

**IN THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**  
**AT MENGO**  
**(CORAM: MANYINDO, D.C.J., ODER, J.S.C. & TSEKOOKO, J.S.C.)**  
**CRIMINAL APPEAL NO. 28/94**  
**BETWEEN**

A1 ALFRED BUMBO

A2 MARTEN BUMBO

A3 EDWARD NAKHABALA===== APPELLANT S

A4 ALEX NAKHABLA

**AND**

**UGANDA=====RESPONDENT**

*(Appeal against conviction by the High Court of  
Uganda at Mbale, (Engwau, J.) dated 18/11/199A, In  
Criminal Session Case No. 160/1994*

**JUDGMENT OF THE COURT:**

The four appellants were jointly convicted of Murder contrary to Sections 183 and 184 of the Penal Code on two counts and sentenced to death. Three of them, the first, second and fourth appellants have now appealed against their convictions. The third appellant died in custody after the conviction. His appeal, therefore, abated.

The particulars of count one of the joint indictment were that they and others still at large on or about 3<sup>rd</sup> February, 1993 at Buwasiba village, in Mbale District, murdered Ester Namukoye (hereinafter referred to as D. 1). Those of the second count were that the appellants and others still at large on the same date and place murdered James Wangwe (D.2).

The prosecution evidence as accepted by the learned trial Judge, briefly, were that the two deceased persons, the four appellants and other persons who testified as prosecution or defence witnesses all lived in the same village and knew each other. The appellants were all related to each other and to D. 1 and D.2, who were mother and son respectively.

It appears that sometime before the incident in which D.1 and D.2 died, D.1 entrusted her two heads of cattle to one Patrick Wasobi for safe custody. When, later, D. 1 demanded the return of her cattle, she was not given them back. Patrick Wasobi died before returning the cattle to D. 1.

Alfred Bumbo, the first appellant, became the legal heir of the late Patrick Wasobi, D. 1 demanded the return of her cattle from the first appellant, but he, too, refused to do so. D.1 took the matter before the Buwasiba R.C.I court, but before the matter was settled D. 1 was attacked at her home at night. She suspected all the four appellants and one Richard Bumbo, and accused them before the R.C Court of the attack and for damage to her property. D. 1 was compensated in the sum of shillings 90,000 for the incident. However, before the R.C Court decided on D.1's claim for the cattle, she was killed in the incident, the subject matter of this appeal.

On 2<sup>nd</sup> February, 1993 at 6.00 a.m. the first appellant went to the home of D.2 and asked him to escort D. 1 to the first appellant's home, so that he could give back the cattle belonging to D. 1. The following morning, D. 1 and D.2 left for the home of the first appellant. They eventually, apparently, ended up at the home of Lawrence Wekesa, (D.W.6) where the first appellant, his co-appellants and others were drinking malwa (a local brew). The deceased apparently left the drinking place and were seen at about 5 p.m. passing by the home of Maiko John (P.W.3), going to the home of D. 1. They were on their way on the return journey home. Shortly afterwards they were attacked by the persons who killed them.

Relatives and villagers answered an alarm raised by D.2 at the scene. The prosecution witnesses who responded to the alarm testified that they found the four appellants and others holding and cutting the throats of the deceased persons with a knife. On seeing the villagers

who answered the alarm, the appellants and their companions fled in different directions. They were chased and the 1st and 3rd appellants were arrested immediately by the chairman of R.C. 1, Peter Wekesa (D.W.5) and others, and taken to Bupoto Gombolola Headquarters; the 4<sup>th</sup> appellant was arrested the following day in Tororo district; and the 2<sup>nd</sup> appellant was arrested much later. Richard Bumbo was never arrested and is still at large.

According to the evidence of the prosecution witnesses, especially Maike John (P.W.3) and John Watibini (P.W.4), who arrived at the scene immediately on hearing the alarm, the appellants were seen holding and cutting the deceased with a knife. P.W.2 and P.W.3 were the only eye-witnesses to the incident.

