HON JUSTICE TSEKOLO.

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO.177/93

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

V E R S U S

A1. LAZARO ISANGA
A2. AMUZA KIMBUGWE
A3. MUTAIGO NGOBI

:::::::::::::::::::::::::::::: ACCUSED

BEFORE: THE HON. MR. JUSTICE C.M. KATO

J U D G M E N T

The three accused persons Lazaro Isanga (A1), Amuza Kimbugwe (A2) and Mutaigo Ngobi (A3) whom I shall hereafter refer to as A1, A2, and A3 respectively, are each indicted for murder contrary to the Provisions of section 183 of the Penal Code Act. The substance of prosecution case as contained in the particulars of the indictment is that on 22/6/91 at Bugonyoka village in Iganga District the three accused persons murdered one Ibrahim Kimbugwe.

All the accused persons pleaded not guilty to the indictment.

It is the law of this land that in all criminal cases, with the exception of a few statutory offences, the burdern is upon prosecution to prove the guilt of the accused beyond reasonable doubt, the accused has no burden of proving his innocence: Sekitoloko v Uganda /1967/EA 531 at page 534 and Woolmington v D.P.P /1935/AC 462. It is also part of our law that an accused person should not be convicted on weakness of his defence but should only be found guilty on the strength of the case as proved by prosecution: Israili Epuku s/o Achietu v R /1934/IEACA 166 at page 161.

This being a charge of murder, prosecution is enjoined to prove beyond reasonable doubt, inter alia, that a human being was unlawfully killed; that the killing was with malice

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aforethought and that the accused persons took part in that killing. (See section 183 of the Penal Code Act).

It has not been seriously disputed that a human being by the name of Ibrahim Kimbugwe died at Mulago hospital on 24/6/91 or 25/6/91. According to the evidence of Dr. Michael Odida(PE5) he examined the dead body of Ibrahim Kimbugwe at Mulago on 25/6/91, the deceased's wife Nabirye Kimbugwe (PW3) stated that h: husband died sometime in June 1991; in his evidence Luganda Hasani (PW2) also says Ibrahim Kimbugwe died sometime on 24/6/91, or thereabout. I have no good reason for doubting the evidence of these witnesses on the issue of the death of Ibrahim Kimbugwe. I hold that a human being known as Ibrahim Kimbugwe mentioned in the indictment died.

The next issue that requires determination is whether or not Kimbugwe's death was caused by unlawful means. It was pointed out in the case of: Gusambizi Wesonga v R /1943/15 EACA 65 at page 67 that in all cases of homicide death of a human being is unlawful unless it has been accidental or authorised by law. The evidence of Mukoma (PW1) and that of Luganda Hasani (PW2) shows that these two witnesses saw the deceased on the night of 22/6/91 he had been seriously assaulted, the details of the injuries are in particular contained in the evidence of Luganda who said that the deceased had a wound on the head, another wound was on the region between the stomach and the ribs, both hands had been cut, the right leg was totally broken. The doctor's laconic report shows that the deceased died of haemorrhagic shock following multiple cut wounds. This report shows that the deceased must have died of the injuries observed by PW1 and PW11 which were mercilessly inflicted upon the deceased, the evidence available does not suggest that the deceased sustained his injuries accidentally or that the law authorised the inflication of such injuries on him.

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The evidence on record clearly shows that the deceased's injuries which resulted in his death were inflicted upon him by fellow human beings when he was cut to ease himself, from that evidence it can be concluded that the deceased's death was caused by an unlawful act. I accordingly hold that prosecution has proved beyond reasonable doubt that a human being by the name of Ibrahim Kimbugwe was unlawfully killed.

Having held that Ibrahim Kimbugwe was unlawfully killed the next question which comes up for consideration is who killed that unfortunate man. It is the case for prosecution that he was killed by the 3 accused persons, but each of the accused is adamant that he had no hand in Kimbugwe's death.

