THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; FORT PORTAL CIRCUIT

CRIMINAL SESSION CASE No.0077 OF 2007; HELD AT KASESE

UGANDA ……

PROSECUTOR

VERSUS

1. JAMADA NZABAKUKIZE alias EMMANUEL }

2. MUKIZA TOMASI }

3. KARIMBANO DAMASENI } ::

ACCUSED

4. NZAMUKUNDA JOYCE }

5. NZAMUYE JOHN }

6. Kamanzi Fred }

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO.

JUDGMENT

The accused in this case, Jamada Njabakukize alias Emmanuel–A1, Mukiza Tomasi – A2, Karimbano Damaseni – A3, Nzamukunda Joyce –A4, Nzamuye John – A5 and Kamanzi Fred – A6; otherwise collectively referred to as the accused, were jointly indicted for the offence of murder in contravention of sections 188 and 189 of the Penal Code Act. The particulars of the offence alleged that the accused, with others still at large, on the 21st day of January 200, murdered Alivera Nkwano Nalongo at Ruhita village, in Kasese District.

The accused each pleaded not guilty to the indictment when it was read out and the particulars explained to them; necessitating this trial, after a plea of "Not Guilty" was entered against each of them. There are four ingredients that constitute the offence of murder. These are namely:-

(i) Death of a human being.

(ii) Unlawful causation of that death.

(iii) The said unlawful causation having been done with malice aforethought.

(iv) The participation of the accused in causing the said death.

The burden rests on the prosecution to prove each of these ingredients beyond reasonable doubt; and an accused cannot be found guilty and convicted unless the prosecution has discharged this burden. The law places a very high premium on the standard required for proof of murder owing to the fact that it is a capital offence; see the case of ***Andrea Obonyo & Others vs. R. [1962] E.A. 542,*** and ***Henry H. Ilanga v. M. Manyoka [1961] E.A. 705 (C.A.)***.

At the close of the prosecution case, the Court found that there was no prima facie case made out against A4 and A6; so they were accordingly discharged. In his final submissions, defence counsel conceded that the prosecution had proved the first three ingredients beyond reasonable doubt. I concur with him. In a bid to establish the participation of the remaining accused, the prosecution relied on the evidence of the following witnesses: Mukhamuson Faith – PW2, Safari Boniface – PW3, Byamukama Robert – PW4, Bazira Basilio – PW5, and Semugenyi Joseph – PW6.

It was the direct evidence of PW2 that the prosecution relied on for an account of the circumstances under which the deceased was killed. She testified that on the fateful day, she was at home in the compound seated with the deceased who was her step mother. A1 whom she knows as her father PW3's brother in law, together with A3 who had once been an employee of her father at their home, came up to them around 7.30 p.m. when it was becoming dark. They came with others who remained at a distance of 15 metres away hence she was not able to identify them. She offered a seat to A1 and went inside the house to collect a seat for A3.

Upon her return she saw A1 grab the deceased from the doorway and stab her, and the deceased bent down. She saw this from a distance of only one metre away. She ran back inside the house and sounded an alarm. She came out of the house when some people came responding to the alarm and found the deceased already dead; but A1 and A3 had already left the place. PW3 testified that he learnt of the incident that had taken place at his home when he rushed there, he found the deceased's body lying at the doorway. When he inquired what had happened PW2 told him that it was A1 and A3 responsible for the death.

PW4 testified that the day after the murder which he had already learnt of, he found A2 at Hima in a confused state, looking fearful and suspicious. He related this state of mind to the killing of the

previous day, and so he notified PW3. He stayed with A2 until the police came and arrested him. PW5 a native doctor (medicine man) testified that A5 was his regular client; and that at one time A5 had visited him in the company of A3 whose name he did not know. On the 21st January 2007 at around 5.00 p.m. he was in a bar at Mubende Town where A5 joined him. A5's phone rang and he went out; and when he came back he was not looking steady. Around 8.00 p.m. A5's phone rang again and he went out again.

