THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-SC-0404 OF 2010

UGANDA ..... PROSECUTOR

VERSUS

LYDIA DRARU ALIAS ATIM ..... ACCUSED

BEFORE: HON. LADY JUSTICE MONICA K. MUGENYI

JUDGMENT

This case entails an indictment of murder against a one Lydia Draru alias Atim. The facts giving rise to this indictment are that on or about the 10th November 2009, at her home in Namuwongo, Kampala District the accused allegedly murdered a one Major General James Kazini by hitting him repeatedly with an iron bar. The accused immediately admitted to killing the deceased. At the trial the accused purported to plead guilty to the lesser offence of manslaughter, but the prosecution was unwilling to amend its indictment to reflect the lesser offence, maintaining that the case against the accused was one of murder.

The accused was therefore arraigned for murder. She pleaded 'not guilty' for the offence of murder, but maintained her plea of guilty for manslaughter. In her words she stated: "I agree I killed him but I did not intend it." Even after the full case against her with regard to manslaughter was read to the accused, she maintained that she did kill the deceased albeit unintentionally. Accordingly, a plea of 'not guilty' was entered in respect of the offence of murder. The accused's plea of guilt for manslaughter was also recorded, but conviction and sentencing in respect thereof was deferred to the final judgment in the event that the offence of murder was not sufficiently proved by the prosecution. This approach was adopted pursuant to the position expounded by Francis J. Ayume in '**Criminal Procedure and Law in Uganda', Law Africa Publishing (U) Ltd, 2010, p. 109** where it was stated:

> **"Where a prisoner pleads 'guilty' to a count in a charge or indictment charging a lesser offence and 'not guilty' to a count charging a more serious offence, the court has, in certain circumstances, a discretion whether or not to accept the plea of guilty. Generally such a plea should be allowed to stand and the court should then proceed to try the accused in respect of the more serious charge to which he has pleaded not**

> **guilty. If he is acquitted of that charge he will then be sentenced on the count to which he has pleaded guilty. But if convicted of the more serious charge, the proper course is to allow the counts to which he has pleaded guilty to remain on the file."** *(emphasis mine)*

In the present case, the indictment entailed only one count of murder, as opposed to a count of murder and another count of manslaughter. This, in my view, was quite correct because manslaughter being a minor and cognate offence to the offence of murder, there would scarcely be need to present the two counts separately. An accused person would not be stopped from pleading to the lesser offence of manslaughter. Indeed, section 64 of the Trial on Indictments Act provides as follows:

> **"Where an accused is arraigned on an indictment for any offence and can lawfully be convicted on that indictment of some other offence not charged in the indictment, he or she may plead not guilty to the offence charged in the indictment, but guilty of that other offence; but the court shall not accept a plea of guilty under this section unless the advocate for the prosecution has signified his or her consent."**

The foregoing notwithstanding, having ruled that the matter go on trial for murder, the duty of court to evaluate the evidence on record and arrive at its own conclusion on each essential ingredient of the offence of murder was neither negated nor lessened by the entry on the record of the accused's plea of guilt to the lesser offence. See the case of **Mawanda Edward vs Uganda SCCA No. 4 of 1999 (unreported).**

I now revert to the offence of murder for which the accused was tried. To constitute the offence of murder the following ingredients should be proved beyond reasonable doubt:

a. Fact of death
b. Death was unlawful
c. Death was caused with malice aforethought

Having proved the foregoing ingredients of murder *per se*, it must also be proved beyond reasonable doubt that the accused person participated in the proven murder. It is well settled law that the burden of proof in criminal trials lies squarely with the Prosecution, and generally that burden of proof does not shift to the accused at any stage of the proceedings. See **Woolmington vs. DPP (1993) AC 462** and **Okale vs. Republic (1965) EA 55**. The defences available to the accused person notwithstanding, the primary responsibility to prove the allegations against such an accused person remains with the Prosecution. The prosecution must discharge this burden beyond reasonable doubt.

For avoidance of doubt, the standard of proof in criminal matters such as the present case is not tantamount to proof beyond any shadow of doubt. Indeed in **Miller vs. Minister of Pensions [1947] 2 All ER 372 at 373**, Lord Denning held as follows:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond (reasonable) doubt does not mean proof beyond the shadow of a doubt."

Under the common law jurisdiction, to which Uganda subscribes, an accused person is deemed innocent until s/he pleads or is proven guilty. Therefore, the prosecution must rebut an accused person's presumed innocence by dispelling from the mind of the trial judge any reasonable doubt as to such accused person's alleged guilt. 'Reasonable' doubt in this regard would, in my view, connote doubt that is founded on reason or logic.

