

No case to answer

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE.

CRIMINAL SESSION CASE NO. 369/91

UGANDA PROSECUTOR

VERSUS

A1 - STEPHEN WAMANGA)
A2 - DISON WALIMBWA)
A3 - MUYESA WILSON) ACCUSED
A4 - MUHAMUDU WANDEGA)
A5 - ROBERT MAFABI)

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

R U L I N G:

The 5 accused persons are jointly indicted for murder contrary to sections 183 and 184 of the Penal Code Act. In the particulars of offence, it is alleged that the 5 accused persons and others still at large on or about the 25th day of January, 1991 at Buzibidi village in the Mbale District, murdered one Birityo Woniala. 5

Under section 64 Trial on Indictment Decree, medical evidence was admitted. The doctor, PW1, who carried the postmortem on 25.1.91 stated that the body of Birityo Woniala was identified to him by one John Wobuyu, a brother of the deceased. The body was of a male person about 5 ft of the apparent age of 45 years. It was well nourished and had no marks of recent origin such as tribal marks. 10

External injuries were stabwounds by sharp cutting objects, for example, a knife. There was a wound on the left thigh 2" x 1". He had also a gunshot wound on the left lumbar region. The entry wound was 1" x 1½". There was no exit wound. The body had a cut wound on the left shoulder 1" x 1". 15

The body had internal injuries on the left side of the neck 0.5" x 2." the neck was swollen on the right side. There was damage to the heart and on the small and big guts. The cause of death were internal and external haemorrhage but internal haemorrhage contributed most. 20

PW2, a wife of A1 testified that on 24.1.91 at around 11.40 a.m. a group of people including the 5 accused persons came to her home. She made a meal for them and after eating they went away. From the group she knew only A1, A2 and A3. She did not know A4 and A5.

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The following day at about 9 a.m. another group of people came and the 5 accused persons were among them. A2 was armed with a gun. The group threatened to kill her apparently for having some knowledge of what had happened to the deceased. Again the group went away.

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Evidence of PW3 is that the deceased was his father. He does not know A4 and A5 but knows A1, A2 and A3 as neighbours. On 24.1.91 at around midnight while dancing native music, by use of torch light, he saw a cow tied in their coffee plantation. He went and informed his parents about it and the deceased got out of the house suspicious that thieves were around the coffee shamba. The deceased went and alerted A3.

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The witness and others at that time were looking for possible cattle thieves and the dogs were barking. Immediately the witness heard a gunshot and the dogs promptly stopped barking. He was about 6 paces away from the deceased and with the aid of a torch light he saw the deceased falling down while saying, "my uncle Walimbwa why are you killing me?" He saw Walimbwa stab the deceased three times with a knife. He recognised A1, A2 and A3 through moonlight but did not recognise the lame gunman. However, in court, he identified the lame gunman as A4.

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The deceased was the husband of PW4. She knows A1, A2 and A3 as neighbours. On 25.1.91 at about midnight, PW3 and other children woke them up and informing them that there was a cow tied in the coffee plantation. The deceased went outside and after about 20 minutes, she heard a gunshot. Immediately she dressed up and went outside. After about 15 minutes she saw the body of her deceased husband being brought home.

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On 1.3.91 the witness was digging in the garden where the deceased was shot and found an identity card belonging to Dison Walimbwa, A2. She reported the matter to Robert Songo, General Secretary R.C.1 of the area. In the identity card container, there were a photograph, Graduated Tax tickets and 3 agreements all belonging to Dison Walimbwa, A2 which the witness identified in court and were tendered for identification purposes only.

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On 17.4.91, a Police Officer, PW5, went to Buzibidi village upon getting information that there were documents recovered at the scene where the deceased was murdered. He recovered them from the General Secretary R.C.1 of the area, one Robert Songo in the presence of PW4. He recovered an identity card bearing photograph 5 of A2 and Graduated Tax tickets ranging from 1984 - 1990 and 4 personal documents all of A2. They were exhibited in court as Exhibit P2. The witness recorded statements from PW4 and Robert Songo regarding the Exhibit P2 and treated them as Police exhibits.

