

THE REPUBLIC OF UGANDA.
IN THE HGH COURT OF UGANDA HOLDEN AT KAMPALA.
HCT-00-CR-SC-0171-2019

UGANDA =====PROSECUTION

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VERSUS

A1. KARUNGI ABUBAKAR

A2. MWEBE HAMZA =====ACCUSED.

BEFORE HON.LADY JUSTICE MARGARET MUTONYI, JHC

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JUDGEMENT.

INTRODUCTION.

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Karungi Abubakar (A1) and Mwebe Hamza (A2) herein after referred to as the accused were indicted for two counts of murder contrary to **sections 188 and 189** of the Penal Code Act, laws of Uganda.

It was alleged that the accused persons and others still at large on the 8th day of September 2018 at Bulenga trading center in Wakiso District with malice aforethought unlawfully killed ASP Kirumira Muhammad and Mbabazi Resty Nalinya.

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When the accused persons were arraigned before this court, they both pleaded not guilty to the charges there by putting all the essential ingredients of the offence of murder in issue.

At the close of the prosecution case, A2 Mwebe Hamza was acquitted on no case to answer since there was no sufficient evidence against him.

This judgment is therefore in respect of A1 Kalungi Abubakar.

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The prosecution was led by the **Assistant DPP Jatiko Thomas** assisted by **Mr. Kyomuhendo Joseph Chief State Attorney**, while learned Counsel **Zimbe Zephaniah and Ssegwanyi Ssakka** appeared for both Accused persons on private brief.

Mr. Segwanyi Ssakka however later withdrew from the defence team by conduct because he stopped appearance without giving any notice to court.

30 **Ms. Jackline Nafula and Ms. Nabuufu Jacqueline** assisted court as assessors.

LEGAL PRINCIPLES

In criminal law, an accused person is presumed to be innocent until proven guilty or until he or she pleads guilty, which presumption is a constitutional right under **Article 28 (3) (a) of the 1995 Constitution of the Republic of Uganda** as amended.

35 This is a common law principle which imposes the burden of proving the charge on the prosecution and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt or in other words with very great clearness.

As such the burden of proof squarely rests on the prosecution to prove the guilt of the accused person.

40 The landmark case of **WOOLMINGTON VS DPP [1935] UKHL 1** reconsolidated the principle of presumption of innocence for application across the commonwealth of which Uganda is a member.

This case identifies the metaphorical *golden thread* running through that domain of the presumption of innocence,

45 The standard of proof is also very high. All the essential ingredients of the offence must be proved beyond reasonable doubt. This means that the prosecution must convince the trial court that there is no other reasonable explanation that can come from the evidence presented at the trial than that of guilt of the accused.

50 In other words, the evidence presented by the prosecution must establish the defendant's guilt so clearly that they must be accepted as facts by any rational person.

If the trial judge can not say with certainty based on the evidence presented that the accused is guilty, then there is reasonable doubt and the judge is obliged to return a verdict of not guilty.

55 In the case of **MILLER VERSUS MINISTER FOR PENSIONS [1947] 2 ALL ER 372**, Lord Alfred Thompson Denning held that:

“The prosecution evidence should be of such standard as to leave no other logical explanation to be derived apart from the fact that the accused committed the offence”.

60 **In a criminal trial like the instant case, prosecution evidence must bring out the actus reus of the accused, that is the action or conduct which is the constituent element of the crime as opposed to the mental state of the accused.**

Likewise the prosecution evidence must demonstrate the mensrea of the accused that is the intention or knowledge of wrong doing on the part of the accused that
65 **constitutes part of the crime as opposed to the action or conduct of the accused.**

If the prosecution evidence brings out the above, then the motive or reason for the criminal conduct can easily be inferred.

This court believes that all murders must be actuated by mensrea that is followed by the actus reus.

70 In a charge of murder, the essential ingredients that the prosecution has to prove are the following;

1. **That there was death of a person.**
2. **That the cause of death was unlawful.**
3. **That death was caused with malice aforethought.**
- 75 4. **That the accused participated in the murder.**

This brings out four issues to be resolved by this court.

1. **Whether there was death of two human beings/persons.**
2. **Whether the cause of death was unlawful.**
3. **Whether the unlawful death was caused with malice aforethought.**
- 80 4. **Whether the Accused Kalungi Abubakar caused or participated in causing the death.**

RESOLUTION OF ISSUES.

85 Let me proceed to resolve the issues in their chronological order.

WHETHER THERE WAS DEATH OF TWO HUMAN BEINGS/PERSONS.

A human being is a person who has been born and is alive. They are born male or female. They are either children or adults.

90 In order to discharge its burden of proof, the prosecution called 15 witnesses one of whom had his evidence disqualified leaving a total of 14 while the defence relied on two witnesses of the accused and his wife. The medical evidence for both the deceased and the accused was agreed upon under **section 66 of the Trial on Indictment Act.**

The agreed documentary evidence was as follows:

95 **i) PF48b the postmortem reports** wherein the bodies of the deceased were examined at City mortuary Mulago. The same was admitted in evidence and marked as prosecution exhibit PEX1 for the body that was identified by Kawooya Baale the father of the deceased in count one as that of **Kirumira Muhamad of Bulenga.**

100 **ii)** The body was taken to the city mortuary of Mulago on the 9th day of September 2018 at 12:15 am and examination was carried out on the same date at 10:25 am with the following relevant findings;

105 **iii)** It was a well-nourished body of a male adult, putting on a white tunic commonly known as Kanza with a white vest, navy blue trouser and a black belt. The upper part of the body was blood stained together with the clothings to wit; a navy blue court, there were broken glass particles on the clothes. Rigor mortis was set and complete.

The body had several bullet wounds that fractured his ribs and affected his kidney, his lungs brought a lot of blood in the stomach, the bullet wounds were almost all over his body apart from the head that was intact and the private parts were also intact.

110 The stomach, chest, the back, the buttocks had several gunshot wounds which affected his internal body parts like the heart, the lungs and the

115 kidney. In the end he died as a result of that hemorrhagic shock from the several bullet wounds.

Important to note was the following information;-

a) All entry wounds were about 0.5 centimeres in diameter and had burnt surrounding soft tissue.

b) They were close gunshot injuries

120 c) The external body injuries corresponded with the defects on the clothings.

d) 2 blood swabs were taken for DNA profiling and future comparison tests.

e) 2 fragments were recovered from the tunic, one fragment from the left shoulder and 5 fragments from the left elbow submitted for ballistic examination.

125 f) Photos were taken by No.39667 Detective Constable Ssemuddu Jonathan Kalinda SOCCO Nansana,

g) All the clothings were handed over to the OC/CID Bulenga Detective ASP Katono Ritah.

130 iv) They also agreed on the second Police Form 48b, which was admitted in evidence and marked as prosecution exhibit PEX2. The body was brought to City Mortuary Mulago and identified by Nakimbugwe Agnes her sister as that of **Nalinya Resty of Bulenga**.

135 v) It was a well-nourished body of a female adult wearing a green blouse with large round black buttons and the blouse had tears all over the lower right aspect. The holes in her clothes were corresponding to the body bullet injuries. She also wore white legging pants which had blood stains and holes corresponding to the injuries on the lower body. She had a perforating injury on the mid third on the right ear lob. The bullets moved upwards to the left. 140 It also had penetrating injuries on the left thigh and had a lacerated wound on the exit, it had laceration wounds on the upper third anterior aspect, entry gunshot wound above the right posterior crest, which bullet wound moved inwards and downwards. The body similarly had entry gunshot wound on the left lower buttock, which bullets re-entered the right buttock 145 through the soft tissues.

The cause of death was indicated in this report as gunshot injuries.

2 blood swabs were taken for DNA profiling and also the recovered full jacketed rifle bullet, copper like with a tampered upper end but intact. These were forwarded to GAL for examination by the ballistic expert.

