

and went back home. PW1 later received a telephone call from the deceased who told her that he had been arrested. She responded by going to the scene where she found many people beating the deceased using spears, pangas and iron bars. It was alleged that the deceased had been caught stealing a pig belonging to A4
5 NOREDA NSHEMWREIRWE. PW1 said that she recognized the 3 accused persons among those who were beating the deceased. The deceased died from the injuries inflicted on him. The 3 accused persons were arrested and charged. In his defence A1 TUSHABOMWE WILBROD placed himself at the scene and supported by DW4, his defence was that as LC1 Chairman he attempted to stop the
10 beating but was overwhelmed by the mob. In their defence A2 BARUGAHARE ALEX and A3 SUNDAY SIMON in their unsworn statements denied being present at the scene or participation in the crime.

3.0. The Burden and Standard Of Proof

15 The burden of proof is always on the prosecution. The prosecution has the duty to prove each of the ingredients of the offences and generally this burden never shifts onto the accused, except where there is a specific statutory provision to the contrary. (see *Woolmington vs D.P.P. [1935] A.C. 462*, and *Okethi Okale & Ors. vs Republic [1965] E.A. 555*). This is not one of those cases where the burden of
20 proof shifts to the accused to prove his innocence.

The standard of proof is proof beyond reasonable doubt. All the essential ingredients of the offence are to be proved beyond reasonable doubt. This standard does not mean proof beyond a shadow of doubt. The standard is achieved if having
25 considered all the evidence, there is no possibility that the accused is innocent. In

Miller vs Minister of Pensions [1947] 2 All E.R. 372 at page 373 to page 374, Lord Denning stated that:–

5 *"The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence: 'of course it is possible but not in the least probable', the case is*
10 *proved beyond reasonable doubt; but nothing short of that will suffice."*

Evidence is evaluated as a whole. The Court considers evidence of both the prosecution and the defence relating to each of the ingredients before coming to a conclusion. The Court should not consider the prosecution evidence in isolation of
15 the evidence presented on behalf of the accused. In *Abdu Ngobi vs Uganda, S.C.Cr. Appeal No. 10 of 1991*, the Supreme Court expressed itself as follows, with regard to treatment of evidence:

20 *"Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted; but if the defence has not raised a doubt that*
25 *the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged."*

4.0. The Ingredients Of The Offences

4.1. Murder

On a charge of murder, the Prosecution has to prove the following essential
5 ingredients:

- (i) That the death of a human being occurred.
- (ii) That the death was caused unlawfully.
- (iii) That death was caused with malice aforethought.
- (iv) That the accused participated in the crime.

10

5.0. The Evidence In This Case

The parties tendered the Postmortem Report in respect of the deceased under
Agreed Facts as Prosecution Exhibit PE1 and the Prosecution called 4 witnesses
namely: PW1 ALINAITWE SCOVIA the wife of the deceased; PW2 MUTABAZI
15 LAZARO the father of the deceased; PW3 BYOMUHANGI DEUS a brother of
the deceased; and PW4 No. 28690 CPL. BYARUHANGA FRANCIS. Each of the
accused persons made an unsworn statement and the Defence called one witness
NORED A NSHEMEREIRWE. The parties agreed on and were given a schedule
for filing written submissions but the prosecution did not comply.

20

1. Whether death of a human being occurred

Death may be proved by production of a postmortem report or evidence of
witnesses who state that they knew the deceased and attended the burial or saw the
25 dead body. In this case the prosecution relied on evidence of witnesses and a

postmortem report that was admitted during the preliminary hearing (Prosecution Exhibit PE1). The evidence of PW1 ALINAITWE SCOVIA the wife of the deceased, PW2 MUTABAZI LAZARO, PW3 BYOMUHANGI DEUS, PW4 NO. 28690 CPL. BYARUHANGA FRANCIS establishes that the deceased died and
5 was buried. The evidence of each of the 3 accused persons, supported by the evidence of DW4 NOREDA NSHEMEREIRWE also supports the evidence that the deceased died. The defence agrees that this ingredient has been proved. I am satisfied that the Prosecution has proved this ingredient beyond reasonable doubt.

10 ***2. Whether the death was caused unlawfully***

The prosecution had to prove further that the death of the deceased was unlawfully caused.

15 Unless accidental or authorized by law, homicide is always unlawful. (See *Gusambizi s/o Wesonge Versus Rep. [1948] 15 EACA 65*).

