

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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**CORAM; HON. JUSTICE L.E.M. MUKASA KIKONYOGO, DCJ
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE S.B.K. KAVUMA, JA**

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CRIMINAL APPEAL NO.21 OF 2005

UGANDAAPPELLANT

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V E R S U S

**1. TIGAWALANA BAKALI IKOBA }
2. GADDAFFI YAKUBU WALUSIMBI }
20 3. BWAMBALE ERISON }..RESPONDENTS**

A N D

**1. GADDAFFI YAKUBU WALUSIMBI }
25 2. BWAMBALE ERISON }.....APPELLANTS**

V E R S U S

UGANDA.....RESPONDENT.

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**[Appeal from the judgment and orders of
the High Court of Uganda at Kampala (Okumu Wengi, J)
dated 10th March 2005 in original C.S.C.No.161/2003]**

JUDGMENT OF THE COURT:

This is a consolidated appeal arising from Kampala Criminal Session Case No.161 of
5 2003 in which the respondents who had been jointly indicted of murder c/s 183 and
184 of the Penal Code Act were all acquitted of the charge but the 2nd and the 3rd
respondents were convicted of a minor cognate offence of manslaughter. The
Director of Public Prosecution appealed against the acquittal on the murder
indictment against the three respondents and the 2nd and 3rd respondents appealed
10 against their conviction for manslaughter. Hence this consolidated appeal.

The background of the case as ascertainable from the judgment of the trial court is as
follows:-

15 **“The three accused persons are indicted for murder c/s 188 and 189 of the
Penal Code Act. The first one is Tigawalana Ikoba Bakali (A1) who is the
LC5 Chairman of Mayuge District while the other two Lt Yakubu
Gaddaffi Walusimbi (A2) and Pte Erizon Bwambale (A3) are serving
soldiers. It is alleged that the trio together with others on the 16th January
20 2003 at Bujuko village Mpigi District murdered one Musitwa Fred Nume.
It is the prosecution case that Musitwa, the deceased, was abducted by
three armed soldiers from within the precincts of the county courthouse
of Kityerera in Mayuge District, where he had gone to attend to a case.
His abductors then took him into a vehicle and drove with him to
25 Kampala. Later in the night, they ferried the captive to the foreboding
forests of Bujuko on the Kampala Mubende Highway where they
murdered him. They then dumped him in a bush a short distance from
the Highway. The body was recovered by the nearby Bujuko Police Post
and taken to the City Morgue at Mulago. There being no immediate
30 claimant, the body was subsequently disposed of, being buried in a mass
grave at the Bukasa City Cemetery, behind the ultra modern Mandela
Stadium, Nambole. The body was later on exhumed and identified by
relatives of Musitwa who took it for burial in Buwenge. Two post mortem
reports were produced in court.**

It is the prosecution case that the first accused person Tigawalana Bakali Ikoba, then freshly elected LC5 Chairman of Mayuge District, was behind the murder of Musitwa. It is contended that the other accused persons together with a fellow soldier one Sergeant Kiganira had been briefed by Tigawalana to eliminate Musitwa, an arch rival in the just ended LC5 elections in Mayuge. That although Tigawalana had been declared successful, defeating Musitwa's preferred candidate, the latter had launched a potentially fatal election petition in court to have Tigawalana dethroned. It is the prosecution case that the deceased possessed the dark secret that the elected Chairman had no requisite academic qualifications for the post, and he would successfully canvass it in court. The irony of the matter is that Musitwa was then allegedly abducted right from a county courthouse where he had gone to attend to a case, unconnected to the election petition, which petition, was subsequently dismissed by the High Court at Jinja. It is the prosecution case that the hired soldiers and others took away Musitwa and coldly dispensed with him as stated above, and, headed back to Mayuge the same night. They are said to have spent some stormy hours at a lodge in Bugembe, indulging in alcohol, dancing and sex to either cool off from the tension, or, to forge an extension of their homicidal exploits that began at Kityerera Mayuge, on to Kampala and Bujuko, and back to Mayuge. They are said to have set off early in the morning before dawn reaching Tigawalana's home in Mayuge in time for breakfast. However the Chairman was away at the time, having gone at dawn on the same day 17/1/2004, to attend the funeral of his fallen colleague, the L.C.5 Chairman of Lira District. His absence in a post facto rendezvous, notwithstanding the prosecution urges this court to treat it as an important clue to his participation in the crime. Sergeant Kiganira, who was also charged with the three accused persons, unfortunately died in prison at a critical time at the very end of his trial within a trial. All the accused persons denied committing the offence in a trial in which the prosecution called a total of 19 witnesses. The accused persons were all represented by three counsel. Gaddaffi Walusimbi (A2)

called three witnesses, while the other two accused persons chose to remain silent.”

The facts of the case from the stand point of the prosecution as narrated by Mr. Vincent Tonny Okwanga Senior Principal State Attorney on appeal are as follows:-

“The deceased, one Fred Musiitwa Nume, was a prominent supporter and campaign agent for Mrs. Mamumbya, against the 1st respondent in the 2002 LCV elections for Mayuge District.

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The 1st respondent having been declared winner in that elections, the deceased in his capacity as registered voter in that District, spearheaded an election petition which was filed against the 1st respondent in the Jinja High Court after such elections challenging the elections of the 1st respondent as the Chairman LCV, Mayuge District on the grounds (among others), that the latter lacked the requisite academic qualifications to hold the post of LCVChairman.

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The deceased, being the chief petitioner and former schoolmate of the 1st respondent, that petition in court soured the relationship between the 1st respondent and the deceased further such that the two were not on good terms and the deceased started experiencing threats and fears for his life.

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The second respondent, RO 6072 Ltd Gaddaffi Yakubo Walusimbi was serving UPDF soldier attached to 79th Btn. Gulu, and so was respondent No. 3, Pte, Bwanbale Ezironi, who also doubled as the army escort to the second respondent, at all material time herein. The deceased also had a criminal trial he was facing at that Grade II Magistrate Court, at Kityerera county headquarters, Mayuge District.

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As a result of the said election petition in court against the 1st respondent, the latter hired some soldiers including A2 and A3 and others not in court under the notorious Kakooza Mutale to have the deceased kidnapped from the Kityerera court on the date the latter was due to appear in the

said criminal trial and have him murdered as the said election petition in court being spearheaded by him (deceased) was worrying the 1st respondent.

5 On 16/1/2003, the day the deceased was due to re-appear in court, the 2nd and 3rd respondents and two other people while armed with a gun went to Kityerera court where the deceased had come to attend his trial, some sat in court and waited until the deceased's case was called and adjourned, while another patrolled the court area, then followed the deceased and as soon as the deceased stepped outside the court house they forcefully arrested, handcuffed him and bundled him into a waiting saloon car in which they came and drove him away to Kampala leaving the deceased's car parked and locked at the court's compound.

15 They kept the deceased in custody at the office of LC1 veteran's market village, Kafumbe Mukasa Road till 8.30 pm, when they hired another car and drove the deceased to Bujuko. On the way to Bujuko the kidnappers telephoned to the 1st respondent narrating to him that they had the deceased with them and wanted to get fresh instructions on what the 1st respondent wanted to do with the deceased now that he was under their armed custody.

25 The 1st respondent directed that he wanted the deceased dead and the captors accordingly strangled the deceased to death threw the body into the nearby bush and they promptly informed A1 that Musiitwa was now dead, and when the 1st respondent insisted on proof beyond doubt that the deceased was actually dead, the captors ordered the driver back to the scene from where they finally killed the deceased whom they found till crawling and struggling for life.

30 The killers, who included the 2nd and 3rd respondent and others not in court, reported a mission accomplished successfully to the 1st respondent who promised to meet them at a certain lodge at Bugembe, Jinja to pay them (the killers) for the job they were hired to do.

When the 1st respondent did not show up at the lodge as agreed, after waiting for him in vain throughout that night, the group directed the driver to drive to the 1st respondent's home in Mayuge where they reached at around 5:15 am only to find the latter had sneaked off that morning for Lira to attend the burial of the former LCV Chairman, Lira.

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The 2nd and 3rd respondents' group lingered around at the 1st respondent's home in Mayuge to either find out whether the latter had left their pay with the wife, have the mission car washed, and or wait for him (1st respondent) till he came back from Lira and pay them. On realizing that nothing was left for them in respect of the deal, the party reluctantly relocated to the 2nd respondent's home in Busembatya where they were treated to some refreshments and washing before the party dispersing to their respective destinations, with the 2nd respondent remaining at his Busembatya home, while Nyungunya and Kiganira and the driver, PW9, returning to Kampala.

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The police investigating the kidnap of the deceased managed to arrest Kiganira who led the police to the scene of the murder from where the police found the body already removed earlier by Bujuko police but eventually managing to trace the deceased's body at a mass grave in Nambole from where the widow identified it to police and later on, to the medical officer that did the post-mortem examination. The police investigation further led to the arrest of the 1st respondent from a lode in Jinja, and 2nd respondent from Soroti town. The 3rd respondent was also arrested and all the four indicted for the murder of the deceased. In the course of the trial Kiganira mysteriously died from custody during the trial within a trial to test the admissibility of his charge and caution statement.

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At the conclusion of the trial, the 1st respondent was acquitted of murder and set free while the 2nd and the 3rd respondents were both convicted of manslaughter on the basis of a minor and cognate offence and sentence to 18 and 17 years imprisonment respectively."

The Memorandum of Appeal contains five grounds of appeal as follows:-

- 5 **1. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence before him, thus arriving at a wrong conclusion.**
- 2. The learned trial judge misdirected himself on the law and the evidence before him in holding that the three respondents above were not guilty of murder.**
- 10 **3. The learned trial judge erred in law and misdirected himself in convicting A2 and A3 of manslaughter yet he had found that the killers of Musitwa had malice aforethought.**
- 4. The learned trial judge erred in law and misdirected himself in delving into speculations and extraneous matters not supported by evidence on record thus arriving at a wrong conclusion.**
- 15 **5. The learned trial judge erred in law when he failed to consider the issue of common intention before acquitting the three respondents above of murder, thus occasioning a serious miscarriage of justice.**

Mr. Okwanga Vincent, a Senior Principal State Attorney with the Directorate of
20 Public Prosecutions represented the appellant being assisted by Mr. Andrew Odiit a Principal State Attorney. Mr. Nsubuga Mubiru represented the 1st respondent on a private brief, Mr. Mubiru Stephen represented the 2nd respondent on State brief and Mr. Timothy Atuheire appeared for the 3rd respondent on state brief.

25 Before us in this court, learned counsel made lengthy submissions which we have studied carefully. They cited several authorities to support their arguments. We do not, in this judgment, go into details of the arguments of counsel. However, we refer to them from time to time in the following re-evaluation of evidence exercise that we are duty bound to carry out under Rule 30 of the Court of Appeal Rules.

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Mr. Vincent Okwanga preferred to argue grounds 2 and 3 of the appeal together first, and then grounds 4, 1 & 5 separately in that order. We find it convenient to handle all the grounds of appeal and cross appeal together as they overlap each other in many respects.

The evidence against the respondents was mainly that of PW4 Denis Nsubuga who drove one Kiganira, the 2nd and 3rd respondents to Mayuge where they arrested the deceased. He also drove them to Kampala with the deceased and handed him to an L.C Official at the orders of Sgt Kiganira and the two respondents. His evidence consisted of what he was ordered to do, what he did and what he heard the arresting party and the deceased say during the period he was with them in his car. The other key witness was PW9 Mubiru who was ordered by the said Sgt. Kiganira and his friends i.e. the 2nd, 3rd respondents and other suspects who were not arrested nor tried. This witness drove the party with the deceased to Mityana Road where they beat up the deceased and buried him half dead near Bujuko Police Post. According to him, they were communicating to a certain “**Afende Kazini**” from whom they appeared to be taking orders as to what to do with their captive deceased. There is no direct evidence from the witnesses as to whether “**Afende Kazini**” was the 1st respondent as alleged by the prosecution but that is the main issue to be resolved in this appeal. PW9 also narrated to court what he was ordered to do, what he heard, what he saw during the all night drive from Kiseka Market – Bujuko – Kampala – Jinja – Some Hotel near Bugembe Stadium and up to the home of the 1st respondent who was and still is the LCV Chairman of Mayuge District. All this time PW9 was driving under the orders of Sgt. Kiganira and the second respondent in this appeal. We propose now to deal first with whether the second and the third respondents were correctly convicted of manslaughter and thereafter we shall deal with the acquittal of the 1st respondent.

25 The 2nd & 3rd respondents:

At the trial in the High Court, the prosecution adduced the evidence of 19 witnesses. This includes the two main eyewitnesses, namely PW4 Denis Nsubuga and PW9 Mubiru Hakim. The learned trial judge went to great length to consider and evaluate all the evidence as against the defence evidence of four defence witnesses. The learned trial judge found as a fact that:-

- 1) The 2nd and 3rd respondents with other soldiers led by one Sgt. Kiganira (now dead) were driven by DW4 to Kityerera court in Mayuge District

where they arrested one Musitwa (the deceased) and took him to Kiseka Market. This was on 16th January 2003.

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- 2) On the night of 16th January 2003, Sgt. Kaganira, the two respondents, the 2nd and the 3rd and two other soldiers hired the vehicle driven by PW9 Mubiru Hakim who drove them to Bujuko on Mityana Road in company of the deceased as their captive. On the way they were beating him severely and communicating to an “**Afende Kazini**” who ordered them to kill their captive.
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- 3) In Bujuko PW9’s passengers pulled the deceased out of the vehicle, beat him thoroughly and abandoned him in a pit for dead after which they attempted to return to Kampala.
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- 4) That shortly afterwards they communicated to “**Afende Kazini**” who ordered them to go back and ensure that the deceased was dead, which they did. They found the deceased trying to get out of the pit but they further assaulted him and made sure he was dead. “**Afende Kazini**” then instructed them to drive to a lodge in Bugembe Jinja in order to be paid for a job well done.
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- 5) That at the lodge in Bugembe, they did not find “**Afende Kazini**” but they were supplied with all the drinks they wanted and all women working at the lodge were commanded by Sgt. Kaganira and the 2nd respondent and distributed to their other colleagues as wives. All the time they were there, they kept communicating with “**Afende Kazini**” who kept on promising to arrive and pay them but he never came. During that communication, Sgt. Kaganira and the 2nd respondent were referreing to their correspondent as ‘**Afende Kazini**’ and also as the **Chairman**.
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- 6) Towards 5 am on 17th January 2003 “**Afende Kazini**” instructed Sgt. Kaganira and the 2nd respondent and their colleagues to go to his home which was apparently well known to Sgt. Kaganira and the 2nd respondent.
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- 7) That Sgt. Kaganira, the 2nd respondent, the 3rd respondent and their other colleagues ordered PW9 to drive them and the journey ended at the home of the 1st respondent who is also the Chairman of LCV of Mayuge District. At that huge home, Sgt. Kaganira and the 2nd

respondent were very well known by the wife of the 1st respondent (Chairman Mayuge) whom the 2nd respondent referred to as “**Mulamu**” which means in this context: “**sister in law**”. They were however told that A1 had just left for burial of another LC Chairman in Lira. They also asked whether the chairman had left something for them but the wife told them the chairman had left nothing for them.