150 All the clothes were handed over to the OC/CID Bulenga police station.

The examining Doctors were **Moses Byaruhanga and Male Mutumba**, both pathologists who duly signed and stamped the postmortem reports with the stamp of Kampala Capital City Authority, City Mortuary police on 9th September 2018.

These two doctors became PW1 and PW2 accordingly

155 vi) They also agreed on the DNA analysis report from the Directorate of Government Analytical Laboratory where the government analyst acting under the request of detective ASP Mutatina Ephraim in reference to case Number CRB 127-2018 dated 11th September from Bulenga police station who submitted the exhibits for examination on the 12th of September 2018 under laboratory number FB 275-18.

160 19 pieces of evidence were submitted in total requiring the laboratory Analyst to ascertain whether the blood stains from the motor vehicle UAJ 228P at the scene of crime and all the other blood stained items corresponded with the donors of the blood; Nalinya Resty and Kirumira
165 Muhamed.

The findings from the examination tested positive to the blood of the donors and the genetic evidence obtained therefrom was graded as extremely very strong.

This analysis was carried out by Kirya Musa A, a DNA analyst who made the report thereafter and signed it on 26th October 2019.

170 This report was admitted in evidence as prosecution exhibit and marked as PEX3. **Kirya Musa** became PW3.

From the medical evidence that was not disputed, two human beings who were adults in the names of Kirumira Mohammed and Resty Nalinya died.

175 The first ingredient of death of human beings/ persons was therefore proved beyond reasonable doubt.

THE SECOND ISSUE IS WHETHER THE CAUSE OF DEATH WAS UNLAWFUL.

Human life by nature comes to an end which end may be caused by natural death or unlawful killing.

180 The constitution of the Republic of Uganda as amended in 1995 which is the supreme law of the land provides for the right to life as a fundamental human right.

Article 22 of the Constitution provides that:

- 185 1) **No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.**

190 Prosecution evidence of PW1 and PW2, the pathologists, as per their findings on both bodies as exhibited in PE1 and PE2, that has already been explained above, shows that the two deceased were brutally shot with several bullets all over their bodies leading to hemorrhagic shock that caused their deaths making the cause of death unlawful. The defence is not disputing this fact.

The second ingredient was therefore proved beyond reasonable doubt.

Whether death was caused with malice aforethought.

The third ingredient of malice aforethought that the prosecution had to prove is described under **section 191 of the Penal Code Act** as follows:

195 ***Malice aforethought is deemed to have been established by evidence providing either of the following circumstances:***

- 200 a) ***An intention to cause the death of any person whether such a person is the person actually killed or not. Or***
b) ***Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually***

killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.

The question is whether whoever attacked the deceased persons intended to cause death or knew that the manner and degree of assault would probably cause death.

205 Malice aforethought from the above description is a mental element which may be difficult to prove by direct evidence but can be deduced from circumstantial evidence as was held in the case of ***R V Tubere s/o Ochan (1945) 12 EACA 63.***

The court may consider the weapon used like the gun with live ammunition like in this case and the manner in which it was used; - (several live bullets were shot at the
210 deceased), the part of the body that was targeted (the bodies had several bullet wounds on all parts of the body) affecting the entire body and destroying the organs of the body leading to hemorrhagic shock.

PW6 Kigongo Abdu a resident of Bulenga A Zone, Wakiso Sub-County in Wakiso District told court that on Saturday 8th September 2018 at 8:00 pm while he was
215 coming from Bulenga and walking to Musoke Road, he saw a parked black corona which was flashing lights at Take Hardware. That at the time he did not know the owner of the car but when he reached the car, he greeted the person in the driver's seat and asked him where he was coming from because he was very smart in a kanzu and cap and that in response, the person told him that he had 3 functions, the first
220 one in Buloba, the second one in Nsangi and the third in Bwebajja. That as they were still conversing, a lady called Resty came. He knew Resty well because she was the daughter of the village defense secretary. That the said lady opened the driver's seat and sat and he decided to leave and give them space.

That about 10 meters away from where the car was parked, 2 motorcycles passed by
225 him each having two people and they were all wearing black jackets. The first one just passed by Kirumira's car while the second one stopped at his vehicle.

They shot the back tyre of the deceased's car. The one who was seated behind then started firing at the driver's door while those on the first motorcycle were firing bullets in the air. That all the vehicles were stopped and after the person who fired

230 the bullets at Kirumira's vehicle got off the motorcycle and walked around the deceased's vehicle, went to the passenger's side and started firing more bullets.

Considering the fact that the assassins came riding motor cycles, stopped where the deceased were and shot several bullets at both victims, after disabling Kirumira by shooting at his tyre such that he could not even drive away, there is no doubt that
235 there was proper premeditation to kill the owner of the vehicle that is Kirumira and whoever was with him. The assassins had the pre requisite malice aforethought and intended to cause death of the victims. It is common knowledge that a bullet is a lethal weapon once shot at a human being. In this case, there were several bullets shot at the deceased with no hope of survival.

240 The double murder was therefore actuated by malice aforethought which was proved beyond reasonable doubt.

This takes me to the most controversial ingredient of participation.

Whether the Accused Kalungi Abubakar caused or participated in causing the death.

Both the prosecution and the defence adduced evidence on this ingredient.

245 To prove participation, the prosecution should adduce credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence.

Even if the accused participated by remote control, that is at a distance and not at the scene of crime, his mensrea and actus reus must be proved to show the extent of his
250 participation. For example, one may hire an assassin to murder some one by shooting. Evidence of hire makes him liable for the murder as though he pulled the trigger.

Unlike the first three ingredients, participation of Karungi Abubakar in the gruesome murder has been the only contentious issue.

255 In a bid to prove participation, the prosecution relied on the charge and caution state of A1, recorded by **PW10 Inspector Walimbwa Steven**, PW 4 AIP Ajiro Pamela who conducted a search at the accused mother's home, **PW5, Sulaiman Kyabagu Who witnessed a search at the accused's mother's home, PW13 D/A I P Massete George**

260 **who procured court orders to get call data of three suspects for purposes of**
ascertaining their communication and location before, at the commission of crime
and after, PW14 Kabera Francis the security Manager Airtel who issued the call data,
PW11 Frank Nyakayiru a Senior Principle Investigator with the Ministry of Defense
CMI/JATI who does general investigations but majorly does phone analysis and data
265 **analysis from phone printouts. PW12 ASP Mutatiina Ephrahim, and PW15 HW**
Robert Mukanza whose evidence was rejected when court conducted a trial within
a trial in respect of the alleged extra judicial statement of A1 since the procedure
used was so flawed that it raised doubt as to whether the accused appeared before
his worship of which he had denied that he never appeared before Buganda Road
Court for recording the statement.

270 Let me review the evidence on participation starting with **PW4 AIP Ajiro Pamela** who
conducted a search at the accused's mother's home on 3rd October 2018.

She informed court inter alia that a search was made after A1 had earlier on revealed
to them in his statement that he went to his mother's place after the murder and they
therefore performed this search to see if they could recover any exhibits from this
275 home. That while there, A1's mother asked him why he was on handcuffs and in their
presence, he revealed to her that 2 of his friends, Hamza and Kateregga lured him
into the task of being their informant to alert them when the deceased's vehicle
approached them. That he performed the task but however, the team disagreed on
the money to be shared as he was not given his cut which made him go back home to
280 his mother. Nothing connected with the crime was recovered from this home.

She confirmed to court that A1 was brought by officers from Chief of military
intelligence (CMI) and was hand cuffed during the search. Apart from what she
alleged was revealed by A1, she had no independent evidence about the accused's
participation.

