THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATES COURT OF MAKINDYE AT MAKINDYE

CRIMINAL OFFENCE NO. 1932 OF 2012

UGANDA:: PROSSECUTOR

VERSUS

A1 ADAM KALUNGI

A2ALI OMAR ALIMUZAHIM

A3 KHAN BABU ABDUL

A4 NOOR ABUBAKAR

A5 ABID RASHID BUTT

A6 FATUMA BABU:: ACCUSED

BEFORE HER WORSHIP ESTA NAMBAYO CHIEF MAGISTRATE

JUDGMENT

On the 14th December 2012, Hon Celina Nebanda was taken to Mukwaya General Hospital Nsambya by her boyfriend Adam Karungi Suleiman (A1), Moses Segawa (Pw1), Kiiza Emmanuel Lwakataaka (Pw2) and a technician from Peoples Hope Medical Centre Kasanga where she was pronounced dead. Adam Karungi then left the country for Mombasa - Kenya from where he was later on arrested, returned to Uganda at Kireka (Special Investigations Unit) and subsequently charged together with Ali Omar Alimuzahim (A2), Khan Babu Abdul (A3), Noor Abubakar (A4), Abid Rashid Bhutt (A4) and Fatuma Babu (A6) with the offence of Manslaughter C/S 187(1) and 190 PCA. The particulars of offence being that on the 14th of December at Buziga, Makindye in Kampala District, the accused persons unlawfully caused the death of Hon Nebanda Celina.

In count II; Ali Omar Almuzahim was charged with unlawful possession of narcotics C/S 47(1) and 60(2) of the National Drug Policy and Authority

Act. The particulars of offence being that Omar Almuzahim during the period between September and December 2012 within Kampala District without lawful excuse, had in his possession class A drug.

In Count III; Adam Karungi was charged with unlawful possession of narcotics C/S 47(1) and 60(2) of the National Drug Policy and Authority Act. Particulars of offence being that Adam Karungi during the period between September and December 2012 within Kampala district without lawful excuse had in his possession class A drug.

In Count IV; all the accused persons were charged with supplying and dispensing of restricted drugs C/S 13(1) and 60(2) a of the National Drug policy and Authority Act. The particulars of offence being that the accused persons between the period of September and December 2012 supplied restricted drugs.

All the accused persons denied the charges against them and prosecution presented 21 witnesses. At the closure of the prosecution case, all the accused persons were directed to defend themselves. Adam Karungi (A1) gave evidence on oath; Fatuma Babu (A6) opted to keep quiet while the rest of the accused persons gave evidence not on oath.

Prosecution was represented by Mr. Odit Andrew, Ms Samalie Wakholi and Ms Lucy Kabahuma.

Mr. Nsubuga Mubiru represented Adam Karungi(A1)

Mr. Rwalinda represented Ali Omar Alimuzahim(A2)

Mr. Mudhoola represented Khan Babu Abdul (A3), Abid Rashid Butt (A5) and Fatuma Babu (A6)

Mr. Macdosman Kabega represented Noor Abubakar (A4)

Mr. Kasirivu was Counsel on State Brief.

It is a criminal law principle that where the accused person denies the offence charged against him/her, the burden rests upon the prosecution throughout the trial to prove all the ingredients of the offence against the accused. This burden must be discharged beyond reasonable doubt. The accused persons have no duty to prove their innocence. This was the holding in the case **of Woolmington- vs- DPP (1935) AC 322** and also in **Sekitoleko vs- Uganda (1967) EA 531. I also wish to emphasize that i**t is not for the accused to prove their innocence; the accused only needs to call evidence that may raise doubt of his guilt to court. Even where the accused sets up a defense, they do not thereby assume the burden of proving it. It is up to the prosecution to disprove the defense by adducing evidence to show that never the less the offence was committed by the accused. See the case of **Wamalwa & anor -vs- Republic (1992)2 EA pg 538.**

I will first address my mind to the 1st count (manslaughter) and then move to the rest of the counts in their order.

Under S.187 (1) PCA it is provided that any person who by an unlawful act or omission causes the death of another person commits the felony termed manslaughter.

Under S.187 (2) PCA An unlawful omission is defined as an omission amounting to culpable negligence to discharge a duty to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily injury.

S.190 PCA provides that any person who commits the felony of manslaughter is liable to imprisonment for life.

Mr. Kabega has faulted the particulars of offence in count 1 submitting that the prosecution did not state the unlawful act or omission ***specifically*** committed by the accused persons leading to the death of Hon Celina Nebanda. He stated that by leaving out the unlawful acts or omission the

accused persons would not know what they were required to defend and were therefore prejudiced in their defense which makes the charge incurably defective and should be struck off record. He relied on the case of **Achoki –v- Republic [2000]2 EA 283(CAK)** where it was held that:

"A charge of rape (under s.141 (1) PCA must allege in its particulars that the act of sexual intercourse was unlawful and without the consent of the woman or girl. The Appellant was wrongly convicted on this charge."

