THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KABALE
CRIMINAL SESSION CASE NO. 0049 OF 2019

UGANDA ..... PROSECUTOR

VERSUS

KANUSU JOHN ..... ACCUSED

BEFORE JANE OKUO KAJUGA J

JUDGEMENT

Introduction:

The accused, **Kanusu John** was indicted with the offense of Murder c/s 188 and 189 of the Penal Code Act, Cap 120. It was alleged by the prosecution that the accused and others still at large on the 2/2/2017 at Ikamiro Village in Rubanda District with malice aforethought killed his wife, **Nyirarudodo**. He pleaded not guilty, necessitating a trial.

Brief facts:

The case for the prosecution was that on the evening of 2/2/2017 within the trading Centre at Ahakajaji, the accused and his brother called Kitama were seen seriously assaulting the deceased. It was alleged that they accused her of sleeping with another man. The following morning the deceased was found dead at the very spot where the accused was assaulting her. Her body bore several marks of assault and blood was coming from her nose and private parts. The police arrived at the scene and took the body for post-mortem examination which established the cause of death as a blunt force trauma. She was also found to be seven months pregnant. The accused and Kitama went into hiding. The former was arrested after two weeks and handed over to the police while Kitama was killed in the bush by the Batwa.

Representation:

Julie Najjunju (SA) represented the prosecution while **Alice Namara** appeared for the accused on State Brief.

Burden and standard of proof:

In all criminal matters, the burden lies on the prosecution to prove the charge to the standard of proof beyond reasonable doubt. The burden of proof is anchored in **Article 28(3)(a) of the 1995 Constitution of the Republic of Uganda** which provides that

every person who appears before a court or tribunal is presumed innocent until proved guilty. In **Woolmington V DPP [1935] AC 462, Viscount Sankey J stated;**

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt."

In **Miller Vs Minister of Pensions [1947]2 ALL ER 372,** it was held that the prosecution evidence should be of such standard as to leave no other logical explanation to be derived apart from the fact that the accused committed the offence. It was further held that 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.

To discharge its burden, prosecution called 5 witnesses and closed its case. The accused was put on his defence and he opted not to call any witnesses. testimony on oath. Both parties made final submissions and I will consider the same in arriving at my final decision.

Proof of Elements of the Offense:

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 unlawful
3. That the unlawful act was actuated by malice afore thought, and lastly
4. That it was the accused who caused the unlawful death.

Proof of 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 body. The prosecution adduced evidence of a post mortem report dated 4th February 2017, prepared by **Dr Odulusi Daniel**, the Regional Police Surgeon, Kigezi Region. It was admitted during the preliminary hearing and marked Exhibit **PEX 1(b).** The body was identified to him by one Musimenta Bruno as that of Nyirarudodo. The Surgeon confirmed death of Nyirarudodo.

P W1- Turyahebwa Bernard, the LC1 chair person, upon receiving the report of death of the deceased from the defence secretary **Niwagaba Moses**, went to the scene and saw the body lying on the ground, facing upwards.

Pw2- Kendrace Nteziki knew the deceased as the daughter of her co wife. She too went to the scene at Ahakajaji trading centre and saw the body of the deceased lying on the

ground. She confirms that they turned the body and saw bruises on the head, back and the arms. **PW3-Kanama Sylvia** who testified that she saw the accused assaulting the deceased also told court that the following day upon receipt of the news of death of the deceased, she went and saw the deceased's dead body. **PW5- D/AIP Byereta Simon Warren** testified that upon receipt of the news of the death of the deceased from the chairman and Tugumusinze Amos, he went to Ahakajaji trading centre with other police men and found a dead body of a lady.

Whereas none of the above witnesses knew where the deceased was buried, the prosecution evidence proves beyond reasonable doubt that Nyirarudodo died. The defence did not contest proof of this element.