285 **PW5, Sulaiman Kyabagu** told court that in October 2018, he was the LC1 Chairman of
the area and on the 3rd day of October 2018 at about 6:00 am-7:00am, he was
awakened by a police officer (PW4) who told him that she needed his help and
permission to perform a search in his area which he accepted and followed the police.
That there were 5 police officers in black clothes and they were led to the home of
290 Namusoke. He found 3 people who were known to him as the CID of Katonga, DISO

of Mpigi and Namusoke. That there was a person seated down and he was handcuffed, on the left there was another police officer who had put on black clothes. The DISO explained to him that they had brought A1 to perform a search. He also stated that in his presence, A1's mother asked him what he had done and he narrated that his friends had misled him and asked him to drive a karaoke car promising to give him money. That he drove the car only to be further tasked to look out for the deceased's car when it stopped and **to give A2 and another a call as soon as the car stopped**. That he did as he was told only to hear bullets and was surprised at what his friends had done. That they even refused to give him the money as agreed. That later that night he went home to his mother at around 11pm in fear and he told his mother that he was scared.

However, he did not tell her what had happened. He also told court that he participated in the search and signed on the search certificate. He also made a statement and signed on it.

When asked if he knew A1 before the search, he responded in the negative.

In cross-examination, the witness confirmed to court that A1 narrated this purported story while he was seated down and on handcuffs.

Whereas he insisted that his statement was recorded by the DISO, a one Matovu in Luganda, the statement in court indicated that it was written by a police officer in the names of Ainembabazi Andrew. The witness insisted that his statement was recorded by DISO Matovu whom he knew very well even before the incident and denied knowing anyone by the names of Ainembabazi Andrew.

PW6 Kigongo Abdu a driver and a resident of Bulenga A Zone, Wakiso Sub-County in Wakiso District was the only eye witness.. He knew Resty well because she was the daughter of the village defense secretary. That the said lady opened the co -driver's seat and sat and he decided to leave and give them space after he had had a conversation with the late Kirumira which is already stated herein.

That about 10 meters away from where the car was parked, 2 motorcycles passed by him each having two people and they were all wearing black jackets. The first one just passed by Kirumira's car while the second one stopped and they shot the back tyre of

the deceased's car. The one who was seated behind then started firing at the driver's door while the ones on the second motorcycle were firing bullets in the air. That all the vehicles were stopped and after shooting at Kirumira, he got off the motorcycle and walked around the deceased's vehicle and went to the passenger's side and continued firing more bullets.

After the act, they turned their motorcycle to face Bulenga and rode away while firing bullets in the air

He went on to say that having confirmed the deaths and as it was approaching midnight, the president His Excellency Yoweri Kaguta Museveni arrived at the scene of crime which the witness had not left since the time of the incident. The president talked to people and inquired if there was an eye witness who could narrate to him what exactly had happened. That he raised his hand and narrated the events to him as he has already stated to this court. The president then requested him to go with him to Entebbe State House to give him a specific statement about what he witnessed. That while there, the witness again narrated his story but this time, the president was writing it down.

He also told court that he did not recognize any of the assailants because it was dark.

This witness told court that he did not take cover but remained standing as the assassins showered bullets at Kirumira's car and in the air yet he was just about ten meters away.

PW10 Inspector Walimbwa Steven is the person who recorded the charge and caution statement of the Accused in respect of one deceased person Kirumira Mohamad on 29th September 2018 which was admitted and marked as **PEX7**.

This statement was recorded in English much as the witness confirmed from him that the accused speaks and understands Luganda.

The witness informed court that after signing the statement, he called the CID Kireka to take their suspect. That they were together between 2:00 pm to 5:00pm.

He also told court that at the time of recording this statement, he established that the suspect then was okay because he told him so and that even physically he did not see a wound on him and he was not scared. Court will return to the statement later.

PW11 Frank Nyakayiru was in detail but basically it was about the movement and communication of A1 Kalungi Abubakali. He informed court that he was tracked using his mobile telephone contact until he was arrested from Bulisa.

355 In this particular case, he saw 2 lines which were under investigation and one was 0752537986 which was alleged to belong to Abubakar Karungi (A1). That this number was already in their radar and they were looking for him together with the one of 0702843480 belonging to a one Abdu Katerega.

360 That A1 and Katerega were in regular communication as ADF operatives and they were being monitored having been suspected to be involved in the earlier murders but had never been placed at the scene of crime save in this case.

That after doing all the analysis, they embarked on the tracking the phone which led to the arrest of A1.

365 He also confirmed that A2 who was acquitted was not included in all the data he collected on his technical report because his call was not picked. A2 did not therefore communicate with the late Katerega and A1 before or after the murder.

The statement of Nyakayiru Frank dated 7th of August 2019 was admitted in evidence and marked as exhibit PE11 and his report as PE10.

370 **PW13 Detective Assistant Inspector Massete George**'s evidence was just a narration of his role in the case during investigations but did not adduce any evidence in respect participation. He procured the Court Orders that enabled the police to procure call data for the suspects.

375 **PW14 Kabera Francis's evidence was in respect of exhibit PE15 AND PE16 the call data for numbers 0702843480 allegedly for one Kateragga and 0752537986 for Karungi Abubakar A1.**

He informed court that he can only know the owner of the telephone numbers through KYC (Know Your Customer) which information he did not have. He did not therefore with certainty confirm the ownership of the telephone numbers that were under investigation.

380 He went ahead and gave detailed information about Exhibit PE15 AND PE16 which detail I will return to shortly.

The accused on the other hand denied the charge and made his statement on oath. His evidence was to the effect that he was residing in Ndejje Kibutika in Wakiso District before he was arrested and worked as a carpenter, roofing houses. He was a
385 family man with a wife and children.

He said it is not true that he committed the offence.

That he was arrested after he had gone to do his work of roofing in Bulisa at a place called Walukuba on the shores of lake Albert. That his client was Ssenjova.

After working, and praying, he was arrested around 7:30 pm by men who came
390 looking for Kalungi. That when he introduced himself, they arrested him and shot bullets on the ground. That he was with a one Sendiomba Joseph.

They asked whether they should kill him and he pleaded with them not to kill him.

They asked him what he had gone to do in that place and he explained that he had gone to roof houses. They told him he had a gun but he denied ever holding a gun as
395 he uses a hammer, a saw and over roll for his work. That they started beating him, put cuffs on his hands and legs, put a hood and mask on his head and he could not see anything. His hands were tied behind and he was boxed in the chest while telling him that he killed a person. He fell down and was lifted and bundled in the car.

They continued beating him on the back using cablewires. He heard them calling each
400 other Dan, Simon, Kule and Hitler. They used a Noah type of vehicle silver in colour.

That he vomited a lot as a result of the beating and became unconscious and regained when it was getting to day time.

That in the morning he was told to shower, they took his 400,000/= and his techno Y2 mobile phone.

405 He was handcuffed again, masked and told to go upstairs under their direction. He met a man called Okumu who is a captain.

The beating started afresh while telling him that he is the one who killed Kirumira.

That they took him upstairs and that is where he met Walimbwa.

They told him to look through the window and asked him what he saw, and he
410 informed them that he was seeing Banda and they started beating him again until he lost consciousness and at a certain point he noticed he had lost his skin on the forehead but he could not tell what happened. The head was paining him.

He was served with posho and beans and asked from upstairs whether he had ever stayed in Luby. He told them he stays in Ndejje. They asked him if he stayed in Masanafu, the day they killed Kirumira, but he told them he stays in Ndejje. They started beating him again.

That they got some sticks and metals, put them between his fingers while asking him to tell them who killed Kirumira.

That they took him to the go down and told him that they were going to remove his head as they continued to ask him who killed Kirumira.

They insisted that he knows who killed Kirumira. He was told to sign some papers and when he refused, they cut his fingers with a razor blade.

That he later signed to save his life.

