

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT RUKUNGIRI
CRIMINAL SESSION CASE NO.0016 OF 2012

UGANDA

PROSECUTOR

VERSUS

KABAYO YOHANA

KATO JOSHUA

ACCUSED

MUSINGUZI NICHOLAS

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused were charged with murder contrary to sections 188 and 189 of the Penal Code Act. It is alleged that on the 13th May 2012 at Kibale village in Rukungiri District, the accused unlawfully and intentionally caused the death of Peter Godwill.

At the commencement of the trial the Prosecution and Defence Counsel agreed to the admission in evidence of Police Form 48b being the postmortem report on the body of the deceased compiled by Dr.Felix Lema of Nyakibare Hospital. It was also agreed to accept as evidence Police Forms 24 regarding the medical examination of all the Accused persons by Dr.Musiimenta Emmanuel.

A2 Kato Joshua at the same sitting pleaded guilty to the murder of Peter Godwill in a Plea Bargaining Session with the Prosecution and the father of the deceased. This was confirmed to Court by all the parties and after ensuring that A2 was fully briefed on the rights he intended to forfeit, Court convicted him on his own plea and sentenced him to 16 years imprisonment.A1 and A3 denied the offence and the Prosecution was called upon to lead evidence in proof of the charge.

The Prosecution called six witnesses and the Accused called A2 as the sole witness.

PW1 Julius Ainembabazi was herding cows on Mr.Katsigazi's farm on the 13th May 2012 when they strayed to A3's garden. A3 ordered him to call a one Mayumba the son of Katsigazi while assaulting him. Mayumba came to see what crops had been destroyed and PW1 ran away. He later heard Mayumba shouting that A3 had cut him.PW1 ran and hid in the farm and could not tell Court whether Mayumba came alone or with other people to meet A3.

PW2 Ham Aijyuka heard PW1 shouting out Mayumba's name on the 13th May 2012.PW2,Mayumba and the deceased responded to PW1's call and ran to the farm where they found PW1 who told them that A3 had assaulted him because cows had eaten his crops.

The trio went to see the destroyed crops and found A1 and A2 in the garden holding spears and walking sticks while A3 had a panga and a walking stick. PW2 told Court that the Accused did not allow the three to talk about compensation for the destroyed crops. A3 cut Mayumba on the head with a panga and when he tried to help him, A2 speared him on the back and he fell down. A2 used the same spear to stab the deceased in the stomach and when he attempted to stand up, A1 stabbed him in the ribs. The witness passed out and regained consciousness in hospital after seven days.

He further told Court that the Accused were found guilty of Causing Grievous Harm and Assault on him and Mayumba respectively and were sentenced to prison terms. PW2 denied going to meet A3 with other people except Mayumba and the deceased and told Court that they were not armed. His testimony was that what occurred was an attack on him, Mayumba and the deceased but not a group fight as suggested in Cross examination. The witness denied knowledge of the injuries sustained by A3 and denied that Mayumba started the fight by assaulting A3.

PW3 Mayumba Gideon heard PW1 crying and shouting out his name on the 13th May 2012. He ran to PW1's rescue ahead of PW2 and the deceased. PW1 told him of the assault by A3 because cows had destroyed his crops. PW3 went over to see the destroyed crops and he found A3 with a panga and a walking stick, A2 and A1 held spears and walking sticks. The witness told Court that A1, A2 and A3 were walking with him to see the crops when he was cut on the head by A3 who was directly behind him. PW3 shouted and the panga fell down. That he then chased A3 but collapsed at some distance and when he returned he saw PW2 and the deceased stabbed. A2 and A3 were not at the scene but A1 was standing about six meters away from PW2 and the deceased holding a blood stained spear and a walking stick. PW3 confirmed to Court he did not see who assaulted PW2 and the deceased and he further denied that they came armed and together with other people to respond to PW1's call for help. He informed Court that he chased A3 for about 15 meters before he collapsed and that he found PW2 and the deceased in the garden and not near A1's home. PW3 further denied knowledge of the injuries sustained by A3 and firmly stated that A1 was holding a blood stained spear when he returned to the scene after the attempt to chase A3.

PW4 Abraham received a call from PW3 to assist the deceased, PW2 and PW3 himself transport them to hospital because they had been injured. He found them in the garden about 300 meters from A1's home. PW3 had a cut on the head, PW2 had a wound on the stomach and the deceased's intestines were hanging out. All the Accused were not at the scene.

PW5 Detective Seargent Babyebuza Nicholas received a report that residents of Kibale village were assaulting A2 because he had injured PW2, PW3 and the deceased. PW5 together with other Police Officers went and rescued A2. They found nobody at A1's home but saw blood near the homes of A1 and A3. The Police Officers went to the home of Katsigazi from where they received a blood stained spear and three blood stained sticks from a one Mushabe who told them that she had picked them from the crime scene near A1's home. On returning to the scene, the Officers found A1 hiding in a banana plantation and he was arrested. PW5 could

not tell Court where A2 and A3 were arrested from but confirmed a fight had taken place between the accused and the Katsigazi family members.

PW6 Hareerimaana Alex was the Police Exhibits storekeeper who identified and tendered in Court the spear and three sticks handed to PW5 by Mushabe as Prosecution exhibits.

DW1 (A1) Kabayo Yohana told Court that on the 13th May 2012 at about 8.00am A3 came and told him that Katsigazi's cows had destroyed his crops but he had chased them away from the garden. He further reported that he had seen Katsigazi's sons coming with sticks and sought advice on what to do. DW1 advised A3 to go and report to the village chairman and when the group from Katsigazi's home did not find A3 at his home, they came to DW1's home which is 150 meters from that of A3. DW1 mentioned Kwetegyeka, Kashenga and Kabira as the people who went to his home and they denied that the cows had destroyed A3's crops. DW1 suggested that they all move to the garden to see the destroyed crops but on the way, Mayumba came and stopped the group from going to the garden and threatened to kill A3. That the deceased and PW2 had then joined the group and A2 was not around. DW1 saw Kwetegyeka holding his spear and when he tried to get it from him, Kabira hit him with a stone on the leg and other boys began stoning him. DW1 ran and hid in a tree shamba located about 250 meters away while the boys threw stones on his house. DW1 told Court he had no spear but only a walking stick since he was nursing a broken leg.

DW1 told Court that he only came to the scene when PW2 and the deceased had been taken to hospital and denied that A3 cut Mayumba on the head. He confirmed to Court that the exhibited spear was his but does not know how it was retrieved from his bedroom and that he only learnt of A2 and A3's participation in the fight after being arrested.

DW2 (A3) Musinguzi Nicholas saw cows destroying his crops and he chased them away. PW1 the herdsman ran away making noise and DW2 went back to his home but later went and reported to DW1 who advised him to go and report to the Chairman. DW2 told Court he branched off to his home and then saw Kashenga, Kwetegyeka, PW2 and the deceased armed and coming to his home. An argument about the cows started and in the process, Mayumba assaulted him with a stick on the head and ordered the others to assault him. The deceased cut DW2 on the right arm whereat DW2 collapsed and was taken to hospital. He told Court that DW1 and DW3 were not at the scene and he denied that they were armed and attacked the deceased and others. DW2 claimed DW3 came later but he did not see him due to the commotion. When questioned by Court, DW2 changed his testimony and told Court that Mayumba assaulted him when DW1 had arrived. He did not mention that DW1 was stoned by anybody or that a one Kwetegyeka had DW1's spear.

DW3 Kato Joshua told Court that he heard A3 calling A1 but did not know what they discussed. He later saw five boys armed with spears, pangas and sticks assaulting A3. DW3 told Court that he entered DW1's house but could not find a stick and he then ran out. He saw the deceased attempting to cut DW2 but he disarmed him and also speared PW2 who had raised a panga to cut DW2. The witness hurt the deceased with a stick but he managed to hit DW2 with a stick on the head. DW3 then speared the deceased. According to DW3, DW2 ran away and Mayumba followed him. DW3 chased Mayumba with a panga and DW1 was not

anywhere near the scene. His further evidence was that those who attacked them were five holding pangas and sticks except Kwetegyeka who had a spear.

The witness informed Court that the attackers targeted DW2 and what saved him was that he had a stick and was fighting back. He later told Court that DW2 had a panga and confirmed that Mayumba was injured on the head. He denied that anybody threw stones on that day.

The defence did not contest all other ingredients of the offence save that of the alleged participation in the murder of Peter Godwill by A1 and A3. It was submitted that PW4, the investigating Officer told Court that a fight ensued between the accused and the attackers and that it was not true to state that the accused prepared to attack and kill the deceased. Counsel also argued that there was no common intention to cause death between A2 and other accused persons and invited Court to disregard the allegation that DW1 speared the deceased.

It was submitted that DW1 was a weak old man of 85 years who could not have speared the deceased. DW1 ran away from the scene and hid where the Police arrested him from. It was also argued that the fact that only one spear was exhibited in Court contradicts the evidence that all the accused had spears and had prepared to fight PW2, PW3 and the deceased.

For the Prosecution, it was submitted that the contradictions in the evidence of the defence witnesses point to a common intention to commit the crime. DW3 denied the presence of DW1 while DW2 told Court DW1 was around when PW3 assaulted him. It was further submitted for the Prosecution, that the subsequent conduct of DW1 who claimed to have run into hiding points to his guilt. The failure by DW1 to explain how his spear came into the hands of a one Kwetegyeka as alleged was also pointed out as major contradiction in the evidence of DW1.

It is settled Law that the Prosecution carries the burden of proving all ingredients of the offence beyond reasonable doubt and the burden does not shift to the accused persons all through the trial. The strength of the Prosecution evidence is the basis upon which a conviction can be based but not on the weakness of the defence it must be pointed out.

In a murder charge as in the instant case, the Prosecution must prove that there was death of a human being. This was proved through the evidence of the Post mortem report corroborated by the evidence of PW2 and PW3 who are related to the deceased. This element of the offence was proved beyond any doubt by the Prosecution.

It must also be proved that the death was unlawful. The death of Peter Godwill was neither as a result of an accident or authorized by Law which makes it unlawful. This element of the offence was also proved beyond any reasonable doubt by the Prosecution.

The intention to cause the death of a human being or malice aforethought can be inferred from the manner the death occurred. The deceased was stabbed in the abdomen which is a vulnerable part of the body which points at the intention to cause death. I have no doubt in my mind that whoever stabbed him achieved the intended result of seeing him dead.

The alleged participation of DW1 and DW2 in causing death was contested by the Accused. There is on record a confession by DW3 who claimed to have stabbed the deceased to death. Whereas PW2 claimed that the deceased was stabbed by both DW1 and DW3, the latter claims to have stabbed the deceased to death alone. It is evident from the evidence on record that PW2 is the only witness who claims to have witnessed the killing of the deceased. PW3 told Court that he chased DW2 and only returned to find PW2 and the deceased injured. DW1 claimed he had run into hiding but PW3 told Court he found him at the murder scene.

DW2 claims he was assaulted by PW3 and others in the attacking group. His evidence was that he collapsed after being cut on the arm by the deceased. DW2 does not mention that he was chased by PW3 or that he returned to the scene of the scuffle. DW3 however claims DW2 participated in the fight and was injured on the head by the deceased before DW3 speared the deceased.

PW2 was the sole identifying witness to the murder and it is incumbent on this Court to carefully analyze whether there were favorable conditions to aid positive identification before basing a conviction on his evidence as a single identifying witness. This is because even a truthful witness can be a mistaken witness relating to identification of the perpetrator. Evidence undisputed is that the accused and the alleged attackers knew each other as neighbors and that the skirmish took place between 8.00 am and 10.00am in broad day light. It is also not disputed that the warring parties were near each other given the nature of weapons alleged to have been held by each side according to the evidence.

DW3's evidence was that he first injured the deceased who had hit DW2 on the head and then speared PW2 afterwards which in my assessment gave PW2 ample opportunity to observe the final assault on the deceased. I have no doubt in my mind that much as all this could have occurred in a charged atmosphere. PW2 correctly witnessed all the events as he was close to the deceased.

DW1 in his evidence denied the presence of DW3 at the crime scene even after DW3 had confessed to the killing of the deceased at the commencement of the hearing. DW3 told Court that DW2 had a stick and a panga and was fighting back which partly saved him from the attackers whereas DW2 informed Court that he was not armed. I find this to be a grave contradiction in the evidence of the accused persons. PW1 was not cross examined on the evidence that he heard PW3 shouting that he had been cut by DW2. I find this to be credible evidence as to who started the assault and DW2's denial of being armed is not at all credible. DW2 had assaulted PW1 and had seen the alleged attackers coming to his home, it is not credible that he just ran to DW1's home stated to be 150 meters away waiting to be attacked without picking any weapon to defend himself.

DW1 told Court that he saw a one Kwetegyeka with the spear he used to keep in his bedroom but failed to explain how the latter came to possess it yet he told Court that no one entered his house. This in my assessment confirms the testimony of PW2 that DW1 administered the fatal blow to the deceased. This also supports the testimony of PW3 that DW1 was standing six meters away from the deceased and PW2 holding a blood stained spear after the skirmish.

This piece of evidence amply corroborates the evidence of PW2, the single identifying witness that DW1 administered the fatal blow to Peter Godwill.

DW3 claimed to have stabbed the deceased and PW2 but could not tell Court where he got the spear from. He told Court that he failed to get any weapon from DW1's house, disarmed the deceased who wanted to cut DW2 but the deceased still managed to injure DW2 on the head before he stabbed both PW2 and the deceased. The sequence of events as narrated by DW3 raises a number of questions given that they happened after he had seen five boys assaulting DW2 as he testified? If Kwetegyeka had DW1's spear identified in Court as his, who then disarmed him? Where then were Kwetegyeka, Kabira and Kashenga and others who DW1 and DW3 claimed had been part of the armed attacking group when all this was going on?

DW1 told Court that he was stoned by some young boys but neither DW2 nor DW3 mentioned such an incident. DW3 emphatically told Court that no stones were thrown that day yet DW1 claimed he heard the sound from the thrown stones from his hiding place that was 250 meters away from the scene.

All in all, I find the evidence of the Prosecution relating to the sequence of events more credible than the contradictory evidence of the accused which was aimed at misleading Court to save DW1. It is believable from the evidence that the accused were armed and DW2 attacked PW3 first which led to the subsequent attacks on PW2 and the deceased. DW2 sustained head injuries from the attack on him by the deceased as narrated by DW3. I do not believe the version of DW3's evidence that the group of six attackers descended on DW2 before DW3 came to his rescue. The medical report on his injuries admitted as an exhibit for the accused would have indicated multiple injuries and possibly fractures. It only mentioned a wound on the head and broken fingers.

DW3 stabbed the deceased first and DW1 administered the fatal blow when the deceased was struggling to stand up which connotes the intention to kill the deceased. This was not an act of self defence by DW1 but signifies the common intention to finish what DW3 had done. It does not require proof of an earlier planning meeting to prove common intention in all cases, it can be inferred from circumstances as in the instant case.

I observed DW1 in Court and he appeared frail after being in Prison for four years. His evidence in Court was that he was able to run and hide in the eucalyptus forest 250 meters away from the crime scene which I find unbelievable given his alleged weakness of limb due to injuries sustained from an attack by robbers years before. This was however contradicted by the evidence of PW5 who told Court that A1 was found hiding in a banana plantation behind his home. I also find it strange that a person who advised DW2 to report the impending attack to the LC Chairman did not see it fit to run to the same office the moment he gained opportunity to flee from the boys who stoned him at the behest of the attackers.

I have not found any evidence incriminating DW2 in the murder of Peter Godwill and I accordingly acquit him unless he is being held for any other lawful charge. I am in full

agreement with the Assessors who advised me to convict DW1.I accordingly convict him of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act.

Moses Kazibwe Kawumi

Judge

16th January 2017.