

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

HCT-11- CR-CSC-129-2011

UGANDA :::PROSECUTOR

VERSUS

MUGABE JAMIL SAM:::ACCUSED

BEFORE HON. MR. JUSTICE J.W. KWESIGA

JUDGMENT

MUGABE JAMIL SAM is indicted for **Murder** in two counts contrary to **Section 188 and 189 of the Penal Code Act**. **In count one** it is alleged that the Accused person, on 25th July, 2007 at Mashenya Cell in the Kanungu District murdered one **Asimwe Regina Korutaro**.

In count two it is alleged that on 25th July, 2007 the Accused person, at Mashenya Cell, Kanungu District, murdered one **Brenda**.

From the on set it is necessary to note that these two counts constitute two different offences despite the fact that they alleged to have been committed at the same time by the same culprits and under the same circumstances. The evidence of the whole trial shall be examined at the same time although criminal liability shall be separately considered for each count. In each of the two counts the prosecution must adduce evidence which proves that:-

- (a) The named deceased is actually dead.

- (b) The death was caused unlawfully.
- (c) The culprits had malice aforethought.
- (d) The Accused person participated.

The facts of this will emerge from the summary of the evidence of the prosecution and defence witnesses which I will proceed to summarize before applying the Law to the evidence. **PW 1 Dr. SSEBUDDE** made examination of the dead bodies, the subject of the two courts in this case. His evidence was admitted pursuant to section 66 of the trial on Indictments Act.

PW 1 examined the body of ASIIMWE REGINA. He observed injuries on the head and ears. The skull was damaged affecting the brain. The cause of death was excessive bleeding and brain damage. (See P1.) He examined the body of BRENDA. She was aged 3 years only. She had deep cut wound on left temporal region, left hand and fingers. She died of excessive bleeding due to brain damage and skull injury (see P.2).

P.W .2 Nshekyera Augustine was the husband of Late Asiimwe and father of late Brenda. The Accused and his brother and sister called GAITANO and KERENI respectively were neighbours and had misunderstandings over land. The three attacked the deceased Asiimwe while in garden in the morning of 25th July, 2007. He responded to ASIIMWE'S alarm to intervene. Before he reached her in response, he met the three including the Accused person. They Accused him of shifting the land boundary marks. The Accused and Gaitano were armed with a panga each at 10.00 a.m. He escaped and went to report to LC 1 Chairman. He reported to the Chairman at 7:00 p.m and on returning to his compound at about 9:00 p.m he found Busarimwe Fulgence, Mugabe (Accused), Gaitano and Kereni in his compound. Fulgence Busarimwe attempted to cut him with a panga but he avoided the panga and raised alarm. Shortly after, he saw the dead bodies of Asiimwe and Brenda lying in the

kitchen not far from where he found the Accused, Busarimwe, Gaitano and Kerani. He said there was a bright moon light. He emphasized it was as bright as the sun light. He recognized each of the four culprits. He knew them before because they were neighbours and distant relatives. They never attempted to hide, Kerani had a stick while all the others were armed with pangas. Under cross-examination he explained that because he had seen them earlier in the day and there was bright moon light he had no difficulties in recognizing these attackers who arrogantly waited for him to finish him off in his compound. The other culprits were killed by the mob on arrest, it is only the Accused and Kerani who survived.

PW 3 Magara confirmed that on the material day at 8:00 p.m reported to him that Mugabe (Accused) and other had attacked him during the day. In the same night at 12:00 mid night he called and reported they had killed his wife and daughter. PW 3 confirmed that before this incident he had been involved in disputes over land between PW 2 on one part and Accused, Gaitano and Kerani.

PW 4 Karigye Nelson participated in the hunt for the suspects of this double murder, they searched all homes of relatives and found Accused , Gaitano and Kerani in the home of Anna Muhereza. The Accused escaped but Gaitano and Kerani were arrested. Mwebaze Ann (PW 5) confirmed that on 25th July, 2007 at about 8:30 p.m Gaitano, Accused and Kerani were at her house. The Accused left but Gaitano and Kerani stayed and they were arrested. When they arrived, Gaitano has a bag and a panga. She described the order of arrival at her home. The Accused and Gaitano arrived at 9:00 p.m and the Accused left that night, she did not know where he went.

PW 7 Minyeto Henry (ASP) recorded a charge and caution statement from the Accused person admitted as Prosecution exhibit P.3. The Accused person gave

a detailed history of a land dispute between his family and that of the deceased. He had filed a case with LC 1 Chairman who did not resolve the dispute but only demanded for sh. 10,000/= which they did not have. He went on to R.D.C who wrote a letter to LC II Chairman to intervene. They saw Kishekyera go to dig the disputed land they got provoked and decided to attack him. He was not at home on the fateful night they killed his wife and a child instead and ran away.

In his defence, on oath he denied being in the village but confirmed there was a land disputed and he had reported in the exact details as contained in the charge and caution statement which he retracted. He told court that at the time of alleged offence he was at Kihihi far away from the scene and he was working for Robert Ngambamakye and his wife whom he called as DW 2 and DW 3 to confirm that on 25th July, 2007 he was with them in Ntabaga Cell, Kihihi. DW 2 and DW 3 told court that the Accused person started working for them from 1st December, 2007 to 8th March, 2008. The Accused person came to work as a casual labourer for only three months and before December, 2007 they did not know him.

This Accused person put up a defence of ALIBI and he decided to prove his ALIBI by calling two witnesses DW 2 and DW 3 to confirm or support his ALIBI. The Accused person, by law had no duty to prove his alibi. The Law in Uganda is that the Accused person who raises a defence of ALIBI assumes no duty to prove it and the burden of proof remains on the prosecution to Disprove It By Adducing Cogent Evidence. See **SEKITOLEKO VS Uganda [1967]EA 531, Festo Androa Asenua and Another Vs Uganda Cr. Application 1 of 1998 (Scu) and Akol Patrick and Others Vs Uganda (2006) HCB**

The moment the Accused person voluntarily assumes the burden of proving the ALIBI by calling evidence to support the alibi, this evidence shall be subjected

to scrutiny and the trial judge should determine its credibility and whether it creates reasonable doubt in the prosecution story that the Accused person was at the scene of crime. The Defence of ALIBI has to be considered not in isolation from the rest of the evidence of identification, the principal identifying witness PW 2 Augustine Kishekyera stated that he saw the Accused person, Gaitano and their sister Kereni at the scene at about 9:00 p.m after they had killed the two victims and they attempted to harm or kill him. His evidence is that there was a moon light which was as bright as sun light. This evidence of the good quality of light that helped his visual identification was not challenged. He testified he had seen them earlier in the day when they attacked him in the garden so he was seeing them for the second time in that day. The attackers were his relatives and he was familiar with their appearance. These factors contributed to favourable identification. The Accused persons false ALIBI, and his retracted charge and caution statement form part of circumstantial evidence that points to the Accused person's guilty. Why did he set up a false alibi. It points to the fact that he was covering up his guilty participation. The retracted charge and caution statement is so detailed and defers with his defence only on one point, participation. The rest of the surrounding facts are the same. I am persuaded that the statement is true.

I have considered that this statement has been retracted and on its own can not be a basis for conviction. However it serves as a corroboration to the evidence of identification. I have also found that the Accused was in the village not far from the scene. He was at the home of PW 5 where he arrived at night shortly after the alleged time of the offence. He told lies that he was away. PW 5, DW 2 and DW 3 disproved his alibi. This corroborated the evidence of PW 2 who said he was with the other culprits when they killed his wife and daughter. PW 2 found the culprits in his compound at about 9:00 p.m armed with pangas. He never saw any of them and particularly he never saw the Accused person cut

any of the victims. What is it that renders the Accused person guilty? He is incriminated by the following chain of evidence:-

- In the morning of the day, the accused and others attacked the complainant and the deceased, Asiimwe, in the garden over the boundary marks. The complainant escaped and went to report to LC 1 Chairperson whom he got as late as 7:00 p.m. This was during the day and he saw the Accused very well.
- On the same day at about 9:00 p.m the complainant found the Accused and the group he had seen earlier in the day in his compound while armed with pangas. There was bright moon light so he saw them well. He was close to the culprits and he could see Busarimwe with a panga, he attempted to cut the complainant.
- The dead bodies, freshly cut were a few metres from where the Accused and his gang were found armed with pangas only to run away when an alarm was raised.
- The Accused at about 9:00 p.m went to the home of his uncle's wife PW 5 but left the home at night leaving Kereni and Gaitano who were arrested late. His conduct of visiting his uncle's home and leaving in the night was strange and pointed to a conduct of a man that was running away to avoid being traced.
- The Accused person put up an ALIBI which was disproved by his own witnesses that he told lies. He must have told lies to defeat the truth that he participated in the crime at the scene where the prosecution evidence placed him.
- His charge and caution statement provides the background of the crime and provided a motive which becomes a piece of circumstantial evidence that renders assurance to the evidence of participation. Following the above examination of the prosecution and the Accused person's defence evidence I am satisfied that the Accused person was at the scene with the gang whose composition was his brothers and sister. He was properly identified by PW 2 Augustine Nshekyera. I have considered that the time

of identification was night but the unchallenged evidence is that there was a very bright moon light, as bright as sub light. The culprits were well known to the single identifying witness who had seen them hours before the murder when they attacked him in the garden as he responded to the call of the deceased, Asiimwe, whom they had attacked earlier. It is specific evidence as to who of attackers killed Asiimwe or Brenda by virtue of section 20 of the Penal Code they were bound by the principle of common intention. The two Assessor's opinion is that the prosecution proved the whole case against the Accused person and advised me to convict the Accused person. I agree;

(a) I hereby find the Accused person guilty of Murder of Asiimwe Regina contrary to **Section 188 and 189 of the Penal Code Act** as charged in court one and accordingly convict him.

(b) I hereby find the Accused person guilty of Murder contrary to **Section 188 and 189 of the Penal Code Act** and I accordingly convict him in count two.

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J.W. KWESIGA

JUDGE

19/11/2012

SENTENCING

STATE: He is a first offender. The Accused person committed a serious offence. He has not been remorseful. We pray for a deterrent sentence.

DEFENCE: The Accused is a first offender, he appeared remorseful. He has been on remand since 3/7/2008. We apply for a sentence that will allow him to return to society.

ACCUSED: I pray for a lenient sentence. I am 24 years old now.

SENTENCE:

The convict has been found guilty of Murder in two counts. The homicide was committed in the most cruel manner. Homicide in this region arising from land disputes is alarmingly high the only way courts can contribute to their reduction is to punish whoever is convicted with severe sentences that will hopefully deter others from taking other people's lives on matters that should have been resolved by taking the disputes to court.

Despite the fact that the convict is a first offender, I have found it difficult to be more lenient than only saving him from a death sentence. I find the following appropriate sentence.

- (a) **In Count 1:** I sentence the Accused person to **20 years imprisonment.**
- (b) **In Count 2:** I sentence the Accused person to **20 years imprisonment.**
- (c) The two sentences shall be served consecutively.

The Accused person has the right to Appeal against the conviction and sentence to the Court of Appeal.

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J.W. KWESIGA

JUDGE

19/11/2012