

THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA  
HOLDEN AT KABALE

**HCT-05-CR-CSC-0108/2007**

UGANDA.....PROSECUTOR

VS

MAGEZI GAD.....ACCUSED

**BEFORE: THE HON. MR. JUSTICE LAWRENCE GIDUDU**

**J U D G M E N T**

Magezi Gad, hereinafter referred to as the accused is indicted with murder contrary to sections 188 and 189 PCA. He denied the charges.

The prosecution case is that on the evening of 28/1/2005, the accused and another person went to the home of Kabuzi Daudi now deceased, claiming to be his relatives who wanted to spend there a night having spent the day looking for peas to buy.

The deceased welcomed them and the two struck a conversation with the deceased's daughter Tumuhairwe (PW4) as the deceased retired to the kitchen. It was a dark and rainy evening. The accused's colleague excused himself and joined the deceased in the kitchen.

When Nshabire (PW5) returned with paraffin from a shop, she found the deceased dead. PW4 had locked the main house due to the stormy weather and so PW5 went to inform her uncle Rubasa (PW3) about the death of the deceased. PW3 rushed to the scene and forced open the door to the main house. He announced to PW4 and the accused that Kabuzi is dead in the kitchen. Upon hearing this information, the accused

got up, opened the main door and fled. He got lost in the village and was arrested on suspicion of being a wrong character. He was taken to the area chairman David Twinomujuni (PW8) who interrogated him and upon being satisfied about his identity as Magezi son of Sebbi of Kitojo gave him direction to Kitojo village. The accused was later arrested from his home in Rubare Ntungamo District and identified by PW5 at a parade at kabala Police Station. He was indicted with murder.

In his defence, the accused denied ever going to the deceased's home. He contended that he spent the whole of 28/1/2005 at his home in Rubare and was surprised to be arrested on 29/1/2005 by the Police led by his LC 1 chairman Burima (PW9). He was transferred to Rwamucucu Police then to kabala Police Station from where an identification parade was arranged and a young girl he does not remember picked him out after a certain woman had pointed him out to the girl. He was charged with murder.

In criminal cases, the prosecution has a legal duty to prove all the essential ingredients of the offence against the accused beyond reasonable doubt.

The accused has no duty to prove his innocence. Should there be a reasonable doubt at the end of the trial, the accused must be given the benefit of such doubt and be acquitted.

*See Woolmington vs DPP (1935) AC 462 and Kiraaa vs Uganda [1976] 1 HCB 305*

On an indictment for murder, the essential ingredients to be proved are:

- (i) That the deceased is dead.
- (ii) That the death was unlawful.

- (iii) That the death was caused with malice aforethought.
- (iv) That the accused participated.

*See Uganda vs Kassim Musa Obura [10811 HCB 9.*

At the closure of the defence case, the learned defence counsel contested only the issue of participation of the accused in this murder.

It was not in contest that Kabuzi Daudi is dead. His body was discovered by PW5 and seen by PW3, PW4 and PW6. PW2 - Dr. Mugabi did a post mortem and reported that the body was in a kitchen beside a pool of blood. It bore two deep cuts extending from the right and left ear with the skull bones cut through. The cause of death was haemorrhagic shock due to open head injury. Death is proven beyond reasonable doubt.

The manner in which the deceased died leaves no doubt that it was unlawful. Two deep cuts running from ear to ear were inflicted on his head cutting through the skull bones. The post mortem report states that a panga is the likely weapon used to inflict these injuries. He died in his kitchen. His death is neither accidental nor authorized by law and is proven to be a homicide which is unlawful. See *Gusambizi s/o Wesonga vs R 1948) 15 EACA. 65.*

Malice aforethought can be inferred from the circumstances of each case. In the instant case, a panga was used to cut the head of the deceased from ear to ear cutting through the bones in the skull. A panga is a lethal weapon and the head which houses the brain in the skull is a vulnerable part of the body. The assailant intended to cause sudden or instant death by administering grave or serious injuries that gave the deceased no chance even to call for help. I find as a fact that death was caused with

malice aforethought.

Who then killed Daudi Kabuzi in Nyakagabagaba village? Prosecution contends that it is the accused and another who executed the murder. That the two went to the deceased's home disguised as distant relatives seeking to spend a night and the other person followed the deceased to the kitchen, murdered him and disappeared. When PW5 found the deceased dead and informed PW3, the accused ran away as soon as PW3 informed them of the death of Kabuzi.

That Kabahita Bernard (PW6) had met the accused and another man whom he knew as a son of Sebbi of Rushebeya village. They had a bicycle and asked him about where they could buy peas. He replied that he did not know. Later he saw them go to the deceased's home and after 8.00 p.m., he heard an alarm that Kabuzi had been killed. He went to the scene and revealed that Magezi the son of Sebbi was one of the assailants. When the accused escaped, he got lost and PW8 interrogated him and after ascertaining he is Magezi son of Sebbi, he let him proceed after showing him direction to his village. Finally that PW5 who saw the accused and his colleague come home picked him at the identification parade.

