THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MUBENDE

HCT CRIMINAL SESSION N0. 102 OF 2008

(ARISING FROM CRIMINAL CASE N0. KBC –AA-113 OF 2001)

UGANDA	**----------**	**PROSECUTION**
VS		
A1. BYANSI MOSES **A2. KASHAIJA JACKSON** **A3. TUMUHAIRWE MISAK** **A4. KURUNGI NATHAN** **A5. LWALI GEORGE** **A6. RURUNGULU JOHN**	**……**	**ACCUSED**

JUDGMENT OF HON. MR. JUSTICE JOSEPH MURANGIRA

The accused persons, Byansi Moses, Kashaija Jackson, Tumuhairwe Misaki, Kurungi Nathan, Lwali George and Rurungulu John, stand charged with murder contrary to Sections 188 and 189 of the Penal Code Act, Chapter 120, Laws of Uganda.

The facts of the case are that: the six accused persons are accused of killing Nyamwihura Edward during the burial of Ndandala on 25th March, 2001. That the six accused and others still at large participated in the murder with weapons that included sticks, axe, and panga. That the murder of Nyamwihura Edward was reported to the police. That the police recovered a stick, broken axe handle, some blood stained shirts of the accused persons. That the postmortem was carried out and the cause of death was found to be heard injury with brain damage leading to severe haermorrhage.

To prove it's case, the prosecution called six prosecution witnesses who testified against the accused persons. Two witnesses, (PW7) Silagi Serwadda and (PW8) Joseph Rwigyemeko, become hostile witnesses and they were declared hostile witnesses. Whereas, in defence, each accused person gave evidence and called one witness who testified on his behalf in defence. Indeed, the trial became complex and involving on both parties.

The six accused persons were indicated with murder contrary to Sections 188 and 189 of the Penal Code Act.

Section 188 and 189 thereof read:

> **"188. Murder,**
>
> **Any person who of malice aforethought causes the death of another person by unlawful act or omission commits murder …..**
>
> **189. Punishment of murder,**
>
> **Any person convicted of murder shall be sentenced to death"**

The ingredients of the offence charged are:-

(i) **that the deceased named in the indictment is dead;**

(ii) **that the death of the deceased was caused with malice aforethought; and**

(iii) **that the death of the deceased was unlawful; and**

(iv) **that it is the accused persons in the dock that caused the death of the deceased.**

In the case of Uganda vs Kassim Obura & another (1981) HCB 9, Odoki J (as he then was) held that in a murder case, the prosecution must prove the following matters:-

(a) that the deceased is dead.

(b) That the accused caused the death of the deceased.

(c) That the death was caused with malice aforethought.

In our criminal law administration of justice system, the prosecution bears the burden of proving all the ingredients of the charged offence against the accused persons. The burden of proof does not shift to the accused persons to prove themselves innocent. The standard of proof is that the prosecution has to prove all the ingredients of the offence against the accused persons beyond reasonable doubt. Proof of the offence charged against the accused persons has to be based on the evidence adduced by the prosecution. The court then has to consider both the prosecution case and the defence case in order to make conclusions on whether to convict or acquit the accused persons.

In the case of Ojepan Ignatius vs Uganda, Supreme Court, Criminal Appeal N0. 25 of 1995, the Supreme Court held that,

> **"***the onus was on the prosecution , as it is always on the prosecution in all criminal cases except a few statutory offences, to prove the guilt of the accused persons beyond any reasonable doubt. (See also the case of Woolmington vs DPP (1935) AC 462)"*

Both the prosecution and the defence counsel agreed to the law as put down by the court and the assessors on the ingredients of murder, the burden of proof and the standard of proof being on the prosecution.

On the 1st ingredient of the offence, that is, the deceased named in the indictment is dead. Mr. Furah Patrick, Counsel for the defence submitted that there is no doubt that Edward Nyamwihura is dead. He relied on the evidence of the postmortem report which is exhibit "A", the evidence of PW1 and PW3 to show court that the deceased, one Edward Nyamwihura is dead. In reply, Mr. Brian Kalinaki, Senior State Attorney for the prosecution concurred with the defence. Counsel for the accused submitted that the 1st ingredient of the offence charged was proved beyond reasonable doubt.

