

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0121 OF 2017

UGANDA **PROSECUTOR**

5 **VERSUS**

IRANYA CHRISTOPHER alias OBULEJO **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*
10 *Act*. It is alleged that the accused on the 16th day of July, 2016 at Ajeri Central village in
Adjumani District murdered one Asienzo Grace.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are
briefly that the accused and the deceased were husband and wife. On that fateful day at around
15 1.00 pm, the accused returned from the trading centre where he had been drinking alcohol and
met his wife coming from the main house going about her business of preparing lunch, assisted
by her daughter P.W.4 Kojoa Evaline. For no apparent reason, the accused grabbed the saucepan
that his wife was holding and hit her with it on the nose. A fight ensued between them during
which the accused threw her onto the ground, knelt on her tummy with his knees and held her by
20 the throat. He used a stick to fend off and threaten his brother who attempted to intervene and
separate them. He later retired to his bed in the main house leaving his wife helpless on the
ground.

In his defence, the accused stated he has no memory of having committed the offence. All he
25 remembers is that he swallowed three tablets of valium (a sleep inducing drug) soon after having
breakfast during the morning hours and went to sleep in his bed. He woke up at 5.00 pm only to
find himself in custody at a police station being accused of having murdered his wife. Although
it had been prescribed to him for taking during the evening hours, he had a headache that
morning and decided to take the drug in the morning.

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
5 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
10 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.

15 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 16th July, 2016 prepared by P.W.1 Dr. Ambaku Michael a Medical Officer of Mungula Health Centre, which was admitted
20 during the preliminary hearing and marked as exhibit P. Ex.1. The body was identified to him by a one Okunzi Peter as that of Asienzo Grace. P.W.3 Okunzi Peter, the L.C.1 Chairman, testified that upon receiving a report of the death of the deceased, he reported to the police and went to the scene with them where he saw the body and saw the police take it away from the scene for post mortem examination. P.W.4 Kojoa Evaline, a daughter of the deceased, was present when
25 her mother died and saw the body in the kitchen before it was taken away by the police. In his defence, the accused said he did not know whether his wife is dead. Although his brother told him so after his arrest, he believes his wife is still alive and is at home. 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 Asienzo Grace is dead.

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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 “hemorrhagic shock due to ruptured spleen.” Exhibit P. Ex.1 dated 16th July, 2016 contains the details of his other findings which include a “ruptured spleen with haemoperitoneum. Bruise on the left leg with two cut wounds on the nose” P.W.4 Kojoa Evaline, a daughter of the deceased, was present when her mother died stated it all started when her mother was hit twice on her nose with a saucepan that was pulled from her hands as she came out of the house proceeding to the kitchen where she was preparing lunch. This was followed by being thrown onto the ground and her stomach being squeezed hard with knees. He held her by the throat during the fight. She had suddenly lost energy and after her father went into the house, she could only crawl with difficulty to the kitchen where she died moments later. In his defence, the accused stated that he has no recollection of this as he had taken three valium tablets soon after, went to bed and slept and it is around 5.00 pm that he came back to his senses to realize that he was in custody at a police station. Having considered all the available evidence relating to this ingredient, I find that this was a homicide. Not having found any justification or excuse in law for the acts leading to her death, in agreement with the assessors, I am satisfied that it has been proved beyond reasonable doubt that the death of Asienzo Grace was caused by an unlawful act.

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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.

In his defence, the accused stated that he had no recollection of anything that occurred between the early morning hours when he went to be after taking three valium tablets and 5.00 pm when he found himself at a police station. Although this medication had been prescribed to him for taking in the evening before going to bed, he took it that morning because of pain from a

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headache. In essence, he contends lack of knowledge of the circumstances of the crime, or of his own whereabouts or conduct at the time of the crime. He has raised amnesia as his defence. Amnesia is nothing more than a failure of memory concerning facts or events to which an individual has been exposed. The accused does not argue that he lacked substantial capacity to appreciate the wrongfulness of his conduct or conform it to the requirements of law at the time of his conduct. The unexplained temporary memory loss, without a mental condition, cannot provide a defence in law. Inability to recall breaking the law does not mean that the accused did not intend to commit it.

