

IN THE HIGH COURT OF UGANDA AT MASAKA

NO.11038 CPL WDR

UGANDA.....PROSECUTOR

VERSUS

MUTENDE GONZAGA DODOVIKO.....ACCUSED.

BEFORE HON. LADY JUSTICE MARGARET TIBULYA

JUDGMENT

No. 11038 CPL WDR Mutende Gonzaga Dodoviko is indicted with two counts of murder contrary to section 188 and 189 of the Penal Code Act.

The prosecution evidence was that on the 10th April 2012, the accused, a Prison Warder at Lwamagwa Government Prison, requested for and was granted a one day leave by his boss (**Pw2 Chief Warder Mujwiiga Godfrey**). The leave was to start on the 11th of April 2012. The accused told Pw2 that he wanted to go to Centenary Bank and withdraw his salary then go to his home and see his sick child. He did not attend the master parade in the morning of **11th April 2012** since he had already left the work station.

On **11th April 2012** at about 6:00 pm Pw7 (**Mr. Fred Mayanja**) a guard at Gayaza Health Centre Kasaali sub-county, Rakai District was approached by a person he did not know then, but whom he later identified as the accused. The accused told him that he had ulcers and wanted some magnesium drugs. Pw7 told him that the Health Workers had signed off for the day and that to his information those drugs were out of stock. The accused then left, but as he was going, Pw7 continued to look at him since he did not know him. The accused stood at the end of the Health Center compound near some thickets and made phone calls. Pw7 closed the Health Center and left him standing in the same position.

Pw7 went to the trading center and bought food then came back to the Healthy Centre at about 7:30 pm. He started preparing dinner but before it was ready, towards 8:00 pm he heard three gunshots followed by alarms and wailing from the complainant's home which is about **200 meters** from the Health center according to Pw5 (**D/AP Okao John Paul**). He went to the scene to establish what had happened.

At the scene he found two people had been shot dead. Some people were saying, "...**there is no other person who has done it. He is the one. One time he attempted to kill her using petrol...**" which made him ask them to describe the person they were suspecting. They described the suspect as tall, not very fat and not very dark, a description that matched the man he had just seen at the Health Centre at 6:00 pm. He informed those people and later the police about that fact.

Testifying about the events of the fateful evening, **PW1 (Senoga John Bosco)** said that on the **12th** day of April 2012 around 8:00 pm he was in the compound of his house. He used a torch to check on his domestic animals. His mother (**the late Nakanwagi Paulina**) was sitting in the compound, while his wife, (**the late Nagawa Justine**) was sitting on a verandah. He gave his wife (**the late Nagawa Justine**) the torch so that she could capture a cricket which was making noise from the compound. She later returned the torch to him.

As Pw1 was standing in the compound the accused and another person emerged from behind the toilet. Pw1 heard a voice say, "**shoot**". The accused then shot the **late Nakanwagi Paulina** in the arm. She first ran towards her house, but turned to go to Pw1's house which had two doors. The late **Nagawa Justine** tried to close the inside door while she tried to open the outer door. In that process the accused shot her (**late Nakanwagi Paulina**) in the chest.

Pw1 who was standing behind his wife (the **late Nagawa Justine**) with the torch flashed it at the attacker and identified him as the accused. He told his wife to move away, but the accused, then standing about **15 feet** from the door shot again and a bullet hit her in the armpit. Pw1 closed the door and realized that his wife, who was six months pregnant, was bleeding. He tied a towel around her, but she (**Nagawa Justine**) died. By then his mother (**Nakanwagi Paulina**) had already died.

There had been misunderstandings between the accused's family and the deceased's family over a piece of land. The accused had in fact attempted to kill the **late Nakanwagi Paulina** on two separate occasions.

PW4 (SPC Semwangu Joseph) visited the scene and found the two dead bodies lying in a pool of blood. One of the bodies was at the entrance to the house, while the other was inside the house. He recovered a cartridge from **about five paces** to the entrance to the house and he gave it to the police. The next morning Pw1 gave him two other cartridges which he handed over to the police.

PW3 (S/P Kavuma Henry) and **PW5 (D/AP Okao John Paul)**'s evidence was similar in material particulars and was that they went to the scene and confirmed the shooting and death of the two people. Pw1 (**Ssenoga**) told them that he flashed a torch at the attacker and he identified him as the accused (**Mutende Dodovico**). Through phone calls, they established that the accused was not at his Unit and that he had booked out to Kyampagi village. On information that he was at his girlfriend's home at Kalisizo, they went and arrested him that night.

