

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0025 OF 2018

UGANDA **PROSECUTOR**

5 **VERSUS**

ASOBASI OLOKI-AMBA **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

10 The accused in this case is indicted with two counts. In the first count, he is indicted for Murder
c/s 188 and 189 of the *Penal Code Act*. It is alleged that the accused on the 23rd day of January,
2017 at Iboa village in Moyo District murdered one Drichile Martin. In the second count he is
indicted for Arson c/s 327 (a) of *The Penal Code Act*. It is alleged that the accused on the 23rd
day of January, 2017 at Iboa village in Moyo District, willfully and unlawfully set fire to a
dwelling house, the property of one Drichile Martin.

15 The events leading to the prosecution of the accused as narrated by the prosecution witnesses are
briefly that the accused and the deceased ordinarily resided together around that time; the
accused met the deceased that evening and obtained the motorcycle from him; P.W.3 saw him
returning from dropping P.W.5; P.W.3. met him shortly thereafter at the house of the deceased
20 and he created an excuse not to let him into the house and told him the deceased had gone to
sleep elsewhere; he was the last person seen at the house of the deceased and the motorcycle was
at the door-side; the door was open at the time but it is found locked the following two days; the
accused was nowhere to be seen the following morning; the mobile phone number of the
deceased was called but it is answered by the accused; he told the people calling that he was with
25 the deceased at Pagirinya and later that the deceased had gone to Elegu with his boss to buy a
carpet.

In his defence, the accused denied having committed any of the offences with which he is
indicted. He testified that He last saw the deceased alive on Sunday 22nd January, 2017 at around

8.00 pm when he gave him the key and motorcycle to carry P.W.5 Lagu Patrick Hassan to Parolinya and not to Chinyi village as claimed by P.W.5. After re-fueling at Andra, he dropped P.W.5 off at to Ukuni Health Centre before Parolinya, because that is where the agreed fare stopped. He returned to his home in Dufele via Iboa Trading Centre. He kept the motorcycle of the deceased for the next two days only to be surprised by an arrest early on Wednesday morning on allegations that he had murdered Drichile Martin and thereafter set his house on fire.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See *Ssekitoleko v. Uganda* [1967] EA 531). 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.

The first ingredient requires the prosecution to prove beyond reasonable doubt the death of a human being. 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. The prosecution adduced evidence of a post mortem report dated 25th January, 2017 prepared by P.W.1 a Medical Officer of Logoba Health Centre III , which was admitted during the preliminary hearing and marked as exhibit P. Ex.2. The body was identified to him by;- Igama Justine Iya, Betty Lozoa and Mazakpwe Alumai as that of Drichile Martin. This is corroborated by the testimony of P.W.3 Adibako Christopher, a friend of the deceased, who saw and recognised the body at the scene, and further by P.W.4 Anyovi Moses, a younger brother of the deceased, who too saw the body of the deceased and recognised it as that of his elder brother,

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Drichile Martin. In his defence, the accused never offered any evidence on this element. Having considered all the available evidence relating to this ingredient, in agreement with the assessors, I am satisfied that it has been proved beyond reasonable doubt that Drichile Martin is dead.

5 The next ingredient requires proof beyond reasonable doubt that the death was caused by an unlawful act. 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. P.W.1 who conducted the autopsy found it to be of "well nourished, about (90 - 100 kg) and about 6 feet 2 inches tall. Beginning to decompose." He established the cause of death as "closed
10 head injury: skull depression at right panetal bone, protruding tongue, discharge from right ear otorrhea (blood and cerebral spinal flow) and suffocation by strangulation using two-fold nylon thread tied around the neck to impair air low and blood circulation." Exhibit P. Ex.2 dated 25th January, 2017 contains the details of his other findings which include a "blisters on the body due to heat resulting from burning grass thatched house of roof covering head, trunk and limbs. It is
15 clear that the body recovered from burning house suffered partial burn because it was wrapped in papyrus and blanket while on bed but still had visible signs of trauma on the right side of the head, tight fitting twofold nylon thread around the neck, and copious quantity of stains and clotted blood on both mattress and papyrus mat, in addition to decomposing serons fluids. Blood loss estimated at 1000 mls and posture in supine position. The house accessed after breaking
20 padlock at the door from outside. The weapon found lying nearby was a stone." In the doctor's opinion, the weapon likely to have been used in causing the injuries he saw was "possibly an object (stone) nylon thread twofold and heat from burning fire of grass-thatched house." P.W.3 (Adibako Christopher) testified that the body had a nylon rope around the neck and that it had begun to decompose when it was retrieved from the house. It was buried hurriedly after the
25 autopsy. Consider whether homicide has been proved. P.W.4 Anyovi Moses) too saw the nylon rope around the neck and the head was swollen. Having considered all the available evidence relating to this ingredient, in agreement with the assessors, I am satisfied that it has been proved beyond reasonable doubt that the death of Drichile Martin was caused by an unlawful act.