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8) Under great disappointment, they were served with tea and someone washed their blood drenched vehicle driven by PW9 Mubiru Hakim. Later they went to the home of the 2nd respondent at Busembatya where they waited hoping to hear from the chairman but in vain.

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In his judgment, the learned trial judge captured the evidence of PW9 Mubiru Hakim, which he believed, as follows:-

“Hakim Mubiru PW9 is the driver who drove Kiganira and co together with Musitwa to Bujuko from Kafumbe Mukasa Road. He told court that he knew Kiganira well and he also identified Walusimbi Gaddafi and Bwambale. He told court that Nyugunya also entered the vehicle. He described the seating such that Kiganira took the front passenger seat while all the four including Musitwa sat in the back. Before a roadblock Afande Gaddafi sat in the front seat and told the people manning the roadblock his identity and destination. In the course of the journey Kiganira asked Gaddafi to call “afande” and he did. He spoke on his cell phone saying:-

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‘We have the person with us. Should we bring him to you or not?’

The witness did not hear the reply but told court that Gaddafi then told Kiganira that afande had told him he wanted the man dead. At this point they ordered Nyugunya and Kadogo to strangle Musitwa which they did. Hakim witnessed a struggle in the back seat. The witness then told court how the deceased had been dumped in the ditch for dead whereupon Nyugunya demanded his pay. Kiganira then told them that they were to proceed to Jinja to the afande to get the money including the vehicle hire charges. He told court:-

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5 *'He said we were going to Jijna Barracks where we would get afande
kazini to give us the money...Kiganira asked Gaddafi to call the
boss and confirm the job finished and to say they were on their way
for the money. Gaddafi called the "Afande Kazini". After the call
he (Gaddafi) told Kiganira that the afande had insisted on knowing
if the man was confirmed really dead. Kiganira also asked Gaddafi
'is the man actually dead'. Gaddafi replied that the man was
dead.... Kiganira then said if that man had not died they would all be
10 dead for failure to fulfil the task. He once again asked if the man
was truly dead. Gaddafi asked Nyugunya if the man's heart was
pumping. They said it was so...'*

15 **But as they drove on Kiganira ordered that the vehicle turn around to go
confirm that the man was really dead. The witness turned and drove
back to seek the place where the deceased had been dumped. Reaching
there a frantic search ensued as Kiganira lamented saying that the
'Afande Kazini' is a killer and would kill him if the deceased has survived
and escaped. Nyugunya located the deceased shouting "he is here. He is
20 trying to crawl around."** He asked for a gun which Gaddafi threw to him.
Nyugunya then did a hitting job which sounded and confirmed that the
deceased was dead now. As they left the scene Gaddafi again called the
'Afande Kazini' who instructed them to proceed to Jinja to a Bar and
lodge where they would be paid. At the Bar Gaddafi again called the
25 'Afande Kazini' who promised to come around 3.00 a.m. Gaddafi was
pressed by Kiganira to call afande again. He did and the witness told
court that he heard Gaddafi ask into the cell phone *'Chairman are you
coming or not we are here seated waiting.'*

30 **At this point Gaddafi told Kiganira that the person he spoke to had
directed them to find him at his home. They then drove there as the bar
girls shouted demands for their unpaid bills. Gaddafi left behind his
mobile phone. They were dumb founded to be told that the man had gone**

to Lira for the burial of the LC5 Chairman there. Hakim Mubiru concluded:-

5 *“It was that LC5 man in whose house we were that had been called Afande Kazini all along! Yes it was the LC5 Chairman who was being called Afande Kazini.”*

10 There was some anger and frustration as all of them entered the bedroom where a woman had a baby and lay to ensure they get money. Kiganira according to Hakim then asked in Lusoga

15 *‘Aye mulamu, did they not leave you any money for us.’ The woman said nothing had been left. At this point they asked to be given tea which was served. Afterwards (they) drove away without any money or meeting with the accused.’*

The witness maintained his evidence when he said:-

20 *‘Yes they said we go the Chairman’s place and we get paid. Gaddaffi told Kiganira that lets go to the lodge. They said it looks like the Chairman is playing tricks on us after we have completed his job. While at Mayuge they ordered me to drive to the Chairman’s home. Kiganira told me to drive to the LC5 Chairman’s home. I did not know it before... What I saw at the Chairman’s were bricks, mango tree. There is a hut with chairs and a very expensive looking table. An old pawpaw tree... I don’t have any grudge agains. A.1. I don’t even know him.’*

30 The evidence of this witness Hakim Mubiru in particular with regard to the Bugembe visit, was corroborated by the testimony of Aisha Naigaga PW11. She recognized Kadogo, Gaddaffi and Kiganira as the people who paid the lodge where she worked a memorable visit. She saw them with a driver who was served soda. This same driver pleaded for and saved her from torment at the hands of Kadogo. That driver was Hakim Mubiru. The group left the lodge early morning before dawn.”

The learned trial judge believed the evidence of Hakim Mubiru. We think he was entitled to do so because this evidence was corroborated by many witnesses including PW11 Naigaga Aisha, Charles Kataratambi (PW15) and PW3 Habukiro James. We have no doubt in our mind that this evidence is very strong and implicated Afende Gaddafi Walusimbe, the 2nd respondent, Bwambale Erison alias Kadogo the 3rd respondent in the death of the deceased.

There is also on record the charge and caution statement of Yakuba Gaddafi Walusimbi, the second respondent, recorded on 27th February 2003 in which he made a number of admissions that implicate him and Bwambale Erison, the 3rd respondent, in this sodid crime. In the statement he admits that he knew and was friends with Sgt. Kiganira. He stated that on 16th January 2003, he met Sgt. Kiganira on appointment at a lodge in Bugembe near Jinja Municipality. He was wearing army uniform and was armed with a rifle (SMG) with 30 rounds of ammunitions. Sgt. Kigania briefed him about the operation they were going to carry out which was to arrest an enemy of government whom the army had information on. The enemy was reported to be at Kityerera Sub County in Mayuge District. Sgt. Kiganira was accompanied by three people two of whom were called Kadogo and Kanyama respectively.

Lt Walusimbi Gaddafi admits in his statement that he on that day participated in the arrest of the deceased. They took the deceased to Kafumbe Mukasa Road. They took him to the office of the LC1 Chairman of the area. He however denied having continued with the party to Bujuko where the deceased was killed and dumped in the bush. He had to see his sick patient in Iganga and so he left the party including the deceased still in the office of the Chairman LC1. It is significant however that he admits having left his gun behind in possession of the Kadogo.

To us this admission though denying parts of the prosecution case against him, is admission that PW4 and PW9 saw him before, during and after the deceased was murdered. It also lends credence to the evidence of PW9 that he and Bwambale alias Kadogo took part in the murder of he deceased. We have no doubt that this was so and the learned trial judge was correct to find that they had participated in his unlawful killing.

What remains is whether they had done so with malice aforethought. The learned trial judge had held that whoever killed Musitwa the deceased had done so with malice aforethought. However, he appears to have developed a doubt as to whether Walusimbe and Bwambale had actually administered the killer blow and therefore
5 convicted them of manslaughter and acquitted them of the murder charge.

With greatest respect to the learned trial judge, we think he greatly misdirected himself on the law and the facts in coming to that conclusion. There is very strong evidence that the 2nd and 3rd respondent were the ring leaders when the deceased was
10 arrested. There is strong evidence that they took part in strangling the deceased and dumping him for dead in the bush near Bujuko Police Station. There is very clear evidence that it was the 2nd and 3rd respondents who handed their guns to a soldier called Nyagunya alias Kinyama who administered the final killer blow to the deceased.

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In light of this evidence, we cannot agree with the learned trial judge where he stated:-

**“As for A2 and A3 I have come to the conclusion that according to the evidence they were active participants in the kidnap torture and in the
20 slaying of Musitwa. There is only one issue and that is the fact that Musitwa did not die in Mubiru’s vehicle. He was dumped while still alive. The evidence shows that Nyugunya located Musitwa’s still living and crawling body and hit him to death. He did it alone and from a distance in the presence of A2 and A3. For this reason I will also have to disagree with the gentleman assessor and find and hold A2 and A3 guilty of
25 manslaughter and not murder as charged. I do and accordingly convict A2 and A3 of manslaughter C/s 187 and 190 of the Penal Code Act.”**
[Emphasis ours]

30 The evidence on record shows that A2 and A3 who are the 2nd and 3rd respondents not only had a common intention with other colleagues of theirs to kill the deceased but also directly had a hand in causing the death of the deceased. Further more it was the 2nd respondent who at all times leading to the death of the deceased was in telephone contact with the person referred to as “**Afende Kazini**” who was the master mind

behind the death of the deceased. We have no doubt that these two respondents caused the death of the deceased with malice aforethought. In the same vain we do not find any merit in their cross-appeal against their conviction of manslaughter.

- 5 We accordingly set aside the conviction of the offence of manslaughter C/s 187 and 190 of the Penal Code Act and substitute the same with a conviction of the offence of murder C/ss.188 and 189 of the Penal Code Act.

The 1st Respondent:

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It was the case for the prosecution that the **“Afende Kazini”** who on the evidence appears to be the master mind and the director of the operation that resulted into the death of the deceased was no other than his political arch enemy one Tigawalana Bakali Ikoba, the Chairman LCV of Mayuge District. The learned trial judge found
15 that though the evidence adduced by the prosecution pointed at him as the master mind, it did not conclusively establish his guilt beyond reasonable doubt.

The prosecution evidence that pointed a finger at the 1st respondent is that of PW9 Hakim Mubiru. I refer the reader to an extract contained on pages 13-16 of this
20 judgment from the evidence of Hakim Mubiru. The evidence was that a certain **“Afende Kazini”** was all along communicating to the 2nd respondent directing the operation to kill the deceased. Indeed the killers led by Sgt. Kiganira and Lt. Walusimbi almost left the deceased half dead until **“Afende Kazini”** ordered them to return to the scene of murder and ensure that Musitwa was actually dead. When it
25 was confirmed and shortly after one Nyuguya struck the final blow, he demanded to be paid his dues for the work done. Sgt. Walusimbe communicated to **“Afende Kazini”** and informed them that he was directed to take the driver and the killers to a lodge in Bugembe where they would get paid for the vehicle hire and for the job well done. They drove to Jinja and arrived in Bugembe after 10 p.m. However **“Afende**
30 **Kazini”** had not yet arrived. Lt. Walusimbe called him whereupon he promised to arrive at 3 p.m. He however authorised them to enjoy themselves with drinks on his count. The killers became restless and started demanding for their pay. Lt. Wlusimbi called **“Afende Kazini”** and this time he was referring to **“Afende Kazini”** as chairman. Lt. Walusimbi told his fellow killers that the chairman had said they drive

to his home where they would be paid. Hakim (PW9) was instructed to drive to the home of the chairman which he did not know. He was however directed by Sgt. Kiganira and Lt. Walusimbi to the home which turned out to be the home of the Chairman LCV of Mayuge District Mr. Tigawalana Bakali Ikoba. The witness had no doubt that these two soldiers were very well known at this home. PW3 Bamureseyo Roland was on the morning of 17th January 2003 at the home of the Chairman when the party arrived. He was ordered by Sgt. Kiganira whom he knew very well to wash a blood stained vehicle which turned out to be the vehicle driven by PW9 Mubiru in which the deceased was strangled before he was dumped for dead. He washed the car but was never paid by Sgt. Kiganira. He later complained to the wife of the chairman. By now, it is clear that shortly after the Chairman asked Walusimbi and his colleagues to go to his home for payment he left his home early in the morning and went to Lira to attend a funeral. There is no evidence that he paid the killers for the job.

The prosecutor called the evidence of PW17 Det. SSP Habukiro James. This witness played a big part in the investigation of this murder. Shortly after Sgt. Kiganira was arrested, Habukiro interrogated him. As a result of what he was told Sgt. Kiganira took him to Bujuko where they got the information at the police that the body of an unknown person had been exhumed nearby and taken to a mortuary in Kampala. It was later found buried near Nambole Stadium. Sgt. Kiganira made a confessional statement before a Magistrate Grade I but died before it was admitted in evidence at the trial. However, Det. SSP Habukiro said he was told by Sgt. Kiganira that, according to the facts before the trial judge,

“a deal had been reached between the Chairman and Walusimbi.” which resulted into the killing of the deceased.

As a result of information revealed by Sgt. Kiganira, PW9 Hakim Mubiru was arrested and he drove a detective called Kataratambi Charles (PW15) to where the killers had ordered him to take them to collect their payments for doing the murder job. He took the detective to the home of the Chairman LCV Mayuge, who is also the 1st respondent in this appeal.

Then, there is the evidence adduced from the charge and caution statement of Lt. Walusimbi the 2nd respondent. I have already alluded to this statement while considering the case against Walusimbi and Bwambale. That statement was challenged in court on the grounds that it was not made voluntarily. A trial within a trial was conducted. The trial judge ruled that it was made voluntarily and admitted it in evidence. In the statement Lt. Walusimbi made two important revelations about the 1st respondent. Herebelow I quote verbatim from his statement the two revelations:-

10 **“I asked (from Sgt. Kiganira) for my gun then he told me that the LCV Mayuge had promised that if the suspect (Musitwa the deceased) was made to be scared not to talk against the government, he would give him shs. 1 million and that when he got it he would return the gun and give me some of the money. From that we went our ways.”**

15 According to the statement, this exchange occurred the day following the killing of Musitwa. From then, he went into hiding to Jinja – Soroti, Gulu then Soroti till he was arrested by police.

Further on in his statement, Lt. Walusimbi stated:-

20 **“Regarding the LCV Chairman Mr. Ikoba I knew him since our childhood as we used to stay together in Mayuge. However on the issue of arresting Musitwa I recall that I talked to him on phone on 17-1-2003 asking him if he was aware of it. He confirmed that he was aware and asked if we had successfully taken him to Kampala. He further said that he was also on his way back from Lira where he had gone for burial. I do not recall talking to him again.”**

30 This evidence was attacked as hearsay and worthless evidence of an accomplice in the crime which required corroboration. However there is quite a lot in the evidence of Hakim Mubiru, Denis Nsubuga, Det. SSP Habukiriro, and Charles Kateratambi that corroborates the statement of Lt. Walusimbi.

The learned trial judge considered all this evidence against the respondent as follows:-

5 “There are few problems in this case. Up to appoint, the hand of the
Chairman (A1) was rather visible in the kidnap and eventual killing of
Musitwa. But the death of Kiganira, who was the key informant and key
actor robbed this court of vital evidence that would bolster the gut feeling
and conviction that indeed A1 could have been behind this killing. If
Kiganira had not removed his evidence from the record by his death at a
critical stage in the case the evidence gathered by the police had tended to
point a finger at A.1. There is also some issue that was taken by the
10 defence counsel. They demanded to know why the prosecution had
withheld the record of telephone transactions between Gaddafi and the
“*Afande Kazini*”. However there was evidence that Gaddafi made calls to
someone. Even without the recorded transcript, which is a modern day
proposition, evidence of these conversations would have sufficed had for
15 instance the “*Afande Kazini*” positively turned out to be A1. Gaddafi’s
telephone set had been left with the lodge owner for unpaid bills. What
happened to it? Given the way the lodge owner presented a surrogate
Aisha Nabukenya (DW3) to attempt to discredit the real Aisha (PW11)
indicates some uncooperative spirit that could have removed the
20 telephone hardware evidence. One can also see the frustrating delays in
the rendezvous with the “*Afande Kazini*”. While Kiganira and Nyugunya
persistently displayed impatience they all got diverted into alcohol and
sex at the lodge till morning and were unable to pay their bills, enabling
the cell phone to be retrieved. Physical contact with the LC5 Chairman
25 also proved tricky. Somehow there were diversionary telephone messages
to the effect that the meeting with the *Afande Kazini* was imminent, then it
was postponed to 3 am. In the meantime the actors were held in penniless
suspense and got taken up by the night long drunk and bar girl
engagements. By the time they arrived at Mayuge their elusive or visit to
30 the house of the LC5 Chairman was in my view sufficiently established.
The evidence of Seeyo (PW3 Bamureseyo Ronald) and Hakim Mubiru
and what the Chairman’s wife told Det. ASP Charles Kataratambi all
show that these people went to the house. The only question is whether
such visit by itself in absence of other evidence was sufficient to establish

conspiracy in which the chairman prompted Kiganira and Gaddaffi to eliminate Musitwa.

The learned trial judge then concluded:-

5

“I have considered the circumstantial evidence in this case to see if it is safe and can suffice to sustain a conviction of A.1 in particular. I was asked by the prosecution to find that a case of procurement of the murder had been made out against A.1. However I was unable to do so in view of the ingredients needed in procurement and also the gaps created by the loss of vital evidence as I have pointed out above. The gentleman assessor advised me to return a verdict of guilty against A.1. But I have had some hesitation and reluctance and would not agree due to the degree of proof required in a charge of murder given the doubt arising from a gap in the prosecution case.” He acquitted the 1st respondent as we already know.

With great respect, while we agree with the evaluation of the evidence as shown above, we do not agree with the conclusion he arrived at. We are of the view that accumulated import of this evidence is that the killers of Musitwa were being controlled by someone powerful who for some reason wanted him dead. They were promised a fee if they carried out the mission. As soon as they accomplished it, they started demanding for their money. A telephone dialogue between the 2nd respondent done at intervals led the group to Jinja, Bugembe and eventually to the home of the 1st respondent. There is no doubt that Sgt. Kiganira and Lt. Walusimbi knew who was to pay and from Bugembe Lodge up to the home of 1st respondent in Mayuge, they were now openly referring to him as the chairman. And indeed the hunt for their remuneration ended at the home of the Chairman. He had cleverly left for Lira.

There are other circumstances that strengthen our acceptance of this view. These are pieces of evidence which, when considered in isolation would not prove any allegation purporting to incriminating the 1st respondent in the killing of the deceased. However, when considered together with all other evidence on record, they strengthen the conclusion that the respondent had a hand in the killing.

(a) Motive:

5 Motive is not an essential ingredient of the offence of murder. However where there is strong evidence indicating that a suspect had a motive to eliminate the deceased, such evidence can be taken into account along with all other available evidence. In the instant case, the deceased and the 1st respondent who had before the 2002 elections been friends had turned enemies in the aftermath of the campaigning. Musitwa had supported a rival of the 1st respondent and even filed a petition in Jinja High Court seeking the nullification of his election. There is evidence on record showing that this worried the respondent so much. He would not have missed opportunity to eliminate Musitwa if he felt he had a chance to get away with it.

15 (b) Apprehension of Danger

Because of the fall out in the campaigns and the pending election petition against the respondent, the deceased started sensing danger. Before and on the day he was kidnapped, he told his wife that he was being followed everywhere and feared for his life. A few days before the kidnap, his house was burnt by unknown people but Musitwa strongly suspected that the Chairman LCV had a hand in it. He reported him to the police but it seems the matter was never taken up. On the day of his kidnap he gave all his private documents to his wife saying that he was going to court but he was not sure he would return home. He never did. Musitwa's last words to his wife were according to her:

25 **“He told me, I am going but I don't know if I will come back. I am not sure of my life. He told me that people are following him. He left me with all his documents”.**

30 PW10 Ngobi Ramathan testified that he was one of the three led by Musitwa who petitioned the High Court at Jinja to nullify the election of the 1st respondent as Chairman LCV Mayuge District. Their cause of action was that he had no valid papers to qualify him to be elected. It is Musitwa who was the classmate of the Chairman who was to testify to that effect. They would also

produce evidence of intimidation and theft of votes. Musitwa was the driving force behind the petition. This witness told court:

5 **“I last saw Musitwa on a Sunday at my house after filing the petition there came a problem they threatened us. People were telling us if we don’t withdraw the case we would be killed. I told my people, brothers, wife and mother about the death threats. Musitwa also told me he was threatened.**

10 PW4 Denis Nsubuga who drove the car that took Musitwa to Kampala testified:

15 **“The handcuffed man (Musitwa) I had not seen him. When they entered the vehicle I don’t recall what they said except that he was told he would be taken to police where he was expected to tell the truth. He said he would answer all he knew. He said the whole matter was out of a grudge because he led the group which took the Chairman to court.”**

20 For Musitwa, he had no doubt in his mind that it was the Chairman who had initiated his arrest and kidnap. On that very day he was killed by his abductors.

25 (c) The killers:

 It is not a coincidence that the 1st respondent, Sgt. Kiganira, Lt. Walusimbi all happen to be Basoga and had known the 1st respondent for sometime as they come from the same area. At the home of the 1st respondent, Kiganira and Walusimbi were given a very good reception. The wife of the Chairman cooked tea and meat was roasted for them. Both Walusimbi and Kiganira were calling the wife of the Chairman **“Mulamu”** which means **“sister in law”**. It is not likely to be a coincidence that after the murder of Musitwa, the arch enemy of the Chairman, they drove from Bujoko and travelled the whole night initially to Jinja to get paid and this chase for their payment led them to

the home of the Chairman. The 3rd respondent happened to be with them because he was the bodyguard of the 2nd respondent but for a fee, he was and did willingly participate in the murder of Fred Musiitwa.

5 On the evidence before him, the learned trial judge found that that on the morning of 17th January 2003, the murder group consisting of the 2nd, 3rd appellants and their colleagues were driven to the home of the 1st respondent at 5.30 a.m. He said that, that fact was sufficiently established to his satisfaction. He was also satisfied that a blood stained vehicle driven by PW9 Hakim Mubiru was washed that morning by
10 PW3 Bamureseyo at the home of the Chairman. He was, however, reluctant to make an inference that in the circumstances the visitors could not have been there so early in the morning and straight after the murder of Fred Musitwa for any other reason other than the furtherance of the plot they had hatched to kill him. We think their conduct cannot be explained in any other manner not compatible with the inference
15 that they had gone there to receive their wages for the crime they had just committed. The irresistible conclusion is that the Chairman was part and parcel of the conspiracy to kill Musitwa, that he invited and plotted it, that it was done in his own way under his supervision and it was him who ordered the killers to travel up to his own home to receive payment for a job accomplished. The evidence proves beyond reasonable
20 doubt that the 1st appellant committed this crime. In the case of **Miller vs Minister of Pensions [1947]2 ALLER 372-272** the term “beyond reasonable doubt was explained by Lord Denning who stated that it did mean beyond a shadow of doubt or absolute certainty. He said:-

25 **“The degree (of beyond reasonable doubt) is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to
30 leave only a remote possibility in his favour which can be dismissed with a sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”**

We have considered and re-evaluated all the evidence adduced by the prosecution and the defence. We are left in no doubt whatsoever that a man nicknamed “**Afende Kazini**” by Sgt. Habib Kiganira and Lt. Gaddaffi Yakubu Walusimbi was the mastermind of the plot to kill Fred Musiitwa. He directed the execution of the crime from the arrest and kidnap of the victim till he was murdered in Bujuko on Kampala Mityana road. “**Afende Kazini**” is no other than the Chairman LCV of Mayuge District, Tigawalana Bakali Ikoba, who is the 1st respondent in this appeal.

In the result, we find that the three respondents should have been found guilty of murder. The 1st respondent was wrongly acquitted and the 2nd and third respondents were wrongly convicted of manslaughter. We set aside the order of acquittal and the convictions for manslaughter and the sentences thereon. We substitute a conviction of murder C/s 188 and 189 of the Penal Code Act in respect of all the three respondents.

Dated at Kampala this 17th day of December 2009.

Hon. Justice L.E.M. Mukasa Kikonyogo

DEPUTY CHIEF JUSTICE.

Hon. Justice A. Twinomujuni

JUSTICE OF APPEAL.

20

Hon. Justice S.B.K. Kavuma

JUSTICE OF APPEAL.