

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-CSC-NO – 138 OF 2011

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

VERSUS

A1: Rtd. Major Guma Gumisiriza

A2: Nsubuga Godfrey

A3: Ruhinda Joseph

A4: Byaruhanga Devis alias Sande

A5: Twesiime Africano

A6: Kitembo Abdul

A7: Tukamushaba Milton alias Kashaba ::::::::::::::: ACCUSED

A8: Tugume Apollo alias Perezi

A9: Mwebembezi Gerald

A10: Habasa Banabus

BEFORE: THE HON. MR. JUSTICE BASHAJA K. ANDREW

JUDGMENT

Rtd. Major David Guma Gumisiriza, (A1) Nsubuga Godfrey (A2) Ruhinda Joseph (A3), Byaruhanga Devis alias Sande (A4), Twesiime Africano (A5), Kitembo Abdul

(A6), Tukamushaba Milton alias Kashaba (A7), Tugume Apollo alias Perezi (A8), Mwebembezi Gerald (A9), Habasa Banabus (A10) (hereinafter collectively referred to as “the accused”) are indicted for Murder contrary to **Sections 188 and 189 of the Penal Code Act.**

The particulars of the offence are that the accused and others still at large on 17/02/2011 at Katojo Cell in the Ibanda District murdered Ainebyona Moses. All the accused pleaded of not guilty. Mr. Ojok Michael, Principal State Attorney for the State, led evidence of eighteen witnesses (PWs) to prove its case. The accused represented by Mr. Muhwezi Ronald (for A1 on private brief) and Mr. Magoba (for A2-A10) on State brief, all save for A1, gave unsworn statements in their defence. The defence also called evidence of one witness.

The Prosecution’s case briefly is that Ainebyona Moses (hereinafter referred to as the “deceased”) a resident of Ishongororo Sub-County Ibanda District was a campaign agent of one Kyooma Xavier who was contesting with A1 for a Parliamentary Seat for the Ibanda North Constituency in the 2011 elections.

On 17/2/2011, at about 10:00 am, A1 ordered his supporters who included all the accused to board vehicles and go for a mission. The accused first had a brief meeting with A1 at his residence, where he ordered the driver, one Adam, to knock any vehicle they found along the way. The supporters of A1 were heard saying that the deceased’s car is the one they were targeting. A1 was also heard saying that rather than lose his seat as MP he would go with someone from Kyooma’s Camp.

Before the deceased met his death, he called Mrs. Fiona Kyoma and requested her to send policemen because A1 was about to kill him at Katojo Cell. The policemen went to the scene and found A7 and A8 holding knives. Motor vehicle Reg. No. UAE 616N, a Toyota Hilux Double Cabin and UAJq 829R which knocked the deceased’s car carried the other eight accused to the scene of crime, belonged to A1 who was using them during his election campaigns.

On the fateful day, the deceased was driving his car Reg. No. UAJ 228H Calidina model, and had two other occupants from Ibanda. When they reached Kambendyaho Trading Centre, the deceased's car was blocked by two approaching vehicles which were driven at a terrific speed. The two cars then by - passed and A1 was annoyed and blamed his driver for failing to knock the deceased's vehicle as earlier instructed. Adam made a U-turn on orders of A1 and followed the deceased's vehicle which was sandwiched between the first car and the one following which later knocked the deceased's car on the side, but the deceased managed to drive off with the accused in pursuit. The deceased abandoned the car at Katojo Cell and ran into the bush.

Some of the accused persons on finding the car abandoned destroyed it and ran after the deceased while holding pangas, sticks and iron bars with which they assaulted the deceased. Adam who was driving A1 knocked the abandoned vehicle of the deceased and A1 and A3 rushed to Ishongororo Police Post and reported the accident.

A1 told police at Ishongororo that he had gone to rescue one of his supporters called Ham, who was under attack by the deceased and others. Police found blood in the house where the deceased was assaulted and recovered a small hoe and iron bar and blood-stained club from the double- cabin pick up of A1. The deceased while in coma was later taken to Kagongo hospital in the said double- cabin vehicle of A1; and he later died from the said hospital. A post mortem examination of the body revealed that the deceased died of haemorrhagic shock due to compressed brain. The accused persons were arrested and indicted as above.

It is called for to first state the cardinal principles which govern criminal trials. The legal burden of proving the guilt of the accused on every issue rests upon the prosecution throughout the case. See *Ojepan Ignatius Vs. Uganda Cr. Appeal No. 25 of 1995(SC)*; *Woolmington Vs. DPP [1935] AC 462*; *R.V. Sims [1946] 1KB5*; *Holmes Vs. DPP [1946] ALL ER 124*; *Wamongo & Or's Vs. Uganda [1976] HCB 74*; *Abdu Ngobi Vs. Uganda Cr. Appeal No. 10 of 1991 (SC)*. The onus does not shift to the accused, except in few specific statutory exceptions, and murder is not one of them. See *Deziderio Kayongo Vs. Uganda MB 29/71*; *Uganda Vs.*

Karerangabo MB/30/71, Uganda Vs. Nkulungira Thomas alias Tom & A'nor High Court Cr. Case 426 of 2010 per Rugadya Atwooki J (unreported).

The standard of proof is beyond reasonable doubt. See ***Doto S/o Mtaki Vs. R [1959] EA 860; Martin Kakuba Vs Uganda [1976] HCB 310.*** The expression “reasonable doubt” means that the evidence adduced by the prosecution must carry a reasonable degree of probability of the accused’s guilt leaving only a remote possibility in his favour. See ***Uganda Vs. Okello [1992-1993] HCB 68.*** In event there is doubt at the conclusion of the trial, it must be resolved in favour of the accused who must be acquitted. See ***Uganda Vs. Jacana Charles, H.C Crim. Session Case No. 80 of 2005 (unreported); Uganda Vs. Awacango & A'nor H.C. Crim. Session Case No. 16 of 2006(unreported).***

The prosecution has to prove each of the following ingredients in the offence of murder to the required standard.

- (i) That there was death.**
- (ii) That the death was unlawful.**
- (iii) That the death was caused with malice aforethought; and**
- (iv) That the accused person participated in or caused the said death.**

See ***Uganda vs. Kassim Obura & A'nor [1981] HCB 9 per Odoki J (as he then was); Joseph Rujumba vs. Uganda [1992-1993] HCB 36 (SC); Uganda Vs Okello [1992-1993] HCB 68; Uganda vs. Nkulungira alias Tom & A'nor (supra).***

There was no dispute whatsoever in respect of the first three ingredients of the offence. It was not disputed that Ainebyona Moses is dead. The evidence of PW17 Dr. Matsiko Charles, who carried out the post-mortem examination (in Exhibit “P4”) confirmed in his evidence that the deceased is dead. Arinaitwe Phiona (PW5) whose husband, MP Kyooma, the deceased was a campaign agent also confirmed the fact of death. None of the accused denied that Ainebyona is dead. Counsel for the state and accused all conceded to the fact of death. The prosecution proved this ingredient beyond reasonable doubt.

There was equally no dispute as to the fact that death was unlawful. In East Africa, the legal position is that every homicide is presumed to be unlawful unless it is excusable. See *Uganda vs. Kulabako Nigh Jennifer, H.C. Cr. Session case No. 61 of 1991 per Kato J (as he then as); Uganda vs. Okello (supra); Gusambizi Wesonga & O’rs Vs R. (1948) 15 EACA 63*. Death is excusable if it is caused unintentionally or accidentally or is committed in execution of a lawful sentence or circumstances of self-defence. See *Uganda Vs Turyasingura Denis & O’rs H.C Cr. Session case No. 96 of 2009 per Bamwine J (as he then was) unreported*. Once again the defence did not contest or rebut the presumption that death was unlawfully caused. The injuries described in the post-mortem report (Exhibit “P4”) as laceration of the brain and wounds measuring 8cm long on the scalp, are all telling of the unlawful manner death occurred. The prosecution proved the ingredient beyond reasonable doubt.

There was also no contention on the fact that the death was caused with malice aforethought. It has been held that the existence of malice aforethought is not a matter of opinion but of fact to be proved by evidence. See *Bukenya & O’rs Vs. Uganda [1972] EA 549; Francis Ocoke vs. Uganda [1992-1993] HCB 43; Nandudu Grace & A’nor Vs. Uganda Cr. Appeal No. 4 of 2009 (SC)*. It is deemed to be duly established either by evidence of intention to cause death or knowledge that the act or omission will probably cause death. See *Tubere Vs.R (1945) 12 EACA 63*.

To infer malice aforethought the court has take into account the type of weapon used, the nature of injuries inflicted, the part of the body assailed - whether vulnerable or not, and the conduct of the accused prior, during and after the attack. See *Uganda Vs. Turwomwe (1978) HCB 182; Steven Misango & A’nor Vs. Uganda Cr. Appeal No. 52 of 2001 (EA)*. In addition, *Section 191 of Penal Code Act* gives similar circumstances from which the element of malice aforethought can be inferred. It states:-

“Malice aforethought shall be deemed to be established by evidence proving either of the following circumstances:-

- (a) *an intention to cause death of any person, whether such person is the person actually killed or not or;*
- (b) *knowledge that the act or omission causing death will probably cause the death of some person, whether such a person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.”*

The spirit of the law encapsulated under **Section 191 (supra)** was amply expounded upon in the case of **Steven Misango & A’nor Vs. Uganda (supra)** and by the **Supreme Court of Uganda in Nanyonjo Harriet & A’nor Vs. Uganda Cr. Appeal No. 24 of 2007**, where it was observed that:-

“In cases of homicide, the intention and or knowledge of the accused person at the time of committing the offence is rarely proved by direct evidence. More often than not the court finds it necessary to deduce knowledge from circumstances surrounding the killing including the mode of killing the weapon used and the part of the body assailed and injured.”
(Underlined for emphasis).