A post mortem examination was done the following day. It was found that **Paulina Nakanwagi** had sustained six gunshot wounds to the chest. The cause of her death was an open chest injury due to gunshot wounds and protrusion of the lung tissue. **Nagawa Justine** sustained an open gunshot wound on her chest and cause of her death was open chest injury leading to hemothorax and lung collapse. The two post mortem reports are exhibits P1.

Before the incident Pw5 (**D/AP Okao John Paul**) had handled some two cases in which the accused was the suspect. One of them concerned the attempted murder of the **late Nakanwagi Paulina** by pouring petrol on her and the second one was that in 2009 the accused stabbed the deceased around the neck. There was a land dispute between their families.

An identification parade was conducted by **PW6 (A.S.P Nansamba Regina)** on the 12th of April 2012. To ensure that the accused, who was in his own cell, was not seen, she instructed him not to come out. Mayanja (**Pw7**) who was to identify the assailant was hidden outside the police station. She called the accused and explained to him what she was going to do and explained to him his rights, for example, to choose the position he felt like. She got eight people of similar features as the accused. The accused positioned himself where he wanted among the eight. After

they were paraded, Mayanja(**Pw7**) came. She told him that he could tell the person to walk, talk or stand in a particular position.

Mayanja (**Pw7**) requested that the participants move around and talk since he had seen the suspected assailant walk. He identified the accused as the person he had seen at Gayaza Health Centre on the **11th April 2012 at 6:00 pm**.

He (**Mayanja Pw7**) was then taken to a certain room. The accused when asked said that he was satisfied with what had been done. The exercise was repeated after the dressing and position of the accused had been changed. Mayanja again identified the accused, and the accused again said that he was satisfied with what had been done. Pw6 made a report (**Exhibit P4**) which the accused signed.

The accused was examined and found to be thirty six years old and of normal mental status. In his defense he said that he did not know the **late Nagawa Justine** but knew **the late Paulina Nakanwagi** as his Aunt. He was arrested on the allegation of murdering her. His further evidence was that there was no land dispute between his father and the late Nakanwagi's late husband (**his late paternal uncle**).

On the 10th April 2012 while at his work station at Lwamagwa prisons, the accused's wife rung informing him that their child had been burnt by a flat iron. She asked him to go and give them help so that the child could be taken to hospital.

The accused asked for and was granted a one day leave to go and attend to the child. The leave was to commence on the 11th April 2012. On 11th April 2012 at **5:00am** he left for Kyotera. He first got some money from Centenary Bank then went to Kalisizo to his wife's home in the Prison barracks where he arrived at 6:00am.

His wife took the child to the hospital while he remained in the house. The wife came back at 10:00am and found him still in the house. She prepared lunch at 1:00pm while he attended to the sick child. They remained at home and at 4:30 pm she prepared dinner. They had dinner at 7:30 pm after which she went for night duty, leaving him at home with the child.

At 1:00 am he was with the child when the police officer knocked at his door. When he opened the door they asked him for "the gun". He wondered which gun they meant. They searched his

house but recovered nothing. He was taken to Kalisizo police station where the O.C Kyotera police station pointed a gun at him threatening to shoot him if he did not produce the gun. He told her that he had handed over his gun at his place of work.

He was detained then called out and taken to Pw6's (**Regina Nansamba**) office. They demanded for the gun he had allegedly used in the killings. He told them that he had handed over his gun with the ammunitions. He was detained but was again asked for the gun the next morning. He told them that he did not have it and was made to make a statement.

Pw6 (**Regina Nansamba**) conducted an identification parade. Before the parade she came for him from the cells. She first stood at the burglar proof while in plain clothes but later changed into police uniform, and told him to get out of the cells. She took him to her office where in a corner there was a man (**Pw7, Mayanja**) who he had never seen. **Pw6 (Regina Nansamba)** again asked him for the gun. He still told her that he did not have it. He was then taken back to the cells.

Before he could settle down she told him that he was going for a parade. He wondered what the parade was about. She told him that he would know what it was. She got all inmates out of the cells. Eight of them were young short children who had been arrested for being idle. There was only one man. They were lined up with him as the first on the line.

Pw6 came with (**Mayanja**) Pw7 who had been with her in the office. She then told the accused that she was conducting an identification parade so that the person who was suspecting him could pick him out. He objected but **Pw6 (Regina Nansamba)** took (**Mayanja**) Pw7 and told him to pick out the one he was suspecting. She had placed him near the accused. (**Mayanja**) Pw7 started with pointing at him.

Pw6 (Regina Nansamba) then removed the children. She took the accused around and he was again made to be the first on the line. (**Mayanja**) Pw7 was not removed. He still pointed at him.

Pw6 then told the accused to sign a certain document. He first objected to that but he later signed without reading through it. She did not read it to him.