The evidence upon which prosecution is relying in proving its case against the accused persons is circumstantial in a sense that nobody saw any of the accused killing the deceased. The test to be applied in deciding whether or not to rely on circumstantial evidence to convict an accused person was laid down in the case of: Simon Musoko v R /1958/EA 715 where it was stressed that in a case depending exclusively upon circumstantial evidence, the court must before deciding upon conviction find, that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypethesis than that of guilt. It was further pointed out in the case of: Teper v R /1952/AC 480 at page 489 that before drawing any inference of accused's guilt from circumstantial evidence, the court should be sure that there are no co-existing circumstances which would weaken or destroy such inference.

In instant case the circumstantial evidence upon which the case for prosecution rests is contained in the two dying declarations which the deceased made before his death, the existence of a grudge between the deceased and the family of the accused persons and in case of A1 his own confession.

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Section 30(a) of the Evidence Act makes it lawful to accept a dying declaration in evidence as an exception to the general rule against hearsay. The available authorities do show that although there is no rule of law requiring such evidence to be corroborated, it has now become a rule of practice that it is highly unsafe to base a conviction on uncorroborated dying declaration Pius Jasunga s/o Akumu v R /1954/ 21EACA 331, Mugundulwa s/o Jalu and others v R/1946/13 EACA 169 Eligu s/o Odel v R /1943/10 EACA 90, R v Ramazani Bin Mirandu /1934/I EACA 107 and Oketh Okale v Republic /1965/EA 555. In the case now under consideration the deceased made two dying declarations. The first one was made to Hasani Luganda (PW2). When taking the deceased to Kiyunga dispensary Luganda heard the deceased saying that his (deceased's) real brothers Lazaro Isanga, Amuza Kimbugwe and Mutaigo Ngobi had out him. According to the evidence of this witness and that of Mukama (PW1) who recorded the second dying declaration there was moonlight on that night. The second dying declaration was recorded at Kiyung dispensary by Mukama (PW1) in that statement: EXPI the deceased said that he had been attacked and cut with a panga which A1 was carrying, he mentioned the attackers as Lazaro Isanga, Amuza Kimbugwe and a third person whose name he did not know. I believe both witnesses to whom the two dying declarations were made when they say that those statements were in fact made to them; they had no reason to have imagined such statements. There is however the issue of identification; can it be said that the deceased was in a position to positively recognised the three people whom he claimed to have seen on that night. There was moonlight and the three accused were not strangers to the deceased as they are said to be closely related. In my view those two factors created favourable conditions under which the deceased was able to correctly identify the accused as the people who attacked him: R v Wambura s/o Nyariyanga /1938/5 EACA 47 (followed on this point).

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The learned counsel for defence Mr. Liiga strongly argued that since 3 people were mentioned in the first dying declaration and only 2 were mentioned in the second declaration the two dying declaration should be ignored. I prefer to share Mr. Wamasebu's view on this point; his view has been that the reason why the deceased mentioned all the 3 accused to Luganda (PW2) is that by then his mind was still fresh but when he talked to Mukama (PW1) later on his mind was weaker so he could not remember everything. It was understandable that after losing so much blood the deceased's mind must have weakened by the time PW1 saw him at the dispensary, this witness also told the court that the deceased's condition was very bad and when under cross-examination Mukama said the deceased's vioce was very weak. It is important to point out here that the deceased in his statement maintained that the attackers were 3 although he mentioned to PW1 the names of A1 and A2 only. I find that the omission by the deceased to mention A3's name to PW1 having earlier on mentioned it to PW2 has been satisfactorily explained.

That leads me to the issue of corroboration of the two dying declarations. It must be pointed out from the very start that the two dying declarations cannot corroborate each other nor can A1's confession be treated as corroboration in respect to A1, the reason is that it is the principle of the law that evidence that requires corroboration cannot corroborate another piece of evidence which also requires corroboration:
Soluwa Tutu alias Shora wa Buru v R/1934/ I EACA 161, R v Ramazani Bin Mawangu /1936/ EACA 39 and Pyaralal Meelaram Bassan & Wathobia s/o Kyambu v R/ 1961 EA 521. According to the evidence of Nabirye Kimbugwe the widow of the deceased there was a grudge between the deceased and the family of the three accused who happen to be brothers. Sometime in March 1991 she witnessed a serious quarrel between the father of the 3 accused and the deceased; the quarrel was over a piece of land and it took place in the presence of A1 and A3, during that quarrel the father of the accused and A1 threatened the deceased

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that he would not live up to June of that year (1991), as fate would have it the deceased was killed in June 1991. It has been held in the cases of: Waibi and another v Uganda [1968] EA 278 and R v Okecha s/o Olalia [1940] 7 EACA 7 that a threat made to the deceased earlier is capable of corroborating any evidence that requires corroboration. Applying the principle laid down in the two quoted cases to the present case in particular to the evidence of Nabirye Kimbugwe (PW3) I find that the 2 dying declarations made by the deceased have been sufficiently corroborated by Nabirye's evidence which I have found to be truthful.

Although it is not clear as to who among the accused cut which part of deceased's body and the deceased only mentioned A1 as having been armed with a panga, judging from the two dying declarations the three accused persons had common intention of unlawfully assaulting the deceased. In his first statement to Luganda the deceased said: "I have been cut by my real brothers" or words to that effect, then he mentioned the three accused perosns, it is reasonable to conclude from those words that the three accused persons had taken part in cutting the deceased.

I find that prosecution has proved beyond reasonable doubt that all the 3 accused persons took part in the violent assault that resulted in deceased's death. The denial by each accused having taken part in the assault is rejected. I have carefully considered the evidence as contained in the two dying declarations along with the unsworn statements made by each accused and I have come to the conclusion that the defence of alibi which was indirectly raised by each accused has been destroyed by the 2 dying declarations so that defence is not available to any of the accused persons. As for A1 prosecution case has been strengthened further by A1's own confession which he made to a magistrate grade II called Edward Katumba (PW4). In his unsworn statement the accused (A1) denied having made the confession voluntarily because he had earlier been beaten by the police; this allegation of his having been beaten was something of

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an afterthought because the confession was admitted in evidence by consent of A1's counsel, had the allegation of beating been brought to the notice of the learned counsel he would definitely have objected to the confession being admitted and he would have demanded for a trial within trial to be conducted but that was not the case. The confession must have been voluntarily made. In the confession which the accused sought to retract he admitted having killed the deceased because the deceased had killed his 6 children and a wife using herbs. That confession has been corroborated by the evidence of Nabirye who said that A1 had a grudge with the deceased. The rules or conditions governing the defence of provocation as a result of witchcraft were spelt out in the case of: Eria Galikuwa v R /1951/18 EACA 175. None of those conditions exist in the present case and as such the defence of provocation on account of witchcraft is not available to A1 in this case.

After having held that the deceased Ibrahim Kimbugwe was unlawfully killed by all the three accused persons the next vital issue to be determined is that of malice aforethought as defined in section 186 of the Penal Code Act. It was emphasised in the case of: Lokoya v Uganda /1968/ EA 332 at page 334 that it is the duty of prosecution to prove the existence of malice aforethought. (See also section 183 of the Penal Code Act). In deciding whether or not malice aforethought has been established by prosecution court must have regarded to such things as the natural of weapon used, the manner in which it was used and the part of the body injured: R v Tubere s/o Ochen /1945/12 EACA 63. In the present case the injuries sustained by the deceased were described by PW1 (Mukama) as [illegible]ous, PWII Luganda in his evidence stated that by use of "tadowa" and moonlight he was able to see the following injuries on the deceased: a wound on the forehead, a wound between the ribs and the stomach from which some liquid was oozing, both hands had been cut, both legs had also been cut the right leg which was originally lame was broken.

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The doctor (PW5) who carried out the post mortem examination on the deceased's body described the cause of death as being due to haemorrhagic shock caused by excessive bleeding which was due to multiple cut wounds. He was unable to tell the court the nature and number of wounds because he had used the wrong form. The report which he tendered in court as EXP3 lacked all the details required for a case of this nature, it only states. "Cause of death: Haemorrhagic shock following multiple cut wounds." The report does not describe the nature of wounds and possible weapon used to cause them, the doctor was also unable to give further details beyond what the form contained. That made it very difficult for the court to determine the seriousness of the injures from medical point of view. Iam however aware of the fact that the court may proceed to convict an accused person of murder even in the absence of medical evidence once there is some other evidence establishing cause of death: Republic v Cheya and another /1973/EA 500 but each case must be taken on its own merits. Apart from the deceased mentioning to PW1 that A1 was having a panga it is not known as to the exact weapon or weapons which were engaged in inflicting the wounds that resulted in deceased's death. The court has met some difficulty in knowing exactly what happened immediately before and at the moment of infliction of the injuries. In these circumstances it would be unsafe to say that prosecution has satisfactorily discharged the burden of establishing malice aforethought on the part of any of the accused persons. The position being what it is I find all the accused not guilty of murder and I do acquit each of them of that offence but I find each of them guilty of manslaughter as I am satisfied beyond reasonable doubt that they unlawfully killed Ibrahim Kimbugwe. I do convict each accused of manslaughter under section 182 of the Penal Code Act. (Lokoya's case (Supra) followed on the issue of malice aforethought). The two gentlemen assessors advised me to convict all the accused for murder but I did not followw their advice because they did not seem to have seriously

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addressed their minds to the weakness in prosecution case regarding the issue of malice aforethought.

C.M. KATO

JUDGE

15/3/94

15/3/94 All accused present.

Wamasebu for state.

Liiga for defence absent.

Baligeya court clerk.

Both assessors present.

Accused: We do not know what has happened to our counsel, we seek for an adjournment.

Wamasebu: I have no objection to an adjournment.

Court: Case is adjourned to 11.30A.M. or to such an earlier time as defence counsel may appear.

C.M. KATO

JUDGE

15/3/94

15/3/94. Later at 11.30 A.M.

Court: The court is as before.

Accused: We feel that judgment should be delivered in the presence of our counsel, we do not know what has happened to him.

Court: The request by the accused to wait for their counsel cannot be sustained. This case was adjourned to to-day in the presence of defence counsel. The case has been pending for a long time and it is the last case in this session which started on 22/11/93 and was due to end before the end of December 1993 but it has been dragging on. Judgment is to be delivered in the absence of the defence counsel but in the presence of all the accused under section 84(3) of T.I.D.

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The judgment is accordingly delivered.

Wamasebu: I have no record of previous convictions in respect of each accused. Considering the injuries inflicted upon the deceased this is a border case to murder. The accused had no right to take away deceased's life. It is common in this part of the country for people to kill others for land. I pray for a deterrent sentence.

Lazaro Isanga(A1): I am aged 28 years. I am married with 5 children. I have been on remand for nearly 3 years. I ask for mercy because my children are suffering.

Amuza Kimbugwe(A2): I ask for liniency. I have 6 children to look after. I am aged 30 years. I have been on remand for nearly 3 years.

Mutaigo Ngobi(A3): I ask for mercy. I am aged 30 years. I have 2 children, I have a wife. I have been on remand for nearly 3 years.

Court: All the accused are first offenders and each has been on remand for nearly 3 years. These matters speak in favour of the accused being considered for a linient sentence. I however agree with Mr. Wamasebu's observation that the accused had no right to take away deceased's life, it is God who gives that life and it is he who should take it away. Human life is precious and everything should be done to preserve it. I feel this is a case that deserves a deterrent sentence to teach the accused and other members of the public that crime of whatever nature does not pay.

Considering all the circumstances of this case I sentence each accused person to 13 years Imprisonment, each accused is accordingly sentenced to 13 (thirteen) years imprisonment. Accused are told of their right of appeal against conviction and sentence.

C.M. KATO
JUDGE
15/3/94