**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT RUKUNGIRI**

**HCT – 05 – CR – CSC – No.0189 - 2009**

**UGANDA …… PROSECUTOR**

**Versus**

**MUGISHA JACKSON alias …….. ACCUSED**
**MAGAMAGA**

**BEFORE: HONOURABLE MR. JUSTICE YOROKAMU BAMWINE**

**JUDGMENT**

The accused person MUGISHA JACKSON alias MAGAMAGA is indicted for multiple murders contrary to Sections 188 & 189 of the Penal Cod Act. It is alleged in Count 1 that the accused and others still at large on the 1st day of August, 2002 at Kakoni Cell in Kanungu District murdered MUTIMA FRIDA; Count 2 is respect of TURYASINGURA PEACE; Count 3 in respect of ORISHABA BENJAMIN; Count 4 in respect of KYARIKUNDA PATIENCE; and Count 5 in respect of NAMARA GIFT; all on the same day, cell and District.

The substance of the case against him as per Summary of the case is that during the year 1995, the accused married one Peace Turyasingura, daughter to Mutima Frida, both deceased; that their marriage relationship became sour and they divorced; that they later on resumed their relationship to no success; that during the last week of July, 2002 the

accused bought some petrol and attempted burn the deceased persons but was intercepted. The matter is said to have been reported to Kambuga Police Post. Thereafter, in the night of 01 – 08 – 2002 the accused is said to have successfully bought petrol, conspired with others still at large; gone to the home of the deceased persons and forcefully entered their house, assaulted them and set them ablaze.

The prosecution case is that the accused was properly identified by Namara Gift and Kyarikunda Patience who informed neighbours.

The accused has denied the charges and raised a defence of alibi.

It is trite that the burden of proving the guilt of the accused persons is on the prosecution. That burden does not shift to the defence. The accused person is not required to prove his innocence but rather the prosecution must prove his guilt beyond reasonable doubt.

It is also our law that an accused should not be convicted on the weakness of his defence or on mere suspicion. Any conviction must be on the strength of the case as established by the prosecution.

To sustain a charge of murder, the prosecution must prove that:

**(i) the alleged victim is actually dead;**
**(ii) the death was unlawfully caused;**
**(iii) the accused killed the deceased with malice aforethought**.

As to whether Matima Frida, Turyasingura Peace, Orishaba Benjamin, Kyarikunda Patience and Namara Gift are dead, the prosecution case is based on the evidence of Tumukuratiire Justus (PW1); PW2 Orishaba Jackline and PW3 D.C Muhereza. PW1 Tumukuratiire is the Vice Chairman of Kanoni Village, Nyarugunda Parish in Kanungu District. According to this witness he knew the five deceased persons in this case as his subjects and they all died on 01 – 08 – 2002. The unchallenged evidence of PW2

Orishaba, a neighbour to the deceased persons and D.C Muhereza then attached to Kambuga Police Post is to the same effect. From their evidence, Mutima, Turyasingura and Orishaba died in the burnt house whereas Namara and Kyarikunda sustained serious burns from which they died shortly thereafter.

No medical evidence has been adduced to confirm the death of the deceased persons and cause thereof. Its absence is not fatal to the prosecution case. Post mortem reports are evidence of two things: the fact of death and cause of it. However, it is open to the prosecution to produce and rely on other evidence to establish those facts. In the instant case, the evidence on record has offered sufficient proof that the five alleged victims in this case are actually dead.

I make a finding to that effect.

With regard to the second ingredient, that is, whether the death of each deceased was caused by unlawful means, our law presumes every homicide to be unlawful unless it is accidental or is otherwise excusable. An accidental homicide is usually a homicide that happens by chance or unintentionally, whereas a homicide is excusable if committed in execution of a lawful sentence or in self-defence.

None of the above factors applies to this case. Mitima, Turyasingura and Orishaba did not get out of the house, while Kyarikunda and Namara got out but died shortly thereafter of burns sustained in the attack.

I have already indicated that the prosecution did not exhibit post mortem reports in respect of the deceased persons. According to PW4 D/ASP Kabuye, the Doctor who carried out the post mortems demanded for payment and before the funds were availed to him he died. All attempts to get the reports he may have compiled were fruitless.

It is trite that an accused person may be convicted of murder in the absence of medical report or where the dead body may not be found so long as there is some other cogent and

compelling circumstantial evidence showing the deceased was actually killed. If any authority were required for this, **R Vs Micheal Onufrejizyk [1955] 39 Crim**. Law Reports 1 and **Okot Sisto alias Makar Vs Uganda Crim. Appeal No.64 of 1999 (C.A)** would suffice.

From the evidence of PW1 Tumukuratiire and PW2 Orishaba, court is satisfied that the death of each deceased person herein was unlawfully caused.

I so hold.

I now turn to the issue of malice aforethought.

