Hon. Mr. Ag. Justice Tsekooko

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HOLDEN AT MASAKA

CRIMINAL SESSION CASE NO. 74 OF 1989
(Original Crim. Case No.MMA.440/87 of the Chief Magistrate's Court of Masaka).

1. Reducing murder to manslaughter
2. Malice aforethought
3. Circumstantial evidence

UGANDA ..... PROSECUTOR

v e r s u s

A1. BUMBAKALI LUTWAMA
A2. MUSA NYAMAYALWO
A3. JUMA NNUME ..... ACCUSED
A4. ABUDU MUWONGE
A5. AHAMADA LUBEGA

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

J U D G M E N T.

The five accused persons Bumbakali Lutwama (A1), Musa Nyamayalwo (A2), Juma Nnume (A3), Abudu Muwonge (A4) and Ahamada Lubega (A5), hereinafter to be referred to as A1, A2, A3, A4 and A5 respectively, are each indicted for murder contrary to the provisions of section 183 of the Penal Code. All the five accused pleaded not guilty to the indictment.

The indictment alleges that on the night of 9/3/80 at Butale village in the District of Masaka the five accused persons and others still at large murdered one Byaruhanga.

In an effort to prove their case, prosecution called a total of 7 witnesses. Among the witnesses there was Paulo Basemulenzi (PW1) who told the court that he was present on the night the five accused took away Byaruhanga from his home when his hands had been tied behind later on he heard that Byaruhanga had died. The next person to give evidence on behalf of prosecution was Dr. John Lule (PW2) who testified that on 12/3/80 he examined the body of Byaruhanga at Masaka hospital, the body was identified to him by one Livingstone Baweze (PW3) and that he found two cut wounds on the body one wound was on the neck and another was on the head. The third witness was

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Livingstone Baweze (PW3) who informed the court that he went to see the dead body of Byaruhanga after receiving the news of his death. That he observed 3 cut wounds on the body, one wound was on the neck, one was on the head and another one was on the ribs. The other witness called by prosecution was Manisuru Lubowa (PW4) who stated that he answered an alarm which was being raised at the home of the late Byaruhanga where he found the 5 accused persons hitting Byaruhanga's house, when Byaruhanga came out the accused tied his hands behind and took him away in company of 2 other people Twahili and Husaini who did not appear in court. Later on he heard of deceased's death. Emmanuel Mbazira (PW5) testified that on 10/3/80 he received the news of Byaruhanga's death when he was with PW3 attending a meeting at the sub-county headquarters from there he went with PW3 to the home of A1 whom he (PW5) was ordered by PW3 to escort to the sub-county headquarters which he did. The evidence of Joseph Banadda (PW6) was to the effect that on 11/3/80 he visited the scene of crime at Butale village where he found the dead body of one Byaruhanga which had several cut wounds. The body was identified to him by A1 (Bumbakali Lutwama). The hands and legs of the body were tied. He collected the body and took it to Masaka hospital where it was examined the following day in his absence. Finally the evidence of No.927 D/Sgt. Olima Zakaria (PW7) was simply that on 16/10/87 he arrested A5 at his home.

Each of the five accused persons decided to give his defence on oath. A1 testified that on 11/3/80 his Muluka chief (PW3) informed him of the death of Byaruhanga and told him to go and report the matter to the police which he did after reporting to the sub-county chief. He went with 2 policemen to the scene and the body was taken to Masaka hospital. In 1987 he was arrested when he had been summoned to the sub-county headquarters. He denied knowledge of Byaruhanga's death and he told court that the witnesses who said that they had seen

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him at Byaruhanga's home had told lies because of personal grudges which he has with them. A2 testified that he knew nothing in connection with Byaruhanga's death, he heard about it from A1 who had been to the police to report it. He (A2) was arrested in 1987 and that Basemulenzi testifed against him because they have some differences among themselves over land. A3 also denied having any knowledge as to how Byaruhanga met his death he learnt of his death from A1, when he was going to see the dead body he was told that it had been taken to Masaka police. In 1987 he was arrested by his Mutongole Chief called, Nsobya who took him to the sub-county headquarters from there he was taken to Masaka police and then to prison. A4 told the court that he did not know Byaruhanga although he heard of the death of a man by that name and he did not know the circumstances under which he met his death. He denied having been to the home of Byaruhanga on the night of 9/3/80. A5 also told the court that he did not know Byaruhanga but he got news of the death of a person by that name in 1987 while at Nyendo and when he went to see A1, A2 and A3 at the police station he was arrested. He denied having taken part in the taking away of Byaruhanga from his home.

