THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI

CRIMINAL SESSIONS CASE No. 0111 OF 2017

UGANDA …… PROSECUTOR

VERSUS

IWA MASENZIO …… ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

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 on the 22nd day of November, 2016 at Unna Central village in Adjumani District murdered one Adrawa Richard.

The prosecution case is that the deceased had borrowed a cart from the deceased father of the accused. The accused was infuriated by the fact that the deceased had not settled accounts with his father before he died, in respect of that borrowing. On the morning of 22nd November, 2016 the accused went searching for the deceased at several homes on the village until he found him coming from inspecting his new construction site. He boxed the deceased on the neck and the deceased fell down unconscious onto some rocks that had been exposed by a grader when maintenance works were done on that feeder road recently. The deceased was carried to a tree shade nearby from where he regained consciousness and he was taken to Adjumani Hospital where he spent one day and his relatives were advised to forward him to Lacor Hospital for his condition was getting worse. The accused died in an ambulance the following day 22nd November, 2016 as he was being transferred to Lacor Hospital. The accused was arrested and charged with murder.

In his defence, the accused only denied having boxed the deceased but admitted an altercation with him. His version is that when he confronted the deceased regarding the cart, the deceased tied to kick him twice but missed. The accused then held him by the hand. The deceased pulled

himself away, stumbled over a pile of bricks, fell down and hurt himself. He also suggested that he deceased having been epileptic, he could have succumbed to an attack of epilepsy.

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*).

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.
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 probe 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 24th November, 2016 prepared by P.W.1 Dr. Aciro Harriet a Medical Officer of Adjumani Hospital, which was admitted during the preliminary hearing and marked as exhibit P.Ex.1. The body was identified to her by a one Irama Silvano as that of Adrawa Richard. It is corroborated by the testimony of P.W.3 Irama Silvano, a brother of the deceased, who saw the body, identified it at the post mortem examination, and attended the funeral. In his defence, the accused did not dispute the death. 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 Adrawa Richard died on 24th November, 2016.

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 established the cause of death as "closed head injury due to fracture of neck and skull." Exhibit P. Ex.1 dated 24th November, 2016 contains the details of her other findings which include; "existence of lacerations at occiput area with hematoma. Presence of lacerations / cut at occiput region accompanied by scalp hematoma and neck deviation to the left due to fracture of cervical spine. No injuries to the internal organs."

P.W.4 who witnessed the circumstances in which the injuries were inflicted testified that on 22ndvNovember, 2016 the deceased was boxed on the right side of the neck and he fell in-between two big stones and immediately became unconscious. He was the moved to a place under a nearby tree shade and she saw blood oozing from the back of his head. He later regained consciousness and was taken to hospital where he spent one day and died the following day, 24th November, 2016. In his defence, the accused stated that the injuries sustained by the deceased were a result of the deceased pulling himself out of his grasp, stumbling over bricks, and falling down backwards or as a result of epilepsy. The court then has to determine whether this was a natural death (as a result of epilepsy), an accidental death (as a result of the deceased pulling himself out of the grasp of the accused) or a homicide (as a result of a punch to the neck). Whereas the other two do not give rise to criminal responsibility, the latter one does.

As regards the suggestion of that the accused was epileptic and that this could have been the cause of his death, I have not found any objective facts on basis of which that conclusion can be arrived at. There is no medical evidence in that respect or the testimony of any person who ever saw the deceased in that state. The accused did not allude to any symptoms, such as convulsions, he may have seen on basis of which his opinion can be tested. I find this to be a wild and speculative allegation that is not supported by any credible evidence. It is accordingly ruled out as a possible cause of death. The accused therefore did not meet a natural death.

As regards the version of the accused that the deceased suddenly pulled himself out of his grasp, stumbled over a pile of bricks and fell down hurting himself, according to section 8 of *The Penal*

Code Act, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will or for an event which occurs by accident, the accused cannot claim this to be an accident because of the context in which it occurred. Whereas persons may lawfully engage in friendly encounters such as in some dangerous sports e.g. boxing, not calculated to produce real injury to or to rouse angry passions, such that when injuries occur they are more likely than not to be considered only accidental, this was no friendly encounter. In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. It was an encounter precipitated by angry passion on the part of accused directed at the deceased for not having accounted for the prolonged use of his late father's cart. I nay event, the scene of crime, along a murruam feeder road that had recently undergone maintenance works of grading and leveling, the version of P.W.4 to the effect that the deceased fell onto some exposed rocks is more plausible when compared to stumbling over a pile of bricks. This version too is accordingly ruled out as a possible cause of death. The accused therefore did not die an accidental death.

That leaves only the version put across by P.W.4 Acan Palima who testified that she was about 25- 30 meters following behind them, pleading with the accused not to assault the deceased when she saw the accused box the deceased on the right side of the neck and the deceased fell in-between two big rocks that had been exposed by a grader, and immediately became unconscious. In *Attorney-General's Reference (No. 6 of 1980) [1981] Q.B. 715* where two men quarreled and fought with bare fists Lord Lane C.J., delivering the judgment of the Court of Appeal said, at p. 719 stated:

> It is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.

