

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CR-SC-0198 OF 2003

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

- VERSUS -

SERUGA YONASANI AND OTHERS ::::::::::::::: ACCUSED

BEFORE: - THE HON. JUSTICE RUBBY AWERI-OPIO

JUDGMENT:

The accused Seruga Yonasani, Lubwama Erunasani and Katete Patrick were indicted jointly on two counts of murder contrary to section 188 and 189 of the Penal Code Act. On the first count it was alleged that the accused person on 28th August 2002 at Nsaasi village in Luwero District murdered Nakamate Gaita. On the second count it was alleged that the accused on 31st August 2002 at Nsaasi village in Luwero District murder Nabwire Harriet.

The background facts leading to the indictments were that the family of Kasamba Mugagga was suspected of practising witchcraft, by some people of Nsasi in Nakaseke sub-county Luwero District. On 27th August 2002 anonymous person wrote a

letter to the family to the effect that the said family should leave their village within 24 hours. That matter was reported to the local authorities. On 28th August 2002 at about 9.00p.m. While all Kasamba Mugagga's family members were in the house, petrol was poured in the house through the window and thereafter the house was set a blaze. Nakamate Gaita who was an infant died in the said inferno. The second deceased Nabwire Harriet sustained serious burns and died in hospital a few days later.

During that night the accused were seen together moving towards the scene and were suspected to have been behind the attack. They were later on over heard discussing how they executed the plan. People who heard this tipped the police and the accused persons were arrested and indicted accordingly.

On arraignment the accused persons denied the offence. They were accordingly tried. Hence this judgment.

In all the prosecution called five witnesses namely, Kiiza Mohammed (PW1), Kalungi Zebidayo Salongo (PW2) D/AIP Oola

Peter (PW3), Dr. Kalyesubula (PW4) and Henry Gandhi (PW5). The prosecution also relied on the following exhibits. Plaintiff statement of Kalungi Zebidayo (P1), small jerrycan (P2), a burnt piece of wood P4 and post mortem examination report (P5); charge and caution statement of Seruga (P6); charge and caution statement of Lubwama Erunasani (P7) and charge and caution statement of Katete (P8).

The prosecution case as borne out by the five prosecution witnesses is in summary as set below:-

Kiiza Mohammed (PW1) who was the area LC Chairman testified that he knew the accused persons who were his subjects. Of the deceased, he stated that he only knew Harriet Nabwire on 28/8/2002 at about 9.00 p.m. he was at his home when one of subjects called Muwanga reported that Mugagga's house had been set on fire. Mugagga was husband to Nabwire and father to Nakamate. As local council Chairman he mobilized his subjects and went to the scene where he found mzee Leuben Sentamu, Kasozi Charles and many others. No one could tell him the cause

of the inferno. He found that Katete and Sentamu had taken Mugagga and Harriet for medical treatment as a result of burns. He reported the matter to the Police who visited the scene. From the scene they recovered a small jerrycan, which had smell of petrol. It was recovered from the compound near the window.

He asked Katete whether all the people in the house had survived. Katete replied that one child could have got burnt in the fire. The Police ordered the people to search for the body of the baby, which was found burnt to death. Later on he got information from one Lutalo that Seruga and Lubwama was seen at Mugagga's home and were suspected to be responsible for the crime. The two were arrested and taken to police. The two later on implicated Katete who was also arrested. He stated that Katete admitted setting the fire after being hired by Seruga at a cost of Shs.100, 000/=.

Zebidayo Kalungi (PW2) testified that he knew all the accused persons, A1 being his son and the rest his brothers-in-law. He stated that Seruga was staying 2 miles away from his home while

Lubwama was staying with him. He testified that he did not know the two deceased persons although he knew they died as a result of an inferno. He admitted answering alarm from Mugagga's home. He denied his Police statement where he was said to have stated that the accused were the people who had burnt Mugagga's house because they were seen going that direction when immediately the house was seen on fire.

PW3 D/A1 AIP Peter Oola testified that in 2002 he was attached to Nakaseke Police Post and was by then he was at the rank of a sergeant. On 29/8/2002 he received a report of arson from Chairman of Nsaasi called Kiiza Mohammed (PW1). He proceeded to the scene together with the chairman and found the house still burning. He recovered from the scene a three-litre jerrycan yellow in colour with some little petrol in it exhibit (P2). A dead child was also recovered from the burning house. He ordered the Chairman, PW1 to bury the child because the mother and father had also suffered from burns and were taken to hospital for treatment. From the scene he ordered PC Ekwang to go to the two victims to take their statements from their hospital beds. He

requested for those who could volunteer information about the crime.