At the close of the prosecution case, the learned defence 10 Counsel for A1, A2 and A3 submitted that the prosecution has not established a prima facie case against his clients. The case for the prosecution stands or falls on the evidence of identification of an eye witness - PW3. According to the evidence on record, the 15 circumstances were not conducive for good identification. The incident happened at night and to be precise after midnight.

In his statement to the Police on 1.3.91 about 2 months after the incident, PW3 stated that the deceased was shot dead 25 metres away from him. In court he says he was 6 metres away. Even then, in cross-examination, PW3 admitted that he did not see 20 the person who actually shot dead his father despite the fact that he had a torch and there was moonlight on the fateful night. First information to the Police is that the deceased was killed by unknown people. The deceased was gunned dead in a mature coffee and banana plantation which ought to cast shadow and PW3 was able 25 only to see the cow tied therein. He admitted in cross-examination that on the fateful night there were cattle rustlers/cattle thieves in the area and the possibility that they could have been the people who shot his deceased father cannot be ruled out.

It is further submitted that when the body of the deceased 30 was taken home soon after the incident, PW3 never told those Good Samaritans who actually murdered his father. The family Council chaired by one Nakisa were not told by PW3 who killed his father. Even when PW3 was sent to Kampala to call relatives for 35 the burial, he never mentioned to them who murdered his father. However, on his return from Kampala, PW3 in cross-examination admitted that he learnt that one Nabugusi was arrested for killing his father but the said Nabugusi is not one of the 5 accused persons.

Further, in his statement to the Police about 2 months after the incident, PW3 stated that he went with the deceased to the home of A2 to alert him of cattle rustlers. A2 gave the deceased a club and promised to take a different route in a bid to round up the suspected cattle thieves. According to the same Police statement, PW3 stated that soon after the incident A3 reported to the home people including PW4 of what had happened to the deceased. It is submitted that if A2 and A3 did what PW3 informed the Police, then there was no motive for them to kill the deceased on the fateful night. The only inference which may be drawn is that both A2 and A3 are being prosecuted for answering the alarm. There is no slightest bit of truth in the evidence of PW3 which amounts to worthless discredited evidence. In the premises, the prosecution has failed to establish a prima facie case against A1, A2 and A3: R.T. Bhatt Vs: R. (1957) E.A. 332.

In a nutshell, learned Counsel for A4 and A5 presented his case in a similar fashion. Evidence of PW2, PW3 and PW4 is that they did not know A5 except here in court. As for A4, in his Police statement, PW3 recognised the person who had a gun as Muhamudu Wandega, now A4, who was lame and who shot his father. In court PW3 denied telling the Police like that and attributed the mistake to the interpreter to the Policeman who recorded his statement.

In his evidence in-chief, PW3 testified that the gunman was lame but did not recognise him. Similarly in cross-examination, PW3 admitted that he only heard gunshot but did not see the person shooting. It is submitted, therefore, that the inconsistency is very major and reflects the difficulties the situation was that fateful night. Moreover PW3 in his Police statement said he was frightened and even took cover. All these explain the reason why PW3 never told the Police who immediately went to the scene of crime the person who killed his father. Even he never informed his mother, PW4 or clan leaders arranging for the burial the following day or his aunt at Kampala when he went to call her for the burial. His explanation that he feared it was night and that he feared for his life is inconceivable in the circumstances. First information to the Police is that the people who killed the deceased were unknown.

Evidence on record is that cattle raiding took place on the fateful night and the raiders had guns. Evidence is that the deceased met his death while pursuing cattle thieves. No evidence to the effect that either A4 or A5 was among the cattle raiders that night, nor is there any proof that A4 or A5 or both had killed the deceased. Consequently the prosecution evidence, especially the star witness - PW3 has been so discredited that it is worthless evidence which A4 and A5 cannot be put onto their defences: Uganda V; Abdalla Nasur (1982) HCB 1. However, a court can convict an accused person on the evidence of a single witness after taking caution: Abdalah Nabulere & Others Vs: Uganda (1979) HCB 77. In the instant case, conditions for identification were unfavourable for PW3 who did not know A4 and A5 before the incident. Though A4 is lame, PW3 has admitted that there are other lame people in the area and to infer that the gunman was A4 is erroneous and stretching imaginations too far. Who actually shot the deceased dead is the question which the prosecution has not answered.

