

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

CRIMINAL SESSION NO. 0146 OF 2018

(Arising from Mbale Criminal Case No. 002/2018; CRB 128/2017 Namisindwa)

UGANDA ::::::::::: PROSECUTION

VERSUS

- 1. WABOMBA NAMONYO STEPHEN alias MUSAMALI**
- 2. MUSAMALI JAMES**
- 3. KHAUKHA GEORGE**
- 4. MASAACA ABEL**
- 5. NAMUGONGO ROGERS**
- 6. NAMONYO BERNARD**
- 7. WALUBENGO ANTHONY alias BWAYO**

::::::::: ACCUSED

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1] The 7 accused persons; **Wabomba Namonyo Stephen alias Musamali** (A₁), **Musamali James** (A₂), **Khaukha George** (A₃), **Masaaka Abel** (A₄), **Namugongo Rogers** (A₅), **Namonyo Bernard** (A₆) and **Walubengo Anthony** alias **Bwayo** (A₇) are all indicted with the offence of ***Murder*** contrary to ***Sections 188 and 189 of the Penal Code Act***. It is alleged that the accused persons and others still at large, on the **03rd day of November, 2017** at Kololo village in the Namisindwa District, unlawfully caused the death of **Kimono Elizabeth** with malice aforethought. The accused persons pleaded not guilty to the offence.
- [2] The brief facts of the case are that during the night of **03rd November, 2017 at around 08:00pm**, the deceased Kimono Elizabeth who had come to visit her mother Jane Wamatsaba (PW₂) in Kololo village, Namisindwa District, was fatally shot by unknown assailants.
- [3] The family of A₁ was majorly suspected to be behind the murder of the deceased because of the feud that existed between A₁'s family and that of the deceased regarding a land wrangle arising from a transaction where

the deceased had purchased A₁'s land but A₁ had refused to execute a sale agreement in the deceased's favour. The feud had reached exploding dimensions to the extent that the 2 families were labeling each other as being witches against each other and that the accused persons had made threats of killing members of the deceased's family and the deceased herself before her death.

- [4] On the other hand, all the accused persons denied ever participating in the commission of the offence and each put up alibi as his defence save for **Musamali James** (A₂) who is the LC1 Chairperson of the neighboring village of Bwiri who maintained his innocence, stating that he cooperated with police in the course of investigations having been even the one who reported the incident at police on behalf of the brother to the deceased.
- [5] It is trite law that the burden of proof in all criminal cases lies on the Prosecution to prove its case beyond reasonable doubt and this burden does not shift to the accused save in certain statutory cases of which this one is not the case; **OKETH OKALE & ORS. VS. R [1965] EA 555 at 559**. It is therefore the duty of the Prosecution to prove the following ingredients of the offence of **Murder** contrary to **Sections 188 and 189 Penal Code Act; UGANDA VS. MUHWEZI OBEDI H. C. CRIM. SESSION NO. 66/2005 FORT PORTAL**:
1. Death of person
 2. Death was unlawful
 3. Cause of death was with malice aforethought
 4. The accused participated in the commission of the offence.
- [6] The defence generally did not contest and or dispute the 1st and 2nd ingredients of the offence. **Whereas Counsel for the 2nd, 6th and 7th** accused persons conceded to the 3rd ingredient of the offence, **Counsel for the 1st, 3rd, 4th and 5th** accused persons Mr. Magellan Olubwe contested it as follows:-

That from the evidence, there is no proof that the deceased's death was caused by a gunshot. That this is so since neither the cartridge nor any bullet was recovered or exhibited. While relying on the authority of **R VS. TOBERE S/O OCHEN [1945] 12 EA CA 63** and **RUJUMBA JOSEPH VS. UGANDA CRIM. APPEAL NO. 6 OF 1987 (Reported in [1992 93] HCB 36** submitted that there should always be evidence of the alleged weapon that was used to cause death, and that the same should be described to

the doctor or observed by the doctor who performed the post mortem examination and in whose opinion, the weapon was consistent with the nature and time of the assault and its effect on the deceased, if that is the truth. Further that in the instant case, the weapon was never proved save for the vague guess of the post mortem report. That neither was any cartridge recovered to show that indeed a gun had been used. That the wound was on the lower mandible, which according to him was not a vulnerable part of the body. That it was the negligence of PW₄ that led to the death of the deceased. He concluded that the Prosecution did not prove the 3rd ingredient of the offence to the required standard.

- [7] **As regards the 1st ingredient of the offence, i.e. whether the death of a person occurred**, both Counsel correctly and appropriately conceded to the fact that on the night of **03rd November, 2017** death occurred of Kimono Elizabeth, the deceased. The **post mortem report** in respect of Kimono Elizabeth's death dated 04th November, 2017 was one of the agreed documents that were admitted in evidence. It is **P. Exh. II**. The cause of the death was indicated as a severe blunt injury and bleeding from gunshot wounds.
- [8] The other witnesses who confirm that death occurred of **Kimono Elizabeth** are his brother **Namongo David** (PW₁), her mother **Janet Wamatsaba** (PW₂), **Dr. Joseph Otuko** (PW₄) and the LC1 Chairperson Bwiri village (A₂whoamong the other accused persons who also concede to this fact). The Prosecution's evidence established this ingredient beyond reasonable doubt.
- [9] As regards whether the death was unlawful, the law presumes every homicide to be unlawfully caused unless it is excusable under the law. It is excusable when it is committed in execution of a lawful sentence or it is accidental or in circumstances of self defence; **UGANDA VS. KULABAKO NIGHT JENNIFER H. C. CR. SESSION NO. 61/1991** per Kato J (as he then was).
- [10] In the instant case, there was no attempt by the defence to rebut the above presumption that every homicide is unlawfully caused unless it is excusable under the law or show that Kimono's death fell under the exceptions above. Accordingly, the presumption that the deceased's death was caused unlawfully remains unrebutted and it follows that this

ingredient of the offence has also been proved by the Prosecution's evidence to the required standard.

