



THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

Case No: HCT-00-CR-SC-0104-2015

UGANDA ===== PROSECUTION

VERSUS

A1: NO. 51472 PC JADEN ASHRAF
A2: NAKKUNGU SANDRA
A3: NABIKOLO SARAH SEBUNYA

} ===== **ACCUSED**

J U D G M E N T

BEFORE HON. MR. JUSTICE WILSON MASALU MUSENE

The three Accused persons were indicted with the offence of Murder Contrary to Section 188 and 189 of the Penal Code Act.

The particulars were that No. 51472 PC Jaden Ashraf (A1), Nakkungu Sandra (A2) and Nabikolo Sarah Ssebunya (A3), on the 17th day of October 2014 at Diplomat Zone, Muyenga in Kampala District with malice aforethought killed Ssebunya Eriya Bugembe Kasiwukira.

The prosecution was handled by M/S Komuhangi Khaukha and M/S Samali Wakooli Senior State Attorneys, while the accused persons were represented by Senior Advocates, Mr. McDusman Kabega for A3, Mr. Nsubuga Mubiru for A2 and, Mr. Ladislaus Rwakafuzi for A1.

When the accused persons were arraigned in court, they denied the charge.

The duty was accordingly cast on the prosecution to prove all the essential elements of the offence charged. An accused person or persons do not bear any duty to prove their innocence as they are presumed innocent until proved guilty. The principle of law was laid down in Uganda since the decision of **Sekitoleko V.R [1967] E.A. 531**. The same principle was also entrenched in the Constitution of Uganda, **Article 28(3)(a)**. The essential elements of the offence of Murder which the prosecution is obliged to prove beyond reasonable doubt are:-

- (a) That the person alleged to be murdered is dead.
- (b) That the deceased died as a result of unlawful act or omission.
- (c) That whoever killed the deceased did so with malice aforethought.
- (d) That the Accused persons are the ones who participated directly or indirectly in causing the death of the deceased.

The above elements were restated in the case of **Uganda Vs. Aramanzani Mubiru [1996] H.C.B. 35**.

In a bid to prove their case as duty-bound by law, the prosecution called a total of 23 witnesses. They also relied on the video recording which was displayed in court during the hearing.

In their respective defenses, all accused persons denied committing the offence.

As far as the first ingredient of the offence is concerned, the testimony of **PW2, William Male Mutumba** - a Consultant Pathologist was clear and elaborate. He testified that the document which was later exhibited in Court and marked P.Exh.4, was a post-mortem report in respect of one Ssebunya Eriya Bugembe Kasiwukira (Deceased).

PW2 examined body and signed the report.

PW2 stated that by the time of examination, the body was still warm and soft. The deceased had bled through both ears and nose. His face was covered with clotted blood. There were abrasions on the left side of head and back of the head. Fore head was affected, back of right hand and right knee joint and left. There were abrasions on the shoulders and left-mid back and lower side and also in the region of the waist. Others were in the chest, right foot (mid side).

PW2 added that internally, the skin over the head had a blood clot. There was a fracture on right hand of head. There was a fracture at base of skull. The skull fractured from one ear to the other. He had ruptured ribs No.2 to 6. Both lungs had bleedings. The liver was injured. He also had fractured bones of the pelvis. He concluded that the cause of death was multiple crash injuries.

All the prosecution witnesses alluded to the fact of death of the deceased who was consequently buried. Even accused in their Defence did not contest the fact of death.

I therefore hold that the first ingredient of the offence has been proved by the prosecution beyond reasonable doubt.

I now come to the second ingredient as to whether the death of the deceased was unlawful. Since the decision of the former East African Court of Appeal in the case of **R. Gusambizi s/o Wesonga (1948) 15 E.A. EACA 65**, it is now settled law that all homicides are presumed unlawful unless excused by law. And more recently, in the case of **Akol Patrick, Ewaku s/o Edeu Odongo Samuel Omotojo s/o Ogwang and Ekoot Michael Vs. Uganda, Criminal Appeal No. 60 of 2002, reported in (2006) HCB Vol. 1, page 4**, the court of Appeal of Uganda reiterated that in homicide cases, death is always presumed unlawfully caused unless it was accidentally caused in circumstances which make it excusable.

In the present case, the testimony of **PW2, Dr. William Male Mutumba** has already been summarised. It gave detailed injuries, including fracture of the skull. The deceased also had ruptured ribs and cause of death was multiple crush injuries. Some witnesses like **PW3, Mugwere Frederick** and **PW4, No. 43452 Sgt. Byamugisha Aloysious** found the injured body at the scene of crime.

Similar testimony was given by **PW5, No. 31604 W/Sgt. Achan Betty** and **PW6, Komakech Richard**. PW6 not only saw a car parked on the left hand side of the road, but he saw the deceased in pair of short and Red T-shirt and heard a bang behind him. PW6 saw and realized that the same vehicle which had parked had knocked the very man (deceased) whom he by-passed.

