

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION CASE NO. 0455 OF 2017

UGANDA ----- PROSECUTOR

VERSUS

- 1) **R.O 0857 CAPTAIN BUMALI MANGENI ALIAS AKEEM**
- 2) **LUMU BENON DUNCAN**
- 3) **KISITU ANDREW ----- ACCUSED**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

The three Accused persons before Court that is: Captain Bumali Mangeni alias Akeem, Lumu Benon Duncan and Kisitu Andrew, were indicted on three counts.

Count 1: Kidnap with intent to murder contrary to Section 243 (1) of the Penal Code Act.

The case for the Prosecution is that the three Accused persons, and others still at large, on the 27th day of October, 2016, between Kololo in Kampala District, and Amerikwii village, Southern Busia District, Western Kenya, in the Republic of Kenya, by force, or fraud and with intent to murder, kidnapped Daniel Weldu Michael.

Count 2: Aggravated robbery contrary Section 285 and 286 (2) of Penal Code Act.

The Prosecution contends that the three Accused persons and others still at large on the 27th day of October, 2016, between Kololo in Kampala District, and Amerikwii Village, Southern Busia District, Western Kenya, in the Republic of Kenya, robbed Daniel Weldu Michael of a white Toyota Prado Motor vehicle registration number CE-178 AL, a passport, two mobile phones, Stanbic money transfer forms, Stanbic cheque leaf,

\$18,000, wrist watch and other personal documents, all valued at approximately Shs. 200,000,000/- and immediately at, or immediately before or immediately after the said robbery, used a deadly weapon, to wit a pistol on the said Daniel Weldu Michael.

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Count 3: Murder contrary to Section 188 and 189 of the Penal Code Act.

10 The case for the Prosecution is that the three Accused persons and others still at large, on the 27th day of October, 2016, between Kololo in Kampala District, and Amerikwii village, Southern Busia District, Western Kenya, in the Republic of Kenya, murdered Daniel Weldu Michael.

15 On taking plea, all the Accused persons denied the offences on all the three charges. When called upon to give their defences, A1 and A3 raised alibis, while A2 admitted having participated in the offences but contended that he was compelled to do so.

20 In determining this case, I bear in mind the established principle of law that the burden of proof is upon the Prosecution to prove the guilt of the Accused person(s) beyond all reasonable doubt.

The burden never shifts to the defence except in a few exceptional cases provided for by law.

25

The Prosecution bears the burden to prove all the ingredients of the various offences to the required standard.

30 Even where there is more than one Accused person, as in the present case, the participation of each and every one of them has to be proved.

35 When the accused raises a defence, the duty remains upon the Prosecution to prove that despite the defence(s), the offence(s) were committed and they were committed by the Accused persons. – Refer to the case of **Woolmington vs. Director Public Prosecutions (1935) AC 462**, **Miller vs. Minister of Pensions [1947] 2 ALL ER 373**, and **Lubogo vs. Uganda [1967] EA 440**.

40 Section 101 of the Evidence Act, which provides that "***He who alleges, must prove***" is also borne in mind.

This Court further reminds itself of the principle that, ***"an accused person is deemed innocent until he or she pleads guilty or is proven guilty"***.

5 Case law has established that ***"the standard of proof required is not proof to absolute certainty. Nonetheless, the prosecution evidence should be of such standard as leaves no logical explanation to be derived from the facts, excepts that the accused committed the offence"***. – See the case of **Woolmington vs. Director of Public Prosecutions** and **Miller vs. Minister of Pensions (Supra)**.
10

In determining a case, the Court has also to bear in mind the duty to evaluate all the evidence on record, both for the Prosecution and the
15 Defence, and arrive at its own findings as to **whether the offences(s) for which the Accused person(s) were indicted have been proved to the required standard.**

I will determine the counts, in the order that they were set out.

20 **Count 1: Kidnapping with intent to murder.**

For the offence of kidnapping with intent to murder to stand, the following ingredients of the offence have to be proved.

- 25
- 1) Taking away of a person or victim.
 - 2) The taking away was accompanied by force or fraud.
 - 3) The taking away was against the victim's will.
 - 4) The **perpetrators** of the offence had a **contemporaneous** intent to
30 murder the victim.
 - 5) The Accused persons were the perpetrators of the crime.

The Prosecution evidence in this respect is that the victim in the present case was taken away from Kololo Uganda all the way to the Border of
35 Busia and into Kenya, without his consent, as will be seen later in this judgment.

He was eventually murdered and his body set on fire.

40 Under S.293 of the Penal Code Act, Kidnapping is defined as **"the conveying of any person beyond the limits of Uganda without**

the consent of that person". Whoever does that is said to kidnap that person from Uganda.

5 Without evidence, to the contrary, this court finds that this ingredient was proved to the required standard.

10 The next **ingredients** to determine is **whether the taking away was accompanied by use of force or fraud** and **whether it was against the will of the deceased**.

The evidence of the Prosecution indicates that a group of people were involved in the planning of the offences in this case.

15 Meetings were held and roles to be played by each participant were apportioned.

Bank details of the victim were obtained together with a copy of his passport and telephone number.

20 The details of the victims account were availed to the group during another meeting.

25 One of perpetrators called the victim and learnt of his intention to travel to Germany for a holiday tour.

30 The victim was assured that this person had connections with the Germany Embassy and he was asked to provide a financial statement as one of the requirements for securing a Germany visa.

On the date of the kidnap, the victim was called on phone and requested to meet one of the perpetrators at Nakumatt. He was then required to go home and pick his passport and cheque leaf.

35 The victim met two people at Kololo and they got into his vehicle and together they went to the victim's home but failed to get the documents as the wife of the victim had gone out with the keys.

40 The victim with the two people then drove to Housing Finance Bank Kololo, where he called his brother A5 and requested him to bring the cheque leaf. A5 brought the cheque leaf and handed it over to the victim and left.

Three people who included the victim then proceeded to the Germany Embassy but the victim was asked to turn around as the people with him claimed that the Security Officer who was supposed to assist them was not at the Embassy.

They then drove to Kololo Airstrip where they were joined by another person.

One of the perpetrators then took over the driving, while the victim was required to sit in the back seat between two people.

The vehicle was then driven from Kololo, via Ntinda, and Namugongo. On the way, the victim was told that he was under arrested as he was being investigated for terrorism and money laundering.

He was required to sign the cheque leaf to transfer money from his account. When he refused to do so, his mouth was sealed with cello tape, and he was then injected with a sedative and he passed out.

His kidnappers then continued the journey up to Jinja where one of them disembarked and returned to Kampala, with instructions to hand over the cheque leaf to someone in the Bank to transfer the money.

The other two kidnappers then continued with the victim up to Busia and eventually into Kenya, when it was dark.

- Refer to the evidence of PW11 and Exhibit P₄₄ the charge and caution statement of A3.

It is apparent from that evidence that, the taking away of the victim from Kampala was accompanied by fraud and then force. And it was definitely against the will of the victim.

Fraud in general has been defined as **"obtaining a material advantage by unfair or wrongful means"**.

In this case, the kidnappers made a false representation to the victim, knowingly and without belief in its truth.

The kidnappers intended that the victim should act **on** the fraudulent misrepresentation, and indeed he acted on it and paid with his life as a consequence.

5 The claim by the Defence that it is the victim who called the perpetrators and that therefore went willingly with them is hereby rejected.

10 Why else would the victim have been trailed for days, deceived that they would help him to obtain a visa and then take him away against his will simply because he refused to comply with their demands?

Court now proceeds to determine **whether the kidnappers were motivated by intent to murder the victim.**

15 As already pointed out, the victim was taken away against his will. In fact, there is undisputed evidence that he sent his brother PW5 a telephone number **0701 995857** and told him that if anything happened to him, they should call that number.

20 When the kidnappers left Housing Finance Bank with the victim and drove to Kololo Airstrip, they picked up their colleague who had two bags which later turned out to have the injections which they used to sedate the victim and the cello tape with which his mouth was bound.
25 One of the assailants was armed with a pistol.

The Assailants then drove up to Jinja with the unconscious victim, where the third Assailant disembarked and was instructed to return to Kampala with the cheque leaf.

30 The other two Assailants continued to Busia with the victim, buying a five-liter jerrycan of petrol on the way.

35 On getting to Busia, the perpetrators booked into a Guest House and in the dark of the night drove into Kenya using unofficial routes.