- [11] As regards the 3rd ingredient of the offence i.e. requirement of malice aforethought, **Section 191 Penal Code Act** stipulates the circumstances and instances from which malice aforethought can be inferred. Regard has to be had to the nature of injuries and the manner in which they were inflicted, the part of the body assailed and the weapon used; **JOSEPH RUJUMBA VS. UGANDA [1992 - 93] HCB 36 (S. C).**
- [12] In the instant case, the post mortem report regarding the deceased was admitted with the consent of the defence (P. Exh. II) under **Section 66 of the Trial on Indictment Act**. The report provided Inter alia, that the body of the deceased had a fracture on the left part of the mandible and a shattered left masseter muscle. The mandible and the masseter muscle are comprised of the lower part of the face/head on a human body. The head is one of the vulnerable parts of the body.
- [13] Again, **Dr. Joseph Otuku** (PW₄), the then medical officer of Magale Hospital where the deceased was rushed after the fatal injuries inflicted on her, through examination described the wound on the deceased thus;
- “the lower part of the face was not blown up but the entry of the bullet at the left mandible area left a sealed hole and it was the exit of the bullet that had an open wound on the lower part of the left eye.”*
- [14] The evidence of **Dr. Otuku** (PW₄) was consistent with the post mortem report (P. Exh. II) of **Dr. Mbanze** of the Uganda Police Health Services. The injuries were inflicted on the head which is a vulnerable part of a human body. Indeed, the injuries later caused the death of the deceased.
- [15] The evidence of **Jane Wamatsba** (PW₂) and **Kuloba Isaac** (PW₃) who were with the deceased in the house before the incident testified that the deceased had gone outside the house in search of a better signal for a phone call, they had a gunshot outside the house. Indeed, after the gunshot, that is when they found her with fatal injuries that later led to her death. The post mortem report alluded to gunshot wounds at close range. **Dr. Otuku** also observed bullet wounds.

- [16] True, **D/Sgt. Nambulawe** (PW₅) conceded that he searched the scene of murder for a cartridge but failed to secure one. My view is that his failure to secure the cartridge does not necessarily mean or prove that there was no gunshot.
- [17] In the instant case, there are explanations or possible reasons why the cartridge could not be recovered; first, the incident occurred during the night of **03rd November, 2017 at around 08:00pm** and police came to the scene on the following day at **around 07:00am**. The implication is that somehow, the scene would have been tampered with by the onlookers and the sympathizers who had gathered around at night. Secondly, it is possible that the cartridge was at the scene but PW₅ failed to locate it and lastly, it is also possible that the assailants could have picked it in view of the available evidence (post mortem report - P. Exh. II) that the fatal gunshot was at close range.
- [18] In this case, the various pieces of evidence highlighted from the above when knitted together surely point that the deceased died of gunshot wounds. Though neither the cartridge nor gun was recovered, there is still overwhelming uncontroverted evidence that the deceased was shot with a gun. The gun is by its nature a deadly weapon. It is a weapon adapted for shooting and when used for offensive purposes, is likely to cause death (**Section 286(3) Penal Code Act**).
- [19] It follows therefore that whoever inflicted the wounds on the deceased knew or had reason to know that death would occur as a result since a gun which was used is a lethal weapon, vulnerable parts of the victim were targeted and the injuries eventually caused death. The injuries were intended to cause grave damage. Death occurred and it is my finding that it was caused by malice aforethought within the meaning of **Section 191 Penal Code Act**. The Prosecution proved this ingredient of the offence beyond reasonable doubt.
- [20] **As regards whether the accused persons participated in the commission of the offence**, in this case, it is clear that none of the Prosecution witnesses saw and identified the accused persons commit the offence save for PW₃ who claim to have identified A₄. The Prosecution relied on circumstantial evidence to prove its case to prove that the accused persons committed the offence.

[21] In **BYARUHANGA FUDORI VS. UGANDA S. C. APPEAL NO. 18 OF 2002; [2005]1 ULSR 12**, the Supreme Court observed that;

*“It is trite law that where the Prosecution case depends solely on circumstantial evidence, the court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must be sure that there are no other co-existing circumstances which weaken or destroy the inference of guilt: (see also **MUSOKE VS. R [1958] EA 715**.*

[22] In **TINDIGWIHURA MBAHE VS. UGANDA S. C. CRIM. APPEAL; NO. 9 OF 1987**, court issued a warning to trial courts to treat circumstantial evidence with caution, and narrowly examine it due to the susceptibility of this kind of evidence to fabrication.

[23] In the instant case, the Prosecution relied on the following pieces of evidence to prove the participation of the accused persons in the commission of the offence in question;

- a. The feud between the **family of A₁** and **deceased’s family** before the deceased’s death.
- b. The deceased’s dying declaration naming A₁ as one of the assailants.
- c. That **Kuloba Isaac** (PW₃) identified A₄ as one of the assailants who killed the deceased.
- d. Telephone **call logo** (printout) that showed communications amongst the accused persons and in particular calls made to and from **A₁, A₃ and A₅**.
- e. The **sniffer canine police dog** that traced the scent of the assailants from the scene to the bedroom of A₁.
- f. The conduct of the accused persons before, during and after the death of the deceased.