Mr. Mubiru strongly associated himself with submissions of Mr. Kabega.

From the above case authority relied on by Mr. Kabega in support of his submission, I wish to point out that the provisions of the law under which the Appellant had been convicted were that;

S.141 (1) PCA (Kenya):

"Any person who has unlawful carnal knowledge of a woman or girl, without her consent, with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape".

The particulars of offence as laid out in that charge were that:

"On the 26th day of April, 1999 at Metamaiywa village at Nyansiongo/Gesima sublocation in Nyammira District within Nyanza Province, attempted to have Carnal knowledge of Caren Kemito Kombo"

The specific actions that the Appellant performed in that case were that he accosted the complainant, knocked her down, tore away her knickers and lay on top of her. He was at the same time lowering his own trousers and he tried to get in between her thighs when he was got. None of the above named acts were laid out in the particulars of offence.

The court of Appeal did not say that the specific actions of the Appellant should have been stated in the particulars of offence. The appeal court said the stated particulars did not disclose the offence under the law. In my understanding what the court of Appeal meant was that the vital ingredients in the offence of rape; namely ***unlawful carnal knowledge*** and ***lack of the victims consent*** were not mentioned in the particulars. In the case before court the particulars of offence are that:

"The accused persons on the 14th December 2012 at Buziga Makindye Division in Kampala District unlawfully caused the death of Hon Celina Nebanda" The vital ingredients in this case being ***unlawful cause of death***; the acts or omission being implied by the word unlawful.

In the other case of **Director of Public Prosecutions V Newbury (1976)2 ALLER 365** also relied on by Mr. Kabega, it was held that;

"(a) That an accused is guilty of manslaughter if it is proved that he did an act which was unlawful and dangerous and that that act inadvertently caused death and (b) that it is unnecessary to prove that the accused knew that the act was unlawful or dangerous."

This case only spells out the ingredients of manslaughter. It is not stated any where in that case that the particulars of offence should name the specific act and/ or omission done by the accused person(s). Therefore, I find that the particulars of offence in this case show the offence of manslaughter in as far as they state that Hon Celina Nebanda's death was caused unlawfully. The specific acts or omission are details that come out in evidence. Therefore, I find that the charge of Manslaughter is not defective, the accused persons are properly charged before this court.

I will now proceed to evaluate the evidence presented to this court in this count.

In the offence of manslaughter prosecution must prove that there was;

1. Death of a person
2. Death was caused by unlawful means
3. It is the accused who caused the death either by their acts or omission

From Evidence on record it is not disputed that Hon Celina Nebanda died. The post mortem report that was tendered in court as exhibit P.16 by Professor Henry Wabinga (Pw12) further confirmed that Hon Celina Nebanda died. So I find no reason to doubt that Hon Celina Nebanda died. What I have to establish is whether or not Hon Celina Nebanda's death was caused by unlawful means.

The legal position on the legality of death is that every homicide is presumed unlawful unless the circumstances make it excusable or is authorized by law. A death is excusable if it occurred under justifiable circumstances like in defence of property or defence of the person or is authorized by the law.

See the case of **Gusambizi s/o Wesonga –vs- R (1948)15 EACA pg 65 and also Uganda –vs- Okello (1992-93) HCB pg. 68** The same position was restated in the case of **Akol Patrick & others -Vs- Uganda (2006)1 HCB pg 6.**

In this case, Karungi told court that he returned home at about 4p.m and found Hon Nebanda seated down leaning on the sofa with 2 bottles of wine, one bottle being empty and some wine in a glass. At first he did not notice any thing wrong. So he put the food he had bought at her request earlier on in the day on the table and went to the bedroom. On return from the bedroom he noticed that Celina had made no movement and was looking weak. He gave her water and milk to drink but it couldn't flow. He got her some first aid and subsequently took her to hospital where she was pronounced dead.

Prof Kakonge (DW7) points out in his report tendered in court as exh D.17 that Hon Nebanda's death was due to a lethal dose of medical morphine. Prof Kakonge's report was based on the post mortem report and the toxicology findings from the UK and Israel. The toxicology reports made a finding of heroine and cocaine in Hon Nebanda's body parts. In his report, Prof Kakonge does not give any basis for his conclusion that the type of morphine that caused Hon Nebanda's death was *high grade medical morphine*. What is the difference between morphine and high grade medical morphine in causing death? Is it just quantity, quality by purification or chemical composition? What comes out clearly from the evidence of Prof Kakonge is that he agrees that Hon Nebanda's death was caused by morphine. The post mortem report by Prof Wabinga (Pw12) tendered as Exh P.17 states that Nebanda's death was caused by multiple organ failure due to a combined effect of alcohol and drug toxicity.

