

Hon. Lady Justice Mary Maitum

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HIGH COURT CRIMINAL SESSION CASE NO. 0015/2002

UGANDA.....PROSECUTOR

VERSUS

1. BYAMUKAMA FEDERIKO

2. NDYANABO JAMESACCUSED

3. BARYAHEBWA JOHN

BEFORE: THE HONOURABLE MR. JUSTICE V. T. ZEHURUWIZE

JUDGEMENT

Ryamukama Federiko, Ndyanabo James and Baryahabwe John are jointly indicted with Murder Contrary to Sections 133 and 134 of the Penal Code Act. It is alleged that the accused persons and others still at large on or about 14/3/2001 at Oburama village, Bwizi Sub-County, in Kamwenge District murdered Rwanzama George. The accused having denied the charge the case went on full hearing.

The Prosecution called 7 witnesses and briefly their case is as follows. Bidobozi Stephen (PW2) is the son of the deceased. He testified to the effect that around 10.00p.m. during the night of 14/3/2001 he went out to see why the dogs were barking. He went back into the house as he failed to find out why they were barking. His father, the deceased, decided to go out and find out himself. This witness and others heard their father crying out and came back being chased by some people. When he was about to enter the house he was whisked away by the attackers. Then he (PW2) flashed the torch he had and tried to follow the attackers as they led away his father. He was able to see the accused and other people. He gave up when his father said that they need not follow him because he was already finished and advised them not to stay around.

The whole family fled and when they came back in the morning they found the dead body on the lower side of the homestead. A pang and Rugabire (tyre sandals) were recovered. He made a statement to Police in which he implicated the accused and other people.

Rwabutontori Godfrey (PW3) is also a son of the deceased who was also

at home in the night of 14/3/2001. He gives almost similar account as PW2 and claimed to have seen the attackers with the aid of the torch which PW2 had. He tried to follow the direction where the attackers had led his father but gave up when he heard a bang and the deceased said that they should go back because he was already finished. They made an alarm but no body came. He then went and hid among the cows from where he saw the attackers passing by after they had killed his father. When he saw the attackers checking in their house he knew there was more trouble so he moved from the cows and hid in the bush till morning. Later he told his uncle one Rwabuganda (PW5) and the police as who the attackers were.

Kellen Katefunga (PW4) is the widow of the deceased who was also present at the time of the attack. She said she saw her husband being pulled away as their lamp was still on. When the deceased was taken she knew there was trouble. She went into hiding with the children and left PW2 and PW3 behind. She came back the following day only to find her husband dead. She was able to see A1 among the attackers.

Like PW2 and PW3, the witness said that the deceased had a land case with Rwendeire the father of A1 and at this time he was in prison together with one Nakebwa for a criminal case arising from the land case. Rwabuganda (PW5) is the brother of the deceased. On 15/3/2001 he received a report from PW3 that his brother was killed. He told him that they had recognised A1, Mugisha, Kasina, A2 and A3. He is the one who identified the body of the deceased to the Doctor Twehaze Frederick (PW1) who carried out the post mortem examination. He found the body blood stained with multiple cut and stab wounds. The cause of death was hypovolaemic shock (this means he lost a lot of blood). The report was received and marked exhibit P.I.

No. 25711 CPL. Kyokwijuka (PW6) is a Policeman who visited the scene. He re-arrested the accused who had been arrested by a homeguard. PW7 is Katabazi kahwera Gabriel, Chairman L.C.I of the area. On receiving the report on 15/3/2001 at around 9.00a.m. went to the scene of Murder. He testified that PW2 told him that A1 was among the attackers but never mentioned the names of A2 and A3 although A2 was with the Chairman.

A3 never came to the scene at the deceased's home. Later in the day the family of the deceased almost killed A1 whereupon PW7 caused a letter to be written forwarding A1 to L.C.II. The letter is on record as exhibit P.5.

In his defence A1 stated that he learnt of the death of Rwanzana on 15/3/2001 at around 10.00a.m. and he went to the deceased's home where he found PW7, the Chairman and A2 and other people and they told him that they had not got any information regarding the identity of the attackers. At around 5p.m. the family of the deceased called PW7 aside and discussed things. thereafter he was tied up on the ground that since his father had a case with the father of the deceased, then he was the one who had killed Rwanzana. The Chairman who had left the scene was called back and stopped people from beating him and he was forwarded to the parish and to Police.