10 Scholars have categorized two types of genuine crime-related amnesia: dissociative and organic (see Maaiké Cima et al., *Claims of Crime-Related Amnesia in Forensic Patients*, 27 *Int'l J.L. & Psychiatry* 215, 215-21 (2004)). Dissociative amnesia refers to a phenomenon where a person fails to remember events after a traumatic experience, even without a neurological defect. One theory argues that individuals suffer from dissociative amnesia when an extreme emotional arousal triggers a temporary dissociative state, during which the individual performs acts that he or she fails to remember later on. Other scholars contend that an extreme level of arousal during conduct interferes with memory retrieval at a later time. Only organic amnesia that is not self-induced, if it attains the level of insanity, may be relevant to the required elements of a crime. Such type of amnesia would be akin to temporary insanity, a recognized criminal defense.

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In contrast, organic amnesia is caused by a neurological defect. While intoxication could create such a defect, leading to an organic amnesia, such amnesia is not relevant in criminal law. Unlike other non-voluntary amnesia, intoxication-induced amnesia involves some voluntary act, i.e. drinking or taking drug, at an earlier time. If criminal law were to recognize self-induced amnesia as an exculpatory or mitigating defense, then accused persons would be motivated to cause their own amnesia to escape liability. Post-crime amnesia, depending on its source, does not necessarily show that the accused behaved without conscious awareness of his own action at the time.

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30 The danger of malingering amnesia to the administration of justice is significant. After all, amnesia is easy to fake but hard to detect. The potential for fraudulent allegations of memory

loss is so great that for that reason alone courts are reluctant to avail it as a defence. Courts generally hold that amnesia is not a defense to a crime, unless the accused, at the time of the act, did not know the nature or wrongfulness of the act. "Unless an accused is legally insane, the law is not and should not be so unrealistic and foolish" (per the Supreme Court of Pennsylvania in
5 *Commonwealth ex rel. Cummins v. Price*, 218 A.2d 758, 760 (Pa. 1966) at 763).

The defense of amnesia raised in this case presents a situation which parallels other defences in which an accused does not recall the facts surrounding the event, e.g. intoxication and insanity. If someone does not remember committing a crime, it does not mean that they did not have the
10 intent to commit it, but if they were suffering from an altered mental state when the crime was committed, they may be able to claim insanity. The insanity defense excuses an accused from criminal responsibility when his or her mental disease interferes with his or her ability to form the requisite intent to commit the crime. If at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and
15 quality of the act he was doing, then the accused cannot be held criminally responsible. Amnesia by itself cannot constitute an insanity defense (see *Thomas v. State*, 301 S.W.2d 358, 361 (Tenn. 1957). It is relevant only if the memory loss is a symptom for an underlying mental disease (see *Lester v. State*, 370 S.W. 2d, 405, 409 (Tenn. 1963) where it was held that "it is elementary that insanity and amnesia are distinct conditions, even though amnesia is sometimes incident to
20 insanity" and *State v. Greene*, 984 P.2d 1024 (Wash. 1999) where it was held that "although dissociative identity disorder is widely accepted as a legitimate mental state in the medical community, it cannot support an insanity defense").

Amnesia is loss of memory caused by psychological or physical trauma. It's not the same as not
25 having the mental status required for a crime. The inability to remember committing a crime doesn't necessarily mean the accused didn't intend to and actually did commit it. An accused's mental state at the time of the crime is what is important. Amnesia occurring after the crime has no effect on conduct at the time of the offense. For example in *People v. Hibbler*, 274 NE2d 101 (Ill. 1971), amnesia caused by chronic alcoholism was rejected as a defense to forgery. Even
30 though the accused couldn't recall his actions at the time he forged the signature on the check, his memory loss didn't affect his intent to commit the fraudulent act. Similarly in *Lester v. State*,

370 SW2d 405 (Tenn. 1963), the court upheld the appellant's murder conviction because his failure to remember the shooting wasn't proof of his mental condition at the time of the act. His memory loss wasn't evidence that he didn't know right from wrong when the crime occurred.

In his defence, the accused attributed the amnesia to three tablets of valium he took that morning.

5 From his own account, his amnesia is not a "disease affecting his mind" within the meaning of section 11 of *The Penal Code Act*. During the trial, it was clear that he had sufficient present ability to consult with his advocate with a reasonable degree of rational understanding and had a rational as well as factual understanding of the proceedings against him.

10 There is no evidence before this court to show that the accused was suffering from any mental disease, and that such a mental disease may have been the cause of his criminal act, or that he was suffering from the same defect at the time of trial. There is equally no evidence that his memory respecting events, circumstances, and conditions surrounding the commission of the alleged crime could not be refreshed. Amnesia *per se* in a case where recollection was present
15 during the time of the alleged offenses, is not a defence. The accused does not contend that prior to Asienzo Grace's death, or at the time of her death, or at any time subsequent thereto, he was insane. On the contrary, he asserted in his defence that he was sane and competent before Asienzo Grace's death, and is now completely sane and completely competent. His conduct as witnessed by P.W.4 indicates awareness of what he was doing, is so far as he warded off
20 attempts by his brother to intervene.