It is trite law that in the event of reasonable doubt, such doubt shall be decided in favour of the accused and a verdict of acquittal returned. Similarly, inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be ignored, save for instances where there is a perception that they are deliberate untruths and are intended to mislead court. See **Alfred Tajar vs Uganda EACA Criminal Appeal No. 197 of 1969**, where the court held that minor discrepancies should be ignored if they do not affect the main substance of the prosecution's case.

In the present case no facts or documents were agreed upon by the parties. The Prosecution called 6 witnesses – the pathologist that conducted a post mortem on the deceased (PW1); the doctor that examined the accused after the alleged murder (PW2); an eye witness to the alleged murder (PW3); the officer that analysed the genetic DNA of exhibits found at the scene of crime (PW4); a scene of crimes officer assigned to this case (PW5), and finally, a neighbour that purportedly witnessed the accused's conduct after the alleged murder. The Defence called the accused (DW1) as its sole witness.

The medical evidence adduced by the prosecution did establish the death of the deceased, as well as the physical and mental disposition of the accused at the time of that death. It thus sought to prove the fact of death and that the death was unlawful, two ingredients of the offence of murder.

The fact of death was attested to by PW1, a one Dr. Thaddeus Barungi. He testified that he led a team of persons that conducted a post mortem on the body of a 52 year old male adult identified by his (deceased's) daughter – Kyomugisha Juliet, as a one Major General James Kazini, the deceased in this case. The death of the deceased was also attested to by PW3 – an eye witness to the alleged murder, as well as PW5 – the scene of crimes officer, who testified to having found the body of a deceased male whom he identified as Major General James Kazini at the scene of crime. PW5 testified that he knew the deceased army officer. Further, the accused (DW1) did also concede to the death of the deceased.

On the basis of the post mortem report (Exh P.1) and the evidence of PW1, both of which pieces of evidence attested to a one James Kazini as having been the deceased person referred to in that

report; as well as the oral evidence of PW5 and DW1, I do find that the death of Major General James Kazini has been established. I am therefore satisfied that the Prosecution has proved the fact of death in this case beyond reasonable doubt.

The question then is whether or not the deceased's death was unlawful. It must be stated from the onset that the evidence on record did sufficiently prove that the accused was of sound mental disposition at the time she is alleged to have committed the present homicide. To that end, Dr. Susan Nabadda (PW2) testified that she examined the accused on 10th November 2009 – the day of the alleged murder – and found the accused to be of sound mental disposition. Therefore, the defence of insanity is not available to the accused. Similarly, no evidence was adduced in support of the defence of drunkenness or other intoxication.

The legal position on the legality of death (or lack thereof) is that every homicide is presumed to be unlawful unless circumstances make it excusable. This position was laid down in the case of **R. Vs. Gusambiza s/o Wesonga 1948 15 EACA 65**. The same position was restated in **Akol Patrick & Others vs Uganda (2006) HCB (vol. 1) 6**, where the Court of Appeal held as follows:

> **"In homicide cases death is always presumed unlawfully caused unless it was accidentally caused in circumstances which make it excusable."**

In **Uganda vs Aggrey Kiyingi & Others Crim. Session. Case No. 30 of 2006**, excusable circumstances were expounded on to include justifiable circumstances like self defence or when authorised by law. In the present case, the accused testified to hitting the deceased in self defence after he allegedly threatened to shoot her. She thus purports to place the killing of the deceased within that category of homicides that are deemed excusable at law. It is pertinent, therefore, to establish the cause of the deceased's death, and whether indeed the circumstances surrounding the death were such as would make the death excusable.

The cause of the deceased's death was attested to by PW1, Dr. Barungi. He identified Police Form 48 (Exh P.1) as a report of a post mortem he had carried out on the deceased. The said post mortem report stated the cause of the deceased's death as 'extensive skull and brain injuries as a result of trauma'. In his oral evidence, PW1 specifically attributed the deceased's death to physical trauma, and gave a detailed description of the external and internal injuries sustained by the deceased. Under cross examination, he stated categorically that the injuries he observed were not commensurate with natural death and affirmed that the external injuries seen during the post mortem were responsible for the internal injuries observed. Clearly, the foregoing medical evidence directly linked the injuries sustained by the deceased to his death.

The evidence on record proved that the deceased died a gruesome death after sustaining extensive skull and brain injuries. The photographs taken by scene of crimes officer, a one Robert Icoot (PW5) and admitted in evidence as Exhibits P7 and PID8 revealed horrendous external head injuries. According to a one Proscovia Toboru (PW3) – the only eye witness to the

attack on the deceased by the accused, he was hit twice with a hollow iron bar. PW1, in turn testified that the injuries found on the deceased's body at post mortem indicate that the deceased took at least 5 blows to his head. This witness squarely attributed the deceased's death to skull and brain injuries sustained by physical trauma. The disparity in the number of blows inflicted upon the deceased notwithstanding, the totality of this evidence conclusively points to a violent rather than natural death. I therefore find that the circumstances of the deceased death are not commensurate with a natural death.

