

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE.

CRIMINAL SESSION CASE No. 52 OF 1993.

UGANDA PROSECUTOR

VERSUS

A1. BENJAMIN MUNGOMA)
A2. JOSEPH WAPALI)
A3. CHARLES BURUNDO) ACCUSED
A4. GEORGE NAMOSO)
A5. TASIKE WESWA GODFREY)

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

R U L I N G:

The 5 accused persons are jointly indicted for murder contrary to sections 183 and 184 of the Penal Code Act.

It is alleged that Benjamin Mungoma, Joseph Wapali, Charles Burundo, George Namoso and Tasike Weswa Godfrey on or about the 30th day of April, 1992 at Nambwa village in the Mbale District, murdered one Zakaria Wamuwaya. 5

The Medical Officer, PW1, testified that on 30.4.92 at around 5 p.m. in Nambwa village, he carried postmortem on a body of a young child of school age of about 6 years old. The body was in a fair general condition and was lying supine in a pool of blood with both lower limbs crushed and blood vessels of the lower limbs destroyed. Cause of death was severe bleeding from the destruction of blood vessels of the lower limbs as a result of a grenade explosion. Medical report tendered as Exhibit P1. 10 15

Evidence of PW2 is that she knows all the 5 accused persons because they live in the same village and the deceased child was her son. On 30.4.92 at around 1 a.m. she heard some footsteps outside her house and shortly thereafter she heard a bang at the window to her bedroom forcing it open. Immediately she saw something causing some light into the bedroom followed by a very loud explosion. 20

As she was in a panic and so much frightened, the witness rushed into the sitting room meanwhile her husband, PW3, took cover under the bed. After about 1½ minutes the witness went outside in hiding under a tree near the banana plantation. 25

It was from there that A1 who had a torch caught her by the hand and took her to the courtyard. From the banana plantation emerged A2, A3 and A4 and she recognised all of them through moonlight. They threatened to kill her but A2 rescued her saying that they should leave her since they had already finished her husband, PW3. 5
On the strength of that assumption, her life was spared and she went to the house of a neighbour, one Daphine Muyama whom she claims she had told about the attackers but was never called by the prosecution to confirm her story.

PW3 testified that he also knows the 5 accused persons as his neighbours and on 30.4.92 at around 1 a.m. he was in a very deep sleep when PW2 woke him up. He also heard some footsteps towards the bedroom window which was banged and the window shutter fell down. Immediately the witness took cover under the bed where he saw some light in the bedroom followed by a very loud explosion. He recognised 15
A1 and A3 by the help of a torch light which A1 flashed but recognised A5 by his voice only.

After the attackers had gone away, the witness went outside and reported the matter to one William Masinde and Mutwalibu and informed them that A1, A3 and A5 were among the people who had 20
attacked him and his family. He claims to have repeated the same story to the R.C1 Chairman of the area one Charles Namwiri who gave him a letter and reported the incident to Busiu Police Post.

Before reporting the matter to the Police, the witness says he had also reported the incident to another R.C. official by the 25
names of Michael Masolo and informed him of A1, A3 and A5 whom he had recognised. Michael Masolo then started gathering neighbours including A1, A2 and A5 so that in a big crowd they could go to the scene of crime. For no apparent reason, A1, A2 and A5 were not arrested by the R.C. officials that very night of the incident. 30

The Police investigating officer, PW4 testified that he went to the scene of crime together with the doctor, PW1 where PW1 carried out the postmortem examination on the body of the deceased identified to them by PW3. He found the body lying on the floor covered with a piece of cloth. He observed that all the lower limbs were shuttered. 35
In the bedroom at a corner he found a pot damaged and in it millet grains were burnt. At around the said pot there was a hole made by the offensive grenade which was thrown through the window. He also found metal fragments which the witness believed were from the offensive grenade and treated them as exhibits but which were not tendered in 40
court for reasons best known to the prosecution. /3

However the fragments also damaged the rear legs of the bed and the wall.

After visiting the scene, the witness drew a sketch plan but which again was not exhibited in court. Thereafter the witness went to Busiu Police Post where he was given 2 suspects in connection with this case and on 5.5.92, A3 was also brought and he detained them all at Mbale Police Station. At the end of investigations, the witness released A4 unconditionally on the grounds that there was nothing implicating him with the offence now before court. He also recommended to his boss that A1, A2 and A3 be released but was overruled by his boss.

Finally, evidence of PW5 is that all the 5 accused persons are his relatives and neighbours. On 30.4.92 at about 1 a.m. he was deeply asleep in his house when he heard a very loud explosion. After about 8 - 9 minutes he heard PW3 calling him and he went outside. He joined PW3 in making alarm and then reported the matter to the Vice-Chairman R.C.1, one Michael Masolo who then decided to gather neighbours including A5.

It was at the home of one Nabende Twalibu that PW3 mentioned that he had recognised A1, A3 and A5 as people who had attacked him. The witness says that PW3 claimed to have recognised A1 and A3 by the torch light which A1 had but recognised A5 by his voice only. However, as neighbours were being gathered, A5 was found at his home but PW3 never raised any complaint against him. Even A1 and A2 were found but PW3 never raised any complaint against them at all.

In the light of all that both Counsel for the accused made their submissions of no case to answer respectively. It is not in dispute that Zakaria Wamuwaya was actually killed. His parents PW2 and PW3 described what happened in their home resulting into death of the deceased. The investigating officer, PW4 and PW5 a neighbour who attended the burial saw the dead body of the deceased. PW1, the doctor confirmed and pronounced the deceased dead.

As to whether the act or omission was unlawful, evidence of PW2 and PW3 is that they were attacked by some people who threw something into the house which fatally injured the deceased and confirmed by PW4 as grenade. The defence concedes that the act was unlawful as their persons or property or provocation was done resulting into that act.

It is also conceded that the deceased died within hours after the fatal injuries. In that regard the prosecution has proved beyond reasonable doubt that the deceased died within one year and one day of the alleged act or omission.

As regards the question of malice aforethought, it is conceded that evidence of PW2 and PW3 suggests that the attackers wanted to kill both of them or PW3 alone. In fact one attacker said all of them were dead and from outside PW2 was left as PW3 was presumed dead. However, under section 186 (a) of the Penal Code Act, it does not matter who is killed, whether the intended victim or someone else.

The last and the only ingredient of great controversy is the evidence of identification whether the accused persons were the killers at the scene of crime. To resolve this ingredient, it must be proved that there was a proper and unmistakable identity of the accused persons and whether the circumstances under which the prosecution witnesses claimed to have identified them were correct for identification: Ndege & Another Vs: Uganda (1979) HCB 162.

Evidence of PW2 and PW3 as the eye witnesses is that the attack was at night at about 1a.m. in a dark bedroom. The window was banged open and through it, something was thrown which gave light before bursting with a loud explosion. PW3 immediately took cover under the bed while PW2 in a panic sat on the bed but shortly ran outside to hide under a tree in the banana plantation. It was at that place that A1 pulled her by hand and took her to the courtyard and that A1 had a torch in the hand.

At the courtyard, there emerged A2, A3 and A4 all of whom she recognised by the aid of moonlight and that it was suggested that she should also be killed but A2 suggested she should be left since her husband, PW3 had already been killed.

On the other hand, PW3 says that while he was taking cover under the bed, 2 attackers entered the bedroom flashing torch lights downwards when trying to find out if the occupants had died. It was through those torch lights that PW3 managed to recognise A1 and A3 but recognised A5 in the sitting-room with his voice only.

By elimination process, PW2 puts A1, A2, A3 and A4 at the scene of crime and leaves out A5 but PW3 puts A1, A3 and A5 only to the scene of crime and drops out A2 and A4.

However, from the evidence of a neighbour, PW5, while he was with PW3 at the home of one Nabende Twalibu on the night of incident, PW3 claimed to have recognised only A1, A3 and A5 whom he recognised by his voice only. But when the Vice-Chairman R.C.1 of the area one Michael Masolo went on gathering neighbours from their homes, A1, A2 and A5 were found in their respective homes and joined the group but PW3 never complained against them as people among the assailants who had attacked him. In fact PW3 confirmed also that A1, A2 and A4 and A5 were found in their respective homes but declined to say why R.C officials did not arrest them if he had reported them to the R.C.1 Chairman, one Namwiri.

In light of the evidence of the eye witnesses, it is the submission of the prosecution that conditions favoured correct identification of the accused persons and in the circumstances PW2 and PW3 could not be mistaken in the identification of the people they had known in the village before the incident. However, the learned State Counsel conceded that recognition of A5 by PW3 by his voice only without showing peculiar characteristics was not conclusive and positive evidence of identification. It is also submitted that any contradictions on record should be treated as minor: Alfred Tajar Vs: Uganda, Criminal Appeal No. 167 of 1969. However the learned State Counsel invited court not to believe some parts of PW4's evidence, especially when he failed to put a date on his Police statement and also on the sketch plan of the scene of crime which he drew. Nonetheless it is submitted that by failing to date his Police statement and the sketch plan, the witness was only forgetful but was not telling a deliberate lie.

The defence submissions are to the contrary in that it is argued that the conditions favouring correct identification were difficult in the instant case. PW2 who claimed to have identified A1, A2, A3 and A5 by the help of moonlight did not say how bright the moonlight was on the fateful night. If anything, the investigating officer, PW4 says the moon was not full at the material time. In that context there is a major contradiction between PW2 and PW4 on the matter which raises some doubt benefit of which should be given to the accused persons.

It is further submitted that when PW4 completed investigations, he had recommended to his boss that A4 be released on Police bond unconditionally which was done on the ground that there was no sufficient evidence implicating him with the offence now before court.

The witness also recommended the release of A1, A2 and A3 on Police bond for similar reasons but was overruled by his boss. However, since the investigations were completed nothing shows that further investigations took place for additional evidence to change the original situation.

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It is also submitted that when PW3 was hiding under the bed, he says torch lights were being flashed downwards for the attackers to find out if the occupants had been killed. In that situation as he was hiding so that the assailants could not see him, it was difficult for him to look directly at the torch lights in order to recognise his attackers. It is therefore the defence contention that PW3 did not have correct identification of A1 and A3 as he claimed. Since the prosecution has conceded that the witness did not recognise A5 positively by the voice only, this benefit goes to him and that explains the reason why he was arrested only 2 weeks before the hearing of this case yet all the time when the offence was committed he was in the village to the knowledge of the complainants. In addition, according to the second summary of evidence A5 is not included as one of the attackers. In fact, the summary is silent about A4 and A5 and if Police investigations implicated them then the court and the accused should have been informed: Seif s/o Selemani Vs: R (1953) 20 EACA 235.

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In order to reconcile the submissions from both sides, evidence of the 2 eye witnesses, PW2 and PW3 and in addition evidence of the investigating officer, PW4 and the neighbour, PW5 is vital to the evidence of identification:

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PW3 says he recognised A1, A3 by torch lights and A5 by his voice only. According to his demonstration in court on how the attackers were flashing torch lights, the witness was under the bed and the torch lights were being flashed downwards and if he was to see anybody at all, the torch lights would dazzle his eyes. That being the only source of light, the witness could not in the circumstances recognise A1 and A3. As for A5 both sides have conceded that he did not recognise him on the ground that there is nothing showing peculiar characteristics in the way he recognised A5 by voice only.

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Further, evidence of both PW3 and PW5 is that at the home of one Nabende Twalibu, PW3 mentioned the names of A1, A3 and A5 as people among those who had attacked him. However, Nabende Twalibu or R.C officials were not called to give evidence to that effect.

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Be that as it may, the Vice-Chairman R.Cl one Michael Masolo, on the very night of the incident collected neighbours before they could go to the scene of crime. According to PW3 and PW5, A1, A2, A4 and A5 were found in their respective courtyards listening to what had happened and in fact they joined the group and went to the home of PW3 where the attack took place. Neither PW2 nor PW3 ever raised a finger at them as being the people who had attacked them. It is inconceivable why PW2 and PW3 behaved the way they did and kept silent over the matter at that material time. The only inference one can draw is that none of them actually recognised A1, A2, A4 and A5 at the scene of crime.

Evidence of PW4 is that in fact A3 reported himself to the Police on rumours that he was being suspected in this case, yet he was commonly being seen in the village. The witness further stressed that in the course of his investigation of the case, PW2 said she was held on the hand by someone while she was trying to hide under a tree in the banana plantation. Immediately that happened 2 more people emerged but she did not disclose the identities of those people to the Police investigating officer. Further, it was only in her additional Police statement that she said she recognised them by moonlight and that was about 4 months after the incident, otherwise she did not say there was moonlight in her first Police statement.

It is to be noted also that even after PW2 and PW3 had talked to each other, PW3 never mentioned to the Police the names of A4 and A5 when he made his report to Busiu Police Post. To crown it all, PW5 never complained against any accused persons even when the R.C. officials and neighbours gathered at the scene. As a result of Police investigations, evidence is that PW4 found no evidence implicating any of the accused persons and recommended their release but overlooked by his boss. Since then no more evidence is collected to grip this case to stand on its feet.

In the end result, evidence of identification is not conclusive and positive in the circumstances of the case on the ground that correct identification was difficult.

Accordingly, mere scintilla of evidence is not enough to establish a prima facie case as in the instant case: Bhatt Vs: R. (1957) EA 332. In the premises, under section 71 (1) Trial on Indictment Decree, all the 5 accused persons hereof are acquitted and set free forthwith unless being held on some other lawful grounds.

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STEVEN GEORGE ENGWAU

J U D G E

6.10.93.

8.10.93: All 5 accused persons before court.

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Mr. Wegoye for A1, A2 and A3 present and holds brief for Mr. Dagira for A4 and A5.

Ms Nandawula for the State.

Mr. Wafula interpreter in Lumasaba.

Ruling delivered in open court.

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STEVEN GEORGE ENGWAU

J U D G E

8.10.93.