According to the evidence on record, the medical evidence which was admitted by consent of the parties under Section 66 of the Trial on Indictment Act is to the effect that Edward Nyamwihura is dead. PW1 Jessica Nyakato, the widow of the deceased; PW2 – Kagoro Moses, PW3- Bogere Geofrey, PW4-Kirunda Stephen, PW5-Ebong James and PW6-Godfrey Kiwanuka Ssebuliba, all testified and confirmed that Edward Nyamwihura, a person named in the indictment died on 25th March 2001. In defence, the accused persons together with their respective witnesses confirmed to court that the deceased is dead. Therefore, I hold that there is overwhelming evidence that proved beyond reasonable doubt that the deceased is dead. Thus, in agreement with both counsel and the assessors, I hold that Edward Nyamwihura, a person named in the indictment is dead.

On the second ingredient of murder, whether the death of the deceased was caused with malice aforethought. The defence counsel submitted that the evidence available on record does not show that there was an intention to kill the deceased. That the evidence of Nyakato Jessica (PW1) is not relevant to determine whether there was an intention to kill the deceased. That he evidence of the Kagoro Moses (PW2) clearly reveals that unfortunate assault on the deceased was occasioned by a mob. That PW2's evidence read together with the evidence of Kirunda Stephen (PW4) and that of Ebong James (PW5) clearly shows that there was no intention. He submitted that the incident was unfortunate reaction of the mob. He submitted that such prosecution evidence read together with the defence evidence of Byansi Moses (A1), Nathan Kalungi (A4), Rurunguru John (A6), Gatete (DW10), Nabimanya (DW12) and that of Rubyoogo Petero (DW7) shows that there were a big number of mourners at the burial of Ndandala, and that with such kind of mob, it is human impossible for such huge mob to have formed an intention to cause death of the deceased. That, this was a mob that had come for the purpose of the burial of the late Ndandala. He submitted that the ingredient of malice aforethought was not proved to the required standard.

In reply, Counsel for the prosecution, submitted that malice aforethought is a mental element, but it can be proved from the surrounding circumstances:-

(i) **the weapon used;**

(ii) **part of the body inflicted of injuries;**

(iii) **the nature of injuries inflicted.**

He submitted that the postmortem report showed that the deceased's assailants' attacked his head which had deep cut wound and that the brain matter was damaged. That such actions shows that there was malice aforethought. That the limbs of both legs were cut and the number of injuries on the deceased's body were a clear indication of malice aforethought. That it was the testimony of prosecution witnesses that all the six accused persons had malice aforethought when they were killing the deceased. Further, it was the opinion of the assessors that the ingredient of malice aforethought was proved by the prosecution beyond reasonable doubt.

The issue of how to determine whether there was malice aforethought or not, is settled in law. According to Section 191 of the Penal Code Act, Chapter 120, Laws of Uganda. Malice aforethought is defined as:-

> *"Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances:-*
>
> (a) *an intention to cause the death of any person, whether such person is the person actually killed or not, or*
>
> (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"*.

In the case of Olenja vs Republic (1973) EA, the Court of Appeal in Criminal Appeal N0. 37 of 1973, Sir William Daffus P held:

> *"that malice aforethought is not necessarily established by proof of intent to commit a felony. He who uses violent measures in committing a felony involving personal violence is guilty of murder if death results even inadvertently knowledge that the act will probably cause death, grievous harm is required before death as of assault or attack or omission is murder."*

In the case of Wanda Alex and 2 others vs Uganda, Supreme Court Criminal Appeal N0.42 of 1995.The Supreme Court held

> *"that malice aforethought could be inferred from the surrounding circumstances such as the weapon which was used, and the part of the body on which it was used."*

Further in the case of Uganda vs John Ochieng (1992-93) HCB 80, Hon. Justice Tinyinondi G, J held:

"That malice aforethought may be summarized as the intentional killing of a human being or knowledge that one's act or omission will probably result in the death of a human being. To establish the existence or malice aforethought court takes into account the following:

(a) *the number of injuries inflicted.*
(b) *the part of the body where the injuries were inflicted.*
(c) *the nature of the weapon used.*
(d) *the conduct of the killer before and after the attack."*

In the case the judge, further, held

"that striking of the deceased on the lower part of the abdomen which was vulnerable and sensitive part of the body, the stick used was evidence of evil intention to cause death of the victim or knowledge that the act would probably cause death."

In the instant case of Edward Nyamwihura, the attack and striking of the deceased on such vulnerable parts of the body according to the evidence on record carried evil and satanic intentions to cause death of Edward Nyamwihura.

According to the medical evidence which was admitted by consent as evidence by both parties, is to the effect that the deceased's body had cut wounds on both lower limbs and deep cut wounds on occipital aspect with the brain damage matter exposed. These deep wound cuts were confirmed by PW1, PW3, PW4 and PW5. The accused persons, all in their evidence and the evidence of their witnesses deny ever seeing the deceased at the scene of crime during and after the alleged murder of the deceased. The defence exhibit "D1" which is the police statement of PW6 – Godfrey Kiwanuka Ssebuliba; in his statement on the last page, he said:

"A panga was recovered with blood on it. Other exhibits which were recovered are known by the police".

PW4 stated that they recovered some exhibits at the scene of crime which were used in the murder, which included an axe-handle. In cross-examination he stated that he also recovered some sticks/walking sticks and shirts sustained with blood. PW5, in cross – examination stated that he received exhibits from PW4 and that he handed them over to the storeman.

From the evidence on record, the assailants attacking the head of the deceased to the extent of cutting a deep wound on the head and to the extent of exposing the brain matter and cutting deep wounds on both lower limbs of the deceased amounts to malice aforethought as defined in the above stated authorities. Wherefore, I am in agreement with the Assessors that the prosecution proved the ingredient of malice aforethought beyond reasonable doubt.

On the ingredient of whether the death was unlawfully caused. The defence Counsel relied on the Article 22 (1) of the Constitution of the Republic of Uganda and submitted that it is clear that the death of the Edward Nyamwihura was unlawfully caused. In reply, the Senior State Attorney submitted that he concurs with the submission of the defence counsel that this ingredient was proved by the prosecution beyond reasonable doubt. The law on this ingredient is settled. Article 22 (1) of the Constitution of the Republic of Uganda reads:-

> *"No person shall be deprived of his life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court."*

In the case of Wanda Alex and 2 others vs Uganda (Supra), the Supreme Court held;

> *"that killing was unlawful since it was not accidental or authorized by law. (See R vs Gasambizi (1948) EACA 65).*

And in the case of Uganda vs Okello (1992-1993) HCB G.M. Okello j (as he then was) held;

> *"that there is a presumption that homicide is unlawful unless excused by law, but the presumption can be rebutted by evidence of accident or that it was permitted in the circumstances. That the burden to rebut the presumption is on the accused. The standard is on balance of probabilities".*

In the instant case, it is the case of the prosecution that the deceased was murdered when he had gone to attend the burial of the late Ndandala. He was attacked by the assailants and beaten to death. His vulnearable parts, which are the head, both the two lower limbs were cut and sustained deep cut wounds. The defence never challenged the death of Nyamwihura Edward in such a brutal and cruel killing. Therefore, I am in agreement with the assessors that the death of Edward Nyamwihura, the deceased, was unlawful. Accordingly, I hold that the prosecution proved this 3rd ingredient of murder beyond reasonable doubt.

On the 4th ingredient of murder of whether the accused persons in the dock are the ones responsible for the death of Nyamwihura Edward, Mr. Furah Patrick, the defence Counsel divided his submissions in respect of this ingredient in two parts:-

The 1st group is of A2 – Jackson Kashaija; A3 – Misaki Tumuhairwe and A5 – George Lwali, on ground that they set up a defence of alibi.