Mr. Murumba, learned counsel for the accused contested the identification of the accused by PW5, PW4, PW8 and PW6 contending it was dark so the witnesses were mistaken about the accused's identity.

He faulted the identification parade by AIP Mugisha (PW11) as being a sham because it was conducted unprofessionally contrary to the guidelines in *Sentale vs Uganda n9681 EA 365*.

Learned counsel went on to point out the contradictions in the manner of

dressing. PW4 stated that the accused wore a jacket and the other man wore a coat while PW6 testified that the accused wore a shirt and the other man wore a jacket. Finally that the accused's alibi was intact in that he was at his home in Ntungamo on that day.

It is not in dispute that the accused was ordinarily resident in Rubare in Ntungamo District while the murder took place in Nyakagabagaba village of Rwamucucu sub-county in Kabale District.

The prosecution witnesses PW4 and PW5 state that the accused and the other person - two people entered their compound claiming to be relatives of the deceased. He welcomed them into the house. This was about 6.00 p.m. They had a bicycle being pushed for them by Ngurusi (who later failed to identify the accused at a parade).

PW6 again saw the two from across a hill at about 7.30 p.m. going to the deceased's house.

When the two went to the deceased's home, they first met PW5 who then called PW4 and the deceased. They introduced themselves as relatives from Buhweju - grandsons of Kamahe. The deceased welcomed them into the sitting room and they started conversing. PW4 went to the kitchen to prepare supper. The deceased asked PW4 to take a candle into the main house which she did. When PW4 returned to the kitchen, the deceased followed. The accused then called PW4 back to give room to the accused's colleague to discuss something private with the deceased in the kitchen. When PW4 demanded to know what the subject of discussion would be the accused replied that the deceased at his age has a lot of advice to give.

PW4 had earlier sent PW5 to buy paraffin and she remained conversing with the accused when rain fell heavily and she closed the door - in fact

locking it.

Later, PW3 arrived, kicked the door and announced that the deceased is dead.

If I analyze this evidence against the defence submission that PW4, PW5 and PW6 were mistaken about the identity of the accused, I establish the following facts. That the visitors to the deceased's home went there when it was still day-time and when they started conversing with the deceased, one could still see. It is later that the deceased called for a candle, Secondly, the time the two spent with the deceased and PW4 was not a brief encounter like is the case in a sudden attack. Though the visitors were strangers to the family members of the deceased, they engaged in a friendly conversation that offered the witnesses ample opportunity to observe their visitors.

When PW6 met them and they asked him about where they could buy peas, he knew or recognized the accused and one Ngurusi who was pushing their bicycle. He knew the accused by name as Magezi son of Sebbi and this is what he told PW4 when he answered the alarm announcing the death of Kabuzi.

When this evidence is taken together with that of PW3 that when he entered and found PW4 having a conversation with a man, as soon as he informed them that Kabuzi is dead, the man got up, ran away. Why would a visitor run away upon being told that the host is dead unless the visitor is aware of the circumstances of that death.

This evidence when compared with that of PW8 who interrogated the accused at 9.00 p.m. which is the time following his running away from Kabuzi's home, and the subsequent revelation by the accused that he is Magezi son of Sebbi makes the prosecution evidence credible that the

Magezi son of Sebbi that PW6 saw go to the deceased's home is the same one who ran away from that home and got lost along the village paths and is the same one PW8 interrogated and after establishing his identity released him and gave him directions on how he would reach his father's village. The evidence of PW6, PW5, PW4 and PW8 accounts for the movement of the accused with certainty. The defence raised the issue of Ngurusi failing to identify the accused at the Kabale parade yet PW6 stated that he met Ngurusi pushing the accused's bicycle which was eventually recovered in the bushes nearby by Turyakita (PW7). While there is no evidence about the relationship between Ngurusi and the accused, it is possible that Ngurusi pushed the bicycle out of joy without minding to recognize the faces of the owners or may have been known to the accused and chose to protect him by not picking him out of this poorly arranged parade.

The bicycle that PW6 saw with Magezi son of Sebbi is the bicycle that was found by PW7 and exhibited in court. Again this piece of circumstantial evidence raises strong inference of guilt beyond mere suspicion.

The chain of identification from PW6, PW5, PW4 and PW8 renders the alibi and the issue of contradictions in the manner of dress irrelevant. PW4 could have had a memory failure but as soon as she asked PW6 about the men he had talked to and who had a bicycle, PW6 named one of them as the son of Sebbi called Magezi.

The opportunity to identify the accused was abundant to PW4 and PW6. It was so abundant that it was fool hardy on the part of the accused to proceed with the motive to bump off the deceased that very evening and escape arrest. The thread or chain of the prosecution evidence places the accused in the home of the deceased on the evening and early night of

28/1/2005.