30 The prosecution is further required to prove beyond reasonable doubt that the unlawful act was actuated by malice aforethought. Malice aforethought is defined by section 191 of the *Penal*

Code Act as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. Malice aforethought is a mental element that is difficult to prove by direct evidence.

5 Courts usually consider weapon used (in this case a stone and nylon thread are suspected to have been used) and the manner in which they were used (blow to the head and tying around the neck) and the part of the body of the victim that was targeted (the neck and head). The ferocity with which the weapon was used can be determined from the impact (fracture of the skull and stoppage of air flow and blood circulation to the brain). P.W.1 who conducted the autopsy
10 established the cause of death as “closed head injury: skull depression at right parietal bone, protruding tongue, discharge from right ear otorrhea (blood and cerebral spinal flow) and suffocation by strangulation using two-fold nylon thread tied around the neck to impair air flow and blood circulation.” The accused did not offer any evidence on this element.

15 Any person who used such a weapon to cut the head of the deceased, fracturing the skull and causing the oozing out of brain matter, must have foreseen that death was a probable consequence of his or her act. So did the one who applied such force to the neck that resulted in the fracture of the cervical vertebrae. Both actions targeted vulnerable parts of the body. Each of them is capable of supporting an inference of malice aforethought. In his defence of the accused
20 did not address this element at all and neither did his counsel in cross-examination of the prosecution witnesses. Having considered all the available evidence relating to this ingredient, in agreement with the assessors, I am satisfied that it has been proved beyond reasonable doubt that the death of Drichile Martin was caused by an unlawful act, actuated by malice aforethought.

25 Lastly, the prosecution is required to prove beyond reasonable doubt that it is the accused that caused the unlawful death. There should be credible evidence placing the accused at the scene of the crime as an active participant in the commission of the offence. In his The accused denied any participation. He last saw the deceased alive on Sunday 22nd January, 2017 at around 8.00 pm when he gave him the key and motorcycle to carry P.W.5 Lagu Patrick Hassan to Parolinya
30 and not to Chinyi village as claimed by P.W.5. After re-fueling at Andra, he dropped P.W.5 off at to Ukuni Health Centre before Parolinya, because that is where the agreed fare stopped. He

returned to his home in Dufele via Iboa Trading Centre. He kept the motorcycle of the deceased for the next two days only to be surprised by an arrest early on Wednesday morning on allegations that he had murdered Drichile Martin and thereafter set his house on fire. He did not have any obligation to prove this alibi. He cannot be convicted on the basis of any weakness in his defence but rather on the strength of the prosecution evidence.

To disprove his alibi, the prosecution relied on the prosecution relies entirely on circumstantial evidence, woven together by the following strands; the accused and the deceased ordinarily resided together around that time; the accused met the deceased that evening and obtained the motorcycle from him; P.W.3 saw him returning from dropping P.W.5; P.W.3. met him shortly thereafter at the house of the deceased and he created an excuse not to let him into the house and told him the deceased had gone to sleep elsewhere; he was the last person seen at the house of the deceased and the motorcycle was at the door-side; the door was open at the time but it is found locked the following two days; the accused was nowhere to be seen the following morning; the mobile phone number of the deceased was called but it is answered by the accused; he told the people calling that he was with the deceased at Pagirinya and later that the deceased had gone to Elegu with his boss to buy a carpet; in his defence, the accused admits having received a call from Iboa; he got permission from the deceased for one errand and for one passenger but he kept the motorcycle for over two days; he did not return to his job with Hassan yet he had not secured another job; the team that went to arrest him found him hiding under his bed, which is not conduct of an innocent person in those circumstances.