There was no dispute that the two deceased persons were murdered by their assailants. The evidence of the eye-witnesses in that regard was corroborated by the medical evidence. Dr. Peter Rogers Nabande (P.W.1) of Bududa Hospital who carried out post mortem examinations of the bodies of the deceased, testified about the injuries he found on the bodies of the deceased and the causes of deaths. On the body of D. 1 the Doctor found a cut wound on the anterior aspect of the neck, 4 cm long and 3 cm deep, severing the trachea and blood muscles. There was also another cut wound on the left chin, 2 cm x 1/2 cm. Cause of death was severe haemorrhage and asphyxia.

On the body of D.2 the Doctor found a deep cut wound on the anterior aspect of the neck, 4cm x 3 cm, severing the trachea and the neck blood vessels. There was also a superficial cut wound on the right of the orbita, 2 cm, and another deep cut wound on the neck region, 4 cm x 3 cm. The cause of death was asphyxia and severe haemorrhage. The Doctor compiled reports of his postmortem examinations, which were admitted in evidence as exhibit P.2.

The medical evidence is consistent with the evidence of Maike John (P.W.3) and John Watibini (P.W.4) that they saw one Richard Bumbo (still at large) cutting and stabbing D.2 with a knife on the neck, throat and face of D.2 while the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants were holding D. 1. When they saw this happening, D.2 was already lying down at the scene, dead

with cut wounds, which they saw on the neck.

There can be no doubt that the assailants of the deceased unlawfully killed them with malice aforethought. If the evidence of the eye prosecution witnesses are true, then the appellants were the assailants. They would be guilty of murder. But were the appellants the deceased's assailants? That was the only issue in this case.

Each and all of the appellants denied the allegations against them, giving alibis as their defences. They all gave unsworn statements and called two witnesses in their defence. The unsworn statements of the appellants were in effect similar in all material particulars. Briefly, it was that at the material time, they and others were drinking malwa (local beer) at the home of Lawrence Wekesa (D.W.6) when they heard an alarm. They and many others ran to the scene. On the way they met relatives of the deceased who set on them (the appellants) beating them on the allegations that they (the appellants) had killed the two deceased persons. They ran away but were chased and caught by the local authorities. Subsequently, they were indicted with the present offences. Their defence witnesses, Peter Wekesa, an R.C.I Chairman (D.W.5) and Lawrence Wekesa (D.W.6) supported their version of events.

The learned trial Judge considered the appellants' defence and the prosecution evidence. He rejected the appellants' defences and convicted them as indicted, in agreement with the unanimous opinion of the assessors.

Four grounds of appeal were originally set out in the memorandum of appeal. Miss Christine Kitumba, the learned Counsel for the appellants, however, abandoned the second ground at the hearing of the appeal.

Ground one complained that the learned trial Judge erred in law and in fact when he failed to direct himself on the serious contradictions in the evidence of the prosecution. In her submission under this ground, the learned Counsel for the appellants referred to what she contended were contradictions, first in the evidence of Patrick Nakhabela (P.W.2) a son and

brother of D. 1 and D.2 respectively. It was contended that P.W.2 at first said that as he was going to the scene, he met the appellants, their clothes blood stained. On arriving at the scene, he found D.1 and D.2 already dead, lying in the banana plantation with their necks cut. Yet, P.W.2 said later on that he saw all the appellants and two others still at large, cutting the deceased. Further, in P.W.2's statements, made to the police on 5/2/1993 and 24/2/1993, he did not tell the police that he saw the appellants. It was contended that these were major contradictions; yet the learned trial Judge did not refer to them.

The learned Counsel also contrasted the evidence of P.W.2 to that of P.W.3, who testified, inter alia, that he did not see the 1<sup>st</sup> appellant at the scene, but saw the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants. P.W.3 also said that he saw Richard Bumbo cut D.2 on the throat. At that time, P.W.2 had not yet arrived at the scene. The contradictions referred to, it was contended, could only have meant that P.W.2 only saw the assailants running away. He (P.W.2) never saw the 1<sup>st</sup> appellant cutting the deceased. He was never there, it was contended.

