THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

HCT-00-CR-SC-01 22-2001.

UGANDA……PROSECUTION

VERSUS

1. LUGOLOBI LWETUTTE]

2. MUWONGE BADRU]

3. LUBEGA TAIBU::ACCUSED.

BEFORE: V.F.MUSOKE-KIBUUKA (JUDGE)

JUDGEMENT.

Yudaya Namaganda, in this judgment called deceased, was an ordinary woman of little means. She lived at Nansana East II zone in Wakiso District. She owned a small house comprising a sitting room and two tiny bedrooms. She occupied her residence with her two daughters, Namaganda Sarah, PW1, and Nalubega Victoria PW3. The deceased's son, Balemezi David Lubega, PW2, also stayed in the same house. Balemezi David, who was aged about 14 years in 2000, slept on the floor besides her mother's bed in the tiny bedroom whose dimensions were about six by five feet.

The morning of 19th July, 2000, was a very sorrowful one for the family of the deceased. At about 4.00 am, as all the members of that family slept, a group of persons entered the house. They cruelly cut the deceased to death. The killing was executed with fierce cruelty and phenomenal brutality. Also injured during the attack was Namaganda Sarah and Balemezi David. The injuries inflicted upon Balemezi David were extraordinary grievous.

The three accused persons, who were immediate neighbours of the deceased, were arrested by the police. They were jointly indicated with the murder of the deceased. They all pleaded

not guilty to the charge of murder C/S 183 and 184, of the Penal Code Act. The prosecution, had, therefore, to discharge the burden of proof, laid upon it by law, to lead evidence proving each essential ingredient of the offence of murder beyond any reasonable doubt. Woolington vs. (1955) AC 462 Uganda Vs Oloya Sb Yovani Omeka (1977) HCB. 4.

The prosecution led evidence from seven witnesses. All three accused persons testified upon oath in their respective defences. In addition, the defence called four witnesses.

In brief summary, the prosecution's case was that during the morning of the 19th July, 2000, PW2, Balemezi David, was awakened up by a loud bang on the hind door of the deceased's house. He sat up on his mattress on the floor. He saw a person standing in the door- way to the bedroom. The door way separating the tiny bedroom from the sitting room had no door. The attacker was armed with a panga and he was flashing a torch on the bedroom walls and the deceased's bed. PW2 rose up and moved towards the attacker. The attacker warned PW2 and the deceased, who was by, then also sitted on her bed, in the following words, "Keep quite! I will shoot you if you shout".

But PW2 shouted by making an alarm. PW2 also grabbed the panga which the attacker was holding. PW2 held the blade side of the panga. The attacker pulled the panga away from PW2. The left palm of the PW2 was seriously cut. The wound measured 7 cm long. The attacker, whom, by then PW2 had identified to be A3, first from his voice when he spoke, and secondly, by the help of the torch light which the attacker kept flashing into the tiny dark bedroom, struck three heavy blows on PW2 with the panga. PW2 was cut on the left thumb, a wound of 3 cm long, on the left forearm, a wound of 15 cm long, and a wound on the forehead and top of the head measuring 10 cm long. After that assault, PW2 lost strength. He gave up the struggle. He sat down on the floor, to desperately watch the attacker cut the deceased on her bed. The deceased was cut eight times on various parts of her body. She died instantly. One of the blows severed her forearm off the wrist.

In the meantime, PW1, Namaganda Sarah, was awakened by the alarm which was made by her brother, PW2. She sat up on her bed which she shared with her sister, PW3, Nalubega Victoria. But before she could do anything she noticed two shadows of human beings moving against the wall of her bedroom. She then noticed torch light flashing against the bedroom wall. Like the bedroom of the deceased, Namaganda's bedroom had no door in the doorway.

PW1 saw two men standing in the door-way of her bedroom near the hind door which was open. She moved towards them. She pushed one of them three times. He too pushed her three times after which he cut her with a panga on the frontal region (forehead). The other attacker, who all along was standing by holding a stick, hit PW1, with the stick, along the left ear. PW1, with the help of the torch and moon light, identified the person whom she pushed three times and who cut her on the face with a panga asAl and the one who hit her with a stick as A2. They were both immediate neighbours to the deceased. A2 was a son of the deceased's brother and, therefore, a cousin to PW1.

PW3, Nalubega Victoria, who shared the bedroom with PW1, was awakened by the alarm which was made by PW1. She joined her sister, PW1, near the door-way of their bedroom. She saw two persons. She recognised one as Al who was holding a panga and a torch. She also recognised the second man as A2. She identified both with the help of moonlight which came into the house through the hind door which was wide open. One of the men aimed his stick at PW3 but he missed her and, instead, hit PW1 along the left ear.

PW3 then saw a third man emerging from the sitting room of the house. He joined the other two where they were standing. PW3 identified him as Al. The three stood still for a while before walking out through the hind door. PW3 followed them outside the house and continued to identify them with the assistance of bright moonlight. The three disappeared into a maize garden beside the house of the deceased.

When the police arrived at the scene at about 6.00 am. PW3 pointed out the three accused persons, from the crowd of village mates who had gathered at the scene, as the persons whom she had seen during the attack. I.P. Isone Rose, PW5, who led

the police patrol squad which went to scene, arrested all the three accused persons and took them to Kawempe police station where they were charged with this offence.
PW6, Dr. Kyokunda Lynnete, at 9.30 am on 19th July, 2000, at the city mortuary, conducted a post mortem examination of a body of a well nourished female African, aged about 50 years. The body was identified to her by one Taibu Lubega, in the presence of AlP Dhabangi, of Kawempe Police station, at that of Yudaya Namaganda.
The doctor found five cut wounds at the back of the head. They were very deep wounds extending right up to the bone of the scull and measuring five to six centimeters deep and three to ten centimetres long. There was a cut wound on the left shoulder joint extending deep

to the bone and exposing the joint. It measured ten centimetres long and four centimetres deep. The wrist had been completely severed off the right hand. There was a deep cut wound on the frontal aspect of the scull exposing it. That wound measured five centimetres long and two centimetres deep. Lastly, there was a fracture of the cervical spine. The cause of death was stated in the post mortem report to be "respiratory failure due to a fractured cervical spine and acute haemorrhaqic shock from multiple deep cuts on the body due to assault."

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The post mortem report prepared by Dr. Kyokunda is exhibit P1.

On 18th October 2000, PW7, Dr. Martin Wagaba Karyemenya, examined PW1 and PW2 against police form 3, in each case. The report prepared by PW7 are exhibits P3 and P2, respectively.

Similarly, PW7, on 2l July, 2000, carried out examinations of each of the three accused persons, against police form 24 to establish the physical and mental status of each of them. The reports made in that respect are in exhibits P4 to P6, on the record.

So much for the prosecution's case. I will briefly state the defence case.

In his testimony, Al denied that he ever took part in the murder of the deceased. He also denied that he was ever present at the scene of crime during the morning of 19111 July, 2000. Instead, Al, at the time of the alleged murder, at about 4.00 am, was in his house sleeping. It was his wife who woke him up asking him, "have you heard the alarm?" Upon waking up, Al saw people passing by his house going to the deceased's home. He followed them.

Al acknowledged that he was a neighbour to the deceased. His house and that of the deceased were very near each other. He had been a neighbour tot he deceased for well over ten years. He knew the deceased and the three witnesses, PW1, PW2 and PW3, very well.

Al also stated, in his defence that he was a driver. He used to drive a Datsun Pickup belonging to one Moses Musisi. In the evening of l81 July, 2000, he parked the pick-up at Nansana Masitowa and went to drink in a bar. He retired from the bar at about mid-night and proceeded directly home. He was very drunk and it was very dark as there was no moonlight.

Al acknowledged as well that he was a friend and neighbour to both A2 and A3. He used to discuss social issues with both. He, however, denied that he was with any of the two, at the scene of crime, during the morning of 19th July, 2000.

Al further stated that he was framed up by PW1, Namaganda Sarah, with whom the two had been boy-friend and girl-friend for about one year. The deceased, when she leant of the love relationship between Al and PW1, had urged Al to divorce his wife and take on PW1 as his wife. But Al had refused to do so. The refusal had angered PW1 who had told Al, at one occasion, that she regarded his refusal to take her on as a wife very seriously.