[24] In this matter, there were essentially 2 advocates for the defence, i.e. **Counsel Magellan Olubwe** for **A₁, A₃, A₄ and A₅** and **Counsel Jude Wamimbi** for **A₂, A₆ and A₇**. The clients of Counsel Magellan Olubwe appear to be connected and or related to A₁. In particular, **A₄ and A₅** are sons to A₁. The clients of Counsel Jude Wamimbi appear to be

independent of the family of A₁. For purposes of ensuring that I properly capture the arguments and submissions of each counsel, I shall resolve the final and vital issue of participation under the heads of Counsel representation.

EVIDENCE AGAINST THE 2ND, 6TH AND 7TH ACCUSED PERSONS:

- [25] As already established, none of the Prosecution witnesses saw any of the accused persons commit the offence in question. As regards evidence against the 2nd, 6th and 7th accused persons, the Prosecution led evidence of **D/AIP Amos Alitia** (PW₇), **D/ASP Emoiti John** (PW₈) and **D/Cpl. Bwayo George** (PW₉).
- [26] **D/ASP Emoiti John** (PW₈), a police officer attached at Namisindwa Police Station secured a court order to enable him obtain phone call logs of the suspects' phones. Thereafter, he secured from the respective telephone service providers phone call logs or patterns of the suspects before and after the incident. **D/Cpl. Bwayo George** (PW₉) together with **D/AIP Amos Alitia**, the then Regional Flying Squad participated in the analysis of the phone call logs/data that helped them to secure the suspects. Both participated in the arrests of the suspects. The phone calls and numbers that formed the pattern for analysis were of **A₁ and his sons; Ben Masolo, A₄ and A₅** and then those they communicated to immediately before and after the murder in question.
- [27] Therefore, as correctly put by Counsel for A₂, A₆ and A₇, these accused persons were charged because of telephone calls that were made to **A₁, A₃ and A₅**. PW₈ obtained a court order for purposes of securing the printouts that showed communications amongst the accused persons or suspected murderers. During cross examination, PW₉ **D/Cpl. Bwayo George** conceded that no voice recordings were retrieved and therefore nothing is known regarding what the suspects communicated with each other.
- [28] In his defence, A₂ **Musamali James** accounted for his communication with A₄. He is an LCI Chairperson of Bwiri village which neighbours Kololo village where the deceased was murdered. He is the one who reported to police the incident regarding the attack on the deceased. This was after he got the information from **Nanongo (PW₁)** and Nanongo had requested him to report to police on his behalf.

- [29] It is his evidence that later, he received a phone call from **Abel (A₄)** who sought for his help; that people had attacked his shop claiming that he is the one who had killed the deceased. Indeed, no contrary evidence has been adduced by the Prosecution regarding A₂'s phone communication with A₄.
- [30] As regards A₆, **Namonyo Bernard**, he denied committing the alleged offence and accounted for his movements on the fateful night. He stated that he heard about the death of the deceased while on his way from his work place, a construction site. His evidence is supported by that of A₆/DW₁, **Lumumba Joseph**, his brother and a fellow builder.
- [31] As regards A₇, **Walubengo Anthony alias Bwayo**, he protested the name "**Bwayo**" being his name. It had appeared that it is a one "**Bwayo**" who had frequently communicated to the family of A₁. A₇'s evidence is supported by that of **Manara Bernard** (A₇/DW₁) who is the area LC1 Chairperson and knew A₇ very well.
- [32] All in all, I find that the Prosecution against **A₂, A₆ and A₇** is that of suspicion. No voice recording of the phone conversation was ever secured and tendered in court to prove that the words spoken on phone between the family of **A₁, A₂, A₆ and A₇** were connected to the murder of the deceased. There is no other evidence available on the record connecting **A₂, A₆ and A₇** to the murder of the deceased. The available evidence is mere suspicion. Suspicion done, no matter how strong cannot take the place of a solid and affirmative proof required on the part of the Prosecution; see ***DHALAY VS. R (1995 - 98) ea at p. 44***, where Court had an opportunity to discuss the admission of telephone conversations. Court observed that if Prosecution is to rely on a telephone conversation, the conversation should be contemporaneously recorded as it proceeds. A contemporaneous recording of the conversation would eliminate the possibility of a concoction or even an innocent misrepresentation of what was actually said and what was meant by it.
- [33] In the instant case, as already observed, not even the recording of the accused persons' conversation with A₁ was done. There is therefore nothing connecting **A₂, A₆ and A₇** to the murder of the deceased. **In the circumstances of this case, A₂, A₆ and A₇ are found not guilty of the**

offence charged and they are accordingly acquitted and discharged forthwith.

EVIDENCE AGAINST THE 3RD AND 5TH ACCUSED PERSONS:

- [34] On examination of the evidence against **A₃ and A₅**, it is clear that **A₃** was connected to the murder of the deceased by his phone communication with **A₁** and his family. According to **D/ASP Amos Aliti (PW₇)**, when police secured and analyzed the phone call logs and patterns of the suspects before and after the incident, they were led to **A₃** in Malaba and on 06th December, 2017, he was arrested. On interrogation, he admitted and revealed how he had hosted **A₁** at his place in Malaba.
- [35] In his defence, **A₃** stated that he was the Defence secretary of Obura Central Cell in Malaba Town Council. He admitted knowing **A₁** who came to his place on **16th November, 2017**. That **A₁** had fled Kololo village because it had been alleged that he had killed a person.
- [36] For **A₅**, apart from him being a son of **A₁** and the claim that he fled the village upon the death of the deceased, there is nothing else incriminating him to the murder of the deceased. He explained that a one Bwayo and Eric Wonorwa who are connected to the deceased's family came and found him at his brother's (**A₄**) place. They attacked him alleging that he was behind the death of the deceased. He fought them and then had to flee the area for safety of his life.
- [37] As can clearly be seen from the foregoing, the Prosecution evidence against **A₃ and A₅** is mere suspicion which suspicion can never be a basis of a conviction in a criminal case. Similarly, **I do find that the Prosecution has not proved its case against A₃ and A₅ to the required standard. The 2 accused persons are found not guilty of the offence charged against them and each is in the circumstances acquitted accordingly.**