On 30/8/2002 he got information from (PW10) that it was Seruga and Lubwama who had set the house on fire. He arranged that very night at 2300 hours to have them arrested. He went to (PW1) and his defence secretary (now A3) who led them to the home Zebidayo (PW2) where Seruga and Lubwama and others were arrested and taken to Nakaseke Police Post. From there Seruga confessed that he was the one who had hired Katete to burn the house at cost of Shs.100,000/= . Lubwama on his part admitted writing the threatening letter to the Mugagga family. He waited for Katete who was to report back to the Police post in the morning of 31/8/2002. On that day Katete went back together with (PW1) where he was arrested. On questioning in the presence of PW1 he admitted that he had been hired from the Police Station Post the wife of Seruga also stated that she saw her husband going away with 3 litre jerrycan of Petrol but he came back at 2100 hours without the same.

After assembling the above evidence he referred the matter to Luwero Police Station for further management and also for charge and caution statements. He concluded that another victim of the inferno died from hospital on 31/8/2002. In cross-examination he stated among other things that he visited the victims from hospital and they told him that they suspected Seruga and Lubwama because they saw them running towards the home of (PW1).

Dr. Kalyesubula 28 years old testified that he carried out postmortem examination on Harriet Nalongo on 1/09/2002. The deceased had burns of 25% which were distributed all over the body as follows: Head 8% Trunk 12% and limb 5%. He concludes that the cause of death was due to severe burns leading to dehydration and shock.

Retired D/IP Henry Gandhi testified that he took charge and caution statements of A1, A2 and A3 where they confessed to the offence (exhibit P6, P7 and P8).

All the three accused persons made unsworn statements denying any involvements in the offence. Seruga A1 stated that he went in the morning and found that there was a problem at Mugagga's home. When the Police reported to the scene he participated in recovering the body of the burnt child and later on participated in its burial. He stated that the Police arrested him from his home as he was sleeping, upon arrest he was tortured and forced to sign documents, which he did not understand. Lubwama Erunasani (A2) on his part stated that he was arrested together with Seruga (A1). He stated that he answered alarm from Mugagga's home. He found the house already burnt. Among those at the scene was Katete (A3). He stated that he was the one who surrounded the drum alerting other residents of the misfortune. Katete and Zebidayo later on took Mugagga for treatment that very night. The following morning they learnt that someone had died in the inferno. The Police ordered them to trace the body, which they got and later buried it. Later on he got himself arrested by police who tortured and forced him to sign some document, which he did not know. Lastly Katete (A3) testified that he was defence secretary of the area. He told court that he answered the alarm,

which Mugagga had raised. He was assisted by the vice Chairman to take Mugagga for treatment, A3 he was going to inform the area Chairman he met him on the way and explained to him what had happened and what he had done to help the victims. The Chairman thereafter reported the matter to the Police. As it was late at night the Police could not visit the scene. The following morning at 9.00 a.m. the Police visited the scene from where they recovered a dead body of a child, Mugagga's graduated tax tickets and a small empty jerrycan which they suspected to be containing petrol. He stated that on 28/8/2002 the Chairman went to his home together with Police and told him to accompany them in arresting Seruga and Lubwama. They proceeded to the home of Zebidayo where they arrested Lubwama. As they were proceeding to arrest Seruga from home, he emerged from Lubwama's place and was immediately arrested. The two were then taken away by the Police. The following morning he went to the Police Post together with the Chairman to follow up the suspects. On arrival at the Police Post he was immediately arrested and tortured. He was forced in the cells naked where he stayed without food for 4 days. He was

forced to thumbprint on a document he did not know. Later on the he was taken to court.

By pleading not guilty the accused persons had set in issue all the essential elements of the offence charged which the prosecution had to prove to secure any meaningful conviction. The standard required to secure a conviction is beyond all reasonable doubt. This burden does not shift on to the accused because and accused person does not bear the burden to prove his innocence. This principle was laid down since the decision in ***Woolmington v. DPP (1935) AC 482***. The above principle has recently been enshrined in our 1995 Constitution which presumes every person charged with a criminal offence innocent until proved guilty or until that person has pleaded guilty: Article 28 (3) (a) of the Constitution.

The essential ingredients requiring proof beyond reasonable doubt to secure a conviction in an offence of murder are:-

1. That the person alleged to have been murdered is dead;
2. That the death of the deceased was unlawfully caused;

3. That whoever caused the death of the deceased had malice aforethought; and
4. That it was the accused who so caused the death of the deceased.