Proof that death was unlawful:

In **R versus Gusambizi s/o Wesonga 1948 15 EACA 65** it was held that ***"In homicide cases death is always presumed to be unlawfully caused unless it was accidentally caused in circumstances which make it excusable".***

Excusable cases include justifiable circumstances like self-defense or when authorized by the law. **P. Ex 1(b)** established cause of death as blunt force trauma. The uterus was opened and there was a dead foetus of 7 months. There were blood clots within the uterus. It was also established that blood was oozing from the vagina and nostrils. The right 4th and 5th ribs were fractured and the right lung was contused. PW1 in his evidence said when he saw the body there were marks of assault, the arms were swollen and there was blood on her body. This is corroborated by **PW2's** evidence who testified that ***"We saw the body of the deceased. She was lying down and we turned her body over. We saw she had been assaulted on the head, back and the arms."***

PW3 further told court that she saw the accused and a one Kitama beating the deceased. That Kanusu was kicking the deceased's legs while Kitama was hitting the deceased on the stomach. She also told court that she observed the body which bore injuries on the legs, arms and the stomach was swollen. **PW4's** evidence further corroborates this when he says that when he went to the scene, he found the body in the grass behind the bars, with swollen face and blood from the private parts, nose and mouth. From the above facts, it's clear that the death was not excusable or justified. It was unlawful and resulted from the assaults. The defense did not contest this element either. This ingredient was proved beyond reasonable doubt.

Whether the unlawful act was actuated by malice aforethought:

Section 191 of the Penal Code Act provides that malice aforethought can be deduced from facts showing an intention to cause death or knowledge that the act or omission causing death will probably cause death. The case of **R versus Tubere s/o Ochieng 1945 12 EACA 63** further explains that an inference of malice aforethought can be deduced from the nature of the weapon used, the part of the body that was hit or

targeted, whether vulnerable or not, the manner in which the weapon was used and the conduct of the accused before, during and after the incident. The question is whether whoever assaulted the deceased intended to cause death or knew the manner and degree of assault would probably cause death.

Counsel for the prosecution in her final submissions after defining malice afore thought submitted that the evidence of **PW3** proves malice afore thought as she saw the accused and another beating and kicking the deceased. She left the beatings still going on. That **PEX(1)(b)** shows injuries consistent with assault, sticks, blows and kicks. That she was pregnant and the assault led to her death.

In his defense, the accused raised the defence of intoxication, which directly affects the resolution of this ingredient. He stated on oath that he had no recollection of the events because he was drunk. He testified that; ***"I know Rudodo, she was my wife. I don't know what happened to her. I heard that she died and I don't know how. I heard she died in 2017. She died at a place called Ahakajaji. They said I murdered her but I don't know of it because I was drunk on that day."***

Counsel for the defendant invited court to consider the defense of intoxication. She submitted that intoxication may be taken into account to establish whether the accused had formed the intention to kill.

She referred to the case of **Kiyengo Zowerio Vs Uganda Supreme Court Criminal Appeal 35 of 2003** where it was held that the onus is on the prosecution to prove that the appellant's judgment was not affected by drink such that he could still form the intention. The test to apply is that when having regard to all circumstances including those related to drinking, it could be safely said beyond reasonable doubt that the accused had the requisite intent when the offence was committed.

To prove intoxication, counsel for the defense relied on the evidence of **PW4** who said that the accused had spent the whole day drinking. **PW5** who stated that the incident happened from the bar and **PW3** who confirmed that the incident happened in front of the bar. Counsel for the defense therefore submitted that malice aforethought was not proved beyond reasonable doubt as the accused formed no intention to kill his wife.

I now go ahead to resolve this ingredient bearing in mind the submissions of the defense, prosecution and the evidence as a whole.

Section 12 of the Penal Code Act provides for the defence of intoxication. It states as follows;

1) ***Except as provided in this section, intoxication shall not constitute a defense to any criminal charge.***

2) *Intoxication shall be a defense to any criminal charge if by reason of intoxication the person charged 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-*
   a) *the state of intoxication was caused without his or her consent by the malicious or negligent act of another person; or*
   b) *the person charged was by reason of intoxication insane temporarily or otherwise, at the time of such act or omission,*
3) *Where the defense under Sub section (2) is established, then in a case falling under subsection (2)(a) the accused person shall be discharged; and in a case falling under subsection (2)(b), the provisions of the Magistrates Court Act relating to insanity shall apply.*
4) *Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he or she would not be guilty of the offence.*
5) *For the purposes of this section, "intoxication" shall be deemed to include a state produced by narcotics or drugs.*

There is a wealth of authorities to further elaborate the above section and I will make reference to the same.

