THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

HCT-05-CR-AA-0184 OF 2002

UGANDA ::: PROSECUTOR

VERSUS

ELSAM RUMONDO & OTHERS :::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE D.N. MANIRAGUHA

JUDGMENT:-

These accused are on indictment of murder contrary to sections 183 and 184 of the Penal Code Act. They were originally charged with other ad the particulars of the offence are as follows:-

> ***"ELSAM RUMONDO, No. RA. 146419, LOPEYOK PASCAL, ROSE KEKIMURI AND No. RA 4578 LT. AINOMUGISHA and others still at large, on the 9th day of***

February 2001 at Nyakahita village in Bushenyi District murdered TIBARABIHIRE JOHN."

The undisputed facts are that Elsam Rumondo, Late Elifazi Rukazana, Late Tibarabeihire John, and Elly Kikwabe were/are brothers living in each other's close vicinity, and Lt Ainomugisha Jonas is the son of Rumondo.

In the night of 9th February 2001 while the deceased John Tibarabeihire was in his house people armed with guns broke into the deceased's house where they found him with his wife Irene (PW1) and in subsequent events the attackers shot and killed the deceased in cold blood.

Following the death of late Tibarabeihire John a number of people were arrested and charged with murder, but through various stages in the process of the law and by nature, charges were discontinued by the Director of Public Prosecutions, one died, and

the last two were acquitted by this court under section 71 (1) of the Trial on Indictments Decree leaving these ones on the indictment, hence this judgment.

The issues to decide are:-

(a) Whether the alleged deceased is actually dead;

(b) Whether his death was caused unlawfully;

(c) Whether there was malice aforethought in the killing; and

(d) Whether or not the accused participate in the killing.

Uganda Vs Aramanzani Mubiru [1996] HCB 35.

Uganda Vs John Ochieng [1992-1993] HCB.

Mr Tusubira, learned counsel for the defence did concede that the first three issues had been established leaving only one ingredient of the offence – participation by the accused being contested.

I have also looked at the evidence on record and have doubt whatsoever, ingredients of the offence have been proved satisfactorily, so the issues are resolved in the affirmative.

I now turn to the hub of contention in this and any criminal charge, which is participation of an accused. In the case of ***Lenton s/o Mkilira Vs Republic [1963] EA 9 at page 11,*** it was state as under:-

> ***"In every criminal charge it is the guilt of the accused which is in issue. Normally it is undisputed that the crime was committed by somebody; and even where that question to be in issue, the crucial question is whether it was the accused who committed it.***

Since the accused denied the indictment, the prosecution bears the usual burden to prove each ingredient beyond reasonable doubt.

Mande Vs Republic [1965] EA 193.

It was the submission of Mr Tusubira that the prosecution had failed to establish this ingredient. He attacked the prosecution evidence regarding identification. Also in respect of A4 Lt Ainomugisha, an alibi was set up and even evidence adduced to substantiate it.

Turning to the question of identification, the attack did take place at night in clearly unfavourable conditions and this calls for extra caution to be exercised if court is to rely on visual identification to found a conviction thereon.

The principles to be followed have been dealt with in various cases right from ***Roria Vs R [1967] EA 583,*** and subsequent cases like ***Uganda Vs Tomasi Omukono & 2 Others [1977] HCB, 61, Abdalla Nabulere & Others Vs Uganda [1979] HCB***

77, and ***Moses Bogere & Another Vs Uganda Supreme Court Criminal Appeal No. 1 of 1997*** (unreported.

I did explain the law to the assessors and duly advert to the same principle in considering this issue.

In the ***Moses Bogere*** (supra) the Supreme Court emphasized this point even where there are more than one witnesses thus:-

> ***"The need for care stressed in the above passage is not required in respect of a single witness only but is necessary even where there are more than one witness where the basic issue is that of identification."***

The reasons were clearly spelt out from page 12 to 14 of that judgment and I do not have to repeat them here, but my duty is to advert to the principles and apply them here, which I proceed to do.

It is noteworthy from the evidence before court that the attack took place at night and the same was sudden as disclosed by Irene Tibarabeihire. When the attackers entered the room adjoining the bedroom by force they fired at the wall to the bedroom and she admits the occupants got up in confusion as to what to do. So clearly there was panic after the first volley of shots into the wall. The attackers found her inside the bedroom where she was standing carrying a baby and shivering. She admits that there was total darkness in the rooms, and these people started beating them while demanding for money. So while inside the house it was not possible to recognize any of the attackers by visual aid.

She claims that while outside there was moonlight, and they made her and the deceased sit down. But all the time they were being beaten.

