THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO.

CRIMINAL SESSION CASE NO. 067/2004

UGANDA ..... PROSECUTION

Versus

OWORA PHILIP ..... ACCUSED

BEFORE: HON. MR. JUSTICE V. A. R. RWAMISAZI-KAGABA

J U D G M E N T

The accused, Owora Phillip is indicted for murder contrary to sectios 188 ad 189 of the Penal Code Act. It was stated in the particulars to the charge that Owora Phillip, on the 7th day of May 2001 at Namukuma village, in Kayunga District murdered Nyaburu Peredasi. The accused denied the charge and was represented by Tumwine Robert while the prosecution was led by M/s Farida Nakayiza.

I wish to mention here that the accused was both deaf and dumb. Such person is called "**Kasiru**" in Luganda. The proceedings were conducted with the aid of two sign language interpreters, namely Awori Micheal Patrick and Alima Akomere

from Uganda National Association of the Deaf and Action on Disability respectively. These sign language interpreters were in addition to the English/Luganda interpreter who interpreted for the other witnesses.

The prosecution relied on nine witnesses to prove its case. The accused, lived with his wife and his grand-daughter called Nyaburu Peredasi. Nyaburu had returned to her parents after her marriage failed. At about 7.30 p.m. On the 7/5/2001 Margaret Akong (PW5) wife of Stephen Owino (PW4) and a close neighbour, was attracted by the sound of a bang at the house of the accused. She went to accused's house. Accused was holding a blood stained hoe with which he threatened to hit her. The deceased was lying on the floor, semi conscious. She called her husband Owino (PW4), who with other people from the camp, managed to overpower and arrest the accused. Federesi lay on the floor bleeding and speechless.

Accused, and the deceased were taken to Busana Police Post by Byansi, the Vice-Chairman LC1, Owino (PW4) and other people who had responded to the alarm. Both accused and the Federesi were handed over to No. 28083 P.C. Mutinye Samuel (PW2) but the deceased died on arrival at Busana Police Post. P.C. Mutinye received a blood stained hoe from Byansi (PW6), which hoe he handed over to D/Sergent Odwar (PW8) who

collected both the body and accused from Busana Police Post. D/Sgt, Odwar brought the deceased, accused and hoe to Kayunga Police Station. He handed the hoe to the storeman, P.C. Nyeyambe Isaac (PW9) who exhibited it in court as exhibit P.4.

The body of the deceased was examined by Dr. Matovu who put his findings on P.F. 48b (**Exh. P1**). The same doctor examined the accused and put his findings on exhibit P2. This doctor did not make any finding about the age and mental state of the accused. I directed that the accused be examined as to his age and mental condition. The report came in long after the close of the case. The report states his age to be about 40 years and a person of normal mental state.

In his defence, the accused chose to say nothing. He said he was leaving it to God to decide his fate.

In every criminal trial, the burden of proof rests on the prosecution to prove the offence with which the accused person is charged beyond reasonable doubt. This burden does not shift to the accused person at any stage except in a few statutory exceptions, but this being none of such exceptions. The prosecution must succeed on the strength of its evidence. Any weakness in the defence or lies told by an accused shall

not be relied upon to bolster the prosecution case or be a basis for convicting the accused. If there is any doubt created by the evidence, that doubt must be resolved in favour of the accused, and he must be acquitted. I explained the assessors as I now warn myself what the burden of proof means, the test to be applied in criminal cases and what the reasonabel doubt means.

See: (1) Woolmington vs. D.P.P. (1935) A.C. 462

(2) Oketh, Okale & others vs. Uganda (1965) EA 555

The accused is charged with murder which consists of four ingredients,namely, the person named in the indicted is dead, that the death of that person was caused by an unlawful act or omission, that the act causing the death of that person was accompanied by malice aforethought, that it is the accused who caused the death of that person acting alone or with other person or persons with whom he was sharing a common intention.

See: (1) Uganda vs. Harry Musumba (1992) 1 KALR 83.

(2) Kimweni vs. Republic (1968) EA 452

Death:

The death of a person is caused when the offender commits any of the acts listed in section 196 of the Penal Code Act and such act or acts are committed within a period of one year and a day prior to the death. (**Section 198 of the Penal Code Act**.)

The deceased in this case, Federesi Nyaburu was assaulted on the evening of 7/5/2001 and died the same night at Busana Police Post. Her death was testified upon by Owino (PW4). Byansi (PW5) and Mufunye Samuel (PW7) who were at Busana Police Post when the deceased, who had been brought there, in a semi-conscious state, died. Her body was taken to Kayunga Police Station by D/Sgt Odwar. Her body was examined by Dr. Matovu (PW1) and a postmortem report – exh. P.1 was prepared by the said doctor on P.F. 48B. His burial ws later witnessed by Owino and Byansi PW4, and PW5 referred to above. The prosecution has therefore proved Nyaburu Federesi is dead.

Every homicide is unlawful unless authorised under some law. In this regard, there is no doubt, that whoever battered Nyaburu's head had no legal excuse or justification to do so. I therefore find that Nyaburu's death was caused by an unlawful act.

See: (1) R. vs. Sharmpal Singh (1962) EA 13

(2) Uganda vs. Kulabako Night – Crim. Sess. Case No.61/91

Section 191 of the Penal Code Act lists out cirsumstances where malice aforethought is presumed to exist. In order to establish the existence of malice aforethought the court may be guided by the following considerations:

the type of weapon used – whether lethal or deadly,
the nature and gravity of the injuries inflicted,
the part of the body on which the injuries are inflicted,
the conduct of the accused, before and or after the commission of the offence.

See: (1) R. vs. Tubere s/o Ochen (1945) 12 EACA 63
(2) Uganda vs. John Ochieng (1992-3) HCB 80

The injuries on Federesi were inflicted on the head, a delicate and vulnerable part of the body. They were inflicted using a hoe, though used for domestic use, can be a lethal weapon when used for offensive purposes. The injuries on her were described by Stephen Owino (PW4) and Byansi Mustafa, (PW6). Dr. Matovu observed two extensive scalp wounds which extended inside and damaged the skull. Naturally, this must have caused brain damage and death. I am left in doubt that, whoever inflicted the injuries observed on the deceased by PW1, PW5, PW5 and PW7 must have done so with malice aforethought.

The paticipation of the accused:

The accused, the deceased and his wife were alone in the accused's house. After Akong (PW5) heard a bang in the accused's house, she called her husband Owino who went to the accused's house. The accused was holding a blood-stained hoe with his foot on the deceased.

The deceased was lying on the floor in a semi-conscious state. The accused was, by his signs, threatening to finish off the decesed. The accused tried to fight off Owino and to run away, but he was overpowered and arrested by Owino (PW4) assisted by other people from the camp who had come to the accused's house in response to the alarms and call by Akog (PW5). On the basis of the evidence of Owino (PW4) Akong (PW5) and Byansi (PW6) the prosecution has proved that it was the accused who killed the deceased.

Although the prosecution need not prove motive in every criminal trial, it can be a relevant consideration as part of the facts preceeding or subsequent to the commission of an offence. Thus, section 8(3) of the Evidence Act provides:
(3) unless otherwise expressly declared, the motive by which a person is induced, to do or omit to do an act or to form an intention is immaterial so far as regards criminal responsibility.
Motive is relevant in this case in as far as it goes to establish the reason why the accused bartered his grand-daughter. It was, said, though I must observe, it was hearsay evidence by Akong (PW5) that the accused killed his grand daughter for selling his children without his permission. This evidence makes the killing revengeful. It is a fact in support of malice forethought on the part of the accused.

The act of revenging for the stealing his chicken is yet another circumstantial evidence which implicates the accused in the killing of the deceased besides showing an intention to kill on his part.

An accused person is entitled to all the defences availed to him. These defences may be those expressly pleaded by him or can be deduced from the prosecution evidence.