From the above evidence, I'm convinced that the late Hon Celina Nebanda died of multiple organ failure due to alcohol and drugs. No excusable circumstances have been shown as cause of Hon Celina Nebanda's death; I therefore find that Hon Celina Nebanda's death was caused by unlawful means. Having made the above establishments, I will now look at whether or not each accused person by his/her acts or omission caused the death of Hon Celina Nebanda. I will first address my mind to Karungi Adam (A1). My duty here is to look at whether or not Adam Karungi is liable for Hon Celina Nebanda's death by; *(a) His act and/ or (b) His omission.*

(a) Act(s)

It is the prosecution's submission that Hon Celina Nebanda died out of Adam Karungi's actions in that he had cocaine and heroin in his house which Celina took thereby leading to her death. Prosecution has submitted

that Adam Karungi told Moses Ssegawa (PW1), Kiiza Lwakataka (PW2), Grace Kigenyi (PW4) and Irene Namuganza (PW7) that Celina had taken his cocaine which was in his house. In his evidence before court Lwakataka informed court that Karungi told him that Nebanda had taken cocaine. Grace Kigenyi(Pw4) said that Adam told him that as he was buying take away to go home and eat with his girl friend, the girl called and told him that she was not feeling well. So he rushed home. On arrival, he got Nebanda indeed not well. She had cocaine and heroine on the table and she had opened up a bottle of wine. So he called up a friend to assist him take her to hospital. Irene said that Karungi told her that Celina is very stubborn she had taken something in the bottle that he had told her not to take. When Irene asked him what things he kept quiet. Irene's statement is on court record as exibit D3 (a). Karungi denies having said what the above witnesses told court.

Mr. Mubiru; counsel for Adam Karungi (A1) told court that since the investigating officer (Mutungi) and Madam Chelimo told court that Hon Celina was at Munyonyo earlier in the day with her mother and brother before he went to Karungi's house, it would have been good for the prosecution to have called Celina's mother and brother to tell court what happened while they were at Munyonyo with Celina. Counsel submitted that it remains speculation as to how Celina came to be in the state that Karungi found her. He also pointed out to court relying on the case of **Oketcho Richard – V- Uganda [1999] KALR at pg 120** that this court should take it that prosecution did not call the late Nebanda's mother and brother to give evidence in court because they knew that their evidence would spoil their case. Mr. Mubiru further submitted that there were so many inconsistencies and contradictions in the report findings of urine that it was not clear

whether the urine examined was for the late Nebanda or not. He explained that the person who extracted the urine should have come to explain to court how the urine was extracted and how it moved up to the UK and Israel. Mr. Mubiru pointed out that Madam Chelimo told court that urine was extracted from Mukwaya General Hospital yet witnesses from there told court that by the time Celina got to the Hospital she was dead and it was not possible to extract urine from her. So this made it important to know the origin of the urine that the examination reports relied on. He relied on the case of **Uganda – V – Albino Ojok (1974) HCB pg 176** and submitted that once there is a break down in the chain of evidence such evidence should not be relied on. He said no drugs were found in Karungi's house even after the police used sniffer dogs.

In addition to the above Mr. Mubiru submitted that if Karungi is to be convicted in this count, prosecution must show that he administered the drugs to the late Nebanda. He relied on the case of **R v Kenede (2007)III weekly law report pg4** where the holding is to the effect that even if a person supplied drugs to another and that other person made a sober decision to take the drug and died as a result of taking the drugs; the supplier is not responsible for that act. Mr. Mubiru submitted that prosecution did not show that Karungi administered the drugs to Hon Nebanda. What it has showed court is that when Karungi went to his house he found Nebanda already in the state of comatose.

I have looked at the case of **Rvs Kenede (ibid)** relied on by Mr. Mubiru. The brief facts of that case are that Cody and Bosque were roommates in a hostel where Kenede (Appellant) also stayed. The Appellant (Kenede) visited the two roommates and found them drinking. Bosque then requested for some heroine from the Appellant to make him sleep. The Appellant prepared a

dose of heroine and gave it to him. Bosque injected himself and returned the empty syringe to the Appellant who left the room. Bosque then appeared to stop breathing. He was taken to hospital where he was pronounced dead. The Appellant was convicted. He appealed. On appeal the court held that;

"The criminal law generally assumes the existence of free will. The law recognizes certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also deception and mistake. But generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act… Thus D is not treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another.

