

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA, AT MBARARA**

**CRIMINAL SESSION CASE NO. 254 OF 1997**

**UGANDA..... PROSECUTION**

**VS**

**AI NUWAYINAMANI YUBU)**

**A2 KAMWESIGYE ) .....ACCUSED**

**A3 KAVIGI EDSON )**

**BEFORE: THE HON. JUSTICE V. F. MUSOKE-KIBUUKA\_**

**JUDGMENT\_**

**Introduction**

The village of Mugono, in Itojo sub-county, Mbarara District, was thrown into extraordinary disquiet on 4<sup>th</sup> August 1996. At about 9.00 p.m. a loud thundering noise occurred in the home of Rwakanigane Festo, the deceased in this case. After a short time, the deceased's dead body was found lying near his kraal.

Subsequently, the three accused persons were jointly charged with the murder of the deceased contrary to sections 183 and 184 of the Penal Code. Each of them pleaded not guilty.

The prosecution alleged that the three accused persons, on or about the 4<sup>th</sup> day of August, 1996, at Mugono village, in Itojo sub-county, Mbarara District, murdered one Rwakanigane Festo.

The original indictment contained the names of six accused persons. They were all jointly

charged with the same offence of murdering Rwakanigane Festo. The six included the present three accused and Twesigye Herbert, Mugume Baker and Bataringaya Geoffrey. However, on 5<sup>th</sup> July, 2000, The Director of Public Prosecutions entered a nolle prosequi withdrawing charges against Twesigye Herbert, Mugume Baker and Bataringaya Geoffrey.

### **Prosecution's Case**

In summary, the prosecution's case, based upon the evidence adduced by the prosecution and accepted by this court, is as below:

The deceased lived in Mugono village, Itojo, in Mbarara District. He was aged about 53 at the time of his death. He was the biological father of A1 and A2 and both accused lived with the deceased more or less in the same homestead.

The deceased was not a man of little means. He owned several heads of cattle. He also had a large and well-attended banana plantation.

When, in 1996, about three months before his demise, the deceased married a second wife, relations in the home became sour. The elder wife who was the mother of A1 and A2 left the home.

A3 had no relation with the deceased. He was an LDU who hired a single room as his residence at Nyamukana trading centre. He used to guard Nyamukana trading centre and used to carry a gun whenever he would be on duty.

On 31<sup>st</sup> July, 1996, one Twesigye presented to A3 a proposal allegedly made by A1 offering Shs. 600,000 for the killing of A1's father. On 1<sup>st</sup> August, 1996, at Nyeihanga, along Mbarara/Kabale Road, Twesigye and A1 met A3 and a fellow LDU called Baker Mugume. The terms of the contract were further discussed.

The final meeting to conclude the contract was held on Saturday, 3<sup>rd</sup> August, 1996. The contractual sum was confirmed to be Shs. 600,000. The day for the performance of the contract was also fixed to be Sunday 4<sup>th</sup> August, 1996.

On Sunday 4<sup>th</sup> August, 1996, A3, who was on duty, withdrew from it. Accompanied by Mugume Baker and armed with a rifle, A3 proceeded to the home of Al at about 8.30 p.m.

After final briefings, at Al's house, Al sent his young brother A2 to the house of the deceased to call him outside. The deceased was already in bed. A2 deceived the deceased that his cattle had broken the kraal and strayed into the gardens. In the meantime, Al, A3 and Mugume Baker had taken up a position among the banana plants. The deceased had moved 58 paces from his house and was about 34 paces to the kraal when he was struck by a single bullet on the right side of the lumber posterior. He died instantly.

PW6, Dr. Kworora, then at Itojo Hospital, examined the body of a well-nourished African male of about 53 years of age. It was identified to him as that of Rwakanigane Festo by PW 1, Kweyamba Godfrey, a brother to the deceased.

PW6, found a penetrating wound on the right lumber posterior, measuring 2 1/2 inches in diameter. A corresponding penetrating wound measuring 5 inches in diameter was on the right-based regional of the chest. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> ribs had been shattered and the right lung and the liver had been injured. The cause of death was stated to be hemorrhage following the injuries to the lung and liver. The post mortem report made by Dr. Kworora is marked as Exhibit P6.