The witness showed court where he was pierced with the needle but because of passage of time, the scars were not apparent.

He remembers captain Okumu and Walimbwa as the people who asked him to sign, and papa and Hitler as the people who beat him.

That he was told to accuse Kateregga and Mwebe as people who killed Kirumira.

He eventually put his thumbprint and names on the documents.

He was then taken to his home for a search but nothing of relevance was found.

He was taken to Kibuli after the search and the vehicle had army men and the police.

The second search was at his mother's home in Mpigi at around 6 am. That his mother asked him why he was in handcuffs and he told her, they have brought him there to force him to say he is the one who killed Kirumira. That they entered inside and as he was trying to explain, Okumu slapped him and they took him back to the vehicle.

This search did not also reveal anything relevant to the case as he was told by one of the lady's who witnessed the search.

He was taken back to CMI and a certain gentleman came and examined him. He asked him why the hands are swollen and he explained to him what had happened and after a few days, he was taken to court.

He was remanded to Kigo Prison where he got some treatment.

He concluded his examination in chief by saying he was forced to accuse some people for killing Kirumira and the lady yet he does not know them. That he does not know Bulenga and has never dealt with any one who was involved in the murder of Kirumira.

He further informed court that he just heard of Kirumira's murder over the radio while he was at home and that he spent the whole day roofing a house at Hajji Kiwuwa's home and went home thereafter.

450 While under cross examination, he informed court he travelled to Hoima by bus, called LINK and then used another car to Bulisa. That his mother is Ndagire Annet and that he was taken to Mbuya CMI after he was arrested from Bulisa.

He said he usually visited his mother and that he did not know the late Kirumira apart from seeing his photos in the News papers

He said he did not know Ssenjoba but he knows Ssendyova.

455 He said he has a wife called Nagitta Halima.

That he met Walimbwa at CMI where they were forcing him to admit that he is the one who killed Kirumira and telling him to sign some documents which he signed by appending his signature and his names were written on some because he was on handcuffs and could not write.

460 That they put his thumbprint on the documents and wrote his names.

And after cutting him, he also wrote his name on some documents.

When asked about his children, he said he has 8 children with the eldest being 17 years old. He mentioned the names of his children which this court is not going to mention because they are children.

465 He said he was living with his wife and children and that is where he left for Bulisa to roof for Ssendiova's house.

When asked about Resty, he denied knowing her but said he heard about her when they read the charges to him in court.

470 When asked about where he was on 8/9/2018, he stated he was at Ndejje Kibutika putting gutters on Hajji Kiwuwa's house.

He said he does not know why they are saying he was the one who killed Kirumira.

He denied being a member of ADF and that he also hears about that group.

He said he has no friends in ADF and does not know Kateregga Abdu.

475 He said he had no friends in Luzira prison and that he came to know Mwebe when they were charged together. That Mwebe has never been his friend and only heard that name when they were beating him. He was asked about Ibra Kavuma, and his response was that he does not know where he is because he does not know him.

He admitted having a phone at the time of arrest with two lines which he does not remember but both were registered in his names.

480 He denied going to Adjuman, Gulu and Luwero

DW2 **Halima Nagitta's** evidence was to the effect that she was a wife to the accused and lives in Ndejje Kibutika. That on the day Kirumira was killed her husband had spent the day putting gutters on a house at Lubugumu and they spent a night together.

485 That she got to know of his arrest after someone called her on phone and she met him at Wakiso court.

That her husband told her he was going on safari to Bulisa but she never heard from him again until she met him at court.

490 While under cross examination, she confirmed the accused has a mother who stays in Mpigi called Namusoke Annet.

She informed court she did not know who killed Kirumira and got to know Mwebe when he was charged with her husband.

She knew her husband as a person who roofs houses.

That was basically the defence case.

495 **In summary ,the accused denied participating in the gruesome murder and denied having made any voluntary confession in regard to participation in the alleged murder. He denied any relationship with the second Accused who was acquitted and Katerrega Abdu who the prosecution alleged hired him to do surveillance on the late Kirumira.**

500 **He denied ever narrating to the mother that he was involved in the murder. That he was arrested after he had travelled to Bulisa for work since he roofs houses and that on that fateful day of the murder, he spent the whole day roofing the house in Ndejje.**

505 **It is trite law that an accused person has no burden to prove his innocence. All he has to do is raise doubt as to his participation. He can even opt to remain silent.**

EVALUATION OF EVIDENCE ON PARTICIPATION.

It is a cardinal principal of criminal law that an accused person should be properly identified and be placed at the scene of crime. He or she must be shown to have

committed or participated in the commission of the offence and not merely suspected
510 to have committed the offence.

In the instant case, the prosecution case is hinged on two main pieces of evidence.
The charge and caution statement and the call detail record/ data. There is no direct
evidence as no single witness identified the murderers

Let me start with the charge and caution statement.

515 The accused is disputing the charge and caution statement much as it was admitted
in evidence. Cross examination revealed that it was not recorded in the language he
understood and in his defence, he disowned it alleging he was merely forced to write
his name and or append his thumbprint after going through untold torture from the
time of arrest upto to the time of thumbprinting on the statement.

520 The police officer PW10 AIP Walimbwa Stephen, stated that he did not see any injury
on the accused and that he was very fine at the time he recorded the charge and
caution statement and that he is fluent in Luganda because he learnt it in P1 and P2.
That he has also worked around Buganda for a long time.

I am alive to the fact that a retracted confession is weak evidence which has to be
525 corroborated by independent evidence.

However if the court is inclined to rely on such evidence, the court must give good
reasons why it has done so. It suffices if the court finds the witness truthful.

The supreme court in the case of **Sewankambo Francis and 2 othrs versus Uganda
SCCA NO 33 OF 2001** while considering the position of the law pertaining to a
530 retracted confession, held that “ **the trial judge does not even need to look for
corroboration and can legally convict on the uncorroborated repudiated/retracted
confessions provided that he is satisfied that in all the circumstances the confession
is true**” .

Looking at the charge and caution statement dated 29/9/2018, I observe the
535 following :

- 1) It is recorded in English all through and signed by D/AIP Walimbwa Stephen
with the name of Kalungi Abubakar written as if it was written by a child
learning how to write a clear indication that he doesnot read and write the
English Language.

540 Counsel Zimbe for the accused submitted that the charge and caution statement was
illegally recorded in as much as it was not recorded in the language the accused
understands relying on the case of **Festo Androa Asenua and Kakooza Joseph Denis
Versus Uganda , SCCA NO 1 OF 1998** which laid out the procedure that should be
545 adopted when recording an extra judicial statement by a magistrate where the court
held that pending the making of rules by the minister as required by section 24 (2) of
the Evidence Act, the police should with necessary modifications follow these
guidelines when recording statements from suspects.

The procedural guidelines were in respect of a confession statement commonly
referred to as an extra judicial statement before a magistrate or charge and caution
550 statement recorded by a police officer of the rank of Assistant Inspector of Police
The implication of this holding is that the same procedure applies to a charge and
caution statement where the accused is admitting his or her involvement in the
offence before a police officer of the rank of Assistant Inspector of Police.

According to the Androa case, it is noted that;

555 **9) The statement should be recorded in the language which the prisoner chooses
to speak. This may be done through an interpreter or the magistrate (in this case, the
police officer) himself if he is fully conversant with the vernacular being used, record
it in the same language ...**

**10) The vernacular statement should be read back to the prisoner incorporating any
560 corrections he may wish to make.**

**11). The prisoner should verify the correctness of the statement by signing or
thumbprinting it. The magistrate and the interpreter (in this case the police officer)
if any should counter sign it. If the statement covers more than one sheet of paper,
all sheets should be so signed or thumbprinted by the prisoner.**

565 **12) An English translation of the vernacular statement including the prefatory
memorandum should then be made by the magistrate (in this case police officer) or
the interpreter as the case may be.**

The above procedure was to be adopted by both the police and magistrates to avoid
objections and criticisms.