On whether Nakamate Gaita and Harriet Nabwire are dead, there was overwhelming evidence. Evidence from PW1, PW2 and PW3 clearly points to the fact that Harriet Nabwire and her son Nakamate died as a result of an inferno. While Harriet Nabwire was rushed to the hospital she subsequently died, Nakamate her son was discovered still burning in the inferno. He was recovered after putting off the fire. Among those who recovered the dead body were Seruga A1 and Lubwama A2 who also participated in its burial. As for Harriet Nabwire there was further proof of her death by medical Report exhibit P5 where Dr. Kalyesubula stated that she died of severe burns, which led to dehydration and shock. Before her death, she was helped by A3 Katete to reach various medical facilities up to Nakaseke Hospital where she eventually died.

In view of the above circumstances, I find that death has not only been proved beyond any reasonable doubt but beyond any shadow of doubt.

As to whether the death of the deceased was caused unlawfully, it is important to bear in mind that in homicide case, death is presumed to have been caused by unlawful act or omission unless it is shown that it was caused by accident or in circumstances which make it excusable. This principle was laid down since the decision in the case of ***R. Vs Gusambizi s/o Wesonga [1948] 15 EACA 65.***

Death is excusable when it is caused in self-defence. In the instant case both deceased were said to have died after their house was set on fire. When the house was set on fire Mugagga who was the head of the family raised an alarm, which was answered by many villagers, including the LC executives. The cause of the fire was not attributed to any accident either on the side of the victims or the accused persons. The cause of death of the deceased was therefore due to violence. It was therefore

unlawful. Third ingredient is whether there was malice aforethought or the persons who caused the death of the deceased under Section 191 of the Penal Code Act malice aforethought is defined as:

- (a) An intention to cause death of any person, whether such person is the person actually killed or not or,
- (b) Knowledge that the act or omission causing death will probably cause the death of some person whether such persons is the person actually killed or not although such knowledge is accompanied by indifference whether death is caused or not by a wish that it may not be caused:

Malice aforethought is a mental element of the act of the killer, which is rare to prove by direct evidence. As a state of mind, it can safely be deduced from a set of facts and circumstances surrounding the events, such as the nature of injuries sustained, part of the body targeted, weapons used and conduct of the assailant before, during and after the attack. The use of precise weapons of killing like concentrated acid or guns, pangas or spear

on vulnerable parts of the body would readily attract inference of malice aforethought. See ***R V. Tubere s/o Ochen (1945) 12 EACA 63.***

In the instant case, the deceased died as a result of an inferno. Their house was said to have been set in fire with petrol which is highly inflammable substance. The two deceased died after sustaining very serious injuries. Nakamate Gaita was recovered when she was completely burnt dead leaving only the dead. Harriet Nalongo was rushed to hospital from where she shortly died. So, whoever, poured the petrol in the house well lit would have known that the resultant fire would cause death of any person. I therefore agree with both assessors that the prosecution has proved this element of malice aforethought beyond any reasonable doubt.

This now leads me to the last ingredient whether the accused participated in causing the death of the deceased persons.

There was no direct evidence implicating the accused. The prosecution relied mainly on the charge and caution statements made by the accused persons. All the accused persons denied ever making the said confession. The accused relied on the defence of alibi.

The law in regard to retracted and repudiated confession is now too trite. Briefly, it is that it is dangerous to act upon a retracted confession unless it is corroborated in material particulars or unless the court after full consideration of the circumstances is satisfied that of its truth: ***See John Kuka Vs Uganda Supreme Court Criminal Appeal No. 1 of 1992.***

These stated charge and caution statements were admitted during a trial within a trial whereupon I ruled that the same had been made voluntarily. I reserved my reasons which I now proceed to give. Although the statements were made in English and not in Luganda which the accused person were speaking, nevertheless that was not fatal to its admissibility as long as court is convinced that the statement was made voluntarily and that it

is relevant: See ***Namulubi Hasadi Vs Uganda Criminal Appeal No. 10/97.*** After perusing the charge and caution statements made by the accused, I am convinced that they are very truthful and can be relied upon since in the confessions the accused persons admit all the ingredients of the offence. Both Seruga and Lubwama stated that they accompanied Katete to the scene and Katete had jerrycan of Petrol which he poured through Mugagga's window and the house caught fire because there was light in the house. They did that because Mugagga was believed to be a witch. Katete on his part stated as follows:-