While outside the gunman remained guarding the deceased as she was sent back into the house to get money. She got the money from inside the house, again which was dark but because she knew where the money was she picked it and handed it over to the deceased. Outside there were many people. When the deceased gave the bag to them they continued beating her. It is at this juncture that she claims she was able to recognize Ainomugisha joining the people who were surrounding her husband. That she also identified Rumondo at that time.

Yet earlier she had stated that she had heard a voice inside the house that was of Ainomugisha. She repeated this in cross-examination. This raised a big doubt in how she recognized Ainomugisha by voice or occularly. Moreover, as she was shivering and being beaten really shaken one doubt whether in such a state she could easily recognize who her attackers were.

A bigger doubt is cast on her evidence by the very fact that although she says she managed to escape from the scene and

crawl to the home of a neighbour called Karokora she never mentioned having seen Ainomugisha among her attackers. This is visibility lacking from her testimony. She claims she lost her mind on returning and seeing her deceased husband's body, but she did not tell even Karokora's wife to whose place she had escaped earlier, and talked to.

It is even noteworthy at the police station at Bushenyi on 13th February 2001 barely three days after the incident she never mentioned this in it. When cross-examined about her statement she says she lost her senses when she saw the husband's body. But whereas this state of shock could cover what transpired on 9/2/2001 at night, it cannot go to the time on making her statement on 13/2/2001 when the tenor of her statement shows she was fully composed so as to give a detailed account of what she believed took place and the background to the incident.

After Mr Tusubira had pinned her down on the absence of inculpatory evidence in her police statement apart from mere

suspicion, she told court on her own that she disagreed with what had appeared in the statement because at that time she had lost composure of herself and was out of control of her senses.

Looking at the realistic side of the evidence, however, I cannot doubt that when she talked at the Police Station at Bushenyi she was well composed looking at details of her statement. They cannot have been given by a person out of control of senses.

Moreover, though what a witness has stated in court is what is taken to be the evidence and not what was said at the police the reason being that what is stated in court is testimony on oath and subject to cross-examination whereas the statement to police is not.

See: **Uganda Vs Joseph Lota [1978] HCB 269 at page 270,** and **Uganda Vs Augustine Musana & 2 others [1985] HCB 20,** the other side of the coin. That is that evidence of a first report to

police is a useful guide as to the consistency of a witness from the time such a statement is made to police till the time of testifying in court.

For as stated in the case of **Shaban Bin Donaldi Vs R [1940] 7 EACA 60,** that evidence of a first report to police is important for someone ultimately called as a witness as it may prove very useful as corroboration under section 157 of the Evidence Act, and

"Sometimes showing that what he now swears is an afterthought or that he is now purporting to identity a person who he did not recognize at the time or an article which is not really his at all." (Emphasis supplied).

Analyzing the testimony of Irene Tibarabeihire carefully, this quotation cannot be more applicable than in her case.

I took great case to observe her during her testimony and as noted on record she was continuously emotional in court and excitable as she recalled the events of the night. My conclusion is that she was a witness capable of dramatizing and constantly sought sympathy of court, thus showing her utmost desire to secure a conviction at all costs to the extent of even dishonouring her statement to police as observed above. I am satisfied that what she was telling court was an afterthought in light of all the anomalies in her prime testimony on identification. Her evidence cannot be relied upon to secure a conviction in the absence of other evidence to support it to the extent of excluding any possibility of error to warrant proof to the required degree of certainty in light of the difficult conditions under which visual and aural (audio identification) is said to have been attained.

Roria Vs R (supra) and ***Abdalla Bin Wendo Vs R [1953] 20 EACA 166*** are considered and the principles applied.

A similar weakness on principle and factors befalls the testimony of PW2 Elly Kikwabe who though he says that on 9/2/2001 night he recognized Lt Ainomugisha among the attackers, he does admit in cross-examination that he that night did not mention him to Katusiime his son, and one Lillian who answered the alarm as having been there immediately they came in answer to the alarm. The conditions were similarly difficult.

The evidence of Natuhwera Aden suffers the same fate. He first claims to have recognized the voice of Lt Ainomugisha, then add, as an afterthought in my view, that he saw him with the aid of moonlight inside the house. It is not clear how bright the moonlight is said to have been to penetrate into the house or how it did so – were there glass windows, open doors? Yet Irene Tibarabeihire could not have used the same moonlight insider her house with now a broken door and unfinished adjoining wall to the bedroom. This witness even never told Julius Rwenzigye who came there that he had recognized Ainomugisha among the

attackers. He says he did not do so because he was not asked, as if he needed to be asked what would normally have been a spontaneous reaction to report all he had recognized. He never even told Tono.

Yet this witness goes ahead to implicate Elifazi Rukazana (late) Rumondo, and Robert who were in his group that ran to the scene in response to the alarm.

In re-examination he says he did not tell people that night because he was not in his normal senses. Then how could he have recognized the attackers? His second explanation is more to reason as to why he sought to implicate the accused - an existing grudge to which I will turn later.

Peace Kikwabe's testimony is not better as she only claims to have heard a voice like that of Ainomugisha. The manner of

identification and brief period spent observing the attackers in the state of panic leaves a lot to be desired.

Turning to the defence testimony first Elsam Rumondo told court how he also got up in answer to the alarm and gunshots. He described how he moved from his home up to that of Tibarabeihire along with others like Rukazana (deceased) and other villagers. His movements up to the time he left the scene are elaborate and he is even corroborated by Kikwabe Elly (PW2) as to how they moved hiding themselves till bullets ceased to be fired. The evidence of Kikwabe is elaborate on this. So Rumondo was clearly among the rescuers rather than the attackers. Any attempt to implicate him is to be found elsewhere, as I will show later.

But considering that his defence is an alibi and in light of the law on such a defence, coupled with the weaknesses in the prosecution case on the crucial factor of identification, his story

stands more credible than the weak prosecution case, and in agreement with the opinion of the assessors I find no sufficient evidence to prove the offence against Elisam Rumondo, so he deserves acquittal.

Turning to the defence of alibi raised by Lt Ainomugisha Jonas, I will deal with the principles of the law on this point in as much as they equally apply to the side of Rumondo as mentioned hereinbefore, I must say that on the question of identification I have covered the law and the evidence above and will here only deal with the defence raised, and whether or not this accused has been properly placed at the scene of crime.

The law on alibi has been reiterated in numerous decisions of the Supreme Court and is now crystal clear, suffice it to quote a few of them:-

1. Kagunda Fred Vs Uganda Criminal Appeal No. 14 of 1998.
2. Nyanzi Steven Vs Uganda Criminal Appeal No. 16 of 1998, and
3. Karekona Stephen Vs Uganda Criminal Appeal No. 46 of 1999, all unreported. I dully proceed to apply the principles of the law without restating them.

Here the accused's alibi is that he was on the material date at his place of work at Gulu with the 4th Division UPDF. He tendered in as evidence in support of his alibi a photocopy of his Movement Order dated 24th January 2001 showing when he left and reported back to his duty station being on 29th January 2001.

Although it was not his burden to prove the alibi he went all the way to do so by calling witnesses to corroborate his testimony. It is evident on record that the prosecution was made aware of his alibi at the first point of suspicion and they had all the time to investigate it and adduce evidence in rebuttal, but no such

evidence was availed to this court despite having a copy of the Movement Order on the police file.

The accused remained at large from February to August, 2001 without being arrested, and the prosecution was aware of his whereabouts.

Despite protracted cross-examination of the witnesses fro the accused, the alibi was not shaken. All the questions sought to challenge the alibi were answered and fell by the way leaving the alibi unscathed.

I have seen no reasons to doubt this alibi since the evidence is neither inherently improbable, nor have I seen any contradictions nor inconsistencies in the whole defence testimony to render it not creditworthy and I find it plausible that the weak prosecution case as pointed out before.

Another weakness in the prosecution case that seems to go to the root of this matter as evidence clearly shows is the existence of a land dispute between the members of the family that I believe is the core of seeking to implicate both accused persons. This is evidence in the harping upon the history of the land problem by the prosecution. Although it was the cause of the accused to kill the deceased, this is a double edged sword that cuts both ways, and here it is more probable than not to be the cause of implicating the accused than that it was the one that led them to kill the deceased since there is no sufficient evidence to prove the latter.

As was observed in the case of ***Ntambi Francis Vs Uganda Court of Appeal, Criminal Appeal No. 19 of 1998*** (unreported), I here find that there is overwhelming evidence that the accused were framed up because of the bad blood in the family over the land issue that has to date remained unresolved.

In the absence of any sufficient coherent and cogent evident to inculpate the accused, this explanation is a more acceptable source of the problem and hence the frame up.

The assessors also advised me to acquit Ainomugisha Jonas of murder and I do entirely agree with them. But I failed to understand their last piece of advice that he be given a lighter sentence. However, since there is no lesser offence established against him this piece of advice is taken as having been misplaced and uncalled for and it is duly neglected.

In conclusion, I find Elisam Rumundo and Lt Jona Ainomugisha not guilty and acquit each of them of murder contrary to sections 183 and 184 of the Penal Code Act.

Under section 81 (6) of the Trial on Indictments Decree they are discharged from custody unless otherwise legally held there.

D.N. MANIRAGUHA

JUDGE

11/04/2003.