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**THE REPUBLIC OF UGANDA**

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

**HCT-11 -CSC-NO. 04 OF 2011 KAB-**

**00-CR-CSC-AA NO. 157/2010 CRB**

**3259/2009**

PROSECUTOR

**VERSUS**

A1 TUMUSHABE ABEL '

A2 TIRWOMWE FRANCIS

**ACCUS  
ED**

**BEFORE HON. MR. JUSTICE J.W. KWESIGA**

**JUDGMENT**

The two Accused persons named above are jointly indicted in two counts of Murder and attempted Murder.

In Count one is Murder contrary to sections 188 and 189 of the Penal Code Act. It is alleged that on 10<sup>th</sup> December, 2009 at Nkombe cell, Kitumba, Kabale District, the two Accused persons murdered KELLEN MWESIGA.

In the second count of Attempted Murder contrary to section 204 (a) of The Penal Code Act. It is alleged that on 10<sup>th</sup> December, 2009 at Nkombe cell, Kitumba, Kabale District, the Accused unlawfully attempted to cause death of RUKUNDO RUTH.

Each of the Accused persons pleaded not guilty. The moment any Accused persons pleads not guilty to a Criminal charge, the burden of proof falls upon the state to prove the case as a whole. This is common law position and in Uganda it is preserved by the Constitution of The Republic of Uganda under Article 28 (3) (a) that:

***“(3) Every person who is charged with a Criminal Offence shall-”***

*(a) Be presumed to be innocent until proved guilty or until that person has pleaded guilty."*

It is for this reason that the Accused person can not be convicted unless the prosecution proves the case against the Accused person. Before I discuss the evidence adduced in this case it is appropriate that I state what the prosecution is expected to prove before securing a conviction on any of the two counts.

**Count 1:**

- (a) Proof that Kellen Mwesiga died on 10<sup>th</sup> December, 2009.
- (b) That Kellen Mwesiga's death was caused unlawfully.
- (c) That the killers had malice aforethought.
- (d) That the Accused persons participated in causing death.

**In counts 2:**

- (a) That an Act capable of causing death was done or inflicted on the victim.
- (b) That there was malice aforethought.
- (c) That the Accused persons participated.

To determine whether the prosecution proved the above set out elements of the offence, I will first summarise the adduced evidence.

**PW 1 Rukundo Ruth,** testified the deceased Kellen Mwesiga was her step-mother. On 10<sup>th</sup> December, 2009 at about 9:30 p.m she entered the house with others, as they tried to close the door, they realized people were following them pushing the door to enter. Kellen flashed a torch and Rukundo recognized A1 Abel and A2 A man that had been working with Local Defence force. The attackers fired bullets. She saw Abel push the door, he had put his head and arm through before the door closed and he held the bag Kellen (deceased) was holding. Kellen was shot she fell down, the witness escaped to the rear of the house.

PW 1 realized later she had sustained a bullet shot on the arm and arm pit. She hide in a maize plantation where she observed the culprits. The witness displayed three gun-shot scars on the shoulders. She told court she observed the Accused for five minutes as she hide while they searched for her. She recognised Abel because he was near. She testified that Abel had a case pending in court of threatening life of KELLEN. Abel had a land grudge with Kellen. PW.2 Dr. Aharizira Moses of Kabale referral hospital, that he examined the dead body of Kellen. He found bullet wounds in the chest and through the ribs. See Post mortem Report. P.1. He examined PW 1 Rukundo, she had gun short wounds under the arm pit, through the wrist joint the injuries were classified as dangerous harm. See P.2.

PW 3 Byarugaba John, confirmed that Kellen's door had been shattered by bullets. PW 4 Kabwebare (D/AIP) went to the scene after the events. He recorded the principal witness statement and A2 was arrested on the basis of the witness's additional statement.

A1 Tumushabe Abel denied participation he gave details of how he was arrested. He confirmed that he had a land dispute with the deceased. Kellen was his sister-in-law and the dispute arose from the piece of land that was supposed to be shared between the Accused and her late husband. This murder took place before it was resolved and the Accused was under trial of threatening violence against the deceased. A2 TIRWOMWE denied participation. He did not know the deceased and had no knowledge of her death.

DW3 Musekura Henry, told court that he is a nephew of the deceased, she was his maternal Aunt. He confirmed that she was murdered on 10<sup>th</sup> December, 2009 and the people who had land disputes were the first suspects and they were arrested including Tumushabe Abel (A1) and Kalisiti Tibahurira plus many others who were released. He confirmed that A1

was the deceased brother-in-law. The brother of this Accused was a husband to the deceased and he died before the family land dispute was resolved. Similarly she was murdered before the said land disputes between her and A1 or with Kalisti Tibahurira was resolved.

I will examine the above evidence against each element of the offence. Death of Kellen Mwesiga was proved by both the prosecution and Defence evidence that she was shot dead on the 10<sup>th</sup> day of December, 2009. See the evidence of DW 3, A1 who confirmed the death. PW 4 Kabwebare Polly (D/AIP) he went to the scene soon after hearing the gun shots at about 11:00 p.m and found the dead body which he took for post-mortem examination. Police Form 48 B, a post mortem report admitted as prosecution exhibit P.E. 1 shows she died on 10<sup>th</sup> December 2009 from gun shot wounds, through the chest and heart. She died due to bleeding and shattered internal organs. This evidence proves that she was killed un lawfully with malice aforethought. Rukundo Ruth (PW 1) who was with the deceased told court that it was about 9:30 p.m when they were attacked by men who tried to enter the house by force. They struggled with the attackers trying to shut the door and as they resisted the attackers fired gun shots which killed Kellen instantly and wounded Rukundo. She suffered two gun shot wounds through the wrist joint and through the arm pit. My assessment is that whoever shot these victims acted un lawfully and death was un-lawfully caused. It is settled that every homicide is presumed to be unlawful unless there is proof that death was caused accidentally or under justifiable or excusable circumstances. PW 1 told court that the victim was attacked as she entered her own houses peacefully in company of this witness. According to medical evidence, see PE 1 and PE II, this was close range shooting. Rukundo Ruth told court the shooting followed the victim's resistance against the illegal entry by the attackers therefore the circumstances proved show that this was un lawful and intentional killing. It is the duty of the

prosecution to prove beyond reasonable doubt that the killer had malice aforethought as settled by the court of Appeal of Uganda in **Paulo Omala Va Uganda Cr. Appeal No. 6 of 1977.** I am satisfied beyond reasonable doubt that the state proved that Kellen's death was caused unlawfully and with malice aforethought.

The prosecution has a duty to prove not only that the offence was committed but also that it was committed by the Accused person. PW 1 Rukundo Ruth told court that she recognized both the Accused persons at the scene. That A1 was pushing the door and A2 did the shooting. If her evidence of identification is believed, it does not matter who actually had the gun or shot. It does not matter whether it is A1, A2 or a third person they would be bound by the doctrine of common intention. PW 1 told court that she indentified the culprits at two points in the attack. First time was at the door when she realized that there were intruders pushing the door to enter which was followed by gun shots which injured her and killed the deceased. She was scared and ran through the rear door and hid herself in a maize garden where the maize plants were covering her, this was at night about 9:30 p.m. Her Police statement was admitted as Defence exhibit D.E I. she stated therein that the attackers were actually first seen by her sister **EVERLYNE ALINDA** who shouted. In the Police statement she stated the following *"I wish to state further that I do suspect that the people who attacked us could be our relatives. One of them is Tumushabe Abel. He is my uncle.....he has been conflicting with my late mother trying to grab our piece of land... I also suspect Calist Tibahurira. He is also a relative who has been encroaching on our piece of land."* This statement was made on 12<sup>th</sup> December, 2009. In her additional statement made on 21<sup>st</sup> December, 2009, nine days later she stated she had learnt that the attackers were FARA and Abel Tumushabe. Her evidence is

that they were pushing a wooden door from inside through which they were shot. It is incredible how she could have seen anybody since she only came to re-enforce Evelyn Alinda who had been pushing the door first. In the additional statement she states that she recognized the culprits with assistance of reflections from the torch light they were flashing around while looking for her in the maize garden. Everlyne Alinda who would have been the second survivor who was at the scene was not called to corroborate the story of this single identifying witness. Evidence of a single identifying witness whose identification is exclusively or predominantly visual identification under difficult conditions must be treated with great caution. PW 1 Rukundo states that it was at night, 9:30 p.m. she was not directly seeing the attackers since she came into action to push the wooden door to resist the attacker's entry when bullets through the wooden door shattered her hand and shoulder and she ran away. There is no doubt that she was scared in addition to not seeing who attacked. She hid herself in thick maize garden, in darkness. The culprits who were holding and flashing the torch light failed to see her. The light was projected to the areas they searched in the maize, away from the attackers. The prosecution evidence is not clear how reflections of this light helped her to see the attackers. Both the scare and poor light could not have favoured correct identification.

I have considered the fact that no particular number of witnesses is required to prove a fact and therefore a single identifying witness could be sufficient to prove identity of a culprit however there is always need to examine evidence of such single identifying witness with great caution to rule out a possibility of convicting a person on evidence of identification that could have been mistaken or erroneous. Where the conditions under which such identification was done are difficult, e.g due to poor lighting, scaring circumstances, abrupt or sudden attack, additional independent evidence is needed to corroborate the

identification.

I have, in details, examined the quality of the evidence of identification in this case which is the crucial or fundamental basis of the case against the two Accused persons I find that the evidence of identification is so weak that it would be manifestly wrong to base a conviction purely on evidence of Rukundo Ruth (PW 1) without any corroboration. The Assessors joint opinion is that the state did not prove the charges beyond reasonable doubt. I agree and I acquit each of the Accused persons.

Dated at Kabale this 30<sup>th</sup> day of October, 2012.

**J.W. KWESIGA JUDGE 30/10/2012**

**In the presence of:**

Mr. Murumba for the Accused on State

brief. Mr. Arinaitwe Rajab RSA for State.

Ms Ampeire Averlyne Court-Clerk.