The 2nd group is of A1-Byansi Moses, A4-Nathan Kulungi and A6 John Rurunguru, on ground that they were at the burial place of Ndandala.

For the 1st group, he submitted that the prosecution failed to destroy their defence of alibi. That the evidence of (PW1) Jessica Nyakato does not implicate any of them to have been at the scene of crime. That (PW2) Kagoro Moses's evidence is general. That he stated that, he was at Ndandala's burial, it rained so heavily, that there were many people. That according to him (PW2) the deceased was attacked by A5. That in cross-examination he did not state what each of the accused person did on the deceased. That he failed to put each accused person at the scene of crime.

That the evidence of PW2 conflicts with the evidence of PW6 – Godfrey Kiwanuka Ssebuliba. That whereas PW2 says that it was A5, George Lwali who sparked off the first blow to the deceased; PW6 says that it was A5 who finished off the deceased. That PW2 said that he stood on an anthill so that he could get a clear view. And that he was in the company of PW6; but that PW6 says that there is no anthill. That PW6 ran short of pointing out, placing each accused at the scene of crime. That A2, A3 and A5 together with their witnesses gave coherent evidence and that their evidence was never challenged by the prosecution.

In reply by the Senior State Attorney for the prosecution, he did not agree. He submitted that all the accused persons pleaded the defence of alibi, that since they all said they did not see what happened at the scene of crime. That they were elsewhere. He submitted that PW2 – Kagoro Moses and PW6 – Godfrey Kiwanuka Ssebuliba testified that they were at the scene of crime on 25th March 2001 and saw all the accused persons hitting the deceased to death. That it was the testimony of the two prosecution witnesses prior to the incident that all the accused persons together with others planned to kill the deceased. That the accused persons had common intention to kill the deceased.

He further submitted that there were no any inconsistencies between the evidence of PW2 and Pw6. That they were all present at the burial. That PW2 said that he saw A5 – Lwali George hitting the first blow at the deceased. But PW6 said that he saw A5 –Lwali George finishing off the deceased. It is the evidence of the PW2 that he saw the scuffle from the start, that's why he managed to see A5 hitting the first blow at the deceased. That PW6 said that for him he heard that there were beating a snake and he came out to find out, meaning that he did not witness the first blow, but saw the final blow. I agree with his evaluation of PW2's and PW6's evidence.

According to the evidence on record PW2 – Kagoro Moses gave evidence that he was at the burial place of Ndandala on 25th March 2001. That on that day at around 5:30 pm, the time of burial, A5 – Lwali George spoke in Ruyankole: "Beitu mukatina muta?" then he saw him hit a stick at Edward Nyamwihura. That all the accused persons and others still at large started beating the deceased. That he climbed on an anthill and clearly saw the

accused beating the deceased to death. PW6-Godfrey Kiwanuka Ssebuliba testified that on that day of the burial of Ndandala, that is, on 25th March 2001, the burial time while constructing the grave he heard people saying that they are beating a snake. That he went to see what was going on in front of Ndandala's house only to see the accused beating the deceased with the walking sticks. That he saw A5 –Lwali George touching Edward Nyamwihura's arm and saying that he is still alive. That Lwali George finished killing that Nyamwihura. Their evidence was not challenged in cross examination by the defence. All the accused persons in defence pleaded alibi. All the six defence witnesses testified that they were not at where the killing of the deceased took place. Therefore, none of the accused persons and their individual witnesses could explain what happened to Edward Nyamwihura as expressed in the testimonies of PW2 and PW6. These two prosecution witnesses were eye witnesses of the killing of the deceased. They gave evidence that put each accused person at the scene of crime. This is because, they testified that they knew each accused person prior to the commission of the offence. That it was during the day time and as such they were able to see clearly the each accused person participating in the murder of Edward Nyamwihura.