It is an established principle of our law that it is the duty of prosecution to prove the guilt of any accused beyond reasonable doubt: Woolmington v DPP (1935)AC 462, and Okech Okale v Republic (1965) EACA 555 at page 559. In a murder case like the one now under consideration, prosecution must prove, inter alia, that a human being was killed, that the killing was unlawful and was with malice aforethought: Section 183 of the Penal Code. It (prosecution) must also prove that the accused participated in the commission of the offence with which he is charged.

I propose to deal with the above ingredients one after the other in the order in which they appear above, starting with

the first ingredient. The evidence adduced by prosecution to prove that Byaruhanga died is contained in the testimony of: Dr. Lule (PW2), Livingstone Baweze (PW3) and that of Joseph Banadda (PW6). The evidence of these witnesses which has already been outlined in this judgment was not so consistent in a number of aspects. In his evidence Baweze said that he identified the body of Byaruhanga to the doctor who visited the scene but Dr. Lule denied having examined the body at the scene but at Masaka hospital. The Doctor says that the body was identified to him by Livingstone Baweze (PW3) but Baweze says that he did not go to Masaka hospital to identify the body to the doctor. Banadda (PW6) also denies having identified the body to the doctor at Masaka hospital, all that he knew is that on 11/3/80 he delivered a dead body of Byaruhanga to Masaka mortuary. Judging from that confusion it would be quite risky to say conclusively that the body which the doctor examined on 12/3/80 at Masaka hospital was that of Byaruhanga as the possibility of there having been some other bodies in the mortuary cannot be ruled out. It is true that the form filed in by the doctor bears the name of Livingstone Baweze as the person who identified the body to the doctor but Baweze has denied that fact, his name on that form Ex.P1 was written in entirely different ink from that used in writing other information which implies that Baweze's name might have been written at a different time and place from that when and where the doctor examined the body. Since both Banadda (PW6) and Baweze (PW3) never identified the body to the doctor and there is no suggestion that it was ever identified to him by any other person or that the doctor himself knew Byaruhanga before his death, the doctor's evidence regarding the identity of the person whose body he examined is worthless as far as prosecution is concerned, but that in itself does not mean there is no other evidence to prove the death of Byaruhanga.

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It is now an accepted principle of the law that death of a person can be established even without medical evidence if there is some other evidence showing that the victim of murder in fact died: Kimeri v Republic (1968)EA 115 and Uganda v Yosefu Nyabenda (1972)2 ULR 19, Republic v Cheya and another (1973)EA 500 at 502. In the instant case there is the evidence of Baweze, Banadda and that of Bumbakali Lutwama (A1) who were quite emphatic that they saw the dead body of Byaruhanga; I have no reason to doubt the evidence of these people on this point. I hold that a human being by the name of Byaruhanga is dead; with all due respect to the defence counsel Mr. Matovu, I do not share his view that Byaruhanga might be still alive. This case must be distinguished from the case of: R v Sirasi Bachumira (1936)3 EACA 40 on this point in that in the case now under consideration there is no doubt from the evidence on record that the body found at the scene was not that of Byaruhanga, but in Bachumira's case (supra) the deceased died in hospital 7 days after he had been stabbed and no witness was called to show that the person who died in the hospital was the same as that who was seen being stabbed 7 days before.

