THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL SESSION CASE NO. 0030 OF 2006

UGANDA:: PROSECUTOR

VERSUS

DR AGGREY KIYINGI AND 2 OTHERS:::::::::::: ACCUSED

BEFORE:- HON. MR JUSTICE RUBBY AWERI OPIO

JUDGEMENT:-

Dr Aggrey Kiyingi (A1), Charles Berwanaho (A2), No. 22682 D/C Mugisha Bob (A3) and others not before Court were indicted for murder contrary to sections 188 and 189 of the Penal Code Act of the Republic of Uganda. The particulars of the offence alleged that the accused persons above named on or about 11th day of July 2005 at Buziga, Makindye Division in the Kampala District, murdered one Robinah Erina Kayaga Kiyingi.

The prosecution theory was that the deceased was a prominent lawyer in town and wife to Dr Kiyingi. The two were elite students at Gayaza and Budo before they met at Makerere University as students. They later wedded in 1977 and had several children; two of whom were successful lawyer and doctor, like mother and father. Charles Berwanaho, (A2), was a close friend of Dr Kiyingi and also his employee at Dehezi International Ltd. Bob Mugisha (A3) was a Police Officer closely associated with Dr Kiyingi and used to provide him with escort and personal bodyguard services at the instructions of Government.

During the dictatorial and fascist regime of Idi Amin, the couple relocated to Kenya and around 1981 relocated to Australia where Dr Kiyingi is still based where he is a heart specialist after undergoing a number of specialized trainings in various International Institutions of world repute. During their stay in Australia, Dr Kiyingi and the deceased acquired a lot of property both in Australia and Uganda and later formed a powerful company called Dehezi international Ltd in Kampala where the deceased was a director.

However, over time Dr Kiyingi and the deceased developed a protracted irreconcilable misunderstandings and differences in both their marriage and company affairs which tore their relationship asunder. Their marriage became characterized by fault findings quarrels, fights, neglect, abuses and eventual desertion, meted out on the deceased by her husband, Dr Kiyingi. Consequently, the deceased left Australia and pulled out of Dehezi international Ltd, to form her own private legal practice in Kampala and to engage in other work and social activities independent of Dr Kiyingi. The deceased however continued living in the family residence at Buziga while Dr Kiyingi, who virtually deserted her, remained in Australia with the children most of the time. All efforts by family members and leading personalities to reconcile the marriage ended in vain. The couple remained on bad terms until the death of the deceased.

At one point, Dr Kiyingi started plotting for the death of the deceased and expressed this plot overtly by talking to various people to help him kill the deceased. Some of the people and plans he had sought to involve became known to the deceased. The deceased reported one such incident to police and her relatives whereupon she expressed fear that Dr Kiyingi, was after her life.

In 2003 Dr Kiyingi filed divorce proceedings in Uganda against the deceased. The deceased in a matter of surprise to the petitioner, responded by seeking to challenge the jurisdiction of Courts in Uganda in the matter and filed a similar proceedings in the Australia Court, where she thought and believed her property interests and other interests would better be catered for because of the property the family had in Australia and by the fact that the petitioner had a dual citizenship in Australia and Uganda.

The deceased's above move was alleged to have greatly angered Dr Kiyingi, who allegedly threatened that the deceased would lose everything. By the time of the death of the deceased the two cases were still pending in both Uganda and Australia.

In addition to the above state of affairs within the family, at the time of the incident, the husband was living in Australia with another women and had cut off all dealings with and any form of help to, the deceased. Whenever he would come to Uganda, he would stay elsewhere. He had

stopped paying utility bills and had recently caused electricity and water to be disconnected from the family home at Buziga where the deceased lived with only one house girl and shamba boy. Immediately before the incident Dr Kiyingi sneaked to Uganda and went secretly to Buziga home and removed some property, which included a television set and music system.

The final plot to kill the deceased involved the accused persons and others not before court. The accused persons had a lot of communication and contact among themselves and with others. Charles Berwanaho was the Chief coordinator. He was the one who brought private Atwine, who was his brother. Atwine died on remand. Bob Mugisha provided the killer gun through Charles Berwanaho. Bob Mugisha was overheard by some people talking about arrangements by his friend who was outside the country to have his wife killed. Soon after the incident, Bob Mugisha was heard saying that he knew the killers.

In short, on the fateful night of 11th July 2005 at around 9.00pm, the deceased was returning home alone, when she was shot in cold blood in her car at the gate and died instantly. Her assailants had been waiting for her arrival, trigger happy. Soon after the incident Dr Kiyingi called from Australia to find out what was going on before issuing instructions for burial arrangements.

Investigations led to the recovery of a gun and other items close to the scene of crime. Further investigations led to the arrest of all the accused persons. Hence this indictment.

When the three accused persons were arraigned, they pleaded not guilty. Having pleaded not guilty our law as posited in the constitution requires that the charge against the accused ought to be proved beyond all reasonable doubt. See: ***Woolmington -Vs- DPP [1935] AC 462; Sekitoleko Vs-Uganda [1967] EA 531.***

Generally speaking proof beyond reasonable doubt means that:

1) Before verdict, the court should consider the evidence as a whole to determine the guilt.
2) The court should not examine facts in issue separately and in isolation; and

3) That where issues of credibility arise between evidence of prosecution and the defence, it is not necessary to believe the defence evidence on a vital issue, it is sufficient if in the context of all the evidence, a state of reasonable doubt is left as to this guilt of the accused.

If there is a reasonable doubt created by the evidence given by either the prosecution or the accused person, the only conclusion which ought to be drawn is that the prosecution has not made out the case and the accused is entitled to acquittal. It is however instructive to observe that beyond reasonable doubt does not mean proof beyond shadow of doubt or absolute certainty. A clear distinction was made out by ***LORD DENNING IN MILLER VS MINISTER OF PENSIONS [1947] 2 ALLER 372, 373.***

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence, "of course it is possible but not in the least probable", the case is proved beyond reasonable doubt but nothing short of that will suffice"***

In a murder charge the prosecution has to prove the following ingredients beyond all reasonable doubt:-

1) that the deceased is dead;
2) that the death of the deceased was caused unlawfully;
3) that the death was caused with malice aforethought; and
4) that the accused participated I causing the death of the deceased.

To prove the above ingredients, the prosecution relied on the evidence of 26 prosecution witnesses. The evidence of the prosecution witnesses can be summarized as follows:

The deceased, Robinah Erina Kayaga Kiyingi was the wife of Dr Aggrey Kiyingi (A1). The two met while they were in High Schools in Gayaza High School and King's College Budo

respectively. They later on met at Makerere University where they cemented their relationship and eventually married and wedded in 1977. The said marriage had several children two of whom took to their parents' professions thereby becoming a lawyer and doctor respectively, after sometime the marriage fell on the rock with irreconcilable misunderstandings and differences. Consequently the deceased was forced to leave Australia where they had relocated, to set up her private legal practice in Kampala. The deceased was occupying the family residence at Buziga according to the evidence of Dr Kasirye Alemu (PW2). While Dr Kiyingi (A1) who had virtually deserted her, remained in Australia with most of the children. According to Alemu (PW2), the deceased and the Dr Kiyingi remained on bad terms until the time of her death. According to PW2, PW11 and PW12 life in the family was characterized by witch hunting, quarrels, fights, threats, abuses, neglect and eventual desertion.

At one point Dr Kiyingi plotted through his uncle, one Laban Kiwanuka to kill the deceased and the matter is still pending in Buganda Road Court. Another plot was when he requested his housemaid Nabossa Prossy (PW13) to help in killing the deceased, a request she turned down on the strength that she was a born again Christian. That was in 2003.