On reaching an open field, the victim who was now conscious was directed to get out of the vehicle and run. As he ran, he was shot in the back. He continued staggering until he fell down. The Assailants
40 followed him and shot him again when they noticed he was still moving.

Thereafter, the five-liter jerrycan can was picked from the vehicle. The petrol was poured on the body of the victim and it was set ablaze. – Refer to the evidence of PW11

- 5 The perpetrators would not have shot the victim and thereafter set his body ablaze if they did not have the contemporaneous intent to kill him or put him in the danger of being killed.

10 By shooting the victim more than once and thereafter actually setting his body on fire, the perpetrators of the offence must have been motivated by intent to murder the deceased.

Indeed, death was a probable consequence of the actions of the perpetrators against the deceased.

15 Under S.235 (2) of the Penal Code Act, the burden is on the Accused person to prove that he/they did not have a contemporaneous intent that the victim would be murdered or put in danger of being murdered – See the case of **Godfrey Tukahirwa and Another vs. Uganda SC. CR./ App. 05/1988.**

I accordingly find that this ingredient of the offence was also proved to the required standard. And the submissions of Counsel for the Accused to the contrary are hereby rejected for all those reasons given.

25 As indicated from the outset, the Accused persons are charged on three counts. This Court will therefore determine the issue of participation on all three counts, after dealing with the ingredients of the second and third counts.

30 **Count 2 is Aggravated Robbery:**

It is the established principle of law that to prove a charge of aggravated robbery contrary to Section 285 and 286(2) of the Penal Code Act, the following ingredients of the offence have to be proved by the Prosecution to the required standard.

- 35
- i) That there was theft.
 - ii) There was use of violence
 - iii) There was threat to use a deadly weapon or that there was use of a deadly weapon or that the perpetrators caused grievous harm to the victim.
- 40

- iv) That it is the Accused persons who robbed the victim or participated in the robbery.
- v) Where there is more than one Accused person, common intention had to be proved.

5

Theft: The evidence of the Prosecution is to the effect that, at the time the victim was kidnapped, he had his motor vehicle a Toyota Prado, white in color, registration number CE-178 AL, a passport, two mobile phones, Stanbic Bank money transfer forms, Stanbic Bank cheque leaf, \$1800, wrist watch and other personal documents, all valued at approximately Shs. 200,000,000/-.

10

That all these items were stolen from the victim.

15

Under S.254 of the Penal Code Act, theft is committed when a person fraudulently and without any claim of right takes anything capable of being stolen.

20

Exhibit P₄₄ described the several personal items robbed from the victim and shared among the Accused persons, before the third Assailant was required to return to Kampala with the cheque leaf.

25

PW5 had last seen the victim in his car, in the company of some of the kidnappers. The vehicle was used to drive the victim into Kenya using an ungazetted route.

PW7 said he saw the vehicle driven into Uganda at the border, when he intercepted the people who were driving it that night.

30

The vehicle according to the evidence was eventually driven to West Nile and sold into the Congo; before the kidnappers returned to Uganda. The vehicle was never recovered.

35

Counsel for the Accused submitted interalia that, the Prosecution failed to prove that any items existed or that they were stolen. And that there were contradictions as to who was in the vehicle when it was intercepted by PW7 as opposed to the evidence of PW10, 11 and 19; which raised doubt in the evidence of the Prosecution.

40

Contrary to the submissions of Counsel for the Accused, it is on record that when the victim was asked to meet the people who turned out to

be his kidnappers, he was requested to go along with his passport and funds which would be required to issue the visa.

That he had a telephone is confirmed by the fact that he sent his brother (PW5) a number to call in case anything happened to him. He
5 was required to sign a cheque leaf by the kidnappers and was sedated into unconscious when he declined to do so.

The vehicle in which he went to meet the kidnappers was well described by the Prosecution witness. All these items were never recovered and it
10 is the undisputed evidence on record that the \$1800 was shared by the assailants.

Although some of these items were never accounted for, the only reasonable conclusion is that, they existed and they were stolen.

15 While some of the evidence concerning theft is circumstantial, I am fortified in my finding by the principle established by decided cases that "***circumstantial evidence is often the best evidence. It is the evidence of surrounding circumstances, which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial evidence***". - Refer to **Thiaka vs. Republic [2006] EA 362.**

25 The contradictions referred to by Counsel for the Accused as regards who is alleged to have been in the vehicle, do not go to the root of the Prosecution case. The vehicle was never recovered.

This court therefore, finds that the ingredient of theft was proved to the
30 required standard.

The next ingredient to determine is **whether there was use of violence.**

35 Violence is defined as "**force exerted so as to injure or abuse**" – **Webster's Collegiate Dictionary.**

The evidence of the Prosecution in this respect is that, the victim's mouth was sealed with cello tape, and then he was injected with a
40 substance that induced unconsciousness.

One of the Assailants was also armed with a pistol, although it was not fired at the time of the robbery.

It was the submission of Counsel for the Accused that, other than PW7, Kasajja Joel stating that he saw one of the Assailants armed with a pistol, there was no evidence led as to what point such a weapon was used in the course of the robbery.

Counsel for the Prosecution asserted on the other hand that use of violence can be proved by the deadly injuries on the body of the victim. That such injuries could only have been inflicted through violence.

The fact that the mouth of the victim was sealed with cello tape against his will and that one of the Assailants was armed with a pistol is sufficient evidence of force exerted against the victim so as to abuse. This was all done against his will.

I therefore find that there was use of violence against the victim at the time of the commission of the robbery.

Court now proceeds to determine **whether there was use of a deadly weapon or that the perpetrators caused grievous harm to the victim.**

It is not disputed that one of the Assailants was armed with a pistol at the time of the robbery, although none was ever exhibited.

And while Counsel for the Accused argued that no evidence was led as to what point the weapon was used in the course of the robbery; what the law requires is not necessarily the use of such a weapon. Possession of such a weapon is sufficient.

See S. 286 (3) of the Penal Code Act which provides that ***"..., where at the time of or immediately before, or immediately after the time of robbery, an offender is in possession of a deadly weapon...."***

S.286(3) Penal Code Act – in Sub Section (2), ***"a deadly weapon includes: -***

(a) ***(i) any instrument made or adapted for shooting, ..."***

There is no doubt that a pistol is made for shooting and that the victim was eventually shot to death.

Apart from being armed with a pistol, the Assailants of the victim also injected him with a substance that rendered him unconscious.

Under S.286 (3) of the Penal Code Act, "**deadly weapon includes: -**

(b) ***Any substance intended to render the victim of the offence unconscious***".

It is accordingly the finding of this court that, the Prosecution proved to the required standard that the perpetrators were armed with and also used deadly weapons against the victim.

Court will determine the issue of participation later, as already indicated in this judgment; after determining the ingredients of the count of murder.

It is trite law that for the offence of murder to stand, the following ingredients of the offence have to be proved to the required standard: -

- 1) Death of a person.
- 2) The death was unlawfully caused
- 3) The death was caused with malice aforethought.
- 4) The Accused persons participated in or caused the death of the deceased.
- 5) Where there is more than one accused person, it must be proved that there was a common intention among them to execute an unlawful purpose.

The fact of death: The Prosecution evidence shows that the victim is dead. A postmortem was performed on the body by PW13 Dr. Byaruhanga Moses, on the 18.12.16.

The postmortem report was admitted in evidence as Prosecution Exhibit P₁₃. It was signed and stamped by the Doctor.

The is also the testimony of the Kenyan witness PW15 and PW16 who recovered the body form the scene. Plus, the team of Uganda Policemen including PW11 and PW14 who picked the body from Kenya.

Photographs of the partially burnt body of the deceased plus the video recording showing the remains of the body were admitted in evidence as Exhibits P₃₅ and P₃₆ respectively.

- 5 PW5 and PW20 relatives of the deceased also testified and confirmed that Daniel Weldu Michael is dead. They identified **his** body.

The fact of death is not disputed by the Defence.

- 10 This court therefore, finds that the first ingredient of the offence was proved to the required standard.

The next ingredient for court to determine is **whether the death of Daniel Weldu Michael was a result of an unlawful act.**

15

As submitted by Counsel for the State and rightly so **"the law presumes every homicide to be unlawful unless it is accidental or excusable or authorized by the law"**. - Refer to the case of **Uganda vs. Okello [1992] HCB 688** and **Gusambizi Wesonga vs. R (1948) 15 EACA 65.**

20

In the present case, the Defence does not seem to agree that the death of the victim was unlawful.

