

UGANDA / JUDGMENT

Uganda V Ssebuwufu Mohammed & 7 Others (Criminal Session Case No. 0493 of 2015) [2019] UGHC 1 (24 June 2019)

[2019] UGHC 1

COURT

High Court of Uganda

BEFORE

Anglin, J

CASE / FILE NUMBER

Criminal Session Case No. 0493 of 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL SESSION CASE NO. 0493 OF 2015

UGANDA ----- PROSECUTOR

5 VS

- **1. SSEBUWUFU MOHAMED**
- **2. KAYIZA GODFREY ALIAS GODI**
- **3. MIRAMBE PHILLIP**
- **4. LWANGA STEPHEN ----- ACCUSED**
- **10 5. TASINGIKA PAUL**
- **6. KITAYIMBWA YOWERI**
- **7. SENTONGO DAMASENI**
- **8. ODUTU SHABAN ALIAS GOLOLA**

15 BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**JUDGMENT**

The 8 accused persons before court to wit: SSEBUWUFU MOHAMED, KAYIZA GODFREY ALIAS GODI, MIRAMBE PHILLIP, LWANGA STEPHEN, TASINGIKA PAUL, KITAYIMBWA YOWERI, SENTONGO DAMASENI, ODUTU SHABAN 20 ALIAS GOLOLA and others still at large were indicted on 3 counts.

Count 1: Murder c/s 188 and 189 of the Penal Code Act.

The prosecution case is that all the accused persons and others still at large, on the 21.10.15, at Pine Car Bond, along Lumumba Avenue, in Kampala District, murdered Betty Donah Katushabe.

25 Count 2: Aggravated robbery c/s 285 and 286 (2) of the Penal Code Act.

The prosecution case is that all the 8 accused persons and others still at large, on the same date and at the same place, robbed Betty Donah Katushabe of her Mobile Phone S/N 354873051133510/11, with Sim card registered number No. 0752540515, valued at approximately Ug. Shs. 300,000/- and at or immediately after the said robbery, used deadly 30 weapons, to wit panga and sticks on the said Betty Donah Katushabe.

Count 3: Kidnap with intent to murder c/s 243 and 242 of the Penal Code Act.

The case for the prosecution is that the said accused persons and others still at large, on the 21.10.15 at Bwebajja, Wakiso District, kidnapped Betty Donah Katushabe in order that the said Betty Donah Katushabe might be murdered.

The accused person denied the offences on all the 3 charges and gave various offences ranging from alibi, silence and general denials as will be seen later in this judgment.

In determining this case, I bear in mind that the burden of proof is upon the prosecution to prove the guilt of the accused person(s) beyond all reasonable doubt.

5 The burden never shifts to the defence except save in a few exceptional cases provided for by law.

The prosecution is enjoined to prove all the ingredients of the various offences to the required standard.

Even where there is more than one accused person as in the present case, the participation 10 of each and every one of them has to be proved.

When the accused raises a defence, the duty remains upon the prosecution to prove that despite the defence, the offence(s) was/were committed and that the accused person committed them. – See **Woolmington Vs DPP (1935) AC 462**, **Miller Vs Minister of Pensions [1947] 2 ALL ER 373** and **Luboga Vs Uganda [1967] EA 440**.

15 Refer also to **Section 101 Evidence Act**, which provides that **"He who alleges must prove"**.

This court further bears in mind that, an accused person is deemed innocent until he or she pleads guilty or is proven guilty.

Case law has established that, **"the standard of proof required is not proof to absolute* 20 *certainty. Nonetheless, the prosecution evidence should be of such standard as leaves no other logical explanation to be derived from the facts, except that the accused committed the offence".***
- Refer to **Woolmington Vs DPP (Supra) and Miller Vs Minister of Pensions (Supra)**.

In determining a case, the court has also to bear in mind the duty to evaluate all the evidence 25 on record, both for the prosecution and the defence, and arrive at its own findings as to whether the offence(s) for which the accused person(s) were indicted has been proved to the required standard.

In this case, for the offence of murder in count 1, the following ingredients of the offence must be proved if a conviction is to be returned:

- 30 1. Death of a person.
- 2. The death was unlawfully caused.
- 3. The death was caused with malice aforethought.
- 4. The accused persons participated in or caused the death of the deceased.
- 5. Where there is more than one accused person, it ought to be proved that there was a 35 common intention among them to execute an unlawful purpose.

The prosecution in this case relied upon the evidence of 26 witnesses.

The fact of death: The prosecution evidence shows that the deceased is dead. A post-mortem was performed on the body by PW4 Dr. Male Mutumba. The body was identified on 22.10.15, by one Moses Kule a brother of the deceased, as that of Betty Donah Katushabe.

The deceased was an adult female. The body was stiff and cold, meaning that she had been 5 dead for more than 12 hours. The cause of death was multiple blunt force trauma.

The report was signed and stamped by Dr. Male Mutumba (PW1) and was admitted in evidence as Exhibit P1.

The defence does not dispute the fact of death.

Court accordingly finds as a fact that Betty Donah Katushabe is dead. She passed away on 10 21.10.15.

The first ingredient of the offence was proved to the required standard.

The next ingredient to determine is **whether the death of Betty Donah Katushabe was unlawful**.

It is trite law that "The law presumes every homicide to be unlawful unless it is accidental or* 15
*excusable or authorised by the law".*The circumstances that make a death excusable include
**defence of the person or properties. – See Gusambizi Wesonga Vs R (1948) 15 EACA 65 and
Uganda Vs Okello [1992 – 1993] HCB 68**

The defence in the present case does not agree that the death was unlawful. They contend that the death was either justifiable or excusable as the post-mortem report Exhibit P1 is not 20
conclusive. It was contended that, death by natural causes could not be ruled out.

However, considering the injuries that were inflicted upon the deceased as described in the evidence of PW4 the doctor and indicated in Exhibit P1 the post-mortem report; I find that they conclusively prove that the death of the deceased was because of unlawful grievous harm. The grievous harm resulted into bleeding and congestion with blood in the various parts of the body, 25 including the limbs, the back, the muscle beneath the skull, the brain and its coverings, the internal membrane of the heart, both lungs and other organs within the abdomen.

The bruises and abrasions that resulted into the extensive bleeding could not have been because of natural causes, as Counsel for the defence would like court to believe.

And without any circumstances to justify the infliction of the injuries that resulted in the death 30 of the deceased, this Court rejects the submissions of Counsel for the defence in this regard and accepts the prosecution evidence and finds that the death of the deceased was unlawful.

To determine **whether the death was with malice aforethought**, Court takes into consideration the provisions of Section 191 of the Penal Code Act. The section defines malice 35 aforethought as
"Intentional killing of a human being or knowledge that the act or omission

will result into death of a human being." Refer also to the case of **Mugao & another Vs Republic [1972] 1 EA 543 and Bukenya & others Vs Uganda [1972] 1 EA 549 (CAK)**

Decided cases have established that "to determine whether or not the prosecution has proved malice aforethought, court takes into account the circumstances surrounding each* 5 *particular case. The circumstances include the nature and number of injuries inflicted, the part of the body injured, the type of weapon used and the conduct of the assailants before, during and immediately after the injuries were inflicted". - See the case of **R Vs Tubere (1945) 12 EACA 63, Dafasi Magayi & Others Vs Uganda [1965] 1 EA 667 (CAK), Ogwang**

Vs Uganda [1999] 2 EA (SCU) and Mbugua Vs Republic [2000] 1 EA 150 (CAK)

The evidence of PW4 the Doctor- Exhibit P1 indicates that the deceased suffered multiple injuries. There was a pooling of blood at the back and the left side of the face had a bruise. That is, there was bleeding into the skin seen as a dark patch on the affected area. There was also an abrasion on the left side of the face in front of the ear, 4 cm long.