On 5<sup>th</sup> August, 1996, PW2 and PW3 — No.28276 and No. 13567 Dt. Cpl. Tukwasibwe Robert and Dt. Sgt. Turyagumisiriza David, visited the scene of crime. PW3 drew up a sketch plan, Exhibit P3. They arrested Al at the scene of crime.

On the August, 1996, both witnesses travelled to Nyamukana trading centre where they found A3 already arrested by the LCS. A3 revealed to the two witnesses that he had shot the deceased and that he was with Al and two others. A3 led PW2 and PW3 to a single room house which he rented at Nyamukama trading centre as his residence. He showed an SMG rifle, AK47, No. 56.128031839, with its magazine containing 9 rounds of ammunition, which he told the two witnesses that he had used to shoot the deceased. They recovered both the gun and magazine of ammunitions and handed them over to PW7, Dt. Constable Nyanzi Rashid at

Mbarara Police Station. The rifle is Exhibit P.1 while the magazine with 9 rounds of ammunition is marked as Exhibit P2, on the record.

On 12<sup>th</sup> August, 1996, A3 recorded a charge and caution statement before PW5, Dt. AIP Kwezi Josua. The exhibit is marked as Exhibit P5. A3 narrated, in details, the circumstances leading to the death of the deceased. He admitted his personal participation and implicated both his co-accused's in varying degrees.

Similarly, on the same day, A2 recorded a similar statement before the same police officer. His statement is marked as Exhibit P7. In that statement A2, to some degree, exculpated himself, but he fully implicated both co-accused.

On the other hand, in his charge and caution statement, Exhibit P4, made before PW4 Dt. IP Barutagira, on 8th August, 1996; A1 totally denied the offence.

During the course of the trial both A2 and A3 repudiated and retracted their respective statements. However, each statement was subsequently proved against the respective accused during a trial within a trial. The two statements are marked as Exhibits P7 and P8, respectively.

### **Defence**

The defence comprised of a statement by each accused, made upon oath.

A1 presented a total denial of the offence. He confirmed that the deceased died on 4th August, 1996. He stated that he was spending most of the days at Bubare where he operated a shop and a coffee buying business. However, he admitted that during the three days preceding the death of his father he had been at his home at Mugono. He spent the entire day of 4th August, 1996, at his home. While he was sleeping, during the night, he heard a thundering sound. He thought it was going to rain. But after some ten minutes, he heard an alarm which was coming from the direction of his father's house.

A1 went to his father's house and was informed by his step mother whose name he did not know that thieves had invaded the home. He reported to the LC 1 chairperson, Kabwekyere Donozio, who, together with the village's defence secretary and A1 reported the case to Itojo

sub-county from where they obtained two armed Local Administration police personnel who accompanied them to the scene. A1 denied that he took part in the killing of his own father.

A2, in his sworn statement, also admitted that the deceased is dead. He however denied any knowledge of how he died. He put up an alibi claiming that he had left his father's home on 25th July, 1996 for a visit to his uncle's home at Rukoni. The uncle was called Kangwamu. A2 claimed that he had remained at Kangwamu's home from 25th July to 10th August, 1996. All that time he had not heard any news of the death of his father. He learned of it on 10th August, 1996, from one Kamunyoha Steven who heard an announcement of the death of the deceased on the radio. A2 immediately set off for home. When he reached Rwenyonyozi, he was arrested by the LCs. who informed him that he was a suspect in the case of the murder of his father. He denied that he took any part in the killing of his father and that he tried to run away afterwards.

A3, again upon oath, agreed that he was working as an LDU before arrest. He also agreed that on Sunday 4<sup>th</sup> August, 1996, he was on duty as an LDU at Nyamukana and he continued to work as such until his arrest on 10<sup>th</sup> August, 1996. He stated that he was armed with a rifle on 4<sup>th</sup> August, 1996, while on duty and he continued using the *gun* until his arrest on 10<sup>th</sup> August, 1996. Although he agreed that when he was arrested the gun which he used to use as an LDU was at his work post at Nyamukana trading centre, he denied that he showed any gun to PW2 and PW3 nor did he admit to anyone that he knew the gun which had been used to shoot the deceased. He stated that he used to sign for the gun on a daily basis from one Kamugisha Stephen who was in charge of the LDU in the parish. When he signed for the gun which he had on 9<sup>th</sup> August, 1996, it had 9 rounds of ammunition in it. So much for the case of each side to this trial.

### **The Law**

It is the position of the law, that, as a general rule in a criminal trial in Uganda the burden of proving the guilt of an accused person rests upon the prosecution throughout the trial and never shifts to the defence. *Woolington vs. DPP (1935) AC 462 and Ssekitoleko vs. Uganda (1967) E. A. 531.* Thus an accused person, during a trial such as this one, bears no duty to prove his or her innocence. For he or she cannot be convicted owing to the weakness or even

absence of his or her defence. A conviction is based upon the strength of the prosecution's case.

In the instant case, like in all trials on a charge for murder, contrary to sections 183 and 184 of the Penal Code, the prosecution had to prove, beyond reasonable doubt:

- a) death of the deceased;
- b) an unlawful act or omission causing the death of the deceased;
- c) malice aforethought; and
- d) participation of each of the accused.

### Analysis

At the commencement of the final submissions by counsel, the defence intimated that they had no intentions of contesting essential ingredients a) b) and c). Counsel for the defence asked the court to treat those three essential ingredients of the offence of murder as proved by the prosecution beyond reasonable doubt. Thus the final submissions of both counsel were restricted to the proof of the participation of each accused.

Perhaps before I analyse the evidence on record in relation to the alleged participation of each accused, it is important for me to state clearly this court's finding on each of the three essential ingredients of the offence of murder which have been conceded by the defence as proved beyond reasonable doubt. It is important to do so because in a criminal trial, and especially in a trial involving a capital offence, a court of law cannot abdicate its responsibility of making a specific finding in respect of every essential ingredient of the offence charged. That remains so, any concession by the defence notwithstanding.

On the death of Rwakanigane Festo, this court is duly satisfied that the evidence of PW1, Kweyamba Godfrey, a brother to the deceased, PW6, Dr. George Kworora and the post mortem report, Exhibit P6, PW9, Kabwekyere Donozio, the LC 1 of Mugono cell and that of DW1 and DW2, both sons of the deceased, prove beyond reasonable doubt that, indeed, the deceased is dead.

On whether the death was the result of an unlawful act, the evidence of PW1, PW6 and PW9 and that of PW2 and PW3, who visited the scene of crime and took the body to Itojo hospital, was that the deceased was shot dead by a gun. Shooting a human being in unauthorized

circumstances and not accidentally, amounts to an unlawful act. See Gusambizi Wesonga vs. R. (1948.) 15 E.ACA.63.

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Regarding the essential ingredient of malice aforethought, the evidence of PW5 as it related to exhibits P5 and P7, reveals a comprehensive plan hatched over a period of time and intended to kill the deceased. Besides, there is overwhelming evidence that the deceased was shot to death with a gun. Once fired, a gun becomes the most deadly weapon so far commonly known in everyday life. An assault with a gun is of a very serious nature because a gun is a very lethal weapon. In the instant case, the accused was shot in a very vulnerable part of the body the chest. See Tubere s/o Ochen vs. R. (1945) 12 E.A. C.A. 63. Even in the absence of the evidence of PW5 and the charge and caution statements of A2 and A3, it appeal-s to me that it would be prudent to infer malice aforethought under the provisions of section 186(b) of the Penal Code to whoever shot the deceased with a gun. He must have intended or at least he *or* she must have known that the act of shooting with a gun would result into the death of the deceased.

In the circumstances, therefore, I find that the prosecution has proved beyond any reasonable doubt that the unlawful act of shooting the deceased with a gun was accompanied by malice aforethought.

I will now move to the more contentious issue of this entire case, that is to say whether the evidence produced by the prosecution proves beyond reasonable doubt that any of the three accused persons participated in the killing of the deceased in order to warrant a conviction on a charge of murder.

In order to establish the guilt of the three accused persons the prosecution relies upon the principle of common intention under section 22 of the Penal Code which provides:

“22 when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

In Solomon Mungai And Others v. Republic (1965) E. A. in which section 21 of the Penal Code of Kenya, which is in pari materia with section 22 of the Penal Code of Uganda was interpreted, it was held that where a common design is proved all those who participated are guilty of the offence charged. And where the charge against more than two accused persons is based on common design, the acquittal of one will not affect the convictions of the others if the evidence establishes that the others shared a common design.

Now, the evidence led by the prosecution against the three accused, in relation to the alleged participation of each one of them consists of that of PW2, PW3, PW5, PW9 and Exhibit P5, the charge and caution statement of A3 and Exhibit P7, the charge and caution statement of A2.

Both exhibits P5 and P7 were repudiated by each accused. They were both proved to be statements made by each respective accused and voluntarily. During the respective trial within a trial, I believed the prosecution's witnesses whom I found to be highly credible witness especially PW5, AIP Kwezi, who recorded both statements and who was a highly impressive witness. He took greatest care to ensure that the recording of the statements fully complied with the Evidence Statements to Police Officers Rules, S.I 43-1

The evidence of A3 in the trial within a trial was unbelievable. It consisted of obvious lies. He stated that when he appeared before AIP Kwezi on 12th August, 1996, to record the charge and caution statement he was very weak having been beaten seriously by those who had arrested him on 10<sup>th</sup> August, 1996. He added that AIP Kwezi gave him papers already written and asked him to sign them.

But then A3 was subjected to a medical examination at Mbarara Hospital on 13th August, 1996. Police Form 24, exhibited P1, in the trial within a trial which was conducted to determine the relevance of his charge and caution statement, shows that he was found without the slightest sign of beating. If he had been beaten on 10th August, 1996, to any degree, as he claimed, he would have borne some signs of that beating on 13<sup>th</sup> August, 1996. Secondly, the statement attributed to A3 was so detailed that it would have been impossible for any person except A3 to frame it against him.

In respect of A2's statement, the only reason which he gave during the trial within a trial for

repudiating it was that AIP Kwezi merely showed him an already written statement and asked him to sign it. He stated that he had spent merely two minutes in AIP Kwezi” office. For the same reason, as in the case of the statement of A3, I found it unbelievable that AIP Kwezi could have invented the detailed story contained in Exhibit P7. It was the story told to AIP Kwezi by A2, and voluntarily.

The statement of A3 amounts to a confession within the meaning of sections 24 and 25 of the Evidence Act. It is a confession because it is sufficient in itself to justify the conviction of the person making it. See: *Anyungu vs. Republic (1968) E.A. 239 and Uganda vs Rev. Fr. Kabishenga And Another (1978) HCB 69.*

On the other hand, Exhibit P7, the statement of A2 does not *in law* amount to a confession because it contains some exculpatory material in relation to A2. He states for instance that lie was “ordered” to go and call the deceased from his house. And that he went to call him ‘under the armed escort of A3.’ Thus the statement does not amount to a confession because lithe exculpatory matters are true they would negative the offence alleged as the maker of the statement would be availing himself the defence of compulsion under section 16 of the Penal Code Act.

In the instant case, both the statements of A2 and A3, Exhibits P5 and P7, are statements of co-accused. In his confession A3 implicates A1 and A2. And in his statement, which, as I stated above does not qualify to be treated as a confession, A2 implicates fully A1 and A3.

It is clear that the statement of A2 cannot be considered against either co-accused under section 28 of the Evidence Act as it does not amount to a confession. It also does not amount to evidence of a co-accused as against both A1 and A3. The reason being that it does not constitute evidence given by A2 upon oath. But even if it were to constitute evidence of a co-accused, it would have to be substantially corroborated. For as general principle, courts of law are always apprehensive of basing a conviction solely upon the evidence of a co-accused. Spry J., as he then was, summed up that apprehension in the following words iii *Issa s/a Ramadhan vs. R (1962) E.A. 686.* “*It is repugnant to all principles of justice to convict a person on the evidence of a co-accused, who in seeking to exculpate herself provided the prosecution with the **only** material evidence against the person convicted.*”

However, in the case of a confession by a co-accused section 28 of the Evidence Act permits a court to consider it as against a co-accused tried jointly for the same offence. However, the evidential weight to be attached to such a confession was stated by the Court of Appeal for Eastern Africa, in Ezera Kyabanamaizi vs. R (1962) E. A. 309. The Court stated:

“At best such statements can only be “taken into consideration” against a co-accused and used only to supplement an otherwise substantial case against an accused person; *Muthige v R. (3) (1954) 21 E.A C A 267*. They can never be the basis for a conviction, as on a proper direction, accomplice evidence can. Further, a confession cannot be considered at all against a co-accused unless there has been a full admission of guilt in statement.”

Elsewhere, specifically at page 315, their Lordships quote, with approval, from SARKAR ON EVIDENCE 910<sup>th</sup> Edn) at Page 295:

“It appears that the real test is not whether the confessing accused ascribes to himself a major or minor part in the crime, but whether when implicating his co-accused he gives a full and true account of the crime and unreservedly confesses his own share of the guilt, i.e., implicates himself as fully and substantially as his co-accused. It may be that the part assigned to him was not a leading or major one, but in any case there must be a confession to the fullest extent of whatever part he took in the commission of the crime. It is in this sense that the confession must “affect them both equally “It is only a statement of this kind that can be said to implicate the confessing accused “substantially to the same extent” as it implicates the others. When there is no full and complete confession of his own guilt and the part taken by him in the crime, but an embroidered story spun out with the object of clearing himself or reducing his own guilt at the expense of others, it is nothing but an explanation of an exculpatory nature or a self-serving statement”

And lastly, I must note that even though there is no rule of law requiring corroboration of retracted statements made by accused persons, it is “a salutary rule of practice to seek such corroboration and for a court to direct itself and the assessors to that effect.” Girisomu Bakaye And Another vs Uganda (1965) E. A. 621. In the instant case I did so direct the assessors and I do so to myself in respect to Exhibits P5 and P7.

With the relevant principles which I have set out above, I will now determine the alleged participation of each of the three accused persons in the instant case. I will start with A3.

In respect of A3, the prosecution produced the evidence of PW2 and PW3, who re-arrested A3 at Nyamukana trading centre. A3 admitted to them that he had participated in the killing of the deceased. When they asked him where the gun he had used to kill the deceased was, he led the two witnesses to a room which he rented at Nyamukana trading centre and showed them an SMG rifle AK 47 No. 56-12803 1839, Exhibit P1. The gun had 9 rounds of ammunition, Exhibit P2.

If the investigations in this case had been more serious, the police would have been in position to obtain more evidence linking the death of the deceased to Exhibits P1 and P2, such as obtaining a ballistic expert's report whether the gun was capable of firing bullets or not and whether the 9 rounds of ammunition were live ammunition capable of being fired by Exhibit P1, and also whether or not the bullet which killed the deceased was fired from Exhibit P1. This is more so in light of the evidence by PW2 that a cartridge had been recovered by the police at the scene of crime.

But be that as it may, I do not have any doubts at all that A3 told the two witnesses that Exhibit P1 was the weapon used by him to shoot the deceased. The two witnesses in my view were truthful in their testimony. Their evidence is corroborated by that of PW5 when A3 told him in Exhibit P5 that "I told the officers the truth about the occurrence and I revealed whoever was involved in the offence."

The second piece of evidence produced by the prosecution against A3 is the statement of A2, Exhibit P7, its overall evidential value against its maker as I have already stated above, is that the statement does not constitute a confession by A2. The relevant part in relation to A2's co-accused reads:

"Twesigye the son of Ngingo is the one who used to ride Yubu on his bicycle to the LDU, Kavigi, before my father was killed. He was in between the whole arrangement. That very 4/8/96 around 23 hours when I was asleep at home, Yubu, Twesigye came with Kavigi who was armed with a firearm. They woke me up. They went and opened the kraal and the cows went out. Yubu, my elder brother ordered me to go and call my father, Rwakanigane, who

was already asleep went under escort of an armed Kavigi and reached the courtyard where I called my father. He responded and did wake up because I had told him that the cows were escaping from the kraal. As he came out, I went together with him and Kavigi. As we reached the banana plantation, where Twesigye and Yubu had remained, the said Kavigi shot my father, Rwakinigane Festo, to death with the firearm he had. After that incident Twesigye and Yubu ordered me to escort Kavigi. Then I ran away.....  
I then went to the home of Twesigye who kept me hidden under his bed where he was feeding me from up to Friday 9/8/96. Around 0800 hrs Twesigye sent me away via Batungura's home for GT tickets as he would pay his own money — that I should look for my own destination and not reveal anything about the incident. I went via Butungura's home for GT tickets which he refused to give me. I went through the bush to Kiyora where I was arrested by LCS around 1800 hrs. on Saturday 10/8/96.”

Although the statement of A2 appears to implicate A3, but in view of the principles which I have set out above, it cannot be considered against A3. In the first place it does not constitute accomplice evidence given by A2 upon oath. Secondly, it does not qualify as a confession of A2 because in it A2 does not admit all the essential ingredients of the offence of murder for his statement to be considered against a co-accused under section 28 of the Evidence Act. Accordingly the statement of A2 has no evidential value in respect of A3.

The third piece of evidence implicating A3 is his own confession, Exhibit P5. The confession is totally unequivocal in relation to its maker. I have assessed it as largely being true and after reading it several times, I have no doubt whatever that A3 participated in the commission of this offence. This confession alone is sufficient to constitute a sound basis for A3's conviction of the offence of murder. It is duly corroborated by the evidence of both PW1 and that of PW6 that the deceased was shot with a single bullet. It also supplements an already substantial case made out against A3 by the evidence of PW2 and PW3. The more relevant part of the confession of A3 reads as under:

*“On the 29<sup>th</sup> day of July, 1996 Monday, one Twesigye s/o Ngingo came and told me that Yubu the son of now late Rwakamigane Festo had coffee on sale. I went there and bought 2 bags at Shs.60, 000. On Wednesday 31<sup>st</sup> day of July 1996 Twesigye came again and found me at home alone and told me that he had a deal of cash shillings six hundred thousand (600,000) of killing a person in Mugono village. He did not disclose the name of person in Mugono village. He did not disclose the person to be killed. Twesigye said that the owner of*

the deal was Yubu who wanted his father to be killed. I declined to wards that deal. On 1<sup>st</sup> day of August, 1996 Twesigye came with Youbu and found me with Baker Mugume at Nyakihanga on the main road Mbarara to Kabale. We bargained again to be paid 1,000,000/= as Yubu insisted to pay US. Shs. 600,000. I suggested to Baker Mugume s/o Bakamukwasa that we arrest the two Yubu and Twesigye then Mugume insisted that we cannot arrest people who have brought us a deal of all that money the Shs. 600,000. Mugume asked whether Yubu and Twesigye had the cash then they promised to pay it late, towards the scene. Mugume then told me to be confident that we do it (meaning that we go and kill,). I resisted to that act a bit, On Saturday 3<sup>rd</sup> August, 1996 the two Yubu and Twesigye came back and talked to Tugume Baker to confirm when to kill the father of Yubu. Mugume confirmed to then Sunday the 4<sup>th</sup> August, 1996. By that day I was not around till Sunday 4/8/96 at around 1500 hrs when I was on duty with Baryagwisa, Junior Twijukye, Kasim and Posi at Mizi village. Three men I know by appearance came and told me that Mugume Baker wanted me urgently at Nyamukama village. I with drew from duty and met Baker at around 1700 hrs. He gave me the whole plan of setting off to Mugono village at 2100hrs. I resisted to go before I got the money promised. As Baker, Mugume comforted me that we were to get money at the scene and he was the one supposed to patrol the trading center Nyamukana, I accepted to go with him at the agreed time of 2100 hrs. of 4/8/96. At around 2000 hrs I went with Mugume Baker, from Nyamukana up to Nyaruteme where we met Twesigye and Yubu. We then all proceeded up to Mugono village in Youbu's house. I asked for the money and they confused mite. Baker kept on telling me to be patient.

At that time Yubu arranged how we were to get his father. He sent his young brother whom I know by appearance but not by ii allies, to call his father. I proceeded to the banana plantation with lily gun in company of Twesigye, Mugume Yubu and we hid ourselves where the called father was supposed to pass. The young brother of Yubu called his father. The father came out of his house and moved towards where we were hidden. As he approached where we were Yubu alerted us that lie is that one coining. Mugume Baker then removed au SMG firearm from me and he shot at the father of Yubu one bullet. I heard and saw him fall down as I ran away leaving the rest behind I met Baker asking him whether he had got the money we worked for. He told me that Twesigye was to bring the money later I did not get the money till I got arrested on Saturday 10<sup>th</sup> August, 1996. I told the officers the truth about the occurrence and I revealed whoever was involved in the offence.”

The defence of total denial of this offence which A3 has presented can, therefore not stand in light of the cogent evidence produced by the prosecution against him. I dismiss it as a desperate attempt to extricate oneself from a very tight situation in which he so willingly threw himself.

As for A2, the prosecution has produced three pieces of evidence implicating him in the commission of this offence.

The first is the confession of A3. That piece of evidence merely implicates A2 to the extent he called the deceased from his house. It falls short of showing that A2 was privy to the design of killing the deceased. That is to say that A2 had full knowledge of what was going to happen to his father after he called him outside or that A2 duly shared the common intention to kill the deceased.

The second piece of evidence is the statement of A1 which is Exhibit P4 on the record. Its evidential value against A2 is nil. It does not contain evidence of a co-accused given by him on oath against A2. Similarly, the statement does not qualify as a confession of A1 so as to be considered against A2 as a co-accused, being tried together with A1. This statement is not helpful to the prosecution's case.

The last piece of evidence against A2 is his own charge and caution statement, Exhibit P7, in which he minimally implicates himself. But as I stated above A2 does so exculpatorily. For that reason, the statement of A2 does not amount to a confession. A2 states that he was ordered by his elder brother, A1, to go and call out his father. He also says that he did so under the armed escort of A3. This evidence has not been negated, by the prosecution, just as the doubt whether or not A2 shared the common intention of killing the deceased with A1 and A3 has not.

Counsel for the prosecution asked this court to note that A2 never disassociated himself from the design at any one time. I have already stated that it was not clear whether or not A2 was associated with the design. His unusual conduct of running away from the scene of crime and hiding for five days following the incident cannot in itself alone render him to be regarded as a party to the design. Naturally, A2 must have been shocked by the circumstances under which he witnessed his father die in such a violent manner.. His hiding for five days under the bed of Twesigye could have arisen out of mere fear than out of guilt. Of course, in light of his own statement and the evidence of PW9 who saw him grazing his father's cattle three days

before his father's death, it is quite clear that A2's alibi is false. It is nothing but a pack of lies. But such lies cannot be used to bolster a weak prosecution's case like the one against A2. Mabingo vs. Uganda (1965) E. A.71

On the other hand, A2 cannot even be appropriately taken to have been an abettor of the commission of this offence as his action has not been established to have been voluntarily done even though he originally was not privy to the common design. Uganda vs. Mugayi Godfrey & Another (1994) I KALR 76.

Owing to the reasons which I have set out above, I have to agree fully with the opinion of both assessors that the participation of A2, in the commission of the offence, has not been proved, by the prosecution, beyond reasonable doubt.

With regard to A1, the evidence brought against him consists of the statements of A2 and A3. Both statements fully, prima facie implicates A1 in the commission of the offence in question.

However, the statement of A2 cannot be considered against A1. This is for the same reasons which I have already given above in respect of A3. The statement does not qualify either as evidence of a co-accused given on oath or as a confession of A2 which would be considered against A1 as a co-accused. It has, therefore, no evidential value as against A1.

On the other hand, the statement of A3, qualifies as a confession and which implicates A1 at the same or even higher level than A3 himself, and could appropriately be considered against A1 under section 28 of the Evidence Act. However, and I believe, because of the casual nature in which the investigations in this case were carried out, there exists no "already substantial case" against A1 which the confession of his co-accused would supplement as was stated by the Court of Appeal for Eastern Africa in Ezera Kyabanamaize's case (supra). The confession of A3 alone cannot constitute the basis for a conviction of A1. In the circumstances, therefore, I have, similarly, to agree with the opinions of the two assessors, though for a completely different reason from theirs, that the participation of A1 as well has not been proved beyond reasonable doubt.

In the final result, therefore, I find that the evidence brought by the prosecution against A1 and A2, is inadequate to prove their guilty of the offence of murder. I acquit each of them of the offence. On the other hand, I find that the prosecution has proved beyond reasonable doubt that A3 participated in the killing of Rwakaniagane Festo on 4th August, 1996. The lady and gentleman assessors both doubted that the participation of A3 had been proved beyond reasonable doubt owing to inability to properly assess the evidential value of A3's confession. I convict A3 of the offence of murder contrary to sections 183 and 184 of the Penal Code Act.

**V. F. Musoke-Kibuuka**

**Judge**

**8/06/2001**

Sentence To A3

Court:

There is only one punishment provided by law for any person convicted of the offence of murder. I, therefore, sentence you to suffer death in a manner provided by law.

Court: Right of Appeal explained to A3.

**V. F. Musoke-Kibuuka**

**Judge**

**8/06/2001**