- 25 Counsel for A1 and A3 submitted that, other than proving that the deceased is dead, the Prosecution failed to prove how he met his death.

And that, while PW13 Dr. Byaruhanga Moses who carried out the postmortem stated that he extracted a bullet fragment from the body of the deceased, no evidence was led as to where the fragment was taken or any action done on it.

30

However, considering the evidence earlier referred to in this case, that the deceased was required to get out of the vehicle and run, and was then shot, staggered and eventually fell down and the Assailants shot him again and then set his body on fire; I agree with Counsel for the State that there is nothing to suggest that the death was accidental or excusable or authorized by law.

35

- 40 And without any circumstances to justify the shooting and eventually burning of the deceased that resulted into his death, this court accepts the Prosecution evidence and finds that the death of the deceased was

as a result of unlawful acts. The submissions of Counsel for the Defence are hereby rejected.

To determine **whether the death was caused with malice aforethought**, court takes into consideration the provisions of Section 191 of the Penal Code Act.

Malice aforethought is defined in that section as **"intentional killing of a human being or knowledge that the act or omission will result into death of a human being"** – See the case of **Bukenya and Others vs. Uganda [1972] 1EA 549 (CAK)** and **Mugao & Another vs. Republic [1972] 1EA 543**.

It has been established by decided cases that ***"to prove whether or not the Prosecution has proved malice aforethought, court takes into account the circumstances surrounding each particular case."***

"The circumstances include the nature and number of injuries inflicted, the part of the body injured, the type of weapon used and the conduct of the assailants before, during and immediately after the injuries were inflicted" – Refer to the case of **Mbugua vs. Republic [2000] 1EA 150 (CAK)**, **Ogwang vs. Uganda [1999] 2EA (SCU)**, **Dafasi Magayi and Others vs. Uganda [1965] 1EA 667 (CAK)** and **R vs. Tubere (1945) 12 EACA 63**.

The evidence of the Prosecution indicates that the deceased was shot twice and thereafter set ablaze. Exhibit P₃₄, the postmortem report made by PW13 confirms that the deceased suffered gunshot wounds and extensive body burns.

The bullet according to the report, went through the skin, left anterior chest muscle between the left fourth and fifth ribs, then through the parenchyma of the left lung and got lodged at the hilum (inner side of the lung). The left lung was collapsed and there was burnt blood in the left chest cavity.

An irregular bullet was retrieved from the inner side of the left lung. There was no soot staining in the airway meaning that, the victim was burnt after death).

The skull was intact and brain was not burnt.

Cause of death was excessive blood loss following gunshot injury to the left lung.

5

The report was signed and stamped by Dr. Byaruhanga Moses and was admitted in evidence as Exhibit P₃₄ on 06.01.2021.

10 It was the submission of Counsel for the Defence that other than proving death, the Prosecution failed to prove how the deceased met his death.

15 That other than the hearsay evidence of PW11, 10 and 21, who claimed interalia that several exhibits were recovered at the time of reconstruction of the scene including cartridges and projectiles and were forwarded for examination; plus, the evidence of PW13 Dr. Byaruhanga who claimed he extracted a bullet fragment from the body of the deceased, there is no evidence as to where the fragment was taken or what action was done on it.

20

Further that, it could not also be established whether the projectiles recovered from the area were fired from the same gun which was never recovered, are the ones used in the murder of the victim.

25 And that the evidence of PW10, 11 and 21 that the deceased was shot twice in the head is contradicted by the evidence of PW13, to the effect that the deceased's head was intact and the killer bullet was recovered in the body.

30 In reply, Counsel for the State relied on S.191 of the Penal Code Act which defines malice aforethought, emphasizing that malice is a mental element ordinarily proved by the critical examination of the surrounding circumstances. For example, the type of weapon used, the nature of injuries inflicted and the part of the body targeted whether vulnerable or
35 not.

And that court also has to examine the conduct of the assailants before, during and after the attack.

40 Counsel asserted that, looking at the surrounding circumstances in the present case, they only connote malice aforethought on the part of the assailants, and therefore the ingredient had been proved.

As earlier pointed out, the evidence of PW13, the Doctor, indicates the type of injuries sustained by the deceased, which resulted into excessive loss of blood and death. And the extensive burns inflicted on the body after death.

Among the body parts injured were the lungs. There is no doubt that **"the lungs are vulnerable parts of the body, which play a vital role in the breathing of a human being. Without ability to breath, a human being cannot survive"**.

Shooting the deceased through the lungs, which resulted into excessive bleeding, the assailants of the deceased must have intended to kill him and ought to have known that such injuries would most likely result into death.

And indeed to be sure that the deceased did not regain life, the Assailants set the body on fire that resulted into extensive burns.

Although the gun used in the shooting was not exhibited as contended by Counsel for the Defence, it has been established by case law that ***"there is no burden on the Prosecution to prove the nature of the weapon used in inflicting the harm which caused death...."*** – See the case of **Uganda vs. Komakech Tony alias Mano and 2 Others HCSC No. 0131/2014.**

In any case, the postmortem report gives a vivid description of the fatal injuries sustained by the deceased and clearly indicates that bullet fragments were found. Bullet fragments can only be discharged by a gun.

This court finds that the grievous injuries inflicted upon the deceased and the body parts injured established malice aforethought.

Those who shot the deceased must have intended to kill him.

The submissions of Counsel for the Defence regarding the contradictions on body parts of the deceased injured in the shooting are hereby rejected. And I find that the Prosecution discharged its burden to the required standard, that the killing of Daniel Weldu Michael was with malice aforethought.

What remains for court to determine is **whether it is the Accused persons before court or anyone of them who kidnapped the deceased, committed the robbery and eventually killed him, and whether there was a common intention to commit all the three offences.**

As already indicated in this judgment, the Prosecution evidence is that the commission of the offences in this case was a well-planned move.

Meetings were held at Muyenga at the office of one Eddy Nsubuga, attended by A1, A2, A3 and others.

Roles to be played by each were apportioned to each party.

A2 got the Bank details and contacts of the victim, and got a copy of the victim's passport and telephone number through one Ssempijja Joseph.

The details of the victim's account were given to the group at another meeting, again held at Muyenga.

A1 took over the role of Security, Eddy Nsubuga was to effect transfer of the money and A3 was the errand boy.

That A1 trailed the victim, called him and learnt of his intention to travel to Germany for a holiday Tour.

He assured the victim that he had connections with the Embassy and asked him to produce a financial statement as one of the requirements for securing the Germany visa within two days.

On the fateful date at about 10am, A2 called the victim, and met him at Nakumatt. They met again at Kololo and A1 and A2 got into the vehicle of the victim. A1 was in army uniform. The victim drove to his home with the two Accused but failed to get the documents as his wife had left with the keys.

A1 and A2 and the victim then drove to Housing Finance Bank, Kololo, and waited for PW5, brother of the victim to bring the cheque leaf.

PW5 eventually brought the cheque leaf and handed it over to the victim and left.

The victim with A1 and A2 then proceeded to the Germany Embassy but asked the victim to turn around claiming that the Security Officer they knew was not at the Embassy and would not want people at his/her home.

5

They drove to Kololo Airstrip where they were joined by A3 who had two bags.

10 A1 then took over the driving of the victim's vehicle and the victim was instructed to sit in the back seat between A2 and A3.

They drove from Kololo, via Ntinda, Namugungo. On the way, the victim was told by A1 that he was under arrest as he was being investigated for terrorism and money laundering.

15

A1 demanded for the cheque leaf from the victim, wondering how he acquired all the money on his account.

20 When the victim failed to handover the cheque leaf, all his phones were taken away from him on instructions of A1 and they were switched off, together with the power bank and passed over to A1.

A body search was conducted and a leaflet of Stanbic Bank Cheque, and bundle of US dollars were retrieved.

25

30 Eventually, A1 stopped the vehicle and got his gun out of the bag and put it in his waist. He also got cello tape and gave it to A2 to seal the mouth of the victim. A1 then got a syringe with some substance in it and directed A3 to inject the victim on the neck. When A3 showed reluctance, A1 became harsh and A3 had no choice but to inject the victim. The victim passed out.

The personal items of the victim that included the cheque leaf, passport, US dollars \$1800, wrist watch and mobile phones, interalia were taken.