I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay if you do it. My efforts may perhaps make it much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened… in this case the heroine is described as freely and voluntarily self administered by the deceased"

In the case before this court, Hon Celina Nebanda was an adult sober person. Karungi found her in his house when she had taken alcohol and was already in a state of coma. Even when it was found out later on that she died due to alcohol and drug overdose, it has not been shown by prosecution evidence that it is Karungi who administered the drugs to her. It is my understanding of the above case law that it is not enough for the prosecution to say that the accused person had drugs which Hon Nebanda took thereby causing her

death. He must have administered the drugs to Hon Celina Nebanda leading to her death. I agree with the submission of Mr. Mubiru that prosecution has not shown this court that Adam Karungi administered to Celina Nebanda the drugs and alcohol which led to her death. Therefore it is my finding that there is no act shown to have been done by Adam Karungi (A1) leading to the death of Hon Celina Nebanda by the prosecution.

(b) Omission

It is prosecution's submission that Karungi's refusal and/or delay to take the late Nebanda to hospital for medical attention soon after he found the deceased in a bad condition among others was negligent conduct which led to her death. In reply, Mr. Mubiru pointed out that prosecution must ascertain that (a) there was a duty on the accused to take the deceased to hospital and (b) he had the means to do so but he just neglected to do so.

Mr. Mubiru submitted that Adam Karungi did not owe the deceased that duty but he did everything to see that Nebanda obtained relevant treatment. He has relied on the case of **Khan v R (1993) CA** and explained that Karungi owed Nebanda no duty of care because she went to his house while he (accused) was not there and accused only returned to get her in comatose. Mr. Mubiru submitted that Karungi and the late Hon Nebanda were just friends and as such the accused was not under a duty of looking after her. He said that Celina was not a minor; neither was she an invited guest. Counsel also said A1 did not have money to meet the medical bills required at hospital. Evidence that Karungi had no money according to Mr. Mubiru is that earlier on in the day Nebanda had sent Karungi money by mobile money to buy some food (take away). He further submitted that another reason was that the late Nebanda was so huge that A1 could not carry her alone but Karungi was able to call in some first aid and using his own transport and

her car he managed to take her to hospital. Counsel explained that there was no evidence that Karungi vehemently refused to take Celina to hospital but his only concern was that Hon Nebanda was not an ordinary drunkard and therefore Karungi had to exercise maximum caution not to subject her to embarrassment and that no one had reason to suspect that Nebanda would die. He said Karungi got home at 4.00p.m and 1st aid was given. They had to first consider whether she was responding to the 1st aid. At 6.00p.m is when they realized that Hon Nebanda's condition was beyond the medic present and they went to hospital. There was traffic jam on the way and they decided to take her to Mukwaya General Hospital as it would have been unthinkable to drive her through the jam to Mulago. Mr. Mubiru submitted that A1 did what it takes to rescue the deceased and that the prosecution failed to adduce evidence to show the ingredients of omission and therefore the charge of manslaughter cannot be sustained.

In the case of **Khan and Another V R** (Ibid) that Mr. Mubiru has relied on, it was noted that;

"if the crown alleged manslaughter by omission on facts as those in the present case, the appropriate course would be to leave to the jury the following questions:

(1) Whether a duty of care was owed by the defendant to the deceased;

(2) Whether there had been a breach of that duty;

(3) Whether the breach had caused the death; and

(4) Whether the breach of duty should be characterized as gross negligence and therefore as a criminal act."

In this case Karungi admitted before court that the late Nebanda was his girlfriend and they had intentions of taking their relationship to the next

level. He said Hon Nebanda had keys to his house and that she would visit his house any time even with her other friends in his absence. One such friend (Irene (Pw7) testified confirming before this court that she went with Nebanda to visit Karungi at Bukoto and at Buziga, her statement is exh D.3 (a) and exh D.3(c). Karungi said before court that as a sign of territory marking the late Celina Nebanda used to leave some of her property at his house. Some of this property was brought to court and some property was said to have been handed back to the late Nebanda's mother by madam Chelimo according to the evidence of Bwonyo Julius (PW16) and exhibits D.7 and D.8. This makes me believe that Celina Nabanda was not a trespasser to Karungi's house. She had Karungi's consent to access and to use his house as and when she desired and had; according to Karungi's own evidence, marked her territory by leaving her personal belongings in his house. Therefore Karungi owed her a duty of care all the time she was in his house.

As to whether there was a breach of that duty by Adam Karungi, I have looked at Ssegawa's account of what transpired. He said that they got to Karungi's house at about 5.00p.m. They found Nebanda seated down on the carpet leaning on the chair in a night dress with saliva coming from her mouth. Nebanda was calling out to Karungi that "b-a-b-e" in a slow motion like a sick person, she was faint and weak. The clinical officer made her to lie down flat and wrote down some medication. Karungi sent Ssegawa to go and buy the medication. He went and returned with the medicine and a technician from Peoples Hope Medical centre after about 30 minutes. Hon Nebanda was now gasping for breath. She was put on drip and a catheter was inserted by the clinical officer who then advised Karungi that he would not add anything else apart from taking the patient to a big hospital for better

management but Karungi feared the “Paparazi” because the patient was an Honorable and she would be embarrassed. They waited and left for hospital at about 6.00p.m Ssegawa says by this time Hon Nebanda was still gasping for breath but at a slower pace. They got to hospital at about 7.00p.m due to traffic jam.

Kiiza Emmanuel Lwakataka (PW2) this is the clinical officer who attended to Celina. He said when he got to the patient she had dilated eyes. She could not see, she could not hear or talk. She was breathing very fast. Someone at a distance could hear her breathing. He asked Karungi what had happened to the lady. He told him that she had taken some drinks. Pw2 asked what drink. Karungi said sort of alcohol. He asked Karungi that why don’t you take her to hospital. Karungi said he did not want her to be seen. He put her in a recovery position to avoid the tongue falling back. He wrote down some medicine and Ssegawa went to buy it. While Ssegawa was away Karungi confided in PW2 that the lady had taken wine mixed with cocaine. Ssegawa returned with a technician from Peoples Hope medical centre. PW2 inserted a catheter to remove urine. The pulse was higher than normal, blood pressure was low and the heart beat was fast. He put a drip and advised that the patient be taken to hospital. Karungi did not agree. After some time he agreed and they left for hospital at about 6.00p.m and got to Mukwaya General Hospital at about 7.00p.m due to traffic jam. Kiwewa Joseph (PW3) a clinical officer at Mukwaya General Hospital said the patient arrived at the hospital at about 7.00p.m with a catheter and IV line inserted/ fixed on her.

Adam Karungi (A1) told court that at the People’s Hope medical centre, he requested that the patient should first be given first aid then taken to a bigger clinic. The doctor agreed and they drove to his house. The doctor requested for some items, Karungi sent ssegawa to buy. When Ssegawa returned with

the items together with another medical person from the same clinic where they had got the 1st one, Hon Nebanda was put on drip. Karungi told court that the doctor then told him that the patient would be fine. A catheter was also fixed and he was then advised that the patient needed oxygen and should be taken to hospital; but the challenge was that she was so big and they were small. Karungi told court that after some time, they managed to put Hon Nebanda in the car and took her to hospital where they arrived at about 5.30p.m due to traffic jam.

Mr. Mubiru submitted that Karungi got home at 4.00p.m and on seeing the problem; he looked for 1st aid which was administered. They waited to consider whether it was working and at 6.00p.m they decided to go to hospital on realizing that the 1st aid was not working.

I find the prosecution evidence of account of what transpired from the time that Ssegawa, Kiiza and Karungi got to Karungi's house upto when the deceased was delivered at Mukwaya General Hospital very consistent that I find no reason to fault it. I'm convinced that Hon Celina Nebanda was delivered at Mukwaya General Hospital at 7.00p.m and not 5.30p.m as stated by Karungi because Karungi's lawyer also states in his submission that they left the house at 6.00p.m. If they left the house at 6.00p.m, how could they get to hospital at 5.30p.m as stated by Adam Karungi?

Mr. Mubiru says that after administration of the first aid they had to wait and see whether the same would work before they made a decision to go to hospital. I find that submission not convincing at all because; in his own words, Karungi said he requested the doctor that the patient should first be given first aid and then taken to a big clinic and the doctor agreed and they drove to his house. While at his house, after the first aid had been administered by Kiiza (PW2), Karungi says that he was told that the patient

needed oxygen. Oxygen was not part of the first aid package. So what improvement was Karungi expecting without oxygen so as to start waiting to see if there was improvement?

I believe the reason Hon Celina Nebanda was delivered to hospital at 7.00p.m was because they delayed to set off from Karungi's house due to Karungi's fear of the paparazzi as was stated by ssegawa. In fact on careful scrutiny of Ssegawa's evidence, you realize that Hon Nebanda's condition continuously deteriorated at every passing time under Karungi's very nose. The fear of exposing his girlfriend to embarrassment kept holding Mr. Karungi back until it was too late to save her life. In the process of his fears to subject his girlfriend to embarrassment, Mr. Karungi breached that duty to save the life of his girlfriend. This was gross negligence on the side of Adam Karungi. It is therefore my finding that Mr. Karungi is guilty of manslsughter by omission and I hereby convict him of manslaughter C/S 187(1) and S. 190 of the PCA by finding him guilty.

In regard to the accused persons Ali Omar Alimuzahim (A2), Khan Babu Abdul (A3), Noor Abubaker (A4), Abid Rashid Butt a.k.a Ikbar(A5) and Fatuma Babu Tuma (A6) the prosecution has not placed any of them at the scene of crime, neither has it presented to this court any incriminating evidence against them in this count. I find none of them guilty of manslaughter and each one of them is hereby acquitted.