Given the above circumstances, it is overwhelmingly clear that the death of the deceased was unlawfully caused. This court therefore had no wonder that even all Advocates for Defence conceded to the 2nd ingredient of the offence.

For record purposes therefore, this court concludes that the prosecution has proved the 2nd ingredient of the offence beyond reasonable doubt.

The third ingredient is whether whoever killed the deceased had malice aforethought. Malice afore thought is defined under **section 191 of the Penal Code Act** to mean:-

- a) An intention to cause death of any person, whether such person is killed or not; or
- b) Knowledge that the act of omission causing death will probably cause the death of some person, whether such person is the one actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused.

Malice aforethought is therefore a mental element or murder which is difficult to prove by direct evidence. In the case of **Akol Patrick & others Vs. Uganda** quoted here in above, the court of Appeal held that in arriving at a conclusion as to whether malice aforethought has been established, the court must consider the weapon used, the manner in which it was used and the part of the body injured.

In the present case, and according to PW6, Komaketch Richard, the killer vehicle was parked on the left side of the road. The car was giving double indicators (a sign of danger or trouble ahead). It was said to have a silver guard in-front and when it knocked the person PW6 had bypassed, the man fell on the bonnet of the car and then in the middle of the road. PW6's further testimony was that the man was knocked on the right hand side of the road and the car sped away. PW6 described the killer vehicle in details. The testimony of PW6 was corroborated by PW7, Kibwota Edward.

When the above testimonies of PW6 and PW7 as compared together with that of PW3, PW4 and PW5, coupled with the Nature of injuries on the deceased, this court is left in no doubt whatsoever that whoever injured and killed the deceased had malice aforethought. The third ingredient of the offence has therefore been proved beyond reasonable doubt.

I now turn to the forth and last ingredient of the offence, notably the identification of Accused persons as the ones who caused the death of the deceased. I hasten to add that this was the key bond of contention by the Advocates for Defence as well as Counsels for State (Prosecution); And before I delve into the detailed submissions and evidence on record, I wish to point out that the prosecution evidence in this regard is partly direct identification and largely circumstantial evidence.

In the case of **Sharma Kooky and Kumar Versus Uganda, Supreme Court Criminal Appeal No.44 of 2000, The Supreme Court of Uganda relied on the decision of Simon Musoke V.R. (1958) E.A. 715** by the then East African Court of Appeal. It was held that in a case depending exclusively upon circumstantial evidence, a Court must before deciding on a conviction find that the inculpatory facts are incompatible with the innocence of the Accused and incapable of any explanation upon any hypothesis than of guilt.

In the present case both the prosecution and defence handled the matter of participation on case by case basis, starting with A1, Jaden Ashraf.

Counsel for the State referred to the evidence of PW16 Awuyo Geoffrey to the effect that A1, through one Adwenya Alex had approached PW16 to kill a certain rich man living in Muyenga. And in pursuit of that, PW16 together with Adwenya Alexx and A1 made an attempt to waylay the deceased near his home, which plan flopped.

Counsel for State added that according to PW16, the killing was on the instructions of A3, Nabikolo Sarah Ssebunya, for reasons that the deceased had brought evil spirits (Mayembe) in the home. Reference was also made to the evidence of PW20, Byamukama Richard, who was said to be a close friend of A1.

It was submitted that between June and July, 2014, A1 approached PW20, Byamukama to assist him in killing a certain rich man whom the wife wanted dead, reason being evil spirits or *Mayembe* in local language. PW20 was said to have been approached after Awuyo and Adwenya had failed.

It was further submitted by the state that PW20, Byamukama had several meetings with A1 before communication breakdown and that when PW16 heard of the death of deceased over the news, he recalled A1 as the person who had approached him to kill.

Learned Counsels for the State then made reference to the Audio recorder which was given to PW16 and where two male voices, A1 and PW20 discussed the death of deceased and the money involved.

Counsel for the state submitted that whereas the recording was not very clear, that PW19 Serwanga Lutaaya Badru was able to follow up the conversation. They also referred to evidence of PW22 – Joel Ayiko who recorded Alex Adwenya and A1, Jaden.

Further submissions by the state were that A1 should not be permitted to turn round that he was forced to say whatever he stated in the video as he did not state who forced him and that A1's lies that he did not know the deceased should not be believed.

They added that A1's lies corroborate the prosecution evidence. The case of **Uganda Versus Godfrey Buterema, High Court Criminal Session Case No.100 of 2012** from Mbale High Court was quoted in support.

Counsel for the State also referred to the evidence of PW14, Kimansule Bosco who saw A1 sitting on the steering wheel of 17.10.2014, a vehicle owned by A2, Sandra Nakkungu. And that thereafter, the deceased was knocked dead, hence putting the Accused No.1 at the scene of crime.

Learned Counsel for A1, Mr. Ladislaus Rwakafuzi on the other hand submitted that the testimony of PW16, Awuyo Geoffrey should be dismissed as PW16 had been in police custody and was allegedly instructed what to state in court. He added that even Adwenya appeared in the video under restraint. It was further submitted that PW16 had a grudge with A1 and that PW20, Byamukama should also not be believed, much as he knew A1.

Counsel for A1 also attacked the accuracy of the video recording and that A1 did not know the deceased, but knew the road to deceased's home.

Mr. Rwakafuzi also submitted that **PW14, Kimansule John Bosco** should not be believed as his evidence was contradictory and he wondered why Kimansule did not report to police.

Counsel for A1 concluded that A1 never participated in the deceased's death as he was on patrol duty and that he be acquitted. I have carefully considered the submissions on both sides as far as the participation of Accused No. 1, Jaden Ashraf is concerned. I have also considered and weighed the prosecution evidence on record.

PW16, Awiyo Geoffrey testified that he knew A1, Jaden very well and that Adwenya Alex told him that Jaden has business of killing people. PW16 further told this Court that A1, Jaden sent for him and Adwenya and took them to the rich man's home in Muyenga and thereafter bought a panga for Adwenya. PW16 further told this court of the preparations as follows:-

“The instructions from Jaden were that we should be near. At 8.00pm, we went to the banana plantation. At 9.00pm, the rich man passed as we did not know the vehicle. Then Alex Adwenya called Jaden who came with a gun. He was wearing uniform and a jacket. Adwenya Alex had a panga. The banana plantation was near the rich man's home. We went there on foot at 8.00pm. The rich man passed us straight to his house. Thereafter we saw the driver in a white vehicle TX. For us, we wanted money from Jaden. We did not want to kill the rich man. Jaden had promised us, UGX. 20,000,000= and a vehicle. Jaden told us the money was from the rich man's wife. Jaden was to come with his gun, then I would open the door of the car and we cut him. That was the plan.”

Another witness who implicated A1 was **PW14, Kimansule John Bosco**. He knew A1 as a policeman working at Muyenga community police.

PW14 testified that he was shocked at the sudden death of the deceased, Kasiwukira on 17.10.2014. He added that on the previous day, 16.10.2014, he had seen Sandra's car following the deceased. And that as deceased stopped to greet him, that the vehicle of A2 (Sandra) passed and parked at Lutaaya's gate and was driven by a man. He added that A2's car was driven straight to her home thereafter.

The more relevant part of Kimansule's testimony pinning A1 was what PW14 stated during cross-examination by Mr. Mubiru Counsel for A2. On page 46 of the proceedings, PW14 had this to say:-

“It is true I saw A2's Pajero on 16.10.2014. It is not the date I last saw Kasiwukira alive. I last saw him on Friday 17.10.2014 the day he died. It was between 6.30 am and 7.00am. I saw the deceased getting out of his residence and sloping down. I had a customer I was taking to Kabalagala. I took a short cut through Diplomat Road. I came across Sandra (A2's) car at a gate. Then I saw a man I knew in the vehicle. I realized it was Jaden wearing dark glasses with his head on the steering. I by passed the car. As I was getting near Kasiwukira's home, I saw him Kasiwukira coming out of his home in a pair of shorts and talking on phone. I bypassed. When I reached the stage I got another customer towards American Embassy. It was approaching 7.00am. My fellow cyclist rang me that Kasiwukira had been knocked by a car and died. I am very sure that the vehicle I saw was Sandra's car. I had known it. It was UAE . . . A. That was on 17.10.2014. That was in second statement on 17.10.2014. On 17.10.2014 I stated 16.10.2014 in the first statement. Kasiwukira was walking when I last saw him; and before I reached Industrial area, I heard Kasiwukira was dead”.

The evidence of PW14 and PW16, together with PW6, points an irresistible finger at the guilt of A1. The testimony of PW6 did not only corroborate what PW14 had stated, but it was sufficient circumstantial evidence connecting A1, Jaden with the commission of the offence in question.

PW6 stated that:-

“On 17.10.2014, I was taking my daughter very early in the morning. As I reached Kalema Drive, I found a car parked on the left hand side of the road. The car was giving double indicator. It was tinted and golden in colour. It had a silver guard in front. Then there was a blue colour in between. It was an old model and big. After passing the car, I reached a junction on the right hand side. I saw a man coming and was talking on phone. We bypassed and the man continued on the right side. He was wearing a pair of shorts and a T-shirt (Red). He was wearing black shoes.