35

A1 then drove up to Jinja Taxi park, got out of the vehicle and he and A2 talked. A1 then picked an envelope from the car, and instructed A3 to return to Kampala and deliver the envelope to one Eddy Nsubuga. A2 then gave A3 \$400 plus Shs. 20,000/- for transport back to Kampala.

40

The envelope according to A3 had a cheque book, two phones and one power bank. A3 then got a taxi and left for Kampala.

A1 and A2 remained with the victim and continued with their journey to Busia. On the way, they bought a five-litter jerrycan of petrol, and also did some shopping.

5

At Busia, A1 and A2 checked into a Guest House and took a break.

During the night, the two crossed into Kenya with the victim using ungazetted short cut routes.

10

About 2kms inside Kenya, A1 instructed the victim to get out of the car, told him to run and shot him in the back.

The victim staggered towards a maize garden and fell down into a ditch. He was traced to where he had fallen down, and A1 shot him again, and then told A2 to pick the jerrycan of petrol from the vehicle. A2 was then directed to sprinkle the body of the deceased with the petrol and A1 lit a match setting the body ablaze. – See evidence of P11.

15

20

A1 and A2 then drove back to Busia, Uganda, in the vehicle of the deceased. After crossing the border into Uganda, they were intercepted by a Police Patrol vehicle, at about 3am.

25

A1 identified himself as a Senior UPDF Officer, on routine surveillance duty and they were left to go.

This evidence was confirmed by PW7 who intercepted A1 and A2 as they returned from Busia, Kenya, on the night of the murder, using an ungazetted route.

30

That they were in a Prado TX, white, CE 178 AL.

A1 identified himself as a Captain, showed them a warrant card of UPDF in the names of Musana Bumali. However, he had not booked with either the District Internal Security Officer (DISO) or Intelligence Officer of CMI, although he claimed he was a high ranking Officer doing classified work.

35

A1 had a pistol tacked in his jean trouser.

40

PW7 did not find out about the two people who were with A1 in the vehicle.

However, he informed the Intelligence Officer, who was not aware of any sanctioned operation by UPDF in Busia. The Intelligence Officer informed his boss.

- 5 A week later, a CID team came from Kampala Investigating a murder case in which Accused (A1) was a suspect.

The relatives of the victim had reported his disappearance to Police and investigations had commenced.

10

PW10 DASP Ahimbisibwe attached to Flying Squad Head Quarters, CPS, Kampala, had received report of the disappearance of the deceased. He got the telephone number availed by the deceased to PW5, to call in case anything happened. Number **0701 995857**. But the number was off.

15

The witness checked with Airtel and got printouts. On checking with MTN and presenting Serial Number, it was found that MTN like number **0777 621310** of Enock Tekle had been inserted in the handset. Enock Tekle PW4 was contacted and he came from Sudan. He did not know about the handset but recalled that in October, he had found out that his line had been swapped on 26.09.16.

20

Several people involved in the swapping of the line of the deceased were arrested. They led Police to A2 as he was the one who had requested for the swapping of the line of the deceased

25

A2 was arrested and his apartment was searched. Among several things recovered was a passport photo of the deceased and a telephone.

30

When the items were recovered, A2 claimed he had a stomach upset and went to the bathroom. Eventually he told Police that the man in the photograph was dead.

35

When A2 was interviewed by PW11, Natumanya Nelson. A2 revealed how the whole plot to kidnap the deceased and withdraw his money from Stanbic Bank, Kampala, was done. That the money was wired under EFT to Equity Bank, Kenya, for their own gain.

40

A2 led Police to A1's home at Salaama, Munyonyo and A1 was arrested.

A search was conducted at A1's home on 15.12.16, and a number of items including three passports and an army uniform were recovered. – Refer to **Exhibit P12**₁₋₂₅. A1 resisted arrest as a result of which he sustained some injuries on his wrists and ankles.

PW9- the Doctor who examined both A1 and A2 on 27.12.16, found A1 with severe tenderness and swelling on both the left and right ankles and bruises on the left and right hand wrists. But he was of normal mental status.

A2 was found with no apparent injuries and was of normal mental status. – See Exhibits P₁₄ and P₁₅ respectively.

An identification parade was conducted and PW5 identified A1 as one of the suspects – See evidence of PW6.

In his testimony, PW5 a brother of the deceased confirmed to have seen A1 at Kololo, when he went to the Housing Finance Bank to take a cheque leaf to his brother, now deceased. It is at that time that the deceased gave him a telephone number to call in case anything happened.

A1 and A2 were taken to Kenya and the scene of murder was reconstructed with the assistance of A2. - See Exhibits and the evidence of PW11.

A1 does not appear in the video recording as it is alleged he became violent and was left in the vehicle.

A3 learnt of the death of the deceased and the arrest of A1 and A2 from the Newspapers. He went to SID Kireka, to inquire about the two.

Upon introducing himself to the Investigating Officer, he was arrested on the ground that A1 and A2 had mentioned him as a participant in the offences.

A3 recorded a charge and caution statement before DAIP Santos, but retracted it during trial. However, the statement was admitted in evidence as Exhibit P44, after a trial within a trial was held.

A search was conducted at A3's home and several items including a Paidu watch identified by the relatives of the deceased as belonging to

the deceased; and clothes claimed to have been bought using some of the funds stolen from the deceased were recovered. - Refer to Exhibit P₂₃.

- 5 When called upon to give their defences, A1 and A3 denied perpetrating the offences against the deceased. They both raised alibis and called witnesses.

10 On the other hand, A2 admitted being a participant in the offences, but raised the defence of compulsion.

15 In his unsworn evidence, A1 stated that he could not have been involved in the commission of the offences, when on the 27.10.16, when the offences are alleged to have been committed, he was already under custody of the Flying Squad on the orders of the then Inspector General of Police (IGP).

20 That he was arrested on the morning of 27.10.16, when he was going to travel to his village in Namayingo District, but had stopped to buy airtime from the shops.

25 The four Police Officers who arrested him took him to the IGP's home at Muyenga, where he was handed over to two other Police Officers for further investigations.

He was hand cuffed, a hood put over his head and taken to an unknown location, where he remained for the next four days.

30 On 31.10.2016, he was moved to CPS, Kampala, given back his phone and was released.

35 From there A1 says he went to Police Standards Unit (PSU) Bukoto, to register a complainant; but it was not taken on the ground that he had not been tortured and had not been held beyond the 48 hours. He went home. On 14.12.16, he got a call from the Head of the Flying Squad Unit of Police, requiring him to report to his office.

40 Abandoning the shopping that he was doing, he reported to the Office of the Head Flying Squad, but was arrested immediately he sat down.

All the belongings he had on him were removed, a body search conducted and he was allowed only to keep a handkerchief.

He was taken to the cells till the next morning 15.12.16, when he was taken to the counter where he found three Police Officers; was handcuffed, his legs shackled and then taken to his home for a search.

5

That the search lasted seven hours, all the items recorded on a piece of paper, although the search certificate does not indicate all items taken. For example, only one uniform is indicated whereas several were picked.

10 After the search, A1 and his wife were taken to CPS leaving their minor children at home.

At CPS, he was put in cells until at night when he was picked from there, handcuffed and shackled and taken to Nalufenya. He stayed there on
15 16.2.16, and was taken away on 17.12.16, driven for a long distance to the scene of crime, but never left the vehicle.

A number of people including A2 came out of other vehicles and moved around the area three times and eventually returned to their vehicles.
20 But that, he never saw any exhibits being recovered.

On the journey back, the hood was put on his head until they got to Busia Police Station, where some Police Officers including PW7 came to look at him.

25

The hood was put back on his head and then travelled to Kireka SIU (Special Investigations Unit), where he was again detained in the cells, till the following day 18.12.16, when he was driven to a Safe House.

30 At the Safe House, two men appeared and requested him to record his statement, which he did. The two men left with the statement.

Another team of people came to him and that is when he was told why he had been arrested. He was then beaten, punched and kicked, more
35 so when he told them he had seen A2 for the first time and that on the 27.10.16, he was in a Safe House.

The torture continued, and then it was demanded that he confesses to having murdered the Eritrean Businessman with A2, which he denied.

40

The torture continued throughout the night up to the following day when he passed out. He regained consciousness at SIU Clinic at Kireka within the cells.

5 That night, he was handcuffed and shackled, thrown into a car boot and driven to Nalufenya. There he was kept in isolation for two days and on the third day, allowed to walk out of the cells for thirty minutes.

