

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

HCT – 05 – CR – CSC – No.096 - 2008

UGANDA :: PROSECUTOR

Versus

A1. TURYASINGURA DENIS

A2. MBABAZI NARIS :: ACCUSED

A3. BYAMUKAMA AUGUSTINE

BEFORE: HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The three accused persons TURYASINGURA DENIS, MBABAZI NARIS and BYAMUKAMA AUGUSTINE are indicted for murder contrary to Sections 188 and 189 of the Penal Code Act. It is alleged that the three accused persons and others still at large on the 12th day of February, 2007 at Kabashaki village in Kanungu District murdered SPEAKER LAWRENCE. They all pleaded not guilty to the indictment.

The substance of the case for the prosecution as per Summary of the case is that on 12/02/2007 the deceased was with the accused persons at Kagashe Trading Centre in the bar of Ahimbisibwe Enid drinking together; that Mbabazi Naris and Byamukama Augustine who are brothers to the deceased were buying him waragi at the time; that around 9:30pm they all left the said bar together proceeding to their home; that after a short distance, the accused persons picked their pangas from the nearby bush without

knowledge of the deceased; that later Byamukama grabbed the deceased from behind and Turyasingura Denis caught his legs, forced him into the flowing water and Mbabazi started cutting him with a panga; that immediately after that the accused persons tied him in a polythene bag and dumped his body at his compound where he was discovered dead by his wife Tumuheirwe Fausta after the accused persons had left.

It is trite law that the burden is on the prosecution to prove the guilt of an accused person beyond reasonable doubt.

In a case of murder the prosecution must prove that:

- (i) the alleged victim is actually dead;**
- (ii) the death was unlawfully caused;**
- (iii) the accused killed the deceased; and**
- (iv) the killing was with malice aforethought.**

With regard to the first ingredient of the offence, the prosecution relies on the post mortem report, Exhibit. P1, made by Dr. Busingye, Medical officer, Kambuga Hospital. His evidence was admitted in accordance with Section 66 (1) of the Trial on Indictments Act. The body of the person he examined was identified to him by one Kahigi as that of Speaker Lawrence. There is also the evidence of PW2 Ahimbisibwe Enid, PW3 Tumuheirwe Fausta, Widow to the deceased and the accused person themselves who saw the body and participated in the burial.

From this evidence, death of Speaker Lawrence has been proved.

With regards to the second ingredient whether Speaker Lawrence's death was unlawfully caused, the law presumes that every homicide is unlawful unless it is accidental or excusable. An accidental homicide usually happens by chance or unintentionally, whereas a homicide is excusable if it is committed in execution of a lawful sentence or in circumstances of self-defence.

From the Post mortem report and testimony of PW2 Ahimbisibwe Enid and PW3 Tumuheirwe Fausta, it is evident that the body had deep cut wounds in the most vulnerable parts of the body. From the Doctor's point of view, the cause of death was haemorrhagic shock due to bleeding from the multiple cut wounds and the left carotid.

The defence does not dispute that Speaker Lawrence's death was unlawfully caused.

From the evidence, he died a violent death that was unlawfully caused.

This essential element of the offence of murder has also been proved.

As to whether the unlawful acts which led to Speaker Lawrence's death were committed by the accused persons, at the centre of this issue is the question of A1 Tutyasingura's extra-judicial statement in which he implicated his co-accused, Mbabazi and Byamukama. I will turn to the statement shortly.

First, the evidence of PW2 Ahimbisibwe Enid.

She operates a local beer at Kabashaki in Kanungu District. It is her testimony that on 12/2/2007 around 9:00pm the three accused persons and their deceased colleague were at her Bar. Her husband was in bed, sick. She served them a drink and because the husband's condition wasn't good, she requested them to leave with their drink. They obliged. The following morning, she learnt of the death of one of them, Speaker Lawrence. She went and saw the deceased's body. After some time, police asked her to make a statement and she obliged. After some time also the police recovered two items from a river bank. The items were a jacket and a shirt. She identified the two to police as Tutyasingura's and Mbabazi's respectively, and that the last time the two were seen in the company of the deceased, each was dressed in the indicated item.

Secondly the evidence of PW3 Tumuheirwe Fausta.