EVIDENCE AGAINST A₁ AND A₄:

- [38] As regards **Wabomba** alias **Musamali Steven (A₁)** and **Masaaka Abel (A₄)**, the available Prosecution evidence against them is as follows:-

- a. That the deceased before her death revealed or made a dying declaration to **Doctor Otuku** (PW₄) who was attending to her and she named A₁ and another from Tororo as the assailants.
- b. That there was a feud between the family of A₁ (**father to A₄**) and the deceased's family and that during one of the attacks on the deceased's family by A₁'s family, A₄ was one of those identified by his voice.
- c. **Kuloba Isaac** (PW₃) on the fateful night when the deceased was fatally shot, he identified A₄ as one of the assailants and after the incident, both A₁ and A₄ vanished from the area, a conduct that is inconsistent with innocence.
- d. The sniffer canine police dog picked the scent of the assailants from the scene and it led them to the home of A₁ up to his bedroom.

[39] As regards the dying declaration of the deceased to **Dr. Otuku (PW₄)**, it is the evidence of PW₄ that when the deceased was presented at Magale Hospital where he was by then attached, before she blacked out, the deceased revealed to him that she was shot by A₁ and during cross examination, PW₄ clarified further that as the deceased fainted, she mentioned about "*somebody from Tororo*" also as one of the assailants. This "*somebody from Tororo*" is a reference to A₄ as the other available pieces of evidence show. It is clear from the evidence of PW₄ that whereas the deceased was categorical about the participation of A₁ in the attack, she was not categorical about A₄.

[40] In the Supreme Court decision in **CRIMINAL APPEAL NO. 9/1987 TINDIGWIHURA MBAHE VS. UGANDA**, it was held Inter alia that:

"Evidence of dying declaration must be received with caution because the test of the cross examination may be wholly wanting; and have occurred under circumstances of confusion and surprise; ... It is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of deceased person, made in the absence and not subject to cross examination unless there is satisfactory corroboration."

- [41] As guided by the above authority, this court takes into cognizance the caution required before it bases its findings on the dying declaration of the deceased. In the instant case, besides this dying declaration, there are other pieces of evidence from the Prosecution that point at the 2 accused persons that need examination; **the feud between the deceased's family and A₁'s family** and the identification of A₁ by PW₃ during the fateful night of attack.
- [42] The feud between the 2 families was highlighted in evidence by **Namogo David** (PW₁) and his mother **Irene Wamatsaba** (PW₂) who is also mother to the deceased. The conflict between the 2 families arose from allegations of witchcraft on the part of the family of A₁ against the deceased's family and a land dispute where A₁ sold a piece of land to the deceased but upon receipt of the money for the sale of the land, A₁ refused to execute a sale agreement. The preceding days of the death of the deceased were for a meeting to be chaired by the LCIII Chairman to resolve the land wrangle issue between the family of the deceased and A₁. It is the reason why the deceased had to come to her mother's place in Kololo where she met her death.
- [43] It is the Prosecution's case that the feud between the 2 families was the cause of the attack and murder of the deceased. It is however the submission of Counsel for the accused persons that there is no nexus between the grudges and the murder of the deceased; that the so called grudge had long been resolved through mediation; that the alleged threats had not been sufficiently established and that there was no evidence that it is these wrangles or grudge that culminated into the death of the deceased.
- [44] In this case, it is the evidence of **Nanongo (PW₁)** that in **April 2017**, A₁ and his family had always verbally threatened to kill the deceased and other members of her family who included himself. The threats became a concern and a report was made at **Lwakakha Police vide S. D Ref. 13/09/04/17**.
- [45] During the **night of 20th October, 2017**, again there was an attack on the family of the deceased but the assailants failed to break into the house. The attackers instead resorted to verbal threats that they would kill the deceased or her mother (PW₂). This incident was also reported at

Lwakakha Police vide S. D Ref. No. 10/23/10/17. In this attack, A₁ and A₄ were identified by their voices by both PW₂ and PW₃. PW₂ referred to A₁ as her “son” and A₄ as her grandson because A₁ had been brought up in her home. Both PW₂ and PW₃ could therefore easily identify A₁ and A₄ by their voices. Besides, during cross examination, PW₂ revealed that she was also able to see and identify them by the help of the solar power light outside as she peeped through the window. At the heels of these reported incidences of **threatening violence**, the deceased was fatally shot on the night of **03rd November, 2017**. In my view, it cannot be said there is no nexus between the family wrangles and the murder of the deceased.

- [46] In a criminal prosecution, motive is always an important aspect of criminal prosecution. This is grounded on the fact that a person in his normal state of mind cannot commit a crime without a reason or motive; **JOHN WANDA VS. UGANDA (CRIM. APPEAL NO. 37/1998)(CA)**.
- [47] Though motive in itself is not an element of any given crime, it is allowed to be proven to make plausible the accused’s reasons for committing a crime, at least when those motives may be obscure or hard to identify with. Motive is in the intention of the perpetrators to commit a crime, all acts start from the motive, therefore the motive needs to be explained to determine intentionality. Once it has been proven it provides good corroboration.
- [48] In the instant case, the wrangles between the 2 families appear not to have been contested by the accused persons. During cross examination, A₄ alluded to the land wrangle but justified it on the ground that when the deceased purchased the piece of land from A₁, she failed to pay the balance of shs. 100,000/- on the purchase price and A₁ refused to execute the agreement.
- [49] As regards the incidences of threatening violence by the family of A₁, Spry J had this to say in the case of **WAIHI & ANOR. VS. UGANDA [1968] EA 278 at page 280:**
- “Evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of murder, but its probative value varies greatly and may be very small or even amount to nothing. Regard must be had to the manner in which a*

threat is uttered ... the length of time between the threat and the killing are also material. Being admissible and being evidence tending to connect the accused person with the offence charged, a prior threat is we think capable of corroborating a confession.”