10 On 27.12.16, he was examined by Doctor Komakech. That by then, he could hardly walk and had bruises on the elbows, wrists, ankles were swollen and the knees and back were painful.

15 On 28.12.16, he was picked from Nalufenya and driven to SIU Kireka. At midday, he was produced before an Officer who required him to record a charge and caution statement but he refused to do so without a lawyer.

20 He was taken back to the cells where he was picked from after a while and taken to Kira Police Station, despite the excruciating pain he was in.

At Kira Police Station, he was dressed in any uniform and participated in the identification parade with eight other Officers who appeared very smart as compared to his disheveled appearance. He was identified by PW5.

25 He was then taken back to Kireka, SIU, from where he was picked at night and taken to a Safe House. He was repeatedly tortured by people who wanted him to confess and implicate his co-Accused, which he refused to do.

30 One night, when the hood was removed from his head, A3 was standing there with two men. He appeared beaten and was in fact slapped twice. A3 was putting on a boxer.

35 When he denied knowing A3 whom he says he was seeing for the first time, the hood was put back on his head and the torture continued until he passed out.

40 That he regained consciousness at Naguru Hospital, where he stayed for a day and was then taken back to Kireka SIU. He remained there for two days and then was taken back to a Safe House, put in a room where the Inspector General of Police appeared and required him to do

what was required of him. When he refused, he was tortured more and his wife brought into the room. She was also punched and kicked viciously until A1 pleaded with them to stop.

5 Papers were the brought to him to sign. Once that was done, his wife was taken away.

A1 spent the night in the room. Next day, he was picked up and taken back to SIU, Kireka, where he remained until he was taken to Nalufenya
10 where he was treated.

He remained at Nalufenya until 30.01.17 when he was taken back to SIU, Kireka and from there to Buganda Road Court, charged and remanded.

15 On 03.01.17, A1 was examined by Dr. Joshua Oluka.

And that on 28.10.17, he interfaced with Nixon Agasirwe after he had been remanded to Upper Prison, Ward 16, and Agasirwe agreed to be
20 his witness.

The document dated 24.11.19, written to the Director of Public Prosecutions and copied to others was admitted in evidence as Exhibit D₈.

25 The Director of Public Prosecutions was allowed to recall a witness to rebut the alibi raised, as the statement had not been disclosed to the Prosecution till that day.

30 A1 had indicated to court that he would call twelve witnesses but eventually only four witnesses appeared and he decided to do away with others.

DW4, Dr. Oluka Joshua confirmed examining A1 at Murchison Bay Prison
35 on 03.02.17. He found him to be stable and no abnormalities were detected. He diagnosed him to have psychosomatic body pains (pain in the mind), and post-traumatic stress disorder (PTSD). He prescribed for him tablets to suppress the psychosomatic stress and for pain.

40 On 06.02.17, when the Doctor again interfaced with A1, he diagnosed him with cough and flu. No other abnormalities were found in the patient. A1 did not complain of torture.

The medical examination report was admitted in evidence as Exhibit D₉.

5 The next witness for A1 was DW5 Bwengye Linnard, a Prisons Officer in the Reception Department. He recalled that on 27.10.17, he received prisoners who included Nixon Agasirwe and Juma Salim among others. - See Exhibit D₁₀.

10 A1 was admitted to Luzira Prison on 30.01.17, as Serial No. 117/17.

DW6 Juma Salim a remand prisoner testified that he got to know A1 on 28.10.17, when he was brought in early in the morning.

15 The other prisoners present included Nixon Agasirwe. A1 and Agasirwe greeted each other. Asked why he was in prison, A1 told Agasirwe that he had been arrested on the allegation of having killed someone on 27.10.16.

20 That Nixon wondered how that could be true when on that date, he had picked A1 from Inspector General of Police (IGP)'s home and taken him to his own (Agasirwe's) home.

Then Nixon told A1 to call him as a witness in court.

25 DW7 Jjumba Derick stated that he got to know A1 at Nalufenya sometime in December, 2016, when A1 was brought to Nalufenya by CMI Police Officers.

30 That A1 was in a bad condition with bleeding wounds all over his body. The witness was then requested by Police to take A1 to the hospital for treatment. He took A1 for treatment and A1 was then taken away.

He next saw him on 10.02.2021, when he (DW6) appeared in court to testify, and again on 12.03.2021, in court.

35 That A1 left Nalufenya mid –January, 2017, came back for a while and finally left in February, 2017 and never returned. By then A1 was still in a bad state.

40 Although he used to talk to A1 when he was at Nalufenya, A1 never told him where he was on 27.10.16.

The rest of the witnesses for A1 were dispensed with for reasons set out on record.

5 A2, Benon Lumu also gave unsworn evidence. He stated that he admits he participated in all the three offences but was compelled to do so.

That he was threatened that if he did not participate, he would be killed. Therefore, to save his life, he complied. That he escorted A1 from Kololo up to Kenya.

10 A2 requested for Exhibit P₃₅ to be replayed before court, which was done.

15 The video shows A2 at the murder scene in Amerikwit, Kenya, being interviewed by PW11 and moving around at the scene pointing out the different spots to the Police Officer.

20 He adopted the Exhibit as his full defence, insisting that he is innocent and did not kill the deceased. And that none of the Prosecution witnesses said that he shot the deceased.

Further that, he was in Police detention for forty-nine days where it was terrible.

25 That the seven Police Officers who searched his home did not reflect in the search certificate, all that had been taken from his house. Only four items were included and yet more than forty items were picked.

30 Referring to the evidence of PW21, A2 said that the witness showed court a backpack picked from his home which had items like cheque books, voda phone mifi, Airtel landline phone, a red metallic safe deposit box among others, picked from his home. Some of the items were never brought to court and were also not indicated in the search certificate. For example, the Uganda passport, a 55 inch carved Samsung TV and a 42 inch Samsung Match TV.

35 He prayed court to make an order directing that the items shown to court but not included in the search certificate PW21 showed to court, be returned to him.

40 A2 did not call any witness.

A3, Kisitu Andrew in his sworn evidence testified that he knows the first two Accused as his Co-Accused.

That he first got to know A1 when he was taken to a Safe House where A1 was, and it was the first time to see him and know he was a Captain by rank.

A3 asserted that he was repeatedly tortured in a bid to make him implicate himself and his Co- Accused. That he was handcuffed, legs shackled, beaten, kicked and punched and denied food for about three days. He was isolated in a water flooded room with a small bucket to ease himself.

That he was arrested on 22.12.16 when he had gone to Kireka SID to see A2, upon learning of his arrest in the Newspapers.

That he was never informed of the reason for his arrest until 26.12.16, while at a Safe House. He was then accused of having participated in causing the death of an Eritrean without being told when the Eritrean had been murdered.

He learnt from the Prosecution evidence that the offences happened on 27.10.16. But that on that day, he was at the Hardware shop of his mother where he was working.

They left the shop at 7pm and went back home to Kiwatule. The next day 28.10.16, he returned to the Hardware at 7am and was there in the afternoon.

After his arrest on 22.12.16, a body search was carried out on him and all his properties taken away. Thereafter, he was taken home and a search was conducted and the following properties were taken away: National ID, Driving Permit, Standard Chartered Visa card, KCB Visa card, three different Forex Bureau receipts for different transactions and dates, Ug. Shs. 150,000/-, belt, phone Nokia Microsoft, handkerchief, Shs. 32,000/- and shoes.

He explained that he obtained the Forex Bureau receipts upon exchanging the dollars paid by a Sudanese customer upon purchasing materials.

Many other things were also collected including two phones, four T-Shirts, three Shirts, three Khaki trousers, four Jean trousers, two pairs of Canvas shoes – Nike and Adidas, one pair of Suede boots, two watches, one for men and the other for ladies.

5

His Mother was made to sign an empty paper purported to be a search certificate. The LC Chairman declined to sign the paper.

10 Referring to the evidence of PW11, who testified that A3 had confessed buying the items from the money taken from the deceased, he said it was a lie. That the items were bought by him and his mother.

15 The watch, belt and wallet were bought for him by his mother around 15.01.2015, as his graduation gifts. For the Prosecution witnesses to claim the watch belonged to the deceased was a lie.