In the instant case, the attack by the accused on the deceased not having been a minor struggle, a properly conducted game or sport, lawful chastisement or correction, reasonable surgical interference, dangerous exhibition, etc. I find no lawful justification for it. It is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence (see *Rex v. Donovan [1934] 2 K.B. 498*).

The prosecution must then 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. Nevertheless, in the instant case, the evidence of P.W.1 who conducted the autopsy established the cause of death as "closed head injury due to fracture of neck and skull." Exhibit P. Ex.1 dated 24th November, 2016 contains the details of her other findings which include a "existence of lacerations at occiput area with hematoma. Presence of lacerations / cut at occiput region accompanied by scalp hematoma and neck deviation to the left due to fracture of cervical spine. No injuries to the internal organs."

P.W.4 who witnessed the circumstances in which the injuries were inflicted testified that on 22ndNovember, 2016 the deceased was boxed on the right side of the neck and he fell in-between two big stones and immediately became unconscious. He was the moved under a nearby tree shade and she saw blood oozing from the back of his head. He later regained consciousness and was taken to hospital where he spent one day and died the following day, 24th November, 2016. This circumstantial evidence has established specifically that the cause of death was due to the unlawful act of the accused in assaulting the deceased. It has established a nexus between the act of the accused and the death of the deceased. 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 Adrawa Richard was caused by an unlawful act.

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. Where no weapon is used, for a court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act that caused the death and whether the accused foresaw death as a natural consequence of the act. The court should consider; (i) whether the relevant consequence which must be proved (death), was a natural consequence of the voluntary act of another and (ii) whether the perpetrator foresaw that it would be a natural consequence of his or her act, and if so, then it is proper for court to draw the inference that the perpetrator intended that consequence.

P.W.1 who conducted the autopsy established the cause of death as "closed head injury due to fracture of neck and skull." Explaining the circumstances in which these injuries were inflicted, P.W.4 said she saw the deceased being boxed on the right side of the neck and he fell in-between two big stones and immediately became unconscious. If injury was caused by the direct hit to the neck, malice aforethought may be readily inferred because this was a direct, unprovoked attack with mighty force directed at a sensitive part of the body. If however it was as a result of a secondary injury caused as a result of the fall, malice may not be easily inferred. Since there is no direct evidence of intention, it can only be inferred from circumstantial evidence of the injuries. I note that considering the severity of both injuries (the fracture of the neck by the direct hit to the neck and the fracture of the skull by a secondary injury from a fall onto rocks), each was sufficient on its own to cause death in the ordinary course of nature.

In my view, any person who by way of an unprovoked attack hits another with such mighty force directed at a sensitive part of the body such as the neck to the extent of causing a fracture of the neck bones, must have foreseen that death was a probable consequence of his act. This fact is capable of supporting an inference of malice aforethought. 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 Adrawa Richard was caused by an unlawful act, actuated by malice aforethought.

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. P.W.4 was the eye witness and placed the accused at the scene of crime. The accused only denied having boxed the deceased but admitted an altercation with him. 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 Code Act*.

Dated at Adjumani this 28th day of February, 2018. ……..

Stephen Mubiru
Judge.
28th February, 2018.

1st March, 2018.
9.51 am
Attendance

Ms. Baako Frances, Court Clerk.
Mr. Okello Richard, Principal State Attorney, for the Prosecution.
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. He deliberately caused the death of the deceased who was sole bread winner,. He is not remorseful. She proposed that he should be sentenced to 25 years' imprisonment.

In mitigation, defence counsel submitted that he has no previous record of conviction. He is 55 years old. He has a family. He is the breadwinner of the family. He is related to the deceased. We

do not condone murder but the circumstances should be taken into consideration that death was a natural consequence of the act. The time he has spent on remand should be considered and he be sentenced to a reformatory sentence of ten years

In his *allocutus*, the convict stated that he has a large family. He is the one taking care of the children of his sister. He only survives as a peasant. The children have no way of going to school since their mother cannot give them assistance, she is lame. His father died and there is no person at home. Hr prayed for a lenient sentence. In his victim impact statement, Mr. Irama Silvano, a brother of the deceased stated that the convict should be given a severe punishment. He had the intention of murdering his brother, he followed him to two different homes and hit him finally at the third. They have lived with the convict for almost twenty years and he has the habit of fighting and a long custodial sentence will ensure that he will be weak when he comes out. He has wasted time of the court in claiming he has witnesses.

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.

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 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*, 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, 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 mother of the deceased.

From the facts of this case, the convict bears a moderately high degree of blameworthiness for having attacked the deceased recklessly. His conduct demonstrates more of a viciousness and reckless disregard of life rather than pre-meditation and planning. He committed it in a callous, brutal manner. In light of these aggravating factors, I consider a starting point of thirty years' imprisonment.

I have nevertheless considered the mitigation made in his *allocutus* and thereby reduce the sentence to twenty two 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 30th November, 2016. I hereby take into account and set off one year and three months as the period he has already spent on remand. I therefore sentence him to a term of imprisonment of twenty years (20) years and nine (9) months 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.

Dated at Adjumani this 1st day of March, 2018.

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Stephen Mubiru
Judge.
1st March, 2018.