

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CASE NO: HCT-03-CR-SC-135 OF 2003

UGANDA ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

No. 22386 CPL OKELLO & 3 OTHERS } ::::::::::: ACCUSED

BEFORE: HON. MR JUSTICE D.K. WANGUTUSI

JUDGMENT:-

The 16th December 2000 began like any other working day for the personnel of the Mobile Patrol Unit Jinja.

The three accused CPL Okello Lawrence, Police Constable Mujuni Denis and Aryenyo Max with others left for their patrol duties in motor vehicle UP0041 at 8.00a.m. They patrolled up-to

Kamuli. On their way back, they intercepted motor vehicle UAB 787 T which according to the accused had been communicated to them by the control officer Jinja Police to have armed robbers.

The accused intercepted it and the resultant shooting left three of the occupants of UAB 787 T dead.

The police rejecting the plea of self-defence charged the accused with murder.

Briefly the prosecution case is that the accused persons with no apparent reason chased the deceased's motor vehicle and intercepted it. The accused then ordered the deceased out, told them to lie down and shot them in cold blood.

The accused on their part admitted chasing, intercepting and shooting the deceased. They however said they had received communication from control room Jinja Police to intercept the deceased's motor vehicle since it was suspected to be carrying

robbers. That when they intercepted it, the occupants of the said motor vehicle opened gun fire in a bid to resist arrest. That they (accused_ also fired back in self-defence leading to the death of the deceased.

Its trite law that the prosecution carries the burden to prove the case against the accused beyond reasonable doubt as the accused can only be convicted on the strength of the prosecution case. **Wamongo & Others Vs Uganda [1976] HCB 74.** It follows that since there are two versions of the events, it's the duty of the prosecution not only to prove its version but also to disprove that of the defence "by truthful and consistent evidence, in order to remove any reasonable doubt in the case" **Martin Kakuba Vs Uganda [1976] HCB 310.**

The ingredients that the prosecution must prove in this murder charge were set out very clearly in the case of **Uganda Vs Kassim Obura & Another [1981] HCB 9** as the following:-

- (a) That the persons said to be deceased are death.
- (b) That this death was unlawfully caused.
- (c) That the accused caused the death of the deceased.
- (d) That this death was with malice aforethought.

To begin with death, the prosecution alleged that on 16th December 2000 motor vehicle UAB 787 T was intercepted and all the occupants save for one were shot dead. The dead were Walube John, Walube Ronald and Kamuhanda Charles.

All the prosecution witnesses testified that the three died as a result of shooting.

PW3 Nakenda Verina who was traveling with the three deceased said they were shot in her presence and their dead bodies loaded on a police pick-up. PW4 also said she saw the bodies of the deceased. PW11 who was on his way from Bugembe and came upon the incident testified to the death of the three. The post

mortem reports, which were tendered as agreed facts, indicates that the body of Kamuhanda was examined by Dr Wamala on the 17/12/2000 at 8.30a.m. and found to be dead. Dr Wamala did similar examinations on the bodies of Walube Ronald on the same day at 8.40 a.m. and Walube John at 8.45a.m. and found them dead. The accused persons who also saw the bodies before they were taken to Mulago Hospital, also confirmed to court that Charled Kamuhanda, John Walube and Ronald Walube died. From the foregoing, court finds no difficulty in holding that the three are dead.

On whether the accused participated in the death of the deceased, again PW3, PW4 and PW11 stated that the deceased were shot by policemen. The accused persons in their charge and caution statements exhibit P23 by PC Aryenyo, Exp2 by PC Mujuni Denis and Ex P28 by CPL Okello, confirmed that they were the ones who caused the death of the deceased by shooting. With the charge and caution statements in place

cushioned by the admissions of the accused in court I find nothing against holding, that the deaths of the two Walubes and Charles Kamuhanda were caused by the three accused persons.

I now turn to the question of unlawfulness and whether there was malice aforethought.

It is trite law and clearly set out in **R Vs Gusambizi Wesonga [1948] 15 EACA 63** that every homicide is unlawful unless proved to be accidental, lawfully authorized or excused .