Although the accused did not offer any evidence on this element, P.W.4 suggested that the accused appeared to be intoxicated at the time he assaulted his wife. The law is that the court is required to investigate all the circumstances of the case including any possible defences even
25 though they were not duly raised by the accused for as long as there is some evidence before the court to suggest such a defence (see *Okello Okidi v. Uganda, S. C. Criminal Appeal No. 3 of 1995*). Intoxication may negate malice aforethought where the accused was too drunk to form the specific intention required.

30 Under section 12 of *The Penal Code Act*, for intoxication to constitute a defence to a criminal offence, it must be shown that by reason of the intoxication, the accused at the time of the act or

omission complained of, did not know that the act or omission was wrong or did not know what he or she was doing and the state of intoxication was caused without his or her consent by the malicious or negligent act of another person, or that the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission. Since in the
5 instant case there was no suggestion that the condition of intoxication the accused was labouring under was caused without his or her consent by the malicious or negligent act of another person, it was necessary to adduce evidence to show that at the time of the act, he did not know that the act was wrong or did not know what he or she was doing since by reason of that intoxication he was insane, temporarily or otherwise.

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Intoxication can provide a defence for offences of specific intent but not for offences of general intent. For offences such as murder which require a particular intent or knowledge, a person who performs the act causing death while in a state of intoxication is liable to be dealt with as if he or she had the same knowledge as he or she would have had if he or she had not been intoxicated,
15 unless it is shown that the substance which intoxicated him or her was administered to him or her without his or her knowledge or against his or her will. Alternatively, that by reason of intoxication he or she was insane, temporarily or otherwise to the extent of not knowing what he or she was doing or that it was wrong. The law was neatly summarized by the House of Lords in *Director of Public Prosecutions v. Beard* [1920 AC 479] in the following words:

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There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete answer to a criminal charge as insanity induced by any other
25 cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so
30 affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act.

The defence of intoxication can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about the reason of

intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him. In the instant case, the accused bore the evidential burden of adducing some evidence creating the possibility that he was labouring under such a degree of drunkenness that he was rendered incapable of forming the specific intent essential to constitute the crime of murder. Once he adduces such evidence, then the persuasive burden is on the prosecution to disprove it by showing that the evidence of intoxication adduced by the accused falls short of proving such incapacity. The onus is on the prosecution to prove that an accused person was not so drunk as to be capable of forming an intent to kill.

Although P.W.4 suggested that the accused could have been drinking before this incident, there is no evidence that he was so drunk that he did not know what he was doing within the meaning of section 12 of *The Penal Code Act*. There is no evidence to establish the fact that the drink the accused had consumed had impaired his judgment in any way. Society is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community. The fact that an accused has voluntarily consumed intoxicating amounts of alcohol cannot excuse the commission of a criminal offence unless it gives rise to a mental incapacity within the terms of section 12 of *The Penal Code Act*. Mere drinking alcohol does not count in law otherwise many killers would get off by arming themselves with alcohol before they go on their murderous missions (see *Feni Yasin v. Uganda, C. A Criminal Appeal No.51 of 2006*). The defence of intoxication is therefore not available to him.

The presence of malice aforethought is rarely susceptible of direct proof, and must instead be established by legitimate inferences from circumstantial evidence. These inferences are based on the common knowledge of the motives and intentions of persons in like circumstances. 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.

5 P.W.1 who conducted the autopsy established the cause of death as “hemorrhagic shock due to ruptured spleen.” P.W.4 Kojoa Evaline stated that she saw the accused assault her mother by applying pressure with his knees directly at the tummy of her mother who was by then visibly expectant. The accused did not offer any evidence on this element. He stated he has no recollection due to the effect of valium tablets that sent him to sleep from the morning hours to
10 sometime past 5.00 pm. In his defence, the accused stated that he was aware at the time that his wife was three months pregnant. Any person who attacks a visibly pregnant must by applying extreme pressure to the stomach to the extent of rupturing the spleen, an internal organ while at the same time strangling her must be deemed to foresee that death was a probable consequence of his act.

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Despite the absence of direct evidence of intention, on basis of the circumstantial evidence, I find, that malice aforethought can be inferred from his direct application of mighty force on vulnerable parts of the body (the neck and stomach), of a visibly pregnant woman, inflicting such a degree of injury that ruptured the spleen, causing hemorrhagic shock and eventual death.