The Prosecution contends that this was a homicide. The defence of the accused on the other hand is a denial.

20

The evidence of PW1 ALINAITWE SCOVIA the wife of the deceased, PW2 MUTABAZI LAZARO, PW3 BYOMUHANGI DEUS, PW4 NO. 28690 CPL. BYARUHANGA FRANCIS establishes that the deceased was beaten to death. The evidence of each of the 3 accused persons, supported by the evidence of DW4
25 NOREDA NSHEMEREIRWE also supports the evidence that the deceased was beaten to death. There is no evidence suggesting that the injuries leading to death

were lawfully caused. The defence does not dispute the proof of this ingredient. I am satisfied that the Prosecution has proved beyond reasonable doubt that the death of the deceased was caused unlawfully.

5 **3. Whether the death was caused with malice aforethought**

The next ingredient for consideration is whether there was malice aforethought. In Criminal Law, malice aforethought is deemed to be established from evidence of circumstances of the intention to cause the death of any person or of the knowledge
10 that the act or omission causing death will probably cause the death of some person.

In particular, Section 191 of the Penal Code Act provides that *malice aforethought shall be deemed to be established by evidence providing either of the following*
15 *circumstances—*

(a) An intention to cause the 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 person is the person actually killed or not,
20 *although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.*

In order to determine whether there was an intention to cause death or that the person knew that his act will probably cause death, the Court can consider the
25 weapon used, the part of the body targeted, the degree of injury and the conduct of the accused before and after the act. (See *R. Versus Tubere s/o Ochieng [1945] EACA 63*). If a deadly weapon is used on a person, the intention to cause or

knowledge that death would occur is deemed to be established. Further, if a vulnerable part of the body is targeted, then the intention to cause death is inferred. Under section 286 (3) of the Penal Code Act “**deadly weapon includes – (a) (i) any instrument made or adapted for shooting, or cutting, and any imitation of**
5 **such instrument.**” A *panga* is a deadly weapon because it is made or adapted for cutting or stabbing and when used offensively on a person it can cause death (See **Supreme Court, Kwesimba Vs Uganda SCCA N0. 14/95**). A spear and an iron bar would qualify as deadly weapons. Failure to produce an exhibit is itself not fatal to the prosecution’s case if witnesses who saw the exhibit adequately describe it in
10 Court. (**Kalist Ssebuggwawo vs Uganda SCCA No. 7 of 1987**). The head has been established to be a vulnerable part of the body and injuries deliberately inflicted upon the head have been held to be intended to cause death or to be accompanied by knowledge that they would probably cause death. (See **Mwathi vs. Republic [2007]2 EA 334**).

15

The evidence of PW1 ALINAITWE SCOVIA the wife of the deceased was that there were very many people assaulting the deceased on the head using spears, pangas and iron bars. The postmortem report (Prosecution Exhibit PE1) revealed
20 that the body of the deceased had external injuries in form of multiple deep cut wounds on the head, back and right arm and face. The cause of death and reason for the same was severe head injury leading to shock and death.

The defence does not dispute the proof of this ingredient. I am satisfied that the
25 Prosecution has proved beyond reasonable doubt that the persons who caused the death of the deceased did it with malice aforethought; that is, with intention to cause death; or with knowledge that their acts would probably cause death.

4. Whether the accused participated in the crime

This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime as the perpetrator of the offence.

5

It was submitted by the defence that there is no direct credible or circumstantial evidence or other cogent evidence that points to any of the accused as having caused the death of the deceased. It was submitted that the only evidence of identification is that of PW1 ALINAITWE SCOVIA who is a single identifying witness under conditions that did not favour a correct identification, because the offence was committed at night when it was dark, and after she had spent a big part of the night partying in Easter celebrations. It was furthermore submitted that since the witness and her husband were believed to be thieves, the witness must have been afraid that she could be lynched together with her husband and that she did not have sufficient time for a correct identification. That her evidence was not credible when she testified that she had found the deceased tied and being beaten by many people while at the same time the deceased was talking on phone. That her evidence on conditions for identification that there was moonlight was contradicted by PW2 and PW3 who stated that they could not identify the people at the scene as everyone was running away when they arrived. The defence maintained that A1 being an LC1 Chairman did not participate in the beating but acted responsibly and attempted to save the deceased from the irate mob. That he did not leave the scene until the police arrived and later arrested him. That A2 and A3 also did not participate in assaulting the deceased.

