REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, J.S.G., ODER, J.S.C., TSEKOOKO, J.S.C.) CRIMINAL APPEAL NO.17 OF 1994

BETWEEN

1. AMISI KATALIKAWE
2. BASHIR KANYUNYUZI=========================APPELLANTS
3. SOWEDI KANYUNYUZI

AND

UGANDA=======================================RESPONDENT.

(Appeal against convictions and sentence of the High Court holden at Fort Portal (Mukanza, .J.) dated 17/9/1991)

IN

HIGH COURT CRIMINAL SESSION CASE NO. 107 OF 1990

JUDGMENT OF THE COURT:

The three appellants above named were indicted in the High Court on two counts. The first count is murder C/S. 183 of the Penal Code and the second count is capital robbery C/Ss 272 and 273(2) of the Penal Code. The appellants were convicted on both counts and sentenced to death on the first count.

The prosecution case is that the appellants and Erika Rukanirwa (PW2), victim of the robbery and the father of the deceased, Angelica Mbalizeki, lived in the same village (Nyakasongo) where they were neighbours. PW2 had a two bed- roomed house there. PW2 had known the appellants for some years prior to the murder of the deceased (Angelica Mbalizeki) on 12/3/85.

On 12th March, 1985 at 10.00 p.m., PW2, his wife and the deceased had retired to bed when six persons invaded the house. The deceased was in her separate bedroom. PW4, John William Mupenzi and other children were in the sitting room where PW4 was telling stories. The house was lit by a tadoba which had been placed on top of a dividing wall, measuring 5 feet high. Two or three members of the group descended on PW2. The group beat up the children who were still in the sitting room.

PW2 and PW4 testified that A2 and A3 and their confederate named Emmanuel attacked PW2. Emmanuel put his gun on the chest of PW2. There ensued a struggle for possession of the gun between PW2 and Emmanuel. Then A2 hit PW2 with a stick on the head. Again A2 stabbed the deceased who had come out of her room to help her father. When she was stabbed, she cried out; “Bashir you are killing me.” . After that cry she was shot dead by Al, according to both PW2 and PW4.

The appellants who testified on oath denied participating in either the murder of the deceased or the robbery. They put up alibis. Al claimed to have left his home on 11/3/85 and was in Kabale on 12/3/85 when the offences were committed. He claimed that he was incriminated by PW2 and Pw4 because he (Al) had arrested PW2 in connection with loss of some cattle in Bihanga village in 1987. A2 and A3 testified that they were at their respective homes and not at the scene of commission of the two crimes at the material time. DW4, Nelisensio Kanyunyuzi, father of A2 and A3 testified in support of A3. DW5 Hasifa Bashir testified in support of A2.

The learned trial judge accepted the evidence of PW2 and PW4 on identification and disbelieved the appellants and their witnesses. He held that the prosecution evidence had placed the appellants at the scene of crimes. He accordingly convicted the three appellants. Hence this appeal, containing seven grounds of appeal.

Mr. Babigumira. learned counsel for the appellants, argued these grounds of
appeal in three, sets:

(a) Grounds: 1,4,5 and 6 were argued together first;

(b) Ground: two was argued next;

(c) Grounds: 5 and 7 were argued last.

Grounds 1,4,5 and 6 state as follows:-

> ***"1. That the learned trial Judge erred in law and fact when he found that the conditions favoured correct and unmistaken identification.***
>
> ***4. That the learned trial judge erred*** *in* ***law and fact when he failed to find that the evidence was rehearsed and the appellants framed, in the circumstances of the case.***
>
> ***5. That the learned trial judge erred*** *in* ***law and fact when he found that the lapse of time between the alleged commission of the offence and the reporting to the police was explained by the absence of authoritative Government.***
>
> ***6. That the learned trial Judge erred in law and fact when he held that theft of the jerrican had been proved beyond reasonable doubt."***

Mr. Babigumira submitted in effect that the prevailing circumstances during the attack were not condusive to positive identification. That as PW2 was attacked suddenly in his bedroom and he had to struggle with one of the attackers for the gun and since he was hit on the head and his fingers were injured, he could not have been able to identify the attackers. Learned counsel contended that that scenario explains why PW2 could not identify colours of clothes won by the attackers and that PW2 could not pinpoint which of the robbers took the jerrican.

