Hon. Mr. Ag. Justice Tsekooko

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HOLDEN AT MASAKA

Murder

1. Circumstantial evidence.

2.

CRIMINAL SESSION CASE NO. 76 OF 1989

(Original Crim. Case No. KLZ 105 OF 1989
of Chief Magistrate's Court Masaka).

UGANDA ..... PROSECUTOR

versus

A1. YOZEFU KIZZA
A2. SENTAMU CHRISTOPHER ..... ACCUSED
A3. FRASKO BWOGI
A4. FRASKO SENOGA

BEFORE: THE HONOURABLE MR. JUSTICE C.M. KATO

J U D G M E N T

The 3 accused persons Yozefu Kizza (A1), Sentamu Christopher (A2) and Frasko Senoga (A4) are each indicted with 2 counts of murder contrary to section 183 of the Penal Code. They pleaded not guilty to the indictment. For sake of convenience they are to be referred to as A1, A2 and A4 respectively hereinafter.

In the first count, the indictment alleges that the 3 accused and others still at large, on the 25th of April, 1985, at Ntovu village, in the District of Rakai, murdered Sgt. Senyange. The second count alleges that on the same day and same place, the 3 accused murdered Cpl. Bbale. All the 3 accused persons denied having been involved in the commission of the two offences.

Before I proceed to deal with the position of these three accused persons, there is a minor matter which attracted my attention and which I feel I should deal with at this stage of the judgment. That matter concerns the inclusion of Frasko Bwogi (A3) in this case. Although the indictment refers to him as one of the people indicted, the truth of the matter is that this man was never committed for trial and he did not appear in court during the hearing of this case. His name must therefore have been included in the indictment by mistake and it must be struck out from the case file, leaving the State free to have him tried later on separately if need be.

Not committed

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This judgment therefore, does not affect him.

Going back ~~to the real~~ issues at stake in this case, prosecution adduced evidence from 6 witnesses who included Dr. Kazibwe (PW1) who carried out post-mortem examination on the bodies of the two ~~deceased;~~ Sgt. Senyange and Cpl. Bbale; Misaki Musoke (PW2) who identified the body of Sgt. Senyange to Dr. Kazibwe, D/Cpl. Basigirenda (PW3) who visited the scene of crime and witnessed the post-mortem examination. He also drew the sketch plan of the scene of crime. The evidence of ~~the~~ above 3 witnesses was admitted under the provisions of section 64 of the T.I.D. The other witnesses testified personally in court and they inclused Haji Safiano Lubowa (PW4), who testified that he and the two deceased persons went to arrest (A3)(Frasko Bwogi) but as they were approaching him he ran towards the home of his father Yozefu Kizza (A1). They gave him a chase but when he saw them nearing his father's home, he told his father and Sentamu (A2) that "those are the ones". At that point the 3 of them i.e. A3, A1 and Sentamu (A2) started chasing them. They ran up to the home of Senoga (A4) where A1, A2 and A3 attacked them. A1 speared Bbale on the chin, below the chest and on the thigh. (A4)(Senoga) arrested him (Haji Safiano). Then A1 threatened that Sgt. Senyange and PW4 should also be killed. At that stage Haji Safiano managed to escape from Senoga and ran away. The following morning he went with Police to Senoga's home, where he found the dead body of Senyange at the very place where he had left him being held by A2 and Bwogi. The other witness was Lazaro Barindimbirako (PW5), who testified that on that particular night he answered an alarm which was being raised near the home of Senoga and his own home. At the scene he found the 3 accused persons and the dead body of Senyange. A1 told him that he had been attacked by robbers and he (A1) had killed one of them and he showed him the dead body and that he further told him the second one robber whom he had wounded had ran away with his wounds. He went and reported the matter to the Batongole chiefs with

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whom he went to the scene the following morning only to find the accused having ran away.

Finally the last prosecution witness was PW6 Justine Kirimuttu whose testimony was that on that particular night of 25th April, 1985 at about 8.00 p.m. Cpl. Bbale was brought to him by PW4 when he had been injured on the chin, below the chest and on the thigh. He took him to Kalisizo hospital for treatment and handed him over to Dr. Kazibwe but before he did that Bbale had complained to him that he had been speared by a man called Kizza at Ntovu village and he feared that his colleague Sgt. Senyange might not be alive by then as he had left him being tortured. The following day he heard that Cpl. Bbale had died and he attended his burial at Kasasa..

On their part the 3 accused persons generally denied having taken part in the killing of the two deceased. According to A1 on that day he had sold some coffee and at night robbers whom he could not identify attacked his home but he managed only to see one whom he injured and that when he got out of the house he found PW4 near the banana plantation struggling with a dog. When he raised an alarm A2 answered it and he found him with PW4. He (PW4) eventually escaped away from them. A2 says that on that particular night he answered an alarm and when he reached near Senoga's home he found there A1 who showed him a dead body of a man. He told him that he had been attacked by robbers. A4 testified that he had heard people struggling outside his house and that when he got out he found there (A1) and (PW4) who eventually ran away. At the scene there was a dead body. That they spent a night guarding the body until the following morning.

It is an established cardinal principle of our law that the duty of proving the guilt of an accused person beyond reasonable doubt lies upon prosecution throughout, that burden ....

does not shift to the accused person except in a few cases where the statute so provides: Woolmington v DPP (1935)AC 462, R v Obar s/o Nyarongo (1955)22 EACA 422, Manyara s/o Mulakandi v R (1955) 22 EACA 502 and Uganda v Peter Kato and 3 others (1976) HCB 204 at 208.

In a murder case like the present one, apart from proving that the accused in the dock in fact did participate in the murder of the deceased, prosecution must also prove beyond reasonable doubt the following 3 ingredients viz: that a human being was killed; that the killing was unlawful and that the killing was with malice aforethought as defined in section 186 of the Penal Code. (See provisions of section 183 of the Penal Code).

Since each accused is charged with the murder of two different human beings, I propose to deal with the above ingredients along with each count separately, starting with the first count. In this count the 3 accused are said to have murdered Seargent Senyange on 25/4/85 at Ntovu village. It must be said here that the evidence against the accused in respect of Senyange's death is circumstantial. I will come back to this sort of evidence later when considering the issue as to who killed Senyange. Regarding the issue as to whether Sgt. Senyange was killed, prosecution produced the evidence of Dr. Kazibwe (PW1) who examined his body, the evidence of Haji Safiano (PW4) who saw the dead body, that of Misaki Musoke (PW2) who identified the body to the doctor, that of PW6 Justine Kirimuttu who saw it being buried at Bakijulula village. I accept the evidence of these witnesses as being truthful on this point and I hold that a human being by the name of Seargent Senyange died. On the issue of whether Sgt. Senyange was unlawfully killed, prosecution relied on the evidence of Dr. Kazibwe whose evidence was to the effect that the deceased had died of cerbral heamorhage due to multiple skull fractures caused by sharp and blunt weapons as

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per Ex.PII. To my mind these weapons described by the doctor cannot be said to have been caused death lawfully. It is our law that in all homicide cases unless accidental cause of death is unlawful: R v Gusambizi Wesonga (1948)15 EACA 65. It is therefore my conclusion that the death of Senyange was caused by an act which was unlawful.

The next point to be considered is whether the killing of Senyange was with malice aforethought. It is trite law that prosecution can only succeed in a murder case where malice aforethought has been established: Lokoya v Uganda (1968)EA 332 at 334. In deciding whether malice aforethought has been established the court is guided by the surrounding circumstances in each case; such as the number of injuries inflicted, the part of body where such injuries are inflicted, the nature of weapon used in inflicting such injuries; the conduct of the accused before and after the act of causing death: R v Tubere (1945)12 EACA 63 and Uganda v Peter Kato (1976) HCB 204 at 208.

In this case, the evidence of the doctor and that of those who saw the dead body indicate that the deceased had several injuries on the head and according to Safiano the head appeared as if it had been crashed in an accident. Judging from the injuries and the part of the body; namely the head where the injuries were inflicted and considering the doctor's evidence that some of the weapons used were sharp, the only inference one can draw is that whoever caused the death of Senyange had intended to have him killed. It is my finding that prosecution has proved beyond reasonable doubt that Senyange was not only unlawfully killed but he was also killed with malice aforethought.

For the time being I leave count 1 and move to count No.2 which concerns the death of Cpl. Bbale. Here again prosecution based their case on the evidence of Dr. Kazibwe who carried

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out post-mortem examination on the body of Corporal Bbale at Kalisizo hospital and found penetrating wounds on the abdomen and chin as being the cause of Bbale's death; as per Ex.P1; that of Haji Safiano who witnessed Corporal Bbale being speared on the chin, below the chest and on the thigh and that of Kirimuttu who saw the wounds on Corporal Bbale. In his report the doctor did not speak of any wound on the thigh although he agreed with the other wounds described by Haji Safiano Lubowa and Justine Kirimuttu, I find that the omission by the doctor to mention the wound on the thigh did not go to the root of this case as there is abandant evidence that the deceased in fact was speared on the two valunarable parts of the body namely stomach (below the chest) and chin and those injuries were the sole cause of his death. I accept the evidence of these 3 witnesses (PW1 , PW4 and PW6) to be truthful to the extent of the injuries sustained by the deceased Corporal Bbale, as to the cause of his death. It is my finding that prosecution has proved beyond reasonable doubt that a person by the name of Corporal Bbale is dead and that his death was caused by an unlawful act of his being speared and that the nature of injuries and weapon used to inflict them on vital parts of the body suggest irresistably that those injuries were inflicted with malice aforethought.

Having resolved that both Sgt. Senyange and Corporal Bbale were killed unlawfully with malice aforethought, I must now turn to one pertinent question which is: Who killed the two policemen? In view of the fact that these two men died in related but rather different circumstances, it is convenient that the above question is answered separately in respect of each victim, which means I have to handle the cause of Senyange's death separately from that of Bbale. As stated earlier, the evidence connecting accused with the death of Senyange is circumstantial in a sense that nobody saw him being killed. The law is that court should be careful in basing such a conviction on circumstantial evidence.

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The law further says that before circumstantial evidence can be used to find a conviction, circumstantial evidence must be of such a nature so as to produce moral certainity to the exclusion of all reasonable doubt as to the guilt of the accused person. In other words, before the court can proceed to have a conviction based on circumstantial evidence it must be satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of any explanation upon any other reasonable hypo thesis than that of guilt: Uganda v John Kakooza and Fred Kayizi (1983) HCB 19, Musoke v R (1958)EA 715, Uganda v Leo Mubyazita and 2 others (1972) Uganda Law Reports Part 2 p. 31 and Uganda v Peter Kwamukaaga and 3 others Criminal Session Case No. 49/86 (unreported). In the case of: Teper v R (1952)AC 480 at 489 it was emphasised that before drawing any inference of guilt the court must be sure that there are no co-existing circumstances which would destroy or weaken the circumstantial evidence upon which prosecution bases its case.

In the case now under consideration the case for prosecution hinges on circumstantial evidence of PW4 (Haji Safiano Lubowa) who testified that on that fateful day he and the two deceased proceeded to the home of Bwogi (A3) to arrest him because he was unlawfully habouring another man's wife. On reaching near his home, Bwogi decided to ran away. When they followed him up to his father's home, his father (A1) and Sentamu (A2) started chasing them. A1 was armed with a stick and spear and A2 was armed with a stick. They chased them up to the home of Senoga (A4) and when they were there he (PW4) appealed to these villagers not to harm them because they were government people. On hearing that Senoga said, "this one is shouting too much, he should be arrested." There and then this witness was also put under arrest by Senoga. While still there A1 said of Sgt. Senyange "I have finished this one, (meaning Corporal Bbale who had been speared) let us kill this one also" meaning Senyange. At that time Bwogi (A3) (not in court) together with A2 were holding

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Senyange and it was at that time that this Haji managed to escape from Senoga by that time no harm had been done to Senyange.

The following morning when he (PW4) went to the scene he found Sgt. Senyange's body lying in the courtyard of Senoga and the accused were nowhere to be seen. The evidence of this witness (PW4) shows that the last people to be seen with Senyange when alive were the accused. The injuries found on the body of Senyange were quite consistent with the weapons which PW4 left A1 and A2 having in their possession. In his report (Ex.P2) the doctor (PW1) described the injuries as having been caused by sharp and blunt weapons, spears are generally sharp weapons while sticks are usually regarded as blunt weapons. By the time PW4 left Senoga's home the accused especially A1 and A2 were in a real violent mood.

The account given by accused persons as to what happened on that night cannot be true except their having seen PW4 and the dead body of Senyange whom they (accused) all claim not to know. A1's story that he was robbed on that night by unknown people is quite unbelievable if he had actually been robed he would have reported the matter to the police or local chiefs instead of reporting himself to the Magistrate at Masaka some 5 days later. The reason given by him as to why he did not report to the local chiefs or police is not convincing. The story told by A2 and A4 as to how they came to know the presence of the dead body at Senoga's home is, to say the least, a pack of lies. In the same way, I do not believe the accused's version as to why they ran away from their village on the night Senyange met his death. The defence counsel's submission that if the accused had taken part in the killing of Senyange they would not have spent a night guarding the dead body is destroyed by the conduct of the accused who left the scene before anybody in authority had arrived at the scene to take charge of the body. The practice in this country seems of a person who is suspected to have been murdered be that people who guard a dead body do not leave the scene until

releaved by another group or by those in authority, but in this case the accused were neither relegved nor released by those in authority.

Another point which I would like to deal with at this point is that concerning identification of the people whom Haji Safiano Lubowa left in company of the deceased Senyange. The accused themselves testified that on that night, they in fact saw Haji Safiano Lubowa although according to their story they met him in circumstances different from those described by Lubowa himself; it is therefore not seriously disputed as to the identification of the people whom Lubowa saw with Senyange. There is evidence from both sides that this man Lubowa had been working in that area as a Muluka chief for a period of over 20 years and all these people were known to him all that time. This witness (PW4) on that evening stayed for quite sometime trying to argue with the accused to spare their lives. I also take his story that it was not yet very dark to be truthful. In all these circumstances I hold that there was no mistaken of identity as the conditions favouring correct identification were present. I also accept Lubowa's story as to the circumstances in which he saw these people to be correct.

All the accused agreed that Lubowa is an honest man, therefore I don't see any point why he should have come in court to create a false story about the accused.

The other point to consider is that dealing with common intention. It is the law of this country that where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in prosecution of such a purpose an offence is committed of such a nature that its commission was probable consequence of the prosecution of such a purpose, each of them is deemed to have committed that offence. (S.22 of P.C.).

In the present case PW4 and the late Senyange went to prosecute a lawful purpose of arresting Bwogi (A3) but while they

were in the process of carrying out their lawful duty A1, A2 and A3 (not in court) decided to resist that lawful arrest and they started chasing them away. The act of holding Senyange was an unlawful act of preventing him from doing his lawful duty, therefore, the subsequent beating and killing of that Sergeant was in furtherence of unlawful purpose which the accused had set upon themselves to carry out. The question however, arises as to whether A4 (Senoga) shared the same common purpose with these other accused. The law as stated in the case of: R v Tabulayenka s/o Kirya and others (1943)10 EACA 51 is that a common intention to be formed does not necessarily require the entering into an agreement before the incident. Common intention may be inferred from the presence, the actions and the omission of any of them to dis-associate himself from the acts of the others. Although it is also the law that mere presence at the scene of crime is not enough to create a common intention, in the present case A4 was not merely an innocent observer at the scene of crime, but he actively participated when he held up PW4 apparently to incapacitate him from assisting the Sergeant in escaping from those violent men. He did not merely say the words, "this one is shouting too much, he also should be arrested," but he went ahead and effected his words by arresting PW4 thus sharing a common intention with the others who were holding Senyange. In the case of: R v Enoka Achira and others (1941) EACA 63 a similar situation arose. It was held that where an accused identifies himself with the acts of others he too must be responsible for their acts.

In all these circumstances I find that the prosecution has adduced sufficient circumstantial evidence irresistably showing that the 3 accused persons in the dock were properly identified by PW4 and that they had common intention and that they were responsible for the death of Sgt. Senyange and they are all criminally liable for his death.

That leads me to count 2 relating to the people who may be held responsible for the death of Cpl. Bbale. Prosecution

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greatly depended on the evidence of PW4 Haji Safiano Lubowa in establishing as to who killed Corporal Bbale. The detailed evidence of this witness has already been given out in this judgment but it is important to state here that this witness testified that Corporal Bbale was speared 3 times by A1 while at the home of Senoga in the presence of all the 3 accused persons and that he saw him doing so; this happened after Corporal Bbale had been chased up to that home by A1, A2 and A3 (not in court). For reasons already stated elsewhere in this judgment and on the authority of the cases of: Franswa Kiiza v Uganda (1983) HCB 12 and Uganda v Kakooza (1984) HCB 1, I hold that PW4 clearly identified A1, as a person who speared the Corporal in the presence of the other accused. A1's story that he injured an unknown robber while in his house is a lie, the alleged robber must be Corporal Bbale whom he (A1) speared while at the home of Senoga in circumstances described by PW4. Kiiza (A1) also boasted to PW5 that he (A1) had wounded a robber who had run away with his wounds, this so called robber was in fact Corporal Bbale, in view of the evidence available. Another piece of evidence relied upon by prosecution is the dying declaration made by Corporal Bbale to Kirimuttu (PW6) to the effect that he had been speared by Kiiza of Ntowu village. The law dealing with evidence of a dying declaration as stated in the cases of: Pius Jasunga s/o Akumu v R (1954)21 EACA 331, John Robert Eilu v Uganda (1973)1 ULR 11 and Uganda v Benedicto Kibwami alias Ben (1972)2 ULR 28 is that as matter of practice such evidence should be corroborated. In the present case such corroboration can easily be found in the evidence of: PW1 (Dr. Kazibwe), PW4 (Haji Safiano Lubowa) and PW5 (Lazaro) which I have found to be truthful. Although PW1's evidence did not tally with that of PW4 and PW6 as to the number of wounds that in itself did not affect credibility of these witnesses as I have already explained in this judgment as to the effect of this contradiction. There was also a contradiction between the evidence of PW4 and PW6 in respect of what happened after Corporal

Bbale had been injured, according to PW4 the last time he had seen Bbale was at the home of Senoga when he was crawling away after he had been speared but according to PW6 he (PW4) in fact took Bbale to the county headquarters. I consider this contradiction minor considering the fact that these things happened more than 4 years ago and the fact that the issue of Bbale having been taken to the county headquarter is not disputed.

Next point to be considered is the question of whether the other accused persons, i.e. A2 and A4 also participated in the killing of this Corporal. I have already examined the law relating to common intention. According to the evidence on record, A1 and A2 chased the deceased Bbale up to Senoga's home. A1 was armed with a spear and stick and A2 was armed with a stick. Although A2 did not take part in the spearing of the deceased but on the authority of the case of: R v Mikaili Kyeyune and others (1941)8 EACA 84 and R v Clement Maganga s/o Ochu and another (1943)10 EACA 49 A2 had the same common intention of beating up the deceased right from the home of A1. It is immaterial that he did not use his stick to hit the deceased. As regards to A4, there is no clear evidence to indicate that role he played when Corporal Bbale was being speared. Since this was done immediately these people arrived, at his home, it is doubtful whether at that stage, he had already formed an intention to join the 2 accused persons. Considering all these facts, I find that the death of Corporal Bbale was directly caused by the injuries conflicted upon him by A1's spear and that A2 shared that same common intention of killing this man, but it would be dangerous to hold the same view in respect of A4 for this count 2.

In view of the above authorities quoted and Before I finally bring this matter to final conclusion I find it necessary to consider the defences which might be available to the accused. Those are the defences of self-defence, defence of property, provocation and alibi.

I have carefully considered each of these defences in the light of the available evidence on record and I find that none of them is applicable to the present case.

Upon considering all the evidence generally as adduced by both sides and the submissions made on behalf of prosecution and defence and in full agreement with the opinion of the two gentlemen assessors, I am satisfied beyond reasonable doubt that all the 3 accused persons now before the court did in fact murder the late Sgt. Senyange and that A1 and A2 also murdered Cpl. Bbale.

I accordingly find all the 3 accused persons guilty of murder in Count 1 and A1 and A2 guilty of murder in Count 2. I accordingly do convict them as charged. But I do find A4 not guilty in respect of Count 2 and I do acquit him in respect of that count.

C.M. KATO
JUDGE.
19/12/89.