As I moved, I heard a vehicle coming behind me. I gave way. The speed of the car was low. Then I heard a Bang behind me. When I turned, I saw the same vehicle which had packed knock the very man whom I had by-passed. The man fell on the bonnet of the car and then fell on the road (in the middle). The man was knocked on the right hand side of the road. That was a wrong side as the vehicle should have been on the left. To my surprise, the car sped away.”

PW6 added that the people in-front of him tried to stop the car which had knocked the deceased but the car did not stop. And as already noted, PW6 identified the killer car as an old model Pajero with a flat screen in-front. The said vehicle was tendered in Court as an exhibit and marked P.Exh.4. The said killer vehicle was also seen at the same place by PW7, Kibwota Edward. PW7 maintained that he did not see the vehicle once or twice, but three times. In effect, PW7 clearly corroborated what PW6 stated. In such circumstances I reject the Defence of A1 that he was told to implicate Sandra and Mrs. Kasiwukira upon being promised UGX. 200,000,000=, a transfer and construction of a house as an afterthought.

A1’s Defence that when he refused the money from the rich man Kirumira to pin Sandra and Mrs. Kasiwukira he was tortured leaves a lot to be desired .

This court finds and holds that the bringing in the name of Kirumira from the blue was like a drowning man trying to hold onto a snake for safety. Kirumira was not an Accused and neither was he a witness. It was therefore uncalled for on the part of A1 to spoil the name of such a person like Kirumira. A1 should dance to his own music other than dragging in the names of innocent people and so this court hereby clears Mr. Kirumira’s name as free of any blemish.

Secondly, whereas A1, Jaden claims that he was tortured, the testimony of PW1, Dr. Moses Byaruhanga who examined him all is to the contrary. PW1 told Court that the findings in respect of police constable Jaden Ashraf revealed that he had no physical injuries and he was of normal mental status.

However, the doctor added that A1 was ill, suffering from cough. Otherwise it is not indicated on PF24 (P.Exh. 4) that the cough was as a result of torture.

Even then, A1 did not deny Byamukama (PW20) or Awuyo or Adwenya. He even admitted being in the video recording. So the submission by Counsel for A1 that PW20, Byamukama and A1 knew each other but PW20 was not telling the truth is also rejected. On the contrary, I find and hold that A1's meeting with Awuyo and Byamukama, and A1's being seen in the killer vehicle on the morning of 17.10.2014 by PW14 squarely puts him at the scene of crime and the defence of alibi collapses.

The conclusion of this court therefore is that A1, Jaden Ashraf now in the dock, was not only seen in the killer vehicle, but that he was the one who knocked the deceased dead.

Having found and held that the prosecution has proved all the four ingredients of the offence against A1, beyond reasonable doubt and as advised by the gentlemen assessors, I do hereby, convict A1 of Murder C/S **188** and **189** of the **Penal Code Act**.

A2, Nakkungu Sandra:

Counsel for the state submitted that A2 was a sister in-law to the deceased, and that the evidence on record revealed that her vehicle, Mitsubishi Pajero UAE 018A, exhibited in court, was the killer vehicle.

They referred to the testimonies of PW14, Kimansule whose testimony was that on 16.10.2014, PW14 saw the same motor vehicle of Sandra Nakkungu drive in Muyenga, following the deceased, and that such evidence was not contested. Learned counsel for the State further

maintained that on 16.10.2014, PW8, Gabriel Bitekyereze went with Sandra to Kamengo in the very vehicle (Pajero UAE 018A) and returned and that it was Sandra driving.

It was further submitted by Counsel for State that the motor vehicle in Question was sold to PW8, Gabriel Bitekyereze on 26.10.2014, which he took to PW11, Bengo Lawrence for repairs. There was also contention on the Sale Agreements and the Defence case that the vehicle was sold on 16.10.2014 before the death of the deceased, Kasiwukira on 17.10.2014.

Learned Counsel for the State also submitted on the bad relationship between deceased and A2 after Deceased had made A2 pregnant, which pregnancy, A2 aborted.

Reference was also made to the evidence of PW13, Silva Habimaana who was assigned to monitor the movements of A2 and A3 by the deceased; And further that PW20, Richard Byamukama went with A1 to meet A2 for purposes of planning for the death of the rich man.

Emphasis was that Sandra had been involved in prior planning.

Counsel for the State also referred to the evidence of PW6, Komaketch Richard and PW7, Kibwota Edward, who all saw the Toyota Pajero Mitsubishi vehicle parked. They added that the findings of PW15, inspector of vehicles were very pertinent, and concluded that the exhibited car was the killer vehicle.

Counsel for the State also discussed the conduct of A2, particularly her disappearance from PW14, Kimansule after the incident and why she sold the vehicle thereafter. The other Questionable conduct of A2 was changing of telephone lines and a strange behavior of A2 fearing to reach the burial. Reference was also made to the fears expressed by A2 to PW14 of eminent arrest.

They concluded that it was not conduct of an innocent person.