In **Director of Public Prosecutions V Beard [1920] AC 479**, the House of Lords summarized the law as follows;

'There is a distinction, however, between the defense of insanity in the true sense caused by excessive drunkenness and the defense 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 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 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"

In **Kiyongo Vs Uganda (2005) 2 EA 106** it was held that;

"In considering the defense of intoxication, the question is not whether the accused was or was not capable of forming the intention but rather, whether by reason of the drink taken, he or she did not form the intention. The test to be applied is whether it could safely be said that the prosecution had proved beyond reasonable doubt that the accused had the requisite intent at the material time."

Also in the case of **Attorney General V Gallagher (1961) 3 ALLER 299,** it was held that intoxication does not stand as a defense where the accused gets himself or herself drunk in order to carry out a crime.

Lastly I have considered the case of **Uganda Vs Iranya Christopher alias Obulejo High Court Criminal Session Case No 0121 of 2017** at Gulu where justice Stephen Mubiru held inter alia;

1. *The inability to remember committing a crime doesn't necessarily mean the accused didn't intend to and actually did commit it.*
2. *That unlike other non-voluntary amnesia, intoxication induced amnesia involves some voluntary act, ie drinking or taking a drug at an earlier time. If criminal law were to recognize self-induced amnesia as an exculpating 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.*
3. *That under Section 12 of the Penal Code Act, for intoxication to constitute a defense 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 since by reason of that intoxication he was insane, temporarily or otherwise.*

Coming back to the instant case, **PW4, PW3 and PW 4** all make reference to the fact that the accused was drinking and/or that the fight took place at a bar. The accused himself says he was drunk that day hence he can't remember anything. Whereas there is evidence on record that the accused could have taken alcohol that day the question is whether by reason of intoxication, he was unable to form the requisite intent. Court looks for evidence that he was temporarily insane at the time of commission of offense by reason of alcohol. A statement that he was not able to recall the events of the day does not translate into an automatic conclusion that he was insane, temporarily or otherwise, by reason of drink. Court has to carefully scrutinize the circumstances surrounding the assault and events occurring immediately after in order to determine whether there was malice aforethought.

The testimony of **PW3** is to the effect that at about 7 pm they found the two beating the deceased. Kitama kept chasing them away. They were beating her in front of Sayuni's bar. Kanusu was kicking her while Kitama was beating her with sticks. She observed them for 2 minutes then ran to report to the LC Chairman because the beating was very serious. She further stated that the three, (accused, Kanusu and deceased kept talking to one another throughout the beating though she did not hear what they were saying. The evidence of the eye witness does not show Kanusu as having been temporarily insane.

PW4, the leader of the Batwa community testified that he was in his office at 6 am on the morning of 3/2/2017 when Sylvia Kanama woke him up with the news of the death of Nyirarudodo. His office was neighbouring Kanusu's residence. He stated that Kanusu was not present and they had to mount a search for him. This evidence contradicts Kanusu's claim that he was woken up at 8 am and told to flee as he had killed his wife, although he did not know about it. The witness statements show that the death was

discovered earlier than 8 am (as early as 6 am) and by then Kanusu was nowhere to be seen.

I find the conduct of the accused after the alleged offence was committed, very helpful in resolving this element.

Section 7(2) of the Evidence Act Cap 6 provides as follows;

The conduct of any party, or any agent to any party, to any suit or proceeding, in reference to that suit or proceeding, or in reference to any suit or proceeding or relevant to it, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if that conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent to the fact in issue or relevant fact.

In the case of **Twehamye Abdul Vs Uganda Criminal Appeal 49 of 1999(2000) UGCA 7, C**ourt of appeal upheld a High Court decision where it was held that;

"the circumstances under which accused was traced locked inside somebody else's house was indicative of an attempt to avoid arrest and affords a cogent presumption of guilt."