He testified that he followed A5 to find out what the matter was. He heard A5 say: *"Is it true that you have killed that person?"* A5 then asked PW5 to give him some medicine as he was almost running mad. Although he gave A5 medicine from home to wash his head, A5 did not do so. He inquired from A5 what was wrong, and A5 told him that he A5 had earlier hired someone to kill his step mother. A5 however did not reveal the identity of the killer. PW5 then pretended that he was going to get some medicine for A5 but instead reported the matter to the police.

He testified further that A5 spent the night at his (PW5's) home; and early in the morning the following day, A3 joined A5 at his (PW5's) home and he slipped out and informed the police. He came back with the police at around 7.30 a.m. and found A3 lying on a bed in his house, but A5 was not there. A3 then called A5, and when the latter came, the police arrested both of them. PW6 testified that on the 22nd January 2007, he arrested A3 and A5 from a native doctor's home at Mubende.

The accused gave their defence on sworn testimonies. A1 admitted being a brother in law to PW3, but he denied knowledge of PW2 since he had never visited PW3 at Kasese; He denied stabbing the deceased; stating that up to 25th January when he was arrested, he was not aware that PW3 had lost a wife. He put up an alibi stating that on the 21st January, he was at his home in Mubende; and that he had never been to Kasese before his arrest. A2 testified that he was arrested on the 22nd January while milking his cows; and before he had known of the death of the deceased. He denied ever meeting or knowing PW4 before the latter appeared in Court as witness.

A3 testified that he was arrested on the 25th January from the home of his brother at Mubende where he had been a visitor from the 12th January. He denied that he had ever been to Kasese before his arrest; and also denied any knowledge of PW3, and of his co – accused before his arrest. He maintained that on the 21st January he was at his brother's home at Mubende; and denied that he was arrested from PW5's shrine. A5 for his part denied knowledge of PW5, stating that he had seen him

for the first time in Court. He also denied having known A3 before his arrest. He however admitted that A1 is his uncle.

He stated that on the 21st January, he slept at Mityana where he had gone to look for a job; and that he was arrested by the police the following day upon his return as he was disembarking from Mubende taxi stage, and could not tell how they knew he was there. In effect then each of the accused put up an alibi with regard to the murder of the deceased. The only direct evidence is that of visual identification by PW2 a single witness who made the identification at a time when it was getting dark. Consequently then, I have to treat her evidence with utmost care.

This is the course of action advised in many decided cases ranging from that of ***Abdulla bin Wendo & Another v. R (1953) 20 E.A.C.A 166,*** and ***Roria vs. Republic [1967] E.A. 583****;* to such cases as ***Abudalla Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77,*** and ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997***. So I warned the assessors of the risk in convicting an accused on such evidence; and that it is less safe to do so basing on such evidence than is the case with multiple identification witnesses.

I advised them that while a conviction can be made on the basis of that evidence alone, there was need for them to first satisfy themselves that, having regard to all the circumstances of the case, it is safe to act on such evidence of identification. I advised them, as I am myself alive, of the fact that there is need to consider the availability of light, the familiarity of the witness with the accused, the distance between the two at the time of the identification, and the length of time the witness had to observe the accused.

This examination of the condition under which the identification was made is necessary so as to ensure that the danger of mistaken identity is lessened if not ruled out altogether. PW2 identified A1 and A3 when it was becoming dark. She however came into close proximity with them as she offered them a chair. She had known them before; the one as her father's brother in law, and the other as a former employee of her father. I believe that the approaching darkness was not such that there was need for any other light other than the natural light of the evening.

Nevertheless, there is need to look for other evidence that would point to the correctness of her identification and make it safe to conclude that the evidence of identification is free from the possibility of error, in keeping with the advice in ***George William Kalyesubula vs. Uganda – S.C.***

Crim. Appeal No. 16 of 1997. PW2 named A1 and A3 to her father PW3 immediately the latter arrived at the scene of the incident. This is other evidence that point to the correctness of her identification in accordance with the decision in Moses ***Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47***, which also advised that the 'other evidence' may be direct or circumstantial; and that it includes an alibi which turns out to be a fabrication.