On the evidence of PW4, learned counsel contended that PW4, who was aged between 13 years andl4 years at the time of the incident and being an uneducated small village boy who must have been frightened during the attack could not have been able to identify the appellants. Learned counsel, in fact submitted, bravely we must say, that PW4's evidence was

rehearsed. He further submitted that Al was implicated because he had arrested PW2 in connection with loss of a number of heads of cattle in Mabanga village.

Miss Betty Khissa for the respondent submitted that PW2 and PW4 properly identified the appellants as there was ample light in the house and that the witnesses knew the appellants well. She submitted that there could not be mistaken identification.

In our opinion on the facts of this case the most important question before the learned trial judge and the assessors was identification. The learned trial judge was alive to this question. At page 7 of his judgment he correctly directed himself when he stated that;-

> ***"The crucial matter in this case is the question of identification whether the accused persons were properly identified by the prosecution witnesses as among the gang that killed Angelica Mbazeliki. The true test is whether the evidence of identification can safely be accepted as free from the possibility of error."***

We have considered the evidence of PW2 and PW4 and found the two witnesses consistent. The relevant evidence of P.W2 *(*pages 10 and 11 of the record) is as follows;

> ***"Then at around 10.00 p.m., .the door was kicked and forced open. They kicked the front door. It was the only door on the house. It did not have a rear door. This door was kicked open and I was in my bed. Then one Emmanuel placed a gun on my chest and I started struggling with him and I was at the same time making alarm. Also the children were crying. Emmanuel found me in the bedroom. I struggled over the gun while raising an alarm. As we were struggling, we moved from the bedroom to the sitting room. My daughter Angelica Mbalizeki came to my rescue. Emmanuel, was putting on an army uniform. Besides Emmanuel A2 and A3 were in the sitting room. Kahima was also in the sitting room plus Gakyalo, and Amisi A1 was standing in the doorway and never entered in the house. A1 was standing on the door way with a gun. Inside the house he (sic) saw A2,A5, Kahima and Gakyalo. A1 was standing on the door way with a gun. So were six people. There was also bright moonlight. When my daughter came to rescue me A2 pierced her***

with a knife on the side of her stomach then the girl exclaimed.

"Bashir have you killed me."
After Bashir had stabbed her A1 Amis . " shot Angelica in the chest with a gun and the girl fell down. Angelica fell down and died instantly. I saw A1 shoot my daughter. A1 was dressed in army uniform. A1 was in full army uniform. He had even army boots on. A1 had put on toppie type of cap. Yes Emmanuel had a gun and A1 had also a gun. A2 had a knife and Sowedi A5 had a stick. When all this was taking place the tadoba was still lit and was still on the wall."

During cross-examination PW2 stated (at page 15) that:-

"I managed to see the three accused persons as members of the gang who attacked me in the night in question. I told this to the neighbours who answered the alarm"

At page 16 he continued during cross-examination thus :-

"....Emmanuel entered my bedroom and we struggled over the possession of the gun. Yes the struggle ended in the sitting room after the girl had been stabbed. I continued struggling with Emmanuel over the gun. The whole incident took 30 minutes. The deceased was shot immediately she was stabbed, and she uttered that 'Bashir you: have killed me'……
"I did not talk to A1. I could not talk to A2 because he had come to kill me. A2 had nothing on his head. A3 was dressed in Civilian clothes. I do not remember the colour of his clothes

As we have stated the testimony of PW2 both in examination -in- chief and during cross-examination was consistent. This witness was not shaken in cross- examination on any relevant part of his testimony.

Because Mr. Babigumira submitted to the effect that PW4 was an ignorant village boy who could not have been able to observe what happened on the material night, we are impelled to set out the relevant portions of the evidence of PW4 as recorded page *22* to 23 of the proceedings). PW4 testified that:-

> *"…I was in the sitting room telling stories. We the children we do tell stories. My father and mother were in the bedroom. Angelica was in her bedroom. It was 10.00p.m. and there was candle light of a tadoba……… while we were there people came and hit the door and the door got opened after the door had fallen inside some people entered the house. I knew all of them. I recognized one Emmanuel, Kahima Bashir A2, Sowedi A3 Gakyalo, and Katalikawe A1…*
>
> *Emmanuel was putting on army uniform camouflaged uniform and was also armed with a gun. Al was also in army uniform Al was armed with a gun. Kahima was not armed with anything. He was putting on civilian clothes, Bashir was putting on civilian clothes and had a knife. Sowedi A3 was dressed in civilian clothes and was armed with a stick I saw two guns one of Emmanuel and that of Al and they were all in army uniform. A2 had a knife.*
>
> *A3 had a stick and Gakyalo was armed with nothing…… Emmanuel continued to the bedroom while armed with a gun. Others stayed in the sitting room. Those in the sitting room were beating the children and I was also beaten. PW2 and Emmanuel started struggling over the possession of the gun; they came from the bedroom to the sitting room. Then Angelica came from her bedroom to go and assist our father PW2. Then A2 stabbed her with a knife near the breast. When she was knifed Angelica exclaimed and said "Bashir you are killing" After she had said that Katalikawe fired with a gun in her chest……… she fell down and died instantly. When Amis A1 shot my sister he was standing in the door way just slightly inside the house……*
>
> *Yes when the assailants entered the house the candle was burning and it continued burning during the course of the whole incident……… It was Africane PW3 who first answered the alarm. When he came I narrated the names of those people who*

attacked us. I told him it was Amis (A1), Bashir (A2) Sowedi (A5), Kahima, Gakyalo and Emmanuel"

Although the testimony of PW4 was long and as crucial as that of PW2, his cross-examination appears to have been quite short. PW4 was consistent throughout about what he saw or heard. He was not at all asked whether he had rehearsed the evidence alone or with the assistance of any other witness or any person. PW4 was not question by defence counsel on his ability or capacity to identify any of the appellants let alone whether he could perceive whatever happened on the night of 12/3/1985. The incident happened when PW4 was still awake and alert, telling stories to his brothers and sisters which perhaps explains why he remembered the events so vividly. We were therefore a little surprised by Mr. Babigumira's submission that PW4, a small village boy could not have been able to narrate the events unless he (PW4) rehearsed his evidence. The implication here is that village boys are generally less endowed with intelligence and capacity to perceive events than towns boys. With respect to the learned counsel we do not agree and we think there is no basis in this case for such assertation. The evidence of PW4 is coherent and consistent bespeaking of an intelligent witness of truth. We are not at all persuade by the arguments that his evidence was rehearsed. We may add that according to the evidence of A2, PW4 was schooling at the time.

Turning to the issue of identification we note that the incident lasted 30 minutes which, in the circumstances, was a long time to enable people well known to witnesses to be identified. There is ample evidence that PW2 and PW4 had known each of the appellants for sometime. Al claimed first that he did not know PW2 but later that they lived in same 10 homes cell since 1982 where PW2 was the chairman. A2 and A3 had known PW2 since 1980. There is the unchallenged evidence that the todoba which was placed strategically on the wall five feet high remained alight throughout the 30 minutes. Apparently the tadoba illuminated the whole house. PW3 found it still alight when he answered the alarm immediately. There is no evidence to suggest that all this time either PW2 or PW4 was obstructed from observing the attackers. PW2 was not really seriously tortured. Apart from some light injuries on PW2, there is no evidence that the injuries were so serious us to impair his ability to see and recognise his attackers. The evidence of PW2 and PW4 is to the effect that the deceased was shot almost half way through the incident, i.e. long after the attackers had entered the house.