The accused in the present case run away after the death of the deceased. By the time the news of the death broke in the community, he was nowhere to be seen. In his evidence he told court that he run because he was told that he killed his wife and people were looking for him with spears. He claims he was informed of it at 8 a.m. If he did not recall anything why was he quick to believe that he had killed his wife as alleged and that he thus needed to flee? All prosecution witnesses have testified that on learning of the death of the deceased, they went to the crime scene and saw the body of the deceased. A prudent husband who has learnt of the death of his wife, and was not sure what had happened would have looked for further information, rather than flee the scene. If indeed he had regained sanity as he claims by 8 am of the following morning, and found his wife was missing he would have been the first person to report the incident to the authorities.

Court takes judicial notice of the fact that if a person becomes drunk, they later become sober. The accused seems to suggest that from the time of the incident at around 7 p.m. until the following day when the body was recovered, he was still drunk and did not know what had happened. I am not convinced by the accused's claims. I do not therefore find the of intoxication available to him, in light of his fleeing from his home.

It is evident that any person who attacks a pregnant woman by applying extreme pressure to the stomach to the extent of damaging the uterus and fetus, beating her and breaking her ribs must be deemed to foresee that death was a probable consequence of

his act. I find that malice afore thought can be inferred from nature of injuries on vulnerable body parts as explained on the post mortem report.

It is also the evidence of PW4 and PW5 that the reason for assaulting the deceased was a suspected unfaithfulness. This in itself goes to confirm that the accused knew what he was doing when he assaulted the deceased.

Having considered all the available evidence relating to this ingredient, I am satisfied that it has been proved beyond reasonable doubt that death of Nyirarudodo was caused by an un lawful act, actuated by malice afore thought

***Whether the accused was the one responsible* for the death:**

For this ingredient to be proved, 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 says he has no memory of participation. All he says is that he was drunk that day.

Counsel for the prosecution in her final submissions, stated that the accused was seen assaulting the deceased with another. That he was known to the witnesses and there was no issue of mistaken identity. She further submitted that Section 20 of the Penal Code Act applied in this case since the accused and another set out to assault the deceased and their actions led to loss of life. In reply counsel for the defense stated that PW3 who was the only single identifying witness said the incident happened at 7pm and she observed it for about two minutes. That Kitama kept chasing people. That because of this the circumstances did not favor correct identification as required by law regarding single identifying witness. That further she said she saw 3 people fighting in front of the bar and later in cross examination she said she saw 2 people

Counsel for the defense finally submitted that Section 20 of the Penal Code Act did not apply because no evidence was led to prove that the accused formed a common intention with Kitama to kill the deceased.

I will now resolve this ingredient putting the above submissions into consideration and the evidence as a whole.

Section 133 of the Evidence Act provides that;

Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.

PW3 –Kanama Sylvia testified that she knows the accused as Kanusu who killed his wife. That she was coming from digging and when she reached Ahakajaji she found

Kanusu and Kitaama beating his wife Rudodo. There were many people but she couldn't notice them because Kitama kept chasing them.

She says she could identify Kanusu because she was standing at a higher level and she could see them fighting while the road was at a lower level. That there was electricity so she could see what was happening clearly. That she also knew Rudodo before her death and she knew her as Kanusu's wife. She also knew Kanusu well.

During cross examination she said it was 7.00 pm but not so dark because electricity was on. That it was evening almost coming to night. She was about 6 metres away from the fight and the distance from the bar to the main road was about 7 metres away.

She said she saw the accused beat the deceased for 2 minutes and then she ran away.

In the circumstances of this nature, the court is required to first warn itself of the likely dangers of acting on such evidence and only to do so after being satisfied that correct identification was made which is free of error of mistakes. 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 witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused. **(See Abdalla Bin Wendo V R (1953)20 EACA 106; Roria V R [1967] EA 583 and Abdalla Nabulere and two others V Uganda [1975] HCB 77)**

As regards familiarity, PW3 knew the accused and the deceased as husband and wife. In terms of proximity she was 6 metres away from the fight and at higher level of the road. As regards duration, she witnessed it for about 2 minutes which in my view is sufficient time to identify someone you already knew. Lastly the assault took place at 7 pm and there was electric light to aid visual identification. The witness properly identified the accused.

After resolving the issue of identification, it leads me to the question of whether the accused had the intention together with Kitama to kill the deceased.

Section 20 of the Penal Code Act provides as follows;

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 consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.