The learned Counsel also contrasted the evidence of P.W.3 to that of P.W.4. Whereas the former said that the 4th appellant ran upwards and the rest ran towards the lower side, without mentioning the 1st appellant; the latter, on the other hand said that he rushed to the scene with P.W.3, and found D. 1 already dead and D.2 being held by the 2nd and 3rd appellants, Alfred Nakhabala and Apollo Bumbo while Richard Bumbo was stabbing and cutting him (D.2) on the face. Richard Bumbo then ran towards the lower side but Alex (the 4th Appellant) ran on the East side and the rest towards the west.

The next contradictions, the learned Counsel contended concerned when the appellants were arrested. P.W.2 said that the 1st and 3rd appellants were arrested on the day of the incident but the 4th appellant was arrested the next day in Tororo, and the 2nd appellant "recently".

P.W.3 on the other hand, said that the 1st and 3<sup>rd</sup> appellants and Apollo Bumbo were arrested on the day of the incident. At that time P.W.3 was chasing Richard Bumbo. The 2<sup>nd</sup> appellant was arrested on 7/1/1994. With respect we do not see any contradictions in the evidence of P.W.2 and P.W.3 about the arrest of the appellants, except that P.W.3 mentioned the arrest of

Apollo Bumbo and the date (7/1/1994) when the 2<sup>nd</sup> appellant was arrested, which P.W.2 did not. The difference between P.W.2's position that the 2<sup>nd</sup> appellant was arrested "recently", in our view, would seem to tally with the date 7/1/1994, given that P.W.2 was giving evidence on 22/11/1994 when he said "recently". Regarding the arrests, P.W.4 said that those arrested included all the four appellants. It was contended that this contradicted the evidence of P.W.2 and P.W.3 on the issue that this is so, because P.W.4 does not say on what dates the appellants were arrested.

Then it was further contended that the prosecution witnesses contradicted one another regarding how the appellants were dressed.

We think that in view of the fact that the prosecution witnesses knew the appellants very well the difference in their evidence about the appellant's dress is of little or no significance.

On the whole, we are unable to agree that the criticism of the learned trial Judge under this ground of appeal is justified. First, because, he did consider and resolve some of the contradictions in the evidence of the prosecution witnesses. For instance on the issues of Identification, dress and arrests of the appellants, and whether P.W.2 and P.W.3 saw the 1<sup>st</sup> appellant at the scene of the crime. Secondly with the exception of the issue of whether the 1<sup>st</sup> appellant was or was not at the scene (to which we shall revert later), we think that the contradictions referred to by the learned Counsel for the appellants are minor and do not indicate that the prosecution witnesses deliberately lied to the trial court.

Subject to what is said above, we think that the first ground of appeal should fail.

The learned Counsel for the appellants next argued ground four of the appeal, which complained that the learned trial Judge erred in law and in fact in failing to examine:

- (a) the effect of the failure by the prosecution to produce the blood stained clothes of the appellants and;

(b) the failure by the prosecution to call the investigating officer.

On leg (a) of this ground, the learned Counsel for the appellants submitted that if some of the appellants were arrested and detained the same day, and if their clothes were blood stained, as alleged by P.W.2, then their clothes should have been examined for blood grouping; but the clothes were not only not examined, but also were not produced in evidence.

The purpose of examination of blood stained clothes worn by the appellants would have been, in our view, to determine whether the blood stain was the same group or groups as that or those of the deceased, thus linking the appellants with their deaths. In that case, it would have, of course, been prudent, for purposes of an exhaustive investigations fir the Police to have done all these things the learned Counsel has complained about. But this the police did not do. However, in view of the evidence of P.W.3 and P.W.4 that they actually saw the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants and others holding the deceased while Richard Bumbo was cutting the throats and necks of the deceased, and that in addition to the appellants being well known to the prosecution witnesses, the incident took place in broad day-light, we do not think that there can be any doubt that the 2<sup>nd</sup> and 4<sup>th</sup> appellants were properly identified as being among the assailants of the deceased. In our view, they were positively identified as being among the assailants of the deceased.

As regards leg (b) of this grounds of appeal, the learned Counsel, complained, rightly so in our view, that not a single Police-officer, including the investigating officer, was called as a prosecution witness. But we are unable to accept the contention that the absence of evidence of arrest or any evidence from the police investigating officer, made the prosecution case any less water tight or left a doubt in the prosecution case.