20 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 Asienzo Grace 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
25 caused the unlawful death. There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as the perpetrator of the offence. The accused has no memory of participation. He remembers swallowing three tablets of valium soon after having breakfast during the morning hours and going to sleep in his bed. He woke up at 5.00 pm only to find himself in custody at a police station on allegations that he had murdered his wife, Asienzo
30 Grace. He has obligation to prove this amnesia. 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 P.W.4 Kojoa Evaline, his daughter who was present when her mother died. She stated that the accused returned in what appeared to be a drunken state and for no apparent reason began assaulting his wife. The death resulted from assault directed at the tummy of her mother who was by then
5 visibly expectant. This being evidence of visual identification, the question to be determined is whether the identifying witness was able to recognise the accused and his actions. In circumstances of this nature, the court is required to first warn itself of likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made which is free of error or mistake (see *Abdalla Bin Wendo v. R (1953) 20 EACA 106*; *Roria v. R [1967]*
10 *EA 583* and *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*). In doing so, the court considers; whether the witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the accused and the proximity of the witnesses to the accused at the time of observing the accused.

15 As regards familiarity, P.W.4 knew the accused as her father. In terms of proximity, she was only a few metres away when the altercation erupted. As regards duration, the altercation between the accused and the deceased took some time, providing ample opportunity for her to recognise the accused. Lastly, it occurred outdoors during broad day light which provided light sufficient to aid recognition . In any event, the accused contested only his memory of the events
20 and not his perpetration of the offence. I observed P.W.4. as she testified and she did not appear to be mistaken in any way regarding what she saw the accused do. Her observations are consistent with the findings of P.W.1 when he conducted the post mortem. Therefore in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that it is the accused who committed the offence. Since the prosecution has
25 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.

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Stephen Mubiru
Judge.
28th February, 2018.

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9th March, 2018

2.46 pm

Attendance

Ms. Baako Frances, Court Clerk.

5 Ms. Bako Jacqueline, Resident State Attorney, for the Prosecution.

Mr. Barigo Gabriel, Counsel for the accused person on state brief is present in court

The accused is present in court.

Both assessors are in court

10 **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; although he has no previous conviction, the offence is rampant and of a serious nature. He killed his own wife. He had no logical explanation. His conduct subjected his children to a lot of trauma. He is dangerous to the society and he is not even remorseful. She prayed that he is given the maximum sentence which is death. This will curb the re-occurrence of the offence.

20 In mitigation, defence counsel submitted that the convict has no previous record. This is an occurrence which is not condoned but it happened. It was quite unfortunate. He was 30 years at the time of the offence. He had a settled family previously with children and was fending for the family. It is unfortunate the children lost their mother. The children still need protection and to go to school and he is the only one who can do that for the children. He has been on remand for a year and a half. He says he did not know what happened. He should be able to appreciate the conviction and is capable of reform if the sentence is lenient and he should return to look after the children if the sentence proposed by the prosecution is given. Cases of a similar nature have not attracted a death sentence.

30 In his *allocutus*, he grew up as an orphan from birth, he never saw his father. He has eleven children and a sister under his care. He is the one taking care of his mother. He had no problem with his wife prior to this incident. Now his mother in law will suffer with the children. He prayed for lenience. He will not follow his daughter to revenge and he will not repeat such kind of thing in his life. In his victim impact statement, Mr. Arap Moi Made Justin, a brother to the

deceased stated that the family of the deceased resolved that since the accused murdered his wife, and strongly denied the fact that his wife died, he should be punished severely. He is notorious for always threatening his wife with a spear. One time he attended a case in person where the convict was caned twenty strokes by the community for bearing his wife and they
5 confiscated his goat which was then eaten by the youth. He should be given a deterrent sentence. He deserves the penalty of death.

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
10 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
15 - 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*).

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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
25 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
30 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.

5 From the facts of this case, the convict's conduct demonstrated a viciousness and reckless disregard of life rather than pre-meditation and planning. He committed it in a callous, brutal manner within the context of domestic violence. In light of these aggravating factors, I consider a starting point of thirty years' imprisonment.

10 I have nevertheless considered the mitigation made in his *allocutus*, most especially his family responsibilities and being relatively young in terms of age and thereby reduce the sentence to twenty 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
15 that he has been in custody since 21st July, 2016. I hereby take into account and set off one year and seven months as the period he has already spent on remand. I therefore sentence him to a term of imprisonment of twenty three years (23) years and five (5) months to be served starting today.

20 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 9th day of March, 2018.

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Stephen Mubiru
Judge.
9th March, 2018.