On whether there was proper indentification of each accused person during the murder of Edward Nyamwihura, PW2 and PW6 gave evidence that they knew every well each accused person as they were all from Kyankwanzi area. PW2 and PW6 clearly stated that they clearly saw each accused person at the scene of crime and described in detail what each accused person did there.

In the case of Buteera vs Uganda, Supreme Court Criminal Appeal N0. 21 of 1994, the Supreme Court held;

> *"that the complainant correctly identified the accused person as her assailant. She knew the appellant well; she had seen him at her home just before the incident."*

In the case of Rorio vs Republic [1967] EA 583, gives the principles of relating to visual identification of the witnesses of the assailant:-

(a) **the nature of light at the scene of crime**

(b) **the distance between the witness and the assailant**

(c) **how well known the assailant was to the victim or witness**

(d) **the time taken in the commission of the offence.**

In the instant case, PW2 and Pw6 said that it was during the day time. A1, A5 and A6 together with their witnesses gave evidence that the alleged incident happened during the day. Thus there was enough light from the sunlight. Further PW2 and PW6 stated they were actually near where each accused person was beating the accused. Thus their being too close to the scene of crime made them clearly see what was going on and that the short distance between them and each accused person made them able to see what each accused person was doing at the time of the killing of Nyamwihura Edward, the deceased. Furthermore, PW2 and PW6 said that they knew each accused person very well prior to the incident. That piece of evidence was not challenged in cross-examination or in defence. Thus, their evidence that they saw very well each accused person beating Edward Nyamwihura holds truth.

The defence Lawyer submitted that there were so many people at the scene of crime, and that as such no reasonable human being could see what was going on at the scene of crime. It is the testimony of PW2 and PW6 and that of the A1, A5 and A6 together with their witnesses that when people attacked Edward Nyamwihura by beating using walking sticks people fled the scene. This evidence clearly shows that by the time Nyamwihura was finally killed by the killers, there were only few people remaining at the scene of crime. Thus the issue of the mob killing Edward Nyamwihura as submitted by the defence Counsel does not arise. From the evidence on record, it is clear that the beating and finally killing of Nyamwihura Edward took a long time, and that time was enough for PW2 and PW6 to see and recognize what each accused person was doing during the process of beating and eventually killing of the deceased. I therefore, hold that the evidence of identification in this case was free from the possibility of error or mistake in view of what a assisted PW2 and PW6 to recognize each accused person.

Consequently, it is case for the defence that in such a mob killing the prosecution cannot attribute the killing of the deceased to the accused persons. In reply, the prosecution submitted that the accused has a common intention to kill the deceased person on 25th March 2001.

It is the testimony of PW2 and PW6 that prior to the incident, each accused person together with others planned to kill the deceased if he dared to step at the burial of Ndandala on allegations that he was the one who bewitched the late Ndandala. The participation of each person in the killing of the deceased in such a violent manner brings out the element of common intention. In the case of Solomon Mungai & others vs R (1965) EA 782, the Court of Appeal for East Africa held;

> *"that if evidence supports the inference that violence of any degree has been used in prosecuting a common design incidentally resulting into death and if the offence charged was a probable consequence of the use of that violence, then all sharing in the design are murderers."*

In the instant case, PW2 gave evidence that each accused person and other still at large in a meeting that was chaired by LCIII chairman, Mpora at the burial of Ndandala on 25th March 2001 around 8:30 am in the thickest nearby the compound of the late Ndandala discussed a plot on how to kill the deceased if he ever stepped at the plance during the burial of Ndandala. PW6 gave evidence that during the night before the burial day,while at Ndandala's funeral one ground which comprised amoung others each accused person vowed to kill the deceased on 25th March 2001 on allegation that the deceased bewitched Ndandala. PW2 and Pw6 testified that on 25th March 2001 during the burial process each accused person attacked and beat the deceased to death. Such evidence was not shaken during the cross-examination nor contradicted in defence. I therefore, find that each accused person had complied in substance with the common design varying only in the manner of execution namely the collateral clubbing or beating of the deceased. Therefore, under the principles of common intention they are held to be murderers. Section 20 of the Penal Code Act, Cap 120, Laws of Uganda covers the principle of common intention of people who are charged jointly of the offence. It reads:-

In the case of Uganda vs Sebaganda s/o Miruho [1977] HCB 7, held Lubogo J;

> *"that where is common intention, it is immaterial who inflicts the fatal injury to the deceased as long as when the injury is inflicted the parties are carrying out a common*

purpose and in such a case one is responsible for the acts of the other."