[50] The evidence in the instant case is to the effect that the threatening violence incidences occurred in the **months of April and October 2017** and the deceased was murdered in **November 2017**. This spate of time is a relevant material to render the threats in questions credible and therefore capable of corroborating evidence to other pieces of evidence that the accused persons participated in the murdering of the deceased.

[51] The next piece of evidence for examination is the evidence of **Kuloba Isaac (PW₃)** who claimed that on the fateful night when the deceased was fatally shot, he identified **A₄** as one of the assailants. Counsel for the accused persons attacked his evidence as lies because in his **police statement**, **PW₃** clearly stated that he did not identify any assailant on the fateful night. During cross examination, **PW₃** attempted to justify his failure to mention the assailants to police in his statement that it was for fear that the assailants would kill him the way they did to his mother.

[52] In **AHARIKUNDIRA YUSTINA VS. UGANDA CRIM. APPEAL NO. 104/2009 (CA)**, court explained the principle in **R VS. GOLDEN (1960) 1 WLR 1169** regarding a witness' evidence being different from their previous statement as follows:-

“... the value to be attached to evidence of a witness whose evidence on oath is at variance with what he or she previously stated to the police. The position is that while court cannot ignore the previous statements which must be taken into account when assessing a witness' credibility, the previous statements do not constitute the evidence upon which the court can act. It is the testimony adduced on oath that constitutes evidence of that witness.”

[53] In **KANTAR SINGH & ANOR. VS. R (1953)20, EACA 134**, it was held that what is said in a statement recorded by police does not amount to substantive evidence at the trial. Its only purpose and value is to show that on a previous occasion, the witness has said something different from what he has said in evidence at the trial, which fact may lead the court to feel that his evidence at the trial is unworthy of belief.

[54] In the instant case I am entitled to use the previous statement of **Kuloba Isaac (PW₃)** recorded by police to assess his credibility. PW₃ testified that on the night of **03rd November, 2017 at around 07:30pm**, his mother (actually auntie), the deceased went outside the house to secure a better phone signal/network. He then heard her scream. He rushed outside to check on her. He was able to see and identify A₄ who had a panga as one of the assailants. Upon the assailants threatening to harm him, PW₃ run back in the house and that is when he heard a gunshot.

[55] In cross examination, he explained that he was able to identify A₄ by help of the solar power light outside. That he however did not mention having identified anybody to police for fear that the assailants could kill him the way they did to his mother/aunties, the deceased.

In the **police statement (D. Exh. I)** dated **06th January, 2017**, PW₃ stated as follows:-

"I did not recognize the assailants as it was at night and due to fear. I highly suspect Musamali Stephen (A₁), his sons Abel (A₄), Rogers (A₅) and Benon (A₁/DW₁) who had all along been threatening our family with death that because we were bewitching them."

[56] From the above statement in D. Exh. I, I am inclined to believe the defence that PW₃ told court lies that he identified A₄. In the first instance, he claims to have identified A₄ by the help of solar power light. If this is true, then, one would have expected him to identify the other assailants who were with A₄ or he would have been able to describe what he saw assuming they disguised themselves to avoid being identified. Secondly, if it true that he feared to mention A₄ for fear of being killed by the assailants, then, he would not have mentioned them as suspects in the police statement. The fact that he mentioned A₁ and his son as suspects is proof that he had no fear of being hurt by the assailants.

[57] In the circumstances above, I do find that aspect of PW₃'s evidence regarding the identification of A₄ unworthy of belief and I reject it accordingly. In addition, PW₃'s evidence does not point at any of the accused persons as being the assailants identified.

[58] The next piece of evidence presented by the Prosecution worthy examination is the conduct of **A₁ and A₄** before and after the incident.

The available evidence regarding the conduct of A₁ and A₄ before the incident is in regard to the feud that existed between the family of A₁ and that of the deceased and then the subsequent threats by the family of A₁ against the family of the deceased which I have already examined. It is the Prosecution's case that after the incident, A₁ and A₄ vanished from the area, actually vacated their homes and they did not even participate in the burial of the deceased, their immediate neighbor. **A₁ and A₄** do not deny vanishing from the area upon the occurrence of the incident. A₄ in particular in the first instance, denied being at the scene at the time the deceased was shot. He put up a defence of alibi.

[59] The law relating to alibi is settled; in **UGANDA VS. GEORGE WILSON SIMBWA, CRIM. APPEAL NO. 37/1995 (S. C)**, it was Inter alia held that when the accused sets up an alibi as a defence, he or she does not thereby assume any responsibility of proving the alibi. The Prosecution is under the duty to negative the alibi by evidence, and must place the accused squarely at the scene of crime. In **BOGERE MOSES & ANOR. VS. UGANDA CRIM. APPEAL NO. 1/1997, (SC)**, putting the accused at the scene of crime "... must mean proof to the required standard that the accused was at the scene of crime at the material time."

