

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

CRIMINAL CASE NO. 174/2013

UGANDA.....
.....**PROSECUTOR**

VERSUS

**LWAMAZA ERONDA JOHN &
ORS****ACCUSED**

JUDGMENT

The 7 accused people were indicted for the offence of Murder contrary to sections 188 and 189 of the Penal Code Act.

It is alleged that: (A1) LWAMAZA ERONDA JOHN, (A2) BATENDERA MATHIAS, (A3) NABIRYE JESCA, (A5) WAISWA YOWERI, (A6) MUKODA FRANSENSI, (A7) KAKO ALICE and (A9) YAHAYA MUGANZA on 13/3/2013 at 7.30am in Bulwamaza zone, Kitayungwa Subcounty in Kamuli District with Malice aforethought killed TENYWA PATRICK.

The brief summary of the facts is that the deceased lived in Bulwamaza zone with his family;

On the morning of 13/3/2013 as the deceased was at his home with his family and children, a group of people armed with sticks

and one with a machete (panga) came to his home while drumming and making alarms. Some of them forcefully grabbed the deceased and dragged him to a nearby Trading Centre. There at, they were joined by another group of people armed with sticks.

Amidst his pleas and cries for mercy, the two groups set upon the deceased and assaulted him with sticks and other implements and assaulted him until he died. The accused people were variously arrested and charged with the offence of murder. Some were released on bail and promptly absconded, one was produced before a Judge, pleaded guilty and was subsequently sentenced. Others ran away from the area and have never been arrested since.

The accused people each pleaded not guilty and raised the defenses of alibi save for Accused No. 1, thus bringing each and every ingredient of the offence in issue.

1. Once an accused person pleads not guilty, everything comes into issue and the Prosecution must prove each of the ingredients of the offence charged.
2. The burden of proof of the ingredients of the offence is always on the Prosecution.
3. The standard of proof is beyond reasonable doubt, and the accused is not required to prove his/her innocence. **Ref: Woolmington Vs DPP (1936) AC 462**

4. Once an accused person raises the defence of alibi, he does not have to prove it.

- The Prosecution must instead produce evidence to convince court and place the accused squarely at the scene of crime as a person cannot be in two places at the same time.
- It is also a consideration that the defense of alibi must be brought forward as soon as possible firstly that if it is genuine then proceedings would be stopped, secondly that its credibility should not be doubted as having been an afterthought. **Ref: SCCA 1/98 Festo A. Asenua & Anor Vs Uganda**

5. When considering the evidence to decide the guilt or innocence of an accused person, the evidence must be looked as a whole both prosecution and defense evidence.

Ingredients:

The ingredients that must be proved in a case of murder are:

- There was death of a human being.
- Death was caused unlawfully.
- It was caused with malice aforethought.
- The accused was responsible for the said death.

The above was the position adopted in the case of **Uganda Vs Kassim Obura (1981) HCB 9**

Ingredient No. 1 - Death

The evidence available in the above respect is:

- The post mortem report - PEx.1 which established the cause of death. The Doctor who carried out the post mortem found deep multiple laceration on the head and bruises in the neck and swelling.
He determined the cause of death as major head injuries following hitting with hard heavy objects.
- The eye witness evidence of PW1 Nanangwe Justine and PW5 Reste Nakato who saw the deceased being assaulted until he died.
- PW2 Mukula Charles, PW3 DIP Mulwanyi Joshua and PW4 D.Cpl Twinamatsiko Collin were police officers who all saw the dead body of Tenywa Patrick and even took it for post mortem.
- DW1 (Accused No. 1) also saw the deceased killed and saw the dead body.

This ingredient was accordingly proved to the required standard.

Ingredient No. 2 - unlawful death:

All homicides are unlawful unless in the following circumstances;

- Execution of a lawful order/sentence
- Accidental death
- Caused during the course of self defence.

The evidence under Ingredient No. 1 should be considered whether the killing of deceased fell under any of the above exceptions.

In **Gusambizi s/o Wesonga Vs R (1948) 15 EACA 65**, It was held that homicide is unlawful unless authorized by law.

The evidence of death under ingredient no 1 shows that Tenywa's death did not fall in any of the exceptions allowed by law.

Ingredient no 2 is accordingly proved beyond reasonable doubt.

Ingredient No. 3 - Malice aforethought:

Malice afore thought is inferred from the following aspects;

- Nature of the wounds injuries sustained by the victim.
- The weapons used.
- The parts of the body targeted (whether they are vulnerable).
- The conduct of the accused person especially after the commission of the offence.