Mr. Nsubuga Mubiru for A2 in reply stated that the vehicle in question had gone through many hands after it was sold off by A2. He also submitted that there was doubt in the Prosecution case and that PW8 should have also been jointly charged. He wondered why Yassin did not come to court. He further submitted that a conviction is never based on the weakness of defence but strength of Prosecution. Learned Counsel concluded that no case has been proved against A2.

I have not only followed and considered the detailed submissions on both sides for and against A2, Nakkungu Sandra, but I have also analysed the evidence on record. The key witness relied on by the Prosecution in connection with A2 was PW8, Gabriel Kwitegyeke. He testified that he knew A2, Sandra Nakkungu whom he met on 13.10.2014 on 6th street; and that the meeting was a result of an accident involving a milk tanker. He added that on 16.10.2014, A2 came to their offices at 10.00am and they proceeded to Kamengo by her vehicle, a Pajero grey in colour with a blue skirting, Reg. No. UAE 018A. PW8 added that the vehicle was in good mechanical condition. And that while at Kamengo A2 agreed to go back to Kamengo with PW8 on 17.10.2014.

PW8's further testimony was that the following day, A2's telephone lines were off and that he kept on calling her in vain. He added that after 3 days, A2 called PW8 and told him she had lost a relative. And that the following day, Sandra went to PW8's office on a boda-boda without her vehicle. They then used a company vehicle to go to Kamengo second time and that as they were in Kamengo, he saw Sandra's vehicle pass. PW8 further testimony was that A2 called the driver who came back and they talked; and when PW8 asked A2 what had happened and she revealed that it had a mechanical problem. PW8 added that he kept on moving with Sandra on a daily basis till 26.10.2014 when Sandra had brought the same Pajero vehicle at Pride Theatre for sale.

PW8 went on to testify that they took it to Pine, Bakuli and Ndeeba, looking for buyers but in vain. He added that when they took it to the person who sold the Pajero to her, that his comments were that the mechanical condition was very bad and it had been badly sprayed.

PW8 then offered her Shs. 2,000,000= and an agreement was made. PW8 further stated that after 4 – 5 days, A2 could not return his money of UGX. 2,000,000= and so she told PW8 to sell the car. PW8 then testified that he sold it in Kisenyi at UGX. 2,000,000= after removing the bull bar.

I have had to quote the testimony of PW8 in details because not only did he become an acquaintance to A2, but A2 sold him the vehicle in question on 26.10.2014.

PW8 added that when they were summoned by police, that the O.C. /C.I.D. moved out and he asked Sandra why she was putting him in problems; And Sandra told him (PW8) that it was her Lawyers who told her not to change the statement of selling the vehicle on 16.10.2014.

During cross-examination by Counsel for A2, PW8 maintained that the vehicle in question was repaired at Wandegeya at the expense of Sandra. PW9, Ssekibuule George Wilson then purchased the same vehicle, Pajero UAE 018A from one Christopher Ssebakigye on 11.11.2014, through one Yakobo, a Court broker.

The sale Agreement between PW9 and Ssebakigye was tendered in Court and marked **P.Exh.6**.

PW11, Bengo Lawrence testified that he was a mechanic, who repaired A2's vehicle in October, 2014.

The other interesting evidence against A2 was by PW14, Kimansule John Bosco who knew A2 very well as her Boss, **Allen Sandra Nakkungu**. A2 bought a boda-boda business motorcycle for PW14.

PW14 confirmed that on previous day of 16.10.2014, he saw Sandra's car following deceased; And that on Friday after the death of deceased, he saw A2 and expressed condolences. Then A2, upon returning from A1's home told PW14 that her phones had been stolen. Then on Saturday, PW14 took A2 to Shoprite to change her old telephone lines.

PW14 also drove A2 to the funeral and three days later, A2 confided in PW14 that she might be arrested anytime. A2 also requested PW14 not to reveal anything and promised him some money.

PW14, who impressed this court as a steady and truthful witness denied loving Sandra and insisted that he saw Jaden in the Pajero before the incident very well. That was during cross-examination by Mr. Kabega on page 48 of the proceedings.

PW15 was Assistant Sgt.of Police, Waiswa Patrick who inspected M/V UAE 018A, Mitsubishi, Pajero.

The inspection was requested for on 26.11.2014. His findings were:-

"Ref. CRB 1452/2014.

Origin: Kabalagala Police Station

Inspection was carried out at Naguru.

M/S - UAE 018A

Make: Mitsubishi Pajero.

Colour: Silver and blue.

When the Bonnet of the car was opened, it was realized that it had panel beating impressions concentrated at the offside end (Right hand side of vehicle). The vehicle is Right hand vehicle. So off side end is driver's side.

The bonnet interior, had silicon glue soiled with dust between the supportive straits and ties tray. That means that while the vehicle was under repair, silicon was put to support the bonnet.