570 Prosecution exhibit PE6 the charge and caution statement was recorded only in the
English language and signed by the Accused and Wolimbwa on each and every page.

As to whether the accused understood what he signed or not is only in the knowledge of AIP Wolimbwa and the accused since the two disagree.

575 AIP Wolimbwa informed court that he explained to the accused in Luganda and he understood and signed while the accused stated he was forced and threatened to write his name or thumbprint on several documents while under custody at CMI without understanding what he was signing. He denied ever participating in the murder.

580 **Courts of law rely on evidence before it and if the evidence is a document, it should speak for itself to help court make an informed decision based on facts or inference. In this case Prosecution Exhibit PE6 should prove that the accused understood what a charge and caution statement means. That he understood the charge labelled against him and that he was admitting that he with others on the 8/9/2018 at**
585 **Bulenga unlawfully killed ASP Kirumira Mohamed with malice aforethought.**

The document should also prove that he made that confession and signed it voluntarily and freely and that whatever he says would be used against him. Before relying on a confession, the statement should satisfy the ingredient of willful participation in the commission of the offence and where other pieces of
590 **evidence is adduced, it should corroborate the confession of the accused leaving no doubt that he truly made that confession. The mensrea and actus reus must be apparent in the confession.**

Even if he retracts it, the other evidence would support that his retraction is just change of mind but he admitted the offence freely and voluntarily and indeed
595 **committed the offence.**

In this particular case, the confession was recorded in English yet Wolimbwa told court that the accused told him he understands Luganda. On page one, PW10 recorded the charge where he mentioned only Kirumira Mohammed and mentioned nothing about Resty Mbabazi as if she was insignificant yet two precious lives were
600 lost. There is no evidence that he explained to him in a language he understands yet he boasted of over 30 years experience as a police detective.

The same happened on each page where he recorded in English and just had the name of the accused written as signature.

605 On the last page, that is page 26, he stated that **“That is what I can state” and the names of Kalungi Abibakar was written,**

AIP Wolimbwa wrote that;

“Charge and caution statement read back to the maker being translated into Luganda by me D/AIP Walimbwa Steven and he has confirmed as true and correct. He appended his signature and rank of D/AIP Walimbwa Steven.”

610 The accused Kalungi Abubakar did not counter sign on this important part that the document was read back to him and he confirmed it to be correct yet through out the pages, he did not indicate that he read the contents back to him and he understood before signing.

615 This being a case involving the murder of his colleague and another, court expected the police officer to do better.

Court believes a new police recruit could have done better because Wolimbwa recorded the statement like he was recording for himself not to be used as evidence in court.

620 He did not only fail to record it in a language the accused understands but failed to interpret it to him to his understanding because he never signed to confirm that the document was read back to him in the language he understands and wrote his names against that affirmation.

625 This court is aware of the court of Appeal decision in **Criminal Appeal Number 177 of 2013 Kiiza Alex versus Uganda** where the justices held that **“ other than not recording the statements in Lukiga,the language that the appellant understands ,PW1 appears to have followed the right procedure before and after recording the statement . He read back the statement to the appellant in Lukiga before the appellant signed it. It is presumed that the appellant signed because he understood what was read to him. It has been held in a number if cases by the supreme court that such procedure is not fatal as long as the charge and caution statement is read**

630 **back to the suspect through a translator in the language he or she understands and he or she signs the English version .see Segonja Paul v Uganda [2002] UGSC 10,Mweru Ali and others v Uganda [2003] UGSC 29 and Lutwama David v Uganda [2004] UGSC 31. In this case a translator was not necessary because the recording**

635 **police officer was well versed with the local language of the appellant”**

In the Mweru Ali case, court held that **“it is desirable that a charge and caution be recorded in the language used by the suspect and later translated into English. However failure to do so does not render the confession inadmissible or worthless”**.

640 In view of the above holding, the trial court has to examine the circumstances of the case and all other corroborative evidence to determine whether the confession can be relied on as evidence or not. Admitting a document in evidence does not automatically make its contents truthful. Cross examination can render such a
645 document irrelevant.

In the instant case, the last paragraph on the last page of the confession where the recording officer stated that charge and caution statement read back to the maker being translated into Luganda by me D/AIP Walimbwa Steven and he confirmed as
650 true and correct was only signed by Walimbwa and not the maker. This distinguishes this charge and caution statement from those that are signed by the accused confirming that they have understood.

**The presumption that the accused / suspect understood before he signed can only be made if the document is properly endorsed by the suspect including the crucial
655 part of where it is stated that the contents were read back to him to his understanding .The last paragraph of the last page of the charge and caution statement dated 29/9/2018 on Page 26 clearly shows that the accused/ maker of the statement did not sign and confirm that the contents were read back to him in Luganda , understood and found the contents to be correct .**

660 Court further observed that the contents of the charge and caution statement from page 2 to 4 had nothing to do with the charge against him. From pages 5 to 7, the maker is talking about being told by a one Kateregga to go to Bulenga to locate the motor vehicle of Kirumira from the parking and that he went and did not find it there. He then wrote that;

665 **“I went back on 8/9/2018 at about 1900 and he found the vehicle parked outside on the road near the parking and he immediately called Kateregga on phone and he came riding a motor cycle TV’S Kiwagi carrying Hamza Mwebe. Mwebe Hamza was armed with a rifle went to where the vehicle of Kirumira was.I had gone close to them and I had identified Kirumira with a lady in the said car.**

670 **I went where Kateregga had parked his vehicle up at northern bypass. Before I left
Mwebe Hamza had already moved to where the vehicle of Kirumira was. I heard
gun shots as I moved away. “,**

He does not state anywhere that he knew the reason why Kateregga wanted him to locate the vehicle belonging to Kirumira or that he knew that they were planning to
675 kill him and he was to assist them in the murder by locating his motor vehicle which would make him an accomplice in crime.

PW6, an eye witness's narration of what transpired on that fateful day and hour is very different. He informed court that on Saturday 8th September 2018 at 8:00 pm while he was coming from Bulenga and walking to Musoke Road, he saw a parked
680 black corona which was flashing lights at Take Hardware. When he reached the car, he greeted the person in the driver's seat and asked him where he was coming from because he was very smart in a kanzu and cap. In response, the person told him that he had 3 functions, the first one in Buloba, the second one in Nsangi and the third in Bwebajja. That as they were still conversing, a lady called Resty came. He knew Resty
685 well because she was the daughter of the village defense secretary. That the said lady opened the driver's seat and sat and he decided to leave and give them space.

That about 10 meters away from where the car was parked, 2 motorcycles passed by him each having two people and they were all wearing black jackets. The first one just passed by Kirumira's car while the second one stopped and they shot the back tyre of
690 the deceased's car. The one who was seated behind then started firing at the driver's door while the second motorcycle were firing bullets in the air. That all the vehicles were stopped and after the person who fired the bullets at Kirumira's vehicle got off the motorcycle and walked around the deceased's vehicle and went to the passenger's side and continued firing more bullets.

695 He described the motor cycles as sports motorcycles and that they were two not one as stated in the charge and caution statement which was retracted.

Whereas in the charge and caution statement the author stated that the accused moved nearby and saw the deceased Kirumira with a lady, the witness who engaged Kirumira for about three minutes, informed court under cross examination that there
700 was no one nearby and no sooner had the lady entered the vehicle than the two motor cycles of the assassins came and started shooting.

Whereas the statement mentions only one motor cycle with two people, the eye witness, mentions two motorcycles with two riders on each and they all actively participated in the murder, the first one shooting in the air to scare off any one and cars from approaching the murder scene while the other one was shooting directly at the deceased.