In order to sustain a conviction based on circumstantial evidence, the inculpatory facts should be 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 *Shubadin Merali and another v. Uganda* [1963] EA 647; *Simon Musoke v. R* [1958] EA 715; *Teper v. R* [1952] AC 480 and *Onyango v. Uganda* [1967] EA 328 at page 331).

I find that the hypotheses advanced by the accused to deflect the inculpatory nature of this circumstantial evidence to be incredible. He claimed not to have returned to the home of the deceased at all that evening after the errand he had been sent to perform yet he was positively recognised and placed at the scene at that material time by P.W.3, Adibako Christopher who
5 found him fidgeting inside the house. He claims to have borrowed the MTN sim-card of the accused two weeks before his death, yet when he was asked what the phone number of that card was he gave a prefix of O75 which is not used by that service provider. He claimed his decision to retain possession the deceased's motorcycle was because they were close friends yet he never bothered to call him even once or appear to have been bothered that the deceased had not called
10 him within the next two days.

I find the inculpatory facts of this case to be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. I have not found any co-existing circumstances which would weaken or destroy the inference. The
15 circumstances have produced moral certainty, to the exclusion of every reasonable doubt. Therefore in agreement with the joint opinion of the assessors, I find that the prosecution has been proved beyond reasonable doubt that it is the accused who committed the offence. Since the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt, I therefore hereby convict the accused for the offence of Murder c/s 188 and 189 of the *Penal*
20 *Code Act*.

As regards the offence of Arson in count 2, under section 327 (a) of *The Penal Code Act*, Arson is committed by any person who willfully and unlawfully sets fire to any building or structure, whether completed or not. For the accused to be convicted of Arson, the prosecution must prove
25 each of the following essential ingredients in respect of counts three to nine, beyond reasonable doubt;

1. Setting fire to a dwelling house.
2. The fire is set unlawfully and intentionally.
3. The accused set the fire.

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To prove that fire was set to a dwelling house, there must be evidence establishing the fact that a dwelling house caught fire and that it was as a result of a deliberate act and not accidental. In this

case there is the testimony of both P.W.3, Adibako Christopher and P.W.4 Anyovi Moses who arrived at the scene and found the body of the deceased had just been retrieved from his burning house. Their testimony was not weekend by cross-examination and in agreement with the assessors I find that this element has been proved beyond reasonable doubt.

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Proving that the fire was set unlawfully and intentionally requires evidence to show that the house was deliberately set alight, without justifiable cause. The word *wilfully* is defined in the *Black's Law Dictionary* as "voluntary and intentional, but not necessarily malicious." The word *unlawful* is defined in the same dictionary as "violation of law, an illegality." Unlawful is also
10 said to include moral turpitude. There must be evidence which establishes that the assailant either should have intended the house to take fire, or, at least, should have recognized the probability of its taking fire and was reckless as to whether or not it did so. It requires proof of a deliberate act of setting fire or in the alternative, conduct which consists of failing to take measures that lay within the power of the accused to counteract a danger that he himself or
15 herself created of a fire breaking out or evidence establishing that the risk of fire is one which would have been obvious to a reasonably prudent person, even if the particular accused gave no thought to the possibility of there being such a risk.

In the instant case, there is nothing to suggest that the fire was caused accidentally or by the
20 deceased himself. Considering that his house had been seen locked for more than two days before the fire broke out, the likelihood that it originated from inside the house is very remote, more especially since the padlock on the door had to be forced open before the rescuers could gain access. In agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that the fire was set unlawfully, willfully and intentionally.