It follows that the presumption of unlawfulness can be rebutted by evidence of accident or that it was permitted in the circumstances. The burden to rebut the presumption is on the accused but on a balance of probabilities. The accused could therefore come up as it did and put up a defence of self-defence. This defence if successful would rebut the presumption of death of the three

deceased having been unlawfully caused. **Ug Vs Okello [1992-93] HCB 68.**

Malice aforethought goes to the intention to kill or the knowledge that one's act or omission would probably result in the death of the deceased. Where there is no direct evidence, malice aforethought would flow from the manner in which the deceased were killed. It would be construed from the type of injuries, the weapon used, the part of the body injured and the conduct of the killer before or after the attacks.

In this case guns were used. These are very lethal weapons, and the bullets were directed in the stomach, chest and head where very delicate and vulnerable organs of the body were encased. The shooting can only be seen as intended to cause death and in this case without an explanation from the accused persons court would be justified in holding that the death of the deceased was with malice aforethought thus hold them liable of murder.

The accused have however in their defence stated that they acted in self-defence.

This defence therefore raised the question on whether the prosecution had proved beyond reasonable doubt firstly that the accused had not acted in self-defence. Secondly if they did so act in self-defence. Whether the force used was not reasonable in the circumstances in safeguarding themselves. Undoubtedly failure to disprove this defence would only result with a verdict of not guilty.

In considering this defence, its necessary to see whether the use of force was justified at all. That is whether the shooting by the accused was called for at the time it happened.

If the foregoing was in the affirmative then court would have to consider whether the force used was excessive or reasonable in the circumstances.

This still also depended on the circumstances prevailing and had to be considered on the basis of the situation or facts as the accused believed them to be even where this belief was a mistaken one and even unreasonable.

If the three accused persons correctly believed that it was necessary to act on self-defence at the time they shot the deceased fully believing that Kamuhanda and Walubes were armed and were going to shot at them, the reasonableness of the force used must be answered on the basis of the facts as these accused persons believed them to be. In other words if there was an attack on the three accused persons and a defence became reasonably necessary, the three accused in defending themselves would not be expected to weigh to a nicety the exact measure

their necessary defensive action. So that if the accused when/if they were attacked did only what they honestly and instinctively thought was necessary, that would in my opinion be evidence that only reasonable defensive action had been taken.

If however there was a danger on the lives of the three accused from the enemy but that at the time they shot the deceased the danger was no longer then due to reasons of surrender or disarmament or even noticeable lack of action from the deceased, then the defence of self-defence collapses and is no longer available to the accused.

This position of passed danger is well illustrated in the case of **R Vs Clegg [1995] 1 All ER 334 by the House of Lords**. Briefly in this case a soldier on patrol observed a car coming for him at speed. It was clear that the occupants wanted him dead. He fired three shots. The motor vehicle passed him with no one hurt. After it had passed he shot a fourth one after it. Their Lordships

held that the conviction would be upheld because the danger had passed when he fired the fourth and fatal shot.

In the instant case, the accused persons have put up self-defence.

The first accused said he led a crew on patrol duties on 16/12/2000 and at 4.00p.m. PC Mugisha who was in the control room communicated to him that motor vehicle UAB 787 T a grey Mark II Saloon was carrying armed robbers and they should intercept it. That when they came across it on Kyabazinga way, they gave chase. He said when the occupants of the Mark II realized they were being chased they stuck on the right of the road. So they were forced to overtake them from the left. That when the bumper of the police motor vehicle had reached the middle of the Mark II, the occupants of the suspect vehicle opened fire and he heard sounds like that of a pistol.

That immediately on hearing this pistol they jumped off. The first accused said further that the patrol vehicle in which he was proceeded 30 yards ahead before they stopped. That he got out he heard a big gun coming from the suspect vehicle. He took cover on the pavement (left side of the road). They then exchanged fire. The accused said he shot there only once. That the man with a big gun was putting on a black jacket and kept on changing position as he fired. According to him, this exchange took five to seven minutes.