While it is desirable that the evidence of a police investigating officer, and or re-arrest of an accused person by .the police, should always be given where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of an accused person. All must depend on the circumstances of each case whether police evidence is essential, in addition, to prove the charge. In the instant case we are satisfied that the absence of police evidence did not weaken the prosecution witnesses and from the appellants unsworn

statements clearly indicating how and when they were arrested. Other evidence also clearly proved the prosecution case.

Ground four of the appeal, therefore, has no merit.

Submitting on grounds three and five together, the learned Counsel for the appellants said that the appellants' alibis should have been believed.

It put them away from the scene of crime. With respect, we are unable, to see any merit in these grounds of appeal, either.

As we have already mentioned before in this judgment there were, in effect, two key witnesses to the incident. These were the two brothers, Maike John (P.W.3) and John Watibini (P.W.4), both Sons of P.W.2. They were related to the appellants and the two deceased persons. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants were their uncles, and the 3<sup>rd</sup> appellant their cousin. D. 1 and D.2 were their grandmother and uncle respectively.

Patrick Nakhabala (P.W.2) also claimed that he saw what happened, but we do not think that he did so. What he said in that regard appears to have been more of an afterthought than the truth. It was contrary to what he had said earlier to the effect that he met the appellants running away from the direction of the scene. The deceased had already been killed. This is also what P.W.3 said about P.W.2. In the circumstances, it is clear that P.W.2 was not, and could not have been, an eye-witness to the incident.

The gist of P.W.3's evidence was that on the material date, D1 and D.2 passed by his home at about 5.00 p.m. on their way to the home of D.1 Shortly afterwards, an alarm was raised. P.W.3's father, (P.W.2) asked P.W.3 to answer the alarm. P.W.3 followed a different direction from the one his father (P.W.2) followed. When P.W.3 reached a distance of about 10 meters from the scene, he saw the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> appellants with Apollo Bumbo and Richard Bumbo holding and cutting the deceased persons.



Richard Bumbo was the one cutting D.2's face and the others were holding him. P.W.3 was frightened and he raised an alarm, which was answered by P.W.2 and others. The appellants fled and were chased by the people who had been drinking at the home of Lawrence Wekesa (D.W.6). P.W.3 also talked about who were arrested. We have already referred in detail to his evidence in this connection. He also said that he witnessed the incident for about two to three minutes. Richard Bumbo had a knife in his hand, but the 2nd, 3rd and 4th appellants were not armed. P.W.3 saw Richard Bumbo cut James (D.2) on the throat.

P.W.4's evidence was that he was at the home of his father (P.W.2) at 5.00 p.m. when D. 1 and D.2 arrived at the home. Having been welcomed, they left. Shortly thereafter, P.W.4 heard an alarm, and P.W.2 told P.W.4 and P.W.3 to answer the alarm. P.W.4 rushed to the scene and found that D.1 was already lying down dead; but D.2 was standing and was being held by the 2nd and 3rd appellants and by Apollo Bumbo. Richard Bumbo was stabbing D.2 on the face and neck. On seeing what was happening, P.W.4 raised an alarm, and the appellants fled the scene. Many people answered the alarm, chased and arrested some of the appellants.

As against the prosecution evidence against him, the 1<sup>st</sup> appellant said in his unsworn statement that on the material date, he went to the home of Lawrence Wekesa (D.W.6) to drink "malwa". Many people were there, including D.1, D.2, Richard Bumbo, and the R.C.I Chairman, Peter Wekesa (D.W.5). The drinking went on until 5.00 p.m., when the wife of D.W.5 entered the house and announced that "whereas you are drinking, an alarm is being raised outside" When the 1<sup>st</sup> appellant came out of the house, he heard an alarm being raised, to the effect that Richard Bumbo had killed D.1 and D.2. The 1<sup>st</sup> appellant and most of those who were drinking ran to the scene. They included D.W.5, D.W.6, the 1<sup>st</sup> and 3<sup>rd</sup> appellants, and one Peter Mukhabu. As the 1st appellant and the others were going to the scene, they Rogers Wangwe, Maike (apparently P.W.3) and other relatives of the deceased. Immediately, Rogers Wangwe beat the 1<sup>st</sup> appellant with a stick and the later fell down. Rogers assaulted the appellant on allegation that he had killed Roger's relatives. It was to avenge the killing. The local R.C.I Defence Secretary then took the appellant to Bupoto Sub-County Headquarters for safe custody.

The 1<sup>st</sup> appellant denied that he killed D.1 and D.2. He said that he only answered the alarm. He also denied that he had any dispute with D.2 about cattle, though he was the heir of the late Patrick Wasobi.

The 2<sup>nd</sup> and 4<sup>th</sup> appellants' version of events were similar to that of the 1<sup>st</sup> appellant. They were drinking with many other people at Lawrence Wekesa's home when they heard an alarm at 5.00 p.m. They rushed to the scene in answer to the alarm. On the way, they met relatives of the deceased, who became hostile to the appellants, allegedly because Richard Bumbo had killed the deceased. The 2<sup>nd</sup> appellant then said that as the relatives of the deceased were hostile and threatening to beat the appellants with the sticks they were armed with, the 2<sup>nd</sup> appellant simply returned to his own home, and had no idea of what else happened thereafter. The 4<sup>th</sup> appellant also denied being at the scene. He said that on his way to answer the alarm, he saw some people chasing Richard Bumbo for allegedly having killed D.2. The 4<sup>th</sup> appellant then went back to continue drinking at the home of one John Wangwe until 7.00 p.m. when he went back to his own home.

The evidence of two other defence witnesses, Peter Wekesa (D.W.5), the local R.C.I Chairman and Lawrence Wekesa (D.W.6), at whose home there was the beer party when the incident happened, is similar to that of the appellants. They answered the alarm, which they heard when they were at the home of D.W.6 drinking with the appellants and others. The appellants also answered the alarm like every body else.

The learned trial Judge believed the prosecution witnesses, whose evidence he accepted. He rejected the alibis of the appellants.

This, we think, he was entitled to do and we also think that he came to the right decision, except in the case of the 1<sup>st</sup> appellant.

We are of the view that the evidence against the 1<sup>st</sup> appellant is weak and leaves serious doubt. The evidence of the eye-witnesses, P.W.3 and P.W.4 does not clearly put him at the scene. His alibi, 'therefore, appeared to be truthful and raised a doubt in prosecution use. He was entitled to the benefit of the doubt.

However, we think that the evidence of these two prosecution eye witnesses clearly put the 2<sup>nd</sup> and 4<sup>th</sup> appellants at the scene.

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. See ***Ssentale v. Uganda*** (1968) E.A. 1968 and ***Christopher Katama v. Uganda***. Crim. App. No. 25/89, S.C.U (unreported).

In the instant case the 2<sup>nd</sup> and 4<sup>th</sup> appellants were clearly identified at the scene as being part of the gang that killed the deceased persons. Their alibis must, therefore, fail. They were part of a gang, which acted in concert in the prosecution of an unlawful act, leading to the death of the deceased. The deaths of the two deceased persons were caused during a single incident.

In the circumstances we are satisfied that the 2<sup>nd</sup> and 4<sup>th</sup> appellants were properly convicted on the two counts of murder of D.1 and D.2, contrary to Section 183 of the Penal Code.

In the result, the appeal of the 1<sup>st</sup> appellant is allowed, his conviction quashed, and the sentence of death set aside. The 1st appellant is, therefore, to be released from custody forthwith unless held on other lawful ground.

However, the appeals of the 2<sup>nd</sup> and 4<sup>th</sup> appellants are dismissed and the convictions and sentences are upheld.

Before leaving this case we must express our discomfort due to the fact that no evidence was called from the Police at all. The first impression is that this case was not investigated by the Police, but we do not think that this was so. This is not the first case in which this has happened. DPD and the Director of CID should do something about this.

This Registrar is, therefore, directed to draw the attention of the Director of CID to this judgment.

Dated at Mengo this 13<sup>th</sup> day of September 1995.

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT