

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO. 0156 OF 2010**  
**TURAHABWE EZRA & 13 OTHERS .....**  
**APPELLANTS**  
**VERSUS**  
**UGANDA.....**  
**RESPONDENT**

5

10 **CORAM:**

**HON. MR. JUSTICE RUBBY AWERI OPIO, JA**  
**HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA**  
**HON. MR. JUSTICE KENNETH KAKURU, JA**

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[Appeal from the Judgment of the High Court of Uganda by His Lordship, the Hon. Mr. Justice Katutsi given at Rukungiri in HCT-05-CR-CS-113 -2010 on the 2<sup>nd</sup> day of August 2010]

**JUDGMENT OF THE COURT**

20 All 14 appellants were tried and convicted of the offence of murder contrary to **Sections 188** and **189** of the Penal Code Act by the High Court of Uganda at Rukungiri in **HCT-05-CR-CS-113 of 2010.**

The appellants being dissatisfied with the decision of the High  
25 Court now appeal against both conviction and sentence.

Initially Turyahabwe Ezra and 12 of the appellants had filed in this court Criminal Appeal No. 156 of 2010 and Edwin Akankwasa had filed a separate appeal, Criminal appeal No.191 of 2010.

The two appeals were consolidated by the order of this court with  
5 the consent of the parties.

This Judgment therefore is in respect of both appeals.

Both appeals were argued on the grounds set out in memorandum of appeal in Criminal appeal No. 156 of 2010. That memorandum of appeal initially set out 6 grounds of appeal. At  
10 the trial counsel for the appellants sought and were granted leave to add an additional ground.

The seven grounds of appeal are accordingly set out as follows;-

- 15 ***1. The learned trial judge erred in convicting and sentencing the Appellants A 7, A9, A10, A11, A12 and A13 when there was no evidence adduced against them by the prosecution and A5 when the charges had been withdrawn against him by court.***
- 20 ***2. The learned trial judge erred by relying on the evidence of PW I (Beatrice Kyansiime) on identification of the assailants when she had moved up-hill, a way from the home, when the attackers returned to the victim's home.***
- 25 ***3. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record as a whole, and relied on the evidence of PW1 and PWII on identification of the attackers which was full of inconsistencies.***

5 **4. The learned trial judge erred in holding that the offence of murder was committed when malice aforethought an essential ingredient of the case of murder was not proved by the prosecution.**

10 **5. The learned trial judge erred in holding that the alibi set up by the appellants crumbled when it had not been disproved by the prosecution evidence.**

15 **6. The learned trial judge erred in law and fact when he relied on the uncorroborated evidence of A3, Baryamureba A, an accomplice in convicting and sentencing the appellants.**

20 **7. The learned trial Judge erred in law and in fact in his interpretation and application of the well established law regarding common intention and erroneously convicted the appellants and sentenced the life imprisonment for the offence of murder.**

25 At the hearing of this appeal all the 14 appellants were represented by learned counsel **Mr. Gerald Nuwagira** and **Ms. Sarah Charlotte Kansiime** while the respondent was represented by learned counsel **Ms. Margaret Nakigudde**, Principal State Attorney with the Director of Public Prosecutions.

30 At the commencement of this appeal learned counsel for the appellants brought to the attention of court the fact that appellant number 5 Nuwamanya Ronald had been tried and convicted in error as the case against him had been withdrawn by the Director of Public Prosecutions before the commencement of the trial at

the High Court. This fact was conceded to by the respondent's counsel. We confirmed from the court record that, this was indeed the case.

This court accordingly discharged him and set him free.

5 The trial Judge himself had noted on the court record on 18<sup>th</sup> May 2010 that charges had been withdrawn against both A5 and A16. Whereas A16 was discharged A5 remained in prison and was in fact present in court throughout the trial at the High Court.

10 He was even convicted and sentenced to life imprisonment. In the result he has spent more than four years in prison for no reason whatsoever.

It is regrettable that such an error could emanate from a court of law whose sole duty is to administer justice.

#### Ground 1

15 **The learned trial Judge erred in convicting and sentencing the appellant A7, A9, A10, A11, A12, and A13 when there was no evidence adduced against them by the prosecution and A5 when the charges had been withdrawn against him by court.**

20 Learned counsel Mr. Nuwagira, submitted that none of the people mentioned in ground one were seen at the scene. That they were arrested for nothing. That those who committed the crime had run away. That the persons mentioned in ground one were

innocent that is why they did not run away and ended up being arrested.

That they were arrested from different places. That there was no evidence adduced by the investigating officer as to the  
5 circumstances under which the named persons were arrested.

He cited Section 59 (a) of the Evidence Act for the proposition that there was no direct evidence to link the named persons to the crime.

### Grounds 2 and 3

10 **2. The learned trial judge erred by relying on the evidence of PW1 (Beatrice Kyansiime) on identification of the assailants when she had moved up hill, a way from the home, when the attackers returned to the victim's home.**

15 **3. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record as a whole, and relied on the evidence of PW1 and PWII on identification of the**  
20 **attackers which was full of inconsistencies.**

Learned counsel for the appellants submitted that the persons who killed the deceased were never properly identified. That the assailants were so many over 100 people in number. That it was  
25 not possible for the witnesses to have identified which of the assailants actually killed the deceased. He submitted that PW1 could not have properly identified the assailants as she had run to

a hill and was far from them. That PW1 did not have ample time and opportunity to properly identify the assailants.

Learned counsel also challenged the identification parade. He submitted that no proper identification parade had been  
5 conducted by the Police in this case. He referred to the case of ***Stanley Kurong vs Uganda (Court of Appeal Criminal Appeal No. 314 of 2003)***.

#### Ground 4

***4. The learned trial judge erred in holding that the  
10 offence of murder was committed when malice  
aforethought an essential ingredient of the case of  
murder was not proved by the prosecution.***

Learned counsel submitted that the prosecution had failed to  
15 establish that the appellants had a common intention to kill the  
deceased. He submitted that this ground was in alternative but  
without prejudice to the arguments made earlier in respect of  
grounds 1-3.

#### Ground 5-6

20 Learned counsel submitted that the learned trial Judge erred  
when he rejected the *alibi* set up by the appellants. That he also  
erred when he relied on evidence of PW3 an accomplice whose  
evidence was not corroborated.

He submitted that the evidence of A3 was unreliable and should never have been relied upon by the learned trial Judge. That A3 had participated in assaulting the deceased and that his testimony in court was only intended to save his neck. He  
5 submitted that the learned Judge did not consider the *alibi* set out by the appellants. That the appellants were never given an opportunity to give evidence on this *alibi* during the trial because the record does not show that court had informed them of their right to call witness.

10 He asked this court to allow the appeal, quash the convictions and set aside the sentences.

In response the learned Principal State Attorney counsel Ms. Nakiggude submitted that PW1 had properly identified the appellants as forming part of the mob that killed her brother.  
15 That the appellants are all persons previously known to her as they are from the same village.

That she had properly identified the assailants as they surrounded her home. That the incident took place during broad day light and as such, the conditions were favourable for correct identification.

20 On ground 2 learned counsel submitted that PW1 had properly identified the assailants including the appellants when she had moved away to a hill. That they were able to cease the deceased as he was too weak to flee having been assaulted earlier that morning by the same mob. PW1 narrates properly what was

taking place and that she had seen A2 Byarugaba Patrick hit the deceased on the head with a stick and she had also seen A6 and A8 dragging the deceased. That she had heard A2 order that she also be arrested and at that point she fled to the hill. That she had  
5 stood firm during cross examination and her testimony was not destroyed. That she named all the persons whom she was able to identify and recognize as the main actors out of the mob.

That PW1 therefore clearly identified the appellants as having been part of the mob that killed the deceased and court correctly  
10 believed her testimony.

In respect to ground 3 learned Principal State Attorney submitted that the trial Judge had properly evaluated the evidence on identification.

That the appellants were all previously known to the witnesses  
15 and as such the witnesses were able to recognize them. That PW2 was able to clearly recognize the appellants as they had forced her to move with them during the commission of the offence.

On ground 4 learned Principal State Attorney submitted that the testimonies of the witnesses in respect of injuries sustained by  
20 the deceased and the nature of the weapon used matched the postmortem report.

Counsel submitted that the Judge correctly found that the appellants had killed the deceased with malice aforethought.



Learned counsel submitted that the learned trial Judge had correctly rejected the appellant's defence of *alibi*. She submitted that the accused person had been found roasting meat near the home where the murder had been committed. The meat was that  
5 of a cow belonging to the victim's farmer that the appellants had killed. They were arrested and were identified by PW1.

She concluded that the prosecution had proved through the evidence of all its witnesses that the appellants had a common intention of killing the deceased. She asked this court to uphold  
10 both the conviction and sentences.

Mr. Nuwagira for the appellants in his rejoinder generally retained his earlier arguments and prayers.

We have listened carefully to the submissions from both counsel. We have also perused the court record and the authorities cited  
15 to us.

This court as a first appellate court has a duty to reevaluate the evidence and to come up with its own inferences on all issues of fact and law. **See; - *Fr. Narsensio Begumisa and Others vs Eric Tibebaaga in (Supreme Court Civil Appeal No. 17 of***  
20 ***2002***).

The duty to re-evaluate evidence as a first appellate court is also a requirement under Rule 30(1)a of the Rules of this court. We shall therefore comply with this requirement of the law in the resolution of this appeal.

The appellant's first ground of appeal is that the learned trial Judge erred when he convicted that appellants A7, A9, A10, A12 and A13 whereas no evidence has been adduced against them.

- 5 The memorandum of appeal does not set out any of the names of appellants. Their names are also not set out in the notice of appeal. It is not clear from the memorandum of appeal who the persons referred to in ground one are.

10 It appears the memorandum of appeal refers to 'Accused' persons as set out in the indictment and not "Appellants" as they should have appeared in this appeal.

We say so because the memorandum of appeal refers to A5 against whom the charges had been withdrawn at the High Court. We were able to ascertain that A5 is accused No. 5 in the lower  
15 court record; Nuwamanya Ronald.

It appears, though not with certainty that A7 is Akampa Babari, A9 Akankwasa Edwin, A10 Oshabire Dick, A11 Byaruhanga Nsio and A13 is Rwanyizire Samuel.

20 The manner in which ground one of the memorandum of appeal is framed offends the provisions of **Rule 66(2)** of the rules of this Court which requires, that a memorandum of appeal sets forth concisely the grounds of objection to the decision appealed against, specifying the points of law and fact alleged to have been wrongly decided.

By failing to specifically name the persons against whom it is alleged no evidence was adduced at the trial ground one of appeal offends **Rule 66(2)** (Supra) and ought to be struck out and is hereby struck out.

- 5 Since this court is required to reevaluate the evidence we shall proceed to consider whether or not sufficient evidence was adduced at the trial to justify conviction against the appellants.

In her testimony in Chief PW1 Kyarisiime Beatrice, stated that she knew all the accused persons who were before her in the dock.

- 10 She went on to narrate the role played by A1, A2, A3, A6 in the murder of the deceased. She stated that all the accused persons now appellants were well known to her as they were all from her village.

- After narrating the specific roles played by each of the above named appellants, PW1, stated at page 19 of the record “The rest of the group set on Naruhoza (deceased) and beat him up.” She went on to testify as follows in her examination in chief :-

- 20 ***“The group was composed of A3 the grandson of Rwambuka, Samwiri now A6. I identified all these people now before the court among those who were beating Naruhooza (deceased)”***

Later in her testimony she further went on to narrate as follows;-

5 ***“Later the police found these accused on top of a hill rounded them up and arrested (sic). They were brought to our home. I was then asked to identify those I had recognized. The group was about 30 people in all. Identified all the accused here.”***

In cross examination the same witness firmly stated as follows;-

10 ***“The accused were in the group all the time. I made a police statement to the police. It was read back. It was correctly recorded. I signed it. This is my signature. I named all these people now accused to Police. They were very many. I named those I had recognized. I identified and recognized the main actors”.***

15 From the above evidence it is clear to us that all the appellants were identified by Pw1 as having been part of the mob that killed the deceased. Although the witnesses did not narrate the specific roles played by each of the appellants they were nonetheless identified as part of the mob that killed the deceased.

20 We find that ground one was therefore without merit and would have accordingly dismiss it.

Grounds 2 and 3 were argued together.

It is contended by the appellants in both grounds 2 and 3 that prosecution evidence on identification was weak and contradictory and should not have been relied upon by the learned trial Judge to convict the appellants.

5 It was contended for the appellants that PW1 had moved up the hill far away from the scene of crime and as such she could not have identified the persons who constituted the mob that assaulted and eventually killed the deceased.

At the hearing of this appeal learned counsel for the appellants  
10 adopted the facts as set out in the Judgment. We agree with facts as set out by the learned trial Judge. We shall only reproduce them in part for the purpose of resolving the above grounds of appeal.

The trial Judge summarised the evidence as follows;-

15 ***“Kyasimire Beatrice is the sister of the late Narohoza Richard. She testified that on 24/11/2007 at about 8.00 a.m. she was at home with the deceased and their sick mother. Deceased got out of the house and returning***  
20 ***immediately told them that their home was under siege. Their sick mother told them to leave the house. She and deceased got out and once outside they found the area Trading Chairman among the crowd. She identified A1 Turyahabwe***  
25 ***Ezera as the said Trading Centre Chairman.***

**Among the mob she was able to recognize and identify Byarugaba (A2) Turyamurebe A3, Tumusiime Samuel A6, and the rest of the accused she saw (sic). Byarugaba A2 ordered one Richard (not in court) to grab the deceased, which he did, and deceased was tied kandoya (arms behind his back). The mob set on deceased and beat him up. Next the group moved to the house of Ainembabazi brother to deceased which they vandalized. They moved to another house in the compound and did the same. In all, all the houses in the homestead were attacked, vandalized and others set on fire and removed iron sheets from the roofs. Next the mob went and destroyed the banana plantation. Twongyere Boaz A4 told her to remove her sick mother from the house which was then set on fire. Later police arrived at the scene and fired into the air to scare the mob to no avail. The mob attacked police and the police fled for their life. Later in the day another batch of police came to the scene. Police took a statement from the deceased and advised them to go to the Gomborora Headquarters for safety. Police then left the scene. When police left, the mob went back to the scene. The witness ran uphill but deceased was too weak to ran. From where she was hiding nearby, she heard one Lamu (not in court) tell deceased, that his days were numbered. This Lamu and A8 then dragged**

**deceased on the ground. A1 hit him with a panga on the thigh. Deceased cried out and crawled into the banana plantation. From there A2 grabbed him and ordered that she too (the witness) be arrested. One Kapesa (not in court) chased her but she was able to flee and ran to the nearby Police Post where she reported what was going on.**

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From the above narration, it is clear that the mob attacked the deceased's home twice. First in the morning, in broad day light when the witnesses were able to identify the appellants from a very close range. The appellants were all well known to the witnesses. The mob retreated and returned later in the afternoon. It is in afternoon that they killed the deceased whom they had earlier that morning assaulted and injured. He was unable to flee to the hill when the mob returned because he was too weak to run. PW1 however, fled to the hill and was able to see clearly what was going on. The learned Judge who saw and heard this witness's testimony stated as follows at page 6 of his judgment.

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***"I had two eye witnesses before me. I subjected their demeanor while in the witness box to a meticulous and anxious examination bearing in mind their close relationship to the deceased. I***

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***must say without any slightest hesitation that I find them to be witnesses of truth. They had more than ample time to see and closely observe what was going on and who was in the mob. I rule out any possibility and probability of an honest but mistaken identity.”***

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We have found no reasons to fault the above observation and finding by the learned trial Judge. We too agree that the witnesses properly identified all the appellants as having been  
10 part of the mob that killed the deceased.

We also find, as did the trial Judge, that the evidence of Pw1 and PW11 was consistent .We do not agree with submissions of the appellants’ counsel that the evidence was full of inconsistencies.

We find that there was sufficient evidence to support the finding  
15 of the trial court as set out above, we see no reason to disturb it. We find also that the evidence of A3, a brother to the deceased was corroborated by the evidence of PW1 and PW2. It was also corroborated by the postmortem report.

We hasten to add that, we agree with the learned trial Judge that  
20 A3 was in fact a hostage. He was never at one time willingly participated in the crime. We do not accept the argument that the learned trial Judge relied on uncorroborated evidence of an accomplice to convict the appellants. A3 was not an accomplice. He was not a voluntary actor, but rather he was at all material



times a captive of the mob, who was compelled to do what he did against his will.

The conviction was based on the prosecution evidence adduced by PW1 and PW2 which was corroborated by evidence of A3.

5 Ground 6 therefore fails.

All the appellants set up the defence *alibi*, which was rejected by the learned trial Judge. We have already stated that we agree with the learned trial Judge, that the appellants were all positively identified by PW1 and PW2.

10 In addition PW3's evidence corroborates that of Pw1 and PW2 and squarely puts the appellants at the scene of crime.

To that extent the prosecution disproved the defence of *alibi* set out by each of the appellants.

15 We find no merit in ground 5 of the appeal and we accordingly dismiss it.

We now resolve grounds 4 and 7 together.

20 Ground 4 faults the learned trial Judge on convicting the appellants of the offence of murder, without proof of malice aforethought. In ground 7 the appellants contended that the prosecution had failed to prove a common intention.

From the evidence of Pw1 the deceased was arrested by the mob consisting of all the appellants and others still at large. A2

ordered his arrest upon which the deceased' arms were tied behind his back. A1 started beating him and was joined by the rest of the mob. This was in the morning. When the mob returned in the afternoon, the deceased was too weak to flee. PW1  
5 narrates what transpired that afternoon when the mob returned as follows in her examination in chief:-

***“Naruhooza was too weak to run. Lamu son of Katembeko found Naruhooza at home and told him that his days on earth were over. Byarugaba now A2  
10 hit Naruhooza on the head with a stick. He was then dragged along. This was A6 and A8 who were dragging Naruhooza. Then A1 hit Naruhooza with a stick. I was all this time closely following. Then A1 hit Naruhooza with a panga on the thigh. Naruhooza  
15 cried out. He crawled into banana plantation.”***

The postmortem report revealed that the deceased had died of heamorrhagic shock due to cut wounds. He had a deep cut wound on the head, forearm, thigh and on the right side of the neck. He  
20 had a deep cut wound on the trachea.

We are satisfied that malice after thought was proved within the meaning of section 191 of the Penal Code which states as follows:-

25 ***“191. Malice aforethought.***

**Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances-**

5           **(a)an intention to cause the death of any person, whether such person is the person actually killed or not; or**

10           **(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.”**

15   Looking at the evidence as whole in this case we are also unable to fault the learned trial Judge on his finding that there was indeed a common intention. Common intention is defined by Section 22 of the Penal Code as follows;-

20           **“22 JOINT OFFENDERS IN PROSECUTION OF COMMON PURPOSE.**

25           **When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”**



30   The appellants were part of a mob that had formed an intention to prosecute an act which act resulted into the death of the

deceased. The manner in which they executed the unlawful acts clearly confirms a common intention. The group moved together and acted in Unison and in coordination in attacking the deceased's home, destroying property, cutting down a banana  
5 plantation, beating up the deceased and members of his family. Then the same mob returned in the afternoon and killed the deceased, slaughtered his father's cows and roasted and ate the meat. The appellants were arrested while roasting the meat. We have no hesitation in affirming the learned trial Judge's finding  
10 that all the appellants had formed a common intention within the meaning of **Section 22** of the Penal Code Act. See: - ***Ismail Kisegerwa and another vs Uganda (Court of Appeal Criminal Appeal No. 6 Of 1978)***.

Both grounds 5 and 7 therefore fail.

15 Counsel for the appellants at the hearing of this appeal raised a matter that is not contained in any of the grounds of appeal. We do not think it was open for him to do so.

It was to the effect that the appellants were not given an opportunity to call witnesses to prove their *alibi*. This appears to  
20 have been an afterthought.

All the appellants pleaded not guilty at the trial. They all gave evidence on oath. They were represented by two counsel. None of them stated he had a witness to call. After the testimony of PW15

Mr. Elly Rugasira learned counsel for the appellants at the High Court stated as follows at P. 38 of the record of appeal.

***“This is the close of the defence case”***

In his submissions on the appellant’s defence of *alibi*, learned  
5 counsel stated as follows at P.51 of the record.

***“the defence of alibi. This had not been destroyed by prosecution. I invite court to find that participation has been proved. They be acquitted accordingly.”***

10 Clearly from the above, it cannot be said that the appellants were denied an opportunity to call witnesses. Be that as it may, at the pre-trial hearing accused persons are required to indicate whether or not they intend to call witnesses. In this case there is no indication on record that they did. We find this argument without  
15 any merit and accordingly reject it because the appellants enjoyed a fair trial and a fair hearing during the trial.

Both appeals herein therefore fail and are hereby dismissed and the decision of the High Court is hereby upheld. The sentences for each of the appellants are hereby confirmed.

20 It is hereby ordered that the appellants proceed to serve the remaining part of the sentence imposed upon each of them

It is so ordered

**Dated at Kampala** this 16th day of December 2014.

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**HON. MR. JUSTICE RUBBY AWERI OPIO**  
**JUSTICE OF APPEAL**

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**HON. LADY JUSTICE SOLOMY BALUNGI BOSSA**  
**JUSTICE OF APPEAL**

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**HON. MR. JUSTICE KENNETH KAKURU**  
**JUSTICE OF APPEAL**

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