In Count II Ali Omar Alimuzahim is charged with unlawful possession of narcotic drugs C/S 47(1) and 60(2) of the National Drug Policy and Authority Act. It is stated that during the period between September and December 2012 in Kampala, Ali Omar Alimuzahim had in his possession without lawful excuse class A drugs.

S.47 (1) of the National Drug Policy and Authority Act provides that:

"No person shall have in his or her possession without lawful excuse, the proof of which shall lie on him or her, any narcotic drug or psychotropic substance under international control."

S. 60(2) of the National Drug Policy and Authority Act provides that:

"(a) where the offence relates to class A drugs, to a fine not exceeding two million shillings or to a term of imprisonment not exceeding 5 years or to both".

Ingredients of this offence as laid down by the prosecution are that;

(1) The drug referred to is a restricted drug

(2) It was found in the possession of the accused person.

I wish to add that the accused person must have had no lawful excuse for possessing the drug.

Possession is defined in section 2 (v) of the Penal Code Act as

"includes not only having in one's own personal possession, but also having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person; if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or her or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them''.

From the above provision of the law, possession may be actual or constructive. Actual possession is having physical custody or control of an object. The person in possession has immediate contact.

In constructive possession the following must be proved beyond reasonable doubt;

1. That the accused was aware of the presence of the object.
2. That the object was subject to the accused's dominion and control.

From its ingredients, evidence in constructive possession cases is mainly circumstantial which quite often maybe fabricated to cast suspicion on the accused. It is therefore very important for the trial Court to be warned that before drawing an inference of the accused's guilt from circumstantial evidence, the evidence has to be such that there are no other circumstances in existence which would weaken or eliminate that inference, see the case of **Teper Vs R (1952) AC 489**

In this case, the prosecution has presented two incidents of recovery of the suspected drugs, the first incident being on the 22nd /12/2012 in the presence of the accused person (A2) and the second incident being on the 24th December 2012 when the accused person was already in police custody.

I will first address myself to the incident of recovery on the 22nd December 2012 in the presence of the accused person (A2).

According to prosecution evidence, D/AIP Mulindwa Henry (Pw15) led his team consisting of police officers namely; D/AIP Tumuhairwe Fred, Opori Richard, Lokwi and others to the accused person's house on the 22nd December 2012 at 6.30a.m. The place was cordoned off. A search was conducted in the presence of the A4, his wife and the LC 1 youth secretary called Bataringaya. Suspected drugs were recovered and police dogs used subsequently. The dogs did not recover anything else. A search certificate was made and signed by the accused himself, his wife, the LC1 youth secretary and the police officers. This search certificate was tendered in court as exh P.20. After the search, D/C Opori handed the recovered items to Bwonyo (in-charge stores) at Kireka SIU. Upon departure from the scene, they took A2 along with them leaving behind some police officers to guard the premises.

Bwonyo (Pw16) confirmed that he received exhibits from A1's residence from D/C Opori. He made record (exh D.5) on receipt and submitted the items to Government Analytical Laboratory (GAL) on the 24th December 2012 together with other exhibits that he received on the 24th December 2012 from D/sgt Muheebwa a police officer Entebbe Aviation police. Exhibit slip of the exhibits of the 24th December received by Mr. Bwonyo was tendered in court as exh P. 22

Justus Ochom Michael (Pw17) told court that Bwonyo submitted the recovered items to the Government Analytical Labaratory. He confirmed that he received PF17A (exh D.9) from Bwonyo on the 2nd January 2013 for examination and that he made his findings as per Exh P.24

Ali Omar Alimuzahim (A2) confirmed to court that police was at his house on the morning of the 22nd /12/2012 and named Mulindwa as one of the police officers who were at his house. He told court that the police searched his house and recovered baking powder bicarbonate and custard powder. He said Mulindwa alleged that it was drugs and when he denied Mulindwa called for the police dogs and told A2 that he was going to prove him wrong. The dogs were brought in, they sniffed every where including the alleged drugs. No drugs were recovered. A2 was told to sign a document which he was told was a search certificate, he signed, his wife signed and some one who said was a secretary for youth for the area also signed. He was taken along with the police. On the 25th December he was taken to Kireka (SIU) where he met Fatuma(A6) and her husband (A3). On the 31/12/2012, they were brought to Makindye court and charged.

It is the prosecution's submission that A2 was found in possession of the drugs that were tendered in court as exhibit and should be convicted.

Mr. Rwalinda submitted that prosecution failed to prove that A2 was found in possession of any drugs. The evidence that prosecution seeks to rely on was full of inconsistencies and contradictions which go to the root of the problem. Counsel pointed out to court that PF17A had inconsistencies in the description of the alleged narcotics by the witnesses who described the drugs by giving them different colors. Mr. Rwalinda submitted that describing the drugs using different colors was not a minor inconsistency.