The accused denied that he went to Gayaza Health Centre on the fateful day. It is not true that Pw7 (**Mayanja**) saw him at the Health Center that day. He first saw Mayanja in **Nansamba's (Pw6's)** office. He did not murder the two deceased persons.

He further said that he had no grudge with the **late Nakanwagi Paulina** over land, and that there is no such grudge in their family. Gayaza is far from Kalisizo where he spent the whole of the 11th April 20102.

THE BURDEN AND STANDARD OF PROOF.

The prosecution bears the burden of proving the guilt of the accused person. Proof has to be beyond reasonable doubt, see **Sekitoleko v Uganda [1967] E.A 531**. The accused is under no obligation to prove his innocence, and therefore should not be convicted on the weakness of the defense case, but on the strength of the prosecution evidence.

In a charge of murder, the prosecution has to prove;

- **That the deceased died,**
- **That the killing was unlawful,**
- **That there was malice aforethought, and,**
- **That the accused committed the offence.**

1. Whether Nakanwagi Paulina and Nagawa Justine died.

Ssenoga (**PW1**) testified that both deceased persons were shot dead on **12th April 2012** at about 8:00pm. **PW3 (S/P Kavuma Henry), PW4 (SPC Semwangu Joseph) and PW5 (D/AP Okao John Paul)**'s evidence was that they went to the scene on the 11th of the same month and confirmed the shooting and death of the two people. A post mortem examination showed that **Paulina Nakanwagi** sustained six gunshot wounds to the chest. The cause of her death was an open chest injury due to gunshot wounds and protrusion of the lung tissue. **Nagawa Justine** sustained an open gunshot wound on her chest and the cause of her death was an open chest injury leading to heamothorax and lung collapse. The post mortem reports jointly marked exhibits P1 which were received in evidence as agreed facts go to galvanize the evidence that **Nakanwagi Paulina** and **Nagawa Justine** indeed died.

There is a bit of contradiction relating to the date of the shooting and death of the deceased persons, with Pw1 (**Ssenoga**) testifying that the incident took place on the **12th** of April 2012 while the other witnesses said that it took place on the **11th** April 2012. The contradiction is minor since it does not go to the root of the case, and can be explained away as an effect of lapse of time. The evidence on record however supports the fact of death by shooting of **Paulina Nakanwagi** and **Nagawa Justine** on the **11th of April 2012**. In any event the defense does not dispute the fact of death of the two people. I believed the evidence and find that the death of each of those persons has been proved to sufficient levels.

2. Whether their killing was unlawful.

It is trite law that every homicide is presumed to be unlawful unless circumstances make it excusable, see **R. Vs. Busambiza s/o Wesonga 1948 15 EACA 65** and **Akol Patrick & Others vs Uganda (2006) HCB (vol. 1) 6**. The term ‘homicide’ has been invariably defined as the killing of a human being by another human being, see **‘Dictionary of Law’, Oxford University press, 7th Edition, 2009, p.264.**

Conversely, what would amount to excusable or justifiable circumstances would include circumstances like self-defense or when authorized by law, (**Uganda vs Aggrey Kiyingi & Others Crim. Sessn. Case No. 30 of 2006**).

Excusable homicide has been defined as ‘**the killing of a human being that results in no criminal liability because it took place by misadventure or an accident not involving gross negligence.**’ On the other hand, *lawful or justifiable homicide* is deemed to occur ‘**when somebody uses reasonable force in preventing a crime or in arresting an offender, in self defence or defence of others, or in defense of his property, and causes death as a result.**’ See **‘Dictionary of Law’, Oxford University press, 7th Edition, 2009, pp.216, 264.**

In the present case there is no indication or suggestion that either of the deceased person’s death was excusable, justifiable or accidental. The evidence that they were shot at was not controverted. The condition the two bodies were found by the police, lying in a pool of blood with gunshot wounds, points to their having been unlawfully killed.

The medical evidence (**Exhibits P1**) shows that **Paulina Nakanwagi** sustained six gunshot wounds to the chest. The cause of her death was an open chest injury due to gunshot wounds and protrusion of the lung tissue. **Nagawa Justine** sustained an open gunshot wound on her chest and cause of her death was open chest injury leading to haemothorax and lung collapse.

The accused simply denied responsibility for their deaths. He did not claim that the deaths were lawful. I find that each of the deceased person's death was sufficiently proved to have been unlawful.

