *Woolmington v. Director of Public Prosecutions*, [1935] AC 462). Much as the court can infer the cause of death from the prevailing circumstances, it would amount to absurdity to establish the cause on mere inferences,  
25 presumptions and inconclusive circumstantial evidence. For that reason, the prosecution has failed to prove beyond reasonable doubt that corporal punishment was the proximate cause of the deceased's death. Since the prosecution has failed to prove one of the essential ingredient of the offence, it is not necessary to evaluate the evidence relating to the rest of the ingredients. The accused is accordingly acquitted of the offence of Murder c/s 188 and 189 of the *Penal Code Act*.

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However, according to section 87 of *The Trial on Indictments Act*, when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it (see also *Uganda v. Leo Mubyazita and two others* [1972] HCB 170; *Paipai Aribu v. Uganda* [1964] 1 EA 524 and  
5 *Republic v. Cheya and another* [1973] 1 EA 500). The minor offence sought to be entered must belong to the same category with the major offence. The considerations of what constitutes a minor and cognate offence were set out in *Ali Mohamed Hassani Mpanda v. Republic* [1963] 1 EA 294, where the appellant was charged together with others with obstructing police officers in the due execution of their duty contrary to s. 243 (b) of *The Penal Code Act*. The magistrate  
10 found the appellant not guilty of the offence charged but convicted him of the minor offence of assault occasioning actual bodily harm, contrary to s.241 of *The Penal Code Act*. On appeal it was considered whether the magistrate had power to substitute a conviction of the lesser offence and whether that offence must be cognate with the major offence charged. The High Court of Tanganyika held that;

15 s. 181 of *The Criminal Procedure Code* (similar to section 87 of *The Trial on Indictments Act, Cap 16*) can only be applied where the minor offence is arrived at by a process of subtraction from the major charge, and where the circumstance embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where  
20 the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted.

Section 87 of *The Trial on Indictments Act* envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been  
25 proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence. A person indicted with a grave offence and facts are proved which reduce it to another of a similar type, he or she may be convicted of the minor offence although he or she was not indicted with it. The circumstances embodied in the major indictment necessarily and according to the definition of the offence  
30 imputed by that indictment constitute the minor offence too. The manner in which the murder

was alleged to have been committed necessarily placed the accused in this case of the offence of torture.

Under section 2 (1) (b) of *The Prevention And Prohibition of Torture Act, 2012* torture is defined to include any act or omission, by which "severe pain or suffering" whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit.

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In my view, on the facts of this case the offence of Torture is contained entirely in the second element of the offence of murder which required proof that the death of the accused was caused by an unlawful act. Therefore, the indictment for an offence under sections 188 and 189 of *The Penal Code Act* gave the accused notice of all the circumstances constituting the offence under section 4 (1) of *The Prevention And Prohibition of Torture Act, 2012* for which she can be convicted. Under that section, a person who performs any act of torture as defined by the Act commits an offence and is liable on conviction to imprisonment for fifteen years or to a fine of three hundred and sixty currency points or both. Under section 2 (2) (a) "severe pain or suffering" is defined as including the intentional infliction or threatened infliction of physical pain or suffering. The offence is constituted by the following elements;

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1. Severe physical or mental pain or suffering was inflicted upon the victim.
2. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions. It was inflicted intentionally.
3. It was inflicted for such purposes as: obtaining information or a confession, punishment, intimidation or coercion.
4. It is the accused who inflicted the suffering

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It is the uncontroverted evidence of P.W.2 that the deceased had his hand tied to the back as he was beaten by his uncle. This beating inflicted severe pain and suffering on the deceased. Under Article 24 of *The constitution of the Republic of Uganda, 1995*, subjecting persons to any form of torture or cruel, inhuman or degrading punishment is prohibited. According to section 94 )9)

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of *The Children Act*, no child is to be subjected to corporal punishment. Therefore the severe physical and mental pain or suffering to which the deceased was subjected did not arise only from, and was not inherent in or incidental to, lawful sanctions. It was inflicted intentionally for purposes of punishing him for money he had stolen from the accused. The prosecution has  
5 proved not only that the acts were deliberate, but also the existence of actual, subjective, intention on the part of the brother of the accused to cause severe pain or suffering by his conduct. The only question that remains is whether the accused was a participant in inflicting that severe physical and mental pain or suffering on the deceased.