About the search certificate Mr. Rwalinda submitted that the Lc1 official who was the only independent witness did not come to court to confirm that he signed on it and as such it cannot be used as evidence in court.

Counsel also submitted that there were inconsistencies in the search certificate (exh P.20) and the exhibit record (exhD.4). Pointing out to court that the search certificate named suspected drugs only while the exhibit record gives more items than what is named in the search certificate, counsel relied on the case of Waswa Stephen and another –vs – Uganda SCA No. 31/85 and Uganda- v- Edirisa Ssali and 3 others (1981) HCB pg 40 and submitted that basing on the contradictions and inconsistencies A2 should be acquitted.

I have looked at the search certificate made on the 22/12/2012 (exhP.20). I note that items recovered in the presence of A2 were described as; "crystalline white substance highly suspected to be narcotic drug (cocaine) in four polythene paper bags weighing about 500gms".

The exhibit record (Exh D.5) describes items received by Mr. Bwonyo as

1. Transparent torn paper bag containing four ties of white crystalline substances suspected to be narcotic drugs. I have marked it as B1, B2, B3 and B4.
2. One small grey hand bag I have marked B2

3. One black helmet with Red strips I have marked as exhibit B3
4. On bilt porch helmet bag marked B4

All items are indicated to have been taken by D/C Opori Richard as exhibits from Kasanga in respect of Omar Ali.

I agree with Mr Rwalinda that the contents of the two documents are different. I wish to point out however, that the difference is only in detail. What is clear is that the major items of investigation which in this case is the suspected narcotics, has been clearly included in both documents. It is indicated as the sole item in the search certificate which A2 also signed. On the exhibit slip it is item No.1. In my opinion the recording having been done by two different officers independently; variation based on detail of number of items but indicating all items reflected on the search certificate does not amount to a major inconsistence. Bwonyo indicated all that was given to him by D/C Opori which in my understanding was the right thing to do. It has not been disputed that those other items handed over to Bwonyo were recovered from the house of A2 neither has it been shown to this court that the search certificate was tampered with.

In regard to the laboratory report, Mr. Rwalinda pointed out in his submission that prosecution had 2 reports from the laboratory in respect the late Celina Nebanda. He said one report had Ref No. 002/2013 and the other report had Ref No.136/2012 in respect of different sets of narcotics from different persons but under the same CRB Number. Counsel wondered which report was in respect of A2 and that even if one report is presented as in respect of A2, how does one tell that it is the narcotics which came from one set and not the other.

According to exh p.24 items received at GAL, Exh 'B' was found to contain a colorless polythene bag containing white glass- like crystals marked B1,

B2, B3, and B4.(see Fig 5). The markings in fig 5 were made by Mr. Bwonyo according to his evidence. From Mr. Bwonyo's exhibit record the items are clearly indicated on the search certificate. I find no confusion about the items as exhibited by Mr. Bwonyo and as recorded on the PF17A showing what was submitted to the GAL.

The same CRB number should not be a problem because it only means that different samples arising from the same file were sent for examination. The samples were recovered from different sources. So the lab receives all of them but gives each one of them a different laboratory number.

On page 6 of the report from the GAL (exh P.24) at the bottom, the result finding of exh B1, B2, B3 and B4 was indicated as methamphetamine. According to the experts evidence Methamphetamine drug is sometimes called crystal methyl.

In answer to counsel's submission that different witnesses described the exhibit by different color descriptions, Justus Ochom (PW17) senior Government analyst's reply was that he is the expert and he believed in his color description. It is my opinion that in the absence of another expert's color description, I find no reason to doubt Mr. Ochom's color description as being the right one. What matters most is that the description is for the same material. If the material in question is consistent, like it is in this case without evidence of tampering, then color description becomes a minor inconsistency which can be disregarded by court.

Accordingly, I find that prosecution evidence is enough to show that A2 was in actual possession of the Drug (methamphetamine) since the item was recovered from his house in his presence on the 22/12/2012.

For the suspected drugs recovered on the 24th December 2012, while A2 was already in police custody, it is the duty of the Prosecution to link him to the

drugs by showing that although the accused was already in detention he knew about them, exercised dominion and control over them. The accused denied knowledge of the suit case. Mr. Rwalinda submitted that the accused person's house had been cordoned off on the 22nd /12/2012 when the police first visited the house; sniffer dogs were used and recovered no drugs. He said the suit case with drug pellets was not recovered during that search. Counsel explained that on departure from the premises police guards were left to keep the place. He found it difficult to believe that some one could have sneaked in the suit case from the air port while the police was on guard. I agree with Mr. Rwalinda. I find that prosecution has failed to show court that A2 was aware of the drugs and that they were under his control.