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Lastly, the evidence implicating the accused in setting the fire must be place him at the scene of the crime. He denied the offence and set up an alibi. The prosecution relies on the same circumstantial evidence as that implicating him in commission of the first count. I find that it is plausible that the accused could have set the house on fire either to ensure that the deceased is
30 dead or in order to destroy evidence. The circumstantial evidence meets the threshold standard of probable cause for his arrest because the facts support an objective belief that the accused had

committed this offence as well. The evidence creates a strong suspicion against the accused but I find that it falls short of establishing proof beyond reasonable doubt. It does not rule out the possibility of other persons having set the fire. It does not attain the required level of establishing moral certainty, to the exclusion of every reasonable doubt, that it is the accused who set the house on fire. Accordingly, in disagreement with the joint opinion of the assessors, I find the accused not guilty of the offence and consequently hereby acquit him of the offence on Arson c/s 327 (a) of *The Penal Code Act* preferred in count two.

Dated at Adjumani this 27th day of February, 2018.

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Stephen Mubiru
Judge.
27th February, 2018.

15 26th February, 2018.
9.51 am
Attendance

Ms. Baako Frances, Court Clerk.
Mr. Okello Richard, Principal State Attorney, for the Prosecution.
20 Mr. Ndahura Edward, Counsel for the accused person on state brief is present in court
The accused is present in court.
Both assessors are in court

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SENTENCE AND REASONS FOR SENTENCE

The convict was found guilty of the offence of murder c/s 188 and 189 of the *Penal Code Act* after a full trial. In her submissions on sentencing, the learned Resident State attorney prayed for a deterrent sentence on the following grounds; the offence is rampant and the manner in which the deceased was killed was brutal. He died a painful death. He was the dole bread winner of the family and his family has been deprived by the act of the accused. He deserves a deterrent custodial sentence of natural life. He should be sentenced to 50 years to keep him out of circulation and to enable the family of the deceased recover from the psychological torture.

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In his *allocutus*, he is sorry for what he did and has no words to express his remorse to court. In their family, they are left only the two of them. His brother has to join secondary school. His

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elder brother was shot dead in South Sudan where he was working. His mother is lame and blind. There is no other person to help the children. He used to give them assistance. He needs to serve his sentence and return to support his siblings.

- 5 The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of the worst cases of Murder. This case is not within that category, although it is close, and I have for that reason discounted the death sentence.
- 10 Where the death penalty is not imposed, the starting point in the determination of a custodial sentence for offences of murder has been prescribed by Item 1 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35 years' imprisonment. The sentencing guidelines however have to be applied bearing in mind past precedents of courts in
- 15 decisions where the facts have a resemblance to the case under trial (see *Ninsiima v. Uganda Crim. C.A Criminal Appeal No. 180 of 2010*).

I have for that reason taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Bukenya v. Uganda C.A Crim. Appeal No. 51 of 2007*,

20 where in its judgment of 22nd December 2014, the Court of Appeal upheld a sentence of life imprisonment for a 36 year old man convicted of murder. He had used a knife and a spear to stab the deceased, who was his brother, to death after an earlier fight. Similarly in *Sunday v. Uganda C.A Crim. Appeal No. 103 of 2006*, the Court of Appeal upheld a sentence of life imprisonment for a 35 year old convict who was part of a mob which, armed with pangas, spears and sticks,

25 attacked a defenseless elderly woman until they killed her. In *Byaruhanga v. Uganda, C.A Crim. Appeal No. 144 of 2007*, where in its judgment of 18th December 2014, the Court of Appeal considered a sentence of 20 years' imprisonment reformatory for a 29 year old convict who drowned his seven months old baby. The convict had failed to live up to his responsibility as a father to the deceased who was victimized for the broken relationship between him and the

30 mother of the deceased.

From the facts of this case, the convict bears the highest degree of blameworthiness for having used a deadly weapons, (a stone and nylon rope) in a manner reflective of his wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and total disregard of the sanctity of life. He abused the trust and hospitality of the deceased and took his life in an apparent attempt at depriving him of his motorcycle. It was an offence motivated by greed and committed in a callous, very brutal manner. In light of these aggravating factors, I consider a starting point of forty years' imprisonment.

I have nevertheless considered the mitigation made in his *allocutus* and thereby reduce the sentence to thirty five years' 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 note that he has been in custody since 14th February 2017. I hereby take into account and set off one year as the period he has already spent on remand. I therefore sentence him to a term of imprisonment of thirty four (34) years, to be served starting today.

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

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Dated at Adjumani this 27th day of February, 2018.

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Stephen Mubiru
Judge.
27th February, 2018.

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