THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

CRIMINAL SESSION CASE NO.15/91

(ORIGINAL MJ.658/88)

Murder

UGANDA::PROSECUTOR

VERSUS

A.1. ERIZEFANI KASAKYA)
A.2. DAUSON JOHN BAGEYA):::::::::::::::::::::::::ACCUSED

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

J U D G M E N T

The two accused persons Erizefani Kasakya (A1) and Dauson John Bageya (A2), whom I shall hereinafter refer to as A1 and A2 respectively, are jointly charged with two offences. In Ct.1 they are indicted for murder contrary to Section 183 of the Penal Code. In Ct.2 they are indicted for aggravated robbery contrary to sections 272 and 273(2) of the Penal Code. In the first count the indictment alleges that on or about the 19th of March, 1988 at Mugeri village in the District of Iganga, the two of them murdered one Mrs. Tirutangwa Dauda. In the second count the indictment alleges that the two of them on the same day and at the same place robbed Juma Munulo of a pair of shoes, a small bag containing books, a Hero bicycle, a pressure lamp and other household properties. In the same indictment, it is alleged that the two accused immediately before or immediately after the time of the robbery used a gun upon the person of Juma Munulo. Both accused pleaded not guilty to the two counts.

The case for prosecution is materially that on that night of 19th March, 1988 at about 11.00 p.m. the Munulo family had finished their supper and had dispersed to their different sleeping places. Before they went to their beds to sleep, an attack was launched upon the family by the two accused persons in Court now and other people still at large. During the attack one Sauti Nangobi the wife of Dauda Tirutangwa PW4 was shot dead and a number of household articles as indicated in the indctment were carried away.

In the same process Mr. Munulo PW2 was shot on the right hand.

Case for defence is a flat denial of any involvement in the matter. On his part A1, testified on oath that on that night he was at his second home at Bukonge village with his two wives; Aida and Ruth, and that he only learnt of the incident the following morning through his porter Patrick Mubaya. A2 also offered to give his evidence on oath. According to his evidence and that of his wife Edisa Nandhego Nangoya, he was at his home on that dreadful night. He only heard the gun shots at the home of the complainants and he was awakened by his wife but when he went to answer the alarm he was chased away on the allegation that he was one of those people who had attacked the family.

It is the law of this land that the burden of proving the guilt of an accused person lies upon the prosecution throughout and it never shifts to the defence or the accused. It is also the duty of the prosecution to prove its case beyond reasonable doubt and an accused person should not be convicted on the weakness of his defence but on the strength of the prosecution case: Uganda V Oloya s/o Yovani Omeke (1977) HCB 4 at page 6. In the case of murder, prosecution is required to prove that a human being was killed, that the killing was unlawful, that the killer had malice aforethought as defined in section 186 of the Penal Code. As for the case of robbery with aggravation, prosecution is under an obligation to prove inter alia that there was theft, that the theft was accompanied with violence, that the robber or robbers threatened to use or actually made use of a deadly weapon during the exercise of that theft. Finally prosecution must prove that the accused person in the dock participated in commission of the offence or offences.

For the sake of convenience I propose to deal with the ingredients of each of these two crimes seperately and then finally consider the most pertinent issue in this case which is whether or not the two accused or one of them participated in the commission of the two crimes or one of the two crimes.

I will first deal with the ingredients of the offence of murder which I have outlined above. In an endeavour to establish that Sauti Nangobi