10 Under section 19 of *The Penal Code Act*, there are different modes of participation in crime; direct perpetrators, joint perpetrators under a common concerted plan, accessories before the offence, etc. Each of the modes of participation may, independently, give rise to criminal responsibility. Individual criminal responsibility can be incurred where there is either aiding or abetting, but not necessarily both. Either aiding or abetting alone is sufficient to render the  
15 perpetrator criminally responsible. "Aiding" and "abetting" are not synonymous though they are so often used conjunctively and treated as a single broad legal concept. They are distinct legal concepts. Abetting implies facilitating, encouraging, instigating or advising the commission of a crime. It involves facilitating (making it easier, smoother or possible) the commission of an act by being sympathetic thereto. Aiding means assisting (usually giving material support) or  
20 helping another to commit a crime.

A distinction is to be made between aiding and abetting and participation in pursuance of a common purpose or design to commit a crime. In crimes requiring specific intent, it is not necessary to prove that the aider and abettor shared the *mens rea* of the principal, but that he  
25 must have known of the principal perpetrator's specific intent. With respect to aiding and abetting, the only mental element required is proof that the accused knew of the intent of the actual perpetrator, but he need not share this specific intent. If the accused was only aware of the criminal intent of her brother and she gave it substantial assistance or encouragement in the commission of the crime then she was only an aider and abettor but if she shared the intent of the  
30 brother, then she is criminally responsible both as a co-perpetrator and as an aider and abettor.

In that regard, the prosecution is required to demonstrate that the accused carried out an act of substantial practical assistance, encouragement, or moral support to the principal offender, culminating in the latter's actual commission of the crime. The assistance must have a substantial effect on the commission of the crime. It must be shown that his participation substantially  
5 contributed to, or had a substantial effect on the consummation of the crime, but does not necessarily constitute an indispensable element, i.e. a *conditio sine qua non*, of the crime. It is not necessary to prove that he had authority over that other person. The prosecution must prove that she had knowledge that acts she performed, would assist in the commission of the crime by the principal or that the perpetration of the crime would be the possible and foreseeable result of  
10 his conduct.

Under section 20 of *The Penal Code Act*, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable  
15 consequence of the prosecution of that purpose, each of them is deemed to have committed the offence. The accused before me set out in conjunction with her brother to assault the deceased in the name of administering corporal punishment. The torture of the deceased was a probable and foreseeable consequence of the prosecution of that unlawful purpose considering the nature of weapons (the three sticks) which she handed over to her brother which her brother openly used to  
20 assault the deceased.

It was the evidence of P.W.2 that at one point during the beating, the accused asked his brother to stop the beating. Thus raises the possibility of the defence of voluntary abandonment. Abandonment or withdrawal is an affirmative criminal defence that arises when an accused  
25 asserts that he or she never completed, or was not involved in, a criminal act because he or she abandoned or withdrew from the act prior to it happening. The defence succeeds when the accused shows that he or she stopped participating in the crime prior to its ultimate commission and either that any actions undertaken by the accused prior to abandoning the crime did not contribute to the successful completion of the crime or that the accused notified the police of the  
30 planned crime as soon as possible in order to attempt to prevent the crime from taking place. Abandonment can occur when an accused is participating in a crime with other co-criminals and

decides to no longer participate, however, the abandonment should occur before the commission of the offense and not during its commission.

For example in *People v. Brown*, 90 III. App. 3d 742, the accused was found guilty of attempted burglary, the trial court sentenced the accused to a term of four years' imprisonment. On appeal, the defence argued that the conviction should be reversed because the evidence established that the accused voluntarily abandoned his criminal activity and purpose. The accused formed an idea to rob car dealership, and his friends agreed. The accused acted as the lookout while his friends kicked in door but had not gained entry. After kicking in door, at this point the accused and another became scared and notified the rest that they were abandoning the plan. As the group was leaving the parking lot of the service station next to the car dealership, the police arrived and stopped them. The court held that voluntary abandonment would have been excuse to the substantive crime, but he was still guilty of attempt that occurred prior to it.