3. Malice aforethought

Section 191 of the Penal Code Act provides that “**Malice aforethought may be established by evidence proving either of the following circumstances:**

- (a) **an intention to cause the death of any person ...**
- (b) **knowledge that the act or omission causing death will probably cause the death of some person, although such act is accompanied by indifference whether death is caused or not ...”**

Malice aforethought in murder trials can be ascertained from the weapon used, (*whether it is a lethal weapon or not*); the manner in which it is used, (*whether it is used repeatedly or the number of injuries inflicted*); the part of the body that is targeted or injured, (*whether or not it is a vulnerable part*), and the conduct of the accused before, during and after the incident, (*whether there was impunity*), see **R. vs Tubere (1945) 12 EACA 63, Akol Patrick & Others vs. Uganda** (supra) and **Uganda vs. Aggrey Kiyingi & Others** (supra).

Pw1 (**Ssenoga**), testifying about how each of the deceased met their deaths said that he saw someone repeatedly shoot at them. His evidence tallies with that of **PW's 3 (S/P Kavuma Henry), 4 (SPC Semwangu Joseph)** and **5 (D/AP Okao John Paul)** who visited the scene and found the two dead bodies lying in a pool of blood and recovered spent cartridges from the scene.

That evidence is in turn lent credence by the medical evidence that **Paulina Nakanwagi** sustained six gunshot wounds to the chest and died from an open chest injury due to gunshot

wounds and protrusion of the lung tissue, and **Nagawa Justine** sustained an open gunshot wound on her chest and died of an open chest injury leading to haemothorax and lung collapse.

Each of the deceased was shot in the chest, a vulnerable part of the body which if targeted by an assailant, imputes malicious intent on his part. In **Nanyonjo Harriet & Another vs. Uganda Criminal Appeal No. 24 of 2002** (SC) it was held that **“For a court to infer that an accused killed with malice aforethought it must consider if death was a natural consequence of the act that caused the death, and if the accused foresaw death as a natural consequence of the act.”**

What a trial judge has to decide, so far as the mental element of murder is concerned is whether the accused intended to kill. In order to reach that decision the judge is required to have regard to all the relevant circumstances, including what the accused said and did, see **R v Nedrick (1986) 1 WLR 1025** and **R v Hancock [1986] 2 WLR 357**. The existence of malice aforethought is not a question of opinion but one of fact to be determined from all the available evidence, see **Nandudu Grace & Another vs. Uganda Crim. Appeal No.4 of 2009** (SC) and **Francis Coke vs. Uganda (1992 -93) HCB 43**.

There is uncontroverted evidence that the assailant used a lethal weapon (**a gun**). The assailant is said to have shot at the victims repeatedly, also a pointer to intention to kill, see **Okello Okidi v Uganda (SC C/A No. 3/1995)**, where malice aforethought was deduced from the fact that the deceased was shot several bullets on the head. There is evidence that the assailant fired the gun from a close range of about **15 feet** from where both deceased persons were. This leaves no doubt that whoever fired the bullets had the intent to kill them.

I find that the prosecution has proved beyond reasonable doubt that each of **Paulina Nakanwagi** and **Nagawa Justine**'s deaths was procured with malice aforethought.

4. Whether the accused participated in the commission of the offences.

The prosecution sought to rely on the following pieces of evidence;

- **Ssenoga** (Pw1)'s evidence that he flashed a torch at the attacker from a distance of about 15 feet and identified him as the accused.
- **Pw2 (Chief Warder Mujwiiga Godfrey)** who gave the accused a one day pass starting on the 11th of April 2012, to go to Centenary Bank and withdraw his salary, and thereafter go to his home and see his sick child. Pw2's further evidence that the accused did not attend the master parade of the morning of 11th April 2012 since he had already left as he had requested is also relevant.
- Pw7 (**Mayanja**) who said that on the 11th April 2012 at about 6:00 pm the accused went to Gayaza Health Center where he used to work and requested for some medicine.
- **PW6 (A.S.P Nansamba Regina)** that on the 12th of April 2012 she conducted an identification parade at which Pw2 (**Mayanja**) picked out the accused as the person he had seen at Gayaza Health Centre on the 11th April 2012 at 6:00pm just before the murder of the victims.
- That there had been misunderstandings between the accused's family and the deceased's family over land and the accused had attempted to kill the **late Nakanwagi Paulina** on two occasions.
- **PW4 (SPC Semwangu Joseph)** who visited the scene soon after the attack found one of the bodies at the entrance to the house, while the other was inside the house, and he recovered a spent cartridge about five paces to the doorway to the house.

Ssenoga (Pw1)'s identification evidence.

Ssenoga (Pw1) the sole identification witness maintains that he identified the accused from a distance of 15 feet with the help of torch light.

Counsel Nyanzi for the accused submitted that Pw1's (**Ssenoga**) identification evidence should be disregarded since the circumstances of fear and terror due to the bullets that were being fired did not favor positive identification.

The learned prosecutor highlighted the following factors, arguing that their existence reduced the possibility of mistaken identity and rendered Pw1's (**Ssenoga**) identification evidence reliable.