The second accused Denis Mujuni told court that he was on patrol duties on the 16/12/2000 together with the other two accused. Between 4.30 and 5.p.m., they received communication that Motor vehicle UAB 787 T was carrying robbers. At Kyabazinga way they spotted the suspect car and they gave chase. The car swerved to the right and so they were forced to overtake it from the left and as they overtook it the occupants of the suspect motor vehicle opened fire. They released two shots. So he jumped off

and took cover. No sooner had they taken cover than more gun fire from opponents erupted. That when he heard a bullet from their side, he believed that the commander had ordered them to shot back.

The third accused PC Aryenyo on his part stated that while on patrol duty on 16/12/2000, their in-charge received information that a motor vehicle No. UAB 787 T was carrying robbers and should be intercepted and occupants arrested.

That they came across the said motor vehicle and gave chase. That as they overtook it from the left side, he heard gunshots of a pistol. That he jumped off the patrol car and took cover. As he took cover, he heard A1 ordering them to fire. That at that time he had not yet heard the SMG. He did not know where the SMG person first fired from. That he after the shooting, he moved with A1 to the suspect motor vehicle and on the pavement, came across a pistol. He picked it. Then Okello came across a woman behind the suspect motor vehicle and led her to the patrol vehicle.

Then Okello communicated. That when reinforcement came, and they were preparing to tow away the suspect motor vehicle, one of them shouted that there was a magazine in the vehicle.

Under cross-examination, he said they had overtaken the motor vehicle by one metre when the pistol was fired.

He said he took cover in a winch with grass a yard tall. He said this bush was on the side of the church.

That as he jumped off from the patrol vehicle he heard bullets from the big gun and he crawled 10 metres into the bush. That he fired from near the car and then moved towards the railway.

That was the scenary as painted by the accused persons.

The prosecution on its part relied mainly on three eyewitness PW3, PW4 and PW11.

PW3 Nakanda Kevina, a sister to the Walube's was in the suspect motor vehicle with the deceased. She said when they reached the railway station the police motor vehicle overtook them. Policemen jumped off their motor vehicle and surrounded the car in which she was traveling. The three deceased got out of the motor vehicle with their hands raised. The police said something and they all lay down on the ground. That all along the deceased cried out that they were Green Summer. Green Summer was the business name.

Then they opened fire upon the deceased. She further told court that a policeman pulled her out of the car and threw her where the deceased were. Then another came and took her to the police pick-up.

PW4 Lovinsa Kakaire said she was from a wedding. She was on her way home from a wedding. She told court that a police motor vehicle overtook them and intercepted the Mark II which was in

front of them. The policemen then told the occupants to get out. That the deceased came out with their arms raised and saying they were from Green Summer. That the policemen then told the deceased to lie down. They did and the police opened fire on them.

Musingwire PW11 said he was from Bugembe and at the railway station, a patrol motor vehicle passed. It overtook a Saloon car. The police directed everyone to get out with hands raised. The men came out and were told to lie down. That the men came out of the car while shouting that they were from Green Summer. They lay down and the policemen shot them.

That for the evidence from both sides, I find it more clear to deal with the whole evidence under each head beginning with the message from the Control Room to the accused persons.

A1, A2 and A3 have all said that they received a message from the Control Room to the effect that motor vehicle UAB 787 T was carrying dangerous robbers and it should be intercepted.

A1 Okello in his evidence said, "It was 4.00p.m. when I received communication from Control Room" He said he received it from PC Mugisha. The message was to the effect that motor vehicle UAB 787 T had been involved in a robbery that had taken place at Lugalambo on the 15/12/2000, which was the previous day.

A2 Denis Mujuni said they received message between 4.30p.m. and 5.00p.m.