When the medical doctors’ evidence on the particular aspect of cause of death is revisited, it vividly demonstrates in detail the fact that death was, indeed, caused with malice aforethought. The cause of death is given as “haemorrhagic shock” due to the wounds inflicted on the scalp which caused the brain to be compressed. To my mind, the head is a vulnerable part of the body particularly when assailed with the force that causes laceration and compression of the more delicate tissue of the brain. In such circumstances when death occurs, it matters not whether the assailant knew or not that act will probably cause death, or was indifferent whether death would be caused or not, or by a wish that it may not be caused. The evidence of the nature of injuries, the part of the body assailed and how death was caused are sufficient to infer malice aforethought. The prosecution has also proved this element to the required standard.

The last ingredient on the participation of the accused in the crime was strongly contested by the defence. All the accused persons denied ever taking part in the

killing of the deceased, and put across their respective defences, mainly alibi. They tried to show that prosecution witnesses were unreliable, and their evidence too weak and at most contradictory.

The law relating to alibi is settled. The Supreme Court in the case of ***Uganda Vs. George Wilson Simbwa, Cr. Appeal N. 37 of 1995***, held that the court must examine both prosecution and defence evidence before coming to a decision. The prosecution evidence ought not to be examined in isolation of defence; and when the accused sets up an alibi as a defence he or she does not thereby assume any responsibility of proving the alibi. The prosecution is under the duty to negative the alibi by evidence, and must place the accused squarely at the scene of crime. The Supreme Court went further in the case of ***Bogere Moses & A'nor vs. Uganda Cr. Appeal No. 1 of 1997 (SC)***, to state that putting the accused at the scene of crime:-

“..must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it but adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept one version and hold that because of that acceptance per se the other version is unsustainable.”

A1 gave his account of events and where he was at the material time on the fateful day of 17/2/2011. He said that about 10:00 am he left his home in Ishongororo to go and rescue a one Mucunguzi Ham his supporter, who had called him that his house was surrounded by Ainebyona, now the deceased, and others. A1 did not tell the people whom he had in his house but stopped what he was doing and moved out, and ordered two police guards to follow his car in another one - a double cabin pickup, which was driven by one Godfrey Nsubuga (A2).

Then A1 told his driver one Adam to take the narrow village road of Nyansimbo towards Kambendyaho-Kyenkanga direction. As they descended towards a river called Katojo, they met another car and A1 instructed his driver to slow down due to the deep pot-holes and protruding stones at that particular spot. The driver of the other on-coming car also slowed down, and someone passed a hand through the rear window and hit the windscreen of A1's car with a stick and shattered it although it did not fall out. As A1 bent from the rear seat of his car to see who hit the windscreen, someone else threw a stone on the window glass where A1 was seated, behind one Ruhinda (A3). Then the other car speed off.

A1 instructed his driver to turn and go to Ishongororo Police Post to report the incident. As they left a place called Omwiguru descending towards Nyansimbo and Kambendyaho, A1 saw many people on the road and his double-cabin pick-up vehicle parked on the roadside. As they slowed down, A1's car was again hit with sticks and stones, by the people who were yelling that "it is Guma" in their local dialect. A1 proceeded to Ishongororo Police Post to report the incident and some people who were suspected to be orchestrating election violence.

A short distance along the way, they found the late Ainebyona's car parked abandoned across the road in a corner in a narrow place which caused A1's driver to knock it on the rear side; but managed to negotiate around it and proceeded to Ishongororo Police. At the said Police Post, A1 found a Cpl. Mujuni and D/Sgt Paul Behwera (PW13), and he reported the encounter. Hardly had police started to take his statement than a group of some people who included one Barekye and Byarugaba Wilbroad; Kyooma's driver, came alleging that A1 was at Katojo Trading Centre with his supporters and were assaulting late Ainebyona.

Cpl. Mujuni told them that AI was inside the Police Post which they confirmed, but left complaining that police was biased. In the meantime, a rowdy crowd continued to gather outside the Police Post as police tried to restore calm. After about 40-50 minutes, the double- cabin pick- up vehicle of A1 also arrived at the Police Post and on it was the late Ainebyona in a very bad condition. He had been assaulted. A1 gave the driver Nsubuga Shs. 50,000= for fuel and instructed him to take the injured Ainebyona to hospital.

The DPC of Ibanda Ochege also came and talked to the rowdy crowd outside as A1 kept seated inside the Police Post. Later, the DPC told A1 that Ainebyona has died at Kagongo hospital. The Regional Police Commander also came and took A1 to Mbarara Police Station, where he made his statement (Exhibit "P2") in which he detailed the same facts as in evidence he gave in court.

To place A1 at the scene of crime, prosecution relied on evidence which, in my view, portrays multiple scenes. The first one was by Sheik Hamdan Kayongo (PW1) that on the fateful day, he was travelling in the same car with late Ainebyona when a vehicle belonging to A1 knocked theirs. It stopped in front of one Mustapha's shop at Katojo Trading Centre, but managed to drive off for about half a kilometre out of the trading centre but the vehicle failed to move. They got out and ran into different directions. PW1 hid in the bush until later at about 3:00 pm when he emerged from hiding.

PW2 Bwebale Abubakari who was also in the same car as PW1 and deceased, testified that as their car crossed Katojo Bridge, a black car belonging to A1 came and knocked it at the rear on the driver's side. PW2 said he saw A1 seated in the front seat wearing a white shirt; but never saw anyone else. According to this set of witnesses, the scene of crime was half a kilometre on the road from Katojo trading centre towards Ishongororo town. They only saw A1 in the car which knocked theirs but did not see what transpired thereafter, because they ran away.

Kakuru Turinawe Nicolous (PW6) gave another account, that on 15/02/2011 at about 11:00 am he was told by the wife of Kyooma (PW5) to go and see what was happening to Ainebyona at Katojo. On reaching at the place PW6 saw many people running into the forest and he followed them thinking that it is where Ainebyona was. When he reached the forest, he met supporters of Guma who assaulted him and he ran back to Ishongororo trading centre

PW7, Kajungu Steven who was with PW6 also testified that on 15/2/11 at about 11:00 am he was at Kyooma's office at Ishongoro Trading Centre, and tried to call Ainebyona on phone to find out whether he had been attacked. He got into a car together with PW6 and a policeman and they headed for Katojo Trading Centre

where they found Guma's double cabin pick-up car with a dent parked on the road side and empty. They asked the residents at the scene who told them that late Aineboyona had been chased into the forest. PW7 and PW6 and the policeman followed the direction mentioned by residents into the forest, but they met a group of people who attacked them. PW6 and Tugume Moses (PW8) were beaten and they ran back towards the trading centre.

PW7 continued with the policemen, and just about 40 meters away from the house where Ainebyona was hiding PW7 was attacked by another group who cut him on the head and broke his arm. He also ran away and hid in the bushes. He states; "I never saw what happened next". While in hiding he received a phone call from PW8 who came and picked him from the bushes and took him to Ishongororo Health Centre IV. He identified one Mande Davis as the one who cut him, but he is not among the accused. According to this set of witnesses, the crime occurred on 15/2/2011 at 11:00 am, and the scene of crime was through the forest and the bushes up to the house in the playground some 2 km from the trading centre.

PW8 Tugume Moses also gave his version of events, but admittedly a very confusing one. He too stated that on 15/2/11 about 11:00 am he was at the office of MP Kyooma at Ishongororo with Kakuru Nicolas (PW6) and Mrs Kyoma (PW5) and others. Mrs Kyoma received a phone call from late Ainebyona that people were chasing him at Katojo. Mrs Kyoma told them to proceed to Katojo to see who wanted to kill Ainebyona.

At Katojo Trading Centre, PW8 saw people running into the forest and he followed them. In the forest he met a group of people with T-shirts of Guma armed with spears, sticks and pangas. PW8 recognized Iddi Lukyeza, a one Tusingwire, Gerald (A9) and Habasa (A10). A10 beat him and chased him back towards the trading centre, where he hid in an unfinished house on the lower side of the road. Then a black car with A1 in the front seat dressed in a short sleeved checked shirt arrived. A white pick-up vehicle also came with many people from Nyansimbo – Ishongororo side. It stopped and many people with Guma's T-shirts surrounded a house at the trading centre. Then Tusingwire - not among the accused - broke the door of the house with a hammer while Gerald (A9) broke the window. PW8 stated

that he was only about 20 metres from the scene of crime just opposite the road where he was hiding on the lower side. According to this version, the scene of crime was just on the side of the road in Katojo Trading Centre.

Tusingwire Provia (PW9) also testified that on the 17/02/2011 about 11:00 am while on her way from Omwiguru to Ishongororo Trading Centre, she met A1's vehicles at Katojo "A" Cell following each other. After a short while so many people wearing yellow T-shirts with pangas, iron bars and sticks ran from the cars and went to a house of one Rwabatwale in the playground and broke it. PW9 saw A1 seated in a black car on the road wearing a black and white shirt, but he never came out of it. She saw all this from a distance of about 50 metres. According to this version, the scene of crime was Katojo "A" Cell.

A1 is mentioned by other witnesses in general terms particularly as regards the vehicles which they said they knew belonged to him or he used in his election campaigns.

When the evidence of the identifying witnesses together with that of A1 is carefully evaluated, it emerges clearly that none of it places A1 squarely at the scene of crime. If the scene of crime was some 2 kilometres from the Katojo Trading Centre through the forest to a playground in a house as narrated by Kakuru Nicholas (PW6) and Kajungu Steven (PW7), then A1 was not there because according to Tusingwire Provia (PW9) A1 never got out his car. Similarly, according to Tugume Moses (PW8) who claimed to have witnessed the whole incident, A1 left before the people on the pick-up car came from the house in the playground the alleged scene of crime.

From the accounts of PW6 and PW7, to access that particular house, it would appear that one had to pass through a forest and emerge through the bushes to a clearing that was a playfield. No witness said they saw A1 go through the said forest to the said house described variously by prosecution witnesses to be about 2 km from Katojo Trading Centre.

The scene of crime which was described by Sheik Hamdan Kayongo (PW1) was out of Katojo Trading Centre about half a kilometre where the deceased's car

stopped and they abandoned it running into different directions. The late Ainebyona ran into the forest while PW1 moved to the opposite direction which is the upper side of the road. Again A1 was not placed at that scene or in the forest where the late Ainebyona is said to have run to after his car stalled.

The other scene of crime as given by Tugume Moses (PW8) is at Katojo Trading Centre on the road-side. He went into the forest and met people with Guma's T-shirts who assaulted him and chased him back to Katojo Trading Centre. As he reached the Trading Centre, a black car with A1 seated in the front seat also arrived, and PW8 hid in an unfinished house about 20 metres from where A1 was.

Then a pick-up car also came from Nyansimbo side and parked there with many people on it wearing Guma's T-shirts. All the said people alighted from the pick-up and then surrounded a house in the Trading Centre, and broke its door with a hammer. All the people entered the house and picked a person and threw him outside. They put the body of the person on the pick-up car with legs dangling and drove away towards Nakasero Trading Centre. According to this version of PW8, A1 had by then left the scene before the pick-up left. Invariably this puts A1 away from the scene of crime shortly before the crime occurred.

The evidence of the prosecution witnesses leaves one wondering as to where the exact scene of crime was. It is not certain whether it was at Katojo Trading Centre, or half a kilometre out of Katojo Trading Centre, or 20 metres across the roadside in Katojo Trading Centre, or 2 km away from Katojo Trading Centre through the forest to the playground. The various descriptions only transmit intense confusion steeped in cloudy uncertainty, where each of the witnesses described a totally different and unrelated scene. Without pin-pointing the scene of crime with precise exactness, it becomes quite difficult to place A1 squarely at any particular one of them.

Even if the scene was the house in the playground, no evince placed A1 there because he was variously stated by prosecution witnesses to have either remained in the car (PW9) or left before the attack on the house (PW8). In absence of such

evidence as would establish the nexus critical to placing A1 squarely at the scene of crime, it becomes extremely difficult to tie him to the crime.

It is in no doubt that A1 was seen travelling in the group of cars that day, and some of the cars belonged to him or were used by him in his election campaigns. Indeed PW7, PW8 and PW9 said they saw A1 that day and knew him very well owing to the fact that he was at one time their MP and was contesting for the same seat with Mr. Kyoma. However, such isolated pieces of evidence could not be sufficient to show that A1 participated in the crime if he could not be squarely placed there.

It is unclear as to why the witnesses advanced such widely varying accounts and descriptions of the scene of crime, if indeed they were describing the same scene. The one offered by PW8 is the most bizarre and it does not add up. He claims to have run back to the trading centre after being attacked in the forest. This could only mean he ran back to the Katojo Trading Centre. He went on to state that he witnessed from his hide-out the attack on the deceased in a house on the opposite side of the road about 20 metres away. Again this could only mean that the scene of crime was on the road-side at Katojo Trading Centre. Yet he had earlier stated that he followed the deceased, said to have run into the forest about 2km away to the scene of crime. PW8 was intercepted in the forest and beaten and he ran back. It is puzzling how he could now see the house- the scene of crime - opposite him on the road only 20 metres away.

Even going by this version of events PW8's evidence could not establish the critical nexus between A1's presence in the car and the alleged the scene of crime. If anything, PW8's outlandish claims only serve to suggest that A1 had left by the time the alleged group of "all people" entered the said house and assaulted the deceased. It is evident that PW8's account was based on his imagination, or if he was indeed at the scene, he terribly distorted the facts and exaggerated them out of proportions, and painted a totally different scene of crime from what other evidence described.

Where witnesses claiming to have observed the same event or facts at the same time not only give conflicting but apparently distorted and exaggerated account of a

supposedly same event or facts, it puts the truthfulness of such accounts into doubt, and whether in fact they are describing the same thing. It raises serious questions as to the credibility of the witnesses which creates reasonable doubts in their case.

Having weighed the prosecution evidence against the defence, A1's version proved credible that he was at the Ishongororo Police Post before or as the alleged incident was taking place. It is corroborated in that material particular by evidence of D/Sgt Paul Behwera (PW13) a police officer who was at the Police Post at the material time when Kyooma's driver Byarugaba Wilbrod came to report that A1 with his supporters were assaulting the deceased at Katojo Trading Centre. PW13 stated that he realised the driver was telling lies because A1 was inside the police post as the alleged assault was reportedly taking place. It is logical then that A1 could not have been in two places at the same time.

With regard to Nsubuga Godfrey (A2), prosecution relied on evidence of Cpl. Oulanya (PW10) who stated that A2 was the driver of the double cabin pick-up car belonging to A1. PW10 did not know A2's name. On the fateful day they drove following the car in which A1 was and stopped at a certain petrol station. Some people whom PW10 did not know jumped on the pick-up and they proceeded towards the Southern direction. They met two cars coming from the opposite direction and A2 knocked one of them at the rear. The car which was knocked continued but stopped after some distance. The deceased got out and people chased him into the forest. PW10 also followed them and after about ten minutes caught up with the people surrounding a house.

PW10 sprayed tear gas into the room in the house where the late Ainebyona was taking refuge. According to him, this was to force Ainebyona out and PW10 would rescue him. PW10 was called after some days to an identification parade and he picked out A2, A5 and A6 as the people he had seen at the scene of crime. PW10 said he had not known A2 as a driver before, although the two had been moving together for over one month.

I find the identification of A2 by PW10 to be quite irregular and improper. PW10 claimed to have identified A2 as the driver of the double cabin pick-up at the

identification parade. The identification was in respect of people the witness could recall having seen at the scene of crime. It was certainly strange for the witness be required to identify A2 with whom he had stayed for over a month at an identification parade. The evidence of PW10 seeing the same driver he had travelled with in the same car, and then stating that the driver was at scene of crime without attempting to show the role of A2 is not only improper but absolutely irrelevant.

It should also be noted that the identification parade evidence was expunged from the record at the instance of the prosecution after it became clear that it had been grossly mishandled. It was practically inadmissible. That being the case no reliance could be placed on identification made at parade whose results were not submitted in evidence.

The above latter finding, I believe, equally puts to rest the identification of Twesiime Africano (A5) and Kisembo Abdul (A6), whom Tar Francis (PW 11) also claimed to have picked from the identification parade. PW11 had not known the suspects prior to the incident, and in absence of the identification parade findings it could not be said there was proper identification. In this regard, I take the view of the Supreme Court in the case of ***Stephen Mugume Vs. Uganda, Cr. Appeal No. 20 of 1995***, where it was held that it is common sense that a witness would not be required to identify a suspect at a parade if the witness knows the suspect whom he/she said committed an offence. Identification parades are as practice held in cases where the suspect is a stranger to a witness or possibly where the witness does not know the name of the suspect. In such a case, the identification parade is held to enable the identifying witness to confirm that the person is the person he had seen commit a crime.

In the *locus classicus* case of ***Abdallah Nabulele & A'nor vs. Uganda [1979] HCB 77***, it was held that where the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence disputes, there is need for caution before convicting the accused in reliance on the correctness of identification. The reason for a special caution is the possibility that a mistaken witness can be a convincing one. Court should closely

examine the circumstances in which the identification came to be made particularly the length of time, distance, the light, familiarity of the witness with accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of mistaken identity is reduced, but the poorer the quality, the greater the danger. I have not found that satisfactory conditions existed for proper identification of A2, A5 and A6 by PW10 and PW11.

Regarding the other accused persons being placed at the scene of crime, prosecution relied on testimony of Kakuru Trurinawe Nicholas(PW6), who testified that he identified some people, including one Mujuni and Ben who beat him at Katojo in the forest while he followed people who had ran after the deceased. He also said that he identified Tusingwire Kadiri, Seruja Meta, Ben Mujuni, Eddie Kamero, Rwaburita Sande, Byarugaba Denis (A4), Tukamushaba Milton (A7), Mwebaze Gerald (A9), Tugume Apollo alias Perezi (A8) and Habasa Banabas (A10). Only Mujuni who beat him had a stick but he did not see what weapons the others had.

It can be correctly inferred that PW6 was able to identify the said accused in the forest where he met them when he was beaten. He ran back to Ishongororo Trading Centre, which suggests that he did not witness the assault on the deceased. It follows that PW6 mentioned the particular accused persons just because he met them in the forest and they beat him; and not because he saw them participate in the murder of Ainebyona. PW6 appears to have been concerned with the assault on himself than on any one else. He was presented with opportunity to mention his assailants and he did just that.

With regard to PW7's account, he testified that as he followed the late Ainebyona through the forest, and just about 40 meters from the house at the playground he met a group of people who cut him and broke his arm. He ran away and hid in the bushes and did not witness what took place next. It becomes rather strange and highly doubtful when in the same breath he claims that he identified Habasa(A10) Tukamushaba(A7) and Gerarld Mwebembezi(A9) at the scene of crime which, in his own words, he did not get to. He hid in the bushes did not see anything else. This makes his purported account of identification of any of the accused at the scene of crime an afterthought of doubtful authenticity.

Similarly, PW8 Tugume Moses claimed to have seen a white car with very many people donning yellow T-shirts arrive at Katojo Trading Centre. They surrounded the house, broke the door entered and picked a person he did not name, and threw him out. One Tusingwire, who is not among the accused, took the person's phone whose model PW8 could identify at that distance from his hiding place. Another one picked twenty thousand notes of money which also PW8 could tell from the distance of about 20 metres while hiding in a fearful state. He would peep and then hide, over and over again because of the attack he had sustained from the forest nearby.

Once again PW8 is on the spot in the identification of the accused as he was in the description of the scene of crime. He demonstrated himself to be so manifestly an unreliable witness, who profoundly exaggerated facts based on his imagination of events and places. If it is true that he was hiding in the unfinished house, presumably in fear for his life, it is highly doubtful that he could properly see or describe what transpired outside on the other side of the road with the precision and graphic detail. He singled out Gerald (A9) as the one who broke the window of the house, yet Gerald was among people he met in the forest who chased him back to the trading centre. It is puzzling how again Gerald could at the same time be among the people on the pick-up vehicle which arrived at the scene just as PW8 was taking position in hiding.

PW8 also claimed that all the people entered the house and picked a person and threw him out. Yet Cpl. Oulanya (PW10) who actually was exactly at the house stated that one person entered the house and got the deceased out. With such inconsistencies it would be unsafe to place any reliance on it this kind of evidence.

Learned Counsel for the accused, Mr. Muhwezi Ronald, submitted that the evidence of identifying witnesses is manifestly inconsistent, contradictory and points to deliberate untruthfulness. I entirely agree pointed out by. For instance, PW6 started by asserting that the date of the incident was 15/2/2011 at 11:00 am. Further, that along with Byarugaba and a policeman, he proceeded to Katojo Trading Centre where they saw many people running into the forest. He followed them thinking it is where Ainebyona was. On the way in the forest he met many people who beat him

with pangas, sticks, iron bars and he fell down. Those who beat him are Mujuni and Ben. Incidentally, the two are not among the accused. With fear he we ran back to Ishongoro trading centre where he only met other victims in a clinic being treated for injuries.

In the same breath PW6 claims to have identified A7, A9, A8 and A10 at scene of crime, yet he had run away from the forest straight to Ishongororo Trading Centre. Logically his alleged identification of anyone at the scene of crime is absolutely untrue because he was not there. The scene of crime was not in the forest. Similar contradictions were pointed out in submissions of Counsel in testimonies of PW1, PW2, PW3, and PW4 and need not be repeated. With such glaring contradictions the testimony of PW6 becomes of less evidential value in attempt to place A7, A8, A9 and A10 squarely at the scene of crime.

In the case of *Oketcho Alfred Vs. Uganda, S.C Criminal Appeal No.24 of 2001* court cited with approval the holding in *Alfred Tarjar Vs. Uganda, Cr. Appeal No.167 of 1969 EACA (unreported)* that contradictions or inconsistencies in prosecution case which are major and go to the root of the case should be resolved in favour of the accused; but where they are minor and were not deliberate lies intended to deceive the court, they should be ignored.

Applying the test to this case, I cannot but find contradictions with regard to time, date and place of the alleged crime to be major. They are so essential and critical success factors in determining whether the crime ever took place or not, and whether the accused are being properly tried for the offence they charged with. Where four key identifying witnesses testifying as to the same alleged crime advance varying accounts as to dates and time and scenes of crime, the inconsistencies and contradictions cannot be ignored, especially when they are not satisfactorily explained. In absence of a clear innocent explanation of the contradictions and inconsistencies, they must be resolved in favour of the defence.

All the accused persons denied participating in the commission of the crime. Their alibis were not been effectively destroyed or specifically rebutted by the prosecution evidence. A4, Byarugaba Denis, stated that on the fateful day

17/02/2011, he was at home sick unable to move. He had been assaulted by some attackers on 15/02/2011 and was under medical treatment. He even reported the incident to police who gave him a police form to be examined by a police surgeon. On 23/2/2011 while in a bus about 2:00 am, on his way to Lyantonde where he had lost his nephew, the bus was stopped and he was removed by police even when he was on his supporting stick. He was subsequently charged with the murder of Ainebyona.

Africano Twesiime (A5,) for his part stated that on 17/02/2011 he was at his home and at about 9:00 am he went to Kahuko Church of Uganda polling station where he was a Polling Assistant to organize the centre for the following day's election on 18/02/2011. At mid-day he went back to his home, and at about 2:30 pm, he went to Kyenkanga Trading Centre where rumours were circulating that Ainebyona has died. The following day he went to the polling station and conducted elections. On 21/02/2011, as he was going to Kambendyaho Trading Centre he met people with pangas and sticks who chased him for 3 miles. He got a motor cycle and rushed to a police post to report the incident. Police advised him to keep at the station for his safety. The following day he was taken to Ibanda Police Station and was surprised to be charged with the murder of Ainebyona, which he denied.

Kisemo Abdul (A6) stated that at the material time he was in Kasese having left Ibanda much earlier than the date in question. That he was arrested from Kasese and brought to Mbarara where he was charged with the murder of late Ainebyona.

Tukamushaba Milton (A7), also stated that on 17/02/2011 he was at a place called Omukanyasi enjoying a drink with friends. At about 12:00 noon he heard rumours that Ainebyona had died. The DPC of Ibanda Mr. Ochege found him and others at Omukanyasi and told him that he was needed to help them because there was chaos in Ishongororo Town where a person had died, and that they should not be in Ibanda drinking. A7 was taken by the said DPC until now.

Tugume Apollo alias Perezi (A8) said he was arrested in similar circumstances as A7 at Omukanyasi while drinking beer. On 17/02/2011 about 11:00 am the DPC Ochege came asking whether anyone was called Perezi Apollo to assist police.

Then it dawned on the revellers that police was looking for Guma's supporters. A8 boarded the police vehicle and was taken to Ishongororo Police Post where he found A1, who asked him why he had been brought there.

Mwebembezi Gerald (A9) also saw DPC Ochege at Omukanyasi on 17/02/2011 where he was having a drink with friends among who was A8. The DPC came with a list of names and read it out, but none of the accused was on it. He then said that Ainebyona had been killed and that every supporter of Guma would be affected. A9 was arrested the following day when a vehicle stopped in front of him as he went to cast his vote. One of the car occupants searched him and another said he was not on the "wanted list." He was nonetheless arrested because he was Guma's supporter and the people who arrested him said that he was one vote less of Guma's votes.

Habasa Banabus (A10) stated that on 15/01/2012 at about 5:00 pm, he was at his home and police arrested him and took him to Ishongororo Police Post. He was not told the reason of his arrest, but was assured that he would know soon. The following day he was taken to Ibanda Police Station and charged with the murder of Ainebyona. He further stated that on 17/02/2011, he was not staying at Ishongororo in Ibanda but was away in Kampala.

The prosecution's evidence of identification of the accused has already been discounted for reasons that need no repetition. Furthermore, the accused persons advanced their own accounts of how they came to be arrested. They denied being at the scene of crime, and that they were arrested by the Ibanda DPC Mr. Ochege who was, surprisingly, never called to testify by the prosecution. The absence of the arresting officer's crucial evidence left a big gap in the chain of evidence as to how and why the accused came to be arrested and subsequently charged.

Court is mindful that, save for A1, all other accused persons gave unsworn evidence in their defence, and as such it could not be tested through cross-examination. However, it is the position of the law as was stated in the case of ***Lubogo Vs. Uganda [1967] EA 440***, that in arriving at its verdict, though a court may take into account the fact that an accused person has not given evidence on oath, this right

must be exercised with caution and must not be used to bolster up a weak prosecution case or be taken as an admission of guilt on the part of an accused.

I do not find that because evidence was not given on oath, it was of any less weight. It is admissible and if any comment has to be made on it, it only goes to the credibility but not admissibility. In the same vein, I have not found that evidence of A5, A6, A7 A8, A9 and A10 is unreliable. In absence of how they came to be arrested or be connected to the crime in issue, their alibis hold firm. The failure to place them squarely at scene of crime renders unproven their participation in the alleged crime.

Similarly, as in case of the arresting officer, no investigating officer testified as to the role of each of the accused in the alleged murder. The reasons for charging each or any of the accused remained hazy and were not clarified. In reaching any verdict on the guilt of an accused person, court should only rely on the evidence before it. What is before court is that a person died and the accused were arrested and charged, but without any effort being made to show how they were particularly linked to the crime. Merely pointing out that the accused could have had a motive to kill the deceased owing to political rivalries is not sufficient to warrant a conviction.

The mainstay of our criminal justice is the strict adherence to the high standard of proof without which justice would be another casual polemic. The standard is set beyond reasonable doubt and the prosecution has the duty to hit the mark; not with anything else but sufficient credible evidence. Optical illusions of prosecution witnesses cannot in the least meet the required standard.

The learned Principal State Attorney, Mr. Ojok Michael, submitted that the accused should be found culpable on basis of the doctrine of common intention. I respectfully disagree, for the reason that for common intention to manifest, it must be established first that the accused persons shared a common intention to commit the offence. See *Augustino Orete & Or's. Vs. Uganda [19656] EA 430*. It is not necessary to prove a prior agreement between the accused, *See Birikadde Vs. Uganda [1986] HCB 6*; but for an offence of murder to be established the common intention must not only be to prosecute an unlawful purpose as is required under *Section 22 Penal Code Act*

but there must also be established the sharing of a common purpose to kill or knowledge that the act causing death will probably cause death. See *Uganda Vs. Waiswa & A'nor. [197] HCB 299.*

There is not a scintilla of evidence adduced which established common intention linking all the accused together to commit murder. It is apparent that there was spontaneous mob action in an emotionally charged election atmosphere, in which a person sadly lost his life. It is unfortunate and sad but the law requires specific prerequisites for criminal responsibility to be apportioned, and the particular criteria of proof by evidence to be strictly met. They have not in this case.

The lady and Gentleman Assessors advised that all accused persons, save for Kisémbó Abdul (A4) should be found guilty; but of a lesser offence of manslaughter. Their main reason was that the accused had been placed at the scene of crime. I respectfully disagree. I gave the necessary warnings in summing up that placing the accused at the scene of crime means proof to the required standard that the accused was at the scene of crime at the material time considering all prosecution and defence evidence not in isolation, but totality. From their opinion, the Lady and Gentleman Assessors appear to have misdirected themselves by considering isolated pieces of evidence of identifying witnesses without considering the defences of alibi set up. The isolated pieces of evidence could not prove beyond reasonable doubt that the accused were at the scene of crime, let alone that they participated; which is the crucial issue for the prosecution to prove. If the accused could not be so placed at scene of crime, it followed that they could not be culpable even of a lesser offence of manslaughter.

Accordingly all the accused persons are found Not Guilty. I acquit each one of them of the offence of Murder contrary to *Sections 188 and 189 Penal Code Act*. It is ordered that Habasa Banabus (A10) who is on remand be immediately set free, and the cash bail of all be refunded.

BASHAIJA K. ANDREW

J U D G E

14/6/2012

Court: Judgment read in open court before all the parties and the lawyers.

Mr.Ojok M, Principal State Attorney for the State in Court.

Mr. Muhwezi R. for A1 on private brief in court.

Mr. Magooba for A2 – A10 on State brief in court.

Court Clerk: Mr. Ngabirano in court.

BASHAIJA K. ANDREW

J U D G E

14/6/2012