15 There was extensive bruising of the back of the left upper limb extending from the shoulder joint to the tips of the fingers. The abrasions were ranging between 2 -7cms.

There was extensive bruising, on the back of the right upper limb, extending from the shoulder joint to the fingertips; and associated abrasions ranging from 1.5 cm x 2 cm.

There was extensive bruising, on the right lower limb, extending from the middle of the thigh 20 to the foot; with abrasions ranging from 0.2 cm – 2.5 cm.

There was also extensive bruising, on the left thigh, extending from the middle to the foot. In addition, there was extensive bruising of the upper and middle back.

On opening, the skin of the skull, and examining the muscle beneath, the Doctor found that there was bleeding on the left side. However, there were no fractures in the skull. Moreover, 25 while the brain and its coverings were congested with blood, there was no injury to the brain and no bleeding in the bonny cavity occupied by the brain.

Both lungs were congested with blood and mild fluids. The internal membrane of the heart chamber had bleeding, although the heart was okay.

The liver had fat deposits, which should not be there. The other organs within the abdomen 30 were of normal structure, but congested with blood.

The uterus had multiple fibroids.

The cause of death was multiple blunt force trauma.

The report was signed and stamped by Doctor Male Mutumba (PW1) and was admitted in evidence as Exhibit P1.

The prosecution argued that, the parts of the body of the deceased targeted and the injuries sustained as a result were indicative of malice aforethought. While defence counsel contended that the weapon said to have been used to inflict the injuries was not exhibited; and there was no careful description of the same to enable court to determine whether it was deadly or not.

- 5 Further, that, the body parts targeted were not established. And that there is no evidence to show that the injuries sustained by the deceased were inflicted repeatedly or that there was intention to cause death. Also that, no unbecoming conduct, of any of the assailants had been established, during or after the attack pointing to guilt. Therefore that, malice aforethought had not been proved.
- 10 As already stated in this judgment, the evidence of PW4 the Doctor- Exhibit P1, shows that the deceased suffered multiple injuries that resulted into bleeding in various parts of her body. This is an indicator that the deceased was repeatedly assaulted.

Among the body parts injured were the liver and other organs in the abdomen, which were congested with blood. The head was also injured as the deceased sustained an abrasion on the

15 left side of the face in front of the ear. Abrasions, explained the Doctor, show that there was bleeding in the skin. Courts have resolved that, *"*The head is a vulnerable part of the body. It contains a vital part of the human body, the brain*".* The liver and other organs of the body are also vital parts of the human body; I would hasten to add.

Indeed, in this case, the muscle beneath the covering of the skull was congested with blood, 20 and so were the brain and its coverings. The lungs were also congested with blood and other fluids, as were other organs within the abdominal structure.

Injuring the deceased on the head and other vital parts of the body, that resulted into extensive bruising and bleeding, the assailants of the deceased must have intended to kill her or ought to have known that such injuries would most likely result into death.

25 Whereas the prosecution, as pointed by Counsel for the defence exhibited no weapon, case law has established that, *"*There is no burden on the prosecution to prove the nature of the weapon used in inflicting the harm which caused death. Nor is there any obligation to prove how the instrument was obtained or applied in inflicting the harm*". –* Refer to the case of **Uganda Vs Komakech Tony alias Mono and 2 Others HCSC No. 0131/2014 by Justice**

30 Mubiru.

Nonetheless, some of the witnesses in the present case gave a vivid description of what happened to the deceased that resulted into the fatal injuries she sustained. PW1 Tumusiime Peter, who went to the scene of crime at about 4pm, on the instructions of PW2, saw the deceased sitting down bare footed, with torn clothes with wounds on the face and legs. In his 35 presence, several men kicked and boxed the deceased on different parts of her body.

PW2 Kobusingye Annette the lawyer of the deceased who was called by telephone no. 0752198368 confirms the assault of the deceased. The caller demanded for payment of Shs. 9,000,000/- or else the deceased would be killed. She was made to listen to the assailants hitting the deceased. She had a loud bang like a slap and then a scream.

PW3 Twesigye Amon confirms the telephone call received by PW2 in his presence. He adds that the phone was on loudspeaker and the caller demanded for his money to be paid before 7pm, otherwise the deceased would die. When advised to take the deceased to police, the caller replied stating inter alia *"*let me beat her while you are listening*".* The deceased was assaulted

5 and her loud screams could be heard. When PW3 eventually went to the Bond where the deceased was, he was also assaulted. When he was taken into the room where the deceased was, she was sitting down and was very weak. She had to be assisted to stand up.

Although no instrument seems to have been used, the grievous injuries inflicted upon the deceased established malice aforethought.

10 **Malice aforethought** has been defined to **"include an intention to kill a person or an intention to do an act likely to kill from which death results".*** – **Refer to Osborn's Law Dictionary 7th Edition by Roger Bird, P. 212**

For those reasons, the submissions of Counsel for the defence are rejected. This Court finds that the prosecution discharged its burden and proved that the killing of Betty Donah Katushabe 15 was with malice aforethought.

What is left for Court to determine **whether it is the accused persons who caused the death of the deceased or participated in causing the death of the deceased and whether there was common intention.** However, it is also alleged that the deceased was kidnapped with 20 intent that she be murdered, and that the robbery of her phone took place during the time she was being tortured, for which the accused are charged on count 2 and count 3. Court will therefore; determine the issue of participation on all three counts after dealing with the ingredients of the second and third Counts.

25 Count 2: Aggravated robbery:

It is an established principle of law that to prove a charge of aggravated robbery c/s 285 and 286 (2) of the Penal Code Act, the prosecution has to prove the following ingredients of the offence:

- i. That there was theft
- 30 ii. There was use of violence.
- iii. There was threat to use a deadly weapon or that there was use of a deadly weapon or that the perpetrators caused grievous harm to the victim.
- iv. That it is the accused persons who robbed the victim or participated in the robbery.
- 35 v. Where there is more than one accused person, common intention has to be proved

As already indicated earlier in this judgment, the burden to prove the commission of the offence beyond all reasonable doubt is upon the prosecution. It never shifts, even where the accused sets up a defence, except in a few exceptional cases provided for by law. See the case **Uganda Vs RO 973 Lt. Samuel Kasujja and 2 Others, Cr. Case No. 08/92.**

- 5 **Theft:** The case for the prosecution is that when the deceased was picked from her home at Bwebajja and taken to Pine car Bond, she had with her mobile telephone serial number 354873051133510/11, with Sim Card registered number: 0752540515 valued at approximately Shs. 300,000/-. She was tortured and her assailants stole her mobile phone. The phone has never been recovered.
- 10 Counsel for the Accused submitted that the prosecution led no evidence as no witness testified on the theft of the phone as alleged in Count 2. Therefore that, theft was not proved. The case of **Uganda Vs Henry Waiswa & Others HCCC No. 420/2010** was cited in support.

