IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO — D.C.J., ODOKI - J., S.C., PLATT-J.S.C.)

CRIMINAL APPEAL NO. 7 OF 1990

BETWEEN

FRANKEWEN BYARUHANGA ……. APPELLANT

AND

UGANDA: ……RESPONDENT

(Appeal from the Conviction/Sentence
and judgment of the H/C of
Uganda at Kampala (Mr. Justice
Okello) dated 19-1-87 in H.C.CR
.SS. CASE NO. 71/85).

JUDGEMENT OF THE COURT:

On 19-1-87, the appellant, Frankeen Byaruhanga, was convicted by the High Court at Fort Portal of the murder of the deceased Pio Nyakatura on 28-5-83, contrary to Section 183 of the Penal Code. He was sentenced to death. He now appeals against the conviction.

The deceased was 45 years old at the time of his death. On the fateful day at about 8.00 p.m, he was in the sitting room of his house when he was attacked and brutally cut on the head with a panga by a single assailant. The deceased screamed as he was being attacked. His wife Kabatooro (PW1) who was in the nearby kitchen went to his aid. In the sitting room she found the attacker hiding behind the open door. Kabatooro was a brave woman for she pushed the attacker back into the sitting room and there she struggled with him apparently for the spear and panga which he was holding. The deceased lay on the ground with the cut wound on his head.

During the scuffle PWI was injured by the attacker's spear on the right arm. Shortly afterwards PWI was joined in the sitting room by her two young sons Sanyu (PW2) and Kyaligonza (PW3). The boys came in with a wick lamp. It was then that PW1, PW2 and PW3 were able to recognise the attacker as the appellant with the aid of the lamp. The

appellant finally over-powered PW1 and escaped. PW1 then raised an alarm which was answered by the father of the deceased; Mutabazi (Pw4) and Baituababo PW5, a neighbour of the deceased was then rushed to the Government Hospital at Fort Portal and later to Kilembe Mines Hospital where he died on 1-6-83. He died of brain damage as a result of a depressed compound fracture of the left pavietal bone.

At his trial the appellant denied the charge and pleaded an alibi — that at the material time when the deceased, who was his paternal uncle, was killed, he was at the home of one Sabiti with Girigoli (DW2) until at about 8.00 p.m. when they went to the home of one Baguma where they stayed up to 9.30 p.m when they parted company for their respective homes. Neither Sabiti nor Baguma testified.

The trial judge believed the evidence of PW1, PW2 and PW3 regarding their identification or recognition of the appellant during the incident. He rejected the appellant's alibi as untrue in view of that evidence. He found corroboration of the evidence of the prosecution witnesses from the fact that after the murder of the deceased the appellant had fled his home and gone to hide in a lace called Ntoroko where he was arrested about a month later. Before this incident the appellant and the deceased were on bad terms as the appellant had admittedly sided with his own father in a land dispute between the latter and the deceased. The trial judge found that provided the motive for the deceased's murder.

Six grounds of appeal were filed and argued by Mrs. Bossa who represented the appellant in this appeal. They are:—

"1. That the learned trial judge erred in law and in fact in finding that there was sufficient light and time to enable correct identification of the assailant.

2. The learned trial judge erred in law and in fact when he failed to find that the identifying evidence war of a solo identifying witness and could only be convicted on after ruling out honest mistake by the identifying witness.

3. The learned trial judge erred in failing to address himself to contradictions in the prosecution case which were major and weakened the whole prosecution case.

4. The learned trial judge erred in law when he decided to disbelieve the accused's alibi.

5. The learned trial judge erred in law when he failed to find that the accused's conduct after the incident was exhaustively and satisfactorily explained.

6. The learned trial judge erred in law when he concluded that because the accused sided with his father in the land dispute therefore he was guilty of murder."

At the hearing of the appeal Mrs. Bossa conceded the fact that there were three identifying witnesses and not a single witness as claimed in the second ground of appeal. The ground was thus misconceived and should have been abandoned.

It is not clear how long the attack lasted but it was by no means a fleeting attack because PWI, PW2 and PW3 who went into the sitting room separately found the attacker still there. All the three witnesses knew the appellant very well before the incident. Pw2 and PW3 were in fact his cousins while Pw1 was the wife of his uncle. These witnesses claimed to have recognised the appellant with the assistance of the wick lamp. They described his attire in quite similar terms and they even mentioned his name to PW4 and PW5 when they answered PW1's alarm night. Like the trial judge but unlike the Assessors, we have no doubt that Pw1, PW2 were in a position to recognise the appellant and did in fact recognise him. This disposes of the first ground of appeal.

With regard to the appellant's defence, the trial judge quite rightly observed that it was incumbent on the prosecution to disprove the alibi which they had done by placing the appellant at the scene of crime at the material time. In our judgment the appellant's claim that he was with DW2 the whole day and up to about 9.30 p.m was not borne out by DW2's evidence which was that they had separated at 8.00 p.m. It is even doubtful if the two men were together that night since the claim by DW2 that the appellant was rather drunk when they separated was contradicted by the appellant himself when he stated that on that day he did not partake of any intoxicating stuff at all. Clearly the alibi was false and as rightly rejected by the trial judge. We therefore see no merit in the fourth ground of appeal.

We will consider the 5th and 6th grounds together. We think these two grounds were well taken. The appellant's explanation for his family was already suspected in the matter as was evidenced 'by the murder of his father Ndoleriire on 1—6—83, by the relatives of the deceased. The Assessors appreciated this point, but the trial judge did not. On our part we see nothing sinister in appellant's action. We cannot agree with the trial judge's conclusion that this was not innocent conduct. That may be a possible inference but it cannot be the only one. It follows that the conduct of the appellant in fleeing his village did not enhance the

prosecution's case and did not have to in view of the clear evidence of identification of the appellant by Pw1, PW2 and PW3. Motive is not necessary in law although it is useful in explaining why a accused person did what did. In this case we think that the trial judge went a bit too far in looking for motive in the land dispute between the deceased and the appellant's father. It is not clear what role the appellant played in the dispute apart from siding with his father.

The judge's finding that:

"The accused's strange conducts before and after the incident more than raised grave suspicions on him as the assailant." was therefore not supported by the evidence.

Finally, we turn to the 3rd ground of appeal. We must say we have not been able to find any serious discrepancies in the evidence of the State witnesses and Mrs. Bossa did not show us any. In the result we are satisfied that the appellant was properly convicted. His appeal is dismissed.

DATED at Mengo this 2nd day of November 1990.

SIGNED:
S. T MANYINDO
DEPUTY CHIEF JUSTICE

B.J.ODOKI
JUSTICE OF THE SUPREME COURT

H. G. PLATT
JUSTICE OF THE SUPREME COURT

I CERTIFIED THAT THIS IS
A TRUE COPY OF THE ORIGINAL

B.F.B .BABIGUMIRA
REGISTRAR SUPREME COURT