

UGANDA / JUDGMENT

Uganda v Mutasya (Criminal Session Case 72 of 1992) [1994] UGHC 101 (8 September 1994)

[1994] UGHC 101

COURT

High Court of Uganda

BEFORE

Lugayizi, J

CASE / FILE NUMBER

Criminal Session Case 72 of 1992

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CRIIgNAL . SESSION . CASE. NO., .7.2/9.?. < •HOLDEN • - • • r. »—» *^j*
^r-v •fzAT*• r.—⁹* MBARARA x« *• . ■».r» .

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OR

VERSUS

GIRASI MUTASYA: .»c0oc<>o.0000000000000000« ACCUSED BEFORE: The Honourable Mr. Ag.
Justice E. S. Lugayizi

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The Accused heroin (GARASI MUTASYA) was indicted for the murder of one ZIRARIDO
BAKETURA. The indictment in issue read as follows⁹

" STATET^M

MURDER, Contrary to Section 1#3 of the Penal Code.

PARTICULARS OF OFFENCE:

"GARASI MUTASYA and others still at large, on or about the 26th day of August, 1966,. at Ryeishe
village, in Bumbaire, Gombolola, in the Bushenyi District murdered one ZIRARIDO BAKETURA".

When the indictment was read and explained to the Accused, he denied the offence; and the
prosecution called four witnesses to establish its case against the Accused.

The prosecution's first witness was Veneranda Baketura, a Catholic, aged 44 years and coming from Ryeishe village, Bumbaire, in Igara county, Bushenyi District. She told court that she 'was the widow of the deceased who was murdered in the night of 26th of August, 1986.

According to the witness, at around 7.00p.m. (in the night in issue, ' when she was at home with her **df'e'i^'hron**; one of them by the name of Bunturaki (PW2) revealed to hbr that the accused herein and some other men were looking for the deceased that evening. The- witness in reply told PW2 that he should go and lock up the cattle kraal and return and join the rest of the family in the house. PW2 complied and later came back to the house.

At this point, the deceased who was not at home also returned; and PW1 told him about what PW2 had disclosed to her.

Soon after the above, the accused came and called the deceased two times* The accused told the deceased that his cows (deceased's cows) had gone out of the kraal.

The witness knew the voice of the accused who had referred to the deceased as "Gerald" when he called him.

The witness tried to prevent the deceased from going out, but because the deceased loved his cows & o much, he refused, and went out of the house. On reaching the compound, the deceased was made to sit down and the accused told him that they had come to kill him. Soon after that, as he ran back to the house, the deceased was shot in the back. The bullets went through his chest. He collapsed and died.

An alarm was raised and many people answered it including the^ RC II Chairman. Later, the matter was reported to the Police who brought a doctor to examine the body which was finally buried.

The Accused was not arrested until two years later when he returned to the village. This was after he disturbed this witness in respect of land boundaries.

In cross-examination, the witness revealed that there was a grudge between the deceased and the accused. This was brought about by a land dispute and the two did not visit each other.

Secondly, she agreed that on the night in issue she did not see the Accused but only heard his voice.

Lastly she told court that two of the accused's friends (i.e. Steriko and Kakuhikire) whom she had implicated with the murder of the deceased were released. She had suspected them simply because! they were accused's friends.

The second witness for the prosecution was Sebastiano Banturaki who is a Catholic, cultivator, aged 26 years. He told court that he was the son of the deceased. He knew the accused before the incident in issue. This was so, because they lived in the same village of Ryeishe in Bushenyi District.

On the evening in issue, at around 7.30p.m while this witness was milking his father's cows outside the house, the accused and some three other men came and asked him where the deceased had gone.

At this point, those men went away. However, the witness had recognized the accused, Steriko and Kalcuhikire. For although they had come when it was getting dark, it was not yet very dark. The witness could still see well.

On this occasion, PW2 had also seen, that the accused and another man, were hiding a gun in their jacket.

Later on, at about 6.00p.m. the deceased returned home. PW2 who was still outside the house milking cows related to him the above events.

Afterwards, the deceased went into the house and PW2 followed him after taking the milk to the kitchen.

As the family was having supper, the accused returned and called the deceased. He told the deceased that his cows (deceased's cows) had gone out of the kraal.

At this juncture, both PW2 and the deceased went out of the house and when they reached the compound the accused ordered the deceased to sit down saying they (accused/others) had come to kill him.

The witness and the deceased then ran to the house. However, before the deceased reached inside, he was shot in the back. He dropped down and died of bullet wounds at the back and chest.

PW2 eventually ran and called for help. Later on, the deceased was buried, but the accused was not arrested until he returned to the village. This was after a long time.

In cross-examination, PW2 denied having told PW1 before the deceased returned home, that the accused and some other men had visited their home and inquired about the deceased in the evening in issue.

Further, PW2 found difficulty in answering the question concerning the name which the Accused used in calling the deceased out of his house in the night in issue and also on 'whether the accused and the deceased were friends or not.

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The third witness who was called by the prosecution, was Tarasisio Kampuga, a Catholic, aged 67 years. He testified that he came from Ryeishe village in Bushenyi District. He knew the deceased who lived in the same village with him.

