

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**

**HOLDEN AT MBALE**

**HCT-04-CR-SC-0055-2009**

**UGANDA.....PROSECUTOR**

**VERSUS**

**A.1 BWOKINO MOSES**

**A.2 MULEKWA PETER.....ACCUSED**

**BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN**

**JUDGMENT**

A.1 Bwokino Moses and A.2 Mulekwa Peter are jointly indicted for murder c/ss 188 and 189 of the Penal Code Act. Prosecution alleges that the two with others at large on the night of 21<sup>st</sup> June 2009 at Kachabali village District murdered one Wandeka Peter Mukama. Each of the accused persons denied the offence.

In a criminal trial it is incumbent upon the prosecution to adduce sufficient evidence to prove the offence charged against each of the accused persons beyond any reasonable doubt.

In a bid to do this prosecution led by the learned resident State Attorney Alpha Ogwang adduced the evidence of four prosecution witnesses. At the trial both accused were represented by Mr. Mudangha on State brief. The assessors were M/s Tegule Isaac and Wepukhulu James.

During the preliminary hearing under S.66 TIA, the postmortem report on police form 48B was admitted with the consent of the defence and was marked Exh.P.1 which comprised PW.1. Dr. Atai J.B. of Pallisa Hospital carried out the postmortem examination on 22.6.2009 on the

deceased. A 67 years old male adult. He found that the body was well nourished and had no marks. It had external injuries on the back measuring 6"x2"x1". The right hand had been cut off (amputated). The body had a deep cut wound on the right shoulder measuring 6"x2"x1" and another deep cut wound of the same size on the left shoulder. The internal injuries compromised a cut occunet 4"x2"x1" and evisceration of the intestines. The cause of death of the deceased were shock, bleeding and haemorrhage.

The 2<sup>nd</sup> witness PW.2 was Nakirya Katalina widow to the deceased. She told court that on the fateful day at 9:00p.m the family was inside the house. After having supper, one of the children told the deceased that he wanted to ease himself. He took the child out. In that short moment PW.2 heard a cutting by a panga. She ran out and saw the attackers. The deceased had made an alarm saying "Magino you are killing me." That after seeing Magino, Bwokini and Mulekwa she also made an alarm which was answered by people. That as she made the alarm, she called the children as well. That she saw the attackers by the aid of moonlight which was bright. At the time the moon was emerging a bit late. PW.2 went on to testify that before the incident, there was a grudge between the brothers of the deceased and the deceased. That the grudge was between the brothers of the deceased and the deceased. That the grudge was between Magino and Wandega over land.

The father of Magino and Wandega asked for one piece of land near the stream.

PW.2 further testified that the homes of the accused were almost 12kms from the deceased's home. She said early that day Bwokino came to her home wanting a hen but she did not give him. He promised to come back in the evening. That Bwokino and Mulekwa were on their way to Pallisa. In cross-examination PW.2 said the moon was not very bright and during the attack she was panicking. That she saw it was Magino who cut first and she ran back into the house. That the accused only accompanied Magino.

PW.3 was No 21810 Cpl Wanjala attached to Butebo Police Post as O/C. on 21.6.09 between 10:00 p.m. and 11:00 p.m. he received a telephone call from LCs reporting that the deceased had been cut. He mobilized a team of personnel to go to the scene at Bugede B village in Kachabali Parish. On arrival they found many people. The victim was lying in his courtyard. His right hand had been cut off. He recovered it and put it in a bag. The deceased was still talking and he told

PW.3 what happened. That the deceased told this witness that he was attacked by four people including the two accused in court. Another attacker is still on the run. He is called Magino. The deceased did not identify the fourth attacker. PW.3 recorded a statement of what he was told and signed it. The deceased did not sign it because his hand had been amputated. The statement was tendered in court and marked Exh.P.2.

After recording the statement PW.3 mobilized transport to take the victim to hospital but he died on the way. He then started tracing the suspects together with the LCs. On 22.6.09 Mulekwa was arrested from his house 6-7kms from the scene. On the same night, Bwokino was also arrested from his home about 10kms from the scene. That when he conducted a search he recovered an old panga from Mulekwa's house. That the panga had blood stains. He took the panga as an exhibit and handed it to Butebo Police Post. After being marked it was forwarded to Pallisa Police Station. Prior to this, at the scene of crime, a bicycle and sandals as belonging to Mulekwa (A.2). That relatives of the deceased identified the sandals as belonging to Mulekwa (A.2). That when he visited the scene it was slightly dark because there was moonlight.

In cross-examination, PW.3 said he got the statement in luganda a language he does not know and wrote it in English. While doing this the deceased was looking at him but was in great pain. That there was partial moonlight.