Malice aforethought is really a state of the mind or mental disposition. It is not capable of being proved by direct evidence. It can be deduced from the circumstances that accompany the commission of the offence in question.

Factors that are considered by the courts in the determination of the existence or otherwise of malice aforethought include the nature of the weapons used; the nature of the injuries inflicted on the body of the deceased and the part of the body on which injuries were inflicted, i.e. whether it is a vulnerable and delicate part of the body or not. It can also be deduced from the conduct of the killer before and after the killing.

In the instant case, from the evidence of PW1 Tumukuratiire, PW2 Orishaba and PW3 Muhereza, itself based on the account of Kyarikunda Patience and Namara Gift before they passed on, the deceased persons were assaulted with sticks, among other weapons. The assailants did not select which part of the body to hit. Thereafter they set the house ablaze, using a lethal liquid, petrol, according to the accused's statement to the police which I will comment on shortly. Considering the weapons used and the non-selective nature of which parts of the body to beat, surely no reasonable person would contemplate that death would not result from the act. I would find that the prosecution has established

beyond reasonable doubt that the unlawful deaths of the five victims herein were caused with malice aforethought.

I so find.

I now turn to the pertinent question of whether the accused person committed those heinous acts.

In every criminal charge, it is the guilt of the accused person which is in issue. Normally it is not disputed, as herein, that the crime was committed by someone. But even where that question is in issue, the crucial question is whether it was the accused person who committed it.

This brings into question whether the people who implicated the accused properly identified him as having participated in the killing.

Tied up with this question of identification is the issue of the dying declarations and accused's defence of alibi.

From the evidence of PW1 Tumukuratiire Justus, he arrived at the scene only to find the bodies of Mutima, Turyasingura and Benjamin smouldering in fire. Kyarikunda Patience and Namara Gift were at the home of their Neighbour, Orishaba Jackline, PW2. They too had got badly burnt but were talking.

They told him that they were a sleep, heard a bang on the door and a person entered with a Torch. That with the aid of that light they were able to see one of their assailants, the accused. They told him that the accused hit Turyasingura with a stick on the head, and when Mutima made an attempt to get out of bed, she too was hit with a stick.

That the assailant then poured water like liquid on Turyasingura and later fire burst out. The same story was repeated to PW2 Orishaba before the Kyarikunda and Namara were rushed to Hospital.

In Hospital the two girls were visited by D/C Muhereza. Kyarikunda talked to him moments before she died and the following account was recorded from her:

> **"Today the 1/8/2002 at round 0200hrs, I was asleep in my bedroom together with my young sister called Namara Gift. Then I was awakened by the big stone which was hit on the door and forced it open. Later the persons who hit the door entered in and started beating my mother together with my grandmother.**
>
> **From there, I immediately rushed to my mother's bedroom and I saw Mugisha Jackson alias Magamaga while beating the two seriously. When he saw me coming to rescue them, he beat me with his stick (enkoni) on my head. Then I ran back to my bedroom and found my sister already awakened. Thereafter, the murders (sic) set our house a braze (sic) and this made me together with my sister to caught (sic) fire and when the situation became worse inside the house, we used the behind door and escaped.**
>
> **After we had escaped from the house, we went to our neighbour called Orishaba Jackline and his ourselves there. Later on, we were brought to Kambuga Hospital where we are being nursed.**
>
> **I wish to conclude and state that when we escaped, we left our mother Mutima, grand mother Turyasingura Peace and our young kid Orishaba while burning in the house. That's all I can state".**

In **S.C. Sarker on Law of Evidence, 12th Edition, at P.353 the learned author states:**

**"In cases of homicide, statements made by a person, since deceased, are admissible to prove the cause and circumstances of that person's death. Such statements are called 'dying declaration'. But such statements under the English law should be made when he was in 'settled, hopeless expectation of imminent death' …… Their admissibility rests on the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath ……. The general principle on which these species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive of falsehood is silenced, and the mind induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice".**

**See: Uganda Antonio Nsubuga Crim. Appeal No.49 of 1996 (C.A).**

**I should hasten to observe, for record purposes, that in Uganda, unlike under the English law stated above, it is not necessary that the maker should be in settled, hopeless expectation of imminent death"** to bring such a statement within the meaning of a dying declaration. What is necessary is that death should have ensued thereafter.

Now turning to the instant case, I warned the assessors, as I warn myself now, that a dying declaration must be approached with caution as it is evidence of the weakest kind. For court to rely on a dying declaration, the prosecution evidence must be so cogent as to exclude any possibility of doubt, especially where the attack takes place at night when the identification of the attacker is difficult.

The weight to be attached to a dying declaration depends to a great extent upon the circumstances in which it is made. If for instance a wound is inflicted on the head, it may dim the memory, weaken or confuse the intellectual power of the victim.

**See: Jasungu S/O Okumu Vs R (1954) 21 EACA 331.**

I have in connection with this considered the apparent mix-up of family relationships towards the end of Kyarikunda's dying declaration. She referred to Mutima as her mother, whereas she was a grandmother, and Turyasingura as her grandmother whereas she (Turyasingura Peace) was a mother to her.

It is of course probable, and I think it is, that the mix-up was D/C Muhereza's and not Kyarikunda's, in view of his admission at the hearing that he himself was not at ease because of tension and confusion at the time arising from the incident. Whatever the source, the mix-up itself though minor highlights the intrinsic risk attendant to reliance on such statements alone. I am alive to the position at law that corroboration of a dying declaration is not a mandatory requirement. However, every case must depend on its own unique facts and circumstances. There cannot be any hard and fast rule about that. In the instant case, considering that the attack occurred at night when the identification of the attackers was difficult, notwithstanding that the two girls knew the accused person very well, it would be unsafe to base a conviction solely on their word before they died, in the absence of some other cogent and compelling circumstantial evidence pointing to accused's participation in the commission of the offence.

In my view that other evidence is to be found in accused's retracted confession. The attack occurred in the night of 01/08/2002. He made a charge and caution statement on 2/8/2002 at 8:00am. He stated in that that statement inter alia as follows:

**“ ……. On arrival I pushed open the door which I knew was loosely locked and entered. I beat dead my wife. I sprinkled petrol in the house and latter (sic) set (sic) the house on fire. I had bought this petrol in Kihihi Petrol Station …….”**

In law a statement is not a confession unless it is sufficient by itself to justify the conviction of its maker of the offence he is charged with. For a statement to amount to a confession, therefore, it should admit all the elements of the offence or substantially all the elements of the offence allegedly confessed. To put it plainly, a statement is a confession if, in the absence of any explanation or qualification, it points clearly to the guilt of the maker for any offence of which he is subsequently charged.

**See: Alloys Vs Republic [1975] EA 213.**

Relating the above principle to the instant case, I have addressed my mind to accused’s entire extra-judicial statement, exhibit. P2. It shows how he elaborately planned the attack and executed it. He indicates in it how he beat up his wife and her mother and what motivated him to do so. It is so detailed that the content could only have come from him, not any other person. His narration of events as they unfolded that might compares very favourably with that of Kyarikunda Patience made in Hospital moments before she died. I am satisfied that it is a true account of what happened that night. It is an admission of a felonious attack and therefore a confession. Notwithstanding that he has repudiated it, I am satisfied that in all circumstances it is a true confession. It offers adequate corroboration to the statements of Kyarikunda and Namara as narrated to PW1 Tumukuratiire and PW2 Orishaba Jackline soon after the attack that the attackers included the accused.

From the testimony of PWI Tumukuratiire and PW2 Orishaba, there was friction between the accused and Turyasingura arising out of their failed marriage. Previous to the attack, Mutima and Turyasingura had complained to the LC I accused's acts of disturbance to their peace. The committee made attempts to reconcile them. Soon after that attempt to reconcile them, Turyasingura went to the Vice Chairman again and reported that while they were in the house they heard scratches on the door and smelt petrol. That when they looked out of the house with aid of moonlight, they saw it was the accused, raised alarm and he ran away. They had a bottle of mineral water with petrol in it which the attacker had left at the scene. The witness considered the case to be beyond his powers and he referred Turyasingura to Police. After about a week, they were burnt.

In the charge and caution statement, the accused alluded to all that. I noted the demeanour of PW1 Tumukuratiire as he testified. He impressed me as a truthful witness, very conversant with the squabbles between the accused and the family of the deceased persons.

I have therefore accepted his evidence of the accused's previous attempt on the lives of the deceased persons before he finally accomplished the plan to eliminate them. His evidence is amply corroborated by the accused's own confession.

Learned counsel for the accused has raised a number of issues relating to the prosecution evidence. He argued, for instance, that the cause of fire has not been conclusively determined, implying that it may have been an accidental fire caused by a candle left burning at night; that whereas PW1 Tumukuratiire mentioned assailant's use of a Torch which the girls used to identify him by, Kyarikunda's statement makes no mention of it; and that the amount of Shs.30,000= mentioned in the statement was too little to construct a house. I have appreciated the ingenuity of these arguments. However, very respectfully to counsel, I think they are far fetched.

PW1 Tumukuratiire talked to the two girls immediately after the attack, when the events were still fresh and vivid in their minds. He did not record what they said. He therefore testifies from memory of what he gathered from the victims of this vicious attack. PW3 D/C Muhereza talked to them later in a different environment. They were already in Hospital, their conditions getting worse. Moments later they died. It is possible that in such circumstances D/C Muhereza may not have asked them to comment on the source of light with which they were able to identify him by.

The argument as to an accidental fire caused by a candle left burning that might is rather fanciful in view of what the girls saw as a water like liquid being splashed around fire bursting out immediately and accused's confession that he personally started off the fire using petrol.

As to the adequacy or lack of it of Shs.30,000= to buy a house with, the accused stated in his confession that it was his contribution towards the purchase of the house; that Turyasingura and her mother made financial demands on him which resulted in his selling his personal property to the extent of spending over Shs.10 million on them. I have understood the Shs.30,000= to have been mentioned in that context.

All in all, it would appear to me that the arguments are not supported by the evidence on record. I am inclined to disregard them and I do so.

I have considered the issue of motive, that is, whether there was any motive on the part of the accused for killing the deceased persons.

Motive is not usually sought in murder cases. However, if it exists, it strengthens the prosecution case. In the instant case, evidence of motive is provided by the testimony of PW1 Tumukuratiire and PW2 Orishaba. It is further provided by the accused himself in his confession. From this evidence, I am satisfied that he had

a strong motive to harm the deceased persons and he deliberately, intentionally and callously executed it.

He led evidence of DW2 Edison Ngabirano, a fellow prisoner but on a different charge, that a certain man in their village, one Kabebe committed suicide upon his wife telling him, in the witness's absence, that he should not kill her the same way he (Kabebe) killed the Mutimas.

I found this piece of evidence worthless, considering that the witness was not present when it was being said **(although he later said that he overheard them quarreling).** In any case that would not take away the fact of accused's participation in the offence in view of his confession, and the information sourced from Kyarikunda and Namara before they died, that he ( the accused) was in the company of other people in the attack.

After serious consideration of the prosecution and defence evidence, the law involved and after due caution to my self, I have accepted as credible and truthful the evidence of the prosecution witnesses that the accused person participated in the killing of the deceased persons. In these circumstances, his defence of alibi cannot stand. The prosecution has successfully destroyed it by adducing evidence which proved his participation in the offence. His defence of alibi is therefore rejected and it fails.

Both assessors in this case, Ms. Mukundane Josyline and Mr. Bamanyirahi Mathew, advised me to find the accused person guilty as indicted. I entirely agree with their opinions. I therefore find the accused guilty of murder in respect of Mutima Freda in Count 1, Turyasingura Peace in Count 2, Orishaba Benjamin in Count 3, Kyarikunda Peace in Count 4 and Namara Gift in Count 5 all contrary to Sections 188 and 189 of the Penal Code Act and convict him as indicted.

**……..**

**YOROKAMU BAMWINE**

**JUDGE**

**24/11/2009**

**24/11/2009** **Accused** present

**Mr. Waligo** for state

**Mr. Matsiko** for the accused

**Both assessors** present

**Court:** Judgment delivered.

**……**

**YOROKAMU BAMWINE**

**JUDGE**

**24/11/2009**

**Mr. Waligo**: We do not have any previous convictions. I invite court to note that he mercilessly killed 5 people. Killing one person is bad enough. But he killed 5, including a child. The disagreements did not warrant conduct such as this. He set the house on fire and people perished. Court should note his demeanour throughout the trial. He did not look remorseful. If treated with leniency, he may organize a genocide. Maximum penalty is death. We leave it to court to see what he deserves.

**Mr. Matsiko**: He is a first offender. He is aged 72 years. He is in the evening of his life. He has been on remand for seven years and three months, i.e, since August 2002. Considering the period in detention, it would be double punishment if he is sentenced to maximum sentence. It is my prayer that he be considered for a custodial sentence.

**Accused/convict**: Court has so decided. I leave it to you

**Court**: **Sentence - reason for it.**

He is a first offender. He has been on remand since 2002, a period of seven years.

He ended lives of 5 people, including own child and its mother. He did it in the most disgusting manner, acting like a beast toward the deceased persons. The punishment he gets ought to reflect the seriousness of the offence and, hopefully, assist him to learn to live with others even though he may have differences with them. Life is a treasure.

It should never be ended in such inconsiderate manner.

What he did was certainly barbaric and out of proportion with whatever wrongs the deceased persons may have done to him to arouse such a desire to kill them.

In my view, a man who buys petrol, carries stick and uses the two on his victims deserves not to live himself. He is a danger to society and to himself. He can do worse things outside jail.

The offences he has been convicted of carry maximum sentence of death. I have noted the pleas for mercy expressed to court by his lawyer. They are all weighed down by the gravity of the offence he committed.

Taking into account all the circumstances of the case and the brutal manner in which he conducted himself towards the deceased persons, and believing as I do that a punishment, however severe cannot match the cost lives, and finally taking into account the seven years spent on remand, I sentence him to life imprisonment in respect of each offence, all five sentences to be served concurrently.

Right of appeal explained.

**……**

**YOROKAMU BAMWINE**

**JUDGE**

**24/11/2009**