After the death of the deceased, the police put an advert requesting for information leading to arrest of the killers. Subsequently one Nasuna Sadha (PW4) gave information that she had been in contact with one private Atwine who had narrated to her how the death of the deceased was planned by Dr Kiyingi (A1), coordinated by Charles Berwanaho (A2) and executed by himself (Atwine) with the help of one Bernard using a gun provided by bob Mugisha (A3). From that information the police arrested the late Atwine from the home of one Nicholas Musiime (PW1). Nicholas Musiime also confirmed that the late Atwine used to stay with him and that Atwine was on a mission of killing the deceased. After tallying the information, police arrested the three accused persons. Nasuna Sadha (PW4) testified that the late Atwine talked to Dr Kiyingi on her phone.

Dr Andrew Simbwa Kibuka Kiyingi (PW10) and Samali Recho Biyinzika Nakagulire Kiyingi (PW12) who were both children of the couple testified that soon after receipt of information about the death of the deceased they knew it was their father Dr Kiyingi who had had a hand in it

because of his past threats and also because during that trying time their father never consoled and comforted them and neither showed any sense of mourning even during the funeral services. He was cold, reserved and never talked about the deceased during his speech. The evidence of police officer D/Sgt. Turyasingura David (PW5) was to the effect that when he saw police advert, requesting for information about the death of the deceased and made comments that it was bad for Dr Kiyingi to kill his wife, Bob Mugisha (A3) told him that he knew the killers of the deceased. When he pressed him (A3) to divulge more light, he declined saying that the family of Dr Kiyingi were very rich and would kill him if they knew about his revelation. D/Constable Ahimbisibwe also testified that sometimes in May 2005 Bob Mugisha (A3) received a call and later on told them that there was a friend of his living abroad who had a girlfriend in Uganda who had conned him and wanted him to help in killing her and that the mission was to cost shs.50 million. He further testified that on 12th July 2005 when he was at old Kampala police station two men came looking for Bob Mugisha (A3). When A3 was arrested, he was surprised to see on 23-7-2005 the photograph of one of the two men he had seen looking for him at old Kampala as one of the suspects in the killing of Robinah Kiyingi.

After the death of the deceased Dr William Male Mutumba (PW7) performed post mortem examination on the body where he established that the deceased died of multiple gunshot injuries that resulted in severe laceration of the brain, lungs and heart. He observed that the three organs were interdependent such that if one of them was affected or ceased to function, the functions of the other two would also lapse.

Four key police officers who investigated the case testified before Court: D/Sgt Karugaba (PW8), D/SP Aisu Victor (PW15), D/IP Katungi, (PW21) and D/C Sakwa (PW23).

D/Sgt Karugaba and D/IP Katungi were the two officers who were at the centre of the investigations. They went to the scene and recovered some exhibits, some of which were submitted for forensic examinations. Their evidence was that the death of the decease had been planned by Dr Kiyingi coordinated by Berwanaho (A2) and executed by the late Atwine who was a brother of Berwanaho (A2). The gun which was used was brought by Bob Mugisha (A3).

That gun was recovered near the scene. Its butt had been cut off and its serial number removed. The gun and ammunitions recovered at the scene were taken to Nairobi by D/SP Aisu (PW15), for forensic examinations. Mr Johnston Musoki Mwongela (PW9), firearms expert from CID headquarters Nairobi, with great skills, managed to restore the serial number, which the assailants had erased. He also confirmed that the cartridges which were recovered from the scene had been fired from the said gun.

D/C Sakwa Fred (PW23) was tasked to procure print out from MTN, Celtel and mango service providers to trace communication between A1, A2, A3 and the late Atwine prior and after the murder of the deceased. His evidence showed that apart from having original or permanent phones, all the four accused persons acquired other private numbers which they began using on specific dates and stopped using on some other dates during the execution of the mission to kill the deceased.

Lastly officers from the three service providers i.e. MTN, Celtel and Mango, gave evidence to confirm that they provided print outs to help police investigations. They were Mugisha Collins (PW24) from MTN Ingin Nyakabwa (PW25) from UTL and Nsubuga Patrick (PW26) from Celtel.

Dr Aggrey Kiyingi (A1) made unsworn defence where have relied on total denial and alibi. He told court that though their marital problems had become serious and irredeemable, he still loved and respected the deceased and opted for the most civilized least confrontational separation which was legal divorce. Before that he thought he was the problem in the marriage for not giving the deceased the necessary attention. So, he offered her a second honeymoon and took the deceased to the most expensive and luxurious cruises money could buy in the Mediterranean Sea in the year 2000. After trying family arbitration and counseling in vain he resorted to divorce. But even after divorce petition, he continued to love and respect the deceased who was staying in the matrimonial home in Buziga with ease and all the necessary services like power water and workers. He told court that he received the sad news at 6.45am Australian time from his brother in law in London (Mr Semanda) on 12th July 2005, which the deceased had been shot dead. He was shocked, confused and disoriented. After a while he recollected himself and contacted his

two sons Kibuka and Kirabo and later his daughter, Samali and started making final arrangements to fly to Uganda. Later he contacted relatives and friends in Uganda asking them to make burial arrangements. He however denied calling Bomboka (PW3) and Dr Eva Kasirye (PW2). He denied calling or receiving a call from Berwanaho (A2). He also denied calling the late Atwine. He told court that he left Australia on 13/7/2005 at 1.00p.m. and arrived in Entebbe on Thursday 14th July 2005 at 8.30am and proceeded to Buziga Home. After greeting the numerous mourners, he was shocked to see the cold reception from his in-laws many of whom did not want to speak to him except his father in law who consoled him in the usual Kiganda fashion ***"Kitalo nyo".***

After that he summoned the children in the master bedroom, including the two girls, Samali and Sanyu whom he found already at Buziga and consoled them and prayed together. He told court that he was degraded and humiliated during the burial, first by Hon Tim Lwanga who bluntly prevented him from consoling and hugging his children by shielding and pushing them away from him and secondly by his arrest by Sgt Karugaba, which prevented him from mourning the deceased. Earlier on the same Lwanga together with Dr Eva Kasirye (PW2) and Samali (PW2) had requested the clergy at Namirembe to block him from addressing the congregation at the memorial service of the deceased. He denied having a hand in the death of the deceased. He denied any dealings with Atwine, Berwanaho and Bob Mugisha for the purpose of planning and coordinating the death of the deceased. He testified that he never contacted Nabossa (PW13) to kill the deceased. He concluded that his June visit to Uganda was not connected to the plot to kill the deceased at all but was for his private and Social Business.

Charles Berwanaho (A2) also made unsworn defence where he denied the offence. He denied coordinating the plan to kill the deceased. He stated that he was in constant contact with the late Atwine because both of them were involved in a research programme in Wakiso District during the time the deceased was killed and the phone lines which he acquired were for the research project. He conceded that he called Dr Kiyingi from Entebbe when he was doing project work but not for the purpose of coordinating the murder of the deceased. He denied calling Dr Kiyingi on 11-7-2005 as alleged by Nasuna (PW4) in her evidence. He further denied receiving money

from Dr Kiyingi to distribute to the killers. All in all, he denied all connections in the death of the deceased.

Bob Mugisha (A3) on his part also made unsworn defence where he admitted that around 19th December 2003 he was deployed together with one Tenywa to guard Dr Kiyingi which they did for only two and half weeks after which they went back to their normal duties when Dr, Kiyingi went back to Australia. After that, he never had any connection with Dr Kiyingi at all. He denied any knowledge of Atwine and Charles Berwanaho and the killer gun.

Lastly, he denied ever escorting Dr Kiyingi to Entebbe together with Charles Berwanaho (A2) and the late Atwine.

The defence relied substantially on the evidence of two witnesses; George William Muwone DW1 whose evidence was that he was a shamba boy at the home of Dr Kiyingi in Buziga. His evidence was that the home of Dr Kiyingi at Buziga did not lack anything including power and water. He testified that during the time he was at Buziga, life was okay and he did not learn of any plot to kill Robinah Kiyingi. He testified that Nabossa (PW13) did not possess a mobile phone and that Dr Kiyingi used to ring them on landline, which was in the house.