A2 testified that he spent the night of 14/3/2001 at his home. At around 9.00a.m. of 15/3/2001 while he was in his gardens working, PW7 the Chairman called him and told him that Rwanzana had been killed. He stopped working and went with the Chairman and Secretary General L.C.I to the deceased's home. He was arrested on 16/3/2001 on suspicion that he was one of the people that killed the deceased.

In cross-examination by Asimwe, the State Attorney, he said when he talked to the family of the deceased they told him that no body had been identified and that the Chairman (PW7) was lying when he said A1 was mentioned as one of the attackers with Muguta and Julius.

A3 testified that on 14/3/2001 he was at home the whole night. On 15/3/2001 at 2.p.m. he learnt from his wife that Rwanzana was dead. At around 5.00p.m. when he was on the way to the deceased's home he met people who told him that his brother in law, A1, had been arrested, he feared and he went back home. He was arrested the following day. In cross-examination by the learned State Attorney he explained that he feared because people were saying that the relatives of people who were in custody were suspected to be the killers. His father in law was in prison and that is why he feared.

The burden of proving the guilt of the accused person rests on the

Prosecution throughout the trial and never shifts to the Defence: Woolington V. D.P.P. 1935 AC 462 and Ssekitoole V. Uganda 1967 EA 531. Thus an accused person, during a trial as this one, bears no duty to prove his or her innocence. He or she cannot be convicted owing to the weakness or even absence of his or her defence. A conviction is based on the strength of the Prosecution case. The accused's guilt has to be proved beyond any reasonable doubt.

In this case of Murder the Prosecution has to prove the following ingredients of the offence if a conviction is to be secured.

1. Death of the deceased.
2. Unlawful act or omission causing the death of the deceased.
3. Malice aforethought.
4. Participation of the accused.

On the death of Rwanzana George, the evidence of all the Prosecution witnesses clearly proves that he is dead. Even the accused in their defence do not contest this fact. They admit that Rwanzana was killed. The post mortem report confirms the obvious. I am satisfied that the first ingredient of the offence as tabulated above has been proved beyond reasonable doubt.

As to whether the death was the result of an unlawful act once again the evidence of all the witnesses proves that fact. PW2, PW3 and PW4 vividly narrated how the deceased met his death. The Post Mortem by PW1 discloses that he died of loss of blood from the cut and stab wounds. The death was neither accidental nor authorised by law. It was by unlawful act -

See Gusambizi S/O Wesonga V. R. (1943) 15 EACA 65.

On the issue of malice aforethought Court has to consider the surrounding circumstances to determine whether the evidence on record established this essential ingredient. In this regard the Court will consider the nature of injuries, the weapon used, the part of the body on which it is used and sometimes the conduct of the accused person before or after the commission of the offence. See Tubere S/O Ochen V. R. (1945) 12 EACA 63. The evidence of the Prosecution witness especially PW2, PW3 and PW4 does disclose that the attackers were bent on taking the life of the deceased. This is fortified by the evidence of PW1 who found a stab wound on the right lateral aspect of

the neck. The wound was extending into the media stinum (part of the chest cavity where you find the heart and it is where the oesophagus, the gullet and the trachea pass to the stomach and lungs). There was stab wound in the left scapula area and the front part of the chest and two cut wounds on the left shoulder.

There were serious wounds on the vulnerable parts of the body. I am satisfied that who ever inflicted these wounds intended to cause death or had knowledge that these acts would probably cause death. I find that this ingredient of the offence has also been proved beyond reasonable doubt.

The only issue for contention is whether it is the accused persons who killed the deceased. The prosecution presented the evidence of PW2, PW3 and PW4 in order to prove this essential ingredient of the offence.

PW2 testified to the effect that at around 10.00p.m. he went out to find out why the dogs were barking, but could not establish the cause. As he came back to the house his father the deceased decided to go out. This witness, PW3 and PW4 kept in the house watching. Then they heard the deceased crying out and came running to the house. This witness and PW3 went out with a torch. He saw his father being followed by somebody. When his father tried to enter the house, the one following him pushed his father off and drove him down the compound. PW2 flashed at the attacker and saw that it was A1. He saw other people in the compound namely Kashijwa alias Ndyanaabo (A2) and Aaryayebwa (A3). He also saw one Kansime, Mugisha and Justus. He saw them by flashing the torch at the group. He followed them as they drove away the deceased until he heard him saying that he was already finished and that they (the family) should not stay around. All this time he was with PW3. Then they went into hiding. The following day when he came back to the scene he saw Rugabire (tyre sandals) which belonged to the said Justus. When he made statement to police he claims to have mentioned the three accused persons as those among the attackers.