The evidence of the eye witness does not corroborate the charge and caution statement at all.

A charge and caution statement which is treated as a confession must be unequivocal. It should not be open to more than one interpretation or leave any doubt as to the guilt of the accused. It must clearly bring out the mensrea that is the intention and wrong doing of the accused that constitutes part of the crime by his own admission.

It must clearly state that the accused understands the charge and admits his participation in the commission of the offence.

AIP Wolimbwa also stated he knows Luganda because he studied it in Primary one and two and has worked around Buganda speaking region for a while . This was the most ridiculous part of his evidence. It is incomprehensible for any one to claim to be an expert in a language after learning it in primary two. The Uganda police Force has very many people from Buganda. For Wolimbwa to claim he learnt his Luganda in P2 was an admission that he does not have a good written command in the Luganda language. He can speak but can not write it.

For any one to qualify to be an interpreter in a language, one must be fluent in speaking the language as well as writing it.

In his defence he denied ever knowing or having any relationship with Kateregga and that he met Hamza at court as a co-accused.

He informed court that he went through serious torture from the moment he was arrested and forced to write his name or append his thumbprint on documents to save his life. Indeed PF24A that was admitted and marked as PE18 Confirmed that he had healing bruises on the forehead measuring 2cm X 2 lower lip measuring ½ X

1 cm ,small multiple wounds on the back, tenderness on the left wrist which injuries were less than one week.

735 The prosecution did not adduce any evidence to prove that he was arrested with those injuries and or that he did not get them while under the custody of police or CMI .

On the issue of Kateregga asking the accused to do surveillance on the Late Kirumira, the prosecution did not adduce any evidence showing the true identity of Kateregga, or whether truly he lived and died. All that court heard was hearsay evidence that he was put out of action. No security officer came to court to confirm that he put
740 Kateregga out of action and or explained the circumstances under which he was put out of action.

Counsel for the accused submitted that no postmortem report was tendered in court proving that a one Kateregga was identified by a relative or anyone who knew him and indeed died. Apart from telling court that he was put out of action, no witness
745 explained to court how he was put out of action and how his body was disposed off. Was he handed over to the family for burial? No body informed court that they attended his burial. His existence and death remains mysterious.

The learned Assistant DPP submitted that in the Androa case, court relied on the confession made by the accused.

750 **I have heard the opportunity to read the Adroa case. The facts in that case are distiguishabe from the facts in this case in that the confession in that case was collaborated with some other evidence like the note that was recovered from the accused where he mentioned the name of Prof Mudhola he had murdered. He was also arrested after he went for help from a witch doctor to silence the ghost of the
755 deceased persons he had murdered by hurling a grenade.**

The collaborative evidence satisfied the trial judge that his confession to the killing was true.

**Even if court held that police with modifications, should follow the guidelines, such modifications can not include failure to record the statement in the language the
760 suspect understands first and and then translate it in English which is the language**

of court. This is a constitutional right of a suspect for the charge to be explained in his language as enshrined under Article 23(3).

765 It can not also mean to merely write at the end of the state ment that charge and caution statement read back to the maker being translated into Luganda by me and he confirmed as true and coreect” and then append his signature or thumbprint.

770 The police after realizing that a grave procedural error had been made by AIP Wolimbwa attempted to cure it by getting an extra judicial statement recorded by a magistrate grade one, but it turned out to be worse than the police charge and caution statement.

Court is therefore declining to rely on the police charge and caution statement based on three main reasons;

- 775 1) The charge and caution statement was recorded in the English Language not Luganda the language understood by the accused, and he never endorsed on the crucial part where he ought to have acknowledged that the contents were read back to him in the Luganda language and he understood before signing or writing his name.
- 780 2) He was found with healing torture marks on 2/10/2018 when he was examined, which was about 4 days before he recorded the statement with one healing wound on the forehead and multiple on the back, which fact PW10 Wolimbwa claimed he did not see which is unbelievable since the one on the forehead was apparent to the naked eye.
- 785 3) The author of the charge and caution statement PW10 D/AIP Wolimbwa Stephen was found not only to be incompetent as an interpreter in the Luganda language but lied about the condition of the accused. Court has no cogent reason to doubt the defence that he was tortured and coerced into writing his name on the confession to save his life.

Section 24 of the Evidence Act Chapter 6 Laws of Uganda is very clear on when the confession is irrelevant.

790 It provides that “ **A confession made by an acused person is irrelevant if the making of the confession appears to the court ,having regard to the state of mind of the accused person and to all the circumstances ,to have been**

caused by any violence, force, threat , inducement ,or promise calculated in the opinion of the court to cause an untrue confession to be made.” .

795 The above three reasons have made it unsafe to rely on the charge and caution statement recorded by Wolimbwa Stephen PW10 as it is trite law that a confession obtained through torture has no evidential value as it is irrelevant.

All in all my finding is that Prosecution exhibit PE6, the charge and caution statement was far for the definition of a true confession as the whole process
800 **of obtaining it and recording was flawed.**

This takes me to the second piece of evidence.

THE CALL DETAIL RECORD.

The second piece of evidence the prosecution relied on to prove participation was the call detail record. A call detail record is a data record produced by a telephone
805 exchange or other telecommunications equipment that documents the details of a telephone call or other communications transactions that passes through that facility or device. It can be a useful tool in investigative case management if it is properly done and details procured. It must be done by the technical staff or experts from the service provider who in courts view are very independent people with no interest or
810 bias in the ongoing investigations.

It can be used to track a suspect who is on the run and or place him or her at the scene of the crime.

It can also be a useful tool in proving that two or more people were communicating with each other. It can be a good piece of circumstantial evidence in relation to a
815 crime. The call detail record can be one of the most effective means of identifying a suspect and placing a suspect at the scene of crime through the process of elimination. A list of possible suspects needs to be identified first followed by surveillance and interviews plus analysis of their electronic devices and call data records. This process would eventually narrow a list of suspects. By the time the
820 investigator narrows down to a few, he must be convinced and adduce evidence to the effect that there is no other person but the accused who was involved in the commission of the offence and that the accused is actually the subscriber or user of the mobile phone number, the subject of investigation.

825 **The prosecution evidence through call detail record must bring out the details of the subscriber but if not, evidence of the person who regularly communicates with the number to prove the identity of the subscriber or user of the mobile number under investigation at the time of the commission of the offence.**

This kind of evidence must be corroborated by some other evidence pointing to the involvement or guilt of the accused person.

830 Prosecution Exhibits PE9 was a court order to inspect and take documents (copies of subscriber details ,call data records in accordance with the provisions of the communications Act . However no details of the subscriber for telephone number 0752537986 was given.

835 The prosecution further tendered in Prosecution Exhibit PE13 an order to the Head Cyber Crime Unit , Directorate of Forensics , to inspect ,and extract information from computer, mobile phone in accordance with the procedures and requirements of digital and electronic evidence section 28(1),(2) and (3) of the Computer Misuse Act 2011. Forensic science or application of scientific methods and techniques to investigate crime when properly done is one of the best evidence of establishing facts.

840 It involves gathering and analysis of all physical evidence related to a crime in order to reach a conclusion about a suspect. The mobile handset used in communication is a very important exhibit in criminal investigations and where one changes a simu card to another handset, it can clearly be established. Not a single handset was tendered in court but just phone print outs which when looked at as is, can not show the
845 subscriber.

I have however, studied exhibits PE15 and PE16 and established that the users of the two mobile numbers **0702843480** and **0752537986** communicated before the murder, after the murder and, around the time of the murder as well as other numbers especially on the fateful day of 8/9/2018, but for reasons best known to the
850 prosecution,the investigsating officers did not investigate those other numbers.