PW.4 was No.28515 D/C Balonde Francis who at the time of offence was attached to Butebo Police. He escorted PW.3 to the scene of crime. At the scene they found the deceased badly cut and police action was needed. The right hand of the deceased was cut off. The intestines were out and he had several cut wounds on the back and shoulders. The scene was cordoned off. The victim could still walk. That the deceased told PW.4 that at 9:00 p.m. a young child wanted to go for a short call, when he took the child out he saw people attack him with pangas. He struggled with them for a long time and was able to identify some. That the attackers were four he identified 3 i.e. Magino, Bwokino and Mulekwa. The statement was recorded by PW.3. PW.4 drew the sketch plan.

PW.4 further testified that at the scene a pair of sandals were recovered. One was near the deceased's door and another about 5 metres away. They were handed a bicycle abandoned by the attackers and one blue slipper (left). The people around said the sandals belonged to Magino.

They also said the bicycle could have belonged to the fourth person who was never identified. As the victim was being taken to hospital he died on the way. PW.4 participated in arresting the accused persons but when they went to Magino's home nobody was found there. That no exhibits were recovered from any of the homes.

In cross-examination, PW.4 said he together with one Wandeka son to the deceased assisted in translating from lugwere to English as PW.3 recorded the deceased's statement. That the deceased was talking lugwere.

In his unsworn defence, DW.1 Bwokino Moses denied committing the offence. He put up a defence of alibi that on 21.6.09 at 3:00 p.m. a councilor called Mwondha Peter called him and sent him to Budaka to buy for him medicines for the latter's drug shop. That he went and bought the items which he delivered to the councilor at around 8:00 p.m. he stayed at the clinic conversing up to around 9:00 p.m. or 10:00 p.m. and bid him farewell because he was tired. When he reached home he entered the house and went to bed. That at 2:00 a.m. he heard somebody calling. He recognized the voice as that of the Chairman. He wrapped himself in a towel and opened the door. The chairman told DW.1 to dress and they go. That as he was dressing, he saw people flashing a torch in his face. DW.1 went on that he inquired why he was being told to go at such a late hour. The group instead started assaulting him. That he was badly assaulted and he fell down. He was hit on the head and bled profusely. He was led away to police then to court where he was remanded.

DW.2 was Mwondha Simon Peter a councilor at Petete sub-county. This witness told court that on 21.6.09 he was with the accused persons. That between 3:00 p.m. he sent A.1 (DW.1) to buy for him drug for his drug shop. He came back at around 7:30 p.m. and they separated at 9:45 p.m. that later towards 3:00 a.m. his Chairman rung him that some residents had been arrested and taken to police accused of murder. The following day he went and found both accused at the police station. He told police that at the time of offence he was with both accused persons. That Mulekwa arrived at his shop almost at the same time with Bwokino.

DW.3 was Gonahasa Kalori the Chairperson LC.1. He is the one who led the police to arrest the accused persons on 22.6.09. the police had a list of names of people to be arrested. That although the accused persons were arrested from their respective homes, Magino was not at his home.

When the home of Magino was reached, his door was ajar but nobody was inside. That A.1 Bwokino was assaulted in his presence.

DW.4 Egulansi wife to DW.1 Bwokino testified that they spent the whole day with her husband save for the time he was sent by the councilor DW.2 to go to Budaka and buy him drugs for the drug shop.

That DW.1 went and came back home with the drugs. That at around 6:00 p.m. he took the drugs to DW.2 and came back home at around 9:30 p.m. She gave him water to bathe and they had supper and slept. Later in the night, the LC DW.3 came with policemen and arrested DW.1 (A.1). During arrest, DW.1 was assaulted and was almost taken naked but he pleaded guilty and he wore clothes. When asked for a panga used to cut a person, DW.4 said they owned no panga.

A.2 Mulekwa Peter testified as DW.5. He denied the offence and pleaded a defence of alibi. He said he did not know why he is in court. That he only saw the chairman come with police to arrest him. He was tied up and taken to police from where he was taken to court and charged.

DW.6 was Justine Koole wife to DW.5 Mulekwa Peter. That on the day in question she was with A.2 who was making a bathroom because they expected visitors on 25<sup>th</sup>. That the accused worked up to 2:00 p.m. he asked for water, bathed, rested in the house then 6:00 p.m. he left to go and converse with the councilor DW.2. He came back home between 9 – 10 p.m. They ate supper and went to sleep. That he did not leave the house after. Later in the night, DW.5 heard people calling led by the Chairman LC.1 Gonahasa. A.2 (DW.5) got out and before he could see the chairman he was tied up with ropes. That at gunpoint he was told to talk. He asked what he had done but the chairman did not answer.

This was the close of the defence case.

In all criminal trials, a case has to be proved beyond any reasonable doubt. The burden of proof lies on the prosecution throughout the trial. At no one time does it shift **OKOTH OKALE V.R. 1965 E.A.555, 559**

In a trial for murder like in the instant case, prosecution must prove that:

1. A human being was killed.

2. The killing was unlawful.
3. The accused participated in the killing.
4. The killing was with malice aforethought.

I will deal with each ingredient separately.