20 A3 further denied recording any charge and caution statement before PW19, one Okello Santos, contending that he first saw the said witness in court. But that when he was in a Safe House and being tortured, one Nuwahereza and others forced him to sign papers he came with. Since he could not bear the pain of torture anymore, he signed the papers without knowing what was there.

25 From the time he was arrested, until he signed the papers, he had been moved from place to place hooded and handcuffed, isolated, beaten (Safe Houses).

30 That he first saw PW2 Mukosi (Trial within a Trial) in court. And that it is a lie to say he participated in the commission of the offences with A1 and A2.

35 By the time he was taken to Nalufenya, he was in a bad state, with bruises all over and could not walk on his own. The knees, ankles and face were swollen and there was a blood stain in his eye.

At Nalufenya, he received medication. He used to be assisted to go from the cell to the clinic by DW7 Derick Jjumba.

40 That he remained at Nalufenya for a number of days until 30.01.17 when he was taken to court. That by then, he was okay with only slight pain in his knees.

The medical examination report of the doctor who treated him at Nalufenya was never brought to court because of the condition he had been in at that time.

- 5 On the first day at Nalufenya, he was thrown into the cell where A1 was but was then taken away after a few minutes. That A2 is his friend but not a relative.

10 The witness for A3, DW8 is his Mother Nakabiri Robinah. She confirmed that before A3 was arrested, he was working with her in the Hardware shop at Kiira, Bulindo, Wakiso District. They were working together since 2014.

15 That on 27.10.16, A3 was at the Hardware shop with her from 7am up to 7pm or 7.30pm.

He was arrested on 22.12.16, when he had gone to Kireka to see his friend and taken home to Kiwatule by Police, to search the house.

- 20 Upon being informed by one of her children, DW8 immediately returned home and found Police in the bedroom but about to leave.

The Police informed her that they had come to the home to do a search at A3's room.

25 They did not show her the items they were taking but just brought her a piece of paper to sign confirming the search, which she did while in tears.

- 30 That the Police told her that they had not found anything in the room but had taken things including clothing. Later, on checking the room, they found clothes and shoes had been taken, including the Paidu watch which used to be on A3's table.

- 35 The watch, belt and wallet had been given to A3 on his graduation on 15.01.15.

40 The items had been bought at Burton Shopping Arcade, Burton Street Kampala. A receipt issued by Lucky Jewelers dated 09.01.15, indicates that the items cost Shs. 130,000/- in total.

The receipt was not signed by the person who allegedly issued it.

Counsel for the State objected to the receipt being admitted in evidence on that ground and also that the receipt had been forged as Shop No 22 had been dealing in plumbing materials and not jewelry, by 09.02.15. Otherwise that since the receipt had not been disclosed until 2pm, he would seek leave of court to contact Management of Shop No. 22 to testify in respect of its activities as of 09.01.15.

The receipt was placed on record for identification purposes pending the calling of the person alleged to have issued it to tender it in evidence

D_{ID1}- S.103 Evidence Act.

DW8 continued with her evidence, identifying the watch she said she bought on 09.01.15 as proved by the receipt D_{ID1}.

She also identified Exhibit P₂₈ and P₂₉ as the two pairs of Jean trousers and shoes bought for A3.

She confirmed that when some customers paid in dollars, A3 would be the one responsible for the dollars.

Asked about the receipt D_{ID1}, she stated that she bought the items from many people who came to the doorway of the Arcade and that she cannot confirm that she bought them from Shop No.22.

A3 closed his Defence without calling the person who issued the receipt for the items in issue. Counsel for the defence stated that DW8 did not know the clear identity of the person who issued the receipt because the shop had many activities and she had not been there since 2015.

At the next hearing, PW11 was recalled to disprove the alibi of A1. The witness was one of the Investigating Officers in the case.

He stated that he was part of the team that interviewed A1 while he was in detention, following the revelations of A2 who had revealed that he had participated in commission of the offences jointly with A1.

During the interview, A1 told him how he had been called by A2 on 26.10.16, and they agreed to meet the next day. That on 27.10.16 at about 10am, they met at Kololo with A3, after he (A1) had been picked from his home at Munyonyo in a Noah vehicle.

At Kololo, the three Accused met with the deceased, whom A2 had said they were supposed to transfer money from his account to a Bank in Kenya.

- 5 That A1 and A2 then got into the vehicle of the deceased and together went to the deceased's home at Muyenga, while A3 returned the Noah vehicle to its owner.

10 At the deceased's home, the deceased spoke to someone who agreed to meet them at Kololo. They left Muyenga and went to Housing Finance Bank, Kololo, from where a young Eritrean man came and gave the deceased a cheque leaf and left A1 and A2 with the deceased.

15 Later, they were joined by A3, and all the Accused persons moved with the victim via Namungongo, Seeta, through Mukono, branched to Kayunga Road and then joined Njeru Town around the Nile Bridge.

They then moved towards Busia boarder via Jinja, Iganga and Busia Highway.

20 This witness asserted that he was doing the direct interview, while his colleague took the short notes as well as filming the interview.

That the late Sgt. Magara Dickson recorded the statement of A1.
25 The statement was later read through by A1 and he affirmed it was correct and countersigned it. The recording Officer also signed.

There had been a series of other interactions with A1. For example, while searching his home, it was established during the interaction that
30 on 27.10.16, A1 was at his home at Munyonyo from where he was picked by A2.

That A1 narrated his movements and participation in the crimes. The testimony was corroborated by his accomplices A2 and later A3.

35 Other witnesses like PW5 the younger brother of the deceased also confirmed meeting A1 before the kidnap and subsequent murder of the deceased. PW5 took the cheque leaf and passport to Housing Finance and handed it over to his brother.

40 PW5 confirmed this in his Police statement and also identified A1 during the Identification Parade conducted during the course of the inquiry.

The Police Officers from Busia Police Station who were on patrol during the night of 27.10.16 -028.10.16 between 03-04am were also interviewed.

5

They confirmed intercepting A1 with another occupant in the car around Sangalo shortcut junction border crossing, a few meters from the main Busia border crossing point.

10 ASP Kasajja Joel PW7 confirmed in his statement having stopped the vehicle where A1 and A2 were, as they crossed back into Uganda from Kenya, and questioned where they were coming from.

15 A1 replied that he was on routine surveillance duties, presented his military card and they let them go.

After explaining that Sgt. Magara who recorded A1's plain statement passed away sometime in December, 2020, in a motor accident; the witness emphasized that he was familiar with his handwriting and signature as he had worked with Magara from 2014, till he passed away.

20 Counsel for the State applied for the statement to be admitted as an Exhibit. Counsel for A1 and A3 vehemently objected on the ground that A1 never made any statement before late Magara, and that DSP Kanabi who was taking notes should be the one to tender it, among other things.

The objection was overruled under the provisions of S.30 (a) of the Evidence Act. The Statement was admitted as Exhibit P₄₈.

30

The witness then concluded his evidence asserting that during his interaction with A1, he did not tell him that he was in any other place other than what he disclosed in the interview; or that he was in detention of the then Inspector General of Police (IGP), Agasirwe and Bakaleke. That the alibi raised was therefore, an afterthought.

40 In determining the issue of participation of the three Accused in these offences, I wish to remind myself of the requirement to examine all the evidence of both sides closely, bearing in mind the established general **principle** that ***"an accused person does not have to prove his innocence. And that by putting forward a Defence like alibi or any other, an accused does not thereby assume the burden of***

proving the Defence except in a few exceptional cases provided for by law”.

5 *"It is up to the prosecution to disprove the defences of the accused persons by adducing evidence that shows that, despite the defence(s), the offence(s) was/were committed and was/were committed by the accused persons".* – See **Kato vs. Uganda [2002] 1EA 101, Wamalwa & Another vs. Republic [1999] 2 EA 358 (CAK) and Sekitoleko vs. Uganda [1967] EA**
10 **531.**

The submissions of both Counsel for the Accused and of the State and of A2 will also be taken into consideration.

15 The submissions raised issues such as identification, direct and circumstantial evidence, defences of alibi and compulsion, alleged torture of accused persons, Human rights violations and contravention of the provisions of the Constitution, contradictions and inconsistencies in the Prosecution case.

20 Accuracy of the video recording, retraction and repudiation of confession statements, disclosure of information which later turns out to be true.

Common intention and jurisdiction of court, among other things.

25 After careful consideration of the evidence of both the Prosecution and Defence, this court finds that the evidence against the Accused persons is both direct and circumstantial.

