

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

HCT-11-CSC-44/2011

CRIMINAL CASE NO CSC 224/2010 CRB 366/2010

UGANDA ::::::::::::::::::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

A1 KATO GODFREY A2 BYARUHANGA
JULIUS A3 KASANDE GRACE A4
MUGYENYI ERIAS A5 SATURDAY JAVILLA

ACCUSED

BEFORE HON. MR. JUSTICE J.W. KWESIGA J U D G M E N T

Kato Godfrey, Byaruhanga Julius, Kasande Grace, Mugyenyi Erias and Saturday Javilla are jointly indicted for Murder in the first count and causing grievous bodily harm in count two as follow:-

Count one: Murder contrary to Section 188 and 189 of the Penal Code Act. It is stated that

on 7th February, 2010 at

Rugarama Village in Kabale district, with malice aforethought, the Accused persons caused the death of Francis Tibugyemwa.

In Count Two: They all charged with causing Grievous harm contrary to Section 216 (a) of the Penal Code Act. It is alleged that the five Accused persons, on 7th February, 2010 at Rugarama village in the Kabale District unlawfully and with intend to harm or disfigure one ASIIMWE SCOVIA caused her Grievous harm. Each of the Accused persons pleaded not guilty and left the prosecution to prove the case against them. It is a settled legal position in our Criminal justice system that once an Accused person pleads not guilty the burden is upon the prosecution to prove his or her guilt. Every Accused person is presumed to be innocent until he pleads guilty or he is proved guilty by the State. This position is provided by Article 28 (3) (a) of The Constitution of The Republic of Uganda, 1995.

In Bogere Moses and another Vs Uganda (1996) HCB 5 or Cr. Appeal 1 of 1997 (SCU) it was restated that apart from certain limited exceptions the burden of proof is throughout on the prosecution. The standard of proof is always proof

beyond reasonable doubt. See R Vs Sims (1946) 1 K.B. 5 where it was settled that the moment an Accused person pleads not guilty to a criminal charge, the burden of proof entirely falls on the Prosecution to adduce evidence to prove beyond reasonable doubt that the offence was committed and was committed by the Accused persons.

In the instant case the prosecution has a duty to prove beyond reasonable doubt the following elements of the offences in the indictment.

- (a) The fact that Tibugyemwa Francis is dead.
- (b) That Tibugyemwa's death was caused unlawfully.
- (c) That the death was caused with malice aforethought.
- (d) That the Accused person jointly participated in the commission of the offence. I will discuss the proof of each elements of the offence in the process of evaluating the relevant evidence adduced.

The death of Tibugyemwa Francis was proved by eye witnesses who responded to the alarm immediately after he had been cut by the assailants. ASIIMWE SCOVIA who was with the deceased raised alarm which attracted PW 3 John Kahima,

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and PW 4 Turinawe Wensi. These two witnesses confirmed that he was cut and died shortly, they participated in burying him. The Post-mortem Report, P.E VI confirmed that the dead body was examined on 8th February, 2010. That the death resulted from the excessive bleeding from the cut wounds. There is no doubt whatsoever left in my mind

that Francis Tibugyemwa died on 7th February, 2010.

In as far as the unlawfulness of death is concerned every human killing or homicide is presumed unlawful unless there is proof that it was caused accidentally or in justifiable circumstances such as in self-defence. Asiimwe Scovia PW 2 testified that the deceased was alright until about midnight on 7th February, 2010 when they were attacked while together in the house. One of the attackers was armed with a panga, he cut this very witness who escaped and left the attackers assaulting the deceased. Shortly after the deceased was found in pain having been deeply cut in the abdomen. He died shortly after the fatal wounding. The medical report admitted as Prosecution exhibit PE VI gives detailed description of the inflicted wounds.

The inflicted injuries were so grave:-

- (i) A cut wound on the face.
- (ii) A deep cut wound on the back.
- (iii) A cut wound into ribs and abdomen.
- (iv) Spine and vertebral bone injured.
- (v) Cut open the abdominal walls.

The Post-mortem report leaves no doubt that this 60 years old man suffered multiple cuttings and trauma from excessive force used by the attackers.

The injuries observed by the doctor show that a deadly weapon, most likely a panga was

used which corroborates the evidence of Asiimwe Scovia that one of the attackers had a panga. The fact that the attackers used the excessive force and a deadly weapon to cause the extensive injuries proved, given the fact that the most vulnerable parts of the human being were targeted, the Prosecution evidence proves beyond reasonable doubt that the death of Tibugyemwa Francis was caused unlawfully and with malice aforethought. Therefore at this stage I am satisfied that the prosecution has proved beyond reasonable doubt a case of Murder under section 188

& 189 of the Penal Code. The crucial issue to be resolved is whether the accused persons are the culprits.