In this they received support from not only DW4 Mugisha but also from prosecution witness PW8 I/P Tanui the officer in-charge Mobile Police. PW8 told court that at 4.00p.m. on the 16/12/2000 he received a message from an informer that motor vehicle UAB 787 T had been involved in a robbery the day before (15/12/2000)

at Lugalambo wherein a minibus was intercepted and its occupants robbed, he said that the informer told him that the motor vehicle UAB 787 T had been seen at the scene of robbery.

DW4 Mugisha supported the accused and said he received the message from PW8 between 6.30p.m. or 7.00p.m. and he passed it over, to the patrol vehicle. When asked how he determined the time, he said this was a very important message and so he did not only record it but also looked at the clock. "I knew it was 6.00 – 7.00p.m. because I checked the clock" he said. "And I recorded the information into the incidents book he emphasized.

This message however became suspect with the evidence of PW25 Keneth Nuwagira. PW25 was in the minibus that was intercepted by robbers and he is the one who made the report to the police. He told court that the robbers struck at 11.20p.m. The motor vehicle at the scene of the robbery was a Dyna pick-up.

That the man who shot at them stood at the front of the pick-up. He insisted that he did not see any small motor vehicle.

PW6 P/C Isiiro a radio control old hand at Kampala Central Police Station told court that he received a message at 11.00p.m. on 15/12/2000 from Nuwagira PW25 that robbers had shot at them. He recorded the information and passed it to Jinja Police Station and received by PC Oine. In the evidence of PW6 and that of PW25 who was at the scene of crime, motor vehicle UAB 787 T was neither sighted at the scene of crime, nor mentioned in their report. Of course if someone else could have made a different report according to PW19 D/CPL Mafabi, it would have been recorded. PW19 led court through the procedures of record keeping in the police. He was in-charge of records. He told court that an anti-robbery file was kept by the police. In this file, all robberies were recorded. He went through the general file reference AR. AR stands for Anti Robbery. It consisted records from 20th December 1999 to 5/12/2001. The reports would

consist action that had taken place in respect of a report at the scene of crime and also mention the motor vehicles involved. The month of December 2000 was combed but motor vehicle UAB 787 T was not there. The exhibit 29 did not point any finger at UAB 787 T or its owners. He also led court through the Station Diary. There was a report that motor vehicle UAB 787 T had been involved in a shoot out with police on Kyabazinga way, but there was no report of that motor vehicle being involved in a robbery the day before as to lead to its interception. The Station Diary was exhibited as P30.

DW4 told court that all incidents reported were recorded on receipt. He was emphatic that a report of armed robbery like the one involving the minibus on 15/12/2000 could never go unrecorded. He told court that when he received the report from PW8 he recorded it immediately before passing it over to the accused persons. In his words, he said

“ I had spent four years in information room. You write down information received in the Incidence Book. This incident was so important that I wrote it down in the incidence Book. I also signed.”

All the foregoing were lies. He was given the Incidence Book exhibit P31. It was the book he had in use on 16/12/2000. the report that he allegedly received from PW8 was not there. He did not have any record that PW8 told him to inform patrol and others that the motor vehicle UAB 787 T be intercepted. He was so rattled by his deception being perforated that he now changed and pointed out the information he had received from A1 about shot out as coming from PW8. “This is the message Tanui gave me and I wrote it at 7.58 “ he said. He had forgotten that he had told court Tanui communicated to him between 6.00 – 7.00p.m. And this message from the patrol vehicle is the one he now said he had passed over to the patrol motor vehicle.

Another is that A1, A2 and A3 all received communication at around 4.30p.m.

According to DW4 by 4.30 p.m. he had not received that information. DW4 told court that he received the information from PW8 at 6.30p.m. or 7.00p.m. DW4 was very sure he received this information at that time because he specifically said "I knew it was between 6.00 – 7.00p.m. because I checked the clock". A1, A2 and A3 said they received the message when they were at Mutai at 4.30p.m. That on receiving the information A1 told the Control Office they were too far to act on it and they continued with their patrol work at Mutai some six miles from the town.

This conflict in time is major because the time DW4 gives enters into the time the motor vehicle UAB 787 T was being chased that is 7.00p.m. and yet the accused persons said at the time they

received the information, there were at Mutai and even continued with their duty that way.