It is submitted that the prosecution is duty bound to prove all the ingredients of murder beyond reasonable doubt. Such ingredients include that the deceased is dead and that he died within one year and one day. That the perpetrators of the death did so with malice aforethought and that the perpetrators are the accused in the dock. However, according to evidence, it is conceded that Birityo Woniala is dead. He died few minutes after sustaining fatal injuries. According to weapon used to wit a gun, the person who caused the fatal injury must have had malice aforethought. Who actually shot the deceased is the question not answered by the prosecution.

The prosecution on the other hand submits that evidence of PW2 and PW3 puts the death of the deceased on all the 5 accused persons. Evidence of PW2 is that on the fateful night at around midnight a group of people went to her home and they knocked at the door. She did not open for them but through the window with the help of moonlight she recognised her husband, A1 talking to A2, A3, A4 and A5 but did not recognise one more person. She knew A2 and A3 before the incident as her neighbours.

The following morning the group returned to her home and even prepared a meal for them. On that day A2 was armed with the gun, but the previous night it was A4 who was armed with the gun. They threatened to kill her when she asked why they had killed the deceased.

In that respect it is submitted that her evidence corroborates PW3 who also had seen A4 with the gun at the scene of crime. Their behaviour of threatening to kill PW2 points at their guilt.

Evidence of PW3 is that when the deceased lit a torch immediately he was shot and PW3 was only 6 metres away from the scene. The deceased mentioned, "my uncle Walimbwa why are you killing me?" PW3 soon thereafter saw Walimbwa, now A2, stab the deceased with a knife. He identified A1, A2 and A3 whom he had known very well and there was moonlight. He also identified A4 as the lame gunman who shot the deceased.

At this stage the court would like to point out the following observations:- In cross-examination PW2 admitted that she was not at the scene of crime where the deceased was killed. In her first Police statement of 29.1.91, PW2 stated that on 23.1.91 at about midnight some people came and knocked at their door. They were calling her husband who was with her in the house at the time. Her husband, A1, then opened the door and went outside to talk with the group as she was seeing them through the window. Yet in cross-examination she denied this piece of evidence and said A1 was not in the house at the time, he came with the group.

As if that was not enough contradiction, in cross-examination, PW2 admitted that although she saw people outside, she did not recognise any of them. She also admitted that on the burial day, A3 was present. At first the witness admitted that she saw both A2 and A4 with guns but later changed the story that she did not see either A2 or A4 with any gun. In fact she further admitted that even A5 had no gun. She came to see A4 and A5 in court.

Now, looking at the evidence of PW2 as a whole, the court does not hesitate to rule that this witness has contradicted her evidence to the extent that it is worthless and the only inference one can draw is that she does not point a finger at any of the accused persons with certainty as the people who killed the deceased on the fateful night. Moreover she confirms that on the night in question armed rustlers were in her village and that some cattle were indeed stolen.

Turning to the evidence of PW3, the only eye witness, again in cross-examination, the witness admitted that he did not see the person who shot his deceased father.

On his return from Kampala where he had gone to call relatives for the burial of his father, he learnt that one Nabugusi was arrested as a prime suspect for killing his father. He never told the Good Sumaritans who took the body home the night of the incident who actually killed his father. He also never told the clan council which organised the burial who murdered his father. Even the aunt at Kampala whom he had gone to call for the burial. In fact in his Police statement dated 1.3.91 PW3 told the Police that soon after the incident, it was A3 who reported the matter to the home people before the arrival of the body and that it was A2 who armed the deceased with a club in pursuit of cattle thieves before the incident. Further, the witness admitted that he did not identify both A4 and A5 at the scene and confirmed that he saw them only in court.

In the light of such major contradictions, this is yet another witness, an eye witness though, whose evidence is so discredited that it is worthless to the case for the prosecution. It is trite law that a mere scintilla of evidence is not enough as it is the case in the instant case to establish a prima facie case.

