

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBARARA HCT-05- CR-**  
**CSC-0297 OF 2006**

**UGANDA:.....PROSECUTOR**

**VERSUS**

**PTE TURAMUREEBA AMON ^**

**L/CPL LWANGA ISSA:.....ACCUSED**

**BEFORE HON. MR. JUSTICE T.W. KWESIGA**  
**JUDGMENT**

The two Accused persons named above are both UPDF Soldiers charged with **Murder C/Ss 188 and 189** in two counts.

In Count one it is alleged that the two Accused persons and others still at large, on 29<sup>th</sup> November, 2005 at Kelembe Cell in Mbarara District Murdered Bagumisiriza Enos.

In count two it is alleged that on 29<sup>th</sup> November, 2005 at Kilembe Cell, Mbarara District the two Accused persons and others still at large Murdered Kataratambi Fred. Each of the Accused persons pleaded not guilty in all counts.

The moment the Accused persons pleaded not guilty each and every allegation of facts in the indictment became an issue. The Prosecution remained with the burden of proof throughout the trial because every person charged with a criminal offence under our criminal Law Justice

is presumed to be innocent until he pleads guilty or he or she is proved guilty. See Article 28 (3) **of The Constitution of The Republic of Uganda.**

The Accused person has no duty to prove his innocence. He has no duty to prove his defence and has the right to keep silent throughout the trial and if at the closure of the prosecution as a whole the case eigeiinst the Accused person has not been proved beyond reasonable doubt the Accused person shall be entitled to Acquittal.

This was settled in the decisions of superior courts that have passed the test of times and widely followed in this jurisdiction. Reference has been made to and follow the decision in WOOLIMINGTON VS DPP (1935) AC 462 AND AKOL PATRICK AND OTHERS VS UGANDA [2006] HCB 4.

In each of the above set out counts the Prosecution must adduce evidence that proves the essential elements of the offence, namely;

That the person named as the deceased is actually dead. That the death was caused unlawfully by the Accused person(s) and with malice-aforethought. The prosecution story is that on the fateful night at about 9:00 p.m while Kataratambi Fred and his brother Bagumisiriza Enos were returning home were ambushed by people who shot them dead at Kilembe cell Mbarara Municipality, Mbarara District. The two homicides are separate offences

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committed at the same time and for this reason. I will examine the evidence adduced on the two cases concurrently but will separate the Criminal Liability at the end of the examination of the evidence.

In proof of the fact of death in each count the prosecution produce two post-mortem Reports:-

PW 1 Dr. Sendi Bwogi on 30<sup>th</sup> November, 2005 at Mbarara Hospital

mortuary examined the dead body of **KATARATAMBI FRED**. He observed multiple gun shot wounds which damaged the lungs, the heart, liver and great vessels. The cause of death was hemorrhage and shock due to the gun shot wounds.

Dr. Sendi Bwogi further examined the dead body of **BAGUMISIRIZA ENOS**. He found multiple gun shot wounds which shattered the lungs and the heart among other important human parts. He died of haemorrhagic shock due to the sustained gun shot wounds. These medical reports were admitted as prosecution exhibits PI and P.2 respectively. The above evidence was received as uncontested evidence by both the Prosecution and Defence pursuant to **Section 66 of Trial on Indictments Act (TIA)**.

From the above evidence there is no doubt left that the two persons named in the indictment as deceased are actually dead. The medical reports have proved beyond reasonable doubt that **KATARATAMBI** and **BAGUMISIRIZA** died on 29<sup>th</sup> November, 2005.

I will resolve jointly, whether the deaths were caused unlawfully and with malice aforethought. At this stage I will disregard the evidence that the prosecution adduced as the Accused persons confessions because I will evaluate it while examining participation of the Accused persons. First and foremost there is a legal presumption that every homicide is unlawful unless there is evidence that it was caused accidentally or under excusable or justifiable circumstances. In the instant case there was no eye witness to tell court what happened. The uncontested medical reports are so detailed that its evaluation suffices to make correct inference that this was unlawful killing with malice aforethought.

Kataratambi Fred suffered multiple gun shots that went through the chest and shoulder. The doctor found seven bullet entries and seven bullet exit that

shattered the most vulnerable parts of the human being, the heart, the lungs the liver and the greater blood vessels. In the body of Bagumisiriza Enos, the doctor observed multiple bullet wounds through the chest that shattered the heart and lungs. It is clear that the culprit by shooting the two dead persons acted unlawfully. No person has a right to take away any other persons life.

Malice aforethought being a state of mind can be inferred from the manner in which the offence was committed. From the postmortem reports the two victims were shot several times in the chest area. The chest is known for housing the most vulnerable organs such as the heart and lungs and who ever aims at damaging them ought to minted or expect to cause death. In each of the two cases the heart and the lungs were shattered. It is clear that the culprits intended to cause death through the

multiple gunshots and the crucial parts they concentrated the gunshots. The deaths of Kataratambi and Bagumisiriza were caused unlawfully and with malice aforethought.

It is the duty of the prosecution to prove not only that the criminal offence was committed, it must prove that it was committed by the Accused person. I will now proceed to examine the evidence adduced to prove participation by the Accused persons.

PW 1 CPL MBIRIM MICHAEL a UPDF Solider told court that he received information of theft of a gun belonging to NAHABWE NASSUR. Nahabwe and Lwanga A2 were suspects. On arrest A2 denied involvement in theft of a gun. This was in November 2005. A2 was arrested in March 2006 while A1 was arrested in August 2006. PW 1 told court that after military interrogation A1 admitted theft of a gun. Un named police man is said to have recovered the gun from a civilian in Kasese called BAGUMA who was arrested. PW 1 told court that A1 admitted that he and A2 used the gun to kill Kataratambi in conspiracy with Rukundo (deceased).

A woman called MELON (deceased) is said to have connected A1 and A2 to Rukundo (deceased) to arrange the murders in this case.

PW 3 Besigye John (IP) told court that A2 LWanga was brought to him to record a charge and caution statement on 22<sup>nd</sup> November, 2006 having been in military custody since March, 2006. He appeared with scars and that he gave a statement in Runyankole voluntarily. Lwanga A2 in his defence denied knowledge of Runyankole. He does not understand English and that he was tortured by the Army Officers who delivered him to Police after 8 months of torture and detention over a conflict over a woman.

PW 4 GASASILA ALICE (ASP) told court that she took the charge and

caution statement of A1 Turyamureeba. That he was in good conditions, normal and no evidence of torture on him. A1 Turyeimureeba was produced in police after being in custody for almost one year. In his evidence told court he did not know A2 until he was arrested and put in the same cell. He was tortured by the army. He was told that if he signed papers presented to him at Police they would release his wife who was in Police cells and very sick and she eventually died.

Medical report under PF 24 in respect of Lwanga shows extensive evidence of torture, multiple cane marks at the back and buttocks. I have considered this evidence and that was given by the two Accused persons who were detained for Eight months before they were brought to Police and I doubt the evidence of Gasasira Alice (ASP) and Besigye John (IP) that the Accused persons were acting voluntarily despite the clear marks over their bodies which is obvious evidence of torture before they were brought to Police.

In my view detention for 8 months before being produced in court was illegal and un lawful detention. The torture under the military who handed the Accused persons to the police for charging can not be ignored. The torture marks which were visible after healing while the Accused persons were in military detention corroborate the torture they underwent. Presenting of Melon (deceased) wife of A1 Turyamureeba who was in very bad health conditions before he signed was meant to break him down to do anything to release his wife and therefore he could not have signed voluntarily.

In my view nothing procured through any form of torture of the Accused persons to incriminate the Accused person has any value of evidence. It is irrelevant that the torture was done by the army and not the police. Both are state security agencies or institutions that participated in the arrest, interrogation, detention and charging of the Accused persons. This court will

not draw a line between their roles to save a case that is outright a manifestation of violation of human rights of the Accused persons. Long detention and torture of suspects breached the provisions of **Article 44 (a) of The Constitution of The Republic of Uganda** which guarantees freedom from torture and cruel, inhuman or degrading treatment or punishment. In evidence available shows that before the two Accused person were handed over to police had been tortured and detained for almost one year and had extracted alleged confessions which were passed on to the Police together with the suspects. I have considered the fact apart from these statements, the police did not carry out any other investigations. There are several persons named in the statements attributed to the suspects. The police should have followed up these people and recorded statements to obtain independent evidence. The Accused persons, throughout the trial repudiated the alleged confessions and any detective should have foreseen that this was possible at the trial. Failure to

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adduce independent evidence to corroborate the repudiated confessions makes it unsafe for tills court to convict the Accused persons purely on the basis of these statements that have been challenged and that have a background of torture and illegal handling of the Accused persons. Before I take leave of this case I must observe that this case is typical of the several cases in which the Police investigators do close inquiries prematurely merely because they have obtained a charge and caution statement. Because the suspects almost always challenge the charge and caution statements, the police should follow the clues in such statement to cover areas opened by the statement to create a chiince of independent and corroborative witnesses. The learned State Attorney submitted in this case that because the alleged confessions are so detailed, because they covered preparation, execution of the offence and conduct of the Accused persons after the offence I should find it true. I am unable to find it true for the following reasons:-

- (i) There is no other evidence at all pointing to the participation of any of the two Accused persons.
- (ii) The Accused persons' defences have depicted a totally different story of how and why they were arrested and lack of knowledge of each other until they met in military detention after arrest which creates doubt in the prosecution story of conspiracy, preparation and execution of the Murder.
- (iii) ASP Gasasira's testimony that Lwanga had no evidence of torture was most unfortunate in light of medical report (under Police Form 24) that Lwanga had extensive scars



showing that he had been caned several times and injured his back and buttocks. This was a cover-up of illegality to the prejudice of the Accused person which points to a testimony given in bad faith. Torture and other forms of ill-treatment of suspects must be condemned. Judges have a duty to ultimately make decisions over life, freedoms, rights and duties of citizens. This duty includes being alert for any sign of torture or ill-treatment or duress of any kind that might take place in course of Criminal investigation and deprivation of liberty as a mistreatment to the suspects.

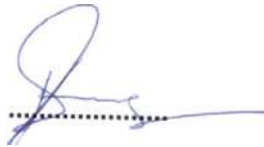
Article 44(a) of The Constitution of The Republic of Uganda states;

*“Notwithstanding anything in this constitution, there shall be no derogation from enjoyment the following rights and freedoms-*  
*(a) Freedom from torture and cruel, in human or degrading treatment or punishment.”*

Article 55 (i) (b) of the Statute of the International Criminal Court provides that a person under investigations *“shall not be subjected to any form of coercion, duress or threat, to torture or any other form of cruel, in human or degrading treatment or punishment*In view of the above I can not convict any Accused person based on a confession extracted under duress at whatever stage of interrogation into alleged criminal activity. Suspects have the right to be treated without subjecting them to any physical or psychological violence or duress.

The opinion of the Assessors in this case is that the Accused persons are not guilty. It is most regrettable that these two young soldiers who joined the Army for a career or gainful employment have had to wait for this opinion and ultimate acquittal from 2006 to 2012, six years of imprisonment pending trial. Whatever circumstances that led to this delayed trial, the Accused person’s right to fair and speedy trial provided for under Article 28 (1) of The Constitution of The Republic of Uganda were not observed in light of what clearly amounted to malicious

Prosecution. I have no doubt the Accused persons are **not guilty** and **1**  
**Acquit** them.

A handwritten signature in blue ink, appearing to be 'J.W. Kwesiga', written over a horizontal dotted line.

**J.W.KWESIGA**

**JUDGE**

**4/9/2012**

**In presence of-**

Mr. Ojok Alex RSA.

Mr. Agaba Jadson for Accused.

Mr. Ngabirano Court-Clerk

**J.W.KWESIGA**

**JUDGE**

**4/9/2012**