The question then is whether the physical trauma or attack that occasioned those injuries and resulted in the deceased's death was excusable so as to give a semblance of legality to the resultant death. Tied in with this question is the issue of self defence raised by the accused in her oral evidence.

Self defence is a complete defence to a homicide and, if proved, may lead to the acquittal of an accused person. In the case of **Uganda vs. Sebastiano Otti (1994 – 95) HCB 21,** Okello J (as he then was) held as follows:

> **"Death is excusable when caused in self defence. To constitute self defence there must have been an unlawful attack on the accused who as a result reasonably believed that he was in eminent danger of death or serious bodily harm and it was necessary for him to use force to repel the attack made upon him. Also the force used by the accused must have been reasonably necessary to prevent the threatened danger."** *(emphasis mine)*

As with other defences available to an accused person, self defence does not negate the onus on the prosecution to prove its case beyond reasonable doubt. However, recourse to this defence (self defence) would place an evidential burden upon an accused person. S/he would be required to adduce evidence that, while not obliterating the burden of proof on the prosecution, creates reasonable doubt as to the guilt of such an accused. See **Keane, Adrian, 'The modern law of evidence', Oxford Publishers, 2008, p. 114**. It is not sufficient for an accused person to simply allege that s/he acted in self defence; s/he must support such an allegation with some semblance of evidence.

Section 15(a) of the Penal Code Act enjoins courts to determine criminal responsibility for the use of force in the defence of person (or property) in accordance with principles of English law. Accordingly, in the case of **Yhefusa Kamali vs Uganda Crim. Appeal. No 29 of 1989** the Learned Justices of the Supreme Court addressed the question of self defence as follows:

> **"Under English law there is a broad distinction made where questions of self defence arise. ... In cases of self defence where no violent felony is attempted a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise (to) break off the fight or avoid the assault,**

he may use such force, *including deadly force*, as is reasonable in the circumstances." (emphasis mine)

In the present case the accused testified that the deceased assaulted her. PW3 corroborated this evidence when in her examination in chief she stated that she saw the deceased box the accused on the head, slap her repeatedly and attempt to strangle her. The accused further testified that she hit the deceased in self defence after he told her that he was going to fetch his gun and kill her. PW3's evidence on record supports this assertion in so far as it confirms that the deceased was headed outside when the accused hit him from behind. Further, the evidence of PW5 lends credence to the accused's fear for her life in so far as it confirms that a loaded revolver was recovered from a brown bag in the deceased's car. To that extent, on the basis of the position expounded in **Yhefusa Karmali vs. Uganda** (supra)**,** the accused would have been justified in using deadly force to defend herself. However, the same **Yhefusa Karmali vs. Uganda** (supra) only finds such deadly force acceptable if an accused person had done all that s/he was able to do in the circumstances, by retreat or otherwise, to break off the fight or otherwise avoid an assault on his/her life.

A review of the evidence is instructive in this regard. It is apparent from the evidence of PW3, the only eye witness to the events of the morning of 10th November 2009, that there were 2 stages of the violence between the deceased and the accused. The first stage ensued upon the couple's return to the accused's house and entailed a one-sided quarrel with the deceased berating the accused. PW3 testified that upon opening the door for the two of them she went back to sleep but was later awakened by the sound of someone crying in the sitting room. She identified the voice of the crying person as that of the accused. As she pondered what to do, PW3 was summoned by the deceased and told that her aunt (the Accused) was a thief and had been bringing other men to her house. All the while the accused was allegedly crying. However, PW3 contradicted herself under cross examination when, in an attempt to reconcile her oral evidence with an earlier statement she had made to the police, she stated that the deceased was quarrelling but the accused was quiet. This, though, appears to be a minor contradiction because whether the accused was crying or silent, the deceased was the aggressive party in that brawl. In any event, crying may be silent.

Prior to that, however, PW3 had testified that the quarrel on the morning of 10th November 2009 was the first time she had seen the accused and the deceased quarrel, yet in her written statement she stated that the two quarrelled often. This does appear to be a significant contradiction that would raise questions about the credibility or truthfulness of her evidence. I shall revert to an evaluation of this witness' evidence later in this judgment. However, on the present issue, her evidence undoubtedly establishes that there was a quarrel between the accused and deceased at that stage, but the deceased rather than the accused was the aggressive party. According to PW3 the accused repeatedly asked the deceased to leave as she wished to rest.

The second stage of the violence that preceded the alleged murder ensued shortly after 6.00 am on the same day. PW3 testified that the deceased accused her aunt, Ms. Draru of stealing his money; the accused denying taking his money, walked away towards PW3's room and asked the deceased to leave; the deceased followed the accused and boxed and slapped her, while she pleaded with him to leave her; the accused then returned to the sitting room and the deceased followed her there, threw her on a sofa and attempted to 'strangle' her. Ms. Draru, the accused, attested to the same events when she testified that upon his return to the house the deceased boxed and beat her until the two of them reached the sitting room, where he attempted to strangle her. PW2 confirmed this assault by the deceased. She testified that when she examined the accused on 10th November 2009 she found multiple finger nail scratch marks on 8 sides of her neck, as well as an abrasion bruise on the right hand of her dorsal aspect (back of her right hand) measuring 3 x 3 cms. This was the second fight the two engaged in and, again, the deceased appeared to have been the aggressive party. The accused clearly walked away from her aggressor and pleaded with him to leave her.

Earlier in her testimony, the accused also stated that during the first stage of their fight the deceased had threatened her after breaking a glass on the table and thrown a whisky bottle at her that missed her and hit the chair. This piece of evidence is corroborated by PW5 who, in his report admitted in evidence as Exh. D6, described the state of the sitting room when he visited the scene of crime as one that was littered with broken glass and indicative of violence having ensued prior to the murder. PW5's report is borne out by the pictures that he took, which were admitted in evidence as Exh. P7 and PID8. The totality of the foregoing evidence denotes a very violent atmosphere largely at the behest of the deceased.

However, after the fight ended the accused did have the opportunity to avoid further violence. PW3 testified that after the fight the deceased picked the accused's hand bag and phone; told the accused to leave the house and on her complying with his instructions, sought to lock her out of the house; asked for his portraits; collected his magazines, and made for the door. The witness stated that as she then went towards the corridor, the accused passed by her and entered her bedroom. She then came out with an iron bar, went past her and hit the deceased, who was facing the main exit door. PW3's description of the setting of the house was in tandem with the house sketch plan that was drawn by PW5 and admitted in evidence as Exh. P8. She did not contradict this aspect of her testimony under cross examination. I therefore find no reason to disbelieve her on how the fight unfolded. Particularly, given that she was testifying to events that she had visually observed. It would appear that the fight had ended and the accused was under no apparent threat or apprehension of serious injury but went ahead to use deadly force against the deceased.

As was held in **Uganda vs. Sebastiano Otti** (supra), to sustain the defence of self defence "**the force used by the accused must have been reasonably necessary to prevent the threatened**

danger." In my view, the foregoing evidence raises questions as to the sustainability of this defence.

On its part, the defence contended that the deceased had told the accused that he was going to get his gun and return to kill her so she acted in self defence. Indeed, a revolver (Exh. D4) was recovered from a brown bag in the deceased's car at the scene of crime. Had there been no firearm in the vicinity of the scene of crime, it would have been quite reasonable to disallow any claims of self defence as the accused would have had reasonable opportunity to avoid, hide or run away from the deceased when he went to fetch a gun. However, the presence of a loaded revolver in the deceased's car that was parked a few metres outside the house creates a different scenario. Further, the accused testified that the deceased had earlier placed her at gun point and threatened to kill her, only calming down when, on her knees, she pleaded with him. Clearly therefore, the accused was very well aware that the deceased was armed. When he stood up to leave saying that he was going to fetch his gun and kill her, the accused did not have reason to doubt him. According to the sketch map the revolver-laden car was parked at the only exit out of the perimeter wall fence within which the accused's house was enclosed. Hence, an attempt to escape through the back door of the house, as posited by the Prosecution, would have come to naught. I do therefore agree with the submission of Defence Counsel that the accused had reasonable grounds to believe her life was in real danger, and defend herself in the best way she could.

I do note, though, that save for the accused's testimony that the deceased had so threatened her life, this allegation was not corroborated by any other witness. PW3 stated quite clearly that she did not hear the deceased say any such thing. And this was a witness that was supposedly present throughout the fight, standing at the main exit door; saw the accused picking his magazines from the sitting room, and only left the sitting room heading towards the corridor at the time the accused rushed to get the iron bar.

I am mindful, however, that the same PW3 did testify that the accused and the deceased were speaking in both English and Luganda. PW3 stated that she did not understand Luganda. There is, therefore, a very strong probability that a threat made by the deceased to the accused in Luganda was not picked up by the witness. In fact, I generally did not find PW3 to be the most logical of witnesses. The discordance in her evidence could be explained by the fact that she only followed bits and pieces of the discussion that under-pinned the couple's fight. She only comprehended the bits that were in English. She certainly could not provide a conclusive account of their discussion on the issue of whether or not the accused was in fact faced with a threat to her life, to which she responded in self defence. On the other hand, as stated earlier in this judgment, the recovery of a loaded revolver does lend credence to the accused's fear for her life. I do therefore accept the Defence position that the deceased threatened to get his gun and kill the accused, and she purported to responded to this threat in self defence.

The question however is having resorted to force in self defence, did she use justifiable force? While **Yhefusa Karmali vs. Uganda** (supra) would seemingly accept the use of deadly force in justifiable circumstances, the force of the accused's attack on the deceased must be examined. PW3 testified that she witnessed the accused hit the deceased and he fell on the ground whereupon, though she tried to restrain the accused, the latter overpowered her and hit the deceased again on the head. She maintained this position under cross examination. Of the same fight, in her testimony the accused stated that she hit the deceased on the back near his shoulder, "*he tried to turn, and the iron bar hit him between his head and forehead and he fell*." Owing to her preference for unsworn evidence, the truth of the Ms. Draru's testimony was not tested under cross examination.

It is trite law that in assessing the evidence in order to arrive at a verdict, a judge can take into account the fact that an accused person did not give evidence on oath but this right must be exercised with caution and must not be used to bolster up a weak prosecution case or be taken as an admission of guilt on the part of the accused. See **Lubogo v Uganda (1967) EA 440**.

In the present case, with recourse to the totality of the evidence adduced, I find that the accused's account of the deadly blows in issue presently corroborates the evidence on the injuries sustained by the deceased in several material aspects. PW1's evidence was that the deceased's body had 3 external injuries at the front of his head – one at the right temporal of the scalp, the other at the right temporal facial scalp and another at the back of the right ear. The fact that all these injuries were on the same side of the deceased's face would support the accused's testimony that they were incurred as the deceased turned to face his attacker. Indeed, one of the internal injuries suffered by the deceased was a shattered fracture of the right (frontal) temporal bone which would affirm the blow the deceased took as he turned. Further, given the remarkably forthright manner with which the accused testified, I am satisfied that her testimony with regard to the fatal blows is cogent and represents a fairly accurate account of the events of the fateful day.

However, in my view, what Ms. Draru's account does not do is justify the amount of force apparently used against the deceased. The nature of the injuries described in the post-mortem report and explained to this court by PW1 suggested a rather horrendous attack that would appear to have transcended the dictates of self defence. Three of the external injuries were 8 – 10 cms deep, while one of the internal injuries was in essence the slicing of the deceased's head in half across the back! Further, according to the accused's own account of events the deceased had been taking alcohol – beer and later waragi – from about mid-day on 9th November 2009; at the time of their tragic brawl it was about 6.00 am of the next day 10th November 2009, and she observed the deceased to have been drunk. How much of a threat, then, could such a visibly drunken person have posed to the accused so as to warrant a blow to a part of the body as delicate as the head? In my view, the deadly force referred to in **Yhefusa Karmali vs. Uganda** (supra) is not a licence for all manner of attacks in the name of self defence. The circumstances of the present case are that the force used in the attack against the deceased was excessive and

unjustifiable. I am, therefore, satisfied that the Prosecution has proved beyond reasonable doubt that the deceased's death was unlawful.

Having established that the deceased's death was unlawful, this court must establish as a fact whether the death was caused with malice aforethought or, for present purposes, whether or not the accused's attack on the deceased was such as would infer an intention to cause death rather than accidental death. However, I shall first address the question of the accused's participation in the deceased's death.

PW3 testified that she witnessed the accused hit the deceased – first on the back causing him to fall, then on the head (presumably while he was still on the floor). She reiterated the same testimony under cross examination. Her account of what transpired would attribute 2 blows to the accused – one to the back and another to the head. The accused confirmed that she did hit the accused on the back and the head thus conceding to having been at the scene of crime. Indeed, in submissions Defence Counsel conceded that the participation of the accused was not in dispute. It was their submission that what was in dispute was whether or not the accused caused the deceased's death with malice aforethought. I therefore find that the prosecution did conclusively place the accused at the scene of crime, and sufficiently proved that she participated in the fatal attack against the deceased.

I now revert to the issue of malice aforethought. This appears to have been the main bone of contention in this case. Section 191 of the Penal Code Act provides that malice aforethought may be proved by direct evidence or may be inferred from evidence of circumstances indicating knowledge by an accused person that his/ her conduct would probably cause death. However, the courts are cognisant of the difficulty of proving an accused person's mental disposition and thus agreeable to an inference of such disposition from the circumstances surrounding a homicide. See **R. vs Tubere (1945) 12 EACA 63.**

In **R. vs Tubere** (supra) as cited in **Uganda vs. Aggrey Kiyingi & Others** (supra), the court gave the following guide of circumstances from which an inference of malicious intent can be deduced:

a. The 'weapon' used ie whether it was a lethal weapon or not;
b. The part of the body that was targeted ie whether it is a vulnerable part or not;
c. The manner in which the weapon was used ie whether repeatedly or not, or number of injuries inflicted, and
d. The conduct of the accused before, during and after the incident ie whether there was impunity.

This position was restated in the case of **Akol Patrick & Others vs. Uganda** (supra) where the Court of Appeal held:

> **"In arriving at a conclusion as to whether malice aforethought has been established the court must consider the weapon used, the manner in which it is used and the part of the body injured."** *(emphasis mine)*

The onus is on the Prosecution to prove that the accused did attack the deceased with the intention of killing him. On the burden and standard of proof of malice aforethought, in **Paulo Omale vs Uganda Criminal Appeal No. 6 of 1977** the Court of Appeal held as follows:

> **"It is for the prosecution to prove beyond reasonable doubt that the prisoner with malice aforethought killed the deceased. It is not for the prisoner to prove accident or self defence and he is entitled to be acquitted even though the court is not satisfied that his story is true, so long as the court is of the view that his story might reasonably be true."**

In the present case, the alleged murder weapon was a hollow metallic bar that was admitted in evidence as Exh. P11. This weapon was identified by PW3, PW4 and PW5, and referred to by PW6. The accused also attested to having used this bar purportedly in self defence. The bar was about 1 metre long, with blunt square edges and a hollow interior. In my view, this bar was capable of inflicting fatal injuries depending on the manner in which it was used and the part of the body that was targeted.

On the part of the body targeted by the accused, according to PW3 the accused used the metallic bar to hit the deceased – first on the back and then later on the head. The accused conceded to this. PW1 did not make any reference to a back injury, which suggests that the injury caused by the blow to the back (if any) was quite inconsequential. On the other hand, the courts have consistently held the head to be a vulnerable part of the body which, if targeted by an accused, imputes malicious intent on his part. See **Okello Okidi vs Uganda Supreme Court Crim. Appeal No. 3 of 1995.** In complete agreement with this position, I find that a potentially lethal metallic bar was applied to a vulnerable part of the deceased's body, raising the inference of possible malicious intent on the part of the accused.

However, this inference must be tested against all the other circumstances of the accused's conduct. See **R v Nedrick [1986] EWCA Crim 2; [1986] 1 WLR. 1025** and **R v Hancock [1986] 2 WLR 357,** where the position of the courts was that what the judge had to decide, so far as the mental element of murder was concerned, was whether an accused intended to kill. In order to reach that decision the judge was required to pay regard to all the relevant circumstances, including what the accused said and did.

In evaluating the circumstances of a murder case to determine an accused person's mental state, the courts are enjoined to judiciously consider all the available evidence. To this end, in the case of **Nandudu Grace & Another vs. Uganda Supreme Court Crim. Appeal No.4 of 2009**, their Lordships cited with approval their earlier holding in the case of **Francis Coke vs. Uganda**

(1992 -93) HCB 43, where it was held that the existence of malice aforethought was not a question of opinion but one of fact to be determined from all the available evidence.

In the present case, the manner in which the 'murder' weapon was used and the conduct of the accused before, during and after the alleged murder are critical. The manner in which the hollow iron bar was used was attested to by PW3 and the accused herself. PW3 testified that the accused hit the deceased once on the back, and once again on the head. The accused's account was similar, stating that she hit the deceased once on the back and, when he turned, hit him on the head. She did not indicate how many times she hit the deceased on the head. However, the onus was not on the defence but rather on the prosecution to prove how the assault transpired and whether or not the accused's conduct in that regard would bring her actions within the ambit of malice aforethought.

Be that as it may, the nature of injuries sustained by a victim could be indicative of the number of blows s/he suffered. Indeed, PW1 stated as much when he testified under cross examination that each of the deceased's injuries (in his opinion) represented a blow and the deceased could have received a total of 5 blows to the head. However, as testified by the accused, the deep cuts to the deceased's head could also be attributed to the deceased falling on broken glass that was strewn all over the scene of crime. The same probability was advanced in Defence submissions.

The existence of broken glass was attested to by PW3, PW5 and the accused. Certainly, the probability of the blunt hollow metallic bar availed to court causing cuts that the post mortem report indicates were 8 – 10 cms deep appears to me to be quite remote. Unfortunately, the prosecution did not present any evidence that positively proves whether in fact the deep cuts observed were directly caused by repeated blows to the deceased's head so as to impute malice aforethought on her part.

The only evidence that sought to prove that the accused hit an already bleeding General Kazini was that by PW4 and PW6. PW4 testified that there were blood droplets on a green blouse recovered at the scene of crime, which allegedly belonged to the accused. It was not factually established by the prosecution that the green T-shirt did indeed belong to or had been worn by the accused on the fateful day. On the contrary, the accused rebutted this evidence when she stated that as soon as she got home she changed out of the clothes she was wearing during the day and wore a black and white T-shirt. Her evidence was corroborated by that of PW3 who also attested to the accused being dressed in a black blouse with white writings on it at the time she committed the offence. Therefore, at the time the crime was committed the accused was dressed in a black NOT green T-shirt. This piece of evidence casts doubt on PW4's explanation that the blood stains found on the green T-shirt were caused by the accused hitting a bleeding General Kazini.

On the other hand, PW4 identified the black T-shirt as an exhibit from the scene of crime that was sent to him marked "E" and had this to say about it:

> *"The DNA recovered from the long black blouse was compared to the blouse recovered from the suspect and it matched on all positions examined. On further examination it was 4 billion times more likely that the suspect was the donor of the DNA recovered from the long black blouse.*

He concluded:

> *"There is very strong genetic evidence for the proposition that the suspect is the donor of the blood stains on Exh. 'E'."*

In lay terms, the blood found on the long black T-shirt belonged to the accused herself and not the deceased. This evidence is also reflected at p.6 of PW4's written report dated 8th April 2010 and admitted in evidence as Exh. P6. It establishes that the accused was also bleeding. It does not prove that the accused hit a bleeding Gen. Kazini.

Of the pair of dark blue jeans recovered at the scene of crime, PW4 opined that the pattern of 5 blood droplets at the front of the jeans suggested that the wearer thereof was standing offside and not in front of a gushing artery. This evidence does not prove that the accused hit the bleeding person, neither was it proved for a fact that the accused was, at the time the crime was committed, dressed in the said blue jeans. This onus lay with the prosecution.

On her part, PW6 testified that at about 6.00 am as she prepared to say her morning prayers she heard 3 loud bangs coming from the direction of the accused's house across the road from her house. She did not see what exactly caused them. Were the bangs heard by PW6 sounds of further beatings by the accused; or were they sounds of the deceased falling repeatedly, suggesting that after the initial blows he got up but was hit again and again?

PW1 also testified that the deceased incurred a separation fracture of the entire length of the back part of the head or, in lay terms, the head had split in two at the back. This injury was observed by this court in photograph 9X of Exh. PID 8. PW5 also testified that there was a broken coffee table and the court did observe the same table broken into 3 large pieces in photograph D of Exh. PID 8. One cannot rule out the possibility of a back fall by the deceased onto one of the 3 large broken pieces of glass, which then slit his head.

However, as quite rightly submitted by State Counsel, it is not the duty of court to speculate as to precisely how the deceased incurred the injuries recorded in the post mortem report. Neither, I might add, would it be the duty of court to determine a criminal trial on the basis of fine arguments in the absence of sufficient evidence in support thereof. The duty to prove the manner in which the deceased in this case incurred the fatal injuries observed lay squarely with the prosecution. In my view, this duty was not sufficiently discharged. It is trite law in criminal trials such as the present one, that any doubts in the mind of the trial judge should be resolved in favour of an accused person. Accordingly, I would resolve the doubts that linger – on the manner in which the 'murder' weapon was used – in favour of the accused.

Having found that the manner in which the lethal weapon was used was not proven to connote malice aforethought, I now revert to the conduct of the accused before, during and after the alleged murder. From the testimony of both PW3 and the accused herself, before the commission of the present crime the accused was insulted and beaten by the deceased but did not respond in kind. I have no reason to doubt the credibility of this evidence. PW3 testified that immediately before the accused hit the deceased she was overcome by anger. In their submissions, the Defence purported to attribute this frame of mind to provocation, but in her oral testimony the accused maintained that she only hit the deceased in self defence out of fear for her life.

I shall address the defence of provocation forthwith. The law on provocation was summed up in **Sowedi Oasire vs Uganda Supreme Court Cr. Appeal No. 28 of 1989**, where the Supreme Court held that for a charge of murder to be reduced to manslaughter on a plea of provocation;

a. The death must be ceased in the heat of passion before there is time for the passion to cool down.

b. The provocation must be sudden.

The prosecution referred this court to an earlier case of **Richard Obong s/o Ochieng vs. Uganda Criminal Appeal No. 4 of 1982**, where the Supreme Court cited with approval the decisions in **Haw Okonaay vs Uganda 24 EACA 58** and **R. vs Shaushi 18 EACA 87** and held as follows:

> **"The essence of the crime of murder is malice aforethought, and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat to attack which is near enough and serious enough to cause loss of control then the inference of malice aforethought is rebutted and the offence will be manslaughter."**

With due respect, I do not find the defence of provocation applicable to the circumstances of the present case. The accused had been harangued, insulted and assaulted by the deceased for most of the wee hours of that fateful morning so the purported provocation was neither sudden nor was the death ceased in the heat of passion. Further, I do agree with State Counsel that, given that the deceased's revolver was in the car and not with him at the time, the threat to attack in the present case was not near enough to cause loss of control on the part of the accused.

On the other hand, while PW3 attempted to attribute the accused's attack on the deceased to anger, no other witness testified to this frame of mind. PW6 testified that she witnessed the accused repeatedly hitting the deceased's dead body and allegedly uttering the words "die, die in the hands of a woman", and thus comes closest to supporting PW3's assertion that the accused was angry when she killed the deceased. It also supposedly suggests impunity on the part of the accused. There is some discrepancy on what words PW6 purportedly heard the accused utter. The witness stated that she heard the accused utter the words "die, die ..." and then states that she

was not certain whether she said “in the hands of a woman.” In her police statement the witness stated that the accused said ‘die in the house of a woman.

However, in her testimony the accused emphatically disputed PW6’s evidence in its entirety, insisting that it was comprised of blatant untruths. To emphasise her point she stated that PW6’s house was across the road from hers; quite a distance away, and it was extremely improbable that she could hear the noise that she claimed to have heard from the back of her house. To compound matters, the same witness admitted under cross examination that certain aspects of her police statement were inserted by the police without her attesting to them. That this critical piece of evidence was not corroborated and yet there were a number of people at the scene of crime at the time, casts reasonable doubt on its credibility.

The same PW6 testified that she heard the accused shouting that she had killed the deceased, and later made a telephone call relaying the same information and asking the receiver thereof to cause her arrest. This part of her evidence was corroborated by PW3 who testified to the same conduct on the part of the accused. Indeed, the accused herself is on record as having admitted to killing the deceased and making calls to the area Chairman and her sister, informing them of the deceased’s death.

The question is does this conduct amount to such impunity as would impute malice aforethought or the intention to kill on the part of the accused? I would be hesitant to draw such a conclusion. I am aware that shortly after the accused was arrested she was subjected to a medical examination that confirmed that she was of sound mental disposition at the time. Therefore the question of insanity, temporary or otherwise, does not arise.

In her testimony, the accused stated that she admitted killing the deceased out of the shock of realizing what she had done – killed a man that had been quite close to her. Her demeanour when she gave her evidence supports this assertion. She broke down repeatedly as she recounted her shock on realising the magnitude of the offence she had committed. She testified that when she realised that Gen. Kazini was dead, rather than flee the scene of crime as she was advised by a relative that she called, she opted to take responsibility for her actions because she knew that she did not intend to kill him. Indeed, throughout this trial the accused did not retract her initial admission of guilt. Such conduct is not commensurate with the ingredient of malice aforethought inherent in an indictment of murder. In the premises, I would be most hesitant to impute from her conduct that she foresaw the deceased’s death as a natural consequence of her physical attack on him.

In the case of **Nanyonjo Harriet & Another vs. Uganda Criminal Appeal No. 24 of 2002** the Supreme Court held:

> **“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 if the accused foresaw death as a natural consequence of the act.”** *(emphasis mine)*

I am extremely mindful of the truism expounded in **Nandudu Grace & Another vs. Uganda** (supra) that the existence of malice aforethought is not a question of opinion but one of fact to be determined from all the available evidence.

In my view, the totality of the evidence availed to court did sufficiently prove that the accused, Ms. Lydia Draru, unlawfully killed the deceased, Maj. Gen. James Kazini. However, it fell short on proof beyond reasonable doubt that General Kazini's death was a natural consequence of the accused's proven actions – one blow to his back and another to his head using a hollow metallic bar; and, more importantly, that the accused foresaw the death of the said General Kazini as a natural consequence of the blows she was proven to have inflicted upon him.

For the foregoing reasons therefore, the details of which are expounded in my entire judgment, I depart from the unanimous opinion of the 2 assessors, and find that the ingredient of malice aforethought has not been proved beyond reasonable doubt by the Prosecution. I am, however, grateful to them for their honest advice.

I therefore acquit the accused, Lydia Draru alias Atim, of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. I do, however, find her guilty of the offence of manslaughter contrary to sections 187(1) and 190 of the Penal Code Act and hereby convict her of the said offence.

Monica K. Mugenyi
JUDGE

1st September, 2011

This judgment was delivered in open court in the presence of Mr. Kakooza for the prosecution, and Ms. Mutabingwa and Mr. Sembajja for the defence.

Monica K. Mugenyi
JUDGE

1st September, 2011