Hon: Justice Tsekoko

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 148/92

UGANDA .....PROSECUTOR

VERSUS

A1: GIDION ISIKO

A2: ERIYA WAISWA ..... ACCUSED

BEFORE: HON. JUSTICE C.M. KATO

J U D G E M E N T

The accused person Gidion Isiko is indicted for two offences. In the first count he is indicted for murder contrary to section 183 of the Penal Code Act. In the second count he is indicted for robbery contrary to the provisions of sections 272 and 273(2) of the Penal Code Act. He was originally indicted with another man called Eriya Waiswa who escaped before this trial commenced. This judgement therefore applies to Gidion Isiko alone whom I herein-after shall refer to as the accused. He pleaded not guilty to the indictment.

The case for prosection is basically that on the night of 4th March, 1990 the accused in a group of other people attacked the home of the deceased John Kirya and during the attack John Kirya was killed and his wife by the name of Jane Nabirye was seriously injured. In his defence the accused denied having commited the offences and he put up the defence of alibi to the effect that on the night in question he was in a different place called Bunya some 50 miles from the scene of crime.

It is trite law that the duty to establish the guilt of an accused person beyond reasonable doubt is upon prosecution. That burden never shifts to the accused person: Woolmington V.D.P.P. (1935) AC 462, UGANDA V Joseph Lote (1978) HBC 269 at 270 and Y.M. Kiiza V Uganda (1978) HCB 279 at 280. In a case of robbery it is the duty of prosecution to establish that there was theft involving violence and that there was a threat to use or actual use of a deadly weapon: within the meaning of section 273 of the Penal Code Act. As for murder the prosecution is enjoined to prove that somebody was unlawfully killed with malice aforethought as per section 183 of the Penal Code Act.

In the case now under consideration it is not in dispute that both robbery and murder were commited at the home of the deceased John Kirya on the night of 4th March, 1990. There is overwhelming evidence from Jane Nabirye to

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establish that these two offences were in fact committed and the defence does not challange that evidence on that point. Prosecution has clearly proved beyond reasonable doubt that the two offences were committed.

The issue before the court therefore is whether or not the accused ever took part in the commission of the two offences or any of the two offences. This issue is tied up with the evidence of the identification of the accused person. The court only heard the evidence of one identifying witness by the name of Jane Nabirye. Although by the provisions of section 132 of the Evidence Act court may proceed to convict an accused person on the evidence of one identifying witness, it has now become the practice of this court that such evidence must be viewed with great caution and it should be water tight before it can be accepted as being free from mistaken identity and especially where conditions favouring correct identification are lacking: James R. Kaweke Museke V Uganda (1983) HCB I at page 2. In determining whether or not conditions favouring correct identification existed the court is guided by a number of factors which include such things as the source of light, the distance between the witness and the accused, the time taken by the witness observing the accused and whether or not the accused was a stranger: Abudala Nabulere V Uganda (1979) HCB 77.

In the present case Nabirye testified that she was able to identify the accused because there was light in the room coming from the torches which the attackers were flashing in the house. This piece of evidence however was seriously shaken up when the witness was put under cross examination. When confronted by the learned counsel for defence the witness changed her mind and said that in fact there was another source of light in the room namely a tadoba. In my view this was a serious contradiction because this witness had earlier in her evidence repeatedly stated that the only source of light was the torches. In my opinion this witness was not certain as to what helped her to identify the people whom she claims to have seen that night. Regarding the distance between her and the accused she said that the accused went close to her and cut her with a panga near the shoulder joint. That was after she had complained to him as to why he was killing his own brother. This point would have been acceptable if the witness had mentioned the name of the accused in her first statement to the Police, but when under cross examination she admittedly said that she might not have mentioned the name of the accused in her first Police statement. She also admitted that she had not mentioned the same of the accused to the two pit swayers who were in

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the compound on that night. This piece of evidence was further weakened by the fact that in her examination in chief this witness persistently stated that she was only able to identify one person on that night but when under cross examination she admitted that in her second statement to Police she mentioned the names of Waiswa and the accused as the people who attacked her family on that dreadful night. To my mind this means that the idea of the witness having seen the accused was something of as after thought. It may be true that the accused / known to the / was witness as a brother in law, therefore he was not a stranger to her but in view of those two above mentioned contradictions it is doubtful whether this witness was in a position to positively identify this particular accused on that night.

It must also be borne in mind that when the witness woke up from her sleep she found these people already cutting her husband with pangas. In my view she could not have been composed well enough to identify anybody among the attackers. In all these circumstances I hold that conditions favouring correct identification of the attackers did not exist that night and I do not accept the evidence of Jane as being free from doubt. The defence of alibi set up by the accused person must therefore be sustained.

In full agreement with the unanimous opinions of the two gentlemen assessors I find the accused not guilty in respect of both counts and I do accordingly acquit him. He is to be released forthwith unless he is being kept in prison for some other lawful purposes.

C.K. KATO
JUDGE
10/12/92