On 22nd of August 2002 at about 1300 hours when I was coming from the forest to burn charcoal, I met one Seruga who contracted me that we should plan to go and burn Mugagga but I refused to do that work and there he went and left me alone. Again on 28th day of August 2002 while I was digging at Mzee Kamulali's home, Seruga came and got me at about 1700 hours, and he told of the same plan to go and burn Mugagga's and his family, and this he promised to pay me Shs.100,000/= after completion of the mission and this was in the presence of Lubwama. After that we

went together to the home of Nabunya where Seruga bought a fanta of waragi and we took together. We left Nabunya's home together. They went direct to their (sic) but for me I branched off to Mzee Kamulali's home to collect Shs.1000/= and he paid me. After getting the money, I followed Seruga and Lubwama whom I found nearing the church. I left them there and went to my home. While I was at home, I saw Lubwama and Seruga coming, on their arrival they told me that Mugagga was distilling enguli at the factory and after telling me like that they went away to their homes. I followed them but I did not get them at first and later Geoffrey also told me that he had not seen them at all. I requested him to give me a panga and indeed he gave me one because we had planned that if we fail to burn them, we would then cut them into pieces. As I was still there I saw them coming with a small jerrycan of 3 three litres and it was Seruga holding it but when we reached the house there were some people still drinking waragi in the house and therefore we first decided to leave those people go and wait Mugagga and his wife to enter the bedroom, so that we pour the petrol inside the bedroom. Among those who were drinking included Sebowa and Muwonge. After

the two (2) people had left we saw Mugagga and his wife going to bathe after which they entered their house. From there they went inside their bedroom the candle was still lighting. Seruga gave me a jerrycan with petrol and a small cup which I used to pour inside the bedroom through the window and we saw fire busting and we ran away waiting to hear what next. Thereafter I heard when Mugagga was raising an alarm and calling me to go and assist him because I am his immediate neighbour. I went there as someone who had not known anything and assisted to rescue some properties like the bicycle and other few things because fire was too much. Then on 30/9/2002 when Policemen came to the village and we assisted them to arrest Lubowa and Seruga plus others after which they were taken to Police meanwhile I and the Chairman were told to report at the Police on 31/8/2002. Indeed we went there together with the Chairman and I was arrested following the information which was given by Lubowa and Seruga which information was true.

It is clear from the above passage that the accused made the confession in great details as if he was on Oath. The same

implicates himself and the other two accused persons how they planned to execute the offence in question. The statement also tallies with that given by A1 and A2 (his co-accused persons).

Apart from being true and accurate the Charge and Caution Statement had corroborative evidence especially from PW1 and PW3. First of all Katete was at the scene and he helped rescuing the property and the victims. The Charge and Caution Statement talks of a jerrycan of petrol. According to PW1 and PW3 the same was recovered at the scene and tendered in as exhibit (P2).

Having considered the prosecution's case I have to look at the defence of alibi raised by the accused persons. The law is that whoever relies on the alibi does not bear the burden of proving it. Considering the detailed accurate and truthful confessions made by the accused I cannot believe the defence of alibi raised by the accused persons. Moreover it is clear from the confessions that the accused had a motive of killing the Mugagga's family that they were practising witchcraft. The Charge and Caution Statement also show that all accused persons acted in concert

and had the necessary common intention to execute and lawful plan which was to liquidate the Mugagga's family, and they were very careful at that. They waited until all the strangers had left Mugagga's home before they set the house on fire.

The assessors were divided in their opinions one advised me to convict while the other one advised me to acquit by the reason that the accused answered the alarm and participated in the burial and so they were innocent. I do not agree with that position in view of the clear and detailed confessions the accused made. There was proof beyond reasonable doubt that the accused participated in the killing of the deceased. The fact that Mugagga's family was practising witchcraft was not compelling reason to set their house on fire.

Like in ***Ali Fadul Vs Uganda Criminal Appeal No. 13/93 (Supreme Court)*** Ugandans are not to be killed on supposition. If Mugagga had breached any code of law courts are there to try him. It was not upon the accused persons to take the law in their own hands. I therefore find all the accused persons guilty of

murdering Nakamate Gaita and Nabwire Harriet. They are convicted accordingly.

RUBBY AWERI-OPIO

JUDGE

4/06/2004

SENTENCE:-

Murder has only one mandatory sentence i.e. death. Each accused is accordingly sentenced to suffer death on both counts. However sentences on 2nd count are suspended since execution cannot be done twice on each convict.

RUBBY AWERI-OPIO

JUDGE

4/6/2004