

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

HCT-CR-11-CSC-072/2012

**CRIMINAL CASE RUK. 00-CR-CSC-006/2011
CRB 141 /2011**

UGANDA ::: PROSECUTOR

VERSUS

1. TWINOMUHWEZI AMON

2. MUJUNI ALEX :::ACCUSED

BEFORE HON. MR. JUSTICE J.W KWESIGA

JUDGMENT

Twinomuhwezi Amon and Mujuni Alex are jointly indicted for Murder contrary to Sections 188 and 189 of the Penal Code.

It is alleged that the Accused persons on 7th February, 2011 at Ahakibungo Cell Kanungu District murdered Barinda Cosma. The Accused persons pleaded not guilty and the State Proceeded to prove the case against the Accused persons. The State adduce evidence a total of five witnesses and each of the Accused persons gave sworn evidence that was total denial.

The burden of proof is upon the state to prove the whole case against the Accused person beyond reasonable doubt. Every person charged with a criminal case has no burden to prove his innocence because he or she is presumed to be innocent until he pleads guilty or he is proved guilty. This is enshrined in Article 28 (3) (a) of The Constitution of The Republic of Uganda and was settled in **Bogere Moses and Another Vs Uganda (1996) HCB 5** and **Ssekitoleko Vs Uganda (1967) EA 531.**

The Prosecution in a case of Murder has a duty to prove the essential ingredients of the offence namely; deceased, the unlawfulness of the death, presence of malice aforethought in causing death and participation of the Accused person.

Before determining whether or not the above elements have been proved I will summarize the adduced evidence before I evaluate it. The evidence jointly admitted of PW 1 Dr. Mutamaini is that she did post-mortem examination of the dead body of Barinda Cosma on 7th February, 2011. The body had several cut wounds on the head and skull, the arm and shoulder. The cause of death was bleeding from open wound injuries. The injuries were caused by a sharp instrument.

PW 2 Musaaazi Adron, the deceased's brother found the deceased killed on the roadside. Identified the body for post-mortem examination and buried the deceased.

PW 3 Mbabazi Faustine, the Chairman of Kigarama trading centre participated in village operation to arrest several suspects including the two Accused persons.

PW 4 Tumugabirwe Pascal, visited the scene of crime pursuant to the information that murder had been committed. The suspects were hunted by villagers. He did not participate in arrests. A total of the four suspects were arrested. He forwarded them to the district police headquarters for further action.

PW 5 John Bosco Tukamushaba 10 years old gave unsworn testimony because of his tender age. He did know God and could not take oath. He told court that he knows A1 and A2 and he was seated behind the two in a party and he heard them conspiring and planning to attack the deceased. That at the end of the party after music machines and the lighting generator was switched off he saw the Accused persons follow the deceased. He did not explain how he saw them

at night after light was switched off. This was the total prosecution evidence. The two Accused person's denied ever being at the party as alleged by PW 5 and each set up a defence of ALIBI.

The Prosecution did not challenge the Accused person's defence of ALIBI in course of cross-examination. It is trite that once the Accused person puts up a defence of Alibi he does not assume the duty to prove it. The duty is upon the prosecution to adduce evidence that disproves it. See: **Ssekitoleko Vs Uganda (1967) EA 531 and Akol Patric and others Vs Uganda (2006) HCB 4.**

The Prosecution did not, in cross-examination, ask the Accused persons about the validity of their ALIBI. The Supreme Court of Uganda settled in a number of cases the inference to be drawn in the following words:-

“Whether the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. Therefore an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that evidence is accepted subject to its being assailed as inherently and palpably incredible.”

See: **James Sowabiri & Another Vs Uganda Cr. Appeal No 5 of 1990 OR Bwire Wycliffe & another Vs Uganda Cr. Appeal 12 of 2002.**

The only evidence that would have put the Accused near the scene of crime would have been that of PW 5 John Bosco Tukamushaba, a child of tender age who gave evidence not on oath for the reasons that despite being a brilliant boy he did not know the duty of giving evidence on oath. Section 40 (3), Trial on Indictments Act settled that *“..... where evidence admitted by virtue of this subsection is given on behalf of the Prosecution, the Accused shall not be liable to conviction unless the evidence is corroborated by some other material evidence in support thereof implicating him or her.”* In **R Vs Campbell (1956) 2 All E.R 272** Lord Goddard held that unsworn evidence of a child must be

corroborated by sworn evidence and if the only evidence implicating the Accused is that of unsworn children the judge must stop the case.

In view of the above authorities and law the evidence given by PW 5 John Bosco Tukamushaba has no value on its own as it stands un corroborated.

The evidence of PW 1, PW 2 and PW 3 proved the death of Barinda Cosma. There is no doubt that he was killed by multiple cutting with a sharp weapon. I am satisfied that the evidence adduced by the State proved that murder was committed by any of the two Accused persons.

The opinion of the Assessors did not address the inadequate evidence of PW 5 a child of tender age, who gave unsworn evidence which cannot be a basis for conviction with being corroborated. For this reason, I am not able to agree with their opinion and advice, I find the two Accused persons not guilty and I do Acquit the Accused persons.

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J.W. KWESIGA
JUDGE
13/12/2012

In the presence of :

Mr. Baguma Batson, RSA for the State.

Mr. Bwagi Jonathan for the Accused.

M/S Ampaire Everlyne- Court – Clerk.