THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-SC-0229-2003

UGANDA …….PROSECUTOR

VS

Al. MURANGIRA ERIYASAFU]

A3. BATUREINE PAUL] ……...……ACCUSED

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

Both accused, Murangira Eriyasafu (A.1) and Batureine Paul (A.3) are charged jointly with murder, contrary to sections 188 and 189 of the Penal Code Act. The prosecution called seven witnesses in support of its case. Dr. Mugume Francis was PWI, Johnson Ganiza was PW2, Kanyoma Eriyasafu was PW3, Kasozi Deus was PW4, No, 23133 D/C George Mwesigwa was PW5, No. 30121 D/C Turyahikayo Erifazi was PW6, while PW7 was RA 164876 Byamukama Willington. For the defence both accused persons gave sworn statements but called no witnesses.

Briefly the prosecution case is that Al was half brother of the deceased, Komuhangi Mabel. Kirokyabusha was father to both. There was a misunderstanding between A.I and the deceased concerning their father's land. Meetings were called on several occasions regarding this misunderstanding but no conclusion was arrived at. At about 7.30 p.m. on the night of 5th August 2003 the two accused are suspected to have fatally assaulted the deceased using a panga. The attack was outside Kirokyabusha's house where the deceased resided. Both accused were seen at a distance fleeing the scene and were later arrested. A panga was recovered from the home of A.3.

In his defence Al stated that at the material time he was in his house. A.3 also stated that he was not at the scene at the time in issue. A.3 denies knowledge of the panga which was exhibited saying he first saw it in court.

It is the duty of the prosecution to prove the case against an accused person beyond reasonable doubt. See *Sekitoleko vs Uganda* [1967] EA 531. Where the charge is of murder the prosecution must prove the following ingredients beyond reasonable doubt:

a) that the deceased died,

b) that the death of the deceased was unlawfully caused,

c) that the deceased was killed with malice aforethought, and

d) that the accused or any of them participated in killing the deceased.

PW 1 testified that he examined the body of the deceased which was identified to him by Gumisiriza Moses. Exhibit P.1 was received in evidence to this effect. There was also evidence from PW2, PW3, PW4, PW5 and PW7 showing that the deceased died. It is not disputed by the defence that the deceased died. I am satisfied that the prosecution has proved beyond reasonable doubt that the deceased Komuhangi Mabel died.

Next the prosecution must prove that the death was unlawfully caused. It is the presumption of the law that the killing of any person is unlawful except where it is accidental or where it is excusable by law. See. ***Gusambizi s/o*** *Wesonga vs R* (1948) 15 EACA 63. The burden to rebut that presumption is on the accused person. See *Uganda* vs *Okello* [1992 — 1993] HCB 68. As I find the presumption not rebutted, I am satisfied the prosecution has proved this ingredient also beyond reasonable doubt.

The prosecution must prove also that there was malice aforethought. This is the intention to bring about the death of any person, whether that person is the one who gets killed or not. It was the evidence of PW2 that there was a misunderstanding involving the two siblings concerning a kibanja which their father owned. PW2 was however quick to add that he knew of no actual case subsisting at the time of the deceased's death concerning the land. Then there was the evidence of PW3 who stated that on three occasions A. 1 has summoned relatives to meetings concerning the kibanja of his father and that A. I had wanted the deceased off the kibanja. It was the evidence of PW4 also that a misunderstanding did exist between A. 1 and the deceased over the kibanja. While I note that there could have been sibling rivalry over the kibanja, I find no evidence of malice aforethought in the state of affairs. Malice aforethought can also be gathered from surrounding circumstances such as the type of weapon used, the part of the body on which

injury is inflicted, the number of injuries inflicted and the conduct of the assailant or assailants before and after the attack. See *Tubere* s/o *Ochen vs R (1945)* 12 EACA 63. In the case at hand a cutting instrument was evidently used and there was one big wound on the jaw extending to the spine. There was also a wound on the arm. From the above evidence of injury I am satisfied the prosecution has proved beyond reasonable doubt that whoever inflicted the injury did so with malice aforethought.

Finally the prosecution must prove that both A. I and A.3 or any of them participated in the offence alleged. The two accused persons have been jointly charged with the offence. I must note that the evidence available does not establish common intention on the part of the two accused. Earlier on I have noted that A. 1 and A.3 both stated they were not at the scene at the time alleged. When an accused person sets up a defence of alibi it is not his responsibility to prove it. The prosecution is under a duty to disprove and destroy the alibi by adducing evidence which places the accused person squarely at the scene of crime. See *Uganda vs George* Kasya [1988-1990] HCB 48.

If the evidence of A.3 is considered first, no relationship is apparent between him and the deceased. There is no evidence that he and A. 1 together had a compact to carry out an attack on the deceased or anybody else. PW2 testified that at 7.30 p.m. on the night in issue from a distance of 60 yards he was able to see the backside of A.3 and A.1. He stated that although it was dark there was some visibility. It was his evidence that he saw both A.3 and A. 1 together disappear into a banana plantation. Clearly the circumstances under which identification came to be made were not auspicious given the visibility regime and the distance. Regarding identification I had to warn myself as I did the assessors about need for caution. In *Moses Kasana vs Uganda* [1992-931 HCB 47, 48 the Court of Appeal stated:

> ‘Where the conditions favouring correct identification are difficult there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered alarm, and of fabricated alibi’.

Accordingly, the other piece of evidence against A.3 is of a panga said to have been recovered at his house. It was exhibited in court but A.3 said it was never his and that he had seen it for the first time when it was produced before court. It was the evidence of PW7 that they found the panga at the house of A.3, that it was under the bed and that it had blood on it. There is no evidence showing the panga ever belonged to A.3. There is no evidence showing the panga ever bore blood or what was done with the panga bearing such tell tale evidence. I find no evidence connecting A.3 to the scene of crime.

PW2's evidence seeks to place A.1 at the scene of crime just like was the case regarding A.3.I have referred to the credibility deficit of the identification evidence when I referred to the evidence against A.3. It holds true regarding A.1 also. Then there is the evidence of PW4 who testified that at about the same time the deceased was attacked he saw A. 1 alone running. He said when he saw A. 1 the latter was carrying a sack and a pair of gum boots. It was his evidence A.1 did not answer to PW4's inquiry why he was running. PW4 testified also that he saw A. I at a distance of 60 metres. Though it was relatively dark and there was a distance of 60 metres between them, he attempted to describe the clothes A.1 had on. Here again there would be need for some other evidence to make evidence of identification certain, given the circumstances of visibility already related to. I have tried to relate the evidence of PW2 to that of PW4. While PW2 thought he saw two men at a distance the two were not running. On the other hand PW4 saw one man who he said carried some luggage and was running. I have anxiously considered the relatively poor visibility obtaining at the time as well as the relatively long distance that separated the witnesses and the person or persons they thought they identified. I find that it is probable the witnesses were mistaken. See *Abdalla Nabulere & Anor vs Uganda* [1979] HCB 77. I warn myself just like I did the assessors that it would be unsafe to convict on such evidence of identification without ruling out any possibility of error. See *George William Kalyesubula vs Uganda* Criminal Appeal No. 16 of 1997 (unreported). Consequently I am not satisfied that prosecution evidence has placed A. 1 at the scene of crime.

The prosecution has not proved beyond reasonable doubt that either A. I or A.3 took part in the alleged offence.

Both assessors in their joint opinion advise me to find both accused persons not guilty. For the reasons I have given in the course of this judgment I agree with that opinion. I find both accused not guilty and acquit them of this charge.

P. K. Mugamba

Judge

21st April 2005