There is, however, an overwhelming evidence that Birityo Woniala is dead. He was brutally killed by use of a gun and a sharp object in the like of a knife. The injuries were on the vulnerable parts of the body. Whoever murdered him did so with malice aforethought. Both the prosecution and defence concede to these facts. However, another issue for determination is a dying declaration. According to PW3, an eye witness, in his Police statement stated that after alerting A2, Michael Magoda, Bernard Mudega, Peter Madoi etc that cattle thieves had invaded the village, the deceased instructed the rest to take cover along the Namakoltye river path. At the time the dogs were barking seriously. When the deceased lit a torch to an area/where the cattle thieves were suspected to be hiding, the deceased was shot. PW3 at a distance of about 25 metres away from the scene together with the people guarding the Namakoltye river path took cover and immediately the dogs stopped barking. It was at that time that PW3 heard the deceased say, "My uncle Walimbwa why are you killing me."

The law regarding a dying declaration is that the deceased actually made it and that it is true and corroboration is required. It is not in evidence that the deceased ever made such a dying declaration to PW3. He simply heard it, but was it true? There is no evidence that uncle Walimbwa shot the deceased on the fateful night.

Evidence is that PW3 saw the lame gunman who shot the deceased. A2 in court is not lame. The incident happened at midnight though there was moonlight and the deceased lit a torch light. Did he actually in such a situation see and recognise his assailants? Moreover PW3 admitted that in the village there were other lame people and also other Walimbwas. There is no evidence that Walimbwa, now A2, is the only uncle of the deceased by that name. Medical evidence is that the gunshot wound was on the left lumber region which is a vulnerable part of the body and in the humble view of the court, the attack was sudden and fatal on the spot. People like Michael Magada, Bernard Mudega and Peter Madoi none of them was called to corroborate the alleged dying declaration and yet they were in the vicinity taking cover along Namukolotye river path.

Consequently, the court rules that there is no sufficient corroboration as by law required in support of the alleged dying declaration. Conditions did not favour the deceased in the proper identification of his assailants. Even PW3 who claimed to have been quite close to the scene of crime admitted that he had not identified the person who fatally shot his father. Whereas the deceased might have made such a dying declaration and that it might have been true and honest yet the possibility that he was mistaken as to the identity of his attackers cannot be ruled out.

As regards the identity card, Graduated Tax tickets and some documents of A2, Exhibit P2 which PW4 claims she got about 2 months after the incident at the scene of crime, in cross-examination, she admitted that very many mourners and sympathisers also visited the scene after the incident. She says she found Exhibit P2 dirty with soil. In court, however, Exhibit P2 was so clean as if it was just pulled out from a pocket with no soil on it at all. The cover of the identity card is red which is a conspicuous colour, and if she is to be believed that very many mourners and sympathisers actually visited the scene of crime several times after the incident, there is doubt as to why none of them ever saw Exhibit P2. There is no evidence that Exhibit P2 was either covered in the soil or was hidden in the bush. It is more probable than not that as it is alleged that all the homes of the 5 accused persons were demolished in anger by the relatives of the deceased, that Exhibit P2 was picked by someone and now planted on A2. It is inconceivable that such a bright colour in the open could not be seen by any mourner who visited the scene.

In conclusion, it is trite law that a prima facie case includes where any reasonable tribunal properly directing its mind to the law and evidence can convict if no explanation was given. In the instant case, even if the 5 accused persons decided to keep mute, no reasonable court could convict them. The prosecution has 5 not established a prima facie case to warrant any of them to be put to his defence.

Accordingly, under section 71 (1) Trial on Indictment Decree, the 5 accused persons are acquitted of murder contrary to sections 183 and 184 of the Penal Code Act and discharged forthwith 10 unless being held on other lawful grounds.


STEPHEN GEORGE ENGWAU

JUDGE

3.9.93.

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7.9.93: A1, A2 and A5 present.

A3 is dead and A4 is sick, HIV.

Mr. Wegoye for A1, A2 and A3 on private brief.

Mr. Dagira for A4 and A5 absent but Wegoye holding brief for him. 20

Ms Nandawula for the State present.

Mr. Wafula interpreter in Lumasaba.

Ruling delivered in open court.


STEPHEN GEORGE ENGWAU

JUDGE

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Court: Death certificate regarding A3 tendered in court and Medical report on A4 sick of AIDS also tendered in court.


STEPHEN GEORGE ENGWAU

JUDGE

7.9.93.

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