The exterior of the Bonnet had cracks concentrated at the offside end (Right hand side). The filler is used by panel beaters to fill gaps which cannot come out.

The next finding was the shade of colour paint on the bonnet was different. It was not the same as used the frame panels of the vehicle both on left and right. The colour could be same but the paint is different.

Next finding was the frame part of the Bonnet was not brought in original shape. The Bonnet lock had a sign of forced opening. The next finding was that the front Bumper Bar had provisions to screw Bull Bar holders Arms. It means the vehicle has a provision for a bull guard bar. It was not there by then. Then the screw poles had dirt settled near the Bumper where the guard sits. The front lower panel had two perpendicular scratches and bends. Where the Bull guard sits, and if it gets a knock, it is forced into the inner panel.

The windscreen had a crack on the left hand side. It also had another crack at the centre. The engine was Toyota make No. 357212295. All tyres were worn out.

His remarks were:-

Findings 1, 2 3 and 5 are indicative of repairs done on the vehicle after a crush on the offside front end (driver's side).

Finding No. 4 was indicative of the aftermath of re-spraying.

Finding No. 6 as, indicative of forced opening of the Bonnet.

Finding No.7 and 8 are indicative of a Bull front bar that was screwed on the vehicle before.

Finding No. 9 was indicative of a force of off-setting the screw on chassis.

Finding No. 10 and 11 are indicative of remnants of a crush.

Then Finding No. 12, 13, 14 and 15 are indicative of a dangerous mechanical condition.

Finding No. 17 is indicative of an altered chassis Number. That is the end of my report. I said the frame Bump Bar had dust settlements following removal of the front guard. There is a panel beating where the bull bar is screwed.

As far as finding 10 is concerned, the use of a guard bar is to prevent dents or crushes which were evident on this particular vehicle. The report was signed by me”.

The findings of PW15, the Inspector of vehicles were consistent and clearly indicated that the killer vehicle which belonged to A2 had been involved in the crush of the deceased. The involvement of A2, Sandra Nakkungu to kill the deceased also came out in the evidence of PW20, Byamukama Richard.

A1, Jaden approached Byamukama and told him of a deal to kill Kasiwukira; and then later, according to PW20, they went with Jaden on a Motorcycle and found a vehicle in which a lady was sitting. The motor vehicle was white, Harrier car and that while PW20 and Jaden sat in front of the car, the lady sat at the back. PW20’s testimony was that they found the lady already seated at the back and she was introduced to PW20 by Jaden as Sandra (A2). PW20 testified that Jaden told Sandra not to fear him as PW20 was his friend.

When PW20 told them (A1 and A2) that he wanted UGX. 50,000,000=, A2 told him she would make consultations. When PW20 asked A2 the reason for killing Kasiwukira, A2, Sandra told Byamukama that Kasiwukira had bought Mayembe to sacrifice the children and, that they had decided to kill him as he was an old man. PW20 added that A2 did not disclose the other person. PW20 went on to state as follows in his further testimony:-

“After some time, Jaden came with the same lady Sandra to meet me. Jaden was on the wheel and Sandra was in the back seat. I asked Sandra for how long she would hide her face from me. Despite Jaden’s assurances to her, she still feared me. She told me they would call me later for deposit. I told my boss who instructed me to arrest them there and then. But they did not call me.”

The evidence of PW20 clearly brought out the involvement of A2 in the plan to kill the late Kasiwukira. In my view, common intention which is defined under section 20 of the Penal Code Act was established. It states:-

“When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed, of such nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.”

It is the finding of this court therefore that A2 and A1 had the common intention to kill the deceased and so A2, Sandra is equally liable for the death of the late Kasiwukira; And as submitted by Counsel for State, the conduct of A2 left a lot to be desired and clearly corroborated the act of common intention. Questions to be asked aloud are why did Sandra disappear from PW8, Gabriel Kwitegyeki on 17.10.2014 when they had agreed to meet. And the disappearance was 3 days. Secondly, why did Sandra sell her motor vehicle, the Mitsubishi Pajero UAE 018A immediately after the death of the late Kasiwukira if not to conceal evidence? Why was the same vehicle taken for repairs, including spraying if again not to conceal evidence?

The other question is, why did Sandra change Telephone lines as brought out in the evidence of PW8 and PW14. That was not conduct of an innocent person at all. This is not to forget Sandra’s fears she expressed to PW14, Kimansule, of her imminent arrest anytime and how she besieged PW14 not to reveal any information regarding her killer motor vehicle. That evidence was never challenged and as already noted, this court found PW14 as a witness of truth.

In the circumstances, this court rejects the Defence of Sandra Nakkungu as it was punctuated by lies apart from being a sister to A3, Sarah Nabikolo Ssebunya and a girlfriend to A1, Jaden. The rest of her Defence was total lies. Sandra lied that she was not in good relationship with PW14, Kimansule and yet she had bought him a motorcycle, they were in many instances moving

together. PW14 drove her to the funeral of the deceased and she used PW14 to change the telephone lines. Sandra also lied about PW11's repair of the vehicle and as if that was not enough, she made outrageous allegations against O.C. Luzira women prison that O.C. took her out of prison at night to show her a piece of land in exchange of pinning her sister, A3.

The interest of the O.C. Luzira women Prison was not brought out as to why she should do that and further lied that she was denied food at prison by O.C. when her physical appearance is not that of a starved prisoner. No sane Court or tribunal could believe such open lies from Sandra and I take this opportunity to clear the O.C. Luzira women prison, M/S Nabunya Stella of any wrong doing. In my view, the utterances of Sandra Nakkungu against O.C. Luzira Women's Prison were kicks of a dying horse. Otherwise, I find and hold that the Prosecution witnesses, PW8, PW14, PW20, PW15 and others on record have proved the identification and participation of Sandra Nakkungu in the murder of the deceased Kasiwukira beyond reasonable doubt. A2 and A1 had a common intention to kill the deceased and all the circumstances point irresistibly to nothing but the guilt of A2, Sandra Nakkungu.

Since the Prosecution has also proved all the ingredients of the offence against A2 beyond reasonable doubt, and as advised by the gentlemen Assessors, I do hereby convict A2 of the Murder C/S 188 and 189 of the Penal Code Act.

A3 – Nabikolo Sarah Ssebunya:

Learned Counsel for the state submitted that there was a strained relationship between A3 and the deceased due to the fact that deceased brought in a mistress.

They added that despite the deceased giving A3 a house in appeasement, the bad relationship between A3 and the deceased never healed because the mistress was there to stay, and she gave birth to children.

Reference was made to the evidence of PW13, Silva Habimaana who was hired by the deceased to follow up the movements of A3 and A2 and report back.

Counsel for the State also made reference to PW22, D/AIP Joel Ayiko who reconstructed the scene of crime with Mark Odong, whereby Alex Adwenya was brought in the video. They added that both PW19 and PW23 interacted with Alex Adwenya in the video which was played in Court and where A3 was referred to as the Madam who was ready to finance the killing of the husband. Counsel for the State wondered why A3 kept quiet in the video, particularly when Adwenya was pointing at her.

Learned Counsel for the State also made detailed submissions about the conduct of A3, who allegedly did not behave as if she had lost a husband. They made reference to the conversation of Jaden and Pw20, Byamukama in the audio recording whereby A3 was confirmed as the Madam. They wondered why A3 denied any knowledge of Jaden, A1, when he was a boy-friend to her sister Nakkungu. It was further submitted that there was common intention between A1, A2 and A3 to kill the deceased and hence equal culpability. They made reference to the case of **Simbwa Paul Versus Uganda, Court of Appeal Criminal Appeal No. 023 of 2012**, where it was held that an unlawful common intention does not imply a pre-arranged plan. That common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault.

Learned Counsel for the State concluded that all the circumstances indicate that the three acted together and so A3 was equally culpable and guilty.

In reply, Mr. Kabega for A3 referred to the case of **Woolmington Vs. D.P.P [1935] A.C.**; where it was held that any slightest doubt must be resolved in favour of the accused who should be acquitted. He also emphasized Article 28(3) (a) of the Constitution and submitted that an Accused person should not be convicted on the weakness of her Defence.

Mr. Kabega further submitted that there was no evidence of common intention whereby A3 was to provide funding. He added that A3 was not at the scene of crime on 17.10.2014.

On the strained relationship between A3 and the deceased, Counsel submitted that PW12, John Bugembe, the brother of deceased testified about reconciliation and restoration of harmony. He added that the Deceased even gave A3 a motor vehicle and a house; learned Counsel quoted the case of **Nsabwe Vs. Republic [2003] E.A. 480**; where in a similar situation like the present case, the Court held that Appellant was entitled to protect her own marriage and that suspicions should

be disregarded. It was further submitted that evidence of PW20 should not be relied on as A3 does not know Byamukama and did not send A1 or A2 to look for alleged killers.

Counsel for A3 also submitted that even PW16 did not know A3 and that the evidence of PW13, Silva Habimana did not pin-point to any house of a witch doctor. He also added that the source of information about spirits for purposes of riches was not disclosed by PW23, Odong Mar.

On the video recording, Counsel for A3 submitted that the same was not only poorly recorded, but that was an attempt by the Prosecution to produce evidence of Adwenya through backdoors since Adwenya did not surface in Court as a witness.

Like in the two previous accused, A1 and A2, I have equally studied the evidence on record with regard to A3. The evidence of PW12 John Gayi Bugembe a brother of the deceased was very instrumental with regard to whether A3 participated in the murder of her husband. PW12 clearly told this court that the relationship between A3 and his deceased brother was very good till 2013 when problems developed as a result of the deceased getting a second wife. PW12 blamed the deceased and at the same time told A3 to forgive the deceased and reconcile. And during cross examination by counsel for A3, he admitted having stated in the statement to police that the deceased was living happily with his wife. He also added that the deceased never believed in witchcraft. Although PW12 during re examination added that he did not know the nitty gritty of the life of his deceased brother and A3, his wife.

The evidence from PW12 there was reconciliation between deceased and his wife creates a benefit of doubt as far as A3's implication in the offence is concerned. That benefit of doubt should therefore be resolved in favour of A3. I have also considered the evidence of PW13, Silva Habimana about trailing A2 and A3. Whereas I hold that it was true the trailing of A3 took place and even quarrelling between A3 and PW13, never the less it did not bring out a clear connection of planning the murder of the deceased by A3. It was in my view part of the normal wear and tear of marriage life whereby married couples are jealous and suspicious of each other's movements without necessarily wishing death to each other in her defence, A3 testified that as a housewife, she was not moving around and did not know Awiyo Geoffrey so as to offer to purchase him a car and cash UGX 20,000,000=. She further stated that there was no way she could connive with Sandra to kill her husband, a father of her children and who had all along looked after her. A3

also testified that even after the misunderstandings with the deceased which were resolved, she never attacked the girlfriend or second wife. And that during the baptism of the children of the second wife, her own children attended the ceremony although she herself did not attend.

This court is in the circumstances inclined to believe the testimony of A3 that she had no intention to kill the father of her children. I therefore disagree with the submissions by state counsel that A3 was the wife who wanted the deceased killed.

The other piece of evidence which could have connected A3 with the common intention of A1 and A2 would have been that of PW2 Byamukama. However in the testimony of Byamukama, he told court that Jaden told him they were going to meet Sandra, A2 and that it was not possible to meet the third person.

PW20 did not mention the name of the third person and he went ahead to meet Jaden and Sandra Nakungu. So this court cannot imagine or assume that the third person was A3. In her defence, A3 testified that she did not know Byamukama and Byamukama during cross examination also stated that he did not A3. Furthermore and I agree with the submissions by counsel Kabega for A3 that no single prosecution witness testified that he heard A3 asking anybody to procure killers. There was none on record so interferences of “madame” alone was not enough because there are thousands and millions of madams in Uganda.

PW23, a Senior Superintendent of Police Odong Mark testified on page 86 of the proceedings that even when Byamukama Richard recorded the conversation, the name of A3 does not feature in that conversation. And that when he recorded the statement of A3, she told him of the misunderstanding which was resolved but totally denied killing her husband. It is also unfortunate that Adwenya who would have perhaps implicated A3 was not called as a witness or he disappeared as the state counsels informed court.

Although he appeared in the video, first of all the video recording was admittedly poor and so not everything came out clearly. Even what came out, Adwenya was found to have given contradictory statements about location of a swimming pool, he could not know where the bedroom was and was talking of streets in the house. But even then, his physical presence in court as a witness was the missing link which is to be resolved in favour of A3.

In **Oketcho Richard Vs Uganda, Criminal Appeal No.26 of 1995**, the supreme court held that it is a duty of the director of public prosecutions to call or make available all witnesses necessary to establish the truth, even though their evidence maybe inconsistent.

Otherwise it is the finding and holding of this court different prosecution witnesses right from PW13, PW16 and PW20 gave different stories but with no direct link to A3 with the planning or commission of the offence. There was no evidence of a meeting between A1, A2 and A3 together like there was between A1, A2 and PW20 Byamukama Richard.

I therefore disagree with the opinion of the gentlemen assessors that the prosecution has proved the fourth ingredient of the offence against A3 beyond reasonable doubt. The participation of A3 is hanging in the air and in such circumstances the law is clear that the benefit of doubt goes to the accused, who is to be acquitted. I accordingly do hereby acquit A3 Sarah Nabikolo Sebunya. She is set free unless lawfully held on other charges.

Sentence and Reasons

I entirely agree with the submissions of the state counsel that life is a precious gift of God which should not be taken away arbitrarily. The deceased was a prominent person and very useful to the nation. It is unfortunate that convicts caused his death in such a cruel and crude manner. It is a big loss to the nation. So whereas both convicts maybe first offenders with other responsibilities, as submitted in mitigation at the same time a deterrent sentence is necessary to serve a warning to all people to respect life.

I have therefore carefully considered all factors and in the circumstances, I find a sentence of 22 years appropriate. I subtract 2 years of remand so I sentence Jaden Ashraf to 20 years imprisonment and also Nakungu Sandra 20 years imprisonment.

Dated this 12th day of October 2016

HON. JUSTICE WILSON MASALU MUSENE