The fact that PW25 who was at the Lugalamba robbery scene did not see the motor vehicle UAB 787 T at the scene, nor make any report to included the said motor vehicle, the fact that PW6 in Kampala did not receive any report on motor vehicle UAB 787 T nor pass on such information to Jinja Central Police Station, the fact that none of the exhibits namely the Incidents Book, the Station Diary and Anti Robbery General Report Book do no have any record of motor vehicle UAB 787T being involved in the robbery yet as made very clear by PW19 that information was key and by DW4 that such important information could never be left unrecorded, the fact that DW4 told blatant lies that he had recorded the message in respect of motor vehicle UAB 787 T being involved in the robbery at Lugalambo and passed it over whereas not, and lastly the fact that A1 Okello could not have received a message at 4.30p.m. from DW4, DW4 having stated

that he received it at 6.30p.m or 7.00p.m., does not only render the message suspect, but makes the un resistible inference that the message was only made up after the shot out absolute.

In my considered opinion there was no such message involving motor vehicle UAB 787 T at the robbery of 15/12/2000 at Lugalambo. All this was a creation of the accused and PW8 Tanui, who on investigation was found, as PW23 D/IP Kauma said to have been communicating on phone with the deceased John Walube before his death.

That for the message, I now turn to the scene of crime.

The prosecution witness said the police patrol motor vehicle chased and overtook the deceased motor vehicle, intercepted it and ordered the people out and told them to lie down.

The accused in great detail told court the scene as it was. A1 like A2 and A3 said they chased the motor vehicle UAB 787 T and since it swerved to the right, they overtook it from the left. That as they were overtaking it, the occupants, of the wanted motor vehicle shot at them using a pistol.

A1 Okello in particular said he was alone with the driver in front. The rest were on the back. According to him, when the person in the wanted vehicle shot, the rest of the crew jumped off and he and driver continued ahead and intercepted the wanted vehicle. He said he jumped out with a big gun begun to sound. He said on getting out he could readily see all his men. He said PC Aryenyo was nearer to Mark II . Aryenyo was 4 metres away but in front of him. PC Mujuni was 5 metres behind him, Eropai was behind him about 7 to 8 metres. Now this in my opinion could not have been the scenario. A1 said he remained in the Police Pick-up and it went ahead while the other had jumped off the pick-up when the first shot came out of the wanted motor vehicle, so while Aryenyo

A1 could be near the Mark II, there is no way Mujuni A2 could have been five metres behind A1, or Eropai being behind him far and Orech 7 to 8 metres behind him. To say so would mean, that on jumping off the motor vehicle, they raced, passed it and went ahead. Since A1 was not facing Jinja side how did A2, Eropai and Orech be behind him?

A2 Mujuni in his evidence said he ran to the church side 15 metres in grass which was 18 inches high. If Mujuni ran towards the church, he could not be said to be behind A1 who had bypassed the church and was now facing it.

A1 told court that as he got out of the cabin of his patrol pick-up he could easily and readily see his colleagues. He said he saw them well because the place was clear. He proceeded to tell court where each of them lay. "My colleagues were taking cover on the slashed pavement. They were exposed. There was nothing covering them."

The above has unwittingly been disputed by the other two accused. A2 said he lay and took cover in eighteen-inch grass while A3 said he was in grass that was one yard tall. Surprisingly A3 said he could still be seen in the one-yard tall grass. What is clear here is that the evidence of three people talking of the same spot, does not have any resemblance.

Again at the scene of crime, the three accused persons all said someone shot at them as they overtook the wanted motor vehicle. This evidence however is very contradictory in many particulars.

To begin with A1 said he heard a pistol shot and the second shot was that of the big gun. But A2 said two shots were fired. A3 also said two shots were fired. They disagreed with A1 Okello yet they were all at the scene at the same time and A1 told court of their expertise in distinguishing pistols from SMG guns. The evidence on the pistol goes to the root of the matter because it would be

one of the reasons why the accused person would defend themselves. That a pistol was found with the deceased is not in doubt. This pistol was exhibited together with the certificates that legitimatised its being possessed by Walube the deceased.