In a similar manner A2 denied ever being present at the scene of crime during the morning of l9' July, 2000. He stated that he was a taxi driver and he was a neighbour to the deceased although his house was about 50 metres from that of the deceased.

On 18th July, he returned from Iganga at about 10.30 PM. He went to check on his grandfather called Ibrahim Maneno, who was sick. He returned to his house at abut 11 .00 pm and slept. He was awakened by an alarm. When he got up he saw some of his neighbours going up. He learnt that some one had been killed in the neighbourhood. He too went up to the scene. A2 did not find any of the deceased's children at the scene. While he was at the scene, PW3 pointed him out to the police as one of the persons responsible for her mother's death. He was arrested and taken to Kawempe Police station.

A2 stated that he had a good personal relationship with his aunt, the deceased. He acknowledged that one of his wives, Sarah Nakawoya and her brothers had told him that the deceased was bewitching Nakawoya. The deceased had also been told about those allegations. Those allegations, however, had not affected the relationship between A2 and the deceased. A2 denied that he knew that it was the brothers of his wife, Nakawoya, who had set the deceased's shrine on fire and burnt it down.

A2 stated that he was framed up in this case by PW3, Nalubega Victoria. He claimed that PW3 bore a grudge against him because sometime, during the year 1999, he had found her standing with a soldier along the road in the evening hours. A2 became very annoyed because he had been contributing assistance to the family of the deceased. When he rebuked and punished PW3, she was very annoyed with him. So was the deceased. A2 thought that the

incident was the reason why PW3 had implicated him in the commission of this offence. A2 insisted that there was no moonlight during the night of 19th July, 2000. When he went out to answer the alarm it was very dark.

A2 acknowledged that he was arrested at the scene of crime and that as soon as PW3 arrived at the scene she pointed him out to the police just at the same time as she did to Al and A3.

On his part, A3 stated that he was a traditional medicine man (dealing in herbal medicine). Before his arrest, he had stayed in Nansana East Zone for about thirteen months. He had a good relationship with the deceased and her children.
During the night of l9h July 2000, he slept in his house. He was awakened by his brother, Sseguya, who asked him whether he had heard an alarm. As the two opened the door of the garage, PW1, PW2 and PW3 arrived at A3's house. A3 administered first aid to Pwl by tying a piece of cloth around the wound on her forehead. A3 and other people who had gathered arranged to take PW1, PW2 and PW3 to hospital.

A3 denied being present at the scene of crime with Al and A2. He stated that PW2 had told court lies when he testified that he had seen A3 in the bedroom of deceased during the night of the deceased's death.

A3 further testified that the 19th July, 2000, was a very dark night. When he got out of the house he could not see the wound on PW1. He stated that PW3 could not have seen him neither in the house nor outside it during such a dark night.

A3 went on to testify that he personally had no problem with the deceased. But the deceased and her children used to be involved in many police matters. The deceased used to tell A3 that her village folks used to call her a witch doctor and that the entire village was against her. She used to state repeatedly that her life was in danger because of A3. But A3 did not know why the deceased was so afraid of him and always suspecting him to be a source of danger to her life.

A3, like both his co-accused, agreed that he was arrested at about 6.00 a.m at the instance of PW3 who arrived at the scene and immediately pointed the three of them out to the police as the culprits in relation to the death of her mother.

The four defence witnesses, DW4, DW5 and DW7, gave evidence more or less emphasizing or amplifying what the accused persons had testified in their respective defences.

On 16th August, 2002, this court had an opportunity to visit the locus in quo to have an ocular demonstration by some of the witnesses of the evidence which they had given in court. See: William Mukasa Vs. Uganda [19641 E.A. 698 and (Ibrahim Bilal Vs. Uganda, Criminal Appeal No-5 of 1983 (not reported).

The court was able to see the location of the deceased's house vis-à-vis those of the three accused persons. It was able to see the inside of the deceased's house including the sizes of the rooms, the possible sources of light. The court also saw the various positions where the three prosecution witnesses who claims to have seen the accused persons at the scene of crime were standing as against the positions where the accused persons were alleged to have been standing. It saw the distance from the hind door of the deceased's house to the location where the maize garden was.

I will now turn to the essential ingredients of the offence of murder and relate the evidence adduced by both sides of the case to each of them.

The offence of murder has four essential ingredients. The prosecution's evidence must prove each and every one of them in order to prove the case against the accused person or persons beyond any reasonable doubt. The four essential ingredients are:

-death of a human being
- unlawful act of omission causing death.
- Malice aforethought (intention to kill a human being or knowledge that the unlawful act would cause death)
- Participation of the accused person or persons.

In the instant case, learned counsel for the defence, Mr. Ssensuwa, in his final submissions, treated the first three essential ingredients of the offence of murder in relation to the evidence adduced before this court during this trial, in the following words:

"it is my submission that the evidence taken as a whole leads only to the conclusions: that Yudaya Namaganda is, indeed, dead

- that she did not die of a natural death but of a brutal and merciless unlawful act.
- That the brutal act was deliberate and clearly accompanied by malice aforethought.

I, accordingly, submit that the three first essential ingredients of the offence of murder were duly proved. I do not intend to labour about them."

In light of that submission by learned counsel for the defence, I will merely set out the specific finding of this court on each of those three essential ingredients of the offence of murder, in relation to this trial without any detailed or elaborate evidential analysis.

On the death of Yudaya Namaganda, the evidence of PW1, PW2 and PW3, all children of the deceased and the evidence of Dr. Lynnette Kyokunda PW6 and that of all the seven defence witnesses, shows and is in harmony about the fact that the deceased in this case, Yudaya Namaganda, is long dead and burned. This court, accordingly, finds that the deceased, in this case is dead and the prosecution has proved that fact beyond any reasonable doubt.

Regarding whether or not the deceased died as a result of an unlawful act or omission. The evidence of the three first prosecution witnesses is that the deceased was cut to death with a panga. The evidence of the three accused is in harmony with that of the prosecution. The finding of Dr. Kyokunda does not differ. It supports the other prosecution witnesses's evidence, It is, therefore, more than clear that the death of the deceased amounted to a homicide. The homicide was not authorised by law. It was not accidental. Nor was it suicidal. It, therefore, arose out of an unlawful act. See Gusambuzi S/O Wesonga (1948) 15 EACA 65.

The prosecution has, therefore, proved, in my view, the second essential ingredient of the offence of murder beyond any reasonable doubt.

The third essential ingredient of the offence murder is malice aforethought or, simply, the intention to kill a human being or knowledge that the act causing death would probably result into death of a human being.

The evidence of PW2, Balemezi David and that of PW6,Dr. Lynette Kyokunda together with

the post mortem report, exhibit P1, appear to me to prove beyond any doubt that whoever cut the deceased with a panga, in such an outright merciless and most savage manner, did, certainly, intend to kill her or, at least, he or she ought to have known that the sevage act would result into death.

Dr. Kyokunda found a total of five deep cut wound at the back of the deceased's head alone. The right hand was completely cut off at the wrist in one single blow. There were deep cut wounds on the left shoulder and on the frontal aspect of the scull (face). The cervical spine had been fractured during the brutal assault. The parts of the body affected were very vulnerable ones.

The nature of the injuries were described by Dr. Kyokunda as going right up to the bones. That means that they were inflicted with maximum force. The weapon or implement used was, according to both PW2 and PW6, a panga, which, judging from the nature of the injuries it caused, must have been well prepared or sharpened for the job it was going to perform. It was a very lethal weapon in that regard.

The evidence of PW2, Balemezi David shows that the conduct of the attacker before and after the attack, indicated that his purpose was merely to extinguish the life of the deceased. The preliminary assault on Balemezi was not originally intended. He Bulemezi was cut by the attacker only because he (Balemezi) had interfered with the attacker's programme by intervening and struggling with the attacker for some minutes. This also explains why Balemezi David was never killed during the attack even in spite of the likely possibility that the attacker knew that Balemezi might have recognised him. The attacker had only the sole intention of killing the deceased. After accomplishing his barbaric mission, he walked out of the bedroom without any further ado. He had done what he had come to do.

In my view, therefore, and following the time honoured tests set down by the court of Appeal for Eastern Africa is the case of Tubere vs. R (1945) 12 EACA. 63, which I have applied in the brief analysis set out above, I find that constructive malice is more than established, in this case, by the evidence adduced by the prosecution.

I will, lastly, analyse the evidence relating to the participation of the three accused persons in the execution of the act which caused the death of the deceased.

Both learned counsel, Mr. Brian Arinaitwe, for the prosecution, and Mr. Ssensuwa, for the

defence, made very lengthy submissions with regard to this particular essential ingredient of the offence of murder.

The key evidence and, indeed, the only evidence which links the three accused persons to the commission of the offence of murdering the deceased is that of PW1, PW2 and PW3. That is Namaganda Sarah, Balemezi David and Nalubega Victoria, respectively. They were all children of the deceased. They lived with her in the same house. Balemezi David who was aged about 14 years then slept in the same tiny bedroom with his mother, the deceased.

The evidence of those three prosecution witnesses, which I did set out at the beginning of this judgment is that PW1 saw and identified Al and A2 in the door-way to her bedroom and that it was Al who cut her on her face with a panga and it was A2 who hit her with a stick, during the night and time the decease was cut to death. The evidence is also that PW3 saw and recognised both Al and A2 in the same position. While PW1 says she saw and identified Al and A2, PW3's evidence goes further to claim that she also saw and identified A3 who joined both Al and A2 in the same position where she had seen them. The three walked out of the house together. Pw3 followed them outside the house and continued to recognise them until they disappeared into a maize garden on the left hand side of the deceased's house.

The evidence of PW2 was that he saw and identified A3 in the bedroom of the deceased with the assistance of a torch light from the torch which A3 allegedly flashed on the walls and the bed of the deceased. PW2 struggled with A3 for some time until A3 cut PW2 with the panga. After that PW2 sat back upon the floor of the bedroom and watched A3 killing the deceased.

The defence has attacked the evidence of the three witnesses very strongly. The defence contends that the three witnesses did not see or identify any of the three accused persons at the scene of crime. The defence position is that there was not enough light to enable the witness to make any correct identification. It is claimed that the three witnesses were motivated by what their mother used to state repeatedly that her life was in danger and that if anything happened the accused would be the persons responsible. It is also claimed, in respect of the evidence of PW1 in relation to Al, that it is a fabrication arising out of a love relationship gone sour. Equally, it is contended, by the defence, that the evidence of PW3, Nalubega Victoria against A2 is ill motivated arising out of a grudge which PW3 held against A2 following A2's rebuke and punishment to her in 1999 after finding PW3 standing in a compromising position with a soldier along the road at night.

Mr. Ssensewa, learned counsel for the defence, has finally submitted that the evidence of identification stands alone. It is not corroborated by any other evidence. He also submitted that failure on the part of the prosecution to produce in evidence the statement made by PW3, Nalubega Victoria to the police alongside her testimony in court was fatal to her testimony as there is nothing to show her consistency in relation to her evidence of identification in order to ensure elimination of the possibility of error.
Mr. Ssensewa relies on Section 155 of the Evidence Act and the decisions of this court in Uganda Vs. Thomas Omukono and 2 others. Lastly, Mr. Ssensuwa submitted that the three accused persons have not been placed at the scene of crime by the prosecution and that the abibi of the entire three still stand.

First, I do not agree that it is true, as the defence contends in this case, that it is legally impossible for a court to convict an accused person upon the evidence of identification, whether by a single witness or more witnesses, without in all cases necessarily first looking for corroborating evidence. It seems to me that the principle guiding the assessment and acceptance of identification evidence as discussed in the well known authorities of Abdulla Bin Wendo And Another Vs. (1953)20 EACA 166, Roria Vs. R 1967 E.A 583 and Abdulla, Nalubere And Others Vs Uganda (1979) HCB 79, points to that effect. I am, therefore, not persuaded by the persuasive decision in Uganda vs. Tomasi Omukono and 2 others (supra) which learned counsel for the defence asked me to rely on. It appears to me that every case of identification evidence must be examined within the peculiar circumstances of that case. Within the context of the rules of practice relating to identification evidence whether by a single witness or by more witnesses identification evidence must always be approached with caution. I did, indeed, caution the assessors. I also caution myself, in relation to the identification evidence in the instant case.

In the instant case, in respect of all the three accused persons, the identifications were made by more than one witness. This case, therefore, is not one of a single identifying witness.

In my view, the principle appropriately applicable is well stated in holding number four in the decision of the court of Appeal of Uganda in Abdulla Nabulere And others Vs. Uganda (supra). In the words of their lordship:
"Where the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in

reliance on the correctness of the identifications. The reason for the special caution is that there a possibility that a mistaken witness

can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly the length of time the accused was under observation, the distance, the light, the familiarity of the witness wit/i the accused. all these factors go to the quality of the identification evidence if the quality is good, the danger of mistaken identity is reduced but the poorer the quality, the greater the danger."see also: Bogere Moses and Another Vs. Uganda, SCCA No. 1/97 (unreported)

As to the identification of Al and A2 by PW1 and PW3, I have no doubt about the quality of the identification evidence by both witnesses. This court was able to observe, at the locus in quo, that the bedroom of PW1 and PW3 was as small as that of the deceased. PW1 says he identified both accused by help of the torch light and moon light which came in from the open door, which was adjacent to the open door way to the bedroom of both accused. I do not doubt at all that there was sufficient light to enable correct identification of both accused.

The distance which separated PW1 and the two persons whom she says she identified was very close indeed. Owing to the narrowness of the house, it was hardly more than one or two feet. PW1 pushed Al more than three times before Al cut her with a panga and A2 hit her on the left ear.

The time taken to identify both accused was not a flicker of the moment but quite long. PW3 said the two stayed standing in the same position for more than five minutes. I believe this to be true. For it appears to me that the sole purpose of the presence of Al and A2 in the door-way of the bedroom of PW1 and PW3 was to cover the third attacker who had gone to the bedroom of the deceased to accomplish the ultimate task of killing the deceased. The cover was apparently against PW1 and PW3. They had to be kept confined to their room and prevented from making noise during the period of the invaders' operation.

Both PW1 and PW3 knew the accused persons very well. Both were neighbours to them. The house of A2 was hardly ten metres from that of the deceased. That of Al was less than twenty metres from that of the deceased. The accused were persons whom the witnesses had seen day in and day out for years.

There was a lot of dispute whether there was moonlight on l9 July 2000 at 4.00 a.m or not. In Silver Tugugu And 3 Others Vs. Uganda SCCA No. 16 of 1992, in a case in which a similar dispute had arisen during the trial, the Supreme Court of Uganda observed that in a criminal trial, where evidence as to whether, on a given date, there was moonlight or not in existence, the court may take judicial notice of the position of the moon as indicated by the calendar. This court looked at a calendar for the year 2000 in order to ascertain the position of the moon on 19m July 2000. The calendar indicated that the moon was in its full moon phase. The evidence of the three accused persons and some of the other defence witnesses was, therefore, nothing but deliberate lies. There was moonlight at 4.00 a.m. on 19th July, 2000.

After observing the location where Al and A2 are said to have been standing when both, PW1 and PW3 claim to have identified them, I am satisfied that there would have been sufficient light from moonlight to facilitate correct identification in the circumstances of this case.

I, therefore, find that the identification evidence of PW1 and PW3, in relation to both Al and A2 is of very high quality. I am satisfied that there is no possibility of error or mistaken identity.

The above analysis would equally apply to the identification evidence of PW3 in respect of A3.

The identification evidence of Balemezi David, PW2, in relation to A3, is, in my considered opinion, equally very high in its quality. I have already mentioned that the room in which PW2 was sleeping with his deceased mother measured about five by six feet in its dimensions. It was, therefore, a very small room indeed. Although it had some sembrance of ventilators, it had no windows at all. It was as dark during the day as it was at night. When a torch is flashed into such a tinny, dark room, it is likely to be entirely lit up.

In his evidence, PW2 was specific that the torch light was flashed not directly into his face, but on the walls of the bedroom and on the bed where his mother was seated. He first identified the A3 by A3's voice. Then he identified him by the help of the torch light. I have no doubt that the torch light was sufficient for correct identification in the circumstances of this case. I am also satisfied that for a person who was both a neighbour and a cousin and whom PW2 had been seeing, and speaking to almost on daily basis, it was possible for PW2 to identify A3 by A3's voice.

Besides, the attacker did not spend a flicker of a moment in the bedroom. He first struggled with PW2 for some time until he over came him. Then he took time in the room which enabled him to strike some eight cutting blows to the deceased. He took time to make sure that the deceased was dead. He then walked out. During all that time, PW2 was helplessly observing him. Like in the case of the evidence of identification of both PW1 and PW2, I find that the identification evidence of PW2 is very high, indeed, in terms of its quality. In my considered view, no mistake or error can arise.

I observed all the three prosecution witnesses, PW1, PW2 and PW3 as they gave evidence in court. I found each of them to be very truthful witness. Their level of consistency could not have been achieved by any amount of conspiracy. It could not be attained if the evidence of identification had been a concoction.

I, therefore, dismiss the claim by the accused persons that the evidence was simply made up. The grudges which Al and A2 claimed to have existed between them and PW1 and PW3, respectively, cannot be believed. They are mere disparate figments of the two accused's efforts to extricate themselves from the predicament in which they find themselves.

I equally dismiss the claim that the identification evidence arose as a result of utterances attributed to the deceased that the three accused would put her life in danger. The consistency and truthfulness of the three witness put that to rest. Moreover, it appears to me that the three accused persons were not the only ones who were against the deceased in the village. The evidence of PW5 Namugerwa Getrude, although much of it appeared to be untruthful and useless to the defence case, it however created a very deep insight as to how the deceased's village folks regarded her.

The same attitude is obvious from the fact that nobody except one Alimansi ever answered the alarm of the PW1, PW2 and PW3 during and after the attack. The people gathered at the scene long after the three witnesses had been taken to hospital by their single benevolent uncle, Alimansi. It is, therefore, not possible that the three witnesses could have only selected the three accused from the many people who obviously regarded their mother as a witch and did not care what happened to her.

I equally reject the preposition that the three witnesses ran to A3 and called him out for help and he gave it. The visit to the locus showed that A3's perimeter wall was about two feet from the road. It provided a courtyard of less than ten feet. The house itself was very close to

the wall. There was no gate. The three witnesses are, therefore correct when they state that they were passing by A3's house. When they saw him outside his house. They did not run to his house for help.

I do not consider section 155 of the Evidence Act to be mandatory which meant apply in all cases. I do equally, not consider the decision of the Court of Appeal of Uganda in Musoke-Vs-Uganda (1983) HCB1, which learned counsel for the defence referred to me to in relation to failure to produce the statement of PW3 to the police, does not appear to me to set down a mandatory general rule applicable in every trial. The instant case is distinguishable from Musoke case in that while there were wide gaps in the evidence of identification in Musoke's case. There is non-in the instant one. While PW4 and PW5 testified in this case, in Musoke's case the police officer to whom the complaint had been made did not appear in court. The complainant's wife had not been asked what she told police. That was not the case in the instant case.

Lastly, I reject the submission by the defence that the three accused persons have not been placed at the scene of crime. I am satisfied that the prosecution has squarely place all three accused at the scene of crime within the meaning attributed to that term by the Supreme Court of Uganda in Bogere Moses and Another Vs Uganda SCCA NO 1 of 1997 (unreported).

None of the accused had a duty to prove his alibi: Ssebyala & Others Vs. Uganda [19691 E.A.204. I am satisfied, however, that the prosecution has destroyed the alibi of each of the three accused. None of the alibi can stand.

I am equally satisfied that all the three accused persons acted, in this case, in pursuit of a common purpose within the meaning of section 22 of the Penal Code Act. They are joint offender and are all liable for this offence. Difasi Magory & Others Vs. Uganda [1965] E.A. 667.

I find no sustainable defence for any of the three accused persons. None of them was mad or intoxicated. None acted under compulsion. They were all in normal.
I am therefore, in full agreement with the lady and gentleman assessors in this case. Each

advised me to convict all the three accused persons as charged. I do convict each accused of the offence of murder section 183 and 1 84, of the Penal Code Act.

V.F.MUSOKE-KIBUUKA

(JUDGE)

10.9.2002.