Thus although the circumstances during the attack could have been frightening from the start, those circumstances were not as terrifying as is normally the case in cases of armed robberies. That may explain why PW4 did not hide or run away. We agree with the trial Judge that the circumstances favoured unmistaken identification.

Further, there is no evidence on the record to support Mr. Babigumira's other claim that the appellants were framed. It is only Al who suggested in his evidence that he was incriminated by PW2 and PW4 because arrested PW2. Now the arrest took place in 1987. Yet PW3 testified that PW2 and PW4 had mentioned the three appellants to him immediately he answered the alarm on the night of 12/3/1985. That means Al's claim is far-fetched.

As regards reporting of the offences and the appellants, Mr. Babigumira submitted that PW2 reported the incident very late because he (PW2) reported the incident very late because he (PW2) did not know his attackers and that the report to the police was an afterthought.

Miss Khissa submitted in effect that reports concerning the attack and commission of the offences and the naming of the appellants were made to authorities when it was convenient to do so.

The evidence of PW2 is, as we have stated already, that soon after his attackers had left, PW3 came to the scene. PW2 immediately mentioned to PW3 the names of all the three appellants as members of the gang which attacked him (PW2). PW2 story is supported by PW3 who answered the alarm immediately after the attackers had gone. PW2 testified that he reported the matters to RCs soon after the incident but because of the fluid situation during that time no authority attended to him as there was no affective Government. He then buried the deceased the following day even without the postmortem examination. PW3 testified that at the time of the incident NRA was in Rwenzori Mountains fighting Obote's Government. Hence lack of Government. It is true that PW2 stated that by the time he made a report to Fort Portal Police station the appellants had been arrested in connection with some other offence. PW2 says the report was made in January, 1986. Yet appellants we arrested in 1987. There is some confusion in record of evidence. But it appears from the evidence that the report to Fort Portal is one of a series of reports he made and that at the time of the commission of the

offences, there was no effective administration in the area. There is evidence to this effect which the learned trial Judge accepted and believed. The assessors who are themselves from Fort Portal believed the evidence that there was no effective administration in the area at the material time. Indeed the evidence of A2 supports PW2 as regards the unstable situation because A2 testified that there was insecurity in the area at the time. In these circumstances we find nothing to fault the learned trial Judge in his holding that there was no effective administration in the area.

The learned Judge misdirected himself when he considered the count of robbery by stating that:

> ***"It is the considered opinion of this Court that the accused intended to steal/demand money from PW2 because the latter used to brew waragi and sell groundnuts and according to PW2 was financially comfortable and used even to lend money to A2 and A3. I find that the accused failed to fulfill their malafide intentions because of the struggle over the gun between Emmanuel and PW2. They got frustrated and that's why they ended up killing Angelica and just picked up a jerrican out of frustration."***

True PW2 's evidence shown he was financially better off than the appellants but there is nothing on the record to preclude the inference that the appellants might have invaded the home of PW2 for purposes other than full scale robbery. One of the purposes could be to murder PW2 as he himself claims. Moreover even if the jerrican was the only item taken, so long as that jerrican was of some value to PW2 and was taken without consent of PW2 and was taken immediately after causing the death of Angelica, the offence committed thereby falls squarely within the ambit of the provisions of s.273(2) of the Penal Code Act, to wit capital robbery. But the evidence of PW2 and PW4 is to the effect that attackers took the jerrican. Despite the misdirection by the learned Judge which we have just pointed out we are satisfied that the learned Judge arrived at the correct conclusions on the facts before him that the offences of murdered and capital robbery had been committed.

For these reasons grounds 1,4,5 and 6 must fall.

Ground two state:-

> ***"2. That the learned trial Judge erred in law and fact by rejecting defence of alibi."***

Mr. Babigumira contended that the learned trial Judge wrongly rejected the alibis of the appellants. Miss Khissa for the respondent submitted that after the Judge had accepted that the prosecution evidence had placed the appellants at the scene of crime, the judge was justified in rejecting the defence of the alibis.