In the instant case, carrying the three sticks to the accused was an act of support that had a substantial effect on the perpetration of the crime. Her attempted abandonment was not made before but during the commission of the offense. Until that point, she had not only given substantial assistance or encouragement to her brother in the commission of the crime, but she had also shared the intent of the brother. She is thus criminally responsible both as a co-perpetrator and as an aider and abettor.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence of Torture c/s section 4 (1) of *The Prevention And Prohibition of Torture Act, 2012* beyond reasonable doubt and I hereby find the accused guilty and convict her for the offence of Torture c/s 4 (1) of *The Prevention And Prohibition of Torture Act, 2012*.

Dated at Luwero this 8<sup>th</sup> day of February, 2018.

.....

Stephen Mubiru

Judge.

8<sup>th</sup> February, 2018

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8<sup>th</sup> February, 2018

11.45 am

Attendance

Mr. Senabulya Robert, Court Clerk.

5 Ms. Beatrice Odongo, Resident State Attorney, for the Prosecution.

Mr. Katamba Sowali, Counsel for the accused person on state brief is present in court

The accused is present in court.

**SENTENCE AND REASONS FOR SENTENCE**

10 The convict was found guilty of the offence of Torture c/s section 4 (1) of *The Prevention And Prohibition of Torture Act, 2012* after a full trial. In her submissions on sentencing, the learned Resident State attorney Ms. Beatrice Odongo prayed for a deterrent sentence on the following grounds; although the convict has no previous criminal record of conviction and has been on remand for three years, being an auntie to the deceased she should have acted in a manner  
15 protective of the victim. She acted to the contrary which led to a loss of life. Her conduct wasn't in line with her role as an Auntie. She proposed a deterrent custodial sentence of six years' imprisonment.

Counsel for the convict Mr. Katamba Sowali prayed for a lenient sentence on the following  
20 grounds; the convict had a family and was looking after the family. P.W.1 the mother of the convict said she had forgiven her. Her mother is in the evening of her life. She suffered a double tragedy; the offence was committed by her daughter and son. He suggested that the period spent on remand be found adequate. The sentence should enable her to return and look after her elderly mother. He this proposed that she is fined. In her *allocutus*, the convict prayed for forgiveness.  
25 She has three orphans and they have no grandmother, uncle or other relatives on their father's side. She prayed for forgiveness since she did not intend to commit the offence.

Under section 4 (1) of *The Prevention And Prohibition of Torture Act, 2012*, the maximum punishment for the offence of Torture is fifteen years or a fine of three hundred and sixty  
30 currency points or both. However, this represents the maximum sentence which is usually

reserved for the worst of the worst cases of Torture. In light of the fact that the convict incurred mainly accessory liability, I have for that reason discounted the maximum sentence.

I have nevertheless considered the aggravating factors in this case being; the level of torture  
5 inflicted on the victim. He was a young boy who ought to have been protected by the convict. Accordingly, in light of those aggravating factors, I have adopted a starting point in the range of three to five years' imprisonment.

I have considered the fact that the convict is a first offender, a young woman with considerable  
10 family responsibilities, her contrite demeanour throughout the trial and the victim impact statement of her elderly mother made during her testimony. A long term of imprisonment will only add misery to an already tragic situation, and may not serve any useful penal purpose. I have further considered the more or less accessory role she played in the commission of the offence and the fact that at some point in the course of administering corporal punishment to the  
15 child, she made an attempt to stop him. Although the latter aspect is not a defence and failed as such, it provides an extenuating circumstance for purposes of sentencing.

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  
20 the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account, I note that the convict has been in custody since 19<sup>th</sup> June, 2014, a period of three years and seven 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.

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

Dated at Luwero this 8<sup>th</sup> day of February, 2018

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.....  
Stephen Mubiru  
Judge,

8<sup>th</sup> February, 2018.

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