died prosecution called the evidence of Doctor Egiiga which was admitted under Section 64 of Trial on Indictments Decree. His evidence was to the effect that he carried out a post mortem examination upon the body of this lady and found that she died due to internal heamorrhage which had been caused by gun shot wounds. There was no serious objection by the defence to the fact that Nangobi died although in his forceful submission Mr. Owor tried to challenge the evidence of this doctor on the ground that prosecution had not tendered the medical report and he doubted whether this lady had not died due to some other causes. He relied on the decision in the case of: Siduwa V R 1964 EA 596. With due respect to the learned counsel he cannot be serious in his contention that prosecution did not prove its case as to the death of the deceased when he himself admitted the evidence of the doctor which was to the effect that this lady actually died of gun shot wounds. By provisions of section 64(3) of Trial on Indictments Decree any fact admitted under that section is deemed to have been proved. Even if the doctor's evidence was lacking it is our law that murder can still be proved even in the absence of medical evidence if there is some other evidence conclusively establishing death: R V Cheya and another (1973) EA 500, Kimeri V R (1968) EA 452 and Uganda V Yozefu Nyabenda (1972) 2 ULR 19. Apart from the evidence of the doctor there was the evidence of all the witnesses who testified from both sides to the effect that Sauti Nangobi actually died. I have no reason to doubt the death of this unfortunate lady. It is my view that prosecution has proved beyond reasonable doubt the first element of the offence of murder namely that a human being by name: of Sauti Nangobi the wife of Dauda Tirutangwa died on the night of 19th March, 1988.

Regarding the issue of whether this lady died as a result of an unlawful act or ommission the law as stated in the case of: Gusambizi s/o Wesonga V R (1948) 15 EACA 65 is that in cases of homicide unless death is caused accidentally, it is unlawful. In this case there is evidence from a number of prosecution witnesses that the deceased died as a result of being shot and she was shot when the family of Mr. Dauda Tirutangwa was under siege by robbers. It is my firm finding that the death of Sauti Nangobi was not accidentally caused, therefore it was unlawful.

This leads me to the issue of whether the killing of this lady was accompanied by malice aforethought. Malice aforethought as defined in section 186 of the Penal Code simply means intentional killing of a human being by another human being or knowledge that one's act or ommission will probably result in the death of another human being.

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When considering whether or not prosecution has established malice aforethought Court considers a number of factors among them are: nature of weapon used in causing the death, the number of injuries inflicted upon the victim, the part of the body where such injury was inflicted and the conduct of the killer before and after the death: Tubere s/o Ochan V R (1945) 12 EACA 63. According to the evidence of PW1 Dr. Eyiiga, the deceased died of gun shot wounds. This evidence is supported by that of PW4 Dauda Tirutangwa the husband of the deceased who said that his late wife was shot in his presence and she died instantly. A gun is a deadly weapon. Anybody shooting another at such a close range as described by PW4 must have intended to kill the deceased. Under all the circumstances of this case I hold that prosecution has established by evidence that he who killed this lady had malice aforethought.

Having found that there was an unlawful killing of a human being which was with malice aforethought I find that prosecution has proved beyond reasonable doubt that murder was committed during the night of 19th March, 1988.

I now turn to the issue of whether the offence of aggravated robbery was committed on the night of 19th March, 1988. The evidence as led by prosecution was that on that night PW3 Badiru Zirabamuzale Budala saw one of the robbers carrying out of the house of Juma Munulo a pair of shoes and another one was carrying a radio cassette. Juma Munulo himself said that when he returned and checked his house he found those items missing. There was also evidence of PW7 Safiati Yoyati who testified that she saw a bicycle being taken away. PW8 (Kanifa) testified that some Shs.750/= were removed from her box. PW4 testified that among things taken there was a pressure lamp. There is however some dispute and doubt regarding the amount of money. In Court some Shs.770/= was produced as having been the money that was stolen during the robbery. It was rather difficult to explain how this money was recovered in the absence of any evidence indicating that the accused were searched or that it was recovered from any of them. The Court also was troubled to find out how this money became 770/= when the money which was taken from the box was only 750/=. It is my view that the money tendered in Court was certainly not the money which was robbed from the house, but that does not mean that the other items were not stolen. I therefore find that a Hero Bicycle, radio

cassette, a pair of shoes and a pressure lamp were stolen on that night.

On the issue of whether or not this theft was accompanied by violance there is evidence on record of PW2, PW3, PW4, PW5, PW6, PW7 and PW8 and also the evidence of DW2 and DW5 to the effect that on that night there was shooting at the home of the complainants. There is also the evidence of Juma Munulo who says he was shot on the hand. This evidence which was not challenged conclusively indicates that a great deal of violence was involved during the time these things were being taken.

As to whether or not a deadly weapon was used, the evidence available is conclusive that a gun was used to shoot at PW2 and Sauti Nangobi. This case must be distinguished from those cases like: Uganda V Peter Byamukama (1981) HCB 16 and Wasajja V Uganda (1975) EA 181 where no gun shot was fired and nobody was injured. A gun is a deadly weapon and shooting at the two people was actually an engagement of that weapon. I find that a deadly weapon was used. Uganda V Firimigo Kakooza (1984) HCB 1 followed on this point. I hold that prosecution has proved beyond reasonable doubt that robbery was committed at the home of Juma Munulo on that night.

I now turn to the most important issue in this case and that is as to whether or not the two accused persons or one of them did take part in the commission of these crimes or one of the two crimes. To answer this question one has to consider the evidence on record, in particular the evidence dealing with the question of identification. It is the law that where a prosecution case depends mainly on the question of identification of the accused a number of factors must be taken into account and these factors include such things as to whether the accused was known to the witness before, how much time the accused was under observation by the witness, what was the source of light and the distance between the witness and the accused: Abudala Nabulere V Uganda (1979) HCB 77. In this particular case prosecution called a total number of seven eye witnesses (PW2, PW3, PW4, PW5, PW6, PW7 and PW8) who claim to have observed the two accused persons at different times and at different places when the attack was taking place. Tied up with this issue of

of identification is the defence of alibi raised by the two accused persons.

These things having started in the house of Juma Munulo it is better that the consideration of the evidence starts also from that place. According to Munulo (PW2) he was able to recognize A1 by the help of the torches and the lamp which was still burning in the house. He stated that he recognized this accused through the window before he entered the house and then recognized him when he entered the house before he (Munulo) ran out of the house. He had known the accused for 10 years. In his testimony PW3 Zirabamuzale testified that he too had recognized A1 whom he saw in the same house where he was with Munulo. This witness also says he was able to recognize A1 because of the hurricane lamp which was burning and because of the torches. He had known A1 for about 4 years before the incident. According to the evidence of PW3 (Badiru Zirabamuzale Budala) A2 was also seen in Juma Munulo's house, but Juma Munulo (PW2) said he only saw A1. The story of PW3 that he saw A2 in Munulo's house cannot be believed because according to him A2 went to the door of the room where PW2 was. If that happened PW2 would certainly have seen this accused. Another place where A1 is said to have been identified is at the house where Musa Luba (PW6) was. According to Musa Luba A1 went to that house following a she goat which had just entered there which A1 and his gang mistook for a person, he was able to recognize A1 because the lamp (Taiowa) was burning. The next witness who claimed to have seen A1 at the scene is Safiyati Yoyati (PW7). According to her this accused went to the house where she was some 20 minutes after she had heard a bang at the house of PW2. She was able to recognize A1 because he was about 5 metres from where she was and he spent sometime while trying to remove a bicycle which had been chained to the bed. A1 and his group found the lamp burning and it remained burning until it was blown out when A1 was going out. The last witness who says she was able to recognize A1 on that night is an old woman called Kanifa Nawamwena (PW8). In her evidence this witness said that A1 was holding a lamp

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(Tadowa) which he found burning in the room, he was holding it so that the other person with whom the accused was could see properly. All these witnesses testified that they were able to recognize this particular accused because they had known him for some time as he was a neighbour. They also recognized him by his brown kaunda suit which he was wearing at the time.

Regarding A2, PW3 said he had seen him in PW2's house but as indicated earlier this evidence cannot be accepted to be truthful. Another witness who is alleged to have recognized this accused (A2) is Tirutangwa (PW4) who says that this man went to his house twice and he was able to identify him while in his house. PW5 also said that on that night he saw A2. These two witnesses testified that this particular accused was wearing a red shirt with a pair of shorts. Both witnesses (PW4 and PW5) said they were helped by burning lamps to see A2. PW7 frankly told the Court that although she had seen somebody with a red shirt that night she did not recognize that person. Apart from the evidence of these witnesses who claim to have recognized Bageya, prosecution also relied on a dying declaration of the deceased who is said to have been heard saying "Bageya why do you kill us?".

As stated earlier both accused denied having been at the scene of crime at all. As for A1 his case is simply that on that night he was in another village of Bukonge some 7 miles away. He called his two wives to support him on this point. A2 also said he first heard the gun shots when he was at his own home and he was awakened by his wife. He then dashed out and went to the neighbours to find out what they could do. After having come across one of the neighbours called Kyamwani he managed to go to the scene but he was chased away by the members of Munulo family who suspected him to have been part of the gang which had just attacked them. His wife testified that on that night she was the one who woke up her husband after hearing gun shots at the homes of the neighbours.

Here the two accused have put up the defence of alibi. It is trite law that where the defence puts up alibi as its defence it (defence) does not assume

the burden of proving that defence. The duty is upon prosecution to weaken or destroy that defence by producing evidence which puts the accused at the scene of crime: Rafeal Kabanda V Uganda (1976) HCB 113 AT 114, Raphoal Alphonce V Republic (1973) EA473 and Erisa Rutagonya V Uganda (1975) HCB 334. Once prosecution has proved that the accused was at the scene the defence of alibi must be rejected.

Mr. Owor the learned Counsel for defence attacked the evidence as given by prosecution witnesses on a number of grounds. In the first place he said that prosecution witnesses were so confused that they could not have recognized the people whom they saw. He maintained that Al could not have been in PW2's house and PW4's house at the same time. He therefore argued that his identification as having been in these places was not proper. With due respect I do not agree with the learned counsel on this point because according to the evidence these people were seen in the other houses after a bang had been heard at the door of PW2. It would therefore seem that the witnesses saw these people after they had already been to the house of PW2.

Mr. Owor also spoke of there having been not enough time for these people to recognize the people whom they saw as they were under fear and that the conditions were very difficult for prosecution witnesses to identify the accused on that night and that the witnesses must have made some mistakes about the people they saw. On this point he quoted to the Court the cases of: Abudala Bin Wendo V R (1950) 20 EACA 166, Roria V R (1967) EA 583, Abdala Nabulere V Uganda (1979) HCB 77 and George Kalyesula V Uganda Criminal Appeal 16 of 1977.

Mr. Owor further urged that there was no moonlight. According to the evidence available there was no moonlight on that night but the identification was inside the houses where there were lamps burning. Therefore the absence of the moonlight is not so material in this case. The position would have been different if the witnesses alleged to have identified those people outside in the darkness.

On his part Mr. Akampulira the learned State Attorney who appeared for the State contended that the witnesses must have identified the persons whom they saw positively and that these people could not have been mistaken about the people whom they identified as conditions were favourable for proper identification. It must be stressed that in deciding whether or not favourable conditions existed the Court is guided by guidelines which were laid down in Abudala Nabulere's case which I have already pointed out elsewhere in this judgement. In the present case I cannot see how the witnesses could have mistaken some other people for the present accused. The accused were well known to the witnesses, they were not strangers. There was light in each room where these people went and they stayed with the witnesses for quite sometime. I feel that these were favourable conditions for proper identification.

Although the defence has no duty of proving their defence of alibi once some evidence has been produced by the accused in support of that defence that evidence must be considered along with any other evidence on record. The two wives called by A1 did not impress me as witnesses of truth, they contradicted themselves greatly as to what Mubaya told them on his return from Mugeri village. DW4 Ruth was frank when she said that she could not know if A1 went out that night as he did not spend the night in her room. I agree with ... the opinion of assessor Waibi when he says that the purpose of A1 in sending his porter Patrick Mubaya to Mugeri village in the morning was to confirm if the mission had been successful because after the robbery A1 was overheard by PW4 and PW6 saying that he was going to Bukonge but he would send somebody in the morning to check and confirm if everything had been successful. The evidence of DW6 did not tally with that of A2 on whose behalf he testified as to the events of that night. This witness testified that he had arrested A2 that night when A2 said that he had been arrested by Swaibu Mawata (PW9). DW6 also did not agree with A2 when he said that A2 remained at the scene all the time when A2 himself said that he had been chased away and later on arrested and taken back. DW3 (Aida) and DW5 (Edisa)

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must have lied to the Court when they said that they were with their husbands in bed on that night for obvious reason of saving their husbands from the present trouble.

I accept the evidence of prosecution witnesses who testified that they saw the two accused persons at the scene of crime to be truthful but not that of the accused who say that they were not there. In these circumstances the defence of alibi raised by the two accused cannot stand as the prosecution has successfully destroyed it by adducing evidence which has put the accused at the scene of crime.

Mr. Owor while still attacking the case for prosecution maintained that there was no evidence indicating that the accused were ever seen participating in the commission of the two offences and that there was no common intention. With due respect I agree with the learned counsel when he says that none of the accused was seen carrying away anything apart from A1 who was seen taking out the bicycle, nor has it been alleged that the shooting was carried out by any of the accused persons. Here Court has got to concern itself with the law relating to common intention as provided in section 22 of the Penal Code. Both of these accused were seen each carrying a torch and a panga or knife. According to the evidence of PW2 it was A1 who pointed at the window of PW2 to the other members of the gang and he was among the group who entered his house. According to the evidence of PW4, A2 was sent out immediately before the shooting of the deceased had taken place but he had been to the same house twice. According to the evidence of PW7, it was A1 who removed ~~the~~ bicycle from the room where she was after one of the robbers had broken the lock with an iron bar and on taking the bicycle out A1 was heard saying "Yiyo ndiyo yako, tutakutana kwa mulima" meaning "This is yours we shall meet at the hill." These facts indicate that the two accused did not only have common intention with the other members of the gang but were in fact active participants in the robbery and murder that was committed in the same process.

It is the law that prosecution need not prove that there was any concerted agreement among the parties in order to establish common intention.

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That common intention may be inferred from the conduct of the attackers and their failure to dissociate themselves from the acts of other members of the gang: R V Okuto (1941) 8 EACA 80, R V Tabulayinka s/o Kirya (1943) 10 EACA 51, Wanjiro Wamiro V R (1955) 22 EACA 521 and Kisegerwa V Uganda (1979) HCB 81.

In his impressive submission Mr. Owor also referred this Court to the case of: Uganda V Benard Borobera and two others (1985) HCB 15 where this Court expressed an opinion that a robber was unlikely to expose himself to people he knew and who knew him for fear of being identified. This opinion has been expressed by this Court more than once but I doubt whether that opinion can be treated as an absolute principle of our law. Each case must be considered on its own merits. To carry that opinion too far may land us in a very dangerous situation whereby neighbours might misuse the principle and begin committing offences against people whom they know with impunity. That proposition must be limited in its application and should be applied not in isolation to other evidence.

Having said all that I find that prosecution has proved its case beyond any reasonable doubt against the two accused persons in respect of the two offences. In complete agreement with the opinion of the two gentlemen assessors I find both accused Erizefani Kasakya and Dauson John Bageya guilty of murder contrary to Section 183 of the Penal Code and aggravated robbery contrary to Sections 272 and 273(2) of the Penal Code and I do convict each of them in respect of each count.

C.M. KATO
JUDGE

31.7.1991