25

PW1 ALINAITWE SCOVIA testified that A1 TUSHABOMWE WILBROD was urging those who were beating the deceased, saying, “kill him”. That A2

BARUGAHARE FELIX had an iron bar that was about 3 feet long similar to those used in construction work and that it had blood on it. That A3 SUNDAY SIMON had a panga. That she saw A1, A2, and A3 beating the deceased. That the others who participated in the beating are in the village, including BAGUMA GIDION,
5 TURYATEMBA VALLANCE, and many others whose names she had forgotten. In cross examination the witness said that others who participated in the beating included MUYAMBI the son of DW4 NOREDA NSHEMEREIRWE and that many people were beating the deceased. In further cross examination, the witness stated that she saw A3 cut the deceased on the head with a panga. That A2 had the
10 iron bar and he was beating. That A2 and A3 were the ones assaulting the deceased. That she identified the accused with aid of torchlight and moon light and that she knew them very well as residents on the same village with her. A1 was the LC1 Chairman of village, Karokarungi Village.

15 PW2 MUTABAZI LAZARO the father of the deceased testified that he was woken up in the night by PW1 who reported to him that she had found and left the 3 accused persons tying and beating the deceased. He found the deceased already killed.

20 PW3 BYOMUHANGI DEUS a brother of the deceased testified that on the way to the scene with PW1 ALINAITWE SCOVIA and PW2 MUTABAZI LAZARO, they met A2 running from the direction of the scene and he dropped something he was holding, which they found to be an iron bar, black in color, that was about 3 feet long, that was blood stained. That they continued to the home of DW4
25 NOREDA NSHEMEREIRWE where they found the deceased's motorcycle and a pig that had been slaughtered. That upon their arrival, the people who had gathered at the scene run away; that the body of the deceased was found in a nearby bush

and it had many wounds. The witness said that he identified A2 when they met him on the way, with the torches that they had and with the aid of moonlight.

PW4 NO. 28690 CPL. BYARUHANGA FRANCIS testified that when they
5 received a report and went to the scene, they found the body in a pool of blood and it had deep cut wounds on the head, right arm and face. He received and exhibited an iron bar that was about 3 feet long. The accused persons were then arrested.

A1 TUSHABOMWE WILBROD in his unsworn statement placed himself at the
10 scene but denied participation in assaulting the deceased he said he witnessed the assault and that in his capacity as LC1 Chairman, he attempted unsuccessfully to save the deceased from the beatings. The evidence of A1 was supported by that of DW4 NOREDA NSHEMEREIRWE who testified that shat when she was inside her house, she heard A1 the LC1 Chairman stopping the people from assaulting the
15 deceased and saying “*you should not kill a person you will bring problems*”.

The evidence of PW1 ALINAITWE SCOVIA the wife of the deceased was that A1 TUSHABOMWE WILBROD was urging those who were beating the deceased, saying, “*kill him*”. While A1 supported by DW4 testified that A1 as
20 LC1 Chairman attempted to stop the beating and in effect was saying “*don’t kill him.*” As for A2 and A3 in their unsworn statements they denied being present at the scene or participation in the crime.

I warned the Assessors, and hereby warn myself, that corroboration is required as a
25 matter of practice when relying on the testimony of a single identifying witness. Such identification evidence should be considered with caution. There is need to

find other independent evidence confirming the commission of the crime and connecting the accused to the crime.

In the case of *Jamada Nzabaikukize SCCA No, 01/2015*, it was held that:

- 5 “The law on identification by a single witness has been laid out in several cases. The leading authority is that of **Abdullah Bin Wendo and another vs. R (1953) 20 EACA 583**. The law was further developed in the authorities of **Abdulla Nabulere vs. Uganda Criminal Appeal No.9 of 1978** and **Bogere Moses vs. Uganda**
- 10 **(supra)**. The principles deduced from these authorities are that-
- i) Court must consider the evidence as a whole.
 - ii) The court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were favourable or difficult.
 - 15 iii) The court must caution itself before convicting the accused on the evidence of a single identifying witness.
 - iv) In considering the favourable and unfavourable conditions, the court should particularly examine the length of time the witness observed the assailant, the distance between the
 - 20 witness and the assailant, familiarity of the witness with the assailants, the quality of light, and material discrepancies in the description of the accused by the witness.”

