

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT PALLISA**

HCT-04-CR-SC-0087-2006

**UGANDA.....PROSECUTOR
VERSUS**

A.1 BULAIMU LUVUNIA

A.2 MWANAWABENE GASTA

A.3 MUTOMUTO PATRICK

A.4 MUSENERO YOSWA.....ACCUSED

BEFORE: THE HON. JUSTICE STEPHEN MUSOTA

JUDGMENT

The four accused persons to wit **A.1 Bulaimu Luvunia, A.2 Mwanawabene Gasta, A.3 Mutomuto Patrick** and **A.4 Musenero Yoswa** are jointly and severally indicted for the murder of one **Dongo Karim** contrary to sections 188 and 189 of the Penal Code Act. Prosecution alleges that the four on the 28th of October 2005 at Bulataka village in Kaderuna sub-county, Pallisa District murdered **Dongo Karim**. Each of the accused represented by **Mr. Mutembuli** denied the indictment.

The State prosecution side is led by **Mr. Walugembe**.

By pleading not guilty, the burden of proof of all the ingredients of the offence of murder was cast onto the prosecution. This had to be done beyond any reasonable

doubt. In criminal law this burden remains onto the prosecution throughout trial. The standard of proof must be maintained because if there is any doubt left in the mind of court, such doubt has to be resolved in favour of the accused which leads to acquittal. In joint trials like the one under consideration the guilt of each of the accused has to come out.

In an indictment for murder, the ingredients to be proved are as follows:-

- (i) That a human being was killed.
- (ii) The killing was unlawful.
- (iii) The killing was with malice aforethought.
- (iv) Each of the accused persons participated in the killing.

I will deal with the first three ingredients together and then deal with the issue of participation.

Whether a human being was killed unlawfully and with malice aforethought.

From the evidence adduced by both the prosecution and defence, there is no doubt that **Dongo Karim** a human being was attacked and killed in the night of 28th October 2005.

According to the postmortem report Exhibit PE.I, the body of the deceased had a crushed skull and multiple cut wounds on the skull, face and trunk. The throat was cut. It had a fracture on the left collar bone, multiple cut wounds and closed tissue injuries. The cause of death was given as traumatic and haemorrhagic shock. The weapons used were sticks. Definitely this death was a homicide. It was held in the often quoted case of ***Gusambizi S/o Wesonga v. Republic (1948) 15 EACA 65*** that in all cases of homicide except where circumstances make it excusable, death is

presumed to be unlawful. Given the revelations in the postmortem report whoever caused the death of this human being had malice aforethought given the extent of the injuries that led to this death. Both learned counsel for the prosecution and defence as well as the gentlemen assessors are agreed that these three ingredients have been proved beyond any reasonable doubt and I agree.

The only contentious ingredient is participation of the accused persons.

Participation:

Regarding this ingredient I have meticulously reviewed the evidence on both sides and the respective submissions by both counsel. To try and prove this ingredient prosecution relied on the evidence of **PW.2 Isma Mwanawabene** and **PW.3 Alamanzan Isabirye** who were the only identifying witnesses.

PW.2 was however the key witness. He testified that while in his room at 11:00p.m on 28 October 2005 he heard voices outside calling his father. That he recognized the voices of **A.1 Luvunia Bulaimu**, **A.2 Mwanawabene Gasta** and **A.4 Musenero Yoswa**. He made an alarm and the attackers removed bricks from the window opening to his house and he was pulled out of his room by A.2 and A.4. That he was aided by candle light in his room and torches flashed by the attackers to identify them. PW.2 further testified that he was ordered to sit down and say nothing by **A.1 Bulaimu Luvunia** then all the attackers hit the father's door cut it and it fell out. Further that the deceased was pulled out of the house while being beaten by sticks and was killed in the doorway. However PW.2 contradicted himself and said he was infact standing two metres away watching aided by light not from his room but from the father's room. The light was from a tadoba (local candle light). That after the killing all the attackers entered the

deceased's house picked a phone and money which was on the table came out and left. That the incident lasted 10 minutes.

PW.2 further testified that his younger brother **Ramathan Isabirye (PW.3)**, **Abdukarim Dongo** and **Ibrahim Mutomuto** were consoled by PW.2. After the assailants had left, PW.2 reported the incident to his uncle **Mulekwa** but did not tell him who the attackers were. He reported to **Yusuf Wanyola** and the chairman **Appolo Wamairu** but did not tell them who had killed his father. Eventually the murder was reported to Kaderuna police where he made a statement. That it is in the statement that he revealed the identity of the killers as the four accused persons and others not identified. The four accused were arrested from the burial. Finally PW.2 revealed that the motive of murder was a one month old land dispute between the deceased and **Luvunia A.1** and others.

During cross-examination by **Mr. Mutembuli** learned defence counsel, PW.2 substantially differed from what he testified during his examination in chief. He admitted that there is information he gave orally during testimony which is not in his statement Exhibit DE.I. In his statement he told police that he was in the kitchen, not where he sleeps. He said he was cooking Dhako. He said he saw people standing outside. He did not identify them. He got scared because there were threats to kill his father. He went and informed his father then got a lamp and got out to find out who the two people were. He found when the two people had vanished. Later he went to his house, then to the latrine and he heard people walking in the coffee and banana plantation and he warned his father. That it was 10:00p.m then. After finishing cooking he went to his room and slept. Thereafter

he heard people knocking at his door calling names and ordering him to open. That he detected or recognized the voices as of;

- **Gasyodo James**
- **Mwanawabene Stephen.**
- **Ndoboli, and**
- **Samairi**

all relatives of his who had been threatening to kill his father. That later when he made an alarm the above mentioned people entered his room and got him out. With the aid of torch flashes he identified;

- **Mwanawabene Stephen**
- **Gasyodo James**
- **Ndoboli, and**
- **Samairi** each wielding a panga.

PW.2 further said that **Gasyodo James, Mwanawabene Stephen, Ndoboli** and **Samairi** went and started cutting the deceased's door open. That it was Kadiri and Bilali who hit the door with a stone but it failed to open.

When the door opened **Mwanawabene Stephen, Ndoboli, Samairi and Gasyodo James** entered to grab the deceased. That the deceased got a stool and hit **Minsi Naloda** on the face. This person is being mentioned for the first time. That the others grabbed the deceased and **Bilali** kicked him. He fell down on the doorway.

PW.2 further states in exhibit DE.I that **Mwanawabene Stephen, Gasyodo James** and **Samairi** pulled the deceased outside. He goes on to say **Ndoboli** and **Kadiri** got hold of the deceased's head while **Minsi Naloda** and **Gasyodo James** and others sat on the legs and held the deceased's hands. Further that "**Mwanawabene Stephen** then slaughtered **Dongo.**" That after slaughtering **Dongo** (the deceased)

Waira and **Luvunia A.1** turned **Dongo** and faced him upside down. Nowhere in his statement to police does PW.2 implicate the accused persons in the murder of the deceased except mentioning A.1 in the passing. He does not say that any of the accused had a panga or stick and cut or hit the deceased.

Whereas in cross-examination PW.2 testified that only the accused attacked his father, in the same breath he alleges the attackers were more than 10 although he saw and identified only the accused persons. But in his statement he substantially departs from what he (PW.2) testified in court in the retrial.

It appears his implication of the accused persons was an afterthought since he never told anybody who the attackers were prior to going to police. Failure to reveal the identity of the attackers as the accused to the relatives he approached immediately affected the veracity and credibility of his implication of the accuseds later. He revealed the incident to several people but to none did he mention who the attackers were. What is surprising is that when PW.2 reached police he mentioned different names from the ones he pointed out from the funeral and were arrested.

In such circumstances, I would agree with **Mr. Mutembuli** that it is safer to go by the statement made five days after the incident than believing what the witness says 7 years later during trial.

The other prosecution witness was **Alamanzan Isabirye PW.3** who sharply contradicted what PW.2 told court although both allege to have been at the scene when the deceased was murdered. PW.3 told court that he was asleep when he heard people calling his father. He identified **A.1 Luvunia Bulaimu** by voice.

That he saw the other accused cut the door of his father open. That the deceased was pierced at the heart using a panga but medical evidence talked of a blunt object i.e. sticks as having been used to kill the deceased.

In cross-examination PW.3 contradicted what PW.2 told court. He said he never saw anybody pull PW.2 out of the house nor **Isma** standing up. He however confirmed that he never implicated any of the accused as the killers until he reached police. This is borne out by his statement Exhibit DE.II in which he did not implicate the accused as the killers. He stated inter alia that there were and I quote,

*“Amongst them I managed to identify **Mwanawabene Stephen alias Mulefu,, Mwanawabene Gasta, James Gasyodo, Minsi Naloda, Ndoboli** and others. The person who grabbed me was **Mwanawabene Stephen.....** I saw when **Mwanawabene Stephen, Mutomuto Patrick, Gasyodo James, Minsi Naloda, Gastus Mwanawabene** grab my father..... I saw **Mwanawabene Stephen** slaughter my father with a panga.”*

Whereas this witness mentions A.2 and A.3 he does not at all mention **A.1 Luvunia** but simply says he identified him by voice. He does not mention A.4 at all. The other names of people who are not on trial are repeated. What is worth noting is that PW.3 implicates A.1 and A.2 during re-examination. What surprises me is that despite the straight forward statements by both PW.2 and PW.3, the police officer **PW.4 No.21888 D/C Oboth Felix** arrested the four accused persons from the funeral for the deceased because they were implicated that morning by

PW.2. One wonders why the names repeatedly mentioned by both PW.2 and PW.3 in their respective statements are not on trial.

After analyzing the evidence on both sides and the respective submissions, I am inclined to agree with **Mr. Mutembuli** that in the circumstances of this case neither PW.2 nor PW.3 were able to identify the people who killed their father. Alleging that there was a one month land dispute which could have caused the death was not convincing. I was not convinced that the witnesses identified the accused amongst 10 people by their voices. I was also not convinced that such a vicious attack by close relatives could take place in full view of both PW.2 and PW.3 and they are left to watch and observe what was going on at close range unharmed. This was not a mob action.

The quality of identification evidence by the prosecution is so poor to be relied on and found a conviction for such a serious crime. Clearly PW.2 and PW.3 did not identify the attackers that is why they did not mention the accused to anybody until they made a reflection and implicated them the next day.

The candle light or torches allegedly relied on to identify the attackers was not enough to aid correct identification.

The story told by PW.2 and PW.3 that the incident took 10 minutes only is so short a time to rhyme with the description by PW.2 and PW.3 of what took place. It is my considered view therefore that prosecution evidence was so discredited in cross-examination to make it believable. This renders credence to the denial and respective alibis by the accused persons that they were not at the scene of crime and did not participate in this killing. The duty of the prosecution to disprove the

defences of alibi was not properly executed. The conduct of the widow and the deceased's neighbour created a lot of suspicion in my mind. Here is a lady who looted the matrimonial home soon after burial. Note that she had deserted the home of the deceased. She went ahead to get married to a close neighbour to the deceased to date and the orphans are living in that home. This is a homicide which required a thorough investigation to be done to zero on the actual killers and the motive behind it.

The gentlemen assessors gave varying opinions.

In his opinion **Mr. Talonsya Sinani** opined that the killing of the deceased was unlawful and with malice aforethought. However after evaluating the evidence he found the evidence for the prosecution inconsistent that it created doubt in his mind if the accused participated in this murder. He concluded that participation of each of the accused persons was not proved beyond any reasonable doubt. On the other hand **Mr. Medard Wanalobi** concurred with his colleague that the prosecution proved that the death of **Dongo Karim** was unlawful with malice aforethought. He however differed on participation and advised that this ingredient was proved by prosecution evidence to his satisfaction because both PW.2 and PW.3 saw the accused persons kill. That the evidence of PW.2 and PW.3 corroborated each other and any inconsistencies in their evidence was minor.

He advised me to convict all the accused persons.

For the reasons I have given in this judgment I am inclined to agree with the opinion of **Mr. Talonsya Sinani** and disagree with that of **Mr. Medard Wanalobi**.

Consequently, I will find that prosecution has not proved the guilt of each of the accused persons beyond any reasonable doubt.

A.1 Bulaimu Luvunia.

A.2 Mwanawabene Gasta.

A.3 Mutomuto Patrick, and;

A.4 Musenero Yoswa

are each found not guilty and are acquitted of murder contrary to sections 188 and 189 of the Penal Code Act. The indictment is dismissed and each is set free unless lawfully held. It is so ordered.

Stephen Musota

JUDGE

23.4.2012