[60] In his unworn statement, A₄ explained and accounted for his movements regarding the fateful day of 03rd November, 2017 as follows:

That he left his place at Kasoli East village, Tororo and went to his workplace at Total Petrol Station during morning and stayed at the workplace up to 06:00pm. Then at around 07:00pm, he returned home. At 07:30pm, he received a phone call from his wife a one Cherengeti who informed him that members of the family of the deceased to wit a one Bwayo and Wanomwa had attacked her claiming that they (the family of A₄) had killed their sister, the deceased. That upon hearing this, he decided to alert the area L. C I Chairman (A₂) and Tororo Police. That however, later, his wife rang him again and told him that the mob was coming for him in Tororo (which is about 40 - 45kms away from Kololo where the incident occurred) to attack him because it was being alleged that he participated in the murder of the deceased. That it is for this reason that he organized his family and arranged to flee, and later, upon reuniting with his wife who had also become a fugitive as a result of the mob actions trying to revenge the death of the deceased, he took his

family to Kween District for safety. He was eventually arrested from Kween District at his father in law's place. **Kasango David** (A₄/DW₁) who was the boss of A₄ at Total Petrol Station, Tororo, **Alamanzan Wayello** (A₄/DW₂) who was his workmate and his sister **Muyama Betty** (A₄/DW₃) who was staying with him in Tororo at the time, all testified on his behalf in support of his alibi.

- [61] The alibi appear believable, it was not challenged at all and when this is coupled by the fact that nobody identified him at the scene of the crime at the material time of the incident, then, court is inclined to agree with the defence that the Prosecution has failed to negative the alibi by evidence. Despite the existence of the feud between the family of A₁ (which include A₄) and the family of the deceased and the fact that he probably participated in the threats of killing the deceased and other members of the family, there is no evidence placing A₄ at the scene of the crime at the material time of the incident. The Prosecution case wholly depended on circumstantial evidence. It follows therefore that before drawing an inference of the accused's guilt from circumstantial evidence, there is compelling need to ensure that there are no other co-existing circumstances which would weaken or altogether destroy that inference.
- [62] In this case, I find that the inculpatory facts therein are open to some other reasonable hypothesis than that of guilty of A₄. A₄'s fleeing from his home is explained. The mob was already in action at his **father's (A₁)** place revenging the death of the deceased and this explained why A₄ had to take his entire family and property away to Kween District for safety.
- [63] In the circumstances of this case, I therefore find it extremely unsafe to infer from his fleeing that A₄ participated in the murder of the deceased. **I find that the Prosecution has not proved the participation of A₄ in the commission of the offence. He is therefore found not guilty of the offence and he is acquitted accordingly.**
- [64] As regards A₁, in its bid to place him at the scene of the crime, the Prosecution led evidence of **AIP Okello James (PW₆)**, a canine sniffer police dog handler.
- [65] The law relating to the importance and use of police sniffer dogs in investigation of crimes appears to be as follows:-

In **UGANDA VS. MUHEIRWE & ANOR. H. C. CRIM. SESSION NO. 0011 OF 2012 (MBARARA HIGH COURT)**, Justice Gaswaga observed as thus:

Principles that may govern the consideration for the exclusion or admissibility of height to be attached to tracker (sniffer) dog evidence are:-

1. *The evidence must be treated with utmost care (caution) by court and given the fullest sort of explanation by the Prosecution.*
2. *There must be material before the court establishing the experience and qualifications of the dog handler.*
3. *The reputation, skill and training of the tracker dog (is) required to be proved before the court (of course by the dog handler/trainer who is familiar with the characteristics of the dog).*
4. *The circumstances relating to the actual trailing must be demonstrated. Preservation of the scene is crucial; and the trail must not have become stale.*
5. *The human handler must not try to explore the inner workings of the animal's mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behavior of the dog and give an expert opinion as to the inference which might properly be drawn from a particular action by the dog.*
6. *The court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from material not subject to the truth - eliciting process of cross examination.*

[66] The foregoing principles were approved by the Court of Appeal in **KYAKURUGAHA VS. UGANDA CRIM. APPEAL NO. 51 OF 2014 (C. A)** and the Justices of the Court of Appeal added that there are 2 aspects that are important to be observed;

- a. *With regard to admissibility, it is essential that the training and experience of the dog handler and his association with the dog in question is established.*
- b. *Secondly, there must be established in evidence the nature of training, skills and performance of the dog in question with regard to the particular subject at hand, be it training scents, or drugs or whatever specialized skills it allegedly possesses so as to establish*

its credentials for that skill. The foregoing are prerequisites before the admissibility of such evidence.

[67] The Justices of Court of Appeal further guided “Nevertheless once admitted it is clear that such evidence must be treated with caution as it is possible that it may be fallible.”

[68] In **PATTERSON VS. NIXON (1960) SC LT 220; SC(J) 42**, cited in **FRECKELTON1**.Admissibility and probative value of expert evidence of tracker dog scent identification. *Forensic Research & Criminology International Journal* 2020; 8(1): S2 – 59, Thomas LJ.C observed;

“I suppose it is common knowledge that people do have different scents and dogs are able to discriminate between one person’s scent and another ... Its value and significance is bound to be a question of circumstances in each particular case and the evidence given as to what the dog did as to its skill and reliability has to be weighed just like any other evidence.”

[69] In the instant case **AIP Okello James** (PW₆) a canine sniffer police dog handler, on the morning of 04th November, 2017, he introduced the canine sniffer dog at the scene and it led him in the bedroom of A₁ where it sat on the bed. This officer joined police in 2007 but joined the police dog unit in February 2010. He is a holder of a Certificate in dog handling from Police Canine Unit Headquarters, Nsambya. His major duties are to use police sniffer dogs to track the suspects or criminals. He explained that in the present case, he used a Germany shepherd dog, sergeant by rank, female by the names of Rhonda whose sense of smell was 100%, sense of seeing was 80%, sense of hearing was 60%, sense of taste was 30% and sense of touch was 20% with 8 years of experience. He put the dog’s efficiency at about 99%. He explained further that this dog tracks by smelling the scent of where the criminal has stepped at the scene of the crime and stores the scent at the back of its brain (olfactory) and moves while smelling on the ground and in the air up to where the scent is very much loaded and it will stop there. Usually, the scent is very much loaded on the body of the person or where he/she stays.