Dr Andama Joseph Dw2 testified that he was a medical officer from Luzira maximum prison who examined the late Atwine. He testified that the late Atwine complained to him that he had been tortured whereupon he treated him. Atwine further complained of stomach pains before he eventually died. He concluded that postmortem from South Africa showed that there were certain chemicals in Atwine's organs, but he stated that he did not know how that had come about.

On the first ingredient, counsel for the accused persons conceded that it had been proved that Robinah Kiyingi is dead. Notwithstanding that concession it is trite law that court must make specific findings on all the ingredients of the offence charged. In the instant case there was overwhelming evidence in proof of the above ingredient. Dr Kiyingi (A1), the husband to the deceased, testified that soon after the death of the deceased, he was informed by his brother in

law in London. Upon that information he informed his children and later his relatives and friends in Uganda and instructed them on the burial arrangements. Soon after the death of the deceased, a number of people visited the scene and saw her dead body. These included Eva Kasirye, (PW2), Mr Bomboka (PW3) Sgt Karugaba (PW8) and D/Corporal Nabetta (PW17). D/Corporal Nabetta in particular was a scene of come officer who visited the scene and took photographs of the deceased at several positions. Post mortem examination of the deceased was done by Dr William Male Mutumba, (PW7) a pathologists, who established that the deceased died of multiple gunshot injuries that resulted in severe lacerations of the brain, lungs and the heart. Above all, the burial of the deceased was attended by among others D/Sgt Karugaba PW8, Eva Kasirye (PW2). Dr Kibuka (PW10) Samali (PW12) and Dr Kiyingi (A1). It is therefore my conclusion that the first ingredient has been proved beyond reasonable doubt.

The second ingredient is whether the death of the deceased was unlawfully caused. In law every homicide is presumed to be unlawful unless it was accidental or excusable. It is excusable when caused under justifiable circumstances like self defence, of property or person or when authorized by law. The above position was taken since the decision in ***GUSAMBIZI S/O WESONGA Vs R [1948] 15 EACA 65***

It is instructive to point however that it is not upon the accused to prove that the homicide was accidental or excusable in the circumstances. The duty is still on the prosecution to establish that. **See**: ***PAULO OMALE –UGANDA, CRIMINAL APPEAL NO 6 OF 1977[COURT OF APPEAL].***

In the instant case, there was no evidence to prove that Robinah Kiyingi died accidentally or under justifiable circumstances. Instead the evidence on record proved that she died a gruesome death after being showered with bullets on the head. The photographs taken by scene of crime officer D/Corporal Nabetta (PW17) revealed entry points and exit points of bullets that were showered on the head spilling out the brain matter. According to Nabossa PW(13) the deceased approached her gate as if she was being chased by some people. Soon she heard gunshots as the deceased was crying ***"Jesus Jesus"***. Those gunshots were also witnessed by Mr. Bomboka (PW3) who was immediate neighbour to the deceased . The medical evidence further proved

that the cause of death was gunshot injuries. Taking the above prosecution evidence in totality, the presumption that the death of the deceased was caused unlawfully is very high. The deceased could not have died a natural death. The concession by the defence that the death of the deceased was unlawfully caused was therefore well conceived and justifiable in the circumstances.

The third ingredient was whether the death of the deceased was caused by malice forethought. Malice aforethought is defined under section 191 of the penal code Act to mean:

1. *An intention to cause death of any person whether such person is the one actually killed or not; or*
2. *Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not; although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused"*

It is clear from the above provisions that malice aforethought is subject of a human mind, which is difficult to prove by direct evidence because what is in the mind of one is difficult to discern by another, but can be inferred from the surrounding circumstances of the incident under investigations. The above theory became law since the decision in the case of ***R Vs Tubere [1945]12 EACA 63.***

In that case and subsequent case, Courts held that malice aforethought can be inferred from:-

a) the nature of the weapon used (*whether lethal or not*)
b) the part of the body targeted (*whether vulnerable or not*)
c) the manner in which the weapon was used (*whether repeatedly or not*)
d) The conduct of the accused before, during and after the incident (*whether with impunity*)

In the instant case as in the third ingredient, overwhelming evidence was adduced to show that the deceased was killed by some assailants who way laid her near her gate and showered her with bullets. Photographs of the deceased taken by D/C Nabetta (PW17) showed that there were several entry and exist points of bullets on the body of the deceased. Those who visited the

scene which included Dr Eva Kasirye (PW2), PW2 Mr Bomboka (PW3); D/Sgt Karugaba (PW8) and D/IP Katungi saw the deadly riddled with bullets on the head with the brain matter splashed out. The killer gun was established by Musoki Mwongela PW(9) to be MORINCO TYPE 56 Assault Riffle a Chinese copy of Soviet Kaiashnikov A.K 47 Assault Rifle whose calbre was 7.62 mm which was designed to chamber 7.62X39 mm military rifle ammunition. The above gun is such a precise weapon (although of small destruction) It was tested and found to be functional. Whoever fired it at the deceased at such a close range time must have clearly had an intention to cause her death. Moreover the assailant(s) fired several bullets on the head of the deceased as was confirmed by Dr Male (PW6) leading to lacerations of the brain, heart and lungs. The head of a human being is a very vulnerable part of the body especially when shot with bullets: **See:** ***Okello –Okidi Vs Uganda; Supreme Court Criminal Appeal No 3 of 1995*** (unreported).

In that case, (***Okello-Okidi Vs Uganda***) the deceased was shot several bullets on the head. The Supreme Court confirmed that the assailant in so doing must have had the necessary malice aforethought.

In the instant case, considering the nature of the weapon which was a lethal weapon and the part of the body the assailant(s) targeted, which was the head and the manner which the gun was used, as several gunshots were fired, one cannot resist inference that whoever assaulted the deceased had the necessary malice aforethought. They killed the deceased in a callous manner oblivious of the plea by the deceased as she was crying for her life in the name of "**Jesus Christ",** according to the testimony Nasuna Pw4 and Nabossa (PW13). In conclusion therefore, I agree with the defence and both assessors that the death of the decease was clearly caused with malice aforethought.

The last and most contested ingredient was the participation of the accused persons in causing the death of the deceased. The prosecution relied on the evidence of the following witnesses in an attempt to implicate the accused persons in this offence:

Musiime Nicholas (PW1), Dr Eva Kasirye Alemu (PW2) , Mr Bomboka (PW3), Nasuna Sadha (PW4), D/Sgt Turyasingura (PW5), D/Constable Ahimbisibwe (PW6).D/Sgt Karugaba (PW8),

Dr Andrew Simbwa Kibuka Kiyingi (PW10), Apollo Mutashwera Ntarirwa (PW11); Samali Recho Biyinzika Nakagulire Kiyingi (PW12), Nabossa Prossy (PW13), Rukia Nabirye (PW19), D/IP Katungi (PW21), (PW23) among other witnesses.

There is one issue which I must resolve before analyzing the evidence of the above witnesses. The defence contention was that the evidence of Musiime Nicholas (PW1), Nasuna Sadha (PW4), D/Sgt Karugaba (PW8) and D/IP Katungi (PW21) be excluded for being hearsay, in that all of them relied on what the late private Atwine John had told them. Hearsay consists of statement, which is direct or written by a person who is now not before Court, the purpose of which is to prove the same that it was made or written. It is second hand evidence, which cannot be subjected to cross-examination and therefore liable to fabrications.

In the instant case the evidence of Nicholas Musiime (PW1) and Nasuna Sadha (PW4) cannot in my opinion be categorized as hearsay as the two witnesses were testifying on facts which they heard from the late Atwine. That category of evidence is provided for under section 59 (b) of the evidence act.

> ***"Oral evidence must, in all cases whatever, be direct; that is to say:-***
>
> (a) **……..**
>
> (b) ***if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it."***

Therefore the evidence of Musiime (PW1) and Nasuna Sadha (PW4) can not be said to be hearsay evidence in so far as they were testifying on what they heard directly from the late Atwine and they were both subjected to rigorous cross-examinations on their assertions. However the fact that their evidence was admissible does not attach any automatic probative value at this stage i.e. whether or not their assertions were truthful.

As for the evidence of D/sergeant Karugaba (PW8) and D/IP Katungi (PW21), those were police officers who investigated this murder case and assembled evidence which led to the arrest and prosecution of the accused persons. They gave first hand evidence as to how they came to arrest

and prosecute the accused persons. Their evidence was therefore very important in this case as investigating and arresting officers forming the necessary chain between direct or circumstantial evidence available in proof of the allegations on the charge.

1 must also add that hearsay rule has become a white elephant in most jurisdictions, being an 18TH century belief that juries were not capable of understanding or giving effect to the basic principles by which judges determine the trustworthiness or reliability of evidence. In Uganda where the roles of the assessors (juries) remain as judges of facts while the judges determine trustworthiness or reliability of evidence and that the opinion of the assessors are not binding on the judges, one wonders why the hearsay rule should still remain as part of our law. In fact jurisdictions like Canada have come out with reforms in hearsay rule where the Supreme Court of Canada have ruled in a number of cases that hearsay evidence should be admissible on a principled basis, the governing principles being the reliability of the evidence and its necessity: A few cases would illustrate this.

In ***R Vs KHAN, (1990) 2 S.C.R531;*** the Supreme Court held that:

> ***"Hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence."***

The Court held that necessity was to be interpreted to mean "reasonably necessary" and reliability was to be assessed having regard to the characteristics inherent in the evidence, but also the safety of relying on it given the other evidence in the case. In that case, **(KHAN),** reliability was said to be present because the child had no motive to fabricate the evidence, the statement had emerged naturally and without prompting, it related to matters which the child could not otherwise be expected to have knowledge and was corroborated by real evidence.

In ***R Vs Smith, (1992) 2 S.C.R 915*** the hearsay rule concerned the admissibility of three phone conversations between the murder victim and her mother. The Supreme Court reaffirmed the decision in **Khan** thus:

"This court's decision in Khan, therefore, signaled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being reliability of the evidence and its necessity."

The Court further gave reasons for the change which was prompted by the re-evaluation of the capacity of the juries to assess such evidence:-

"……..It would neither be sensible nor just to deprive the jury of this highly relevant evidence on the basis of an arcane rule against hearsay, founded on a lack of faith in the capacity of the trier of fact properly to evaluate evidence of a statement made under circumstances which do not give rise to apprehensions about its reliability, simply because the declarant is unavailable for cross- examination. Where the criteria of necessity and reliability are satisfied, the lack of testing by cross- examination goes to weight, not admissibility and a properly cautioned jury should be able to evaluate the evidence on that basis" emphasis is mine.

About caution the ***Ontario Court of Appeal in R Vs A(s) [1992], 76 CCC (3d) 522*** observed as follows:

"In summary, the jury should understand that they must first determine whether the statement was made. If they are satisfied that it was made, they must determine what weight, if any to give that statement. In considering the weight to be given to the statement, the jury must proceed with caution for the reasons set out above, and they must look to the rest of the evidence for indicia, which tend to support or negate the reliability of the statement.

Finally, the jury must be told that having exercised the required caution and considered the statement in the context of the rest of the evidence, it is exclusively for them to decide whether the statement was made and, if so, what weight, if any, to give the statement in their ultimate determination of whether the crown has proved the accused's guilt beyond a reasonable doubt"

I am highly persuaded by the above Canadian revolution in the hearsay rule as a systematic and analytical development in the law of evidence. Law is a living and progressive subject which should change or be changed in line with progressive contradictions. I am therefore in pains why our Courts of Law should not be free to apply hearsay evidence as long as it is necessary and reliable after cautioning and applying the same in the context of the rest of the evidence on record.

Turning back to the issue of participation of the accused persons in this offence, the evidence which the prosecution relied on was from D/Sgt. Karugaba (PW8), and D/IP Katungi (PW21) who testified that after the murder and burial of the deceased, they received information from Nasuna Sadha (PW4), that it was the late Atwine John who fired the bullets which ended the life of Robinah Kiyingi on 11/7/2005. The information that time was incriminating Dr Aggrey Kiyingi A1 and Charles Berwanaho (A2) in that Dr Kiyingi was desirous of getting rid of his wife, the deceased and Charles Berwanaho was tasked with the duty of coordinating the whole mission when the late Atwine was arrested by police with the assistance from Nasuna Sadha, he (Atwine) told the police that he had been lured by Charles Berwanaho (A2) to desert the army to come to Kampala and assist in the murder of the deceased who was said to be disturbing her husband, Dr Kiyingi (A1). The late Atwine was promised to be paid a lot of money for the mission and was to be relocated to Australia where A1 was staying. Atwine further gave information to police that Bob Mugisha (A3) had earlier been given the assignment but had failed to accomplish the same to the chagrin of Dr Kiyingi A1 after being paid. That, subsequently he (A3) offered to provide the killer gun which was received from him from the office of Charles Berwanaho (A2) from his office at Agip House, Kampala

The prosecution also relied on the evidence of Nicholas Musiime (PW1) who testified that he (PW1) housed Atwine a week or two preceding the murder. Musiime Pw1 testified that Atwine told him that he was in Kampala on a mission to kill a wife of a Doctor.

Following the evidence of Musiime PW1 and Nasuna Sadha PW4 the police recovered at the scene a jacket which Nasuna PW4 identified as belonging to her but had been lent by her to the Late Atwine for sometime. The police also recovered at the scene, a map which was showing the

direction and geography of the late Robinah's home. On the map they found fingerprints of the late Atwine which was confirmed by Apollo Mutashwera Ntarirwa (PW11)

From the scene the police also recovered piece of plywood with fake number plates which were identified by Nasuna Sadha PW4 as fake plates which the late Atwine had prepared in her presence and informed her that they were for the purposes of disgusting the actual car plates that were to be used in the murder.

The evidence implicating particular accused persons were as follows:

As far as Bob Mugisha (A2) was concerned, the prosecution led evidence that Bob Mugisha was unofficial guard of Dr Kiyingi up to 2005 according to Nabossa Prossy (PW12). The hub of the evidence implicating Bob Mugisha was mainly from the information that late Atwine gave to the police and that it was Bob Mugisha who provided him with the killer gun from Charles Berwanaho's offices at Agip House. It was at that office that Charles Berwanaho (A2) introduced him to Bob Mugisha (A3). After getting the gun, he took it to Kireka where he erased its serial number and removed the butt. The prosecution evidence was that the late Atwine clearly described bob Mugisha as a police officer who was attached to old Kampala police station and later on identified him in an impromptu identification parade.

Another evidence the prosecution relied on to implicate Bob Mugisha (A3) was from D/Sgt Ahimbisibwe (PW6) who told court that sometimes in May 2005 while in the company of Bob Mugisha A3, and a police woman constable Maganja as they were walking towards the Car Park, Bob Mugisha received a call and stopped to talk on his handset. After talking on his phone he rejoined them and told them that he had a friend of his abroad who had a girlfriend in Kampala who had conned him of a lot of money and wanted to find away of killing her and wanted his assistance. That Mugisha Bob told them that the mission involved a lot of money and that he was going to get a gun from a constable. PW6 further testified that on 12/7/2005, a day after the murder of Robinah Kiyingi two young men went looking for Bob Mugisha at Old Kampala police station. Soon after, he (PW6) saw in the Newspapers after the arrest of the accused persons the very picture of one of those young boys who had gone to the station looking for A3 a day after the murder. He said that the brown one was Atwine who was putting on a blue T-shirt in the Newspaper.

Another prosecution witness was D/IP David Turyasingura (PW5) who testified that on 17/7/2005 while at old Kampala Police station reading News papers he commented in the presence of Bob Mugisha that Dr Kiyingi did bad to kill his wife. Upon hearing that, Mugisha told him that he knew the killers of the deceased. He pleaded with Mugisha so that the law could take its course and also that he could benefit from the 5 million shillings the police had staked on information leading to the arrest of the murderers. Mugisha however refused to disclose claiming that the family of Kiyingi was very rich and would kill him if they got to know that he had revealed the killers. He testified that he was surprised that the next day he heard that Bob Mugisha had also been arrested in connection with the death of the late Robinah Kiyingi.