The deceased was her husband. He left home around 8:00pm on 12/2/2007 without telling her where he was going. Her self and the children went to bed and slept. Then around 11:00pm people started throwing stones at their house. After a short time, she heard a bleating sheep and went outside to see what the problem was. Near the house she came across the dead body of her husband. According to her, judging from the amount of blood where the body lay, the deceased was not killed at that point, rather the body was carried to that spot. She alerted the neighbours who also alerted the police.

Thereafter, the hunt for the killers of her husband begun.

Thirdly, the evidence of PW4 No.19082 D/C Turyahebwa Dan.

He was attached to Kanungu Police Station when on 13/02/2007 he received a case of alleged murder to investigate. He proceeded to Kabashaki Cell and at the deceased's home, he found the deceased's body in the compound. It had multiple cut wounds on the head. He searched around for possible clues as to the murderers but he got none. He removed the body and took it to Kambuga Hospital for post mortem. Mr. Busingye examined the body and gave cause of death as hemorrhagic shock.

Later, the body was handed back to the relatives for burial.

A week later he received information about A1 in connection with the killing. He gave the source of information as Kagurusi, a brother to the deceased but this Kagurusi did not appear as a witness. Be that as it is, the witness communicated to Rugyeyo to have A1 arrested. He was arrested and he found him in the cells. On talking to him, A1 Turyasingura allegedly admitted commission of the offence with Mbabazi and Byamukama. The alleged admission amounts to nothing in-law in view of the witness's rank. But it takes us to another level, that of PW5 Gumisiriza Karinkiza, to which I will revert shortly.

Fourthly the arrest of A1 Turyasingura, his co-accused were also arrested.

After about two months, on 21/4/2007, he also received information that when it rained, Kabashaki river burst its banks and washed a shore clothes. He recovered a jacket and shirt on the basis of this information. The two items have since been identified by PW2 Ahimbisibwe Enid as A1's and A2's.

Following, the evidence of D/ASP Gumisiriza Karinkiza.

He was the O/C CID Kanungu at the time. On 23/2/2007 he recorded a charge and caution statement from A1 Turyasingura. In the statement, the accused admitted complicity in the killing of Speaker Lawrence and implicated A2 Mbabazi and A3 Byamukama.

I admitted the statement in evidence after a trial within a trial in which I was satisfied that the statement was freely and voluntarily made as medical evidence did not indicate marks of the torture on the accused and the accused did not talk of any torture anyway.

From the above facts, it is clear to me that the evidence tending to connect the accused persons with the death of Speaker Lawrence is purely circumstantial in the sense that nobody testifies as having seen the accused persons killing the deceased.

The law governing circumstantial evidence was clearly stated in **Simon Musoke Vs Republic [1958] E.A 715.**

The principle stated in that case is that where the prosecution case is founded on circumstantial evidence, that evidence must show that the accused is guilty and there are no co-existing factors that tend to weaken or destroy the inference of his guilt.

I will now consider those pieces of circumstantial evidence and draw a conclusion out of them.

The first piece of circumstantial evidence relied upon by the prosecution is that of PW2 Ahimbisibwe Enid. From her evidence, she knew the accused persons. She operates a Bar business at Kagashe Trading Centre in Kanungu. It is her testimony that the deceased and the three accused persons were her regular customers and that she was with them on 12/02/2007 around 9.00 pm. They all left her Bar at the same time.

The following morning she got information that Speaker Lawrence died that night; that he had been killed. By that time police had no idea who the killers were. She therefore did not volunteer any statement to police about it. I cannot say that this was unusual since at that stage, she had no reason to suspect that after leaving her place, the deceased could have been killed by his own blood relations. With time, however, police investigators reached her as they were bound to. She indeed had useful information for them being one of the last people in the area to see him alive that night. Her evidence is that from her recollection, A1 was in his usual jacket that evening and A2 was in a white shirt. It is of course possible that she came to that recollection after similar items were recovered from a nearby river two months later. By the time of recovery, the accused persons were already in prison. She has identified those recovered items as property similar to what A1 Turyasingura and A2 Mbabazi were dressed in that evening.

Interestingly, all the accused persons have distanced themselves from anything to do with being at PW2 Ahimbisibwe's Bar that evening or owning the recovered jacket and shirt.

She gave her evidence in a cool manner. There has been no suggestion of any grudge between her and themselves to possibly motivate her into fabricating evidence against them. None existed in my view. I have therefore seen no reason to doubt her evidence on two pertinent aspects: that on 12/2/2007 in the evening the four converged at her Bar for a drink and thereafter moved away peacefully; and that A1 was in the recovered jacket and A2 the recovered shirt. I have not found their conduct of distancing themselves from any activity at PW2's Bar, in view of her credible and truthful evidence to the contrary, to be conduct compatible with innocence.

On the strength of this evidence, I would make a finding, and I do so, that the last time the deceased was seen alive was on 12/2/2007 around 9:00pm at PW2 Ahimbisibwe's bar. He was in the company of the accused persons.

Turning now to the evidence of PW3 Tumuheirwe, she last saw the deceased around 8:00pm. She was awakened from her sleep around 11:00pm by stones thrown at their house and the bleating of the sheep. On reaching outside, she came face to face with a body of a husband she had last seen a couple of hours ago.

From her evidence, court is entitled to make a finding that the stones were thrown in the direction of her house to purposely alert her about the catastrophe that had just befallen the family. It was a deliberate act on the part of the killers to alert the deceased's wife about the presence of the husband's body in the compound. From this evidence, court is satisfied that the deceased was slain from elsewhere and the killers were kind enough to carry the body to his compound.

If the killing had been done at the place where the body was eventually found, surely PW3 Tumuheirwe would have heard cries for help/or a scuffle outside. She heard none of these. In these circumstances, the irresistible conclusion is that the body was carried to the deceased's compound. I so find.

The question that arises from all this is who then it was that had the guts to kill the deceased and kindly carry the body to his home?

The answer in my view is not hard to get. It lies in the evidence of PW4 D./C Turyahebwa and PW5 D/ASP Karinkiza. PW4 was the investigating Officer.

A week after Lawrence Speaker's death, he received information about A1 Turyasingura's complicity in the killing. He (A1) was arrested and he revealed to police that he had killed the deceased with A2 and A3.

As fate would have it, these three people were indeed the last people to be seen in the company of the deceased. From the evidence of PW4 D/C Turyahebwa, since A1 was volunteering information, he was put before PW5 Gumisiriza Karinkiza for a charge and caution statement.

In the statement made before PW5 a day after arrest, A1 narrated how in the morning of 12/2/2007 at a burial A2 and the deceased made arrangements to meet later in the day; how around 8:00pm Mbabazi (A2) called him (A1) to assist him to carry Tonto (a local brew) from Moses' place to Bashaija's; how on the way they met Byamukama (A3) and traveled with him upto Kagashe; how they found Speaker in a bar of one Karaaro; how Mbabazi bought Speaker three glasses of Waragi; they moved with Speaker and reached Kabashaki river; how Byamukama grabbed the drunk Speaker from behind; how A1 held his legs and they pushed the head in water; how A2 picked 2 pangas from the bush and cut Speaker on the head about 6 times; how they kept the head in water as it bled; how they carried the body upto the deceased's compound; and how A2 and A3 threw stones on the roof of the house and Speaker's wife came out making an alarm that robbers had attacked her; and how Byamukama untied one sheep which was tethered in the compound, the idea being to create impression that thieves had come to steal the sheep and in the process killed Speaker.

He has since retracted the same.

I have considered the circumstances under which the charge and caution statement came to be made. PW5 though O/C CID Kanungu at the time was not on the team of police officers investigating the case. Upto the time A1 made the statement, the police had not received details as to how the murder was planned and executed, to raise inference that PW5 found information on the file, prepared a statement and put it before A1 for signature as he (A1) would have wished court to believe. The statement itself was made shortly after arrest.

It is detailed and covers all pertinent particulars of the case.

I have considered the medical examination of A1. It is on record as Exhibit. P.3. It shows that A1 had no physical injuries on examination.

I directed the assessors, and I so direct myself now, that a statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he/they are charged. For a statement to amount to confession, it must admit all the elements of the offence or substantially all elements of the offence allegedly confessed: **Anyangu & Others Vs R [1968] E.A. 232.**

I was satisfied after conducting a trial within a trial that A1 made the statement freely and voluntarily. I maintain that finding. The same amounts to a confession as in it A1 admits all the elements of the offence of murder.

As I directed the assessors, it is dangerous to rely on a retracted confession in the absence of corroboration, but court and the assessors may do so if fully satisfied that the confession must be true. Corroboration is not necessary in law though.

A court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession must be true. Corroboration implies independent evidence which implicates a person accused of a crime by connecting him with it. It is evidence which confirms in some material particulars not only that the crime was committed, but also that the accused committed.

I have considered A's confession in the context of PW2 Ahimbisibwe's evidence placing all the accused persons at her Bar in the evening of 12/2/2007. I have also considered it in the context of PW3 Tumuheirwe's evidence of people throwing stones at their house, the bleating of the sheep, and the recovery of a jacket and shirt from the river 2 months after the incident, which items have been positively proved to belong to A1 and A2. In the statement made before recovery of the items, A1 talks of the trio going to the river to

wash themselves. On the basis of all these pieces of evidence, I have come to the conclusion that A1's confession is true. The evidence of PW2 Ahimbisibwe and PW3 Tumuheirwe provides ample corroboration to it.

Under Section 27 of the Evidence Act, when a confession made by one of the accused persons affecting himself and his co-accused is proved, the court may take into consideration such a confession as against that co-accused as well as the accused that makes the confession.

I am acutely aware that a confession of co-accused is weak evidence against the co-accused.

This caution was adequately laid down in **Karaya S/O Nyonji & Others Vs R (1953) 20 EACA 324** in the following words:

“It is incorrect to regard a confession made by one accused in an extra-judicial statement as a basis for a case against his co-accused, and to hold that with some corroboration it is safe to convict. What is needed is independent evidence, which, when linked with and supported by the confession of the co-accused, removes beyond any reasonable doubt the question of innocence.”

In the instant case, we have evidence of PW2 Ahimbisibwe which proves that the deceased was last seen in the company of the **three** accused persons.

There is no evidence of the four persons ever parting company to raise inference that he may have met his death at the hands of assailants other than the accused persons. What we have on record, therefore minus the confession, is evidence tending to prove the guilt of all the three accused persons. A1's confession comes in as additional evidence to support that other evidence. I would take it into consideration within the meaning of Section 27 of the Evidence Act and find that it (A1's confession) relates quite accurately,

correctly and truthfully to what happened on the night of 12/2/2007 as between the deceased and the accused persons. I make that finding. Believing as I do that the evidence on record shows that all the three accused persons are guilty and there are no co-existing factors that tend to weaken or destroy the inference of their guilt, I find that the trio participated in the killing of Speaker Lawrence.

I now turn to the issue of malice aforethought, that is, intentional killing.

Malice aforethought is really a state of the mind. It is not capable of proof by direct evidence. It can, however, be deduced from the circumstances that accompany the commission of the offence in question.

Factors that are considered by the courts in the determination of the existence or absence of malice aforethought include:

- **nature of weapon used;**
- **nature of injuries inflicted and on what part of the body, whether a vulnerable one or not;**
- **the conduct of the killer before or after the killing.**

From A's true confession, the weapons used in killing Speaker Lawrence were 2 pangas. The injuries were inflicted on the head, a vulnerable part of the body. The Doctor gave cause of death as hemorrhagic shock due to bleeding from the multiple cut wounds and the left carotid.

As regards the conduct of the killers, it is evident from the same source that the plan to meet that evening was hatched in the morning. In the evening the three accused persons found the deceased in a Bar and bought him one glass after another of waragi. By the time they reached Kabashaki river, the deceased was already drunk. He therefore put up

no resistance. A2 then went to where he had hidden the two pangas, picked them and used them to cut the deceased like they were cutting a wild animal. The Doctor's finding of multiple cuts on the head is consistent with the six or so cuts mentioned by A1 in his statement.

To constitute murder there must not be any defence available to the accused. In the instant case, none has been raised by the accused persons and none is in any view available to them. In my view, no reasonable person would contemplate that death would not result from the accused persons' acts, to warrant reducing the charge to manslaughter. I am of the considered view that if there has ever been a case of premeditated murder, this is it.

For the reasons stated above, I find that the killers, the accused persons, acted with malice aforethought.

I have addressed my mind to the issue of the alleged blood stains on the jacket and shirt. The stains could not easily be identified at the hearing and no forensic tests were carried out on them. They had been exposed to all kinds of weather in the two or so months in the bush. Be that as it may, I have already made a finding, grounded in the credible evidence of PW2, that the jacket and shirt were for A1 and A2 respectively. They threw away their own garments, in any view, to avoid detection and they did so at the time when they went to the river to wash soon after the incident, according to A1's accepted confession. This act of throwing away their own garments soon after the killing is further evidence of A1 and A2's participation in the killing.

As for the failure by the police to recover the **'buveera'** mentioned by A1 in his confession, he was not categorical in his statement that the same had been thrown in the pit latrine. According to him, A2 and A3 left him in the compound and went towards A2's latrine. He then heard them **"as if they were throwing the two buveera and pangas into the latrine"**. He did not say that he was positive about that, to raise inference that he may have lied in his statement. It was at night. They may have hidden

them elsewhere. From the nature of his statement, if he had positively identified where they were kept, he would have stated so. The police failure to recover those two items does not in my view in anyway weaken the inference of A1, A2 and A3's participation in the killing.

Finally, I have addressed my mind to the issue of common intention. For this doctrine to operate against accused persons on the same indictment, it is not necessary that the accused persons must have agreed or entered into a pact to commit the offence.

Common intention may be inferred from their conduct, presence at the scene of crime and their actions or from their failure to disassociate themselves from the commission of the offence. The law is that if violence is used to execute a common intention, as indeed happened in this case, and death results, then all the participants are guilty of murder.

Considering the circumstances of this case, I do not hesitate to find that the accused persons shared a common intention in the killing of Speaker Lawrence. They are all culpable in terms of Section 20 of the Penal Code Act.

After serious consideration of the prosecution and defence evidence, the law involved and after caution to my self on dangers of basing a conviction purely on circumstantial evidence, I have accepted as truthful the prosecution evidence of accused persons' participation in the murder of Speaker Lawrence.

In these circumstances, the defences of alibi and denial raised by the accused persons individually cannot stand.

The prosecution has successfully destroyed them by adducing evidence which connected them with the offence.

Both assessors in this case, Mr. Bahemuka Jerome and Kinderesire Nathan, in a joint opinion advised me to find the accused persons guilty and convict them. I entirely agree with their opinion.

I therefore find A1 Turyasingura Denis, A2 Mbabazi Naris and A3 Byamukama Augustine guilty of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act and convict them as indicted.

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YOROKAMU BAMWINE
JUDGE
26/11/2009

26/11/2009 **Accused persons** present

Mr. Martin Rukundo for prosecution

Mr. Ndimbirwe holding brief for Mr. Matsiko

Assessors present

Court: Judgment delivered.

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YOROKAMU BAMWINE

JUDGE
26/11/2009

Mr. Martin Rukundo: The prosecution has no record of previous criminal records of accused persons. However, I submit that accused persons do not deserve any lenience.

This is because from the time they were arrested to date, they have shown no sign of repentance. The offence was planned and executed after a long period of time whereby they should have changed their criminal plans. They didn't. They cut the deceased several times on the head.

Conduct of accused persons was beastly. It deserves highest level of condemnation.

I pray for a deterrent sentence.

Mr. Ndimbirwe: True deceased met a very rough death.

That notwithstanding, we pray that court exercises lenience when passing sentence. Maximum sentence is death. One of the cardinal points of sentencing is that the accused reforms. They can reform.

The maximum sentence would kill that chance. Sentence them leniently.

A1: I pray for release. I did not commit the crime.

A2: I am a Youngman. When you lose in court, you accept the judgment. When you are on remand, you repent and we learn a lot which we can teach our colleagues at home. I call for a sentence which can allow me to go back and help my people to understand.

A3: I am a Youngman. I would request that in view of period spent on remand, I be given a lenient sentence. Given chance I can go to the village and tell the youth how to conduct themselves.

Court - Sentence - reasons.

The accused persons are first offenders. They have, however, been convicted of a very serious offence which carries a maximum death sentence. They ended life of a human being for no good reason or at all and did so in the most dehumanizing manner. They cut him as if they were cutting a pig. For this reason alone, they should deserve no mercy. But as first offenders, I am inclined to the view that they can reform. Going in for the maximum sentence may not be in their best interests.

I notice that A1 was getting to 18 years of age when he committed the offence although he deceived the police that he was 15 years old. Under Section 105 of Trial on Indictments Act, no sentence of death can be imposed on him.

For the role he played in the killing, his age at the time, his co-operation with police and taking all factors together, I consider a sentence of twelve (12) years imprisonment adequate.

As for A2 and A3, who were adults and should therefore have guided A1, they ended up misguiding him. The offence they committed weighs down their pleas for mercy.

Taking the period of 2 years spent on remand, I sentence **each** of them, A2 and A3, to eighteen (18) years imprisonment.

Right of appeal explained.

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YOROKAMU BAMWINE

JUDGE

26/11/2009