That it was also fired on the 16th day of December 2000 at the scene of crime is also not in doubt. Evidence is abundant that a bullet cartridge from the pistol was found at the scene of crime.

Where the pistol was found and who fired it was the big question. In their evidence A1 said Aryenyo found the pistol on the pavement. A2 said he heard A3 shout that he had recovered a pistol on the pavement near one of the bodies. The foregoing however contradicts the contents of the charge and caution statement exhibit P28. Exhibit P28 was made by A1 and on oath in court, he said the contents of the statement were a correct version.

In the statement A1 stated that after the shoot out, “we checked the vehicle and found three people dead and recovered one pistol from among the bodies lying by a magazine of SMG with 30 rounds”.

This means that they are the ones who “recovered” the magazine but I shall come to that later.

The first accused made this statement just after the incident, the impression it gives is that the deceased were shot and killed in the car which in my opinion is not true concluding from the sketch plan exhibit P34.

To come back to the pistol the accused in their defence also contradict each other against exhibit P28 as to where the pistol was found.

On who fired the pistol, after going through the evidence, I can only conclude that this pistol was not fired by the occupants of the Mark II there is a lot of evidence to that effect. The first one is piece of evidence that I have given above namely that the accused do not agree in how many time it was fired. The second one is that their evidence as to when it was fired differs from what they stated in their caution statements and even amongst themselves in defence.

In court A1 said their motor vehicle was just overtaking the Mark II when someone shot at them. In his charge and caution statement he said its when they had overtaken and stopped the Mark II that the occupants shot at them.

In court A2 said as they overtook the Mark II, they opened fire. In his caution statement exhibit P26 and which he said was correct, he stated that they first stopped the deceased and then they shot at them.

As for A3, in court he said they had passed the Mark II by one metre, when the deceased shot at them.

In his charge and caution statement he said “when we overtook the Motor vehicle we managed to block it from in front where by before I could jump off our vehicle we heard bullet coming from the occupants”.

This disparity in statements made at police and made in court on a grave thing like the pistol cannot be referred to as minor. It puts the whole issue of a pistol being fired from the wanted car in question. The last nail in this pistol saga however is that if the bullets had emanated from the wanted car, the cartridge would have fallen either in that Mark II or just outside it. The cartridge from that pistol was however found where the police patrol vehicle UP0041 had parked. This was evidenced to by PW23 Kauma. In his evidence, he told court how he found a pistol cartridge. He

described the position on exhibit P36. it was the same position as “A” on exhibit P34 which indicated the position of the patrol pick-up. his evidence was not challenged. This lack of cross-examination means that it was accepted.

The cartridges position showed that the pistol was fired by someone else not the deceased, since the deceased, neither by the evidence of the prosecution nor that of the defence even went to where the patrol motor vehicle was parked.

The only conclusion is that the pistol was fired after recovering it from the deceased persons.

A1 said one of the bodies was near the right front of the Mark II. So did A2. This again was not true because PW21 I/P Koire who went to the scene first, found the deceased all lying on the left hand side of the Mark II. He even drew a sketch plan exhibit P34 with “C” to indicate the three bodies. They were all near each

other. It is even surprising that A1 who stated in his caution statement that the bodies were in the motor vehicle could now say they were lying outside.

There are other things like A1 saying there was no other motor vehicle on the road as they gave chase and then forgetting and saying there was a minibus but it made a U-turn and went back. How it made the U-turn is not known because the only turn was in front of the Mark II yet the accused persons, said there was a volley of bullets flying by. In any case the path was littered with bodies since they fell on the left hand side of the Mark II onto the road.

I turn to the magazine.

In their defence A1, A2 and A3 have all said a magazine was found in the motor vehicle of the deceased.