Further, PW2's and PW6's evidence reveals motive on the part of the accused person before the time they murdered the deceased. The defence is that each accused person was not at the scene of crime. They deny such participation in the plan to kill the deceased. In the case of Masanja Omari Mlewa vs Republic Criminal Session Case N0. 184 Singinda 76 [1979] LRT N0.14 held; Chipeta, J:

"Motive need not to be proved on a charge of murder although it's presence my suggest malice aforethought."

In this instant case and in accordance with the prosecution evidence available, I hold that the motive of the accused persons to kill the deceased suggested malice aforethought on the part of each accused person.

Mr. Furah Patrick for the defence challenged the prosecution that failure to call the investigation officer and the arresting officer to testify on its behalf negatived greatly the prosecution case. It was the submission of Counsel for the prosecution that basically the prosecution case lies squarely on the evidence of PW2 and PW6 who were eye witnesses during the murder of Nyamwihura Edward. That, therefore there was to no need to call the evidence of the said police officers. I agree with that submission.

In the case of Kamudini Mukama vs Uganda, Supreme Court, Criminal Appeal N0.36 of 1995, held by; Supreme Court;
"that whether a witness should be called by the prosecution is a matter within the discretion of the prosecuting State Attorney and an Appeal Court will not interfere with the exercise of the discretion unless for example, it is shown that the prosecutor was influenced by some oblique motive. However, where the evidence of an arresting witness is relevant, the prosecution should call that witness.

However, in this case, on the evidence of PW2, PW3, PW4 and PW6 failure to call the investigating officer and the arresting police officer did not create any doubt in the prosecution case which could affect the case against each accused person.

Counsel for the defence submitted that failure by the police to arrest the accused for even a period of three years shows that the state made frame ups of the charge of murder against the accused persons. The Senior State Attorney did not agree. He submitted that there is evidence that the police took action against the accused persons during the three years they received the report of murder. PW3 – Bogere stated that on 26th March 2001 when they reported at the scene, A1-Byansi Moses was already arrested and that he was being detained at Kyankwanzi Polise Post. PW4 Kirunda corroborated that statement. PW3 further stated that while at the scene of crime, he received information that some people who had murdered his father and had ran away are: Lwali George, Kashaija Jackson, Rurungulu John, Tumuhairwe Misaki and others. That after burial, they started hunting for those people until when they arrested them. This piece of evidence was never challenged this piece of evidence. According to exhibit "DI" which is the police statement of PW6 among other statements, states, in the last paragraph that:- others had run out of the village and now came back. They included: Rurungulu, Kuruingi and Rwamuhanda. Most of them are available.

This is the piece of evidence that defence exhibited in Court. DW4 (A4) Kurungi Nathan testified that he was arrested at around 2:00 – 3:00pm in 2004. DW5 (A5)- Lwali George testified that in 2004, Bogere (PW3) came to his home with about 10 policemen, he was arrested together with the other accused persons and taken to Kyankwanzi Police Post. DW6 (A6) Rurungulu John testified that he was arrested after period of 2 years by policemen who arrested him at night at around 1:00 am and taken to Kiboga Police Station. From the way the accused persons were arrested, clearly shows that the police acted on tip off and they never wanted to give chance to the accused persons to escape from their jurisdiction of operation. From the evidence of A1, A3, A4, A5 and A6 in respect to the way they were arrested. I hold that A2, A3, A4, A5 and A6 had ran away from Nalukonge village, only to re-surface in the said village when they felt the threat of police arrest was over. The conduct of the accused persons is not incompatible with their innocence. In the case of Uganda vs Yowana Batisita Kabandize (1982) HCB 93 held by Karokora J, (as he then was);

"the conduct of the accused immediately after the death of deceased of running away from the scene of crime clearly showed a guilty mind."