The next issue to be considered is that of whether the death of Byaruhanga was caused by an act or omission which was unlawful. According to the evidence of PW3 and PW6 the body of Byaruhanga had some cut wounds. The two witnesses, however, disagreed as to the number of injuries: according to PW3 the wounds were 3 but according to PW6 the cut wounds were several. I, with due respect, agree with Mr. Charles Ogwal Olwa the counsel for prosecution when he submitted that the number of wounds seen by each witness should not affect the substance of their evidence, what is important here is that the witnesses saw cut wounds on the body; the nature and number of wounds may however be material in deciding whether or not there was malice aforethought but at this stage that is not a matter for consideration I will come to it later in this judgement.

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I accept the evidence of PW3 and PW6 that they saw cut wounds on the body of Byaruhanga to be truthful; in the absence of any evidence showing that Byaruhanga died of some other causes different from those cut wounds it is reasonable to draw an inference that he died of the cut wounds. In the case of: R v Gusambizi Wesonga (1948)15 EACA 65 it was held that homicide unless accidental is always unlawful except when committed in circumstances making it excusable. In the instant case there is nothing on record suggesting that Byaruhanga's death was caused accidentally or in circumstances making it excusable. In these circumstances I find that Byaruhanga's death was unlawful.

Having resolved that Byaruhanga is dead and that his death was as a result of an act which was unlawful, I must proceed to decide whether his killer or killers had malice aforethought within the meaning of section 186 of the Penal Code. It is trite law that prosecution cannot obtain a satisfactory conviction without first proving beyond reasonable doubt the existence of malice aforethought: Lokoya v Uganda (1968)EA 332 at 334. In deciding whether or not malice aforethought has been established by prosecution the court takes into account the surrounding circumstances of the case; matters such as number of injuries inflicted, nature of injuries, part of the body where inflicted, weapons used, and conduct of the accused before or after the attack must be considered: R v Tubere s/o Ochen (1945)12 EACA 63 and Uganda v Peter Kato and 3 others (1976) HCB 204 at 208. Where prosecution has failed to prove malice aforethought court cannot convict for murder but where there is evidence that there was unlawful killing of a person a conviction for manslaughter may be sustained: Lokoya v Uganda (1968)EA 332 at 334, R v Joseph s/o Byarushengo and another (1946)13 EACA 187 and R v Kibia arap Serem (1940)7 EACA 73.

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In the case before me now prosecution relied on the evidence of PW1, PW2, PW3, PW4 and PW6 to establish that the killer or killers of Byaruhanga had malice aforethought. PW1 (Basemulenzi) and PW4 (Lubowa) told the court that those who took away the deceased were armed with pangas (big knives) and sticks. PW2 (Dr. Lule) testified that when he examined the body which he found at the mortuary he found there two cut wounds: one on the neck and one on the head, as stated earlier in this judgment the evidence of this doctor cannot be regarded helpful to the prosecution as nobody identified to him the body which he examined as that of Byaruhanga. PW3 (Livingstone Baweze) gave evidence that he had seen three cut wounds on the body of the deceased one was on the head, another was on the neck and one was on the ribs. The evidence of PW6 (Joseph Banadda) was that he had seen several cut wounds on the body of the late Byaruhanga.

Mr. Matovu who appeared for all the five accused persons attacked the evidence of these witnesses severely on a number of grounds. He had much to say about the evidence of the doctor which I have already rejected as worthless for prosecution. He tried to discredit the evidence of PW3 and that of PW6 for contradictions. Mr. Ogwal-Olwa the counsel for prosecution conceded that there were some contradictions as to the injuries observed by the two witnesses but he felt that the contradictions were minor and he requested the court to ignore them. he cited the case of: Alfred Tajar v Uganda EACA Crim. Appeal No.167/69 as his authority. The law as stated in the above case and the cases of: Uganda v Salvatori Ayo and 9 others Criminal case No.119/83 (unreported), and Uganda v George William Kigundu (1978) HCB 281 at 282 is that where there are discrepancies in the evidence as adduced by prosecution such discrepancies should be resolved in favour of the accused if they go to the root of the case and they are deliberately made to mislead the court; but where they (discrepancies) are minor

and can be explained away they should be ignored. In this present case, it is true that the two witnesses who testified as to the injuries which they saw did not agree on the number of injuries. Considering the fact that these things happened about 10 years ago this sort of contradiction is expected, it must also be borne in mind that PW3 was a Muluka chief whose attention must have been mainly attracted by the big wounds but PW6 being a trained policeman, assuming he is, who had gone to the scene of crime must have been concerned with some minor details which an ordinary person might have taken as negligible, as it was rightly pointed out by Mr. Matovu in his submission this policeman might also have refreshed his mind by looking at his record before coming to the court and since the greater must include the lesser the description by PW6 of the cut wounds being several does not exclude the 3 wounds seen by PW3. In these circumstances I treat the contradictions in the evidence of these witnesses regarding the number of injuries as minor. The two witnesses also did not agree on the position in which they found the body of Byaruhanga. According to PW6 the body had its hands and legs tied but according to PW3 only hands were tied. For the reasons which I have just given above I find this discrepancy between the two witnesses understandable. Regarding the evidence of PW1 and PW4 that some of the people who took the deceased away were armed with pangas, I would say that the cut wounds seen on the body are not conclusive evidence that such wounds were inflicted by pangas or some other weapons which can be used for cutting, it would be unsafe to come to the conclusion that the injuries were solely caused by pangas in the absence of any eye witness or doctor's evidence.

Reviewing the evidence generally and in view of the available authorities I am inclined to say that prosecution has not sufficiently adduced evidence to lead to a definite conclusion that Byaruhanga was killed with malice afore-thought.

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That finding leads me to the issue of who killed Byaruhanga. The prosecution is adamant that it was the five accused persons and others not in court who killed him, but the five accused say that they had no hand in the death of that man. It must be said from the start that the evidence against all the accused is circumstantial in nature in a sense that nobody saw the accused persons or any of them killing the deceased; related to this circumstantial evidence is the issue of the evidence of identification of the accused persons by PW1 and PW4. Both counsel addressed the court at length on both issues.

The law relating to circumstantial evidence simply and briefly stated is that: where the case for prosecution depends exclusively on circumstantial evidence, as the present one, before a conviction can be obtained the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt and there must be no other co-existing circumstances which may weaken or destroy the inference of guilt: Musoke v R (1958) EA 715, Uganda v John Kakooza and Fred Kayizi (1983) HCB 19 at 20, and Lejzor Teper v R (1952)AC 480 at 489. In the present case the circumstantial evidence upon which prosecution case rests, is contained in the testimony of Paulo Basemulenzi (PW1), that of Mansuru Lubowa (PW4) and to some extent that of Livingstone Baweze (PW3) and Joseph Banadda (PW6). The essense of the evidence of PW1 and PW4 is that on the night Byaruhanga met his death, they answered an alarm which was being raised at his home. On reaching the home of the deceased they found the five accused persons and others not in court (according to PW4 they include Twahiri and Husaini) hitting the deceased's house with pieces of bricks, by then Byaruhanga was still inside the house from where he was raising an alarm but eventually he was brought out (it is not clear as to who exactly brought him out).

When he came out he was tied by the accused persons with hands behind. He was then taken away from his home by the accused persons (according to PW4 Twahili and Husaini were in the group of the accused when the deceased was being taken away) on the allegation that he had attacked A2 and A1 and that he was to be taken to the Muluka chief (PW3) but they never took him there instead the following morning his dead body was found lying somewhere in the bush. PW3 and PW6 saw the dead body. In short the evidence of these witnesses points to the accused persons as being the last people seen with the deceased while alive.

Mr. Matovu attacked the above evidence vigorously for a number of reasons. His first point of contention was that even if the accused persons were the last to be seen with the deceased still that in itself did not prove prima facie case against them in the absence of any motive, he cited the case of: Uganda v John Mudoga (1972) HCB 170 in support of his argument. Mr. Ogwal-Olwa on this point submitted that by provisions of section 9(3) of the Penal Code prosecution need not prove motive. I quite agree with Mr. Olwa's contention; even if prosecution was required to prove motive, in this particular case the evidence of PW1 and PW4 had sufficiently proved such a motive because these two witnesses testified that when they answered the alarm A1 told them that the deceased had attacked A1 and A2 at their homes and that they had chased him up to his home which clearly shows that they wanted to avenge or to punish the deceased for his attack and trespass: R v Okech s/o Ololia (1940)7 EACA 74.

Another reason why the defence counsel thought that the evidence of PW1 and PW4 should not be believed is that, the evidence of PW1 was not consistent with what he told the police in his police statement. I agree with the learned defence counsel to the extent that the evidence as given in court by PW1 does not tally with what he told the police in his statement

in some respects. It must be remembered that these things happened in 1980 (about 10 years ago) and the witness made his statements to the police in late 1987 and he testified in late 1989, it is only natural that he cannot be 100% accurate regarding details of the events, allowance must be given to the human errors with such passage of time. In the case of: Uganda v Joseph Lote (1978) HCB 269 it was held that what a witness tells the police is not evidence because it is not said on oath but what he states in court should be taken to be the truth as it is stated on oath. I take that to be the correct proposition of the law with one qualification that where the witness tells a totally different story from what he told the police then the court has to consider whether his story in court is about the same events which he told the police about. It is also the law that in determining credibility of a witness such inconsistencies should be taken into account. In this particular case I find that the differences appearing in PW1's statement to the police and what he told the court did not affect his credibility for the reason which I have just given above, at any rate his police statement was only tendered in court for identification but was never tendered as an exhibit by the policeman who recorded it.

Mr. Matovu also attacked the evidence of PW1 and PW4 on the ground that the two witnesses differed as to how many people who answered the alarm. I consider this attack as being too far fetched because these witnesses said in their evidence that there were many people present therefore failure by one of the witnesses to mention the same people as those mentioned by the other witnesses cannot be taken to be so fatal to the case for prosecution, what is important is whether these two witnesses were at the home of Byaruhanga on that night and saw the accused persons. I hold that they were there, but as to whether they saw the accused persons there, that is a matter I shall deal with later on in this judgment when considering the issue of identification.

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There was also evidence of PW3 and PW5 which was subject of defence counsel's complaint in respect of contradictions. The learned counsel complained that the two witnesses contradicted themselves as to where they went first upon receiving the report concerning the death of Byaruhanga. According to PW3 they went to where the dead body was, then from there to Al's home but according to PW5 they went directly to Al's home from the sub-county headquarters. In my opinion this contradiction is irrelevant to the real issues involved in this case. The question of where the two chiefs went after getting the report has no bearing on the death of Byaruhanga because by the time the two witnesses got the report Byaruhanga was already dead so what they did cannot explain the circumstances in which the deceased met his death. On the authorities already stated regarding contradictions, I find this particular contradiction very minor and it must be ignored.

I feel I have said enough about contradictions appearing in the evidence as advanced by prosecution, I must now turn to the question of whether the two witnesses: (PW1 and PW4) saw the accused persons at the home of Byaruhanga. It is the case for prosecution that there were conditions favouring correct identification of the accused by PW1 and PW4, the learned counsel for prosecution relied on the case of: Franswa Kiiza v Uganda (1983) HCB 12. On the other hand the defence contended that the two witnesses could not have properly identified the people whom they saw on that night because the moonlight was feeble and people were moving to and fro. The learned defence counsel also submitted that the witnesses were not able to tell the court who among the accused was doing what on that night and that if they had identified the people whom they saw there was no reason why they did not report the matter until 1987, Mr. Matovu further argued that the evidence of these witnesses that they identified the accused by their voices should be treated as unreliable as there was no evidence that those people whom the witnesses

saw ever spoke, on this point he based some reliance on the case of:Uganda v Yosefu Lukwago (1972) HCB 167. Like most of the cases quoted by this learned counsel for the year 1972 HCB, I was unable to get the copy of this case from the poorly stocked and manned High Court Library; although Mr. Matovu himself had promised, while in court, to pass to me copies of those caseshe never did so.

I do not intend to reproduce the evidence of PW1 and PW4 here as that evidence has already been outlined in this judgment but I will refer to those aspects relevant to the issues raised by the advocates in the course of their arguments in respect of the issue of identification. In his argument Mr. Matovu pointed out that there was a feeble moonlight so that the witnesses could not have identified the accused and that there could be no identification by voices of the accused. These two arguments could have only been valid if the witnesses had not known the accused persons before. In this case the witnesses knew the accused long before the incident; the compound was so small that these people were close together, according to the evidence of PW1 these people were about 5 yards from where he was, Al spoke to both witnesses as to why he and his group had decided to attack Byaruhanga. According to PW4 the accused stayed with them for nearly 15 minutes before they took away the deceased. The witnesses must have been well composed as this was not a case of hit and run. Mr. Matovu's argument that the witnesses could not have identified the accused because people were moving up and down cannot be sustained in view of the evidence available, these people were not strangers to the accused nor did they appear to be in any hurry. Mr. Matovu's contention that if the witnesses saw the accused on that night they would have been able to tell the court who did what, is totally destroyed by the evidence on record. As I have already said somewhere in this judgment, these things happened 10 years ago so witnesses cannot be expected to remember each and every detail of what

they saw on that night. Be that as it may, PW1 in his evidence told the court that A1 and A2 were holding pangas while the others had bricks; PW4 told the court that some of these people had pangas and sticks although he could not remember exactly who had what but he could remember that A1 is the one who ordered that the deceased should be tied. This witness (PW4) pleaded with A1 that the deceased should not be taken to the Muluka and that the matter should be settled the following morning but A1 proceeded to have the deceased tied and taken away.

On the issue of failure by the witnesses to report the incident to the police until 1987, Mr. Matovu felt that the reason was because the witnesses had not identified the attackers of Byaruhanga. The two witnesses while under cross-examination gave reasons as to why they never made statements to the police until 1987, their reason was simply that nobody had asked them to do so until 1987. PW3 in fact testified that he had reported the matter to the police and his evidence is supported by that of A1; after the matter had been reported to the police it was the duty of the police to follow it up. It is not true to say that the witnesses did not report the matter to the police because they did not identify the people whom they saw at Byaruhanga's home. The allegation byMr. Matovu that witnesses who testified for prosecution had been paid for by one Sentongo to tell lies in court was baseless because when the court requested Mr. Matovu to mention at least one witness who had been paid and how much had been paid to that witness he (Mr. Matovu) failed to do so.

Considering the fact that the accused were known to the prosecution witnesses (PW1 and PW4) before the incident, that there was moonlight, that accused remained at the scene with the witnesses for nearly 15 minutes, that the accused and the witnesses were close to each other and the fact that PW4 did not only mention the five accused as the persons he saw but he also mentioned Twahili and Husaini as being among the people whom

he saw taking Byaruhanga away, I hold that there were conditions favouring correct identification of the accused persons by the two prosecution witnesses (PW1 and PW4). In coming to this conclusion I have been greatly assisted by the decisions in the cases of: Franswa Kiiza v Uganda (1983) HCB 12 at 13, Uganda v Firimigio Kakooza (1984) HCB 1 at 2 Okech Okale v R (1965)EA 555 at 558 and Abdu Lubowa v Uganda (1975) HCB 304. The allegation of grudges between the two witnesses and some of the accused persons did not sound so serious so as to have prompted these witnesses to tell lies against the accused persons. The above finding also disposes of the defence of alibi which, although not pleaded, could have been available to the accused if prosecution had failed to prove that the accused were at the home of Byaruhanga on that particular night.

I must turn to the question of common intention. The law dealing with common intention of parties in criminal matters is contained in section 22 of the penal code, under that law where two or more persons form a common intention to prosecute an unlawful enterprise, an act or omission by one of them is deemed to have been done or omitted by them all. In the case of: R v Tabulayenka (1943)10 EACA 51 it was held that it is not necessary for the accused to have had any concerted agreement between themselves before the attack on their victim, but their intention may be inferred from their presence, their actions or omissions and failure to disassociate themselves from the attack. In this case prosecution called the evidence of PW1 and PW4 who found all the five accused with other people hiting the house of the deceased with bricks, when the deceased came out the other people disappeared but the 5 accused together with Twahili and Husaini (both of these two were not in court) proceeded to tie the deceased and took him away purportedly to the Muluka chief. The learned counsel for prosecution maintained that prosecution had established common intention among the accused persons and other people, but Mr. Matovu the

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defence counsel was of the opposite view. According to Mr. Matovu's argument there was nothing wrong in taking away the deceased from his home by those who had answered his alarm with the view of taking him to the authorities and that tying his hands was a common feature in our society. I accept the evidence of prosecution witnesses that they found the accused hitting deceased's house with bricks to be true. Attacking a person's house at night (these things happened at about 11.00 p.m. according to the evidence of PW1 and PW4) is a serious matter in the absence of any clear explanation. Al's explanation, that the deceased had attacked them first and that they had given hot pursuit cannot be accepted as a good reason, at any rate that explanation was not admitted in court by defence, although I am sure that is what Al told PW1 and PW4 when they found him at the scene and asked him as to what was happening. According to the evidence of PW4 the accused tried to beat up the deceased but they were stopped. There was no justification in the accused having to attack the deceased's home at that hour of the night and having his hands tied when he was being escorted by a group of 7 men some of whom were armed with pangas (according to PW4 apart from the 5 people in court Twahili and Husaini also were in company of those who took the deceased away). In my considered opinion the accused persons had a common unlawful intention of causing some harm to the deceased or his house. Mr. Matovu's assertion that there was no evidence as to how these people who were living apart came to meet and agreed to attack the deceased, is legally unsound in view of the decision in Tabulayenka's case (supra). Unlike the other members of the group who went away the moment Byaruhanga came out of his house, the accused proceeded to tie him up thus clearly associating themselves with the illegal act of malicious damage to his house which had been taking place before he came out. The accused also had a common intention of committing criminal trespass at the house of the deceased.

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The position would have been different if these people had gone there to answer an alarm. The accused's denial of any involvement in this matter cannot be accepted as truthful.I have failed to discover any reasonable reason as to why PW1 and PW4 should have come to this court to tell lies against each of them.

Having found that the accused were properly identified and that they had common unlawful intention, one more question arises and that is: who among the five accused truck the vital blow that caused the death of the deceased. Although it is clear that Byaruhanga died as a result of the injuries inflicted upon him it is not clear as to which of the injuries was the cause of his death, in the same way it is not known as to who among the five accused was responsible for that injury since nobody was present when the injuries were being inflicted. In a situation like this it would be quite unsafe to convict the accused of murder: Uganda v Leo Mubyazita and 2 others (1972)11 ULR 3.

After carefully considering all the evidence adduced in court and the submissions of the learned counsel, I am satisfied beyond reasonable doubt that the circumstantial evidence available conclusively shows that the five accused persons did in fact unlawfully kill the deceased Byaruhanga, there have been no co-existing facts to destroy or weaken that evidence. In the absence of medical evidence (Doctor's evidence having been discarded) and in view of the fact that nobody knows which blow was responsible for deceased's death and in view of the fact that prosecution failed to establish malice aforethought, I find all the accused not guilty of murder and I do acquit them of that offence, but I find each of them guilty of manslaughter contrary to section 182 of the Penal Code and I do convict each of them of that offence: Lukoya v Uganda (1968)EA 334, R v Joseph Byarushengo (1946)13 EACA 187, Uganda v Mubyazita (supra), R v Kibia arap Serem (194[illegible] 7 EACA followed. This case must be distinguished from that of: Uganda v B Sali (1972)1 ULR where the facts were almost the same as the present

case and accused was convicted of murder, in that case the accused admitted having murdered the deceased and the accused was only one so the question of who inflicted the vital blow did not arise.

One gentleman assessor advised me to acquit all the accused while one advised me to convict them of murder. I have disagreed with both of them. I disagree with the one who advised me to acquit (Mr. Bbale) because he did not seem to have seriously addressed his mind to the evidence before court; I disagree with the one who advised me to convict (Mr. Kalibala) because he did not direct his mind properly on the issue of malice aforethought.

C.M. KATO
JUDGE.
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