PW 2 Asiimwe Scovia is the principal prosecution witness who was at the scene of crime. She knew the Accused persons before the attack, the deceased was her husband while the Accused persons are the children of the deceased born of the deceased's first wife. She knew each of the Accused persons. A3 Kesande Grace lived not far from the scene of crime, in an extension of the house the deceased had given to this Accused person. In the evening before the attack, at 8:00 pm. She had seen the Accused persons gathered in the house of A3 Kesande. She said she could see the Accused persons seated on a single form in the house. The attacker who was armed with a panga was A1 Kato Godfrey who she saw very well because A2 Byaruhanga Julius alias Majuri was flashing a torch that lit the whole room and enabled her to identify A1 and A2 at the scene. Asiimwe heard Kesande A3 telling the other Accused persons A1 and A2 to finish off the victims. This witness's evidence of identification needs to be tested with greatest care. The guiding factors for considering were settled in Uganda Vs G.W Simbwa Cr. Appeal no 37 of 1995 (SCU)

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where the Supreme Court of Uganda stated:- *"The Law is that although identification of an Accused person can be proved by the testimony of a single witness this does not lessen the need for testing with greatest care the evidence of such a witness regarding identification, especially when conditions favouring correct identification are difficult. The circumstances to be taken into account include the presence and nature of light, the*

length of time and the opportunity the witness had to see the Accused, the distance between them.” Same guidance is found in Abdala bin Wendo & others Vs R (1953) 20 EACA 166 and Abdla Nabylere Vs Uganda Cr. Appeal No. 12 of 1981. In the instant case Asiimwe Scovia knew each of the Accused persons, she had seen them before the attack. The torch light helped her to see the attackers. She was close enough, A1 Kato struggled with her, put her down and cut her arm in the process. She was close enough to know who cut her. She was well conversant with KESANDE’S voice. The conduct of KESANDE that night corroborated the prosecution evidence in pointing at her guilt. Her house was just an extension of the deceased’s homestead, she did not respond to the alarm that came from her step-mother and immediate and close neighbour. She, instead disappeared until the time after the

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deceased was taken to hospital. Her conduct following her calling that the victims be finished off legally puts her in association with the actual attackers that killed the deceased. They are bound by the principals of common intention. She is materially associated with the commission of the offence. She is a joint offender in terms of section 20 of the Penal Code Act. PW 2 Asiimwe’s evidence is adequately corroborated by the deceased’s dying declaration. PW 3 John Kahima’s evidence confirms that Asiimwe, at the earliest opportunity mentioned the attackers. He was the first person to answer the alarm which he heard at 12:00 midnight and Scovia Asiimwe was saying “*Kato and Majuri have attacked us.*” Separately the deceased told him that “*Julius, Kato and Kesande have killed me.*” The deceased repeated this to PW 4 Turinawe and to the

Policeman who testified, PW 5 D/CPL Mushabe. Each of the Accused persons has set up ALIBI in Defence and the defence as a whole has been considered. I have not found any evidence throughout the trial that incriminates Mugyenyi Erias and Saturday Javilla. They were not identified at the scene of crime. I find that the ALIBI of A4 and A5 above mentioned remained intact because they were not placed at the scene of crime by the prosecution evidence or any other

evidence in the case. A1 Kato, A2 Byaruhanga Julius and A3 Kesande Grace were properly identified at the scene as I have analyzed above the defence of ALIBI is not available to any of the three Accused persons.

The opinion of the Assessors is that there were no favourable conditions to help identification of the attackers. The Assessors did not consider the fact that torch light had lit the whole room as testified as by Asiimwe Scovia as I have analyzed and evaluated with the other circumstances that incriminate A1 , A2 and A3. By virtue of the provisions of section 20 of the Penal Code Act, I do hereby find Kato Godfrey (A1), Byaruhanga Julius (A2) and Kesande Grace (A3) guilty of Murder of Francis Tibugyemwa contrary to Sections 188 and 189 of the Penal Code Act. They are accordingly convicted. I have found no evidence to prove participation of A4 and A5 Mugyenyi Erias and Saturday Javilla. The two are hereby Acquitted.

J.W. KWESIGA JUDGE 06-09-2011

STATE: No record against the three on previous criminal record. They have been convicted of serious offence. The sentence provided is death. They took away without mercy their fathers life. They deserve a maximum sentence. The life of their father can not be replaced. The principle witness's life is still in danger.

DEFENCE: The convicts are first offenders. The convicts are sorry, young and energetic

persons who need a chance to reform and return as a useful person. Maximum should not be passed, a custodial sentence would serve a purpose.

SENTENCE AND REASONS FOR IT

The three Accused persons have been found guilty of killing their own father in the most in-human and merciless fashion. The helpless old man was cut in pieces and there is no doubt he died a painful death at the hands of his own children. The Act shows that for whatever reasons the Accused/convict did not value their father's life and can not value any other human life. This was the highest degree of cruelty. They deserve a maximum sentence which is death but I will discount this and allow them to live longer in prison and be able to tell other potential murders the pain of Imprisonment that follow these kind of conduct. These merciless murderous in the circumstances deserve a longer sentence. For these reasons I do hereby sentence them to such a long sentence that when released they will no longer be strong and destructive persons. I sentence each one of the three convicts to (40) Forty years Imprisonment.

J.W. KWESIGA JUDGE 06-09-2011