According to A1 the magazine was found by Joshua who came with the reinforcement. He handed it to him and A1 then handed it to PW21 Koire. The presence of the magazine would strengthen the accretion that the deceased had an SMG with them. In other words the defence of self-defence would be given evidence.

I have considered the magazine issue in detail.

There is no doubt that the second and third accused went with extra magazines. A1 in his police statement admitted that they had done so.

A2 and A3 said they handed the extra magazines to CW1 AIP Kauta at the time of their arrest. Kauta however denied receiving any magazines. This denial was left unbroken by cross-examination. It's even believable because of the conduct of the accused persons in respect of the magazine right from the time of

recovery. First of all the three accused persons said the magazine was recovered by Joshua when the reinforcement came. But PW21's evidence was that on arrival at the scene and this was much before the arrival of Joshua, A1 Okello handed to him a pistol and a magazine. The other thing was A1's denial that A2 and A3 had left the station with extra magazines. He denied this in court when he knew very well that they had carried them. The denial confirms that the 2nd and 3rd accused never handed magazines to PW21.

There would have been no reason to deny that. Its because A2 and A3 testified after A1 had been broken down over the extra magazines, that they brought in the story of having handed the magazines to Kauta.

A1's denial actually corroborates CW1's evidence on the magazines. If they did not hand in the magazine to Kauta, where did they go?

This magazine which was allegedly recovered from the car was handed to Koiré before the arrival of Joshua. Joshua's name was brought in to cover themselves upon the source of the magazine. This is clearly seen with the case of the pistol. When they recovered the pistol, they came outright and declared they had recovered it.

Attempt by A2 and A3 to make a place for the magazines, shows that one of the magazines that the accused persons had left the station with, was the magazine that the accused claimed had been found in the suspect Mark II.

A1's denial of A2 and A3 carrying second magazines, also leads to nothing but the same conclusions. This one is even stronger because A1 wondered how the magazine would be explained if he admitted that they had gone with extra magazines and not returned them.

Its my considered opinion and I do find that there was no magazine in suspect motor vehicle UAB 787 T. That the evidence of finding the magazine in the Mark II was made up by the accused persons.

Lastly I turn to the man with the gun. A1, A2 and A3 all said that there was a man in the suspect motor vehicle with an SMG.

A1 told court that as soon as his motor vehicle stopped, a man fired a big gun. He took cover and answered back, he said the man who was shooting had a black jacket. He kept on firing and changing position. He said the exchange took 5-7 minutes. The man with SMG ran towards the railway.

What is interesting is that when the accused made his charge and caution statement he did not mention this gunman. Neither was this mentioned by A2. while they do not have to prove the

innocence, they were duty bound on a balance of probability to show that they were acting in self-defence.

A1 said the man with the big gun begun shooting when he was just near the motor vehicle. He said the deceased persons were not firing. The danger therefore was from the gunman. The deceased according to him simply rolled on the ground. A2 saw the gunman shot when he was on the road to town which in this case was on the other side of the island. He said he did not see the victim because his head was down. He then in complete about turn said he did not see the man with gun. "I only saw CPL Okello leading away the woman." If he could see Okello leading away the woman and there is evidence on record that there were streetlights what would have stopped him from seeing the man with the gun. The man who proved a danger to him. Is it not because the man was non-existent. He earlier said he opened fire on the man retreating towards the railway station.

As for A3 he said he could not tell where the SMG man fired from. Yet under cross-examination, he said the man fired from near the car. A2 clearly said the man begun firing after he had left the car and was on the road to town. It means he had gone beyond this island and was on the road to town.

These different positions attributed to the alleged gunman, the admission by A2 that he did not see him, yet there were street lights, and also taking into account the planted magazine to reinforce the gunman's existence, clearly, indicates that no gunman existed at all. The only way the extra shells and extensive shooting can be explained and irresistibly too is the missing magazine that A2 and A3 had failed to produce at the time of their arrest and attempted to run away from it by falsity telling court that they had handed them to IP Kauta.