- He had a torch which he flashed at the accused,
- He knew/knows the accused (**his cousin**) very well,
- He identified him at close range (**a distance of about 15 feet**), a fact which **Pw4 (SPC Semwangu Joseph)** who picked a spent cartridge which was 5 paces from the door way supports.

The accused raised an alibi, maintaining that he was at his wife's home in Kalisizo Prison barracks from 6:00am of 11th April 2012 till 1:00 am of 12th April 2012 when the police arrested him.

The defence of alibi

The law is that an accused person who sets up an alibi assumes no burden to prove the truth of his alibi. The burden to disprove an alibi by adducing credible evidence placing the accused at the scene of the crime at the particular time lies with the prosecution, see **Tumusiime Isaac v Uganda (Criminal Appeal No. 213 of 2002)** and **Katugena Stephen v Uganda (Cr. Appeal No.60 of 1999)**.

It is the duty of the court to direct its mind properly to any alibi raised by an accused. It is only when the court comes to the conclusion that the alibi is unsound that it would be entitled to reject it, see **R v Thomas Finel (1916) 12 Cr. App. R.77.**

Counsel Nyanzi pointed to the fact that **Pw2, (Chief Warder Mujwiiga Godfrey)** supported the evidence that the accused was given permission to go and attend to his sick child. He invited the court to find that the accused gave a credible account of his movements and to believe his account of events.

The learned state attorney however argued that Kalisizo where the accused said he spent the day and Kyotera where the scene of crime was border each other. The accused could therefore move

and accomplish his mission in a short time. Further that between 7:00 pm and 1:00am the accused was alone. He therefore had time to accomplish the mission.

Pw2's (Chief Warder Mujwiiga Godfrey) evidence that the accused was given permission and he went to attend to his sick child is double edged. For the defense it tends to support the fact that the accused indeed asked for the permission and stated the purpose to be to go and attend to his sick child. The evidence does not prove that he in fact went for that purpose.

For the prosecution it rules out the possibility of the accused having been at his work station at the material time.

I am alive to the fact that Ssenoga is a single identifying witness. The law relating to the evidence of a single identifying witness is that the court may convict on it after warning itself and the assessors of the special need for caution. The reason for the special need for caution is that there is a possibility that the witness might be mistaken. See **Christopher Byagonza Vs Uganda Crim. Appeal No. 25 of 1997** and **Abdalla Nabulere & Another vs Uganda Crim. Appeal No. 9 of 1978.**

Indeed in **John Katuramu vs. Uganda Criminal Appeal No. 2 of 1998** it was held:

“The legal position is that the court can convict on the basis of evidence of a single identifying witness alone. However, the court should warn itself of the danger of possibility of mistaken identity in such case. This is particularly important where there are factors which present difficulties for identification at the material time. The court must in every such case examine the testimony of the single witness with greatest care and where possible look for corroborating or other supportive evidence. If after warning it-self and scrutinising the evidence the court finds no corroboration for the identification evidence, it can still convict if it is sure that there is no mistaken identity.”

The test of correct identification was laid down in **Abdalla Nabulere & Another vs Uganda Crim. Appeal No. 9 of 1978** as follows:

“The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between

the witness and the accused, the lighting and the familiarity of the witness with the accused.”

These principles were restated in **Lutwama David vs. Uganda (Criminal Appeal No.4 of 2003)** and were summarised as follows;

1. Identification of an accused can be proved by the testimony of a single witness, but,
2. There is need for testing with the greatest care the evidence of such a witness regarding identification, especially when the conditions favouring correct identification are difficult.
3. In such case there is need for other evidence pointing to guilt from which it can be reasonably concluded that the evidence of identification can safely be accepted as free from the possibility of error.

In keeping with the above guidelines I have given anxious consideration to the circumstances under which the identification took place in this case.

The time of the day

According to Pw1 and Pw7 it was about 8:00pm. But Pw1's evidence was that he flashed a torch at the assailant and was able to see the accused. Counsel Nyanzi pointed to the fact that there must have been fear and terror due to the shooting, and that the witness could not have identified the attacker under those circumstances.

My view, based on the absence of evidence that Pw1 (**Ssenoga**) was overcome by fear and terror, is that it was not un-reasonable, impossible, un-natural, illogical, misplaced or farfetched for him to flash a torch at the assailant even in those circumstances. Were it to have been naturally un-reasonable, impossible, illogical, misplaced or farfetched to do so, there would be basis for doubting his evidence. Since there is no reason to doubt it, he must be believed as I hereby do, and with that, the fact that there was light from the torch which was directed at the assailant. This renders the fact that it was 8:00 pm and therefore dark of no consequence.