In the instant case, the conduct of the accused persons of running away from the scene of crime completely and did not come back even on 26th March 2001 to complete the burial of the village-mate, the late Ndandala clearly points at each accused's guilty mind.

The defence counsel criticized the prosecution on the failure to produce the exhibits that caused death of the deceased. That, that failure created a gap in the prosecution case as to what weapons were used in the killing of the deceased. The prosecutor submitted that there was no need to produce such exhibits to prove the death of the deceased. The medical evidence which was admitted in evidence by both parties stated that at the scene of crime they recovered an axe-handle. The defence exhibit "D" the police statement of PW6, PW6 stated therein that a panga stained with blood was recovered at the scene of crime. PW3 and PW4 gave evidence that at the scene they recovered sticks and an axe-handle. Their piece of evidence was never challenged in cross-examination neither in the defence. In defence A1, A5 and A6 and their witnesses who attended the burial of Ndandala stated that they heard the sound of many sticks that were used to beat a person, whom they came to know later to be Nyamwihura Edward. From the piece evidence available the weapons used in killing the deceased are well known. Therefore, non-production of such exhibits did not create a doubt in the prosecution case. In the case of Kalisiti Sebugwawo vs Uganda, Supreme Criminal Appeal N0. 07 of 1987, it was held by Supreme Court;

"that although no weapons were produced in this case, but there was ample evidence to justify the learned judge's finding that a spear was used."

The issue of the evidence of PW2 and PW6 contradicting each other was raised by the defence during the final submissions. The Senior State Attorney evaluated the evidence of PW2 and PW6 very well. I did the same. I found that the evidence of PW2 and PW6 are independent of each other. The two witnesses were eye witnesses. Their evidence was not challenged in cross-examination and even in the defence case. I therefore hold that there are no contradictions in the evidence of PW2 and PW6 as alleged by Counsel for

the defence. Further, I hold had the opportunity of seeing each prosecution's witness testify in Court. They were firm and confident of their testimonies. They were not shaken. The defence Counsel invited me during his submissions to consider the demeanour of PW6 when he was testifying before me. I do confirm that when I could pose writing to look at PW6, I could find him looking at me. I put questions to him in cross-examination and he responded to them very well. On the whole, I found the prosecution witnesses truthful. On the other hand, I find that the defence whiteness's evidence particularly during cross-examination contradicting that of the accused's evidence. Those contradictions or inconsistencies negative the defence case. In the case of Sarapio Tinkamalirwe vs Uganda Supreme Court, Criminal Appeal N0. 27 of 1989, it was held by the Supreme Court;

> **"***that it is not every inconsistency that will result in a witness's testimony being rejected, it is only grave inconsistency, unless satisfactory explained, which will usually, but not necessarily result in the evidence of a witness being rejected, minor inconsistency will not usually have the effect unless the Court thinks they point to deliberate untruthfulness."*

In defence, the accused persons pleaded the defence of alibi. That they were not there when the alleged offence was committed. However, as discussed herein above, the evidence of PW2 and PW6 which stood unchallenged in cross-examination nor in defence, put each accused person at the scene of crime. There is no doubt that they were all present and that each accused participated in the beating and killing of Nyamwihura Edward. The defence witnesses in cross-examination did not offer much support to the defence case. All the defence witnesses were also saying that they were not at the scene of crime when Nyamwihura Edward was being killed. They did not witness the killing of the deceased. Such evidence does not at all challenge or negative the evidence of PW2 and PW6 in particular and other prosecution witnesses in general. I found the evidence of the defence witnesses wanting in material particular. In the case of Justine Nankya vs Uganda, Supreme Court Criminal Appeal N0. 24 of 1995, it was held by Supreme Court;

> **"***that whether a Court believes one witness and disbelieves another is a question of credibility after the Court has considered all the evidence and demeanour of witnesses."*

And in his instant case, I evaluated the evidence of both the prosecution and the defence and I find that prosecution witnesses credible and reliable in their testimonies.

A2- Kashaija testified that he came back to his village when both Ndandala and Nyamwihura had died. His witness DW8-Yebare testified in cross- examination and re-examination that A2 came back before Ndandala's burial. This contradicts the evidence of A2 and corroborated that of the prosecution evidence that A2 was at the scene of crime when Nyamwihura Edward was killed.

A5 testified that at the time of Ndandal and Nyamwihura Edward died he was with Kajuna in Mengo Hospital. He could not bring any medical evidential documents that they were away at the time the deceased died. His witnesses DW9-Kajuna George abandoned him when he failed to re-appear in Court to produce the medical documents showing when he was admitted in Mengo Hospital and the period he was discharged from the said Hospital. Both A5 and DW9 talked about the different dates of admission in Hospital and discharge from Hospital.

A1-Byansi Moses's evidence and that of his witness Rubyoogo as to what happened during the said chaos at Ndandala's burial contradict each other.

A4-Kulungi Nathan's evidence as to what he saw at the burial place of Ndandala contradicts that of his witness (DW12). The departure in their testimonies creates doubts as to whether DW12 was present at Ndandala's burial.

DW6 (A6) Rurungulu John' evidence in some aspects contradicts with that of his witness Gatete. In Cross examination Gatete made denials about what A6 had stated in his evidence. This creates doubt as to who of the two is truthful.

Wherefore, I find that the defence witnesses' evidence were inconsistent with the evidence of a particular accused person who called such witness. Thus, the defence of alibi put up by the accused persons cannot stand. In the case of Alfred Bundo and Others vs Uganda, Supreme Court Criminal Appeal N0. 28 of 1994, it was held by the Supreme Court;

> *"that the law is that once an accused person has been positively identified during the commission of a crime then his claim that he was elsewhere must fail."*

I therefore, hold that the defence has not raised any doubt that the prosecution case is true and accurate. I further hold that PW2 and PW6 correctly identified the six accused persons as the persons who were at the scene of the incident as charged of murder. Each accused person participated in the killing of the deceased.

All in all, an in agreement with Assessors, I hold that the prosecution proved beyond reasonable doubt that each accused person participated in the killing of Nyamwihura Edward on 25th March, 2001. Therefore, each accused person is found guilt of murdering the deceased. According to my findings on each accused person and considering the Assessor's opinion, each accused person is convicted of the offence of murder as charged.

_____

JOSEPH MURANGIRA
JUDGE
26/09/08

Court: Since sentence of murder is death

A1, Byansi Moses is sentenced to suffer death contrary to section 189 of the Penal Code act.

_____

JOSEPH MURANGIRA
JUDGE

26/09/08

A2, Jackson Kashaija is sentenced to suffer death contrary to section 189 of the Penal Code act.

_____

JOSEPH MURANGIRA

JUDGE

26/09/08

A3, Tumuhairwe Misaki is sentenced to suffer death contrary to section 189 of the Penal Code Act.

_____

JOSEPH MURANGIRA

JUDGE

26/09/08

A4,Kulungi Nathan is sentenced to suffer death contrary to section 189 of the Penal Code Act.

_____

JOSEPH MURANGIRA

JUDGE

26/09/08

A5, Lwali George is sentenced to suffer death contrary section 189 of the Penal Code Act.

_____

JOSEPH MURANGIRA

JUDGE

26/09/08

A6, Rurungulu John is sentenced to suffer death contrary to section 189 of the Penal Code Act.

_____

JOSEPH MURANGIRA

JUDGE

26/09/08

Court: The death sentence on each convict shall be carried out as authorized by law.

_____

JOSEPH MURANGIRA

JUDGE

26/09/08

Court: Right of appeal which is automatic is explained to the parties

_____

JOSEPH MURANGIRA

JUDGE

26/09/08