In our considered opinion the trial Judge had adequately considered the prosecution evidence on identification and the defence of alibi in respect of each of the first and second appellant before he rejected it. The evaluation of evidence with respect to the alibi of A3 is open to criticism but as a first appellate Court we have the duty to reevaluate that evidence and draw our own inferences.

The three appellants are neighbours of PW2. Apart from the first appellant who claimed he was in Kabale on the night or murder and robbery, A2 and A3 were in the village on the material night. A2 who leaves within hearing range from the home of PW2 put up the incredible story that after hearing the alarm from PW2 'S home, he and others left their homes for the purpose of answering the alarm. However, and strangely, on their way A2 and his group chose to make a campfire to warm themselves. After they warned up, they returned home to guard their own homes, even after learning of the murder and robbery. PW2 testified that his home and the home of A2 is within hearing distance. He was not challenged on this. A2's evidence is in any case to that effect. We agree with the learned trial Judge that the story of A2 in the circumstances is incredible. PW2 testified that A2 had stabbed the deceased with a knife. A2 himself testified that he armed himself with a panga when he answered the alarm. Mr. Babigumira submitted that a panga is not the same as a knife. The implication in this submission is that even if A2 was seen at the scene with a panga, a panga is not a knife, therefore A2 could not have been at the scene. We find no merit in this. This is a question of semantics. A panga is one type of a knife. We think that there is no doubt that A I and A2 were correctly and unmistakenly identified and therefore their alibis were correctly rejected

by the learned judge.

A3 testified that on the material night he and his father DW4 were at their home when they had alarms from PW2's home. They answered the alarms and allegedly stayed at the scene throughout the night and were present till burial. A3 claimed that PW2 did not know the people who had attacked him. A3 claimed that he remained in the village on patrol duty for a week presumably to look for suspects. He claimed that until his not arrest on 27/10/1987, he had been around and had on 3/10/87 or thereabouts fought with PW2 following arguments whether or not he (A3) had stolen Byomuhangi's property. On this evidence A3 was not cross-examined by counsel for prosecution. He was only asked whether or not there was a grudge between him and PW3. DW4, Nelisensio Kanyunyuzi, a father of A2 and A3 testified to support A3's alibi. He differed from the evidence of A3 on one aspect. He claimed that PW2 said the deceased was killed by soldiers. Like in the case of A3, DW4 wasn't cross-examined much. However, the learned Judge who had the opportunity of seeing DW4 in the witness box rejected the evidence of DW4 because DW4 had been in Court at the time A3 testified and that he (DW4) was a liar. DW6 was at the scene on the night of 12/3/1985. He did not see A3 at the scene that night except on 13/3/85 during day. On the other hand PW3 testified that he never saw appellant at the scene on 12/3/85.

We have anxiously considered the evidence of PW2, PW3, PW4 and the defence of A3 and DW4 and DW6 and have come to the conclusion that although the learned trial Judge's evaluation of A3's evidence in respect of the alibi, was lacking, we are fully satisfied that the identification evidence of PW2 and PW4 unmistakenly placed A3 at the scene of crime. PW3 supports consistency of PW2 and PW4 in that he (PW3) was among the very first people to answer alarm. He found the tadoba still alight. The three appellants were named by PW2 and PW4. He stayed at the scene the whole night but never saw A3. PW3 further testified that after the incident all appellants disappeared from the area and resurfaced latter. He was not challenged on this. Disappearance of the appellants after the offences were committed is evidence of guilt. The alibis were disproved. Ground two fails.

Finally grounds 3 and 7 state as follows:-

“3. ***That the learned trial Judge erred in law and fact when he found that malice aforethought had been proved beyond any reasonable doubt (sic.)***
7. That the learned trial Judge erred in law and fact when he failed to consider the defence of accident.”