The prosecution further relied on the evidence that towards the murder all the parties to the murder acquired other numbers which were for strict use with regard for the mission so that they were to act in a discreet manner such that in case of any problem. They would not be put together. That was why Bob Mugisha was found with a sim card on top of usual numbers.

As for Charles Berwanaho, (A2) the prosecution relied on the evidence of Nasuna Sadha (PW4) who told Court that in March 2005, she met the late Atwine who was her former schoolmate and a village mate in Bushenyi. The late Atwine told her that he was a soldier in the army attached to Gulu. After that meeting Atwine stayed in Kampala for two weeks and went back. Shortly after, Atwine retuned to Kampala and told her that he was staying with a friend of his. Atwine told her that he returned to Kampala because his brother Charles Berwanaho A2, had a deal and wanted his help. In the month of June 2005 the late Atwine disclosed the deal to her that Charles Berwanaho A2 had a doctor friend who had someone he wanted to kill and that the lady had sold off the doctor's container and that the women was a lawyer and was disturbing the new wife the doctor had married. So the deal was to kill her (the lawyer woman) that she tried to trace that lawyer but failed. Her evidence was that Atwine stayed in Kampala for about two months at the expense of Charles Berwanaho A2 who was the Chief coordinator of the mission. During that time Atwine and Berwanaho were communicating very constantly. The surprising thing was however that whenever Atwine wanted to talk to Berwanaho, he would beep him using Nasuna's

phone and erase the number. Then Berwanaho would call but Atwine would hide his number. That meant that the parties were secretive.

Atwine's information to the police investigation officers was that it was Charles Berwanaho who had introduced him to Bob Mugisha who provided the killer gun to him and one Bernard who went with him to the death point as a backup hit man.

The police information was that it was Berwanaho (A2) who drove the assailants to the scene and kept them there.

According to the police investigations as evidence by D/C Sakwa (PW23) as the day of the murder was approaching, the late Atwine, Dr Kiyingi and Charles Berwanaho acquired other numbers. That on 1/6/2005 Charles Berwanaho who initially had two lines later, and for the purpose of this mission acquired Celtel No. 075896311 and on the same day acquired another line 075-205532. The later number was in use up to 15/7/2005 and then abandoned. That was the date Dr Kiyingi was arrested by police. On the same date, 1/6/2005 the late Atwine acquired celphone No 075-991327 which he used up to 11/7/2005 at around 8.00am. That day was the day of the murder of the deceased. That line was later on abandoned by the late Atwine. On the other hand, Dr Kiyingi also acquired a new line on 3/7/2005 which was No 075-980608 which he strictly used only for that date. Dr Kiyingi also used his known telephone line on the same day.

D/C Sakwa (PW2) testified that on that date, 3/7/2005, Dr Kiyingi used 075-80608 to communicate to Charles Berwanaho on his (A2) newly acquired No 075-205532. D/C Sakwa testified that that day Dr Kiyingi was leaving the country and he was with Charles Berwanaho (A2) at Entebbe Airport, having come to Uganda on 20/6/2005. The reason for Dr Kiyingi's coming to the country according to Nasuna Sadha (PW4) and Atwine's information to police, was to bring in money to pay the killers and also to make final arrangements. According to Nasuna Sadha (PW4) it was Charles Berwanaho A2 who called Atwine on 3/7/2005 at 4.00p.m. when Atwine was in Mukono with her (Nasuna).

Nasuna PW4 testified that after receiving the call Atwine told her that it was Charles Berwanaho who had called him instructing him to rush to Entebbe to go and escort Dr Kiyingi and that Atwine left immediately on receipt of that call. The extracted print-out by police (exhibit $P24_{(15)}$ showed that Atwine was called on his phone No 077-617849 by Charles Berwanaho on phone No 075-205532.

Further more the evidence implicating Charles Berwanaho A2 was that according to exhibit P_{24} on 13 /7/2005 two days after the murder at 1202 pm telephone No 071-326345 which belonged to Charles Berwanaho called Nasuna Sadha (PW4) on No 077-606212 to talk to Atwine

According to Nasuna Pw4 on receiving that call Atwine was panicky and immediately got a taxi and left Nakawa for Kireka.

Lastly the evidence of D/Sgt Karugaba (PW8) and D/IP Katungi (PW21) was that when Charles Berwanaho learnt or suspected that police were looking for him, he kept away from his home and never slept at his home in Kyambogo until he knew that the police had apprehended his wife that he was compelled to report himself which was not a voluntary conduct as he alleged.

As for Dr Kiyingi A1 the evidence and contention of the prosecution was that he had motive (though not necessary in criminal trial) to kill his wife, the deceased because of two reasons: Their marriage had been on the rock for long and he wanted to remarry and was already cohabiting with a young lady. He had already petitioned for a divorce which was surprisingly opposed by the deceased which did not go down well with the accused.

Another reason was that Dr Kiyingi was disgruntled about the deceased sharing his property after their separation. So the only solution was to kill the deceased. The prosecution relied on the evidence of Nicholas Musiime (PW1), Nasuna Sadha (PW4) and D/Sgt Ahimbisibwe that the theory below the death of the deceased by Dr Kiyingi was property concern and his desire to remarry. The evidence of Nicholas Musiime (PW1), was that Atwine had told him that Dr Kiyingi wanted his wife dead because they had misunderstanding. Nasuna Sadha (PW4) and D/C Ahimbisibwe that the theory below the death of the deceased by Dr Kiyingi was property

concern and his desire to remarry. The evidence of Nicholas Musiime (PW1) was that Atwine had told him that Dr Kiyingi wanted his wife dead because they had misunderstandings. Nasuna Sadha (PW4) on the other hand testified that Atwine told her that a certain Doctor wanted to kill his wife because she had grabbed his property and was disturbing her- co -wife while the evidence of D/C Ahimbisibwe (PW5) was that Bob Mugisha told him after communication with some one on phone that he had a friend of his living outside the country whose girlfriend had conned him and so he wanted a way of killing her.

In support of the above theories the prosecution relied on the evidence of past threats by Dr Kiyingi on the deceased. It was the evidence of Dr Eva Kasirye Alemu (PW2); Dr Kibuka Kiyingi (PW10) and Samali Kiyingi (PW12) that in 2001 Dr Kiyingi pointed a gun at the deceased and threatened to kill her after finding her with a 19 year old Christian praying in the family home. Again in 2001, after the deceased was convinced by Dr Kiyingi to stay with him in Australia, she expressed fear on her life to her children Kibuka PW(10) and Samali (PW12) after Dr Kiyingi had told that he could kill her and no one would know. The deceased further reported to Dr Eva Kasirye (PW2) that sometimes after the burial of her mother in-law, Dr Kiyingi threatened to kill her with a spear. That incident was also said to have happened in 2001.

Nabossa Prossy (PW13) testified that around 2002 and 2003, when she was employed as a housemaid to the family of Dr Kiyingi at Buziga, Dr Kiyingi contacted her to request her to kill the deceased but she rejected the request being a born again Christian and reported the incident to the deceased. She testified that Dr Kiyingi enticed her with a phone and shs.200,000/= but she declined the request to kill the deceased and instead advised Dr Kiyingi to reconcile the marriage. Nabossa testified that Dr Kiyingi had promised her heaven on earth. On top of money she was to be built a house and Dr Kiyingi was also prepared to pay school fees for her child.

Another evidence of past threats was that in 2003 Dr Kiyingi through his nephew Laban Kiwanuka contacted some soldiers to kill the deceased but the plan aborted because the soldiers disclosed the plan and the deceased got wind of it and informed her sister Dr Eva Kasirye Alemu (PW2) and her children, Dr Kibuka (PW10) and lawyer Samali (PW12). She wrote a letter to that effect (exhibit P_{11}) implicating Laban Kiwanuka and Dr Kiyingi. Laban Kiwanuka's threat was

supported by Nabossa Prossy (PW13) and the conduct of the accused in trying to exonerate him through a forged letter from the DPP (Exhibit P12).

The prosecution further alleged that the conduct of Dr Kiyingi prior to the murder, was suspect in that he came to Uganda secretly on 29/6/2005 and left on 3/7/2005.

According to the evidence of Nasuna Sadha (PW4) and Atwine's information to the police, the purpose of that visit was to bring in money to be used in the murder. Prosecution contended that the fact that Dr Kiyingi was with the late Atwine and Charles Berwanaho at the Airport on that day confirmed that he had brought the money. They relied on print out Exhibit P $24_{(3)}$, P $24_{(9)}$ P $24_{(15)}$.

Another allegation on the conduct prior to murder was that on 3rd July 2005, a week before the murder, Dr Kiyingi went stealthily without knowledge of the deceased and removed valuable property from the matrimonial home, according to Prossy Nabossa (PW13). Among them included TV, radio set and loud speakers. The deceased did not know that her husband was within the country. The deceased told the presence of the accused to her sister Dr Eva Kasirye Alemu (PW2) to whom she expressed fear about her life.

The prosecution also asserted that Dr Kiyingi (A1) withdrew guards from the Buziga home so that he could be in control of the home so that the planned mission could succeed after removing those who were close to the deceased.

The prosecutors further relied on the allegations that Dr Kiyingi A1 never communicated to his in-laws on 11/7/2005 about the unfortunate incident but instead offered to call other people like Sam Kagulire Lwasa and Prince Nakibinge. On top of that it was also prosecution evidence that Dr Kiyingi further failed to greet his in- laws at the funeral and yet he greeted other mourners. Further more, it was the evidence of his daughter Samali (PW12) that her father Dr Kiyingi never comforted them as mourners and that his speech during the funeral service was as if he was not bereaved. The speech never embraced sorrows. It was as if it was a baptism service for the children because he never talked about the deceased.

The prosecution further relied on the evidence of D/Sgt Karugaba (PW8) that Dr Kiyingi was suspected because his itinerary showed that he arrived in Uganda on 13/7/2005 and was to leave Uganda on 15/7/2005 which to them, was strange for a bereaved spouse of mother of his children to plan his travel in such a way. D/Sgt Karugaba PW8 and Nasuna Sadha PW4 further stated that on 17/7/2005 Dr Kiyingi received a call when he was at CID Headquarters from the killer Atwine on phone No 041-541525 and that same number thereafter called Nasuna Sadha PW4 who was also at the CID Headquarters and on receipt of that call and on realizing that call the was from Atwine, Nasuna switched the call to hand free and everybody including D/Sgt Karugaba and D/IP Katungi (PW2) heard that conversation between Atwine and Nasuna. The prosecution contended that the communication was because Atwine was demanding his balance for the mission.

Lastly, the prosecution relied on the evidence that the in Atwine's notebook; the telephone number of Dr Kiyingi was noted in one of the pages to prove that he was in contact with the late Atwine.

From the above evidence it is clear that there were no eye witnesses to the gruesome killing. The evidence implicating the accused persons were therefore based on a chain of circumstantial evidence. The law on circumstantial evidence was well taken by **Ssekandi J.A** (as he then was) in his lead judgment in ***Amisi Dhatemwa Alias Waibi Vs Uganda, criminal appeal No 23 of 1977,*** in terms set below:

"It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving facts in issue quite accurately, it is no derogation of evidence to say that it is circumstantial; See: R Vs Tailor, Wever and Donovan, 21 Criminal Appeal R 20.

However it is trite law that circumstantial evidence must always be narrowly examined, only because evidence of this kind may be fabricated to cast suspicion on another. It is therefore necessary before drawing the inference of the accused guilt from circumstantial evidence to

be sure that there are no other co existing circumstances, which would weaken or destroy the inference….

The burden of proof in criminal cases is always upon the prosecution and a case based on a chain of circumstantial evidence is only as strong as its weakest link"

Recently the **Supreme Court** reaffirmed the above position of the law in the case of Janet Mureeba and ***2 others-Vs Uganda , supreme Court Criminal Appeal No 13 of 2003*** as follows**:**

"There are many decided cases which set out tests to be applied in relying on circumstantial evidence to sustain a conviction; the circumstantial evidence must point irresistibly to the guilt of the accused. In R -Vs- Kipkering Arap Koske and Another [1949] 16 EACE 135 it was stated that in order to justify, on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. That statement of the law was approved by the East African court of Appeal in Simon Musoke Vs R[1958] EA 715 and see: Bogere Charles (Supra)."

Bogere's case is very instructive on this issue in that the court observed that:

"the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt"

In conclusion therefore the above authorities clearly set out how courts should square up while dealing with circumstantial evidence.

Having stated that relevant position of the law, I now proceed to appraise the evidence on record. As far as Dr Kiyingi is concerned, a chain of circumstantial evidence was raised against him by the prosecution. Among them was past threats on the life of the deceased. The law is that past threats on the deceased by his or he assailant can be good evidence leading to conviction. However, there must be sufficient proximity between the threats and the occurrence of the death in order to form a transaction. See **MUREEBA** (Supra). If the threat is too remote in terms of

time and transaction, then it would not constitute circumstances of the transaction leading to the death of the deceased. The Court held further that circumstances must be circumstances of a transaction. General expression indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of the death was held not to be admissible.

In the instant case, it was contended that the marriage between the couple had fallen on the rocks whereby even the enormous wealth, which they had, could not redeem it. Between 2001-2003 the marriage was characterized by threats, abuses, hatred and mistrust to the extent that the deceased continued to live under constant threat to her life until her death. Those threats occurred two years prior to this incident, to say the least, I think those threats offered during the above period were too remote to constitute a transaction in the death of the deceased. They were not proximate in view of the time lag. Save perhaps for Laban's incident, the other threats and abuses were manifestations in the wear and tear in the marriage relationship. Furthermore, there was no evidence to prove that Dr Kiyingi continued to threaten his wife or that he continued to request his maid to help in doing away with the deceased.

Unlike in **Mureeba's** case where there were persistent threats on the life of the deceased by way of telephone threats and physical harassments, in the in the instant case, there was no evidence to show that the accused was in overt pursuit of threatening the deceased. Even when the accused was said to have sneaked into the country, there was no evidence that he made attempts to threaten the deceased by telephone contact or otherwise. Therefore the fear that the deceased expressed for her life when the accused sneaked into the country on 29/6/2005 was just a general expression of fear and suspicion, which needed corroboration. Therefore I find the above chain of circumstantial evidence to be of a very weak nature.

There was an assertion that the conduct of the accused was not that of an innocent person. First of all, it was the prosecution evidence that the accused did not communicate the death of the deceased to his in-laws, did not console and comfort the children and his away of booking a return journey two days after the burial was not conduct of a bereaved husband.
The accused in his defence stated that after receiving the bad news of the death of the deceased from his brother in law, One Semanda from London, he was shocked, confused and disorientated

but after a while he recollected himself and contacted his two sons, Dr Kibuka and Kirabo and later his daughter, Samali and started making travel arrangements to fly to Uganda. Later he contacted relatives and friends in Uganda to make burial arrangements.

The defence of the accused was further that after arriving in Uganda on 14th July 2005. He proceeded to his Buziga home where he got mourners. However he was shocked at the cold reception from his in laws, many of whom did not want to speak to him except his father in law, who consoled him in the Kiganda fashion-***"Kitalo Nyo"*** The accused told court further that thereafter he summoned the children to the master bedroom including his two daughters, Samali and Sanyu whom he found already at Buziga and consoled them and they prayed together.

