

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CASE NO: HCT-03-CR-SC-0209 OF 2003

UGANDA ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

A1. MAGIGU ISABIRYE }
A2. IDUMA ISABIRYE }
A3. TWAHIRI ISABIRYE } :::::::::: ACCUSED
A4. HASAN ISABIRYE }
A5. IDI ISABIRYE }
A6. EDIRISA KANAKA alias ISABIRYE }

BEFORE: HON. MR. JUSTICE DAVID K. WANGUTUSI

J U D G M E N T:-

The villages of Katuba and Wandegeya lay next to each other in Kityerera sub-county.

The deceased and his family lived in Katuba. So did the 6th accused Edirisa Isabilye. The 1st, 3rd, 4th and 5th accused were his sons and apart from A1 who had

migrated to nearby village of Namiso, lived in Wandegeya.

On the 8/7/2002 Fatuma wife of Magidu left their Namiso home and went to their cassava garden in Katuba. This garden was next to that and home of the deceased Kirewere. Fatuma is said to have borrowed a hoe and knife and a sack from Kirewere's wife before she proceeded to harvest her cassava. She never returned home that day. A search was mounted. She was found, but not alive. She had been strangled, one of her breasts had been cut off. Her tongue had been removed. Her eyeball scoped out and left attached by nerves.

The Isabilyes suspected the Kirewere's. A search at the home of Kirewere is said to have led to the discovery of the missing body parts. Kirewere and his sons were

arrested but the end of the week the police had released them under circumstances that beat the Isabilyes. The Isabilyes are alleged to have taken the law into their hands and attacked the Kirewere establishment killing Mzee Kirewere, burning the huts and demolishing the houses in the home stead.

The police suspecting the whole male family of Edirisa Isabilye, detained him with his sons Magidu, Iduma, Twahiri, Hassan and Idi and charged them with the murder of Ali Kirewere.

At the beginning of the trial, the second accused could not be traced and the Director of Public Prosecutions withdrew charges against him.

The 1st accused person in his defence denied committing murder. He said he hit the deceased in self-defence when the deceased attacked him with his sons.

The 3rd. 4th and 5th accused also denied. They told court that at the time of the killing, they had gone to harvest maize five miles away.

As for Edirisa, he told court that he was unable to walk and so he could not have been at the scene of crime.

In a murder case such as this one, the prosecution is enjoined to prove the following ingredients:-

- (a) That Mzee Kirewere is dead.
- (b) That his death was unlawfully caused.
- (c) That the accused persons participated.

(d) That they did it with malice aforethought.

On death the prosecution called the doctor PW1 Dr David Bitaira who stated that he examined the body of late Kirewere who had died of a skull fracture. PW1 Nkwanga Muhamad, PW3 Jamawa and PW4 Amis Madoga daughter and son of Kirewere together with all the accused and defence witnesses told court that Kirewere died. They all knew Kirewere well and could not have mistaken his identity. There is therefore no doubt that Kirewere died.

Kirewere died of a fractured skull occasioned by a blunt object. Whoever swung the object to the execution of the injury that caused his death was not sanctioned by law to do so. This death was not accidental. It is the position that homicides are unlawful when they fall in the category I have mentioned above. Since Kirewere's

death was not sanctioned by law nor was it accidental, I find it was unlawfully caused.

I now turn to the question of participation.

The prosecution called PW1 who told court that he saw the accused persons namely Magidu, Iddi, Hassan, Twahiri and their father Edirisa Isabilye branch to the home of the deceased Kirewere. He said Magidu had a panga. Iddi had a panga, Twahiri and Haruna had sticks. Edirisa had a spear. He said Magidu cut Kirewere on the head with a panga while Iddi cut him on the leg. Twahiri and Haruna beat him with sticks and finally Edirisa stabbed him on the ear using his spear.

That A1 Magidu inflicted the wound on Kirewere's head is not in doubt. Magidu himself told court that he grabbed a

stick and hit the deceased on the head. He told court that this was in self-defence. In his defence Magidu said he did not know the person he hit. That he did not know whether the person he hit fell. That when he raised an alarm, all his attackers ran away.

The law version of his defence are difficult to believe. The first reason, is that the deceased fell where he was hit from and the police found the body at the home under the jackfruit tree whereat photographs exhibit P3 were taken. It can therefore not be true that all the Kirewere's ran away. The accused also said when he was attacked, he grabbed a stick and lashed out blindly without seeing whom he hit. This again is not true because the same A1 told court that he grabbed a stick from PW4 Anis Magoda. That on grabbing it all the people stood and watched him. That then he hit one of them. If everyone stood and

watched him. And he had time to observe this, then he saw the person he hit. The story in his defence that he knew of the person he had killed after two days does not hold water. It is even made clear in the charge and caution statement exhibit P4. on this statement he refuted a position . The position he refuted was that he had attacked the home of Kirewere with his brothers. Indeed the only accused mentioned in the statement is Idi. The rest are not mentioned. The first accused told court that apart from the inclusion of his brother's the rest was correct. He said the statement was otherwise read out to him. He found it correct and signed it. Having said this the otherwise required corroboration attendant to a repudiated or retracted statement was no longer necessary.

In the charge and caution statement, the first accused told the police that his wife Fatuma had been killed by the Kirewere's but when he reported the matter the police did not help him so he mobilized the clans men, who on gathering sounded a drum as they demolished the houses of Kirewere. That the intention was to uproot the family He owned up the leadership of the mob as follows:-

“I wish to clarify that I am the one who led the group which killed Kirewere.

He then went on to say that before they left for the mission they agreed that they were to kill anybody found in the home of Ali Kirewere. That they were armed with sticks.

The foregoing is clear and leaves no doubt that Magidu first accused participated in the death of Ali Kirewere.

The evidence on the rest of the accused persons taken one by one also shows that the prosecution witness had failings here and there. Some of their evidence was inconsistent and riddled with discrepancies.

To begin with PW1 Nkwanga Muhamad, he told court that Magidu and Idi cut the deceased with pangas, the former on the head and the latter on the leg. Medical evidence did not reveal any other cut other than the injury on the head. Idi could not therefore have cut the deceased on the leg as PW1 says.

Further PW1 saw Edirisa (A6) had a spear, but PW3 Jamawa Nandego daughter to the deceased and who

allegedly faced the wrath of the attackers, said Edirisa A6 instead had a panga.

While PW1 said Hassan and Twahiri had sticks. PW3 said they had pangas. In the whole of this incident I am not even satisfied that a panga was used by anyone. I would agree with what is in A1's charge and caution statement that sticks were used. This conclusion receives support from the doctor's findings that a blunt object must have been used.

PW3 told an obvious lie when she said Edirisa's home was 100 miles away. When it is clear on the record that it was half a mile away.

She said she did not know whether Magidu had a wife, yet she said Fatuma Isabilye had borrowed a hoe, knife

and polythene bag from PW3's home, had not long ago been her neighbour and a few days before, PW3's home had been searched as a prime suspect of her murder. Fatuma's body was found near the Kirewere's home which was home to PW3 and her brothers and father had been arrested as suspects to her death, but still PW3 said she did not know Magidu's wife. Just as she was untruthful, so was her brother PW4 Amis Mugoda. PW4 told court that the woman (Magidu's wife) who died in the garden next to them was unknown to them. the only difference with his sister PW3 was that while he accepted to have heard of her death, PW3 Fatuma told court that he had not heard on any death.

To go back to the scene of crime, PW4 told court that as their assailants arrived, they first hit a child Ahmed on the hand. This child is not mentioned by PW1 yet he claims

he saw the whole incident. PW1 in fact says there were only two children of the home. PW1 said after beating PW3 they chased the deceased and cut him in the head. He does not mention PW4 being chased. At the same time PW4 told court that while on the tree where he had taken refuge, he saw Hassan A4 strangling PW3. But PW1 told that A4 who saved PW3 by telling the others not to harm her.

PW1 said he saw the deceased being cut. But PW4 said the deceased was killed from behind a house so how could PW1 have seen the killing.

When you look at PW5 Isiba Swaliki's evidence, he said when he heard the drum, he answered it. he met Edirisa with a spear and panga. But PW1 told court that Edirisa had no panga. PW3 told court that Edirisa had no spear.

PW5 told court just like PW1 that Kirewere's body had deep cut wound on the head and another on the ear. But the doctor PW2 who did the post mortem told court that there was only one wound caused by a blunt object. PW5 then told court that he looked on the side of the house and saw the body of Kirewere. But evidence in abundant that Kirewere's body was behind the house. then later PW5 said he was shown the body by Idi.

PW5 also told court that on arrival at the scene of crime, he had met Haruna at the junction to the home of Kirewere, but PW1 told us that when he returned with the villagers the Haruna had left.

Then PW5 who told court that he did not find Twahiri and Hassan, went on to tell court how they all had pangas. Then he told court that Magidu's home was mile from his

but did not know whether his wife died of natural causes. A body found with a tongue and breast missing would be a song of the village. There is no other conclusion other than that PW5 died.

Lastly the evidence of PW6 is questionable. He told court that all the accused had pangas. Contrary to PW1 and PW3's evidence.

He told court that he found Kirewere's body lying behind the house, yet in the same breath he said he had actually seen Magidu A1 drag the body to behind the house. he then denied knowledge of how Magidu's wife died. In the same breath he said she was bewitched. This was the climax because throughout the village, it was known that Fatuma had been murdered and her tongue and breast cut from her body.

The prosecution witness have so much differed from each other in respect of types of weapons, where the body was, who were found at the home of the deceased, in cases outright and deliberate falsehood told to court that the discrepancies and inconsistencies could not be said to be minor.