Corroboration means additional independent evidence connecting the accused to

25 the crime. In *R. v. Baskerville [1916] 2 K.B 658*, it was held that:

5 *“We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.”*

The EACA adopted the definition in the context of accomplice evidence in ***R v. Manilal Ishwerlal Purohit (1942) 9 EACA 58 (p.61)*** as follows:

10 *“The corroboration which should be looked for is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. It is of course*
15 *not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and whilst the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the*
20 *crime. Corroboration may be found in the conduct of the accused.”*

I can proceed to rely on the evidence of a single identifying witness even without corroboration, if I am satisfied that the witness was truthful and there is no possibility of error in the identification of the perpetrator. (See ***Abdala bin Wendo & Anor v. R (1953) 20 EACA 166***).

25

PW1 ALINAITWE SCOVIA testified that in the previous evening of the fateful day, she and the deceased went to celebrate Easter at Hamungo Trading Center. Their stay extended into the night. At around 1.00AM, PW1 left the deceased there and went back home. PW1 later received a telephone call from the deceased who
5 told her that he had been arrested. She responded by going to the scene. She testified that she went to the scene and found many people gathered, that the deceased's hands were tied and that he was being beaten by many people who included A1, A2, and A3. That A1 was urging the others saying "**kill him**". That A2 had an iron bar while A3 had a panga. In cross examination the witness stated
10 that there were many people and they were all beating. In answer to court, the witness clarified that many people were beating the deceased, and that they were using spears, pangas and Iron bars. In cross examination the witness stated that there were many people and that others were behind saying "**kill him**". It is hard to see how the witness was able to identify A1 as one of those who were saying "**kill**
15 **him**". A1 supported by DW4 testified that A1 as LC1 Chairman attempted to stop the beating and in effect was saying "don't kill him." Although A1 was at the scene, there is reasonable doubt as to whether his role there was to participate in assaulting the deceased, or to maintain law and order and try to save the deceased from the mob action as contended by the accused.

20

PW1 ALINAITWE SCOVIA testified that she identified the assailants because there was moon light and flash light from the phone, and she knew the accused being residents on the village. On the other hand PW2 MUTABAZI LAZARO testified that when he reached the scene after getting a report from PW1 that the
25 deceased was being beaten, they met people running away from the scene and because it was night, she could not see and did not recognize any of them. The evidence of PW2 relating to the same scene raises doubt regarding the

identification evidence of PW1 in relation to whether the prevailing conditions were favorable for a correct identification.

In her examination in chief, PW1 when asked what she (PW1) was doing when the
5 deceased was being beaten, she answered that she ran to call his parents. PW3
BYOMUHANGI testified that PW1 told him that she has left A1 tying her husband
and they were beating him. This raises doubt as to whether the witness spent
adequate time at the scene to be able to identify the assailants and the role of each
one.

10

PW1ALINAITWE SCOVIA testified that she went to the scene and found many
people gathered, that the deceased's hands were tied and that he was being beaten
by many people who included A1, A2, and A3. In cross examination the witness
accepted that in her statement to the police she stated that she found the deceased
15 tied but that he was speaking to someone on his phone. This raises doubt as to
whether the witness saw the deceased tied and being beaten or only tied and
speaking on the phone. It is incredible that the deceased could be tied, being beaten
by many people using spears, pangas and Iron bars, and at the same time be
speaking on the phone.

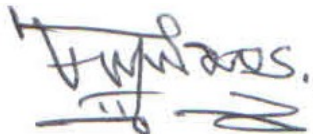
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There is no sufficient evidence to demonstrate that the prevailing conditions
favored a correct identification. I find it unsafe to convict the accused on the basis
of the identification evidence of PW1 ALINAITWE SCOVIA, being a single
identifying witness under difficult conditions and prevailing circumstances. The
25 evidence attributing an iron bar to A2 BARUGAHARE FELIX is unhelpful given
my conclusion regarding the identification evidence at the scene and where there

were many people who were all beating the deceased using spears, pangas and Iron bars.

In conclusion, I find that the Prosecution has failed to prove the case against each
5 accused, beyond reasonable doubt, and in agreement with the Lady and Gentleman
Assessors, I find each of them Not Guilty and I acquit each of the accused. They
are discharged and should be released forthwith unless held on other lawful
grounds.

10 **Dated at Fort portal this 15th day of February 2022.**

A handwritten signature in black ink, appearing to read 'Vincent Wagona', with a horizontal line underneath.

Vincent Wagona

JUDGE

15 15.02.2022