That there must have been fear and terror due to the shooting.

The submission that there was fear and terror was only based on an untested assumption that fear and terror is the only natural reaction to the sound of bullets. That assumption must be treated with caution especially in this case where the witness was not asked whether he feared and/or was terrorised. His evidence was that he flashed a torch at the assailant and identified him. He must be believed.

The distance

Pw1's evidence that he identified the accused from a distance of 15 feet was lent credence by that of **PW4 (SPC Semwangu Joseph)** who recovered a spent cartridge from a distance of 5 paces from the door way. Pw1 testified that he had been standing at the doorway when the assailant released some of the bullets. While in court the witness practically illustrated the distance at which he identified the assailant. I was persuaded that it was about 15 feet, and that at such distance one could identify another under the circumstances of the case.

The relationship between the parties.

It is common cause that the protagonists were cousins who knew each other well.

The length of time the encounter lasted

It appears that the witness flashed the torch once, and that the length of time taken watching the attacker was brief.

I have subjected the above evidence to the tests set down in **Abdullah Bin Wendo and Another V R (1953) 20 E.A.E.A**; and **Roria v Republic (1967) E.A. 583** and as restated in **Katugena Stephen v Uganda (Cr.Appeal No.60 of 1999)**.

I make the following findings;

1. The accused was well known to Pw1 (**Ssenoga**).
2. The witness flashed a torch at the assailant. There was therefore sufficient light to support positive identification.

3. He properly identified the assailant a distance of 15 feet.

I noted the fact as it appears to have been, that the witness flashed the torch once, and that the length of time taken watching the attacker was brief, but since he knew the accused well and yet the light was specifically directed the assailant, the risk of mistaken identity was completely removed.

I cautioned the assessors as I hereby do to myself of the danger of relying on uncorroborated evidence of a single identification witness in difficult circumstances, but the facts of this case persuade me of the total positiveness of the identification.

The above evidences alone can form a basis for an adverse finding that **Pw1 (Ssenoga)** correctly/positively identified the accused as the assailant, and that the accused was placed at the scene for purposes of committing the offence. This however is not the end of the story.

Pw7 (Mayanja)'s evidence.

He testified that he saw the accused at **Gayaza Health Center** on the 11th April 2012 at about 6:00 pm. **Gayaza Health Center** is about 200 metres from the scene, and the murder took place at about 8:00pm. The accused maintains that at 6:00pm he was at his home at Kalisizo.

The details of Pw7's (**Mayanja**) interaction with the accused are important since they help to show the length of time he interacted with the accused, and therefore help determine the quality of this identification evidence.

According to **Pw7 (Mayanja)**, a man (**he later came to know as the accused**) approached him and inquired whether the health workers were around. Pw7 told him that they had signed off. The accused expressed self-pity and told him that he wanted magnesium drugs for treatment of ulcers. Pw7 then told him that even if the health workers had been around he would not have got the drugs (magnesium) since his information was that those drugs were out of stock.

The accused left, but as he was going, Pw7 continued to stare at him since he did not know him. The accused stopped at the end of the health center compound near some thickets and made phone calls. Pw6 closed the health center and left him standing in the same position. In court

Pw7 identified the accused as the person he had seen under the circumstances I have described above.

At an identification parade that was conducted the following day (12th April 2012), Pw7 identified the accused as the man he had seen on 11th April 2012.

The identification parade.

PW6 (A.S.P Nansamba Regina) who conducted the parade said that she instructed the accused who was in his own cell not to come out to ensure that he is not seen. Mayanja (**Pw7**) who was to identify the assailant was hidden outside the police station. **PW6** explained to the accused what she was going to do, and explained to him his rights, for example, the right to choose the position he felt like. She got eight persons of similar features as the accused. The accused positioned himself where he wanted among the eight. After they were paraded, Mayanja (**Pw7**) came. She told him that he could tell the person to walk, talk or stand in a particular position.

Mayanja (**Pw7**) requested that the participants move around and talk since he had seen the suspected assailant walk. He identified the accused as the person he had seen at Gayaza Health Centre on the 11th April 2012 at 6:00 pm.

He (**Mayanja Pw7**) was then taken to a certain room. The accused when asked said that he was satisfied with what had been done. The exercise was repeated after the dressing and position of the accused had been changed. Mayanja again identified the accused. The accused said that he was satisfied with what had been done. Pw6 made a report (**Exhibit P4**) which the accused signed.

The defense however said that accused was first taken to **Pw6's (Nansamba)** office where he found **Pw7 (Mayanja)** before the parade was conducted. The accused did not know what the parade was about. Pw6 only told him that he would know what it was. She got inmates out of the cells eight of whom were young short children who had been arrested for being idle. There was only one man. They were lined up with him as the first on the line.

