

**REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA NAKAWA CIRCUIT HOLDEN AT**  
**MUBENDE**

**CR CASE NO 042/05**

**CRB NO 838/04**

**UGANDA .....PROSECUTION**

**VERSUS**

- 1. ARINATWE DAVID**
- 2. BYARUHANGA GODFREY**
- 3. SENKAYI DICKSON**
- 4. LUBEGA PIO.....ACCUSED**

**BEFORE HON LADY JUSTICE FAITH MWONDHA**

**RULING**

The accused persons were indicted on a charge of murder C/S 188 and 189 of the Penal Code Act. The particulars as alleged by the prosecution were that the accused person Arinatwe David, Byaruhanga Godfrey Senkayi Dickson and Lubega Pio on the 21/10/2004 at Kisiwula village in Mubende District murdered one Jackson Ndimubanzi.

The prosecution as in all criminal cases has always the burden to prove the charge beyond reasonable doubt in order to bring the guilt of the accused person home. In this offence of murder, the following ingredients have to be proved beyond reasonable doubt;

1. that the deceased is actually dead
2. that the cause of the death was unlawful
3. that there was malice aforethought or intention to kill
4. that the accused participated in the act

The prosecution brought four witnesses to discharge its burden. There was some evidence which was agreed on by both the prosecution and the defence. This was contained in medical evidence the post mortem report in form PF 48C in respect of

Ndimubanzi Jackson the deceased. The body was identified by one Mugisha Sylvia. It had a crashed face and crushed jaws. The cause death was hyporyric and pain shock and assyphixia. The weapon used was alleged to have been a blunt object. The other evidence was on the PF24 where all the accused persons were each examined. They were all found of ages 18, 22 and 24 years respectively and mentally normal. All these PF24 exhibits and PF48C were tendered as exhibits and marked EXP 1 and 2 respectively.

PW1 was one of the wives of the deceased. She said she could not identify any of the accused persons. That David Arinatwe was arrested suspecting him to have murdered the deceased. That she heard that he died while in prison over an alleged announcement on the radio. That she did not bother to go there and the body was not collected because they did not care.

PW2 who stated that A1 David Arinatwe died. He said he knew A2 and A4. That they were village mates in Kyejunga LCI. That he knew Ndimubanzi Jackson as a former resident and neighbour. That Ndimubanzi Jackson was murdered by A1 David Arinatwe. That he was told by one of the deceased wives Kimanyiyangi. That she told him that her husband had disappeared but that he had been with the same David Arinatwe. That when A1 was asked he told them that the deceased was searched for but he disappeared completely. That the matter was reported to police and A1 was taken to police and the police started searching for him. That on 24/10/04 the police came and told them that A1 had told them where the deceased was buried. That he told them that he was buried in the potato garden and was buried on the 6<sup>th</sup> line of the potato heaps. That they went together with the police and dug out the potato heap and indeed they found when the body of the deceased had been put in polythene bags two of them. The doctor came, Dr Kiiza he examined the body and he instructed them to burry him. That he had already started decomposing. That the police said they wanted one Lubega and the other two accused persons. That the police told them that A1 (Arinatwe deceased) told them that A4 was together with them. That A4 was arrested the day the deceased was buried. That he was nearby at a wedding ceremony. PW3 was a police officer who investigated the case he was No 21906 Det Cpl. He said he investigated a case of murder in 2004. That Arinatwe denied the charge. He said he could not recognise him if he was among the three accused persons in court. That he

went to the village to investigate but failed to find the deceased. That when he came back and he asked Arinatwe questions, he later received information that A1 (Arinaitwe) wanted to tell him something. That he arranged to talk to him. That A1 told him that himself (A1) Senkayi and Byaruhanga participated in the murder and buried him in the potato garden at home near an anthill. That A1 confirmed that what he was saying was true. That they went there and they recovered the body wrapped in two polythene bags. That since the doctor was there the post-mortem was carried out and the body was handed over to the relatives to burry.

That the suspected persons were arrested and charged with murder. That he took photographs of the scene where the body was found and the body itself and those were tendered as exhibits and marked accordingly. That Arinatwe told him that he did not want his mother to be victimised. That he admitted having murdered him (Ndimubanzi). PW4 was another police officer attached to Isingiro police post. He was at the police post when Arinatwe David was brought to the post for a charge and caution. That he made a voluntary statement in luganda which was translated into English by No 18784 D/Cpt Kule Luke. That he admitted together with the rest of the accused persons that they beat him up and buried him secretly.

At the close of the prosecution case the defence counsel submitted that a prima facie case was not made out to require the accused to give his defence. The prosecution also conceded on the grounds that the accused who is alleged to have murdered and made a confession was since dead and there was no way the confession could be relied on in the absence of the evidence to point to the guilt of the remaining accused persons.

The charge and caution which Arinatwe is said to have recorded was not a declaration because he is dead. But even if one said that it was it lacked corroboration. Some decided cases have held that a dying declaration is evidence of the weakest kind as it cant be tested by cross examination unless if it has been satisfactory corroborated see ***Uganda v. Thomas Omukono and others [1977]HCB 61*** by Justice Ssekandi as he then was and also ***Uganda v. Francis Lutalo [1976] HCB.***

The charge and caution is a confession in this regard because Arinatwe was admitting to having committed the offence of murder. The fact that Arinatwe David passed on in

prison there was no way the prosecution could prove it to be true. None of the witnesses could identify him. It was not known how it was recorded whether it was actually voluntary. The confession is only admissible if it was taken in the immediate presence of a police officer of or above the rank of Assistant Inspector of police see S.24 of Evidence Act. Since the accused A1 (Arinatwe David) passed on before his trial, it defeated the settled law as held by superior courts in the case of ***Tuwamoi v. Uganda [1967]EA*** which was cited with approval by the Supreme Court of Uganda in ***Cr. Appeal 10/87 Hassan Kalule v. Uganda***, it was held among others as follows,

“we agree that in ordinary cases as a general rule when a confession is retracted categorically its unsafe for the court to act upon it without corroboration but if after inquiring into all material points and surrounding circumstances the court is fully satisfied that the confession cant but be true, there is no reason in law why court should not act upon it.”

In the instant case the key person to test the voluntariness and legality of it to make it admissible could not be reached since he was dead.

From the evidence as summarised about its apparent that the prosecution proved the first, second and third ingredients but as for he last ingredient of participation it fell too short of the standard required.

In the celebrated cases ***of Bhatt v. Republic [1957] EA 332 and Wakiro alias Musa v. R [1966] EA page 184***, it was held that a prima facie case is not a case proved beyond reasonable doubt but a case where a reasonable tribunal properly directing its mind on the law and evidence could convict if no reasonable explanation is offered by the defence. In the instant case it would be a waste of time and denying the accused persons justice to make them give their defence, when there is no credible evidence at all pointing to their guilt. It's a pity that the case has collapsed because of the delayed trial which is a breach of the constitution.

Accordingly I find that a prima facie case has not been established by the prosecution to require the accused persons surviving to be put on their defence. They are not guilty and acquitted accordingly. They should be released and set free.

Faith Mwendha

**Judge**

29/06/2010