Where witness say they saw the same person, but attribute different weapons to him, the doubt that they saw him at all prevails where a witness says he found a dead body on the ground and in the same breath says he saw it being dragged, the doubt that he was at the scene of crime does not only linger in the mind but is strong.

The 6th accused who was said to be at the scene of crime some saying he had a spear and others saying he had a

panga, has set up an alibi. He told court that he was bedridden and could not have been able to walk to the home of the deceased let alone participation in the vigours of chasing and stabbing him. All the defence witnesses who knew him well sons and daughters-in-law and own relatives told court that Edirisa had been sick and bedridden. Stone Baraza had seen him being carried to hospital. DW10 Genze Malinzi told court A6 had swollen legs and could not walk. DW6 Zainab Naigaga also attended Fatuma's funeral, which took place at A6's home told court he was indisposed and could not walk. So did DW8 Nuru Nabirye. Then evidence was not only given on the background of much discredited evidence of the prosecution, but also remained strong and firm to the vigorous cross-examination of the learned State Attorney. Lastly what showed that 6th accused was indeed immobile at the time Kirewere was killed, was the affidavit is

support of his bail application filed in this court on 26/3/2003 and which had remained on this court record.

In paragraph 4 of his affidavit A6 deponed as follows:-

“That I am a very old man suffering from chronic backache which resulted to legs being paralyzed unabling me to walk”.

He deponed before a Justice of the Peace S.P. Ishaka Magemeso. At that ran. Ishaka Magemeso a Gore hands the accused was, would not have allowed falsity if accused was able to walk. It is therefore my finding that A6 was incapable of walking at that time and whoever said he saw the 6th accused at the scene of crime told court falsehood.

As for A3, A4 and A5, then defence also came on the same background of the discrepancies and inconsistency of the prosecution evidence.

A3 told court that he did not remember where he was. A4 and A5 told court that they were in the garden harvesting maize. They told court that A3 was with them. DW6 told court that Twahiri was his husband and that she was with him, A4 and A5 in the garden when the deceased was killed. DW8 Nuru Nabirye, wife to A4 also told court the same story. they were supported in this by DW7 Stone Baraza who said he went to the scene of crime where at are Nabala told him that Magidu had killed Kirewere. That after he left the scene of crime he went to the trading centre whereat he met A3, A4 and A5 together with DW8 and DW6 from harvesting maize. They were from the opposite direction. DW9 was in full

agreement with what DW7 told court for he said he was told at the scene of crime that Magidu had avenged his wife's death. That he later rode to Wandegeya trading centre where at he met A3, A4, A5 and A6 and DW8 carry maize from their garden.

These defence witnesses and the accused were all very consistent in their evidence that is left no doubt that they spoke the truth. The unco-ordinated prosecution evidence against the 3rd, 4th and 5th accused strengthened the notion that the accused were not at the scene of crime.

Malice aforethought. This as I said can be construed from the type of weapon, type of injury, part of body aimed at by the assailant whether vulnerable or not and conduct of the accused.

Kirewere was hit on the head. The type of injury he sustained was deep resulting into a fracture. If only proves the stick used was heavy and dangerous. It was applied on the head which was a vulnerable part of the body. It was premeditated because the accused A1 first mobilized people and as he said for the purported of killing the Kirewere's.

The intention to kill was spelt out by his action and the fatality of the blows on a vulnerable part of the body such that malice aforethought flowed conspicuously. I find that the accused Magidu had malice aforethought when he hit the deceased with the stick leading to his death.

Both the lady and gentleman assessors have advised me to find the first accused Magidu guilty of manslaughter.

They have also advised that I find Twahiri Isabilye, Hassan Isabilye, Idi Isabilye and Edirisa Isabilye not guilty.

I have given the reasons for my decision above. Because of those reasons I, with great respect do not agree with them on A1 Magidu. I do agree fully with them on A3 Twahiri, A4 Hassan, A5 Idi and A6 Edirisa.

The prosecution having failed to connect 3rd, 4th, 5th and 6th accused to the offence within the required standard of beyond reasonable doubt, I find them not guilty of murder and accordingly acquit them.

The prosecution however having proved beyond reasonable doubt that A1 Magidu with malice aforethought caused the death of Ali Kirewere, I find him guilty of murder and accordingly convict him as charged.

DAVID K. WANGUTUSI

J U D G E

1/10/2003.

1/10/2003:-

Accused present all.

Ms Nayebale for state.

Mr Iyamulemye for accused.

Ms Muyama/

Mr Mugerwa interpreters.

ASSESSORS:-

1. Ms Kazoora.
2. Mr Makisho.

Court:-

Judgment delivered in open court and therein signed and dated.

DAVID K. WANGUTUSI

J U D G E

1/10/2003.

SENTENCE:-

The accused Magidu Isabiliye is sentenced to suffer death as prescribed by the law.

DAVID K. WANGUTUSI

J U D G E

1/10/2003.