Pw6 (Nansamba) came with **Pw7 (Mayanja)** who had been with her in her office. She then told the accused that she was conducting an identification parade so that the person who was suspecting him could pick him out. The accused objected but **Pw6 (Regina Nansamba)** took

Pw7 (Mayanja) and told him to pick out the person he was suspecting. She had placed **Pw7 (Mayanja)** near the accused. Pw7 started with the accused and pointed at him.

Pw6 (Regina Nansamba) removed the children (i.e. the rest of the participants). She took the accused around and he was again made to be the first on the line. **(Mayanja) Pw7** was not removed. He still pointed at the accused.

The accused was told to sign a certain document. He first objected but he later signed without reading through it. Pw6 did not read it to him.

Counsel Nyanzi argued that the identification parade was not properly conducted because **Pw7 (Mayanja)** was introduced to the accused before the parade and the accused was not placed among people who look like him. They were inmates who were shorter than him contrary to what Pw6 (**Nansamba**) told court.

The learned Prosecutor submitted that Pw7's (**Mayanja**) and Pw6's (**Nansamba**) evidence was not discredited. Moreover the accused, an educated prison warder must have signed the parade report after understanding its contents.

Two issues are to be determined;

1. The credibility and veracity of the evidence,
2. The compliance with the guidelines relating to conducting identification parades.

The credibility and veracity of the evidence.

- The defense maintain that the accused was first taken to **Pw6's (Nansamba)** office where **Pw7 (Mayanja)** was sitting before the parade was conducted. The prosecution said that the Pw7 was kept outside the police station, and was only brought after the parade had been formed.

I considered Pw6 and 7's evidence about how the parade was conducted. They were consistent had no reason to incriminate the accused or to tell lies. They testified that Pw7 came from outside the station after the parade had been formed. Pw7 was clear that he did not enter any

office at the police station. He testified in a flowing manner and impressed me as a witness of truth. I believed Pw6 and 7's evidence and rejected the defense account of events.

- That the accused did not know what the parade was about.

Pw6 was clear that she briefed the accused over what was to take place and even informed him about his rights. There is nothing to suggest that she had reason to lie to the court. I again believed her account of events.

- That eight inmates who were young short children who had been arrested for being idle were the ones who participated in the parade. There was only one man. They were lined up with the accused as the first on the line.

Pw6 (Nansamba) was clear that the accused was informed that he had a right to position himself where he wanted. She was not challenge on this. The version that the accused was placed at the beginning of the line was not put to her to give her a chance to accept or deny it. It must be an afterthought which I reject.

The report (Exhibit P4) which the accused signed shows that nine people participated in the parade. Their ages were 23, 24, 25, 26, 30, 36,36, 36, and 43 years. The assertion that they were young children is not borne out in the evidence. Similarly, the assertion that they were inmates who had been arrested for being idle is not borne out on the record since the report shows that three were Boda-Boda riders, three were police men, one was a technician and one was a fish monger. They were not idlers and even if some were inmates, a good number were not.

- The rest of he complaint was that **Pw6 (Nansamba)** came with **Pw7 (Mayanja)** who had been with her in her office. She then told the accused that she was conducting an identification parade so that the person who was suspecting him could pick him out. The accused objected but **Pw6 (Regina Nansamba)** took **Pw7 (Mayanja)** and told him to pick out the one he was suspecting. She had placed **Pw7 (Mayanja)** near the accused and that Pw7b immediately started pointed at him. **Pw6 (Regina Nansamba)** removed the children. She took the accused around and he was a gain made to be the first on the line. **(Mayanja)** Pw7 was not removed. He still pointed at him. Pw6 then told the accused to

sign a certain document. He first objected but he later signed the document without reading through it. She did not read it to him.

These allegations are again against the weight of evidence and are not borne out on the record. They were not even put to the prosecution witnesses for them to admit or deny them. I believed the prosecution account of events and rejected the defense assertions as mere afterthoughts.

The compliance/non-compliance with the guidelines relating to conducting identification parades.

The relevant guidelines are laid down in *SSENTALE V. UGANDA 1968 E.A 365* and they are;

- The accused should be informed that he may have an advocate, friend or relative when the parade takes place.
- The officer in charge of the case, although he may be present does not carry out the identification parade.
- Witnesses should not see the accused before the parade.
- The accused must be placed among at least eight persons as far as possible of similar age, height, general appearance and class of life of himself or herself.
- The accused should be allowed to take any position he chooses. He should be allowed to change position after each identifying witness has left, if he so desires.
- Care has to be exercised that witnesses are not allowed to communicate with each other after they have been to the parade.
- People with no business at the venue must be excluded.
- A careful note should be made after each witness leaves the parade, recording whether the witness identifies or other circumstances.
- If the witness desires that the accused walk, hear him speak, see him with a hat on or off, this should be done.
- All participants must do the same as a precautionary measure.
- The witness must touch the person he/she identifies.
- At the end of the parade or during the parade the accused should be asked if he/she is satisfied that the parade is being conducted in a fair manner and a note of the answer should be made.