30 Case law has established that **"circumstantial evidence is often the best evidence. It is the evidence of surrounding circumstances, which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial evidence"**. – Refer to the case of **Thiaka vs. Republic [2006] EA**
35 **362.**

A1: The evidence adduced by the Prosecution shows that A1 was arrested as a result of information given by A2 to the Police – See
40 Evidence of PW4.

When A1 was arrested, an identification parade was conducted as already indicated in this judgment. PW5 identified A1 during the parade. The circumstances were favorable for correct identification. He had seen him on the date in issue at Kololo Housing Finance Bank, when
5 he took the cheque leaf to his brother. A1 was dressed in Military uniform.

It was the testimony of PW5 that the image of A1 had stuck in his memory.

10 During his testimony via video link, PW5 was still able to identify A1 and his Co-Accused as the person he had seen in the company of his late brother at Kololo.

15 Contrary to the submissions of Counsel for A1, the identification parade was properly conducted in accordance with the required rules, to the extent that A1 did not in any way protest the exercise or raise any questions whatsoever. Indeed, he signed Prosecution Exhibit P₂ to confirm that the parade had been properly conducted.

20 In addition to the identification of A1 at parade, is the evidence of PW7 ASP Kasajja John who intercepted A1 and A2 as they crossed back into Uganda from Kenya during the night of 27.10.16, and morning of 28.10.16.

25 The witness interacted with A1 and saw his particulars on the warrant card which was admitted in evidence as Exhibit P12₁₈

30 Upon a search being conducted at A1's home, among the things recovered was a military uniform. The same attire had been described by PW5 as the uniform A1 was putting on at the time the deceased was kidnapped.

35 The evidence of PW7 concerning what A2 revealed to Police after his arrest, describing the meetings held where A1 was involved; where the whole plan to get the deceased so as to transfer his money from his bank account, and where roles were given out to each participant, was not disproved.

40 Further, the involvement of A1 was confirmed by the Defence of A2, who clearly indicated that A1 participated in all the crimes right from Kololo, up to the time the deceased was murdered in Kenya.

This was confirmed by Exhibit P₄₄ the charge and caution statement of A3; which gives a detailed account of the role A1 played before, during and after the commission of the crimes.

5

Although A3 **is a Co- Accused, the confessions implicating A1 can be taken into consideration against each of the accused persons under S. 27 of the Evidence Act.**

10 The section provides that ***"at the trial of more than one person for the same offence, if a confession is made by one of them affecting himself and others, Court may take into consideration such confession against him and others"***.

15 *As already pointed, the evidence is corroborated by the evidence of A2. And even then, the Supreme Court has held that "corroboration is not necessary in law and Court may act on a confession alone if it is fully satisfied after considering all the material facts and surrounding circumstances that a confession cannot but be*
20 ***true"***. Refer to the case of ***Festo Androa Asenwa & Another Vs Uganda SC Appeal 1/88***, where the case of ***Tuwamoi Vs Uganda [1967] EA***, was relied upon.

25 All that evidence is coupled with the evidence of PW11 who was recalled to disprove the alibi of A1. It clearly indicates that after A1 was arrested, he willingly told the Police the part he played in the commission of the crimes.

30 He did not raise the issue of having been in detention or having been tortured. – See Exhibit P₄₈.

The claims of A1 to being tortured were also disproved by Doctor Oluka, who as already set out in this judgment did not upon examination **of** A1, find anything to do with torture.

35

The injuries on the wrists and ankles of A1 were explained by the prosecution as having been sustained at the time of A1's arrest; when he was trying his very best to resist arrest.

40 For all those reasons, I find that the Defence of A1 was disproved by the Prosecution and he was placed at all the scenes of crime in the three offences.

I agree with the Prosecution that the Defence was raised as an afterthought.

5 While an accused bears no burden to prove his alibi, Case law has clearly established that ***"a person who sets up the defence bears the burden to account for so much of their time during the transaction in question, so as to render it impossible to have committed the imputed act(s)"***.

10 It also requires that for the defence of alibi to be believed, it should be disclosed at the earliest possible opportunity.

15 In this case, A1 did not raise the alibi until at the time of his defence; to the extent that the Prosecution had to recall a witness to rebut it.

Refer to the case of **Festo Androa Asenwa and Another vs. Uganda (Supra)** where the Supreme Court held among other things that ***"if an accused does not bring forward the defence of alibi until months afterwards, there is naturally a doubt as to whether he/she has not been preparing it in the interval."***

"To raise the alibi at the earliest opportunity, gives the prosecution an opportunity to inquire into the Defence".

25 In the present case, the letter A1 claims was written to the Director of Public Prosecutions and copied to others was written after two years of detention.

30 This court accordingly finds that the Defence of A1 was disproved and he was placed at the scenes of crime and proved to be a participant in the commission of the offences.

The submissions of the Defence to the contrary are therefore hereby rejected.

35 **A2:** A2 in his Defence admitted being a participant in the crimes right from Kololo, Kampala, Uganda, right up to Busia, Kenya, where the deceased was killed.

40 This is confirmed by the evidence of the Prosecution which as already set out in this judgment shows that, among the items recovered from

the home of A2 was a passport size photograph of the deceased. –
Refer to the evidence of PW8. The photo was confirmed as being
the photo of the deceased by his relatives. - **See Exhibit P₄.**

- 5 **Exhibit P₅,** the Nokia phone was also recovered at A2's home. The
phone was proved by the Prosecution to be the one in which the line
which was used to lure the deceased into the kidnap; had been placed.

10 The same number is the one which last called the victim. The only
reasonable conclusion is that it is A2 who lured the victim.

The evidence of PW8 and PW11 also confirms that the deceased was
killed in Kenya and A1 fully participated.

- 15 Later after his arrest, A2 led Police to the scene of crime in Kenya,
where the body of the deceased had been recovered.

The scene was reconstructed with A2's assistance and Exhibits including
a match box, projectiles and cartridges were recovered.

- 20 The spot where the deceased's body was set ablaze was verified as true
and evidence around the areas observed. – See **Evidence of PW15,
16 and PW14.**

- 25 Indeed, A2 adopted the video taken during reconstruction of the scene
as his evidence in Defence.

This information given by A2 led to the discovery of facts **which** were
proved by the evidence of the Prosecution to be true and can be rightly
30 used against him. – Refer to **S.29 Evidence Act.**

The information could only be within the knowledge of an active
participant in the crimes; as pointed out by Counsel for the State.

- 35 This court also finds that the Defence of compulsion raised by A2 is
unsustainable for the following reasons:

The Defence is meant to establish that the person performed the act(s)
involuntarily and as a result of being compelled by another person to do
40 so under the threat of death.

However, A2 gave no clear narration of how he was compelled to participate in the offences. More so, when there is undisputed evidence that he participated in the planning meetings before the offences were perpetrated and took part in their commission.

5

Even after the offences were committed, there is no indication that A2 in anyway disassociated himself from the offences, when it is apparent that he had opportunities to do so.

10 After the murder of the deceased, he still remained in the company of A1. They spent the night in the same Hotel at Busia, and traveled together to Arua the next day; where the vehicle of the deceased was disposed of.

15 When A1 and A2 were intercepted by PW7 at the border on their way back from the murder scene, A2 had the opportunity to seek refuge with the said Police Officers but did not do so.

20 Even all the time before his arrest, there is no indication that A2 ever reported to any authority what had transpired, so that he could thereby dissociate himself from all the actions that culminated in the crimes that were committed.

25 I therefore, find that the Defence of compulsion is not available to the A2.

30 It is apparent that he deliberately and willingly participated in the commissions of the three offences only mindful of the material and monetary benefits that he hoped to gain therefrom. He never disassociated himself from any of the offences.

35 **A3:** The evidence of the Prosecution was that, the identity of A3 was revealed to Police by A2. When A3 went to Kireka after learning of the arrest of A1 and A2, he was arrested on the ground that he had been named as a participant.

40 Upon his arrest, A3 recorded a charge and caution statement admitting his participation and that of his Co-Accused in the crimes of Kidnap and robbery, although he indicated that he did not go to Busia, Kenya, where the deceased was murdered.

Nonetheless, during trial, A3 repudiated and retracted the statement. A trial with in a trial was held and the statement was admitted in evidence as **Exhibit P₄₄** for the reasons set out in the ruling.