Indeed as the learned Principal State Attorney submitted, there is no basis upon which the accused who is ordinarily resident in Ntungamo would be implicated in a crime committed in a village in Rwamucucu in Kabale District in a home of persons who had not known him before. This is a common sense position which I accept.

The prosecution evidence is that it is the accused's colleague who murdered the deceased and disappeared. He never returned to the main house.

The prosecution contended that the accused who was in company of the assailant set out to jointly prosecute an unlawful purpose for which he is criminally liable as a principle offender under S. 20 PCA.

Common intention to murder the deceased can be inferred from the association of the accused with the other assailant. The two were seen together by PW6, they arrived together in the deceased's home, had a discussion with the deceased and the action of the accused to call back PW4 so that his colleague could talk to the deceased in the kitchen plus the action of running away as soon as PW3 informed them that the deceased is dead leaves no doubt that the accused was part and parcel of the scheme to kill the deceased. His conduct laid the strategy through which his colleague murdered the deceased while his running away is proof of guilt.

Indeed, an unlawful common intention does not necessarily imply a pre-arranged plan. It may be inferred from the accused's presence, his actions and his omission to disassociate himself from the assault. *R. vs Tibalavembe s/o Kirva & 3 others (1946)*<sup>10</sup> EACA 51: *R. vs Outer (1941)* 8 EACA at P. 80 applied. Common intention may also develop in the



course of events though it might not have been present from the start. See *Waanvarra Ramiro vs R (1955) 22 EACA 521*.

In the instant case, common intent existed prior, during the conversations they had - even after the event, the accused flight from the scene proved his prior knowledge of the mission to kill the deceased.

The chain of both direct and circumstantial evidence is so strong that it renders the faults in the identification parade inconsequential. It was a waste of time to call PW11 to testify because frankly his conduct of the identification parade rendered it useless in terms of evidential value. PW11 admitted it was his first parade and in my view his last because at 57 years, he had few years to retire from the force.

The two gentlemen assessors advised me to acquit the accused on grounds that the accused remained with PW4 conversing in the main house while his colleague murdered the deceased. Participation of the accused in law does not mean physical holding of a panga and jointly cutting the deceased. Under section 20 PCA and the case law referred to above, the accused's presence, his action of isolating the deceased by calling back PW4 and that of running away soon after PW3 broke the news that the deceased is dead proves that the accused had a common intention to prosecute an unlawful purpose. He did not disassociate himself from the scheme and his running away is not conduct of an innocent persons.

I therefore, respectfully reject the advice of the two gentlemen assessors and find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt.

In accordance with S. 20 PCA, the accused is deemed to have committed the offence, and I accordingly find the accused guilty of murder contrary to

sections 188 and 189 of the Penal Code Act.

I convict him accordingly.

**L a w r e n c e**  
**G i d u d u**  
**J u d g e**  
20/4/2009

20/4/2009

Accused in dock

Pros - Asimwe

Murumba - for

accused

Turyamubona -

English/Rukiga

Judgment

delivered.

A handwritten signature in black ink, appearing to read 'Lawrence Gidudu', with a large initial 'L' and 'G'.

Lawrence Gidudu  
J u d g e  
20/4/2009

**Allocutus**

Pros:

Convict is a first offender. He has been on remand for 4 years. He committed a serious offence. The deceased was killed maliciously

which calls for a deterrent sentence.

We pray for a death sentence.

Murumba:

Convict is 33 years, has 3 children, first offender and deserves mercy.

Convict paid a visit with a criminal and is deemed to have committed the offence on that ground. The convict did not physically kill. He was merely in company. We pray for a sentence

less than life imprisonment so that he may go back home to be a good citizen. He is reformed and sorry for what happened.

**Reasons and Sentence**

The decision of the Supreme Court in Constitutional appeal 3 of 2006 *AG. vs Kiuala and 147 others*, is that the High Court has discretion whether to impose a death sentence or not upon a conviction on charges such as murder. Each case must be treated according to its circumstances.

In the instant case

the prosecution has called for the maximum while the defence asks for lenience that the convict happened to move with a murder and did not physically participate in killing the deceased. Of course the convict in law is a principle offender although his role was to divert attention of other family members to allow his companion to finish the job. During the trial, it was revealed that his companion died in Mbarara Hospital. May be he answered for his sins and his

escort and  
strategist should  
not be hanged but  
should be put out  
of circulation long  
enough to have  
memories of his  
presence erased. I  
agree with the  
defence that the  
maximum sentence  
should not be  
imposed for the  
role that the convict  
played and I  
sentence the  
convict to life  
imprisonment.



Lawrence Gidudu  
**J u d g e**  
20/4/2009

Court:

R/A within 14 days  
against conviction  
and sentence  
explained.

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