Ground 7 is alternative to the rest of the grounds but Mr. Babigumira argued it together with the third ground. Mr. Babigumira submitted on the third ground that the prosecution had not proved the ingredient of malice aforethought beyond reasonable doubt. He also contended in effect that if the appellants wanted to kill anybody they should have killed PW2 but not the deceased. Counsel submitted that therefore the killing of the deceased was accidental.

Miss Khissa submitted that there was no evidence of accidental shooting and that the evidence shows deliberate shooting and therefore the prosecution established malice aforethought.

Mr. Babigumira did not refer us to any authority in support of his submissions on malice aforethought and accidental killing. On the facts of this case Mr. Babigumira’s submissions are, with respect, imprecise and even vague.

Persons how attacked the home of PW2 were armed with two loaded guns. Al and Emmanuel who was never tried were armed with those guns. They must have been prepared to kill any person in the course of their enterprise. The deceased was deliberately shot dead after she named A2 and cried out after he stabbed her why he was killing her. We have no doubt that she was shot because she had recognised A2. The killing was deliberate.

On the question of malice aforethought, we are satisfied that there is more than sufficient evidence to support the conclusion that there was malice aforethought in the killing.

The learned trial Judge directed the assessors and himself properly on the question of malice aforethought.

Section 186(a) of the Penal Code Act referred to by the trial Judge defines malice aforethought thus:

> ***"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."***

It has been stated by this Court that intention is rarely established by direct evidence but by circumstantial evidence: See ***Kadir Matovu v. Uganda*** Supreme Court Criminal Appeal No.11 of 1986 (unreported). The former Court of Appeal for Eastern Africa observed with respect to malice aforethought that

"A Court has a duty to perform in considering the weapon used, the manner in which it was used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established and it will be obvious that ordinarily an inference of malice will flow more readily from the use of say, a spear or a knife than from the use of a stick…" (See ***P.v. Tubere s/o Ochen*** (1945) 12 EACA 63).

When homicide is caused by the use of a lethal weapon an inference of malice of much readily drawn than when a non lethal weapon is used: *Y.* ***Damulira v. R*** (1956) 23 EACA 501. A gun is among the most lethal weapons.

In our considered view malice aforethought is readily inferred from violent acts perpetrated by the use of a gun as in this case where there was no excuse at all for the use of that gun. We are fully satisfied that the facts of this case warranted the inference of malice and the learned trial Judge and the assessors were correct in so finding.
The defence of accidental killing for what it is worth was raised obliquely at the trial during

submission by defence counsel. As we have stated Mr. Babigumira cited no authority to support his submission that the killing in this case should be regarded as accidental. But his submissions can be considered with reference to sub section (1) 01 S.9 of the Penal Code Act, which deals with intention or accident. That sub sections reads as follows:-

> ***"Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident."***

This Court considered these provisions and the question of malice aforethought in Supreme Court Criminal Appeal No.11 of 1982 ***Francis Ocoke v. Uganda*** (unreported). We find it unnecessary to recite the facts of that case in which the killing was caused by a vehicle running over the deceased. But at page 17 of its judgment this Court observed when commenting on the views of the learned Judge about the defence of accident that:-

> ***"……..Accident means the unforeseen consequences of a conscious act. It is inadvertence without culpable negligence. It is therefore a complete defence: See Woolmington v. D.P.P. (1935) A.C. 462."***

In our view that in summary is the statement of the law on the defence of accident. Moreover once the trial Judge was satisfied, as he was here, that the evidence established malice aforethought, the questions of accident was ruled out. On the facts we think that there was not any possibility of a verdict of not guilty on the ground of accident. In the result we are satisfied that there is no merit at all in the submission that the killing was accidental. Accordingly grounds 3 and 7 must fail. For the reasons we have given, we find no merit in the appeals of the three appellants. The appeals are accordingly dismissed.

Dated at Mengo this 29th day of June 1995.

B.J. ODOKI

JUSTICE OF THE SUPREME COURT

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT