

**IN THE HIGH COURT OF THE GAMBIA**  
**CRIMINAL CASE No: HC/119/10/BK/00/D1**

**BETWEEN:**

**THE STATE**

**COMPLAINANT**

**AND**

**NFALLY KOLLEY**

**ACCUSED PERSON**

**MONDAY 5<sup>th</sup> DECEMBER 2011**  
**BEFORE HON. JUSTICE EMMANUEL A. NKEA**

**ACCUSED PERSON PRESENT**  
**MR A. MIKAILU (DPP) FOR THE STATE PRESENT**  
**MRS N. GBUJI FOR THE ACCUSED PRESENT**

**JUDGMENT**

The accused person herein was arraigned before this Court on a one Count charge for having on the 25<sup>th</sup> day of December 2009 at Sinchu Sorri, in the West Coast Region of The Gambia unlawfully caused the death of one KAJALLY SANNEH (alias Kajali), contrary to Section 187 and punishable under Section 188 of the Criminal Code. The accused person pleaded not guilty to the charge.

The case of the Prosecution was led through ten (10) witnesses and in support thereof nine (09) exhibits were tendered. The accused person testified as the lone witness in his defense but tendered no exhibit.

The case of the prosecution is that on or about the 25<sup>th</sup> day of December 2009, the accused person herein had a fight with one KAJALLI SANNEH

now deceased. The accused alleged that the deceased who is his relation had an amorous affair with his wife. After the fight the deceased complained of general body malaise and was taken to the Fajikunda health centre for medical attention. Although the deceased had initially reported the assault on him to the Police station at Wellingara on the same day of the assault, he only made a statement to the police the following day the 26/12/2009. This Statement which is in evidence as exhibit "C" states that the accused beat the deceased on his penis with an iron bar. Upon this complaint, the accused was invited whereupon he volunteered a cautionary and two voluntary statements. These statements which are all dated the 26<sup>th</sup> of December 2009 are in evidence as exhibits "D", "E" and "F" respectively. The deceased was admitted in hospital where he was operated upon. Unfortunately the deceased died on the 15/01/2010. The death certificate confirming this fact is in evidence as exhibit "A". A post-mortem was carried on the *de cujus* on the 18/10/2010 and the report thereof is in evidence as exhibit "B". Following the death of the deceased, the accused was again summoned by the police where he made one additional cautionary and voluntary statements. These two statements are in evidence as exhibits "H" and "I" respectively. Exhibit "G" is the iron rod with which the accused assaulted the deceased.

The accused person's defense was a complete denial of the act of murder. However, he admitted in his cautionary statement and *viva voce* evidence in Court that he had a problem with the deceased arising from an alleged amorous relationship between the deceased and his wife. He had initially

reported this matter to the Bundung Police station whereat the deceased was summoned and cautioned. The deceased would however still come to his house in chase of his wife. He allegedly caught the deceased in copulation with his wife on the 25/12/2009, but preferred to report the deceased to his mother. As he went to report the deceased to his mother that evening, the deceased tried to restrain him from getting into their compound but was prevented from doing so by his mother. Whilst in the compound, the deceased tried to assault him but those around them prevented them from fighting. The deceased later reported him to the police.

These are the brief facts of this case, at the close of which both sides elected to waive their right to address me. I now proceed to judgment by framing out the issues for determination as follows:

- (a) Did the victim die?
- (b) Did the death result from or caused by the accused person?
- (c) Were the acts of the accused done with the intention that death or grievous bodily harm would be the probable consequence?

See the case of *OMISORE V THE STATE (2008) 3 NCC, 60*

I have looked at exhibits "A" and "B" - the death certificate and autopsy report of the deceased and both convincingly establish the fact that KAJALLY SANNEH died on the 15/01/2009. There is no iota of evidence in rebuttal. I take the facts contained therein as established. I am therefore satisfied that KAJALLY SANNEH died and this I shall hold as a fact.

Contrary to the denials of the accused person, there is overwhelming, uncontroverted, cogent and irresistible direct evidence confirming the fact that the accused beat the deceased on the 25/12/2009 with an iron rod. The law as settled in a long line of cases is that once a statement is admitted in evidence it forms part of the prosecution's case and the Court is required to attach probative value to it (*NWACHUKU V. THE STATE (2007) 31 NSCQR 312-359*). When the matter was still fresh in his mind the accused stated in his cautionary statement of 26/12/2009 (exhibit "D") of the incident thus "*...I went to Nyima's house with an iron rod. I wanted to kill Kajally... but he ran away... I hit him on the hand with the iron rod...*" This piece of evidence is similar in material particulars with the evidence of PW1 and I am inclined to believe it as the truth in this matter. I consider the subsequent denials in court as an afterthought. From the foregoing I am satisfied that the accused assaulted the deceased with an iron rod and this I shall further hold as a fact.

Issue (b) is the most important one in my view in the circumstances of this case. It deals with the cause of death of the deceased and relates to the medical evidence thereof. The general principle of law is that a Court can rely on a medical report emanating from a medical expert to prove cause of death in murder cases. However, a Court can in the absence of a medical report, properly infer the cause of death from the evidence and circumstances of the case. **See ADAMU v. KANO NATIVE AUTHORITY (1956) SCNLR 65; RABIU v. THE STATE (1980) 8-11 SC 130; ERIC UYO v. ATTORNEY GENERAL BENDEL STATE (1986) 1 NWLR (Pt.17) 418.**

I have seen from exhibit "B" the autopsy report that the deceased died of "*septic shock secondary to severe peritonitis.*" Peritonitis is an inflammation of the peritoneum, caused by a bacterial or fungal infection of this membrane. There are two major types of peritonitis. Primary peritonitis caused by the spread of an infection from the blood and lymph nodes to the peritoneum. The more common type of peritonitis, called secondary peritonitis, happens when the infection comes into the peritoneum from the gastrointestinal or biliary tract. Both cases of peritonitis are very serious and is life threatening if not treated quickly. Whilst primary peritonitis is usually caused by liver disease, secondary peritonitis is caused by conditions that allow bacteria, enzymes, or bile into the peritoneum from a hole or tear in the gastrointestinal or biliary tracts. Such tears can be caused by pancreatitis, a ruptured appendix, stomach ulcer, Crohn's disease, or diverticulitis.

Where the Court relies on expert medical evidence to prove the cause of death of the deceased, such medical must go to show clearly that the injury inflicted on the deceased, caused the death without any intervening cause or causes culminating in the death of the deceased. Where there is the slightest possibility of any such intervening factor creating the possibility that the cause of death could be through causes other than the actual injury inflicted, there is some doubt on the proper cause of death and such doubt must go to the benefit of the accused person. See the Case of *OFORLETE v. THE STATE (2000) 12 NWLR (Pt.681)*. The decision in the above case reflects the common law position on the issue of the cause of death in

murder trials. From this position, it is clear that the cause of death, not being a direct result of the accused person's act cannot connect the accused person with the cause of death of the deceased.

However, according to section 193 of the Criminal Code, a person is deemed to have caused the death of another even if his act is not the immediate or sole cause of death if he or she inflicts bodily injury on another in consequence of which the victim undergoes a surgical or medical treatment which causes his death. I have already held as a fact that the accused beat the deceased with an iron rod consequent upon which the accused was taken to the hospital. The uncontroverted evidence on record is that the deceased was admitted in the hospital whereat he was subsequently operated upon. Unfortunately, he died a few weeks after the said operation. Unfortunately for the accused, the second limb of section 193 of the Criminal Code cannot be invoked in his favour as there is no evidence before me to suggest that the medical treatment attended to the deceased was either done in bad faith or employed without common knowledge or skill.

The above presents two contradictory positions. However, it is trite that where common law conflicts with Gambian statute latter (Gambian Statute) will take precedence. It is for these reasons that I will hold that the death of the deceased was resultant from or caused by the accused person and this I will also hold as a fact.

The *mens rea* for murder is traditionally and statutorily referred to in the Gambia as malice aforethought. In the English case of *HYAM V. D.P.P (1174) 2 ALL ER 41*, the House of Lords held that, '*an intention to cause death or grievous bodily harm is established if it is proved that the accused deliberately and intentionally did, and knowing that it was probable that it would result in the death or grievous bodily harm to the victim, even though he did not desire that result*'. It is settled law that intention is not capable of positive proof. It is generally inferred from the facts and circumstances of each case. The above facts reveal that the deceased was struck with an iron rod. Perhaps the evidence in exhibit "D" remains the best evidence of the intention of the accused. He stated in exhibit "D" thus "... I wanted to kill Kajally..." This statement when linked up with the evidence on record in this matter demonstrates in a very strong way the fact that the accused did not only intend to inflict grievous bodily harm on her but also intended to see him dead. I am therefore convinced that the accused struck deceased with the iron rod knowing that grievous bodily harm or death would be the likely consequence and this I shall also hold as a fact.

Having answered the three issues framed above in the affirmative, I am satisfied that the prosecution has proved the charge of murder against the accused person with the certainty required by law. The accused person **NFALLY KOLLEY** is accordingly found guilty and convicted as charged.

**PREVIOUS CONVICTION: Nothing Known**

**COURT:** This Court has now found you NFALLY KOLLEY guilty of the offence of Murder under Section 187 of the Criminal Code. Before sentence is passed on you, the Court would like to know if you or Counsel on your behalf will like to say anything in mitigation.

**ALLOCUTUS - Mrs. Ogedo:** My Lord we are asking for mercy. We urge the Court to show pass sentence with leniency.

### SENTENCE

I have carefully listened to the plea for leniency, and I have also considered the fact that the convict is a first time offender. I would have been tempted to temper justice with mercy in passing sentence. However, the law itself does not afford this Court any discretion. Since the acts of the accused person leading to the death of the deceased involved the use of violence, I shall accordingly and in terms of Section 188 of the Criminal Code as read with Section 18 (2) of the Constitution,

**EMMANUEL A. NKEA  
JUDGE**

**SENTENCE THE CONVICT AS FOLLOWS:**

1. Convict is sentenced to death.
2. Pursuant to Section 250 Criminal Procedure Code I direct that the death sentence be carried out by hanging.
3. May God have mercy on your soul!
4. Convict is reminded of his right to appeal in terms of Section 251 of the Criminal Procedure Code.



5. The Principal Registrar of this Court to take steps in terms of Section 253 (1) and (2) of the Criminal Procedure Code respectively.
6. There shall be no further Order.

**ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND THE  
HAND OF THE PRESIDING JUDGE THIS 5<sup>th</sup> DAY OF DECEMBER  
2011**

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**REGISTRAR**