In cross-examination, by Mr. Nyamutale Counsel for the accused, the witness insisted that he saw all the accused, Kansime and Mugisha because he had a torch he flashed at the group. He knew all the accused before as

villagemates. In re-examination by Mr. Asimwe, the State Attorney, PW2 said that on the following morning i.e. 15/3/2001 he told his uncle PW5, that A1 was one of the attackers.

PW3 more or less repeated what PW2 had told Court. He testified that he saw the attackers because of the torch light which PW2 had. He saw A1, Mugisha and Kansime as they pulled away his father. Then he saw A2. He also followed the attackers until he heard a bang and his father told them to go back because he was already finished. As they ran back PW3 hid amongst the cows in the Kraal. Again he was able to see all the accused persons and Julius and Kansime. When these people entered their house he sensed danger. He moved from the Kraal and hid himself in the bush. The following morning he told his uncle PW5 that the accused were among the attackers. His uncle went to report to Police. PW3 mentioned the accused as among the attackers when he made statement to Police. He also knew all the attackers as they were villagemates.

PW4 on hearing the commotion came to the sitting room and was able to see A1 by means of a tadoba which was in the sitting room. She saw him pulling away the deceased.

On the other hand all the accused in their defence said that during the night of 14/3/2001 they were in their respective homes and they know of the incident the following day. They reason that they are merely suspected because the father of A1, one Rwendeire had a land dispute with the father of the deceased called Ka'aloga. This resulted in an assault case which led the said Rwendeire and one Sakabwa to be put in prison and they were still in prison at the time of the Murder of Bwanzara. It appears the family of A1 and A2 are very close, while A3 is brother in law of A1. The said land dispute, the fact that the father of A1 and another were at the material time in prison and the relationships of the accused persons are not disputed.

The evidence of the above three prosecution witnesses is based on the identification of the accused persons. The law is that there is need for case even where there are two or more witnesses so long as the evidence relied on is of identification. The judge should warn himself and the

assessors of the special need for caution before convicting accused in reliance on the correct identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances the identification came to be made, particularly the length of time, the distance, the light, the familiarity of the witnesses with the accused. See Abudala Nabule & others V. Uganda 1979 HCB 77 and Uganda V. George William Simbwa Cr. Appeal No. 37/95 (S.C. unreported).

I did warn the assessor and do also warn myself of the danger involved in circumstances like the present one where the attack took place at 10.00p.m. at night. In the instant case all the identifying witnesses were awake as a result of barking by the two dogs. PW2 had a torch which enabled him and his brother PW3 to see who the attackers were. When the deceased cried out on seeing the attackers and tried to flee from them back into the house the two witnesses got alerted and tried to come out to see what was happening and at the same time PW4 came from the bed room into the sitting room. There was a tadoba in the sitting room.

Their house did not have a door as it is said it had always to be open so that they could easily see the cows. When the deceased was pulled away as he was trying to enter the house PW4 was able to see only A1 by means of a tadoba in the sitting room whose light reached the entrance. PW2 and PW3 were able to see the person who pulled away the deceased, as he was about to enter the house, as A1, by means of light from a torch in possession of PW2. PW2 and PW3 followed the attackers for some distances as the attackers led away their father until he told them to give up. They were flashing the torch against the attackers. PW3 testified that he hid himself among the cows and could see the attackers as they went to their house, after killing the deceased. He said he was able to identify the accused persons and others as there was some moonlight.

The operation appears to have taken a bit of time right from the deceased was driven away, killed and up to the time the attackers came back to the

deceased's house only to find all other members of the family had fled into hiding. The distance between the attackers and PW2 and PW3 who were following them could not have been too long since all were in the same compound. They only gave up when the deceased told them that he was finished and that they should just leave the place.

All the identifying witnesses knew the accused persons before as they were villagemates, I do find that all the above factors favoured correct identification. All the identifying witnesses were consistent as to the attackers whom they identified. PW4 genuinely identified A1 and she never claimed to have seen any other person as she never tried to follow the attackers. PW2 and PW3 were consistent in their identity of the attackers. They also informed the police of the same leading to the arrest of the accused and others who were later released for reasons best known to the police investigators.