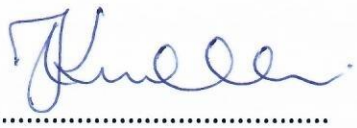
In the case of **Kisegerwa and Another Vs Uganda Court of Appeal Criminal Appeal No 6 of 1978** court held that:

In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific un lawful purpose which led to the commission of the offence...an un lawful common intention does not imply a pre-

arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault.

In the present case, PW3 saw the accused and Kitama together beating up the deceased. From the evidence the accused did not do anything to dis associate himself from the assault.

Therefore, in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt all the essential ingredients of the offence beyond reasonable doubt, I therefore hereby convict the accused of the offence of murder C/s 188 and 189 of the Penal Code Act.



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Jane Okuo Kajuga

Judge

24.1.2022

SENTENCE AND REASONS FOR SENTENCE

The convict was found guilty of murder c/s 188 and 189 after a full trial. In her submissions on sentencing, the learned state attorney prayed for a deterrent sentence on the following grounds; the accused has been convicted of an offense that attracts a sentence of death; deceased was pregnant, she was his wife, the offence is rampant and the convict was not remorseful.

The learned defense counsel on the other hand prayed for a lenient sentence on the following grounds; The convict is a 1st offender, he is a bread winner, has 4 children and has a problem of water in his lungs.

The offence of murder is punishable by a maximum penalty of death as provided under Section 189 of the Penal Code Act. This sentence is usually reserved for the rarest of the rarest cases.

Where death penalty is not imposed, the starting point in determination of a custodial sentence for the offences of murder has been prescribed by item 1 of part 1 (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.

I have taken into account the current sentencing practices in relation to the offences of this nature. **In the case of Mbunya Godfrey Vs Uganda, Supreme Court Criminal Appeal No 04 of 2011**, the appellant murdered his wife in cold blood and court while dealing with the sentence observed that;

"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing...."

In this regard, I have considered in the case of **Aharikundira Yustina Vs Uganda Supreme Court CA No 27 of 2015,** where the appellant brutally murdered her husband and cut off his body parts in cold blood. Court while considering sentencing observed as follows;

"The maximum sentence for the offence is death. That notwithstanding, the appellant was a first time offender with no previous criminal record and she is of advanced age. Further, she did not

bother court on second appeal regarding her conviction and displayed remorsefulness. The appellant was the surviving spouse and mother of six children..."

Court in that case after considering the mitigating and aggravating circumstances set aside the death sentence and substituted it with 30 years imprisonment.

I have also considered;

The case of **Akbar Godi Vs Uganda Supreme Court Criminal Appeal No 3 of 2013** where the appellant shot his wife and was sentenced to 25 years' imprisonment.

In the case of **Jacquelyn Uwera Nsenga Vs Uganda Court of Appeal Criminal Appeal No 824/2015** where the accused ran her husband over with a car and eventually killed him at the gate in their home and was sentenced to 20 years imprisonment.

Lastly,

Regulation 6(c) of the Sentencing guidelines provides for the need for consistency with appropriate sentencing levels and other means of dealing with offenders of in respect of similar offences committed in similar circumstances.

In the instant case I have considered all the factors raised in aggravation and mitigation. I take note of the fact that the Convict was the actual perpetrator of the murder in this case. He had a pregnant wife whom he mercilessly beat up in the most vulnerable body parts with another person. He is not remorseful. He has wasted court's time. The aggravating factors in this case far outweigh the mitigating factors that the convict is a first time offender, has spent 4 years,10 months and 17 days on remand.

Having considered the sentencing guidelines, the current sentencing practice in relation to offences of this nature and the circumstances of the case, I consider a sentence of Twenty-five years' imprisonment to be appropriate. I accordingly sentence the convict to Twenty-five years' imprisonment.

It is mandatory under **Article 23 (8)** of the Constitution of the Republic of Uganda, 1995 to take into account the period spent on remand while sentencing a convict. Regulation 15 (2) of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, requires the court to "deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. From the sentence of Twenty-five years' imprisonment, I set off the 4 years, 10 months and

17 days as the period the convict has already spent on remand. He will serve the remainder of the period which is 20 years, 1 month and 13 days.

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

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Jane Okuo Kajuga

Judge.

24/01/2022