- 5 In his Defence, A3 maintained his retraction of the statement and raised an alibi. He claimed that on that date when the offences are alleged to have been committed, he was at his mother's Hardware shop where he used to work.
- 10 Further that, all the alleged exhibits said to have been bought using the money robbed from the deceased and the watch retrieved from his room upon a search being conducted, were bought for him by his mother on his graduation.
- 15 A3 also maintained that he signed the alleged charge and caution statement as he had been severely tortured and signed out of duress so that the torture could be discontinued.

His alibi was supported by his mother as earlier indicated in this
20 judgment.

I am mindful of the requirement of accepting a repudiated or retracted confession with caution. And that ***"before a court can find a conviction based on such a confession, it must be fully satisfied in all the circumstances of the case that the confession is true"***.
25

The principle established by decided cases is that ***"Court will only act on a confession if it is collaborated by independent evidence accepted by the court."*** – See the case of **Festo Androa Asenwa and Another vs. Uganda (Supra)** where the case of **Tuwamoi vs. Uganda [1967] EA 84**, was relied upon.
30

But as already indicated earlier in this judgment, the Justices of the Supreme Court emphasized in that case that ***"corroboration is not necessary in law and court may act on a confession as long as it is fully satisfied after considering all the material points and surrounding circumstances that a confession cannot but be true"***.
35

40 In the present case, this court finds that the statement cannot but be true considering the detailed account of the events, that was given by the maker.

The details could not have been made up by Police as the Accused wanted court to believe.

- 5 The claim that A3 was tortured and just given papers to sign was also disproved by the Doctors called to testify on his behalf, who clearly told court that he was suffering from allergic rhinitis and had no signs of having been tortured as he claimed.
- 10 The Police also recovered from A3's home clothes and T-Shirts he claimed to have bought from the funds he shared when the deceased was robbed. – Refer to **Exhibits P26, 27, 28 and 29.**

These exhibits could only have been identified by A3.

- 15 A watch confirmed by PW20, to belong to the deceased, was also recovered from A3's room.

- 20 While A3 claimed that the items including the watch were bought for him on his graduation and some by himself; his mother's evidence meant to confirm his claim was found to be unreliable/incredible as it was full of contradictions.

- 25 While she claimed she bought items from Shop 22 Burton Street Arcade, and a receipt was issued to her by a lady, at the same time, she claimed that she was approached by several people at the entrance of the Arcade, from whom she bought the items.

- 30 The possibility that the receipt could have been forged for purposes of exonerating A3 could not be ruled out, as it was the undisputed claim of the Prosecution that, during the period the items were said to have been purchased, the shop number 22 was not dealing in jewelry.

- 35 The Defence was given a chance to call the person who issued the receipt to appear and testify, but that was not done. Therefore, the receipt having been admitted for identification purposes and not as an exhibit could not be relied upon without being admitted as an exhibit. It is accordingly rejected.

- 40 The confession of A3 was also corroborated by evidence that indicated that the crimes were meticulously planned in meetings which A3 attended and where roles were given out.

He was given the role of errand boy and hence the evidence that he and A2 picked A1 from Munyonyo on the Morning of 27.10.16, drove to Kololo and then he returned the vehicle to the owner.

5

Later, he joined A1 and A2 at Kololo Airstrip and was with them when the deceased was kidnapped, injected into unconsciousness and robbed. Some proceeds of the robbery were shared with him and he was then directed to return to Kampala and pass on the cheque to one Eddy Nsubuga which he did; which resulted into the emptying of the account of the deceased.

10

And upon discovering from the Newspapers that the deceased had been murdered and A1 and A2 had been arrested, he went to Kireka where they were being held and that is when he was arrested.

15

What would be his interest in the two Accused persons whom he claims were unknown to him?

20

There is also no evidence to indicate that he disassociated himself from their actions.

This Court accordingly finds that A3's alibi was disproved and he was placed at the scene of kidnap and of the robbery.

25

This court is also aware that the law provides that such a confession as made by A3 may be taken into consideration against the maker and other Accused persons; under S.27 of the Evidence Act, as already pointed out in this judgment.

30

With all the evidence already set out in this judgment, and for all the reasons given, I find that the ingredient of participation in all the three offences has been proved against all the Accused persons.

35

Counsel for the Defence raised issues of inconsistencies and contradictions in the Prosecution case, without pointing out specifically where the evidence was inconsistent or contradictory.

40

Each witness related what they saw or found out by way of investigations. And it is the established principle of case law that **"no**

two or more witnesses can give exactly the same version of events of what transpired in a matter”.

And it is “**where discrepancies or contradictions are found in evidence to be serious or grave unless explained, will result in the evidence being rejected. However, minor inconsistencies will be ignored unless they point to deliberate untruthfulness**”.

– See the case of **Antonio Ruhweza vs. Uganda Cr. App 07/2001**.

The issue raised by Counsel for the Accused was that some of the Police witnesses did not record their own statements and those who did, did not include some of the evidence they gave in court.

It is trite law that “**Police statements are not made under oath. And court will always prefer the witness evidence which is tested by cross examination**”. – Refer to the case of **Chemonges Fred vs. Uganda SC. CR. App. 12/2001** which was relied upon in the case of **Lawrence Mwayi and Others vs. Uganda Cr. App 162/2001**.

After careful evaluation of all the evidence of the Prosecution and the Defence, court finds that the Prosecution proved to the required standard the commission of all the three offences and the participation of each of the Accused persons in commission thereof. Their Defences were disproved as already indicated.

Under **S.19 of the Penal Code Act**,

(1) When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it.

(a) Every person who actually does the act or makes the omission which constitutes the offence,

(b) Every person who does or omits to do any act for the purpose of aiding another person to commit the offence.

(c) Every person who aids or abets another person in committing the offence.

The evidence of the Prosecution places all three Accused persons under that Section considering the roles each played in committing the three offences.

- 5 The Accused hatched a plan to rob the deceased of his money, lured him to Kololo on the pretext of helping him to obtain a Germany visa, kidnapped him, made him unconscious when he refused to sign the cheque, robbed him of all the properties he had, and the money shared among three Accused. Thereafter, he was driven to Busia, over the
10 border into Kenya, killed and his body set on fire.

Thereafter, the vehicle was driven back to Uganda, and into Arua the next day and sold over the border.

- 15 All this is sufficient evidence of a common intention to execute an unlawful purpose. – Refer to the case of **Difasi Magayi and Others vs. Uganda [1965] 1EA 667 (CAK)**.

- 20 Under S.20 of the Penal Code Act “**where two or more persons form a common intention to prosecute an unlawful purpose and in the Prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of that purpose, each of them is deemed to have committed the offence**”. – See the case of **Isingoma vs. Uganda [1986-89] 1EA 155 (SCU)**, **Opoya vs. Uganda [1967] 1EA 752 (CAK)** and **Andrea Obonyo and Others vs. Republic [1967] EA 542**.
25

- The kidnap, robbery and eventual murder of the deceased all occurred in the process of all Accused executing an unlawful purpose. They
30 shared a common intention in the process of which the deceased was kidnapped, robbed and killed.

- Prior agreement was proved by the evidence of meetings held to plan as to how to execute their unlawful purpose, although normally “**prior agreement is not necessary to be proved between the Assailants**”.
35

- “**Normally, it is sufficient to prove the intention that can be inferred from the presence of the Accused, their actions or omissions to disassociate themselves from the attack.**” – Refer
40 to the case of **Birikadde vs. Uganda [1986] HCB 6**.

For those reasons, A3 is also accordingly culpable for the murder of the deceased, although he was not at the scene of the murder.

The submission of Counsel for the Accused that this Court had no jurisdiction to try the offence of murder is hereby rejected with the contempt it deserves.

S.5 of the Penal Code Act clearly provides for offences committed partly within and partly beyond the jurisdiction.

It states that **“when an act which wholly done within the jurisdiction of the court, would be an offence against this code is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this code in the same manner as if such act had been done wholly within the jurisdiction”**.

I reiterate that the actions of the Accused persons which culminated into the death of the deceased were done partly within and partly beyond this jurisdiction.

The Accused who have been found to have participated in the actions are within the jurisdiction of Uganda and were accordingly properly tried before this court.

For all the reasons set out in this judgment and in total disagreement with the opinion of the Assessors, I hereby find all the three Accused persons guilty as charged on all three counts and they are hereby convicted as charged.

FLAVIA SENOGA ANGLIN
JUDGE
17.05.2021