The above are a pointer to the state of mind of the assailant whether he/she wished harm/grievous harm/death to the victim.

The prosecution relied on the following to prove this ingredient:

- The post mortem report showing the injuries which demonstrates the parts of the body targeted.
- The eye witness evidence of PW1 Nanangwe Justine and PW5 Nakato Reste claim they saw the deceased seriously assaulted and eventually strangled to death.
- PW2, PW3 and PW4 all described the condition of the deceased's body and injuries.

It is clear the injuries sustained were fatal and that the objective of the assailants was to achieve the maximum results which in this case were death.

Ingredient No. 4 - Participation of the accused:

The prosecution relied on various pieces of evidence and aspects of law to prove the participation of the accused people.

These include:

- Identification
- Common intention by the accused and or motive
- Circumstantial evidence
- Confessions

Identification:

When considering evidence of Identification, the courts will consider the following factors to decide if there were favorable conditions for identification.

- The light available.
- The duration of the incident. The prior knowledge of the suspect/accused by the witness.
- The proximity of the identifying witness to the suspect/accused

Reference is made to the case of **R vs Turnbull & Others (1976) 3 ALL E.R 553 And Rorio vs Republic (1967) EA 583.**

According to the prosecution, PW1 Nanangwe Justine experienced the events of that day first hand and narrates what happened that

fateful day in graphic detail. She described the group of about 30 people who came to their home and she identified some of them as being Eronda Lwamaza (Accused No.1) who was holding a stick and Panga, A4 Jesca Nabirye, A5 Waiswa Yoweli and A6 Mukoda Frances. She knew all these people as fellow residents she has known for the 22 years she was married to the deceased.

She especially named A5 and two others not in court as the ones who forcefully carried and pushed the deceased to the Trading Centre. She claimed they had been sent by the sub county chief to take the deceased to the sub county. They were armed with sticks and Accused no 1, Eronda Lwamaza had a machete (panga). Others Picked bricks from the compound which were later used to hit the deceased.

At the Trading Centre she names the rest of the accused who were in the group plus others who are at large she describes the actions of most of the accused who variously assaulted the deceased and one Annet Magambo finally finished him off by strangulation. Some of those in the second group were Kabi, Mulwany, Kasubo w/o Mulwany, Batendera Matyasi, Yahaya Muganza and Kako Alice. They hit him all over the body with Aggrey Lwamaza commanding that if the deceased was spared he would take everybody to prison as he was used to courts of law.

She also describes the way some of the accused were dressed.

As the Tenywa was in his last moments Annet Magambo called out that he was still alive. She then tied a wrapper around his neck and strangled him.

The mob then saw the children and Pw1 crying and chased them from the scene and the said children fled in all directions.

One Kisuyi picked the shoes of the deceased from Diana one of the children and went away with them. This witness fled into the house of her brother in law and later proceeded to the police.

On cross-examination she described how some of the assailants were dressed. A1 had a dirty whitish shirt, Mukoda in a skirt and blouse redish and brownish patches Jesca Nabirye was in a Gomesi while Yoweri Waiswa had a pair of shorts, a T-shirt with a black collar.

This witness insisted on cross-examination that she knew the assailants having lived in the area for 22 years and that it was broad day light with no likelihood of mistaken identity.

PW5 Nakato Resty's evidence was strikingly similar to that of PW1. She was an eye witness who followed the mob and was able to point out each of the accused and their actions and others still at large. She was 14 at the time of the incident. She mentioned some of the assailants as Nabirye Jesca, Mirembe Namasole, Waiswa yoweri who together with kyomya and Kaune lifted the deceased and dragged him to the trading Centre. She

knew the assailants right from her childhood and there was no possibility of mistaken identity.

Those at the Centre included Batendera Matias, Kako Alice and Yahaya Muganza.

This witness was emotional as she recited the events of that day but was consistent in her testimony even during a rigorous cross examination by defence counsel. She impressed court as a truthful witness as she painfully narrated the tragic events that resulted in her father's death.

The incident happened during day light.

The police officers who came to the scene collaborated this evidence as they reached the scene shortly after the death of Tenywa. They rushed to the scene and even met PW1 also rushing to report the matter to police.

The defence has tried to discredit the identification on grounds that PW5 could not have been in position to observe what transpired due to the size of the crowd and that she followed from behind with her siblings. What is clear is that this witness witnessed the brutal killing of her what transpired own father and could not have so easily forgotten.

Circumstantial evidence and Common Intention.

Both witnesses cited the land disputes that were the origin of the misunderstanding between the deceased and the accused who

were either directly involved in the land disputes or are closely related either by blood or marriage.

The evidence of the said land disputes was part of the admitted facts and exhibited as PEx.4, PEx.5. PW2, PW3 and PW4 all gave evidence connecting the evidence of the land dispute to the incident that led to the killing of the deceased.

They gave evidence of attempts to arrest some of those involved in the land disputes earlier that morning.

Instead those they attempted to arrest e.g. Lwamaza Aggrey and Sabasa made alarms, mobilized the residents who repulsed the police and the said police had to retreat. It is the same Lwamaza Aggrey who in the morning at 7 - 7.30 led the residents and commanded the attack on the deceased.

PW2 DAIP Mukula testified about the Land disputes and the previous attempt to arrest the suspects in the boundary marks case and the said failed attempts.

The above evidence may be considered as part of the conduct of the accused that may be inferred to lead to conclusion of the malicious intent of the accused people who have been pointed out and identified as having been at the scene of crime.

This also leads to the conclusion that the accused were pursuing a common intent and had preconceived ill intentions against the deceased.

In **SCCA 2/2005, Baguma Evans and 2 others**, the deceased was successful in a land dispute against the accused who threatened to harm him. A few days later the deceased was hacked to death and the accused were identified at the scene of crime.

The prosecution claims there could have been no chance of mistaken identity given the above evidence and circumstances.

Conduct of accused:

The other piece of evidence by the prosecution is that apart from Accused No. 1 who was arrested at the scene of crime. Even then the 1st accused's conduct led to his own arrest as he was seen by PW1, PW2, PW3 and PW4 as having been seen and heard mocking the dead body of Tenywa.

The rest are said to have been arrested much later on different days having run away from their homes and only came back later.

The above was collaborated by the investigating officer Cpl Collin Twinamatsiko as well as the agreed evidence in respect of arrest. Mukoda A6 and Batendera Mathias A3 were arrested on 26/3/2013 when they came back from their hiding.

Kako was arrested on 9/4/2013 after she also came back home A4 and A5 are said to have been arrested at Wakitaka, Mafubira where they were hiding after a tip off. Among those arrested at with A4 was Mirembe Namasole who is now serving a sentence, having pleaded guilty to the Murder charges before another Judge.

It is submitted that all this was conduct pointing to the guilt of the accused people.

Confessions

The prosecution tried to rely on the Charge and Caution statements of Yahaya Muganza, Kako Alice and Yoweri Waiswa. These were brought up during the cross examination of the said accused people by the prosecution.

Confessions are by their nature evidence in chief at the disposal of the prosecution. Springing such a “confession” on the accused at cross examination of the accused during his defence is not only unfair to the accused but also unacceptable. I have accordingly not relied on the said statements (PEx 6, 7 and 8) in this Judgment. Doing so would prejudice the accuseds’ case.

Defences:

The accused people save for A1 put up defenses of alibi.

A1 claims although he saw the incident, he was chased away by the mob as he is a crime preventer and might report them to the

police. He even went closer to the police to tell them about the incident when they came.

He admitted having a land dispute with the deceased who according to him had won the dispute in court through dubious means. He denied owning a panga in his home.

This was attacked by the prosecution as being at variance with what he stated earlier that he had watched from a distance slashing his compound and that he saw Nabirye Jesca and Mirembe Namasole at the scene.

The prosecution has submitted that he placed himself at the scene as identified by PW1 and PW5.

The evidence of DW2 (A3) Batendera Mathias was that he had attended the vigil of a person supposed to be a mother in-law where he spent a night and came back in the morning. His wife Accused No. 6 Mukoda Frances spent the night at the same vigil and came back in the morning.

In cross examination by the Resident State Attorney there was no clear response as to whether customarily a son in-law attends a vigil of a mother in-law in the culture of this area.

The prosecution attacked the credibility of evidence as the timing does not tally. His brother DW10 Tezikya Bonifance with whom he is alleged to have gone to the vigil tells a story that is different about the timing, the events and what time they came back.

While DW10 claims they came back together and went to the Trading Centre, the accused claims he slept for some time before going to the Trading Centre. He was also one of those using the land that the deceased had disputes over.