Counsel for the Prosecution on the other hand insisted that the deceased's phone has never been accounted for to date; and Court should therefore find that theft was proved.

15 PW7 WSPC Nyanzi Specioza testified that the deceased wanted to make a call when they got to Pine car Bond, so that the money demanded from her would be brought. However, that the witness left before the deceased made the call, as the driver who had her phone was still outside.

That the deceased had a telephone is confirmed by PW1 Tusiime Peter, who testified that PW2 Kobusingye Annette gave him the number of the deceased when she asked him to follow up 20 the matter concerning the deceased. That on his way to Pine Car Bond, at Amama House, he called the deceased who informed him that she was still in the custody of her kidnappers.

Since the telephone has never been accounted for, the only reasonable conclusion is that it was stolen. This Court therefore finds that the ingredient of theft has been proved.

While the evidence of theft is circumstantial, I am fortified in my finding by the established 25 principle of case law that, *"Circumstantial evidence is often the best evidence. It is the evidence of surrounding circumstances, which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial evidence"*. - **Thiaka Vs Republic [2006] EA 362**

Under S. 245 (1) of the Penal Code Act, theft occurs when *"a person fraudulently and with* 30 *intent to deprive the owner of a thing capable of being stolen, takes that thing from the owner without a claim of right"*.*

The submissions of Counsel for the accused in this respect are rejected for those reasons.

The next ingredient to prove is **Use of Violence:**

The prosecution's evidence in this respect was that the deceased was tortured. She was beaten and kicked by her assailants, because of which she sustained fatal injuries that resulted into her death.

Refer to the evidence of PW1, which is to the effect that when he got to the Pine Car Bond 5 and was led to the room where the deceased was, he found her seated on the floor bare footed. Her clothes were torn; she had bruises on the face and legs and appeared weak. She was surrounded by 6 strong men *"Kanyama"*. That she was also kicked and boxed in his presence.

The violence meted out to the deceased is confirmed by PW2. She received a call from telephone no. 0752198368 from a person who demanded that if the Shs. 9,000,000/- was not

10 paid, the deceased would be killed. She was then asked to listen as the deceased was being beaten. She then heard a loud bang followed by a scream.

PW4 Dr. Male who conducted the post-mortem also found injuries on the various body parts of the deceased, already described in this judgment. The injuries were consistent with the use of force. - Refer to Exhibit P1.

15 However, Counsel for the accused submitted that without any evidence of the use of a deadly weapon as required by S. 282 Of the Penal Code Act, there was no proof of use of force.

Counsel for the Prosecution asserted that the use violence against the deceased is borne out by the post-mortem report Exhibit P1, the evidence of PW1, PW2, PW3, PW9 and Pw12. And that it was proved to the required standard.

20 Violence is defined as *"force exerted so as to injure or abuse" – Webster's Collegiate Dictionary.**

That the deceased was violently assaulted is evident from the evidence of the prosecution witnesses, some of whom were eyewitnesses to the assault. The injuries the deceased sustained in vital parts of her body as described in the post-mortem report; are consistent with use of

- 25 force. I accordingly disagree with the submissions of Counsel for the accused and find that there was use of violence at the time of the commission of the offence.
- **Use of a deadly weapon or that the perpetrators caused grievous harm to the victim:** As submitted by Counsel for the accused, no deadly weapon was ever exhibited by the prosecution. 30 The guava sticks referred to by PW24 were never produced in Court. Nonetheless, this Court has already found that the injuries inflicted upon the deceased resulted into grievous harm to the deceased and in fact resulted into her death.

It is the finding of this Court that, the Prosecution proved to the required standard that, the perpetrators occasioned grievous harm to the deceased.

Count 3: Kidnapping with intent to murder:

It has been established by case law that *"the offence of kidnap with intent to murder comprises of two key elements, namely: the prohibited conduct of kidnapping or taking away by force or fraud and the specific intent to cause the victim to be murdered"*. –* Refer to **Mugombe Moses Mulo Vs Uganda SC CA12/1995 and Ibrahim Bilal Vs Uganda CR. App.**

5 05/1983

For the offence of kidnapping with intent to murder to stand, the following ingredients of the offence have to be proved:

- 1. Taking away of a person or victim
- 2. The taking away was accompanied by force or fraud.
- 10 3. The taking away was against the victims will.
- 4. The perpetrators of the offence had a contemporaneous intent to murder the victim
- 5. The accused persons were the perpetrators of the crime.

The prosecution evidence in this respect is that the deceased had purchased a car from A1 and 15 owed a balance of Shs. 9,000,000/- on the purchase price. The money was secured by two postdated checks that were to mature on 30.10.15 and 31.11.15 respectively.

However, suspecting that the deceased would not pay the balance on time, A1 instructed A5 to report a case of theft of a motor vehicle against the deceased. The case was reported to CPS under SD 54/17/10/15.

20 On 21.10.15, at about 7am, A5 on the instructions of A1 and in company of Police Officers left for Bwebajja, along Entebbe Road, where the deceased used to reside, to arrest her. They booked at Bwebajja Police Station under SD reference 03/21/10/15 at 7.29am. Thereafter, they went to the deceased's home from where they picked her and brought her to Kampala.

The deceased was brought to Kampala in a motor vehicle. Instead of being taken to CPS was 25 taken to Pine Car Bond. They arrived at the bond between 8.30 – 9am. At the Pine Car Bond, the Police Officers handed over the deceased and left after being assured that the matter would be settled.

It is contended by the prosecution that the deceased was purportedly arrested based on a case file of stealing a vehicle, opened up at CPS, Kampala. - SD 54/17/10/2015. Based on that 30 reference, the home of the deceased was put under surveillance on various dated prior to 21.10.15. On that date, she was taken away to Pine car Bond instead of police.

Further that the SD file on which the taking away of the deceased was based was redundant, since no investigations were ever carried out and no witness statements were ever recorded. - See the evidence of PW25 DAIP Walya Henry, the Investigating Officer.

35 It was the submission of Counsel for the State that, the taking away of the deceased from her home was an act of fraud as the SD file was opened up as a cover to try to legitimise the actions of the kidnappers. Therefore that, it was against the will of the deceased.

The defence contends on the other hand that the prosecution did not prove any of the ingredients of the offence. That the evidence of PW7 clearly indicates that it was an official arrest, and that the evidence of PW17 supports this. That it was the deceased who requested to be taken to Pine Car Bond and not to CPS.

5 It was asserted that the arrest of the deceased was based on an SD reference and Police Officers from CPS booked in at Bwebajja Police. - Evidence of PW17. In addition, that PW7 stated that the deceased was not kidnapped.

Court now proceeds to determine whether the first four ingredients of the offence were proved.

Taking away a person or victim: It is not disputed that, the deceased was picked from her 10 home and taken to Pine Car Bond. She was picked by people in the company of Police Officers, after booking in at Bwebajja Police Station.

This ingredient of the offence was accordingly proved beyond reasonable doubt.

15 Whether the taking away was accompanied by use of force or fraud and whether it was against the will of the deceased:

It is the uncontroverted evidence of the prosecution that the deceased was purportedly arrested based on a case file of stealing a vehicle, opened up at CPS, Kampala. - SD 54/17/10/2015. Based on that reference, the home of the deceased was put under surveillance on various dated 20 prior to 21.10.15. On that date she was taken away to Pine Car Bond instead of police.

Further that the SD file on which the taking away of the deceased was based was redundant, since no investigations were ever carried out and no witness statements were ever recorded. - See the evidence of PW25 DAIP Walya Henry, the Investigating Officer.

For those reasons, Court is more persuaded by the evidence of the Prosecution witnesses and 25 the submissions Counsel for the State that to find that the taking away of the deceased from her home was an act of fraud, other than an official arrest. Without any evidence that the SD reference file, upon which the booking at Bwebajja Police and the arrest were eventually made, was ever investigated; I find that the file was opened up as a cover to try and legitimise the actions of the kidnappers.

- 30 If the purported case of theft of motor vehicle had been genuinely filed, then the deceased would have been first taken to CPS after her arrest; and then upon her request to settle the matter, she would have been given a chance to talk to her kidnappers in circumstances where she would not be possibly tortured. Being arrested with the assistance of armed Police officers in the circumstances outlined in this case; the deceased was left with no choice but to comply
- 35 and it is apparent that she was deceived into believing that the matter could genuinely be settled. The arrest was fraudulent and against the will of the deceased.

Why was the deceased's home put under surveillance for several days when she could have been summoned to police?

In her evidence, PW7 admitted being paid by the kidnappers to leave the deceased at Pine Car Bond. If the deceased willingly accepted to go to the Bond, why would PW7 be compromised 5 into leaving her in the hands of the kidnappers?

The taking away of the deceased from her home was an act of fraud and was against her will.

The next ingredient to determine is whether the perpetrators of the offence were motivated by intent to murder the victim:

- The evidence available indicates that, as soon as the deceased was handed over to the assailants, 10 they began demanding for the money she owed, and assaulting her for failure to pay the same. She was threatened to be killed unless she paid the money. This is confirmed by the evidence of PW1, PW2 and PW3. All her pleas to allow her to be given a chance to get the money and pay the balance fell on deaf ears.

- The perpetrators would not have assaulted the deceased, targeting very vulnerable parts of the 15 body or at all, if they did not have the contemporaneous intent to kill her or put her in danger of being killed. More so, when it is contended that she had given posted dated cheques which had not yet matured. Or why would she be accused of theft of a vehicle and arrested when no statements had been recorded by the complainants at police and no investigations had been made? –See evidence of PW17.
- 20 By threatening to kill the deceased and actually violently assaulting and occasioning her grievous bodily harm as already indicated in this judgment, the perpetrators of the offence must have been motivated by intent to murder the deceased.

Indeed, death was a probable consequence of the actions of the perpetrators against the deceased.

25 According to the case of **Godfrey Tukahirwa & Another Vs Uganda SC CR APP.05/1988**, "S. 235 (2) of the Penal Code Act, casts the burden on the accused (Appellant) to prove that he did not have the contemporaneous intent that the victim would be murdered or put in danger of being murdered".*

This Court accordingly finds that the ingredient of the offence was also proved to the required 30 standard. The submissions of Counsel for the accused to the contrary are rejected for those reasons.

What remains for Court to determine is **whether it the accused persons before Court or anyone of them who killed the deceased and committed the robbery; whether, it is the 35 accused persons who kidnapped the deceased and whether they had a common intention.**

As earlier referred to in this judgment, the prosecution evidence in this respect is that the deceased had purchased a car from A1 and owed a balance of Shs. 9,000,000/- on the purchase price. The money was secured by 2 post-dated checks that were to mature on 30.10.15 and 31.11.15 respectively.

5 However, suspecting that the deceased would not pay the balance on time, A1 instructed A5 to report a case of theft of a motor vehicle against the deceased. The case was reported to CPS under SD 54/17/10/15.

On 21.10.15, at about 7am, A5 on the instructions of A1 and in company of Police Officers left for Bwebajja, along Entebbe Road, where the deceased used to reside, to arrest her. They 10 booked at Bwebajja Police Station under SD reference 03/21/10/15 at 7.29am. Thereafter, they went to the deceased's home from where they picked her and brought her to Kampala.

The deceased was brought to Kampala in a motor vehicle driven by A5. But instead of being taken to CPS was taken to Pine Car Bond where A1's office was. They arrived at the bond between 8.30 – 9am. At the Pine Car Bond, the Police Officers handed over the deceased to 15 A1 and left after being assured that the matter would be settled.

However, PW7 Nyanzi Specioza, the Woman Police Officer who accompanied the people who picked the deceased from her home, contended that the deceased declined to be taken to CPS, and requested to be taken to the Pine Car Bond as she preferred to settle the matter with the **"Rich man"**. The Rich man was identified as A1.

20 At A1's office was also A2, A3, A4, A6, A7 and A8 and one Kiwanuka Sam alias Damage, who is still at large. That A1 demanded for his money from the deceased and immediately began assaulting her.

All the accused at the bond continued assaulting the deceased demanding for payment of the debt and threatening her with death in case she did not.

25 PW1 who works with PW2 went to the bond to try and rescue the deceased. He advised the assailants that she be taken to police but his advice was ignored.

The assault of the deceased continued. Eventually, the assailants called PW2. They told her that if she wanted the deceased alive, she should send the money. They made PW2 listen to the agonizing cries of the deceased as she was being assaulted.

30 PW3 another lawyer working with PW2 went to the bond to plead for the release of the deceased. He was instead also assaulted on the instructions of A1, who accused lawyers of protecting thieves and thereby interfering with the recovery process.

Two police officers were at the scene with PW3, on the instructions of the O. C. CPS. PW3 insisted that they take the deceased to police, but he was instead still assaulted; and the police 35 officers only intervened after the crowd complained about their lack of action.

Eventually, the deceased was put in motor vehicle no. UAP 155 T, Toyota Premio (Exhibit P) to be taken to CPS. The vehicle was availed on the instructions of A1 and was driven by A4. In the vehicle were the two Police Officers, who sat with the deceased in the back seat, together with PW3. PW8 sat in the Co. driver's seat.

At CPS, the Police Officers got out of the vehicle and instructed A4 to park the vehicle and go make a statement. A4 declined and instead drove off with the deceased and PW3 still in the 5 vehicle.

Upon realizing that A4 was taking them back to the Pine Car Bond, PW3 jumped out of the vehicle, leaving the deceased in the car.

The deceased was finally rescued by police at about 6.30pm, taken to CPS and the finally to Mulago Hospital from where she passed on.

10 Investigations commenced. The accused were arrested. Samples of blood were picked from the Car Bond Office and from the vehicle which had transported the deceased to CPS. The blood samples matched with the DNA of the deceased.

The prosecution also adduced evidence of the call data records made by the various accused persons on that day. The records place them in the Pine Car Bond area, apart from A8 whose 15 phone was not recovered.

The home of A5 was searched and among the items recovered were the handcuffs that were used on the deceased.

As already set out in this judgment, the post-mortem report Exhibit P1 is to the effect that the deceased died of injuries sustained as a result of the torture meted out to her. No weapons were 20 exhibited.

All the accused persons were medically examined and found to be of sound mind. Identification parades were held and A1, A2, A3, A5 and were identified.

As earlier indicated, all the accused denied perpetrating the offences against the deceased. They put up various defences.

- 25 AI in his unsworn evidence raised an alibi. He stated that on the date of the alleged murder, he was not at the scene of crime as he was attending court at Mengo. He called a witness DW9 to confirm that he was at Mengo Court on the fateful day **from 11.30am to 03.30pm**, when the matter was adjourned to another date. Further that, he could not have arrested the deceased and assaulted her, when she had given him post-dated cheques for the money owed. - See Exhibits
- 30 D

Further that he was being blackmailed by PW1, PW2 and PW3 the lawyers, as they had asked him for money and he had refused to pay them. And that the offices said to belong to him were being rented from Sudhir Ruparelia and had been searched by the police in his absence and nothing was found indicating that he was the owner.

35 A2 also gave unsworn evidence. He asserted that he was already in police custody at the time of the alleged offence. That he had been arrested by the Flying Squad, kept at Katwe Police Station and taken to CPS when he failed to pay the Shs. 2,000,000/- demanded by the Officers of the Flying Squad. Eventually that he was picked from CPS and charged with this offence.

That the phone No. 0752872601 alleged to be his, is in the names of Jennifer Kiwawu.

A3 in his unsworn evidence stated that he was a car Broker at the Pine Car Bond. While he was 5 at the Bond on the fateful day, he was waiting for a customer who was to pay for a vehicle. He denied being A1's Bouncer or participating in the commission of the offences. He contended that, the identification parade evidence was not true, as those who identified him already knew him.

A3 further claimed to have been tortured by the Flying Squad Officers to make him admit the 10 charges and implicate other people.

A4 in his unsworn evidence stated that he is a Special Hire Driver of motor vehicle no. UAP155T. He denied the charges, claiming that PW25 the Investigating Officer told lies when he stated that it was his vehicle that picked the deceased from Bwebajja, whereas not.

That on 21.10.15 at about 6.10pm, he was called by A1 to go to the Pine Car Bond. When he got there, he found A1 together with other people on the road. A1 asked him to take 2 Police Officers, a woman and a young man to CPS.

He set off with the said people and when they got to CPS, the Police Officers asked him to get out of the car and make a statement, which he refused to do. Instead, he drove back to Pine Car Bond with the deceased and the young man. The young man jumped out of the vehicle. At the 20 bond, the deceased remained in the vehicle until a patrol car went there and picked her. That was the last time he saw her.

A5, in his unsworn evidence stated that by 2015, he was a Special Hire Driver. Before that, he was a break down driver at CPS. That on 17.10.15, the DPC Baguma Aaron asked him to take Kiwanuka Damage and a Woman Police Officer Annette Tusiime (PW5), to Bwebajja. On the way to Bwebajja, Kiwanuka Damage told him to take them back, as the woman was not there.

The next day, A5 picked PW5 Tusiime Annette and they met Kiwanuka at Freedom City, together with another person. They went to the deceased's residence but she was not there.

On 20.10.15 although directed by the DPC to go with Kiwanuka and pick the woman, he could not do so as he had another customer.

30 On 21.10.15, he was called by Birikadde (PW25) and told to go to CPS. They picked up a female police officer and booked in at Bwebajja Police Station. Thereafter, they drove to the home of the deceased and she was arrested for theft of a Prado TX. They met Kiwanuka and CPL Tusiime at Katwe Police Station.

As they drove to CPS, the deceased requested to be taken to Kiwanuka's office to settle the matter. They drove to Pine- Kiwanuka's office.

At 9am, A1 appeared and when Kiwanuka came, the deceased told him that she had sold the vehicle in the Congo. She then asked A1 to give her the log book of the vehicle she had bought from him, to put it in as security for Kiwanuka. But that A1 said he was going to Court and left. That he A5 left with the Police Officers after being paid.

5 That, although his home was searched and 4 old phones were found, and he signed the search certificate; the handcuffs were just added to the certificate.

He also denied being security personnel for A1.

A6 and A7 exercised the right to remain silent.

A8 in his unsworn evidence stated that he was a loader of goods at Nabugabo. He vehemently 10 denied participating in any of the 3 offences, ever having been to Pine Car Bond or being a bouncer for A1. He contended that he was arrested from Namungona Play Ground by Flying Squad Officers and taken to CPS. That he was then tortured and charged with these offences. But that, he does not know any of the accused persons and has never communicated with any of them.

In determining the issue of participation, this Court reminds itself of the requirement to examine all evidence closely, bearing in mind the established general rule that "an accused person does not have to prove his innocence. And that by putting forward a defence like alibi or any other, an accused does not thereby assume the burden of proving the defence except* 20 *in a few exceptional cases provided for by law. It is up to the prosecution to disprove the defence of the Accused persons by adducing evidence that shows that, despite the defence, the offence was committed and was committed by the accused persons". - Refer to **Sekitoleko Vs Uganda [1967] EA 531, Wamalwa & Another Vs Republic [1999] 2 EA 358 (CAK) and Kato Vs Uganda [2002] 1 EA 101**

- 25 The lengthy submissions of Counsel for both sides will also be taken into consideration. The submissions raised such issues as identification, failure to call some key witnesses, defence of alibi, direct and circumstantial evidence, motive, frame up, ownership of vehicle that picked deceased from her home, contradictions and inconsistencies in prosecution case and intentional lies, common intention, among others. Several cases were cited in support of the submissions.
- 30 **A1:** After careful consideration of the evidence of both the prosecution and the defence, this court finds that A1 was properly identified by several witnesses and placed at the scene of crime. PW7 Nyanzi Specioza, the Woman Police Officer who accompanied the people who picked the deceased from her home stated that the deceased was taken to Pine Car Bond to settle the matter with the "**Rich man**". She described the "Rich man" as "a fat, short, dark* 35 *man"* and identified him as A1 Ssebuwufu Mohamed.

PW1 Tumusiime Peter went to the Car Bond at about 4pm; on the instructions of PW3; who told him that the deceased was being tortured by A1. He found a gathering of people and was directed to A1 whom he found standing outside with another gentleman. He introduced himself to A1, who then led him to the room where the deceased was. The deceased was seated on the floor, bared footed with torn clothing and had bruises on the face and legs. She was surrounded by six strong men. When the deceased was telling this witness how she had been kidnapped from her home that morning, A1 began kicking her and also instructed the 6 men to kick and 5 box her.

The witness further stated that, he asked A1 to stop torturing the deceased as he was going to organize for the payment of his money. As the witness moved out of the office, A1 told him that if he did not receive the money by 7pm, the deceased would be dead.

PW1 identified A1 at the identification parade and at Court during his testimony.

- 10 PW2 Kobusingye Annette, confirms sending PW1 to the Pine Car Bond to find out what was happening to the deceased. Further that, she received a call from telephone no. 0752198368, where a male voice speaking in Luganda *"I have been told that you are the lawyer of this woman. If you do not pay Shs. 9,000,000/- we shall kill her. Hear us hitting her".* The witness then heard a loud sound like someone was being slapped and then a loud scream. She called
- 15 999 the Police Emergency number and requested that the deceased be rescued. She was informed they were aware of the matter and were handling it with CPS. That is when she sent PW3 to CPS to check. When she called PW3 later and failed to reach him, she and her Assistant called Jane went to Pine Car Bond and were told that The deceased and PW3 had been taken to CPS. It was now approaching 7pm.
- 20 At CPS, she was told the matter was being handled and asked to go back next morning to make a statement.

PW3 Twesigye Amon, who also saw A1 at the scene, was able to identify him during the identification parade and at Court when he appeared to testify. He stated that at about 5pm after PW2 their colleague returned to office from the Car Bond and briefed them about the torture

- 25 of the deceased, PW2 received a call from the Bond. The phone was put on loud speaker. The caller said he had their client at the Bond, and demanded to be paid before 7pm or else the deceased would die. The witness later identified the voice on the phone as that of A1. He was speaking in Luganda.
- The caller was advised to take the deceased to Police but he instead abused PW2 and made her 30 listen to the cries of the deceased as she was being assaulted. Police 999 was informed and PW3 was requested to follow up with Police. He went to CPS and at about 5.30pm he went to Pine Car Bond in company of two Police Officers.

There were many people at the Bond. When A1 noticed PW3, he asked him what he wanted. The witness informed him that he was following up the matter of Donna and handed over his

35 identity card to him. Upon seeing the identity card, A1 asked PW3 if he (PW3) had brought his money. Thereafter, A1 confiscated PW3's identity card and told him he was not leaving and was going to be taught a lesson as lawyers were taking him for granted.

A1 then called out loudly **"Golola"**. Immediately, 4 men came out of the office and surrounded PW3. They held him by the collar, lifted him up and began punching him.

When PW3 pleaded, A1 directed the men to put him down and made a call and gave the phone to PW3 to talk to the person on line. The person on line never identified himself, but stated that they were tired of lawyers defending people stealing their vehicles.

A1 then made a second call and said **"Kiwanuka, another lawyer is here. Talk to him"**.

5 PW3 introduced himself to the person on the phone and told him he was at Pine to ensure that the matter was resolved amicably. This person also reiterated that he was tired of lawyers and that PW3 was not going away, as their cars including a Prado TX had been stolen and yet lawyers were defending thieves.

As PW3 was explaining, A1 took the phone away from him and instructed his men to take him 10 behind and give him treatment. The four strong men (bouncers) lifted PW3 up, and he pleaded with A1 that he was not there to fight but to sort out the matter.

The people watching intervened and the Police Officers asked A1 why he had called their boss if he did not want their intervention. A1 directed the Police Officers to arrest PW3 and they did. He was taken to the room where the deceased was. She was sitting down.

15 The deceased was too weak to stand up when requested to do so. A1 threatened to beat her up again if she did not stand up. The Woman Police Officer assisted the deceased to stand up and escorted her out, and the male Police Officer also escorted PW3 out.

At first A1 declined to avail them transport to CPS, but eventually told them to use the Premio car parked on the roadside. The vehicle was driven by A4 Lwanga Steven, while A8 Odutu 20 Shaban alias Golola sat in the co-driver's seat. They drove to CPS and parked in front of the gate. It was about 6.30 pm.

The witness identified A1 at the identification parade. This is confirmed by PW8.

PW23 DCPL Magoola Brian, is versed with Crime Data Management, phone tracking and 25 interpretation of Data. He testified that he was briefed by OC. CID. CPS; on 12.01.18, about the murder that occurred on 21.10.15. He was directed to analyse call data printouts, specifically looking at 21.10.15.

Part B of his report is in respect of A1's telephone numbers: 077 2650846, 0788828071 and 0392943989. It shows that on 21.10.15, at 08.35 am MTN network, that A1 was located at 30 Rwenzori Towers and Rwenzori House Masts. - No. 03924943989.

The same day at 9.20 am, A1 communicated to Kiwanuka alias Damage's no. 0703399955. Rwenzori Mast.

The same day at 01.30 pm, A1 was located at Mengo Mast. But by 2.00pm he was located at Rwenzori Towers Mast.

35 At 4.30 pm at Rwenzori Towers Mast, A1 received a call from Kiwanuka.

It is clear from all the above evidence that A1 was identified by several witnesses and placed at the scene of crime. This court accordingly finds that the alibi of A1 is disproved. While he could have gone to Mengo Court where he had a civil matter, it is apparent from the prosecution evidence that he set off after the deceased had been received and detained on his instructions.

5 And he was back at the scene of crime by 2pm, contrary to his claims. The evidence of his witness DW9, who testified that A1 was at Court for the whole day, could not be believed as he was not Counsel in personal conduct of A1's case. And Court records being public documents indicate that the matter was adjourned earlier to another date.

The submissions of Counsel for the Prosecution in this respect are consequently sustained.

- 10 As regards the submission of Counsel for the accused that A1 had no motive to commit the offence; this Court relies on S. 8 (3) of the Penal Code Act to hold that "Motive is immaterial so far as regards Criminal responsibility. Although it is a factor to be taken into account as part of the circumstantial evidence on the culpability or otherwise of an accused person". -* **Kabiru Vs Republic [2007] 1 EA 107**
- 15 **S. 8 (3) of the Penal Code Act** provides "Unless otherwise expressly declared , the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility".*

In the present case, the uncontroverted evidence of the prosecution is that the deceased had bought a vehicle from A1 and owed him a balance of Shs. 9,000,000/-. Fearing that she would not pay, A1 hatched a plan to have the deceased arrested. Indeed, when the call was made to PW2 at about 5pm, the person who talked on the phone demanding for payment of his money, otherwise the deceased would be killed, was later identified by PW3 as A1.

It can hence, be discerned that A1 had a motive that induced him to act as he and others did, that culminated into the death of the deceased.

- 25 While the deceased had given A1 post-dated cheques for the sum of money owed, and the cheques had not yet matured, it is apparent that for reasons best known to A1 he ignored the cheques and the pleas of the deceased that the money would be paid, and instead caused grievous harm to the deceased that resulted into her death
- 30 The claim of A1 that he was framed by PW1, PW2 and PW3 because they wanted to extort money from him, was disproved by the evidence of PW3 to the effect that they filed a civil suit against A1, seeking damages for the injuries he sustained as a result of being assaulted on the instructions of A1.

The undisputed evidence of PW3 is supported by the provisions of the Constitution to the effect 35 that; "if someone has a right, and that right has been violated, he/she has a right to file a suit against the violator".* Without any other evidence to support the claim of extortion, this court finds that by filing a suit, PW3 was merely exercising a right granted by the Constitution. ****\

*

A2 was also identified by PW3 as having been at the scene of crime and having participated in the assault of the deceased. The offence was committed during the day time and the possibility of mistaken identity can be ruled out.

PW3 was also positively identified by PW3 as one of the people he saw at Pine Car Bond on 5 21.10.15, and among those who assaulted the deceased.

PW4 was also identified by PW3, as the person who drove the motor vehicle no. UAP 115 T from Pine taking the deceased, PW3 and two Police Officers to CPS and then back to Pine.

A4 does not deny this in his evidence.

A5 was also identified by PW7 as the driver who took them to pick the deceased from her home 10 at Bwebajja and delivering her to Pine Car Bond. He is also the one who gave PW7 the Shs. 20,000/- as transport, when PW7 left the deceased at the Bond.

A5 does not deny having picked the deceased from her home at Bwebajja.

The telephone no. **07552198368**, which was used to call PW2 to demand for the money that the deceased owed A1 and threatening to kill her if the money was not paid by 7pm; was 15 confirmed to belong to A5 by PW 26. It was during the call made on that phone that PW2 and PW3 heard the agonizing cries of the deceased as she was being assaulted.

The evidence of PW25 who searched the home of A5 indicates that handcuffs that were used on the deceased were recovered from his home.

The contention of Counsel for the Accused that the handcuffs were added as an afterthought to 20 the search certificate cannot be sustained. This is because the Exhibit Slip Exhibit P23C indicates that it was one of the items that were recovered, together with four telephones, among other things. A5 acknowledges having signed the search certificate. Court is left to wonder why A5 would have signed the search certificate if the handcuffs were added as an afterthought.

- 25 **A6 and A7:** it contended that these two accused were not identified by any of the prosecution witnesses. However, the evidence of PW25 DAIP Walya Henry Peter the Officer who investigated the murder is to the effect that he arrested A6 and A7. The witness added that after the arrest of A1 and A4, the rest of the accused went into hiding. On 27.10.15, he got information that A6 had appeared at the Bond and he was arrested. Why would the two accused 30 persons go into hiding after the murder? Their disappearance is not conduct of innocent people.
- The witness exhibited the phones of A1, A5, A6 and A7. Exhibits P25A –P25 D.

This belies the submission of Counsel of the accused to the effect that the two accused were arrested by Flying Squad.

And Exhibit P26. Exhibit P57 the telephone print outs, also indicate the location of A1- A7 as 35 having been within the surrounding areas of the crime scene on the 21.10.15.

PW23 No. 38309 DCPL Magoola Brian who deals with Crime Data Management, tracking phones and interpretation of data explained that Rwenzori Towers, Buganda Road, and Rwenzori House are Major Network Masts that locate calls made or received from Pine Car Bond.

5 This evidence raises issues of circumstantial evidence, which I have already referred to in this judgment, as *"evidence capable of proving a proposition with the accuracy of mathematics"*
See **Thiaka Vs Republic (Supra)**

A8 was identified by PW3 as the person referred to as "Golola" by A1 and being among the people who assaulted the deceased and also assaulted PW3. He accompanied A4 when he was 10 taking the deceased and PW3 to CPS and sat in the co-driver's seat. It is the uncontroverted evidence PW3 that A8 urged him to ensure that the money was paid or else matters would turn ugly.

For those reasons I find that the alibi of 8 was also disproved. He was placed at the scene of crime. I am fortified in my finding by the case of **Opolot & Another Vs Uganda Cr. App**

15 155/2009 [2014] UG CA 39

Court wishes to observe that, the offences in the present case occurred between 7am and 6.30 pm, during day time and some of the witnesses interacted with the accused. The possibility of mistaken identity of the accused that were identified by the eye witnesses is therefore ruled out.

There was also corroborative evidence in the fact that some of the accused were also identified 20 by the witnesses at the identification parades.

As can be discerned from the record, A5 stated that the deceased was arrested in respect of a matter opened up concerning theft of a vehicle. The case was entered in Bwebajja Police Desk Diary as SD. 54/17/15 This is confirmed by PW7 and PW17. This belies the submission of Counsel for the accused that, the prosecution failed to prove that a case had been opened up at 25 CPS. The people who went to arrest the deceased already had the SD. Number. There is no evidence that the number was given by Bwebajja Police. Nevertheless, when the deceased was arrested, she was taken to the car Bond instead of CPS.

As to whether the report out of which the SD number arose was made by Kiwanuka Sam alias Damage and not by A1 as claimed by A5, is of no consequence, as the evidence of the telephone 30 conversations indicate that A1 and Kiwanuka Sam were in constant touch all day. And other evidence already referred to indicates that A1 never disassociated himself from the actions that followed the deceased's arrest. Indeed, the deceased was handed over to A1 after she was picked from her home.

If A1 was acting on the orders of Kiwanuka Sam, then he was acting on illegal orders. The law 35 clearly prohibits obedience of illegal orders. Therefore, A1 is still culpable.

It is not disputed that A4 drove the deceased from the Car Bond to CPS and then back to the Bond, even though he realized that she had been badly beaten and needed immediate medical attention.

He declined to make a statement and handover the deceased who was then still alive to police. On getting back to the Bond, the deceased was left in the vehicle where the police eventually picked her from.

By deliberately driving the deceased back to the Bond, the actions of A4 contributed to the death of the deceased from the injuries that she sustained at the hands of the other accused persons.

I will come back later to this point in my judgment.

Counsel for the defence raised issues of inconsistencies and contradictions in the prosecution case.

10 It was contended that there were inconsistencies in the evidence of PW1, PW2 and PW3 in their police statements and the evidence given before court. And that they pointed to deliberate untruthfulness of the witnesses.

This Court is mindful of the principal of law that "Where discrepancies or contradictions are found in evidence to be serious or grave unless explained, will result in the evidence being¹⁵ rejected. However, minor inconsistencies will be ignored unless they point to deliberate untruthfulness". -^{*} Refer to the case of **Ruhweza Antonio Vs Uganda Cr. App 07/2001** and

In the present case, the Police statements of PW1, PW2 and PW3 were relied upon by Counsel for the accused to impeach their credibility. The statements were tendered as Defence Exhibits. While the statements seem to be contradictory to the testimony of the three witnesses, for

- 20 failure to include some of the evidence given in court, it is trite law that "police statements are not made under oath. And court will always prefer the witnesses' evidence which is tested by cross examination". -^{*} See the case of **Lawrence Mwayi & Others Vs Uganda CR. APP. 162/2001**, where the case of **Chemonges Fred Vs Uganda SC CR. APP 12/2001** was relied upon.
- 25 In any case, it has been established by decided cases that "no two or more witnesses can give exactly the same version of events of what transpired in a matter".^{*}

The three prosecution witnesses in the present case were cross-examined by Counsel for the accused and remained firm in their testimony.

The fact that PW2 received a call from no.0703592423 was confirmed by PW 26. And as 30 already indicated in this judgment, the voice on the phone was later recognized as that of A1 by PW3. Since court has already found that A5 and A1 were placed at the scene of crime, it would not be farfetched to believe that A1 used the phone to speak to PW2.

The defence also contends that the deceased was picked by a different vehicle from her home and not the one that A4 used to take her to CPS in the evening. That, therefore, the Court ought

35 to have made orders to find out who the owner of the vehicle was. But it is my considered view that the use of a different vehicle other than the one referred to by the prosecution is not fatal to the prosecution case. A5 does not deny picking the deceased under circumstances this court has found were fraudulent. The vehicle used and who was the owner of the same would not make any difference.

Defence Counsel further submitted that the Prosecution failed to call some key witnesses like the sister and husband of the deceased and therefore were hiding something. This submission

- 5 cannot be sustained as it is a recognized principle of law *that, "there is no required number of witnesses necessary to prove a case."* And as observed by Counsel for the Defence, indeed *"The DPP has discretion to decide who are the material witnesses and whom to call*."*- as rightly held in the case of **Nalongo Ziwa Vs Uganda CACA 088/2009**
- In calling 26 witnesses in this case, the DPP exercised his discretion which is granted to him 10 by the Constitution; and which should not be interfered with. For those reasons, this Court declines to draw adverse inferences from the action of the DPP. The matter has to be determined based upon the evidence of witnesses called to court and the evidence of the defence.