- When introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Do not say “pick out somebody,” or influence him in any way whatsoever.
- While conducting the parade the responsible officer must act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably.

The evidence on record supports the suggestion that Pw6 was alive to the need to comply with the above guidelines, and that she, by and large, complied with them. The only sticky issue relates to the fact that the participants were of mixed ages. The fact that the participants varied in age does not in my view water down what was done given that the guidelines only require that the ages “**should as much as possible be similar to that of the accused**”. I find that the ages, 23, 24, 25, 26, 30, 36, 36, 36, and 43 years are “as much as possible be similar” to that of the accused.

D/ASP Nansamba Regina (PW6)’s evidence about how the parade was conducted tallied with that of the identifying witness Pw7. They were not shaken in cross examination. Pw6’s evidence that the accused did not object to the manner in which the parade was conducted was not challenged. The Police Form 69 on which she recorded the proceedings of the parade was received in evidence without objection from the defence. I find that the identification parade was properly conducted and that **Mr. Mayanja (Pw7)** identified the accused at the parade.

Pw7’s interaction with the accused took place at 6:00pm, when it was still day time. Gauging from the conversation they had, the interaction took a reasonably long time sufficient for Pw7 to take note of and later be able to properly identify the accused as he did at the identification parade and in court.

Pw7 testified in a straightforward manner. He did not waver or shake and appeared confident. Moreover there is nothing to suggest that he had reason to lie or to incriminate the accused. He convinced me to have been a witness of truth. I believed the evidence that he saw and interacted with the accused as he testified.

Through **Pw7's (Mayanja)** evidence the prosecution has partially disproved the alibi raised by the accused by proving that on the 11th April 2012 at about 6:00pm the accused was at Gayaza Health Centre with Pw7 and not at his wife's home at Kalisizo as he testified.

The fact that the accused was within 200 meters distance from the scene two hours before the murder lends credence and provides sufficient corroboration to the evidence that **Pw1 (Ssenoga)** saw him at the scene, and was therefore not at his wife's home at Kalisizo at 8:00pm as he testified. I find that the alibi raised by the accused has been sufficiently disproved.

MOTIVE

In **Syson Muganga Vs. Uganda (Cr. Appeal 33 of 2005)** it was held that while motive is not dispositive in a criminal action, it can nonetheless provide useful evidence which might establish a clearer understanding of the circumstances surrounding the event. **Tinkamanyire Vs Uganda (1988-1990) HCB 5** was cited with approval for the finding that the existence of a motive makes it more likely that the suspect did in fact commit the offence.

The evidence that there was land dispute between the accused's family and the deceased's family, and that the accused had attempted to kill the late Nakanwagi Paulina on two occasions is relevant. The accused denied the existence of the land dispute but independent witnesses like **Pw5 (Okao)** testified to the existence of the land dispute and the reports of the attempted violence towards the late Paulina Nakanwagi by the accused. Okao's evidence lends credence to Pw1's in this regard. I am positive that the dispute existed. Its existence provides a motive for the killings. That motive makes it more likely that the accused murdered the deceased persons, and taken together with the evidence of Pw's 1 and 7 leaves no doubt that the accused was the assailant.

Counsel Nyanzi invited the court to take note of the fact that even while the accused was in prison (**Mayanja**) Pw7 was targeted by people who considered him a threat, meaning that other people not being the accused killed the deceased.

The fact however that the accused was in prison should not be the basis for the conclusion that he could not make the threats alluded to by counsel. It is however not helpful to go into the details

of whether or how he managed to do so. That is not in issue here. Suffice it to say that there is sufficient proof that the accused killed the deceased persons. If any threats were made to **Pw7 (Mayanja)** on account of his impending testimony in the case, they must have been made by the accused.

The gentlemen assessors were satisfied that the accused has been proved guilty beyond reasonable doubt. They advised me find him guilty and convict him as indicted. I am in total agreement with the opinion of the gentlemen assessors.

I am satisfied beyond reasonable doubt that the prosecution has proved the accused's participation in the killing of **Nakanwagi Paulina** as charged in count one, and in the killing of **Nagawa Justine** as charged in count two.

I accordingly convict him as charged on each of the two counts.

Margaret Tibulya

Judge

15th June 2016.