The alibi of A4 and A5 is that while she was sick at home with sick children, A5 went to school 45km away with his sister and returned with at 5pm. He only heard about the death of Tenywa late in the evening. This has been attacked as being at variance with other available evidence on record.

Both accused claim they then went away to care take a sibling of A5 and daughter to A4 and this was on 28/3/2013. The said sick person had had a miscarriage on 28th of Feb. She went with A5 and her 2 sick children.

This is also attacked by the prosecution as not only unlikely, but also a concoction and that the 2 accused were in hiding.

To compound matters, the A4's daughter Mirembe Namasole and A5's sibling with whom he says he went to school with pleaded guilty to the charges of murder and is currently serving her sentence. The three were identified at the scene by PW1 and PW5..

Accused No. 7 - Kako Alice lost a brother. She says the burial was on the 10/3/2013. This is at variance with her earlier claims that the burial was on 8/3/2013 (PEX.7). Her witness DW9 Soscipateri Mupere claims the burial was on 8/3/2013. He last saw his

daughter on 12/3/2013 at midnight and could not vouch for her whereabouts on the early morning of 13/3/2013.

DW8 Butimbo Beatrice claims they were together on the 13/3/2013 early in the morning cooking a special meal and serving mourners.

Her father says early morning when he looked for her to cook and serve mourners she was nowhere to be seen.

These are contradictions in the evidence of Kako Alice and her 2 witnesses each with a different story.

Finally Accused No. 9 Yahaya Muganza, his evidence in court was that he was bedridden for many years, and could not have been at the scene of crime.

He was however able to walk to DW11's shop (Kasolo James) for tea. He also attended the burial of Tenywa- a place he had not been to for the ten years he claimed he had been sick. He also denied having any dispute with the deceased. PEx 5 however reveals that he was one of the accused in the case of removing boundary marks. This exhibit was one of those admitted as part of the agreed facts under section 66 TIA.

His narration of events does not explain his whereabouts in the early morning.

This accused was also clearly identified at the scene of crime by PW1 and PW2.

The defense has pointed out inconsistencies in the prosecution case.

Defence counsel submitted that PW1 and PW2 only had the accused arrested because of land wrangles.

The law is that once an accused raises an alibi, he has no duty to prove it, or his innocence. Instead the prosecution has a duty through evidence to rebut the said alibi. **Ref: Bogere & another Vs. Uganda SCCA 1/97.**

In **Festo Androa Asenua Vs Ug (supra)** the Supreme Court has gone further and held that once an accused intends to rely on an alibi, he should bring this to the notice of the prosecution to enable investigation and verification of the same. If he waits and only brings it at the time of defence then any inconsistencies there in will go to the discredit of such alibi as there is a likelihood that the accused could have made up the alibi while the trial was pending.

I have considered these defence in view of the other evidence evidence on record. There is no doubt that there is overwhelming evidence that the accused people were identified and placed at the scene of crime. In that light therefore the alibi pleaded by each accused person comes across as concoctions or after thought which were given birth and nurtured during the pendency of this trial.

In Bogere & another Vs Uganda (supra), the Court observed:

“What amounts to putting an accused 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.”

The Court further held that it is incumbent for the Court to evaluate both versions (Prosecution and Defence) judiciously and give reasons why one version and not the other is accepted.

In the instant case I have found that the prosecution has proved all the ingredients of the offence of murder against each of the accused people to the required standard.

Assessors' Opinion

The assessors gave a joint opinion. Therein they found that the first three ingredients of the offence were proved to the required standard.

As regards ingredient no 4 they found that the accused were proved to have committed the offence and gave the following reasons:

- Each of the accused was placed at the scene of crime and was properly identified.
- The conduct of the accused in escaping from their homes and were arrested later at different places and times point to their guilt.

- PW5 Nakato Reste was old enough to observe and remember the killing of her own father and would not fail to recall or identify the assailants. The killing occurred in broad day light and the conditions were favorable especially as the assailants were well known to PW1 and PW5.
- The accused were involved in a land dispute with the deceased and he had been successful.
- They also found the alibi of each of the accused not credible as compared to the evidence adduced by the prosecution.

They accordingly advised that the accused should be found guilty as indicted.

Conclusion

I have already made my findings that the accused were proved to have killed the deceased Tenywa with malice aforethought.

I do agree with the assessors that the indictment has been proved beyond reasonable doubt against each of the accused persons.

I accordingly find each of the seven accused people guilty of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. I convict each of them as indicted.

Godfrey Namundi

JUDGE

15/09/2015