On 26th August, 1996, at around 8.00p.m. he heard three gun-shots. Later on, PW2 came to him and told him that the deceased had been murdered. This witness went to the scene of crime and saw the deceased lying in a pool of blood. The deceased had gun shot wounds.

The following morning the Police went to the scene of crime and examined the said body⁵ after which it was buried.

Subsequently, the accused was arrested and also another man called Kakuhikire. Kakuhikire was later released.

The fourth prosecution witness was N0. IS757, Detective Corporal Twehamye Adriano, who is 34 years old. He was attached to Bushenyi Police Station in 1990. In July 1990, he took over inquiries in this case.

He looked for one Steriko and Kakuhikire and failed to trace them. However, when the time for committal proceedings came, he was able to re-arrest the accused who was then on bail. The accused was later sent to Mbarara.

At the end of the above evidence, the prosecution closed its case. The defence in turn submitted a no case to answer.

In brief Mr. Zehurikize for the accused argued that the main prosecution witnesses in this case PW1 and PW2 were unreliable. Their evidence was contradictory in important areas. For example, in respect of the name allegedly used by the Accused in calling out the deceased on the night in issue; and also in respect of whether PW2 had revealed to PW1 what he saw outside the house just before the incident in issue took place.

Mr. Zehurikize submitted that these two witnesses lied about the incident in issue, simply because they wished to fix the Accused. The driving force behind all this, was simply the grudge between the accused and the deceased which was brought about by the land dispute between the two.

Mr. Zehurikize concluded that the accused should not be put on his defence in respect of such contradictory and unreliable evidence.

On the other hand, Mr. Wagona counsel for the State submitted that the prosecution had made out a *prima facie* case against the Accused. PW1 had heard the Accused's voice on the night in issue and she knew it. PW2 had seen the accused. The above coupled with the grudge which the accused had against the deceased, were sufficient to make the prosecution case strong enough to require the accused to be put on his defence. The contradictions in the evidence of PW1 and PW2 were minor and can be explained on the basis of lapse of time.

Having had time to consider the prosecution case and the submissions of both counsel, I am of the view that it is plain on the evidence available, that the deceased was killed on the night in question, and that those who were responsible for his death, intended to kill him. This is particularly so, when one considers the weapon which was used (i.e. a gun) and the manner in which he was killed. However, the crucial question here, is whether the accused was among the assailants who killed the deceased. Does the case for the prosecution really show that the accused was among the said assailants?

To prove that the accused was indeed one of the assailants who killed the deceased, the prosecution mainly seems to have relied upon the evidence of PW1 and PV72.

The said witnesses, based their certainty of the accused's participation in the crime in issue, on different promises. While PW1 said that she heard the accused calling the deceased by name, PW2 claimed to have seen the accused at two instances; one just before the crime was committed, and the second one, during the commission of the crime.

However, a close examination of the evidence of the said two witnesses, reveals that it is contradictory in a vital part, self-contradicting in others and unreliable.

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Forexample, while P.71 related to court that before the deceased returned home on the fateful night, P-72 had disclosed to her that he had seen the accused and some other men who were looking for the deceased; PU2 wholly denied having done so.

There is no doubt that what the above contradiction shows, is that one of the said witnesses was lying in this vital area of evidence.

The above aside, F1's evidence was self contradicting in respect of the name the accused used in calling out the deceased on the night in issue. At the beginning PJ2 said that the accused called the deceased "Bakatura". Later, he changed and said that the accused used the name of "Zorado". Finally, he said that it was the name of "Gerald" which was used.

The same thing happened again. when PL72 was asked whether the accused and the deceased were friends. In one breath he said that the two men were friends, yet in another, he said they were enemies.

Even P1 admitted in her evidence that she implicated Steriko and Kakuhikire simply because these men / accused's friends. It is clear that those two were initially arrested, but later released.

In my view, there cannot be a better description for P-71 and PVJ2 than that, they are unreliable witnesses.

It is trite law, that if the prosecution case is solely made up of discredited unreliable evidence, the accused person would not be required to be called on his defence since no prima facie case would have been made out against him. Please see: Ramanlal Trambaklal Bhatt v. R [1957] E. A. 332; Uganda v. Moses Kitawa, Criminal Session Case No. 237/92; V/ibiro alias Musa v. R [1960] E.A. 164; and Uganda v. Edward Ndyababo and 2 others Criminal Session Case No. 231/91.

In view of the defects which have been pointed out above in respect of P1's and PVJ2's evidence (which is the heart of the prosecution case) and taking account the position of the law, I believe that no prima facie case has been made out against the accused herein.

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I therefore have no choice but to acquit him of the offence of murder and order his immediate release, unless he is being held on some other lawful charges.

May I lastly, point out that like counsel for the accused, I believe that P/1 and PW2 wanted to fix the accused with the crime in issue, because of the land dispute between him and their family. It is possible they suspected the accused because of the said dispute. However, suspicion no matter how strong it may be, is not enough to make out a prima facie case against an accused person. (Please see *Uganda v. Edward Ndyababo and 2 others*) (supra).

> D. J. Lugayizi Ag. J U D G E \$5/7/94\$

Edward

Read before: 5 Accused Accused Mr. Zehurikize for Accused. Mr. Wagona for the State. Mr. Munyampenda court clerk. Mrs. Matsiko - Assessor.

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