In the instant case A3 had, very early in the morning following the murder, joined A5 at PW5's shrine where A5 had slept, seeking medication to clear his head from the consequences of a killing reported to him the previous evening. A5's account of the circumstances under which he was arrested is not persuasive. It is a clear fabrication. I believe the testimony of PW5 and PW6 that A3 and A5 were arrested from the shrine of PW5. This circumstantial evidence was 'other evidence' pointing to the correctness of PW2's evidence of identification.

In any case, as was pointed out in the ***Bogere*** case (supra), type of evidence that amounts to that other evidence need not be as stringent as in cases of sexual offences. All that is required is supportive evidence pointing to the guilt of the accused hence the correctness of identification. The condition existing for identification by PW2, while not excellent with regard to the quality of light, was compensated for by her prior knowledge of A1 and A3; and the fact that they had come very close to her, and she had witnessed the heinous crime being committed from a distance of only a metre away.

The circumstantial evidence from the conduct of A3 in the morning following the incident pointed to his presence at the scene of crime as stated by PW2. The evidence above suffices to allay my mind of any doubt as to the correctness in the evidence of identification by PW2. The circumstantial evidence of the presence of A3 at the scene of crime does not stand alone owing to the evidence of identification by PW2; hence there is no need to subject it to the rule that it for its acceptance, it must be incompatible with his innocence, and be incapable of explanation upon any other reasonable hypothesis than that of guilt; or that there be no co-existing circumstances that would negative the inference of guilt.

This is an exception to the rule governing the treatment of evidence which is wholly circumstantial, as laid down in the authority of ***Barland Singh v. Reginam (1954) 21 E.A.C.A. 209;*** where the Court of Appeal held at p. 211, that:

"…circumstantial evidence, although not wholly inconsistent with innocence, may be of great value as corroboration of other evidence. It is only when it stands alone that it must be inconsistent with any other hypothesis other than guilt."

As the Court warned in ***Abudalla Nabulere*** case (supra), to allow a more stringent rule such as a requirement of corroboration in every case of identification would result in affront to justice; thus greatly hampering the maintenance of law and order.

I am therefore convinced that the prosecution has proved beyond all reasonable doubt that A1 murdered Alivera Nkwano Nalongo as charged. However, while the prosecution has adduced evidence placing A3 at the scene of the crime, it did not provide sufficient evidence to prove that he was acting in concert with A1 in the murder to place the matter under the doctrine of common intention provided for under section 20 of The Penal Code Act. The evidence by PW2 the identifying witness was that A1 who struck the fatal blow, had in fact come with his hands folded with no weapon visible. He might have hidden the murder weapon under his clothes, and kept A3 in the dark about his intention as they came to the scene of the crime.

A3's conduct in visiting PW5 the witch doctor might have been as a result of the consequences of witnessing a murder. I will give him the benefit of doubt, his lies about the circumstance of his arrest notwithstanding. I find too that the evidence adduced by the prosecution against the other accused at best placed them under suspicion; but it was not sufficient to pin them down as being part of a plan, if there was one, or execution of the murder. The premium that is placed on the prosecution to prove the capital offence murder is commensurately quite high; and the prosecution evidence has unfortunately fallen far short of that standard.

In the result I am in agreement with the gentlemen assessors, and convict A1 – Jamada Nzabakukize alias Emmanuel of the offence of murder as charged. I am however in disagreement with the gentlemen assessors with regard to A3 – Karimbani Damaseni whom I acquit; and equally A2 – Mukiza Tomasi and A5 –Nzamuye John whom I also acquit, in agreement with the opinion of the gentlemen assessors, for lack of sufficient evidence against them. Unless Karimbani Damaseni, Mukiza Tomasi, or Nzamuye John are being held for any other lawful purpose, they must be released forthwith.

Chigamoy Owiny – Dollo

JUDGE

25 – 11 – 2009