Telephone number **0702843480** called number **0701246277** while picking Luby Mast 18:13:06 and the communication lasted for 122 seconds. The number again called mobile number **0701246277** at 18:32:64 and they communicated for 65

seonds. The number also called number **0704540904** at 18:40:11 and conversed for
855 26 seconds. It called mobile number **0752537986** at 18:49:16, and conversed for 92
seconds. It called mobile number **0701260927** at 18:51:15 and talked for 65 seconds
the number called number **0704540904** at 18:42:58 and talked for 353 seconds. The
same number called **0701 260927** and conversed for 36 seconds. The same number
called number **071260927** at 19:53:09 and their conversation lasted 66 seconds, The
860 same number called **0752537986** at 19;56:04 and conversed for 41 seconds and this
time the calling number 070283480 was picking Nakuwaddde Mast.

The communication with all the above mentioned numbers was at a very critical time
in view of the fact that the murder happened around that time.

Why was the investigations not wide enough? Why was it so narrow and yet the
865 **two numbers of interest communicated with other people?**

Who was the registered owner of mobile number 0704540904?

Who communicated with holder of number 0702843480 for 5 minutes?

What about holder of mobile number 071260927 who communicated with the same
number at 19:53:09 for about one minute shortly before the alleged murder time?

870 Nakawadde and Lubya are distinct Masts .They show different location of the caller
or receiver. It shows people are not together.

On 8/9/2018, the two numbers picked Lubya and Nakuwadde masts which are stated
to be near Bulenga the murder scene yet Bulenga is stated to have its own mask
according to PW11 Nyakairu Frank in his report PE10.

875 Further scrutiny of the two numbers revealed that the subscriber of mobile number
0752537986 communicated to number 0702843480 on 8/9/2018 at 20:01:09 but the
cite name /or Mast location was not indicated on the call data as per PE15.

The same number called 0704907737 on 8/9/2018 at 20:: 29:29, critical time of the
murder, but the location of the caller is not indicated. It is therefore not possible to
880 tell from the call data the location of the suspected killer at the time of the murder.

Court observed that the following day 9/9/2018, the holder of this same number 0752537986 was picking the telecom mast of Nakuwadde from around 14-16 hours. And on 12/9/2018, he also picked Nakuwadde mast.

885 On 1/7/2018 he sent a text message to 0702843480 while picking Nakuwadde and communicated with so many other people. The prosecution did not however adduce any evidence to get the true identity of the user of the mobile line.

Looking at prosecution exhibit PE11 allegedly prepared by Nyakairu Frank, the caption of his document was titled JOINT TECHNICAL COMMUNICATION CHART FOR ADF OPERATIVES”.

890 He went ahead and indicated those that have been arrested .The document did not have anything to do with the murder case of ASP Kirumira and Resty.

Much as the document indicated that most of them were arrested, none of them was called to confirm to this court that the murder of Kirumira and Resty was done by ADF operatives.

895 Besides, PE11 showed that Kalungi communicated once with a one Kateregga Abdu contrary to Prosecution exhibit PE15 and PE16 the call data for the numbers indicated thereon as 0702843480 and 0752537986. He did not indicate how he got the particulars of the names and photographs of the people he put on his document. His document PE11 therefore raises a lot of doubt as the source of his information
900 is questionable leaving his document with no evidential value in as far as this murder case is concerned as this court was not investigating communication between ADF operatives.

The undated technical report on suspected murderers of the late Kirumira Mohammed which was admitted and marked as PE10 does not indicate how Frank
905 Nyakairu the senior investigating officer got to know the subscribers of mobile phone numbers of 0752537986/0756583180/256702843480/0782990487/0701193818 as Kateregga ABDUL, Kalungi Abubakar and Hamza Mwebe.

He did track the phones and concluded that they knew each other from the communication. He reported that they were within the vicinity of the murder scene

910 since they picked from Luby, Nakuwadde and Nsangi kisozi at the same time, during, before and after the incident. The report identifies him more as a phone tracker, His evidence needed to be corroborated by some other independent evidence in as far as identification of the subscriber is concerned and involvement of the accused as the murderer.

915 He also indicated on page 2 of his report that a one Kateregga Abdul picked Bulenga Mast, but none of the call Data detail record showed Bulenga at the critical time of the murder or shortly before. This makes his report to be treated with a pinch of salt.

I know the law does not allow the telecom companies to just print out text messages for privacy reasons but they can be obtained through a court order which was done
920 but without purpose.

No text messages were printed out to ascertain what was communicated yet text messages were sent. You can tell from a text message the motive of the conversation. Nothing of significance was from Nyakairu Frank who seemed to be an expert working with CMI who the prosecution relied on as their star witness. Yes, he might be good
925 at tracking phones but did not help the prosecution in adducing evidence of participation?

His investigations were bascally to track the accused for purposes of having him arrested as an ADF operative who was suspected to have been involved in the murders of Kawesi, and now this one.

930 He did not even inform court whether they established the reason why he was in Bulisa. The prosecution did not rule out his defence as a carpenter who roofs houses and that he had not gone to work but was running away from being arrested. This part of information in a case that has no direct evidence is very important. Who was his host in Bulisa? What had he gone to do?

935 According to the print out, the number PW11 was tracking clearly shows that the person was extremely mobile and picking Nakuwadde, Luby mast was not only on the particular day but even in July and after the murder picked those masts.

Evidence did not therefore prove that the holders of the questioned mobile phone numbers were strangers in that area. They were there long before the murder as early as July 2018.

PW14 Kabera Francis from airtel who tendered in the call data for telephone number 0752537986 which was requested for by Massete George as per prosecution Exhibits PE9 (a) the affidavit, and was given a court order marked as PE9, exhibited the call data marked PE15. When asked who the holder of this number was, he informed court that he does not know. That he could only know through KYC (Know Your Customer) which is the verification of the identity of a customer.

The prosecution never attempted to get the identity of the holder of telephone number 0752537986 at all or rely on any of the persons who used to communicate with that number to identify the user in case it was registered in some other person's names. Looking at PE15, as it is, one can not tell the owner of that number and the people he communicated to.

The same applies to PE16 for 07028434480. Court found PW14 a very useless witness who did not help the prosecution because identity of the registered mobile telephone number owner is very crucial in cases where the prosecution wishes to rely on it for identity of the suspect.

Just like the holder of mobile number 0752537986 communicated to so many other people, the holder of number 07028434480 also communicated to so many people but none was summoned to record a statement or inform court who the known holder or user was.

PW 11 Nyakayiru presented himself as an expert in tracking mobile phones, but he fell short of an expert in identifying the holder of the number. He informed court that he already had the numbers of interest in his radar because he was informed by some person but that person was never called as a prosecution witness.

In this case, call data analysis should have included the number of the deceased Resty Nalinya to establish how often for example she communicated with the deceased Kirumira. Was she the one he was communicating with before she joined him? Was

he talking to another person? What about the call data for the late Kirumira? What did it disclose?

970 The defence tendered in court exhibit DE4 which was a letter to the Director Forensics, police headquarters to investigate numbers 0779304101/0700614651 for the late ASP Kirumira and 0759501712 for the late Resty. 0752720905 for Mrs Kirumira, 0700395678 for Ali Kabanda Bashir and 0751874333 for a one Kalema Lawrence. This was a step in the right direction.

975 However nothing was adduced in court showing the call record detail of the late Kirumira and Resty just like those other numbers that picked Lubya, Nakuwade masts at the critical hours towards the black hour of the gruesome double murder.

980 The eye witness PW6, Kigongo Abdu who engaged Kirumira for some time only to move away to a distance of 10 meters and then watched a horrendous ferocious attack on Kirumira and a lady who had just joined him surprised court when he informed court that he remained standing and watching and waiting at the place upto close to midnight only to leave when the very concerned and fatherly fountain of honour in this nation arrived at the scene and requested him to go to state house Entebbe to explain to him properly.