According to the evidence of PW7 who went to the scene at 9.00a.m., PW2 told him that A1 was among the attackers. PW7 had come with A2 but he said that PW2 never mentioned the name of A2. I do believe that PW2 feared or lacked courage to confront A2 as one of the attackers. He was the Secretary to the Chairman (PW7) thus both members of the executive of L.C.I of the area. He could easily have jeopardised the case - PW2 was in any case already traumatised by the events of the previous night. It needed more courage to pin such a man in the company of his Chairman. I believe PW2 for the time being thought it prudent to mention A1, although also a member of the L.C.I executive, since he was not in the immediate presence of the Chairman. A2 in cross-examination denied PW2 and PW3 ever telling PW7 that they had seen A1 as one of the attackers. He went on to say that the Chairman lied when he said that Kadotozi (PW2) and Rwabutantorori (PW3) mentioned A1, Julius and Mugishu as among the attackers. I do not see why the Chairman (PW7) should have told lies to court as to what the members of the deceased's family told him. I do believe that it is A2 who lied to Court.

A1 told lies to court when he said that at around 5.p.m. the family of the deceased called the Chairman aside and discussed things and thereafter

PW5 tied his hands alleging that he was the one who had killed the deceased. He goes ahead to say that when they tied him to a tree the Chairman had gone. This was to give the impression that the Chairman left him at the mercy of the family of the deceased.

I do believe PW7 when told court that at around 4.00p.m. he saw people running saying that another person was to be killed near the body of the deceased and when he went back to the scene he found it was A1 who had been tied to a tree and was being beaten. He rescued him and forwarded him to L.C.II with an accompanying letter (exhibit E.5).

I have also considered the defence by A3. He said he knew of the incident at 2.00p.m. through his wife and he tried to go to the scene but changed his mind because he learnt that since A1 had been arrested he would also be arrested because all relatives of those in person were being suspected. It should be noted that it was only A1 who was arrested on 15/3/2001 and no other relative of those in person i.e. Rwendeire and Akabwa had been arrested. I believe the arrest of A1 alerted him that the attackers had been identified. He rightly feared.

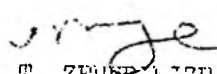
According to the evidence of all the accused persons they say that they are merely suspected because the father of A1 and another were in prison on account of the case between the father of the deceased and father of A1. The accused persons and particularly A2 came out with the story that the deceased using Game Rangers had burnt some homes of people who had settled at a place called Kwebishahi. I believe this was intended to create the possibility of other people having committed the crime. If such enmity existed the family of the deceased would have been aware and if it were a matter of picking on suspected enemies as the attackers they would as well have picked on them.

As already stated all accused persons said they were in their homes, the whole night of 14/3/2001. Thus a defence of alibi was raised. It is trite law that by setting up an alibi, an accused person does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case. It is still the duty of the prosecution to disprove it and place the accused persons at the scene of the crime - See Ntalo V. Uganda

1968 EA 365, Ssekitooleko V. Uganda 1967 EA 531.

Herein above I have already considered the evidence as a whole regarding the participation of the accused persons. They were honest and their evidence was not based on mere suspicion. Their evidence placed the accused person, at the scene of the crime, I am in agreement with the gentleman assessor that there was no mistaken identity.

Consequently I find all the accused persons guilty of Murder Contrary to Sections 183 and 184 of the Penal Code Act and I convict them accordingly.


Sgd. (V. T. ZEHURHIZE)

JUDGE

14/1/2002.

14/1/2003: All accused persons in Court.

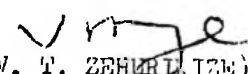
Mr. Nyarutale for the accused.

Mr. Asimwe for the State.

Kahigi - assessor in Court.

Kihumuro - interpreting.

Court: Judgement delivered in open Court in the presence of the accused and both Counsel.

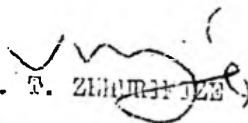

Sgd. (V. T. ZEHURHIZE)

JUDGE

14/1/2003.

Court: Sentence

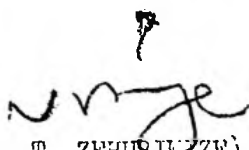
Upon conviction of Murder there is only the mandatory death sentence. Therefore I sentence you Byarukana Federiko, Ndyamako James and Baryahobwa John and all of you shall suffer death in the manner authorised by law.


Sgd. (V. T. ZEHURHIZE)

JUDGE

14/1/2003.

Court: Right of Appeal explained.


Sgd. (V. T. ZEHURILYZE)

JUDGE

14/1/2003.