### **Ingredient 1**

In his submission Mr. Mudangha learned counsel for the defence conceded that indeed death of Wandeka Mukama occurred. The postmortem report Exh. P.1 was admitted in evidence. All prosecution witnesses and the defence witnesses confirmed the fact of death. I am equally satisfied that prosecution has proved the fact of death beyond reasonable

### **Ingredient 2**

Regarding whether the said death was unlawful the defence also concedes to this fact. It is trite law and has been pronounced over again that all homicides are presumed unlawful unless there is evidence to show that they were excusable. Ms. Ogwang learned Resident State Attorney submitted that there was nothing excusable in the way the deceased met his death. From available evidence, nothing can suggest that this death was accidental or authorized. I entirely agree with both counsel that prosecution has proved this ingredient beyond reasonable doubt.

### **Ingredient 3**

The third ingredient is whether each of the accused participated in the offence. The defence vehemently submitted that prosecution did not prove participation of each of the accused persons beyond any reasonable doubt. That the evidence that implicates both accused was by PW.2 Katalina Nakirya the only identifying witness whose evidence must be received with caution and greatest care. That PW.2 reluctantly stated that all the time of offence the moon had just come out. That it was not bright. That this was not a reliable source of light to prove favourable conditions for correct identification. That in PW.2's panicky situation under such circumstances, she was not able to identify the attackers. That the way the statement of deceased was recorded was unreliable because the recorder did not know the language of the deceased yet the interpreter Wandeka's son to the deceased did not testify. That this made the statement hearsay.

Further Mr. Mudangha submitted that the defence case was strong with responsible witnesses. That these witnesses were with the accused persons throughout the night.

The learned Resident State Attorney submitted that the moonlight was bright enough to favour correct identification. That the testimony of PW.2 was corroborated by that of PW.3 on this point. Further that there was sufficient time to identify the attackers. That although evidence of a single identifying witness should be corroborated, it is only a rule of practice not a hard and fast rule.

Corroboration can be got from the dying declaration where the deceased gave the names. That court can convict on non-corroborated evidence of identification after warning itself of the dangers of relying on such evidence. That the evidence of PW.2 corroborated the dying declaration. The learned resident State Attorney attacked the defence of Alibi as being contradictory especially on the time frame of event. That prosecution evidence destroyed that defence and put the accused at the scene of crime. That since the accused persons were properly identified, the defence of alibi must fail.

Principles governing reception of identification evidence of a single identifying witness have been repeatedly laid down by this and higher courts. In the case of *R V. Turnbull* Ors (1976) 3 ALL E.R 553 and in *Abdallah Nabulere v Uganda* [1979] HCB 77, factors to be considered while dealing with evidence of identification are:

- a) How long did the witness have the accused under observation.
- b) At what distance.
- c) Was the observation impeded in anyway by presence of other people or an obstacle.
- d) Had the witness ever seen the accused before.
- e) How often.
- f) If only occasionally had he any special reasons for remembering the accused.
- g) And where the quality of identification evidence is poor there is need to look for other evidence which supports the correctness of identification.

Our Supreme Court emphasized need for care and caution in reception of identification evidence where the case entirely rests on identification. Court has a duty to satisfy itself that it is safe to act on such evidence which must be free from mistake or error on the part of the witness. It is

more necessary when conditions for identification are difficult FRANK NDAHEBE V  
UGANDA CR. APP.2 of 1993.

In the instant case, I am of the considered view that the evidence of identification adduced by the prosecution must be evaluated with caution because conditions were not favourable for correct identification. The only light available was moonlight which was not very bright and it was just emerging at that late hour of 10:00 p.m. I was not convinced that PW.2 was able to identify the attackers because she answered the deceased's alarm but did not stay long because she was gripped with fear. Her testimony is from what she heard the deceased cry out. The deceased mentioned Magino as the person who was cutting him with a panga as he was entering the house. The deceased then implicates the two accused persons as having severely cut him. I highly doubt whether in such a scenario he was able to see the accused persons join in the assault. The only eye witness PW.2 said she heard the deceased cry that "Magino you are killing me" and she indeed saw Magino.

PW.2 testified that the accused persons only escorted Magino. The evidence of PW.2 is not enough to corroborate the dying declaration by the deceased as is required by the law. The dying declaration itself had loopholes caused by the way it was recorded. It was recorded in English. The recorder PW.3 said the deceased talked in luganda. But PW.4 who was at the scene said the deceased talked in lugwere and he assisted in translating the same to help PW.3 who did not know the language well. PW.4 was assisted by Wandeka to translate but Wandeka did not testify. As submitted by Mr. Mudangha failure by Wandeka to testify was fatal to the dying declaration. PW.4 casually interjected while he was busy drawing the sketch plan. Evidence of a dying declaration must be evaluated with caution in order to base a conviction on it.