The other issue raised by Counsel for the Defence was of hostile witnesses

- 15 This Court is aware that *"The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to crossexamine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight (see *Alowo v. Republic*, [1972] E. A. 324). The rule of practice is based on logic,* 20 *because if a person is found to be untruthful, there is no reason to suppose that he was any*
- *more truthful before he was caught out than after: indeed, it is the very evidence that he has given that has shown his unreliability".* - See the case of **Batala Vs Uganda [1974]1 EA 402 (CAK)**

In the present case PW24 Hamidu Wasaaka who was defence Secretary at the Pine Car Bond 25 at the time of the offence, was declared a hostile witness and was cross examined by the Prosecution. It follows therefore that his evidence against any A5, A2, A3 and A8 cannot be relied upon and it was not relied upon.

Nonetheless, there is other evidence implicating the accused given by other witnesses, as already indicated in this judgment.

30 As earlier set out in this judgment, the deceased did not die of natural causes as the Defence would want Court to believe. PW7 the Woman Police Constable who was present when the deceased was picked from her home, verified that the deceased did not have bruises on her when she was handed over to A1 and other accused persons.

All injuries, bruises, and abrasions on her body as set out in the post-mortem report were clearly 35 inflicted on her at Pine.

Prosecution Exhibit 17, the Analytical Lab Report shows that the DNA of the blood on the walls at Pine Car Bond, matched with that of the deceased. - Evidence of PW22 Onen Geoffrey, Government Analyst. This confirms that she was tortured there.

The argument that the office used by A1 was hired from Sudhir, would not change the fact that it was used by accused persons who participated in the commission of the offences. There is evidence by the prosecution that the police officer was directed to this office, as the office that was being used by A1.

- 5 The credibility of PW22 was not impeached in cross-examination. *"All questions for the purpose of impeaching a witness' s character and credibility must be put to the witness while in the witness box, otherwise they cannot carry weight with the court".* Refer to **Uganda Vs Adonia Zoreka & No. 7770 DC Kikwemba.**
- 10 All the Accused persons before Court were placed at the scene of crime by Prosecution witnesses, and the alibis of A1 and A8 disproved.

The medical evidence of examination of the accused persons indicates that they were of normal mental status.

The theft of the phone happened during this period in circumstances court has found amounted 15 to robbery.

It was also found by this court that the deceased was kidnapped and did not leave her home on her own free will. She was picked from her home by A5, with the assistance of police officers; on the orders of A1, and Kiwanuka Sam alias Damage. The rest of the accused participated in her torture save for A4, who was asked to take her to CPS and he did, but instead returned her 20 to the Bond in circumstances already described in this judgment.

The accused having been placed at the scene of crime and properly identified. And this court having already found that the deceased was tortured and sustained grievous injuries that resulted in her death; it is concluded that the accused had a common intention to execute an unlawful purpose.

- 25 It has been established by decided cases that *"When two or more people form a common intention to prosecute an unlawful purpose in conjunction with one another and in prosecution of that purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence". – See S. 20 of the Penal Code Act and the case of *Isingoma Vs**
- 30 *Uganda [1986 – 1989]1 EA 155 (SCU)*

*"The doctrine of common intention applies irrespective of whether the offence committed was murder or manslaughter. It is now settled law that an unlawful common intention does not imply a pre-arranged plan". Refer to the case of *Ogwatu Vs Uganda CR. APP. 30/2015**

It is trite law that **"Common intention may be inferred from the presence of the accused* 35 *persons, their actions and omission of any of them to disassociate from the assault". - See P Vs Okute [1941] EACA 80***

Courts have also observed that "it is immaterial whether the original common intention was lawful so long as the unlawful purpose develops in the course of events". - Refer to Wagiro Maniro Vs R [1955] EACA 521*

There is sufficient evidence adduced by the prosecution to prove beyond all reasonable doubt 5 that there was a common intention between those accused persons to kidnap the deceased, and tortured her, which resulted into grievous harm that led to her death. Her phone was also stolen in the process.

After careful evaluation of both the evidence of the prosecution and the defence, Court finds that the Prosecution proved to the required standard that A1, A2, A3, A5, A6, A7 and A8 10 committed the offences that they are charged with.

They were placed at the scene of crime and the alibis of A1 and A8 were disproved.

The deceased did not die of natural causes as the defence wanted court to believe, all injuries, bruises and abrasive on her body as set out in the post mortem report were inflicted on her at the Pine Car Bond.

15 The theft of the phone happened during the period the deceased was tortured by the Accused persons, in circumstances that amounted to robbery.

She was kidnapped and did not leave her home on her own free will.

There is sufficient evidence adduced by the Prosecution to show that there was a common intention between those Accused persons, to kidnap the deceased with intent that she be 20 murdered, hence her torture, which resulted into her death. Her phone was stolen in the process, in circumstances that amounted to robbery.

The Kidnap of the deceased, the attendant murder and robbery of her phone were committed by those Accused persons above named in the prosecution of unlawful purpose, that is, to forcefully get the balance of the money she owed paid. They had a common intention to 25 execute an unlawful purpose.

Prior agreement was proved by the act of picking her from her home under the guise of settling the matter, although normally prior agreement is not necessary to be proved between the assailants. Usually, **"it is sufficient to prove the intention that can be inferred from the presence of the Accused, their actions or omissions to disassociate themselves from the* 30 *attack".* – See Birikadde vs. Uganda [1986] HCB 6.**

There is no credible evidence that A1, A2, A3, A5, A6 and A7 dissociated themselves from the kidnap and the attendant attack on the deceased.

As already indicated, the available evidence places the Accused at the scene of crime and their defences are therefore disproved and are hereby rejected.

For all those reasons given in this judgment, Court finds the Prosecution proved the ingredients of participation of A1, A2, A3, A5, A6, A7, and A8 in commission of the three offences beyond reasonable doubt.

And in disagreement with the opinion of the Assessors, I hereby find all those accused persons 5 guilty as charged on all the three counts and they are hereby convicted as charged.

However, in as regards A4, the evidence available shows that the role he played was to drive to the deceased to CPS and back to Pine – which contributed to her demise. He is hereby found guilty of being an accessory after the fact under S.206 of the Penal Code Act on all three counts and he is convicted accordingly.

10 Accessory after the fact to murder: The law provides that, *"Any person who becomes an accessory after the fact to murder commits a felony".**

S.89 Trial Indictment Act – provides for conviction for being an accessory after the fact.

"When a person is charged with an offence, he or she may be convicted of being an accessory after the fact to the commission of that offence although he or she was not so 15 *charged".**

FLAVIA SENOGA ANGLIN JUDGE 24.06.19

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CASE PAGE <https://chat.esheria.ai/case-law/uganda/uganda-v-ssebuwufu-mohammed-7-others-criminal-session-case-no-0493-of-2015-2019-ughc-1-24-june-2019-unknown-topic-unknown-court-2019>

Prepared on 14 October 2026 · Esheria