According to exh P.24 (page 7) and evidence in clarification by Mr. Ochom Justus (Pw17) methamphetamine is a classified drug under the second schedule as a class B drug under the National Drug Policy and Authority Act Cap 206. A2 has not shown to this court any lawful reasons why he had the drug in his possession, neither has he shown this court that he was authorized to have the drug in his possession. I therefore find him guilty of being in unlawful possession of methamphetamine a drug classified under the National Drug Policy and Authority Act which is C/ S. 47(1) of the Act; and I hereby convict him accordingly.

In Count III, Adam Karungi is charged with the offence of unlawful possession of narcotic drugs C/S 47(1) and 60 (2) of the National Drug Policy and Authority Act. It is alleged in the particulars of offence that Adam Karungi alias Luli, during the period between September and December 2012, within Kampala District without lawful excuse had in his possession Class A drug.

Adam Karungi denied being in possession of any drugs.

Prosecution submission is that Ssegawa (Pw1), Lwakataka (Pw2) and Kigenyi Grace (PW4) told court that they were told by Adam Karungi (A1) that he had cocaine in his house which the late Celina Nebanda took. Prosecution further submitted in paragraph 8 under its count III of the filed written submissions that;

"the deceased having been a member of parliament, the accused person knew that investigations into her death would be carried out which would lead to his home and he had to do the smart thing of clearing all the evidence then ran off to Kenya"

It is my considered view that prosecution should have provided evidence to support its above allegation. Submitting without supporting evidence does not make a case beyond reasonable doubt against the accused person. It is my finding that the prosecution has failed in this duty. I find Adam Karungi not guilty of unlawful possession of narcotic drugs and I hereby acquit him.

In count IV A1, A3, A4, A5 and A6 were charged with supplying and dispensing of restricted drugs C/S 13(1) and 60(2) of the National Drug Policy and Authority Act.

The particulars of offence are that Adam Karungi, Khan Babu Abdul, Noor Abubakar, Abid Rashid Bhutt (Ikibar), Fatuma Babu and others still at large during the period between September and December 2012, supplied restricted drugs to wit heroin and cocaine to Hon Nebanda Celina.

All the accused persons denied the offence.

S.13 (1) of the National Drug Policy and Authority Act provides that;

"Subject to this section, no person shall mix, compound, prepare, supply or dispense any restricted drug unless that person is a registered pharmacist, medical practitioner, dentist or veterinary surgeon or a licensed person."

Under S. 12(1) (a) of the National Drug Policy and Authority Act, it is provided that a list of restricted drugs is laid out in the first, second and third schedules.

Prosecution submission is that PW14 (Bigirimana) informed court that he knew all the accused persons and that A4 who was his brother –in- law used to give him drugs to deliver to A1, A3, A5 and A6.

Prosecution further submitted that the accused persons constitute an organized group of drug dealers and that they supplied drugs to A1 and to the late Hon Nebanda thereby leading to her death as confirmed by the toxicology reports from the UK, Israel and the post mortem report.

Counsel for the accused persons submitted that the evidence of Bigirimana was so riddled with lies and inconsistencies that this court should disregard all of it totally.

Bigirimana said that he his evidence before court, reported his brother –in-law Noor (A4) at Katwe police station for dealing in drugs. There is no record of any case of that nature tendered in court to confirm his statement. He then said he was detained at Kabalagala police in November 2012 and granted a police bond in January 2013 because the police had turned against him because of the case he reported at Katwe against Noor (A4) who later on compromised the police; prosecution has not provided any documentation to show that Bigirimana has ever been detained at Kabalagala police and that he was released on police bond. There is even no documentation whatsoever to show that Mr. Bigirimana was communicating on phone to the accused persons A1, A3 and A5 yet he identified them

before court explaining that he was communicating to them on phone so as to supply drugs to them. In addition to the above Bigirimana also said that upon release from Kabalagala police, he was taken to Muyenga community police to become a police witness. It is not clear under what circumstances Mr. Bigirimana was made a police witness. Is this why he came to this court to testify against the accused persons? Isn't Bigirimana only hitting back at his brother-in-law for their personal issues not known to this court? I say this because Bigirimana said that he went to report at Katwe police when he disagreed with his brother- in- law. This makes me agree with the submissions of counsel for the accused persons that Bigirimana's evidence is not credible.

Prosecution has not presented any other evidence to show that the accused persons supplied drugs to the late Hon Celina Nebanda as stated in the particulars of offence. Therefore, I find no incriminating evidence against any of the accused persons in this count. I find no accused person guilty and each one of them is hereby acquitted.

Esta Nambayo
Chief Magistrate
31st /01/2014