See: (1) D. Kabagenyi vs. Uganda (1978) HCB 216 (C.A.)

(2) Mafabi s/o Mafabi vs. R. (1956-57) 8 ULR. 59 (C.A.)

Although the accused did not make any defence, but four defences arise from the prosecution evidence. They are:
Denial of the charge persuant to his plea of not guilty to the charge.
Diminished responsibility
Provocation
Intoxication

It is a cardinal priciple that when the accused pleads not guilty to the charge the prosecution has the burden to prove his guilt beyond reasonable doubt. The prosecution in this case relied on the evidence of Owino (PW4) Akong (PW5) and Byansi (PW6). I believe their testimony. They found the accused at the scene, holding the blood-stained hoe with the deceased lying on the ground unconscious.

After considering all the prosecution evidence, there is no doubt that it was the accused who inflicted the injuries on the deceased with the hoe – exhibit P4. It is the injuries he (accused) inflicted on the deceased that resulted in her death.

Diminished responsibility:

Diminished responsibility is a defence to murder because of its existence, the accused is not found guilty of murder but with diminished responsibility, which condition incapacitates him so that he does form the specific intention required in murder charges. (see section 194(1) of the Penal Code Act). But in order to avail himself of this defence, the defence must plead and prove it. The burden placed upon the defence to prove – this defence is on the balance of probabilities.

See: 1. R. vs. Byrne (1960) 2 Q.B. 396
Rose vs. R. (1961) A.C. 496 (P.C.)
R. vs. Terry (1961) 2 Q.B. 314 – (CCA)
R. vs. Gomez 48 Crim. Appeal Reports 310 (CCA)

The defence in this case did not raise or endevaour to prove circumstances which would tend to show the accused was acting under diminished responsibility. Can the court avail this defence to the accused even if the defence has not pleaded it?. I am very reluctant to hold in the positive though the assessors held the accused was acting under diminished responsibility when he killed Naburu.

The assessors did not direct their minds on who had to raise this defence and the required standard of proof before they could avail that defence to the accused. At page **1594 of Archbold 1997-Edition-paragraph 1967** the learned author stated:

The case of **R. vs. Kooken 74 Crim. Appeal Reports 30** was followed in **R. vs. Campbell 84 Crim. Appeal R. 255** – C. A. their Lords in the Court of Appeal observed it was the defence to raise and prove the defence of diminished responsibility.

The learned author made the following observation – (p.1594)

" The judge's knowledge of the evidence available in relation to the issue of diminished responsibility would inevitably be limited, and if he did more that their Lordships had indicated, he might cause serious damage to a defence which had been put forward, without adding anything to the case'.

The evidence we have from PW4, PW5 and PW6 – (Owino, Akong and Byansi respectively) is that the accused was prone to violence and using deadly/lethal weapons when he was either drunk or annoyed. He was generally regarded as a cruel and fearful person in his community. He would fight at the slightest incitement as he could not control his anger. All these, in my view, do not amount to diminished responsibility. I am further fortified in my finding that the accused was not

affected by any disease of mind by the evidence of the same witnesses (above) who stated that the accused was a happily married man who went about his duties normally. Finally, the medical report, which was belatedly sent to the court, describes him as mentally normal. For those reasons I find the defence, of diminisehd responsibility was, not only raised by the defence but there are no circumstances upon which the court can conclude that such a state of mind existed in the accused.

Provocation is defined in sections 192 and 193 of the Penal Code Act. There is the hearsay evidence of Akong that the accused hit the deceased for selling his chicken without his consent. The question arises whether the accused was acting under provocation or revenge for his stolen chicken. Generally speaking, the force used in retaliation should be proportionate to the insult or act causing provocation. Where the force used in retaliation is out of proportion to the act causing the annoyance then the defence of provocation ceases to be available to the accused. But there is no hard and fact rule as to what retaliation will be proportionate to the annoyance extended to the accused.

I will borrow the words of ***Fuad J in the case of Uganda vs. Nabwegere son of Rovumba (1972) U.L.R. 15***.

"Judging the accused by the standard of a reasonable member of the unsophisticated community to which he belonged, legal provocation had been made out sufficient to reduce the terrible killing to manslaughter". Given the circumstances of the accused the selling of his chicken, the means of his livilihood, was sufficient provocation to make him lose his self control.

Intoxiation is not a defence to the offence to a criminal charge per se but it can be a relevant factor to show the presence or absence of the requisite ingredient, necessary to prove the charge of murder. This ingredient is the intention to kill as stipulated in section 191 of the Penal Code Act. Section 12(2) of the Penal Code Act provides that intoxicatin shall be a defence if the offender, at the time of committing the offence, did not know the act or omission was wrong or did not know what he was doing.

See: (1) Chemingwa vs. R. (1956) 23 EACA 45

Kinuthia s/o Kamau vs. R. (1950) 17 EACA 137.

Kajumba vs. Uganda (1987) HCB 1 (C.A.U.)

We have in this case the evidence of Akong who said "**Accused appeared to be drunk. He was smelling enguli**" Owino stated "**Accused is a habitual drunkard. He was smelling alchol on the day he hit his grandchild-Federesi**".

These same witnesses stated that the accused was prone to

being violent aggressive and using lethal weapon to fight other people when he was drunk. I believe the evidence of PW4 and 5 that accused had drunk enguli (**crude waragi**) when he assaulted Federesi.

It was observed by the Court of Appeal for Eastern African(then) in the case of **Chemingwa vs. R. (1956) 23 EACA 45**, that "intoxication may provide a defence either by enabling the accused to prove temporary insanity or by indicating that he was incapable of forming the intention necessary to constitute the offence. In the first case, the onus is on the accused to show the insanity. In the second, the onus never shifts from the prosecution.."

See also: Kinuthia s/o Kamau vs. R. (1950) 17 EACA 137.

As in provocation, once a person has lost self control because of being under the influence of alchol, such person may not have the capacity to balance the object of assault he is using and the harm it will cause to his victim.

See: Uganda vs. Robert Kanyankore (1984) HCB 23.

Because of the provocation extended to the accused coupled with his state of intoxication, the accused was temporarily deprived of his senses to form the required intention for the offence of murder. His offence is, for those reasons, reduced to one of Manslaughter.

The assessors advised me to convict the accused of murder but with diminished responsibility. Section 82(1) of the Trial on Indictments Act requires the assessors to give their opinion orally, which opinions, the Judge must record. But the Judge is nto bound by the opinions of the assessors 82(2) but if he disagrees with their unanimous opinion, he must give reasons for doing so 82(3). Thus the assessors are advisers to the court. If they give opinions which are not supported by the evidence on record or their opinions are not based on the law governing the case, then, the judge is at liberty to disagree with their opinions.

See: (1) Habib Kara Vesta and others vs. R. (1934) 1 EACA 191.
(2) R. vs. Mwita s/o Samo (1948) 15 EACA 128
(3) Adam Mulira vs. R. (1953) 20 EACA 223

I have earlier observed that the assessors did not properly adress themselves on the evidence which must be available to court to establish the defence on who the burden to raise and prove the defence lies and the test of proof required.

The assessors were carried away by the descriptions such as "**fearful man**" "**always drunk**", "**prone to violence**" "**always aggressive**" which the witness (**PW4, 5, and 6**) attributed to him. Strange as he (**accused**) may have been behaving, this did not mean he was a victim of diminished responsibility. I therefore reject their opinions on that ground.

SENTENCE

The accused/convict is sentenced to twelve (12) years imprisonment less the period he has been on remand.

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V. A. R. Rwamisazi-Kagaba

J u d g e

6/1/2005

Right of Appeal

The convict is explained his right of appeal to the Court of Appeal within fourteen (14) days.

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V. A. R. Rwamisazi-Kagaba

J u d g e

6/1/2005