

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

**CRIMINAL SESSION CASE NO. 257/2011**

5

**UGANDA.....PROSECUTOR**

**VERSUS**

**A1: WAMPA FAZIRI**

10

**A2: TIBITA DAVID**

**A3: ISABIRYE PHILIP**

**A4: MAGANDA SAADI**

**A5: BATEGANYA FRED.....ACCUSED**

**BEFORE: THE HONOURABLE JUSTICE NAMUNDI GODFREY**

15

**JUDGMENT**

The five accused are jointly indicted for the offence of Murder contrary to section 188 and 189 of the Penal Code Act.

20

The prosecution contends that on the morning of 5/7/2011 towards 4.00am, the deceased Mukisa Paul also known as Kagame was enticed to move out of his house to check on his chicken which were making noise.

25

When he came out; the assailants locked his wife inside the house using a bolt and then set upon the deceased, hacking him and left him for dead.

As he was being attacked he kept shouting and mentioning the names of his assailants. His wife made an alarm and also mentioned some names. Investigations were made based on the said names, leading to the arrest of the accused before court.

5

All the five accused denied the charges and all raised alibis – accounting for their time on the material morning of the offence.

10 In criminal cases the prosecution is required by law to prove all the essential ingredients of the offence against the accused persons beyond reasonable doubt.

The accused has no duty to prove his innocence. **(See: Woolmington Vrs. DPP (1935) AC 462).**

15

In **Uganda Vrs. Kassim Obura (1981) HCB 9**, it was held that to prove an indictment of murder, the following ingredients must be proved:

1. Death of the deceased.
- 20 2. Death was unlawful.
3. The death was caused with malice aforethought.
4. The accused caused the death.

25 Regarding ingredients 1 and 2, all witnesses including those for the defence confirmed the death of Mukisa Paul who was killed on 5/7/2011 and was buried the same day. He died of excessive bleeding and shock as shown by the post mortem report – P.Ex<sub>3</sub>.

Death is accordingly proved beyond reasonable doubt.

30

The injuries inflicted on the deceased as shown by the Post Mortem report P.Ex<sub>3</sub>, the photographs of the body exhibited as P.Ex<sub>5</sub>, and the Medical evidence of PW7 Dr. Bamudaziza that the deceased suffered deep cut wounds occasioned by a sharp object indicate that the deceased's death was neither accidental nor was it authorized by law. In **Gusamubizi s/o Wesonga Vrs. R (1948) 15 EACA 65**, it was held that homicide is unlawful unless authorized by law. Ingredient No.2 is accordingly proved beyond reasonable doubt.

Ingredient No.3 – Malice aforethought is inferred from the circumstances of the case but specifically from the following:

- The weapon used.
- The nature of the injuries.
- The part of the body targeted.
- Conduct of accused after offence.

In the instant case, the Medical evidence shows that the head and the neck were targeted and suffered deep cut wounds. They were inflicted by a sharp object which caused fatal damage to vital tissues. The head and neck are vulnerable parts of the human body.

Whoever attacked Kagame-Mukisa Paul definitely intended to kill him. Malice aforethought is accordingly proved beyond reasonable doubt.

Ingredient No.4-Participation of the accused:

To prove this ingredient, the prosecution has relied on various pieces of evidence and aspects of the law to try to place the accused people at the scene of crime.

These include:

- Identification.

- A dying declaration by the deceased.
- Alleged threats by the 1<sup>st</sup> accused.
- Common intention by all the 5 accused people.
- Circumstantial evidence.

5

### **Identification:**

The prosecution has relied on the evidence of PWI-Namaganda Margaret, the wife of the deceased and that of PW2 Mugambwe Godfrey. PWI testified that as the deceased was being assaulted on the material day, she was able to see Accused No.2 in the compound with the aid of the moonlight. She was inside their house where she had been locked from outside but she could see the scene through the window.

15 That she also recognized the voice of Accused No.1 who she has known since childhood and operates a Boda-boda motorcycle within the Trading Centre. That he is a talkative person and his voice is well known. She says she heard him urge his colleagues to hurry and leave the scene as the deceased was ***“finished”***.

20

PW2 says when he was going towards the deceased's home in response to the alarm, he heard people walking towards him. He was on a foot path through a coffee plantation. He moved away from the footpath and hid in the coffee plantation - five metres away from the footpath.

25 With the aid of the moonlight, he saw A1 and his colleagues on the footpath moving away from the scene. One Ronald was leading carrying a panga (machete) and the others including A1 were carrying sticks and clubs.

The above pieces of evidence are contested by counsel for the defence who has submitted that there was no proper identification since PW2

cannot even describe the way the assailants were dressed. Secondly that given the conditions at the time, e.g. the obstacles caused by the coffee plants, there was no possibility of identifying the accused who in any case were running.

5

Further there was no electricity or other source of light. He also disputes the identification of A1 Wampa by voice as claimed by PW1. He cited the case of **R. Vrs. Turnbull & Others (1976)3 ALL E.R 553** where considerations for identification should be taken into account.

10 These include:

- The length of observation by the witness,
- The distance,
- Any impediments e.g. other people or objects.

15 That where identification is poor there is need to look for corroborative evidence.

Other authorities require or include other considerations e.g. the familiarity of the witness with the assailants (**See: Rorio Vrs. Republic (1967) EA 583**). Both witnesses stated that they knew the accused people as fellow residents with whom they have lived and known from childhood.

20

Secondly, that there was moonlight. PW2 remained in the coffee plantation for 15 minutes and observed the accused people pass by him from a distance of five metres.

25

PW1 saw A2 in the courtyard through her window at a distance of 3 metres and there was moon light.

30

Given the distance as shown above, the duration of the incident, the moonlight and the fact that everyone knew the other, I am inclined to believe that there was proper identification in the circumstances.

5 **Dying Declaration:**

The prosecution has produced PW4 and PW5 who have testified that the deceased in his dying moments, painfully disclosed to them the names of the people who had attacked him. He named Wampa, Ronald and Robert as some of the people who had attacked him.

10

Counsel for the accused has attacked this evidence wondering why among all the people present, it is only these 2 witnesses who were able to hear the deceased say anything, further that this contradicts PW1 whose evidence is that the deceased was left unconscious by the assailants and could not talk.

15

The witnesses however in their evidence stated that the deceased was very weak but conscious and could painfully and through great effort talk slowly. Other people feared to approach, due to the terrifying injuries of the deceased.

20

**Section 30 (a) of the Evidence Act provides that if a statement is made by a person as to the cause of his/her death, or as to any of the circumstances of the transaction which resulted in his/her death, in cases in which the cause of that person's death comes into question, and the statements are relevant whether the person who made them was under expectation of death and whatever may be the nature of the proceeding in which the cause of death comes into question - that statement may be admitted in court.**

25

30

In **Uganda Vrs. John Ochieng (1992-93) HCB 80.** It was held that a dying declaration needs to be corroborated by other evidence otherwise a conviction may not be based on it alone.

5

First, I am satisfied that the deceased indeed made a dying declaration, the circumstances under which it was made having been satisfactorily explained by PW4 and PW5.

10 There is also corroboration of the said statement as seen from the evidence of PW1 and PW2 regarding identification of the assailants. I have earlier stated that the identification was satisfactory.

**Threats and or motive:**

15 The prosecution has led evidence to show that there was a grudge between the deceased and Accused No.1.

PW7 Odel testified that he investigated a case of inciting violence against the first accused which was reported by the deceased. A1 was  
20 given a bond on 30/6/2011 in respect of the said case. This witness further stated that when he tried to reconcile the 2 parties, A1 is reported to have said he was not ready to reconcile with the deceased and was ready to go far with him.

25 That on 4/7/2011, the deceased reported to this witness that his life was in danger. The witness was supposed to go for further investigations the next day at Bugono but early on 5/7/2011, he received information that the deceased had been hacked to death. The prosecution cited  
**Supreme Court Criminal Appeal 2/2005, Baguma Evans & 2**  
30 **Others Vrs. Uganda**, where the accused threatened to kill the

deceased after the deceased were successful in a case before court which led to the eviction of the accused people.

5 The deceased was attacked and killed a few days later and the accused and 2 others people were identified at the scene.

In a recent appeal in the **Court of Appeal - Criminal Appeal 62/2011 - Hussein Akbar Godi Vrs. Uganda**, the said court considered threats issued by the appellant to the deceased's friends. A few days later the  
10 deceased was shot to death.

It observed as follows:

***“In law, evidence of previous threats is a relevant consideration in determining the guilt or innocence of the accused. Such  
15 evidence if accepted as correct, shows an expression of intention of the appellant in the commission of the crime. It goes beyond mere motive and tends to connect the accused person with the commission of the crime”.***

20 The Court of Appeal then upheld the findings of the trial court that the threats by the accused indeed connected the appellant to the commission of the offence.

The defence has rebutted the position of the prosecution regarding the  
25 alleged misunderstanding between the Accused No.1 and the deceased. That since the dispute was in court then there was no way the accused No.1 could plan to take away the life of the deceased. That in any case he had reported the matter to the authorities. That the Accused No.1 was a victim of circumstances.

30



The fact that the deceased reported on 4/7/2011 that his life was in danger – having been threatened by the Accused No.1 and less than 24 hours later the same deceased was hacked to death is too much of a coincidence and I am led to believe that the hand of Accused No.1 was  
5 very visible in the said death of Kagame Paul Mukisa.

**Common intention:**

In my summing up to the assessors, I posed to them the question that what is the connection between the A1 and the other 4 accused people  
10 to make them join up to cause harm to the deceased?

The prosecution has relied on the evidence of PW1, PW2 and Detective Wafula who in their evidence claimed that the accused persons are members of a Clandestine group – commonly known as “Lala Salaama”  
15 whose task was to keep security and weed out criminal elements in the area.

PW5-Maido and PW6 and even A1 in their evidence indicated that the deceased was a suspected thief who would steal livestock, goats and  
20 even break shops. According to PW6, A1 had threatened to deal with him.

The evidence of PW7 indicates that the dispute in the court at Namugalwe arose out of inciting violence when A1 almost caused the  
25 lynching of the deceased.

It is argued by the prosecution that under Section 20 of the Penal Code, the 5 accused people are jointly criminally liable and that it is through their membership of the “Lala Salaama” that the death of Kagame was  
30 executed. That according to PW2, Ronald was seen moving from the

scene of crime with a panga while the other accused people were seen with other weapons.

Relying on the **SCCA 2/2005 Baguma Evans & 2 Others Vrs. Uganda (op cit)**. It does not matter who executed the fatal blow/action so long as all the accused had the common intention of eliminating the deceased.

The defence has argued that first, the so called “Lala Salaama” group does not exist as indeed was the denial of all the 5 accused people.

Secondly that for Section 20 of the Penal Code to apply, there must be a plan which has to be hatched by the perpetrators which leads to the unlawful act thereafter. That the prosecution never established that there was any plan between the accused for a common goal.

Further, the accused through their alibis showed that they were not anywhere near the scene of crime.

Finally that the people who were alleged to have held the deadly weapon, the panga are still at large.

To resolve the issue of common intention, other pieces of evidence also have to be looked at to first of all establish whether there is any other corroborating evidence.

#### **Circumstantial evidence:**

In a Kenya High Court decision – **Republic Vrs. Thomas Culbert Chocumo Ndeley Criminal case 55/2006**, it was noted that “**Circumstantial evidence is very often the best evidence. it is**

**evidence of surrounding circumstances which, by intensified examination is capable of proving a preposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial”.**

5

The evidence considered in the foregoing is on the most part circumstantial, but as has been held elsewhere, circumstantial evidence may be relied upon to convict once there are no other co-existing circumstances which point to the accused innocence. **(Teper Vrs. R**

10 **(1952) AC 489)** where the circumstantial evidence is inconsistent with innocence of the accused and cannot be explained upon any other reasonable hypothesis than that of guilt, the accused may be so convicted. **(Simon Musoke Vrs. R (1958) EA 715).**

15 It is necessary to consider the defences of the accused people who have each raised alibis to show that they were nowhere near the scene of crime.

20 A1 claimed he was at home on the material day, A2 indicated that he was in Pallisa and only came for the burial and went back, A3 produced his wife as a witness to show that he was at his residence, A4 claimed that he was at Kangulumira, while A5 was at Bugono.

25 The defence has argued that the prosecution did not place the accused at the scene of crime. That A1 was arrested as he was innocently going about his duties, while A2 like any other responsible person travelled from Pallisa to attend the burial and went back. Those who were available attended the burial.

Further that apart from A1 the rest were arrested from their homes a year after the incident.

5 The position in law is that once the accused raises an alibi, he has no duty to prove it or to prove his innocence. Instead, the prosecution has the duty through evidence to rebut or disprove the said alibis. **(See Bogere & Another Vrs. Uganda SCCA 1/97) and (Cpl. Wasswa & Another Vrs. Uganda SCCA 49/99) and (Uganda Vrs. Dusman Sabuni (1981 HCB 1).**

10

The evidence on record as per the evidence of PW9, PW1 and PW2 is that apart from the 1<sup>st</sup> accused person, the other 4 accused people disappeared from the area and were only arrested a year later when they came back to the village one by one.

15

This conduct together with other pieces of evidence go a long way to discredit the defence as raised by the accused persons.

20

This conduct also resolves the remaining consideration in considering malice aforethought discussed much earlier. This is conduct that points to resolution of ingredient No.3 of the offence of murder.

25

I have considered all the evidence available, the circumstances of the offence and the various pieces of circumstantial evidence, I am satisfied that all the accused people were properly placed at the scene of crime.

In the case of **Bogere and Another Vrs. Uganda (supra)**. The Supreme Court made the following observations. **“What amounts to putting an accused person at the scene of crime? We think that**

**expression must mean proof to the required standard that the accused was at the scene of crime at the material time.**

**To hold that such a proof has been achieved, the court must not**  
5 **base itself on the isolated evaluation of the prosecution**  
**evidence alone, but must base itself upon the evaluation of the**  
**evidence as a whole. Where the prosecution adduces evidence**  
**showing that the accused was at the scene of crime, and the**  
**defence not only denies it, but also adduces evidence showing**  
10 **that the accused person was elsewhere at the material time, it**  
**is incumbent on the court to evaluate both versions -**  
**Judiciously and give reasons why one and not the other version**  
**is accepted.**

15 **It is a misdirection to accept the one version and then hold that**  
**because of that acceptance per se, the other version is**  
**unsustainable”.**

I must say that the assessors gave an opinion that the accused were not  
20 placed at the scene of crime because of the unfavourable conditions for  
identification. I find that they did not consider the evidence for both  
the prosecution and defence in its totality and hence came to the wrong  
opinion which I must disagree with.

25 I find that the prosecution has proved all the ingredients of the offence  
of murder against each of the accused beyond reasonable doubt.

I accordingly find each of the accused guilty of the charge of Murder  
contrary to section 188 and 189 of the Penal Code and convict each of  
30 them accordingly.

**Namundi Godfrey**

**JUDGE**

5 **12/11/2013**

12/11/2013:

Accused in court

10 Prosecutor Kitimbo on brief for Anyong  
Muzuusa for accused

Court: Judgment read in open court.

15 **Namundi Godfrey**

**JUDGE**

**12/11/2013**

20 PROSECUTION:

There are no previous records on each of the accused. Murder carries a maximum sentence of death. The Sentencing Guidelines show that a sentence of death can be imposed where the accused committed the offence in pursuit of a common goal.

25

Consider the injuries, the way it was executed. The sentence of A1 who was the mastermind should be more severe than that of the others.

Under section 20 (c) of the Sentencing Guidelines, the leading offender,  
30 his sentence is more aggravating and should be higher.

MUZUUSA:

In mitigation these are the prayers:

- They are all first offenders.
- 5    - They all have families and children and are breadwinners.
- The time spent on remand.
- They are young adults and may be given an opportunity to reform.
- The circumstances surrounding the arrests of the convicts.

10

Court should exercise its discretion judiciously.

15    SENTENCE:

The taking of a human life unlawfully and intentionally is something that cannot be explained away especially when it was done with malice aforethought.

20    I have considered the way the deceased was killed on suspicion that he was a thief, by members of an unlawful group, that took the law into their own hands.

They operated outside the law in total disregard of the legal procedures  
25    e.g. reporting the suspect to police for appropriate action.

The convicts are young men which I take into consideration. I have considered the submission by the State that the master mind should have a harsher sentence.

30

I disagree with the said argument as all the convicts are equally criminally liable.

I will however not impose the maximum sentence. Each of the convicts  
5 is sentenced to serve life imprisonment.

**Namundi Godfrey**

**JUDGE**

10 **12/11/2013**

Right of appeal explained.

15 **Namundi Godfrey**

**JUDGE**

**12/11/2013**