Lastly the accused denied failure to mourn the deceased. He told court that he was degraded, humiliated and prevented from mourning the deceased in that during the funeral service, Hon Tim Lwanga bluntly prevented him from consoling and hugging his children by shielding and pushing them away from him. Earlier on, the same Tim Lwanga together with Dr Eva Kasirye (PW2) and Samali (PW12) had requested the clergy at Namirembe Cathedral to block him from addressing the congregation during the memorial service of the deceased.

I do agree, with the defence that with the above kind of treatment, even a man with the hardest character would not have contained the embarrassment and humiliation. The accused told court that although the clergyman in their God given wisdom gave him opportunity to speak, his heart was already too heavy to sustain a good speech, but all the same, he spoke within the context of the occasion. The above defence which the accused made in a calm and composed mood is quite plausible and believable.

Apart from the above defence, the accused further told court that because over traveling and staying without proper sleep for very many hours, he was in a state of fatigue such that he could not make a good speech in the circumstances.

I have considered the evidence as outlined above. People express grief in many ways. In fact there is no standard form of grief unless it is being orchestrated. Some cry others don't. Some

break down in grief while others standup to the grief. Therefore to attach the guilt of the accused to the type of speech he made at the funeral service clearly lacked moral certainly. That chain of evidence should accordingly be discounted for being weak and uncertain because it did not rule out the human weakness of the accused: **See *Bogere Charles -Vs-Uganda, Supreme Court criminal Appeal No 10 of 1998.***

The prosecution engine was based on the evidence of Musiime Nicholas PW1, Nasuna Sadha PW4 and the police investigation team comprising of D/ Sgt Karugaba PW8, D/IP Katungi (PW21) and D/C Sakwa (PW23).

The evidence of Nicholas Musiime (PW1) Nasuna Sadha (PW4) D/Sgt Karugaba (PW8) and D/IP Katungi (PW23) all relied on the revelation which the late Atwine had made. However the evidence of Musiime (PW1) and Nasuna (PW4) suffered a serious blow in assessment of their truthfulness with the death of the late Atwine John who was one of the suspects in this case. However, that misfortune could not bundle completely the evidence of the two witnesses as worthless as long as there was other evidence which when tied together could irresistibly point to the guilt of the accused persons.

One of such evidence could have been if the state had tied the death of Atwine on the accused persons. But here the state was more to blame than the accused because it was its duty to keep Atwine safe in custody. As mentioned earlier, the evidence D/Sgt Karugaba (PW8) and D/IP Perez Katungi (PW21) constituted evidence of investigating officers which was vital as foundation evidence in support of prosecution case. However the evidence of these witnesses like those of Musiime and Nasuna were barren of evidentiary value without the necessary corroborative evidence. The information which Atwine made to the above officers were not confessions because they were not made under charge and caution. Even if they were, their truthfulness would have first been tested and refined before admission.

In an attempt to harness the evidence of the above witnesses, the prosecution relied on the assertion that, towards the execution of the murder mission the accused persons acquired telephone lines, which they used strictly for the mission and discarded soon thereafter. The

prosecution relied on the evidence of D/C Sakwa (PW23) who was a specialist in analyzing telephone printouts from service providers. Using great skill and expertise, D/C Sakwa (PW23) presented telephone printouts covering the period before and after the murder of the deceased.

However, according to D/C Sakwa, the printout revealed that no calls had ever been made by DR Kiyingi to Bob Mugisha; there was no call made by Dr Kiyingi to the late Atwine, there was no call made by Bob Mugisha to Dr Kiyingi or Charles Berwanaho or to the late Atwine and vice versa

The print-outs further revealed that there was no international call made by Charles Berwanaho to Dr Kiyingi and yet it was alleged by the prosecution witness that soon after the mission was accomplished, Charles Berwanaho phoned Dr Kiyingi to inform him accordingly where he was said to have expressed his happiness. The shortfalls in the printouts created a hole in this case. The only contact, which the printouts revealed, was between Charles Berwanaho and his brother the Late Atwine. The defence explained that that was a normal contact between blood brothers. Charles Berwanaho explained further that during that period, he was carrying on research together with the late Atwine. That was why they were in close contract. The

The prosecution called the evidence from service providers i.e. MTN, Celtel and Mango. All these witnesses (PW26, PW25 and PW24) confirmed that their systems did not have the capacity to listen to telephone conversations. This should have been a useful advancement in detecting crimes. Those service providers also alluded to the shortfalls in the printouts about telephone contacts between the accused persons.

The only evidence which the prosecution brought against Dr Kiyingi in respect of telephone contacts was through D/Sgt Karugaba (PW8) Nasuna Sadha PW4 and D/IP Katungi (PW21) that on 17th July 2005 Dr Kiyingi received a call when he was at CID headquarters from the late Atwine on phone No 041-541525 and that the same number thereafter called Nasuna Sadha who was also at the police headquarters and on receipt of that call and or realizing that the call, was from Atwine, Nasuna switched the call to hands free whereupon everybody including D/Sgt Karugaba and, D/IP Katungi heard the conversation between Atwine and Nasuna. The

prosecution contended that the conversation between Atwine and Dr Kiyingi was because Atwine was demanding his balance. But one cannot be certain about the authenticity of this conversation. That was the first time both Karugaba and D/IP Katungi were hearing the voice of the late Atwine if ever he was the one speaking at all . Moreover the call was from a payphone. Therefore, it is possible that Nasuna could have been talking to anybody. More-over I am very reluctant to trust the credibility of this Nasuna in light of the fact that she could not reveal the plot to kill the deceased to the local or public authorities at the earlier opportunity and yet she was said to be having a very prominent uncle in the Police Force, One Asuman Mugenyi who was by then heading public relations department of the Police Force. If she could reveal the same to a stranger, it could have been much easier for her to have reported the same to the said officer. It is therefore doubtful whether she even made efforts to save the life of the deceased as she claimed. Moreover the testimony of Nasuna also failed to tally with other prosecution evidence. Her reasons for the killing of the deceased were different from the version, which Atwine was said to have given to Musiime. She also told Court that Atwine had told her that Dr Kiyingi booked him in a posh room in Entebbe. This however conflicted with the evidence adduced by D/C Sakwa (PW23), which was that the late Atwine never slept in Entebbe. This among others, throws doubt on the prosecution theory. At this juncture it is instructive to recite the case of ***Woolmington-Vs-DPP [1935] AC 662:***

> ***" Just as there is evidence on behalf of prosecution so there may be evidence on behalf of the accused which may cause doubt as to his guilt. In either case he is entitled to the benefits of doubt. But while prosecution must prove the guilt of a prisoner. There is no burden laid on the prisoner to prove his innocence. It is sufficient for him to raise a doubt as to his guilt. He is not even bound to satisfy the jury as to his innocence"***

The above case has been followed in number of jurisdictions including Uganda **See:** ***SEKITOLEKO-VS-UGANDA [1967] EA 531.***

In Australia the same case was applied with approval in the case of ***Green-V- the Queen [1971] C.L. R 28***, in the following terms:

"The burden of proof, as you well know, is on the Crown and it is on the Crown in respect of every issue in respect of every element of the crime. Well, now before you say you are satisfied for the purpose of a verdict about a certain issue, you of course have to reach a certain degree of satisfaction in your mind, and what degree of satisfaction must be reached?" The answer is that you must be satisfied beyond reasonable doubt and that is the time - honoured phrase and is usually thought to be very good work in seeing that no body is convicted of a serious crime unless the Court that tries him is satisfied of his quilt beyond reasonable doubt. And you may say "well how do I know when I have got to a stage of being satisfied of his guilt beyond reasonable doubt?" and the answer to that is that it is when you have reached the stage that you either have no doubt at all, because you have got rid of all reasonable doubts; or if there is something nagging in the back of your mind which makes you hesitate as to whether you are satisfied beyond reasonable doubt, you have got to try and take it out and identify thing which is causing the hesitation, causing the doubt if you like, and you have a look at it and you try to assess it and you say to yourself is this doubt that is bothering me, does it proceed from reason; is it a rational doubt is it something which raises a really sensible doubt; or is it a fantastic sort of doubt, is it something which arises from some prejudice that I may have, some quite unreasonable fear that I might go wrong, some perhaps reluctance to make an unpleasant finding. Well if it is one of those doubts then of course it cannot be described as reasonable doubt because it does not come from reason, it comes from something which is emotional or irrational or at any rate it is not based on reason and if you have had a look at what is bothering you and you decide that it does proceed from something which is not reason but something fantastic or rising out of prejudice or one of these other things, then you should say to yourself.

" the only doubt I have got is one which is not based on reason"

……

And of course it is commonsense point of view before you find anybody guilty of crime like this, you need to feel comfortable about it, you need to feel" very well I have considered everything and I am well satisfied. I am satisfied beyond reasonable doubt.

I have given it the best consideration I can" <u>And then you go away from the court and you are comfortable, and that is the way you ought to be. You may not enjoy it, but you will nevertheless be</u> <u>comfortable and unless you can make a decision of guilt and feel comfortable that is the right Decision"</u> **Emphasis mine.**

The above quotation is very inspiriting, highly persuasive and very instructive to the instant case. The finding of guilt should only be based where there is no doubt or if there is doubt, the doubt must be based on reason and not prejudice , fear or reluctance to make unpleasant finding. In other words the finding of guilt must not be like ***<u>Pilato's biblical trial of Jesus Christ.</u>***

Taking the prosecution evidence in this case in totality and the defence, which Dr Kiyingi raised, my mind is still left nagging whether he committed the alleged crime. The truthfulness of evidence of Musiime Pw1 and Nasuna Pw4 could not be fully established due to the sudden death of the late Atwine. The allegations that the accused persons acquired a number of telephone sets to coordinate the mission was not established by the prosecution to the required standard. This being a very serious crime, court ought to be certain beyond reasonable doubt. The law in its usual kindness in that it is safer to let 99 criminals free than to convict one innocent person. Experience abound where innocent people have been convicted recklessly. Although it was not his duty to prove his innocence, Dr Kiyingi made a formidable defence, which created a huge cloud of doubt on the prosecution case. He destroyed the allegation that during the eve of the murder he had sneaked into the country to bring in money to pay the killers. His explanation was that he had come to do his private business and to perform a social function. He had been invited as a guest of honour in a social function during the launching of Nagujja's album where his company was the sponsor. I have no reason to disbelieve that explanation. If the accused had come to finance the said deal, at least some part of the money could have been recovered from one of the accused person because the deal was said to have involved a lot of money. However not even 100,000/ was recovered from the late Atwine or Charles Berwanaho, who was said to be the one who was charged with the distribution of the said funds.

The accused also explained that his return schedule had nothing to do with his guilt as that was a provisional booking. He also denied withdrawing electricity and security services from the

house. In totality, the alibi which the accused was not bound to prove in law created a huge doubt in the prosecution case.

For the above reasons and others already outlined, I find this case has not been proved beyond reasonable doubt and I therefore would not feel comfortable to convict the accused. The evidence on record merely leaves the accused as a high suspect in the death of his wife. But the law is very straight on that point, suspicion however high it may be can never be a basis for conviction. **See*: R Vs Israel Epuku s/o of Achietu.*** The circumstantial evidence against the accused did not point irresistibly at the accused unlike in the **Mureeba *case*** *(supra)* where after the death of the deceased, the accused was heard rejoicing that the **Malaya** who was after her husband was now dead. And she proceeded to engage a witch doctor to help her out of trouble after the murder, but in the instant case, however the circumstantial evidence could not be tied around Dr Kiyingi. The evidence as pointed earlier left the accused as a high suspect. It was not water tight as required by law. Therefore having failed to prove this case to the required standard and this being a very serious crime, I would feel very uncomfortable in convicting the accused. In agreement with both assessors, I find Dr Kiyingi not guilty on the charge. He is accordingly acquitted

As far as the 2nd and 3rd accused persons are concerned, the prosecution relied on the same evidence to implicate both of them. With regard to the 2nd accused Charles Berwanaho prosecution further relied on his conduct of hiding from the police team upon realizing that he was under probe. In his defense, Charles Berwanaho denied ever hiding and told court that the previous night he had not evaded police arrest but had spent the night at the home of his mistress and that upon realizing that he was wanted by police, he decided to report himself to the police. Further defence was that during the material time he was carrying on a research on Aids, which was being funded by the Global Fund. At that time he was carrying research in Wakiso together with the late Atwine. He conceded that in the process he was in constant touch with the late Atwine on phone. He denied making an international call to Dr Kiyingi. The issue of international call between Dr Kiyingi and Charles Berwanaho was ruled out by the printouts, which the prosecution laid before this court. The accused also made a plausible account of his

presence in Entebbe during the material time that he was there doing his research. Therefore, the possibility that the accused was in Entebbe, not on account of Dr Kiyingi could not be overruled.

As for the conduct of the accused that he evaded arrest I am satisfied with his explanation that during the night in question, he had slept at the home of his mistress in Kyambogo and only managed to return in the morning and when he learnt that he was wanted by police he reported himself to the police headquarters. I think it was irrational to make adverse inference on the conduct of the accused person because if at all he had intended to hide from the course of Justice he would not have reported himself to the police headquarters, purportedly to rescue his wife who had been arrested by the police . But I must also say that the conduct of arresting the wife of the accused who had nothing to do with this crime tantamounted to high handedness. A person should only be arrested for the crime he or she has personally committed but not for crime committed by another person, not even that of a spouse.

Another reason the accused related for the constant communication with the late Atwine was that they were brothers. The blood relationship between the two was even confirmed by the prosecution. The accused also testified that there was employee-employer relationship between him and Dr Kiyingi, which would prompt them to communicate to each other whenever it was necessary. All the reason above clearly set out the weakest link in the circumstantial evidence relied on by the prosecution because the links gave other co existing circumstances which would weaken or destroy the inference of guilt. **See: WAIBI** (supra). Furthermore, if it is true that the assailants had used Charles Berwanaho's motor vehicle to the scene, why was it that the prosecution failed to identify its registration number? If the information from Atwine was to go by, then he should have been in a position to identify that motor vehicle because that was his brother's vehicle.

Lastly, I have to deal with Bob Mugisha A3. Again as for the other two accused persons, the evidence against this accused is of a very weak nature. In addition to the witnesses whose evidence I have already analyzed in respect of the other two accused persons, the prosecution relied on the evidence of D/Sgt Turyasingura (PW5), and D/C Ahimbisibwe (PW6). The evidence of D/Sgt Turyasingura (PW5) was that the accused never revealed the names of the

assailants a part from saying that he knew the killers. In the testimony of D/C Ahimbisibwe (PW6) the accused never made specific reference as to the doctor from a broad who was planning to kill his girlfriend. The evidence of the two witnesses were therefore speculative and needed very strong corroborative evidence which the prosecution failed to adduce.

All in all, the prosecution case failed the standard required in criminal justice, to prove this case beyond reasonable doubt. That standard is very high. The court is not bothered by the strength or weakness of the defence as was the point in ***PAULO OMALE -Vs- UGANDA CRIMINAL APPEAL No. 6 of 1977*** where the defunct Court of Appeal for Appeal for Uganda had this to say:

> ***"It is for the prosecution to prove beyond reasonable doubt that the prisoner with malice aforethought killed the deceased. It is not for the prisoner to prove accident or self defence and he is entitled to be acquitted even though the court is not satisfied that his story is true, so long as the court is of the view that his story might reasonably be true"***

For the above reasons, I agree with the unanimous decisions of the lady and gentleman assessor that the accused persons should not be found guilty. The accused persons are accordingly acquitted and set free.

Order:-

Any money paid for bail be refunded to the accused persons.

RUBBY AWERI OPIO

JUDGE.

11/12/2006.

11/12/2006:-

Judgment read in open court in the presence of both defence and prosecution attorneys.

RUBBY AWERI OPIO

JUDGE.

11/12/2006.