In the instant case, the deceased had in mind that he was suspected to have bewitched his late younger brother Okiring James and another brother Magino had not been relating to him well. He got information that Magino planned to either harm him or his children if they continued cultivating clan land at Kacoca. See Exhibit .II. In the said statement, the deceased said he held on to Magino after he cut him on the back and shoulder and then Bwokino came and cut him on the stomach and he fell down. That he then saw Mulekwa rush with a panga and cut off his right hand which was stuck on the shirt of Magino. I did not believe this chronology given the strong the strong defence of alibi put forward by each of the accused persons. The defence witnesses



gave a consistent and corroborative story of what happened on the day in question. They struck me as responsible people and were truthful. I was persuaded to believe that the accused persons were nowhere near the scene of crime. A.1 was sent by DW.2 to buy him drugs from Budaka. He was sent at around 3-4 p.m. He went and came back with the drugs. He passed his home and delivered the drugs to DW.2 at around 7:00 p.m. He did not leave the shop of DW.2, a councilor until almost 10:00 p.m. He went back home and never left his house until he was arrested at 2:00 a.m. basing on the dying declaration of the deceased. But the offence took place around 10:00 p.m. the time A.1 left DW.2's drug shop. If he participated in the crime, A.1 ought to have been at the scene before 10:00 p.m. But between 7:00 p.m. he was with the councilor. The wife to A.1 corroborated the councilor.

The defence evidence also proves the alibi of A.2 Mulekwa Peter. He is a close neighbor to where the DW.2 does business. He arrived at DW.2's shop almost at the same time with A.1. The three stayed together that evening until around 10:00 p.m. when A.2 also retired to his home. He did not leave his home until he was arrested. The evidence of the accused and DW.2 was not corroborated by the testimony of DW.6 Justine Koote his wife who said that A.2 was at home the whole day. That he spent part of the day constructing a bathroom because he expected visitors. A.2 rested in the afternoon and in the evening he went to the councilor's shop to converse up to around 10:00 p.m. with this believable evidence, there is no way A.2 would have been at the scene of crime.

The only prosecution evidence implicating each of the accused person, the only eye witness and the discredited dying declaration.

In my considered view therefore the prosecution has failed to adduce sufficient evidence to disprove both accused's defence of alibi beyond any reasonable doubt. This is so despite the deviations in time. The failure of the defence witnesses to mention exact times of events was a minor discrepancy which did not go to the root of the fact that the accused persons were not at the scene of crime at the time it occurred. The most important thing to note is that the accused persons live 12kms and 8km away from the scene respectively and to be there, they must have left their homes earlier than 10:00 p.m. yet between 7:00 p.m. and that time they were with DW.2.

Another lacunae that perforates the prosecution case is the way the exhibits were handled. According to prosecution, PW.3 said a blood stained panga, and shirt were recovered from Mulekwa's home and it was taken into custody by the police. In examination by court PW.2 said he took the exhibits including a bicycle to Pallisa Police. But despite a promise by prosecution to adduce evidence to tender these exhibits, no evidence was led. PW.3 is however contradicted by PW.4 D/C Balonde Francis. He testified that no exhibit was recovered from the homes of both accuseds.

According to PW.3, the recovered bicycle and sandals belonged to Mulekwa A.2 according to the relatives of the deceased. But this was contradicted by Balonde PW.4 who said he recovered the bicycle and sandals from the LC.III Chairman Petete. The chairman got the items from the people who were at the scene. These people suspected that the bicycle belonged to a 4<sup>th</sup> suspect who was not identified and has not been arrested.

The gentlemen assessors made a modest but good evaluation of the evidence for both prosecution and defence. In their joint opinion they have advised that prosecution has not proved each of the accused persons guilty of the offence and they be acquitted. I finally agree with the advice of the assessors.

For the reasons I have given hereinabove, I will find that prosecution has not proved the indictment for murder c/ss 188 and 189 of the Penal Code Act against each of the accused persons beyond any reasonable doubt. Consequently both Bwokino Moses (A.1) and Mulekwa Peter (a.2.0 are acquitted. The indictment is dismissed and each accused set at liberty unless held lawfully.

The police and DPP should pick interest in the role Magino and the 4<sup>th</sup> unidentified person played in the demise of this old man.

**Musota Stephen**

**JUDGE**

**12.5.2010**

12.5.2010

Both accused in court.

Ogwang for State Resident State Attorney.

Mudangha for accused on State brief.

Assessors in court.

Wanale Interpreter.

Kyabire.lugwere.

**Resident State Attorney:** Case for judgment.

**Court:** Judgment delivered.

**Musota Stephen**

**JUDGE**