[70] On the 04th of November, 2017 around 07:00am the morning of the incident, he introduced the canine sniffer dog at the scene which had been preserved by way of cordoning it with a tape and in the presence of

the Local authorities, other police officers and residents, the canine sniffer dog Rhonda picked the scent of the culprit and it moved for a distance of about 400 meters, passing through the gardens and it led its handler to the house of A₁ and upon entering the house, it ended in the bedroom and sat on the bed.

- [71] The conclusion from the conduct of the sniffer dog was that the person who participated in the death of the deceased came from the house of A₁. The sniffer dog tracked the culprit using the scent it picked from the scene of crime and the scent led it up to the house of A₁. According to PW₆, in between the houses of the deceased and A₁, there are 2 houses but the sniffer dog did not rest at any of them. It only rested at A₁'s house.
- [72] In his defence, A₁ relied on alibi. He stated that on the **03rd day March, 2017** at around 08:00am, he left his home and went to Bubutu Sub county to check on his sick mother. **He reached Bubutu around 11:00am and returned at around 08:00pm by a boda boda rider who dropped him at Bumwomi Sub county signpost which was about 2kms from his home.** From the signpost, he walked up to a beer party, then from there, he proceeded to Bwiri Trading Centre where he met people who were running about claiming that a person had been killed.
- [73] At Bwiri Trading Centre, he ended up at his son's shop, that is A₄ where he found his other son **Namugongo Rogers (A₅)** and **A₄'s wife Alice Cherengeti**. This is where he saw 2 boys **Eric Wanomwa** and **Isaac Bwayo** come crying and referring to him and A₄ as the murders of the deceased. That the 2 boys confronted A₅ and a fight ensued.
- [74] He stated further that the fight between A₅ and the 2 boys was followed by a mob which had formed around and they started looting whatever was in A₄'s premises. That people became violent alleging that he participated in the murder of the deceased and for that reason, he became scared and decided to flee the area and went back to his mother's place. At his mother's place, again he felt that he was not safe and as a result, he had to relocate to his wife's place in Bugobero where he was able to coordinate with the rest of the members of his family. It is then that he was told that his crops and banana plants had been slashed by the mob in revenge of the deceased's death. His cattle were also not spared.

- [75] To concretize his alibi, A₁ brought to his aid a one **Manana Steven (A₁/DW₂)** as his witness. According to him, it was on **03rd November, 2017** (and not **03rd March, 2017** as narrated by A₁) at around 06:00pm – 07:30pm when he was with A₁ at his local brew selling place. The boda boda rider had brought A₁ and dropped him at his place.
- [76] In cross examination, **Manana Steven (A₁/DW₂)** was questioned whether he knew where **Bumwoni Sub county signpost** was located, he **explained that he knew where it was located and that it was a distance from his place. That one had to pay shs. 500/- to a boda boda rider to ride from where the signpost is located to reach his place. His evidence therefore in the circumstances sharply contradicted that of A₁ whose evidence was that the boda boda rider dropped him at Bumwoni signpost and he had to walk up to the beer party place (Manana Steven's place).**
- [77] The law on contradictions or inconsistencies is that where they are minor and were not deliberate lies intended to deceive the court, they should be ignored but where they are major and go to the root of the case, they should be resolved in favour of the accused and if they are defence contradictions then, the accused is placed at the scene; ***OKETCHO ALFRED VS. UGANDA CRIM. APPEAL NO. 24/2001 (S.C).***
- [78] In the instant case, the contradiction is not minor to be ignored majorly because it touches the defence of alibi as set up by the accused while trying to show court that at the material time he was not at the scene of the crime. I find it a major contradiction to the extent that it creates an impression that at the time, A₁ was either not at a place he purported to had been or his alibi is just a lie. **In any case, he accounted for the day of 03rd March, 2017 yet the date in question is 03rd November, 2017.**
- [79] The dog handler (PW₆) in the instant case fulfilled and satisfied the requirements in ***UGANDA VS. MUHEIRWE*** and ***KYAKURUGAHA VS. UGANDA***. He enumerated his training experience and his association with the sniffer dog Rhonda. He established the nature of training skill and performance of the dog in question especially its skills in human scents and put its efficiency generally to about 99%. I find his evidence very consistent and was not essentially challenged during cross examination. The killer either ended or retired in A₁'s house, a fact that

was established by neighbours and the Local authorities around. The scent from the scene of the crime led the sniffer dog and its handler into the bedroom of A₁.

- [80] In this case, following the principles and the caution required of a trial Judge when considering the sniffer dog evidence as I did to the assessors, I warn myself about the danger of convicting an accused on the evidence of the police dog alone. It is important that I look for corroborative evidence to support the sniffer dog evidence.
- [81] The conduct immediately after the incident of death of the deceased can offer ample corroboration. It is the evidence of **Nanongo Wakoko** (PW₁) brother to the deceased that A₁ grew up in their family because his father took him up as an orphan. A₄ who is also a son to A₁ used to stay with PW₁ when PW₁ was working in Tororo. The mother of the deceased **Jane Wamatsaba** (PW₂) also testified to that effect and this evidence was not controverted by the defence. The house of A₁ and that of the deceased are within the vicinity of each other. This was also alluded to by PW₆ who led the sniffer dog to the scene of crime.
- [82] On the eve of the murder of the deceased who was shot at, everybody got concerned and appeared at the scene, A₁ however opted to disappear. This was testified to by PW₁ and police **D/AIP Amos Alitia** (PW₇) who were at the scene the very morning of the incident. A₁ himself conceded to this when he gave an unsworn defence and stated that he left the place at around 08:00am to go and check on his sick mother in another village. A₁'s son **Benon Wamutibi** (A₁/DW₁) also conceded that on the morning/eve of the incident, at around 07 - 08pm, PW₁ and police came to their place but A₁ had left. He however claimed that he had not known the death of their neighbor, the deceased. It is surprising that the family of PW₂ where he grew up from would lose a beloved one under the circumstances as described in this case and A₁ feigns ignorance and early in the morning leaves for another village.
- [83] It is my finding that the conduct of A₁, unlike that of his son A₄ Masaaka Abel which was explainable, amounted to disappearance from the area of a crime from which one can infer guilt. It was held in **REMEGIOUS KIWANUKA VS. UGANDA CRIM. APPEAL NO. 41/1995 (S. C)** that the disappearance of the accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has

committed the offence. This is because such sudden disappearance from the area is incompatible with the innocence of such a person.

- [84] I find the conduct of A₁ in the circumstances of this case corroborative evidence to that of the sniffer dog pointing at A₁ as being one of the killers of the deceased.
- [85] There is also the history of the stormy relationship between the family of the deceased and that of A₁ including reported threats to kill any of the members of the deceased family emanating from the land wrangle, a fact that was conceded to by the defence (especially A₄). In **MUREEBE JANET & 2 ORS. VS. UGANDA CRIM. APPEAL NO. 13 OF 2003 (SC)** and **Section 30(a) of the Evidence Act** is for the proposition that threats constitute circumstances of the transaction which resulted in the death of the deceased.
- [86] In this case, the deceased had come to her mother's (PW₂'s) place to attend to the settlement of the land wrangle she had with A₁. It is from this that threats to kill her or any other member of the family arose. It is my finding that the threats in question formed the motive and such is sufficient corroborative evidence pointing at A₁ since he was at the center of the wrangle.
- [87] As I already discussed and found, the deceased's dying declaration is also capable of corroborating the sniffer dog evidence as it also pointed at A₁ as one of the murderers. Lastly, when the foregoing is considered along with the contradictions in A₁'s alibi, the totality place A₁ at the scene of crime. He participated in the murder of the deceased.
- [88] In agreement with the Honourable Assessors, I find that the Prosecution has proved its case against A₁ beyond reasonable doubt and as a result, I find the accused (A₁) guilty of the offence of murder of Kimono Elizabeth and I convict him accordingly.

Byaruhanga Jesse Rugyema

JUDGE

17/09/2020

17/09/2020:

- [89] All accused persons present.
Mr. Wamimbi for A₇ but holding brief for Counsel Mooli for A₂ & A₆ and Counsel Magellan for the rest of the accused persons.
Mr. Masola: Clerk.
Mr. Malinga for State.
2 Assessors present.

Court:

- [90] Judgment is read in the presence of the above.

State:

- [91] This offence is rampant in this country. The deceased lady died helplessly under the hands of a relative. She was gunned down in the hands of a relative she grew up with, the accused having been brought up by the father of the deceased. The family of the deceased went through a lot of torture. There were peaceful ways of resolving the issue of land that was at stake. In fact, that is the reason why the deceased had come to the village. Cases of murder arising out of land disputes are rampant. A strong message should go to the communities regarding holding the law in their hands when faced with land wrangles.
- [92] The deceased had a life to live. It is our prayer that if the accused cannot be sentenced to death, this court considers a sentence of 60 years term of imprisonment.

Mr. Wamimbi:

- [93] The convict is a first offender with no past record. He was arrested and charged in December, 2017. He was therefore in remand for 2 years and 9 months. The convict is a sick person. He was tortured during arrest which affected his eyes and legs. He is aged 62 years and had 2 wives and 8 school going children and 5 of them are in S. 4 (candidate class). The child needs parental guidance from the convict. It is true the convict is related to the deceased and it is our prayer that this court puts into consideration for purposes of reconciling the parties. Such shall heal the effect of the deceased's family.
- [94] It is true death caused by land wrangles are rampant but these offences were not committed by the accused. He has fully reformed and he is a member of the Church in prison. In the circumstances, we pray for a very lenient sentence.

SENTENCE

- [95] The accused is an old man aged 62 years and has been on remand since December 2017 and therefore he has spent 2 years and nine months on remand. The offence was committed under circumstances of greed over land. There had been a land wrangle between the deceased and A₁ and this wrangle had eventually sarked in the entire family of A₁. A₁ was brought up in the family of the deceased. He is therefore a relative but greed pushed him to the level of committing this heinous offence. The act of the convict led to the arrest and suffering of the rest of the accused persons who were later found not guilty of the offence charged and acquitted.
- [96] The offence carries a maximum sentence of death. This court is not for that sentence but it is mindful of its duty to send a signal to the other would be offenders of murder that it does not pay to hold the law in one's hands as A₁ did. The land wrangle in question could be settled by the Local authorities and courts of law as is this case, such a process had commenced.
- [97] In the circumstances of this case, I find the aggravating factors outweighing the mitigating factors. The deceased was brutally shot and murdered in cold blood. Her death itself must have created trauma that is still haunting PW₃ and PW₂, the mother. Bearing in mind the convict has spent 2 years and 9 months on remand and therefore, as per his entitlement, I take that period into account and sentence A₁ to **life imprisonment**. Right of appeal explained.

Byaruhanga Jesse Rugyema

JUDGE

17/09/2020