985 The only eye witness's conduct was like of one watching a horror movie where one is very sure it is just but a movie.

990 **His courage and confidence to remain standing and watching the shooting at the vehicle several bullets at the drivers seat, co drivers seat while several bullets were shot in the air to scare off every other person from approaching the murder scene from all sides, which was confirmed by the bullet riddled bodies of Kirumira and Resty can not be explained as it is a contradiction of the natural instinct of human beings when faced with imminent danger. When asked to illustrate to court how far he was, he estimated it to be 10 meters away. Observing that 10 meters was too close to stand by watching a ferocious murder by shooting, court asked him to show the distance from where he was to the scene of the murder. He said it was like from the witness dock and column outside the court Room which was indeed too close for anyone one to remain standing.**

The murder of Kirumira and Resty was ferocious, and savagely brutal. The assassins used several bullets according to evidence. A single gun wielding man can scare a civilian person and even a trained but unarmed person.

1000 What was the basis of PW6's confidence that the assassins would not shoot at him at such a close range? What interest did he have watching any way and keeping watch over the place until the arrival of his Excellency the president?

Prosecution exhibits PE4 and PE5 Sketch plans of the scene of murder though not drawn on scale do not even show where this indomitable lion of a man was standing.

1005 In his evidence, he said he did not see any other person nearby yet the sketch shows that the crime scene was having many shops around which ideally attracts people around.

In my humble observation and opinion, **PW6 Kigongo Abdu** should have been investigated over his rare courage and confidence that the assassins who acted in the most gruesome and brutal manner could not harm him as he watched them kill two people whom they must have seen him talk to because he had hardly moved away from the car than they struck as per his own evidence.

1010 In my observation, the investigations in this case were not systematic, and properly done to discover and examine the facts. The suspicion that the assassins were ADF rebels according to PW11 Nyakayiru was the beginning of mismanagement of the criminal investigations of this gruesome double murder with impunity.

The prosecution requested court to take the evidence of PW11 in camera but this being a criminal matter, court could not close doors but ordered all the press men and other people out.

1020 Court was however disappointed that all he said was just how he tracks phones and how they tracked and arrested the accused person without showing how he was connected with the murder.

No single witness came to court to identify the accused as an ADF Rebel much as Defence Exhibit DE5, mentioned a one Jamil Muwonge. The information remained as

1025 hearsay evidence which is not admissible since Jamil Muwonge was not called as a witness.

Most cell phone service providers can help retrieve even deleted messages if they receive a request via legal means.

1030 A smart investigator in a high profile case like the instant one where there is no direct evidence would have thought of the option of getting the text messages to ascertain what the text messages between suspects were about.

Courts of law rely on facts and not imagination or suspicion for suspicion however strong it may be can never be a basis for conviction.

The investigating officer in this case did very shoddy work.

1035 It is not enough to get call data and imagine it's enough to prove participation moreover without getting concrete evidence of the identity of the persons who are communicating.

1040 In the instant case the prosecution relied so much on the call data between two mobile phone numbers alleging that one was for the accused and one was for Kateregga Abdu without evidence of their subscription or any other evidence through the people they communicated with.

Who is Kateregga Abdu?

The prosecution did not adduce any evidence of identification of Kateregga Abdu much as they allegedly got his number in their radar as an ADF operative.

1045 The prosecution informed court that Kateregga is the person who instructed A1 to do surveillance on the late Kirumira.

No evidence of his killing or death was ever adduced before court to confirm that Kateregga existed and was the person who instructed A1 to trail Kirumira.

1050 It is trite law that death may be proved by production of a post mortem report or evidence of a witness who state that they knew the deceased and attended the burial or saw the dead body.

If at all he was put out of action that amounted to extra judicial killing which is not allowed in law.

1055 Kateregga remains as mysterious as well as his involvement in the murder. Why would he kill Kirumira and Resty? Where did he get the guns that were used during the murder? Why was he put out of action when it was necessary to establish the motive for the gruesome murder?

1060 Did they find any weapon with him? If that is the reason why he was put out of action where is the weapon that was recovered to trace the supplier of the weapon? It is general knowledge that guns and bullets are a preserve of the Uganda Peoples Defence Forces, the Uganda Police Force and Uganda Prisons Service.

1065 Where Ugandan Citizens are gruesomely murdered like in this case using weapons that are a preserve of our Security Forces, it is important that investigations are taken seriously to the extent of establishing the kind of weapon that was used and possible source of supply. This would help in directing the course of investigations.

It is not known whether the investigators in this case ever thought of tracing the source of the murder weapon. If at all they were convinced Kateregga had a hand in the murder, they should have not killed him but arrested him to obtain his statement and possible retrieval of the murder weapon.

1070 If at all he was killed the police that was investigating the gruesome murder of their very own and another should have exhibited what was in his possession that made him dangerous to the extent that he had to be put out of action in defence of their own lives or what he had which had any connection with the murder.

1075 The arresting officer is allowed to use excessive force only where the suspect is dangerous or armed.

What was it that those who put him out of action were fearing or wanted to conceal?

We have a well established criminal justice system that does not necessitate extra judicial killings of suspects. This court condemns this kind of conduct as it violates the constitutional right to a fair hearing provided for under Article 28 of the constitution

1080 which presumes suspects to be innocent until proven guilty and destroys the chain of investigations.

The above notwithstanding there was no evidence whatsoever that proved that the accused and a one Kateregga knew each other before. Mobile telephone numbers without evidence of users is not evidence of identification of the subscriber.

1085 Exhibit PE15 and PE16 reveal communication between several numbers with the holder of Mobile number 0702537480 which was picking Nankuwadde/Lubya masts just like **071260927 at the critical time of the double murder but the prosecution did not adduce any evidence about those other numbers and the subscribers.**

Who were they? Apart from alleging that the number was for a one Kateregga and
1090 the accused no evidence was adduced in court to prove beyond reasonable doubt that the subscribers or users of the numbers under investigation belonged to Kalungi or Katerregga. According to the print outs, these were very busy numbers communicating with very many people long before and after the gruesome murder.

1095 What did the police investigate about this case apart from relying on an irrelevant confession? Who was Resty Nalinya Mbabazi and how did she get to be a victim in this murder? Who was the last person the deceased Kirumira spoke to since PW6 a man who watched all the gruesome murder with a lot of ease informed court that the late Kirumira was actually speaking on phone before Resty the second deceased came in. How could Kirumira converse with him while he was speaking on phone with
1100 another person?

How many motor cycles were involved and how many people? Were they two or four according to the eye witness?

The motive of the ferocious and gruesome murder like in the instant case should always be at the centre of investigations.

1105 Who was to benefit from Kirumira's murder? What about Resty's murder? Who was Resty to Kirumira? Were they acquaintances or strangers? Was Resty a mere unfortunate victim? This court finds that the prosecution evidence left many questions without answers.

1110 Thorough investigations should have unravelled the mystery behind the gruesome double murder.

This is a case that had no direct evidence on participation and as such investigations should have been wider and thorough to show that the inculpatory facts are inconsistent with the innocence of the accused.

1115 In view of the above my final conclusion is that the prosecution failed to discharge its burden of proof on the ingredient of participation as it relied on fanciful speculation that it was the ADF rebels that killed the two deceased persons without even adducing any evidence linking the accused to ADF rebels. Whoever led the investigations in this case killed it the moment the focus was on the ADF operatives yet no evidence was adduced before court linking the accused with ADF.

1120 I agree with the opinion of the two lady assessors that the accused should be acquitted and I hereby acquit him of the two counts of murder.

He should be released unless lawfully held over some other lawful charges.

Dated at Kampala this 24th day of April 2023.

1125 **MARGARET MUTONYI, JHC**

CRIMINAL DIVISION.