The other reason I can say there was no crossfire is because PW3, PW4 and PW11 were never even cross-examined on the issue of cross fire. In their evidence they told court that there was no crossfire. The three prosecution witnesses clearly told court how the accused overtook, stopped the Mark II ordered the

occupants to lie down and opened fire upon them. The accused namely A2 and A3 told court that the deceased were running away towards the church direction. The accused told court they were in that direction too.

If that was the case the bullets would have entered the deceased from the front of their bodies. Here however the post mortem reports showed that the bullets entered their bodies from the back. A2 and A3 said they shot at the gunman as well in the direction of the town and at the deceased who were running away in the direction of the church. If that was also the position, the deceased would have been running at right angle to the road. It meant that their right sides of the body were facing the accused. The bullets would therefore have entered them through the right side of the body and exit on the left side. In no way would the bullets have entered the deceased through the back and emerged from in front. The only reason why the bullets went through the back was because the backs were exposed to the accused. PW3

said the men were told to lie down and they were shot through the back. PW4 who was in a minibus from a few paces away and which as I saw had no way of U-turn also testified to court that by the lights of their taxi, she said the men ordered out of their car and told to lie on the ground and shot in cold blood. This evidence received support from that of PW11 who said the same. PW11 had nothing to gain by telling lies. He had no reason to tell lies.

That the deceased were shot while lying on the ground was further shown and proved by evidence of IP Kauma PW23 who found bullet marks on the road. Exhibit P36 shows the marks on the road as index 6. the bullet marks could only have been made by a gun pointed down. They were in the spot where the bodies were found as exhibit P34 indicates. They were from marksmen standing and hovering over the victims on the ground. The accused had the deceased at their mercy.

At that time there was no danger pertaining to avail self-defence.

Even if the deceased had fired a pistol, even if a gunman had been there, which did not exist in this case, the moment the deceased were subjugated and the gunman disappeared, the danger was past. In the case of **R Vs Cliff [1975] 1 All ER 334**, where a soldier on patrol observed a car coming for him at speed and he fired three shots but the car passed and the fourth shot after it passed injured and killed a passenger, their Lordships found him guilty because the danger had passed when he fired the fourth and fatal shot.

In the instant case however, the evidence of the accused persons was too contradictory, with inconsistency and discrepancies as within each of them and amongst all of them that it was rendered unreliable. It went to very grave matters and the root of the whole charge on things like the pistol fire the magazine and the gunman that it could not be said to be minor.

Furthermore some of it like the presence or non presence of extra magazines were blatant and deliberate lies that this was evidence as would fall in **Tajar Vs Uganda EACA 167/67** for rejection.

There were of course contradictions in the testimony of PW3 and PW4. while PW3 said she was pulled out of the motor vehicle after the deceased had been shot, PW4 said she was pulled out before they were shot. This discrepancy did not go to the root of the matter. It was minor. It was given by two women who were horrified at what they saw and were bound to have a dialers of events here and there. On the whole the rest of their testimony tallied and fell on all forms with that of PW11 and I believe their testimony as the truth of the matter.

The manner in which the deceased were killed was not accidental or sanctioned by law. It was unlawful. The intentional killing was full of malice aforethought.

Both the lady and gentleman assessors have advised me to find the accused guilty of manslaughter. However for the reasons I have given above, with respect I do not agree.

The prosecution having disproved self-defence, I find the accused persons each and every one of their guilty of murder on all three counts as charged and accordingly convict them.

D.K. WANGUTUSI

JUDGE

2/9/2003.

2/9/2003:-

Accused all three present.

Mr Iyamulemye for accused.

Ms Alice Nayebare for state.

Ms Muyama Court Clerk.

Assessors:-

1. Mr Maganda
2. Ms Katawera

Court:-

Judgment delivered in open court and therein signed and dated.

Sentence:

There is only one penalty on conviction of murder and that is death. Accused are sentenced to suffer death on each of the three counts.

The death sentences are however suspended on count two and three. Leaving the sentence on count one in place for each of the three accused.

D.K. WANGUTUSI

JUDGE

2/9/2003.